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6. The Latest on the Ballast Water Conundrum
As we gather for CMA 2016, “Volatility” seems to be the key word for this year. It is the year of the monkey in the Far East. It is a presidential election year here in the United States, with such a wide range of campaign themes and personalities in the running that a state of uncertainty and confusion is understandable both at home and abroad. Stock markets world-wide continue gyrating. And many sectors of the shipping industry seem to be in the mode of simply bracing to get through the year, wishing that 2016 would hurry up so that we can put it behind us.

To the extent the work of law firms can be said to serve as an economic indicator, what do we see happening? Our insolvency and restructuring practice continues to be very active. Regulatory compliance continues to have an important role, and we expect that to be a permanent feature of the business. Sanctions issues also remain very active. But the shipping business has been through turbulent seas many times before and the resilient spirit of the people working in this business is remarkable. It is impressive that so many sectors of the shipping business are holding to a long-term positive view. This year’s theme of the CMA is “Local Talent, Global Impact,” and that seems very apt. We look forward to participating in the discussions.

In the final hours of the first session of the 114th Congress, Congress passed an omnibus appropriations bill that increased the planning budget for new Coast Guard icebreakers to six million dollars for FY2016. Both the House and the Senate passed Coast Guard authorization bills, and final passage is expected early in the second session of this Congress. Both bills would permit the Coast Guard to use "incremental funding" for the acquisition of icebreakers. But even with incremental funding, it would take five to ten years to fully fund a new icebreaker, and this could require a significant plus-up to the Coast Guard’s acquisition budget.

In any case, our national interest demands that the Congress and the Administration find the funding to build icebreakers, even if it means “breaking the mold” in providing the appropriations to do so. The construction of new icebreakers will provide excellent work for the U.S. shipbuilding industry, will allow them to upgrade their capabilities, and will also enable the United States to compete with Russia in the Arctic and protect our national security interests in both the Arctic and Antarctic.


To fulfill the Coast Guard’s mission and to allow the United States to build new icebreakers, funding could come not just from the Coast Guard’s budget, but also from other agencies that rely on the Coast Guard for research and logistical assistance in the Arctic and Antarctic, including the U.S. Navy, NSF (with its base in McMurdo), and NOAA. Keeping a presence in the Arctic is critical for national security as well as for the conduct of oceanic and atmospheric research in the Arctic and Antarctic.

Conclusions

The United States has taken the first steps towards acquiring at least one new icebreaker, but this should not be the end of the story. To accomplish the tasks that Congress and the Administration have set for it, and to protect our vital interests in the Arctic—and Antarctic—the Coast Guard needs at least two new icebreakers, and Congress must find a way to fund them, through incremental funding, borrowing from other agencies, and creative budget scoring. In any case, our national interest demands that the Congress and the Administration find the funding to build icebreakers, even if it means “breaking the mold” in providing the appropriations to do so. The construction of new icebreakers will provide excellent work for the U.S. shipbuilding industry, will allow them to upgrade their capabilities, and will also enable the United States to compete with Russia in the Arctic and protect our national security interests in both the Arctic and Antarctic.

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The real conundrum is how and who will pay for the new icebreakers, the Coast Guard, with other agencies, patrol these dangerous waters and monitor activities. With the Arctic, it is more imperative than ever that the Coast Guard has begun initial planning to acquire new Coast Guard icebreakers to 2020 from an original planning date of 2022. Supra, “President Obama Announces New Investments to Enhance Safety and Security in the Changing Arctic,” Sept. 1, 2015. As a result of this announcement, the Coast Guard has initiated a program to purchase at least one new icebreaker, and has initiated a program of “aggressive industry outreach” according to Coast Guard acquisition chief, RADM Mike Haycock. See Megan Eckstein, “Coast Guard To Finalize icebreaker Acquisition Strategy By Spring”, Production by 2020,” USNI NEWS, (Dec. 9, 2015, 4:53 PM). http://news.usni.org/2015/12/09/coast-guard-to-finalize-icebreaker-acquisition-strategy-by-spring-production-by-2020. The Coast Guard has also signed agreements with Canada and Finland to leverage their research on icebreaker design and capabilities. (Idem.) And, an Industry Day will be held in March 2016. The real conundrum is how and who will pay for the new icebreakers. They are estimated to cost about one billion dollars apiece. (CSR report, above.) The Coast Guard is already strapped for resources. Its acquisition and construction budget is dedicated first to the procurement of new offshore patrol cutters and then to the replacement of its climate change is reshaping the Arctic in profound ways.” Office of the Press Secretary, The White House, Fact Sheet: President Obama Announces New Investments To Enhance Safety And Security In The Changing Arctic, (Sept, 1, 2015), https://www.whitehouse.gov/the-press-office/2015/09/31/fact-sheet-president-obama-announces-new-investments-enhance-safety-and.

Certainly, Russia is building up its icebreaker fleet to explore its Arctic oil and gas resources and pursue aggressively what it views as its national interest in the Arctic. Russia has a fleet of over 40 icebreakers and is building more. See Barbara Padtova, Russia Approach Towards the Arctic Region, CENAA, (2012), http://cenaa.org/analysis/russian-approach-towards-the-arctic-region/. Russia is also willing to defend its right to Arctic oil and gas “with missiles,” according to a German newspaper article from 2015. See, e.g., Russia Will Defend Its Right to Arctic Oil, Gas With Missiles, SPLITNIK INTERNATIONAL, (Oct. 2, 2015), http://sputniknews.com/russia/20151002/1027910073/russia-arctic-resources-missiles.html.

For all these reasons, it is imperative that the United States has its own fleet of modern icebreakers.

Building and Funding New U.S. Icebreakers

During a visit to Alaska in the fall of 2015, President Obama stepped up the Administration’s efforts in the Arctic, and he also announced that he would accelerate the acquisition of new Coast Guard icebreakers to 2020 from an original planning date of 2022. Supra, “President Obama Announces New Investments to Enhance Safety and Security in the Changing Arctic,” Sept. 1, 2015. As a result of this announcement, the Coast Guard has begun initial planning to acquire at least one new icebreaker, and has initiated a program of “aggressive industry outreach” according to Coast Guard acquisition chief, RADM Mike Haycock. See Megan Eckstein, “Coast Guard To Finalize icebreaker Acquisition Strategy By Spring”, Production by 2020,” USNI NEWS, (Dec. 9, 2015, 4:53 PM). http://news.usni.org/2015/12/09/coast-guard-to-finalize-icebreaker-acquisition-strategy-by-spring-production-by-2020. The Coast Guard has also signed agreements with Canada and Finland to leverage their research on icebreaker design and capabilities. (Idem.) And, an Industry Day will be held in March 2016. The real conundrum is how and who will pay for the new icebreakers. They are estimated to cost about one billion dollars apiece. (CSR report, above.) The Coast Guard is already strapped for resources. Its acquisition and construction budget is dedicated first to the procurement of new offshore patrol cutters and then to the replacement of its climate change is reshaping the Arctic in profound ways.” Office of the Press Secretary, The White House, Fact Sheet: President Obama Announces New Investments To Enhance Safety And Security In The Changing Arctic, (Sept, 1, 2015), https://www.whitehouse.gov/the-press-office/2015/09/31/fact-sheet-president-obama-announces-new-investments-enhance-safety-and.

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Deepwater Horizon Court Ruling Closes the Gap on Responder Immunity

(continued from page 2)

Deepwater Horizon litigation sidestepped the immunity provision in OPA 90 by using responders for personal injuries allegedly caused by exposure to the spilled oil and/or the dispersants that were approved for use by the U.S. government and alleged gross negligence and willful misconduct related to the response actions. Since the responder immunity provision does not apply if a responder acts with gross negligence or willful misconduct, or causes personal injury or wrongful death, the plaintiffs’ allegations exposed the responders to liability lawsuits and protracted and costly litigation for damages they did not cause. Indeed, this case is now almost six years old, as this unfortunate incident occurred on April 20, 2010, and it continues.

Scope of Responder Immunity: Ensure that the scope of responder immunity applies to all types of responders, including Incident Command personnel not employed by the responsible party, as well as Emergency Responders, including salvors and emergency well containment responders.

Attorney Fees and Court Costs: Require plaintiffs to pay the costs of litigation if they file a frivolous case and lose.

Presumption of No Gross Negligence: Provide a statutory presumption that a responder was not grossly negligent in responding to an incident, thus placing the burden of proof on the plaintiffs to prove otherwise.

Unfortunately, the coalition’s efforts have not been successful due to the objection of one industry organization involved with only one limited sector of the marine industry, despite broad support from many entities that potentially would be a responsible party for a spill occurring from owning or operating a vessel.

This recent development may provide an impetus to revisit a possible enactment of a statutory amendment, or at a minimum to have the National Academy of Sciences (“NAS”) or the U.S. Government Accountability Office (“U.S. GAO”) conduct a study of the issue, including the impact that this district court decision may have on potential future litigation against responders following a spill incident.

Conclusion
The Eastern District of Louisiana’s February 16, 2016, decision is a major break-through with respect to responder immunity. However, it took over almost six years for the judge to rule on a motion for summary judgment, and millions of dollars have been spent by the responder defendants so far on this case. It is now time to assess the impact that this decision will have on future litigation and on whether cleanup or emergency responders will continue to take bold immediate actions at the time of spill incidents in the future. If Congress will not take action to enact amendments to OPA 90 to foster such action, then it certainly is appropriate for Congress to direct the NSA or U.S. GAO to conduct a study of the current state of affairs, including the recent court decision and costs/fees associated with defending lawsuits filed by plaintiffs against responders to assess whether more needs to be done to ensure for an immediate and effective response to spills in the future.

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Legislative Efforts to Close the Gap
As a result of the lawsuits filed against first responders following the Deepwater Horizon casualty, the response industry formed a coalition to address the identified gaps in the current responder immunity provision under OPA 90. The coalition has identified a number of enhancements that could be enacted in order to discourage, and possibly prevent, future lawsuits against responders or other chemicals. Many states already provide immunity from claims for personal injury and wrongful death, at least with regard to claims for exposure to oil, dispersants, or other chemicals. Many states already provide for this immunity and the responsible party already bears responsibility for this liability. In the alternative, legislation could statutorily adopt the court’s ruling as discussed above.

Personal Injury and Wrongful Death: Provide immunity from claims for personal injury and wrongful death, at least with regard to claims for exposure to oil, dispersants, or other chemicals. Many states already provide for this immunity and the responsible party already bears responsibility for this liability. In the alternative, legislation could statutorily adopt the court’s ruling as discussed above.

With this increase in commerce and recreation and renewed recognition of U.S. national security interests in the Arctic, it is more imperative than ever that the Coast Guard have the requisite fleet, especially icebreakers, to patrol these dangerous waters and monitor activities.

Congressional Interest in New Icebreakers
For some, it is unthinkable that a great maritime power such as the United States would lack sufficient icebreakers to ply the frozen waters of the Arctic and the Antarctic and protect its national interests. This is in contrast to Russia whose icebreaker fleet numbers more than 40 and has 11 more in production. (Report No. RI34391, Sept. 2, 2015, by the Congressional Research Service, entitled “Coast Guard Polar Icebreaker Modernization: Background and Issues for Congress,” at 11.)

Over the past two decades, there have been a number of reports completed by various federal agencies, congressional committees, and academic and nonprofit institutions, that recognized that there needed to be a long-term plan to ensure that there were adequate icebreaking vessels available to carry out activities in the polar regions that were important to U.S. national interests, but no real action has been taken to address this growing crisis. The cost of building a new heavy icebreaker is estimated to be on the order of one billion dollars—a figure that, to date, neither the Executive Branch nor the Congress has been willing to fund. We as a nation now find ourselves on the precipice of a major crisis in how to provide the resources necessary to protect our national interest in the Arctic. There are, however, glimmers of hope for congressional support for the acquisition of at least one new icebreaker. Senator Murkowski from Alaska, for one, has intimated her support for funding the new icebreaker.

This article argues for the need for the United States to build two or more icebreakers, to have them built in U.S. shipyards, and to have them acquired through incremental payments over a five to ten year period with contributions from other related federal agencies (e.g., the National Oceanic and Atmospheric Administration (“NOAA”), the National Science Foundation (“NSF”), and the U.S. Navy).

Why U.S. Icebreakers?
The United States is not only a maritime nation, but also an Arctic nation. Despite this, the United States had not placed a high priority on pursuing its national interest in Arctic. Only in the last few years as climate change, energy development potential in the region, and a high level of activity by Russia in establishing the Arctic as its national priority, has the United States begun to focus more intensely on our national interests in the Arctic. In fact, the United States is currently chairing the eight-member Arctic Council.


The Administration’s heightened commitment to the Arctic was highlighted further during President Obama’s trip to Alaska in the fall of 2015. At this writing, we are waiting to see if his FY2017 budget request reflects this commitment.

The United States has a vast Exclusive Economic Zone that extends around the coasts of the United States and its territories seaward to 200 n.m., and it also has an extended continental shelf under the sea adjacent to the Alaskan coast that could extend more than 600 n.m. under the boundary principles recognized by the United Nations Convention on the Law of the Sea (“UNCLOS”). The United States recognizes these maritime principles as part of customary international law even though it has not ratified UNCLOS. See Ronald Reagan, Proclamation 5030 – The Exclusive Economic Zone of the United States of America, THE AMERICAN PRESIDENCY PROJECT, (Mar. 10, 1983), http://www.presidency.ucsb.edu/ws/?pid=41037.

Russia has filed, and amended, a formal claim for an extended continental shelf with the UN Commission on the
it is certainly within the realm of possibility that the U.S.’s current trajectory of ending sanctions against Iran and Cuba could change within the next year.

Barring Iranian infringement of the PS-1 agreement, it is unlikely that the global community or the United Nations would muster to reinstate sanctions against Iran as happened earlier in the decade. This would mean that any sanctions imposed unilaterally by the United States would be less far-reaching than the previous sanctions regime, and may not impact the maritime industry or other businesses to the same extent. However, even unilateral U.S. sanctions would impact the maritime industry as the United States has shown an increased willingness in recent years to target foreign nationals as well as its own citizens for sanctions violations.

Conclusions

The recent opening of trade with Iran and Cuba has created opportunities for an industry that has faced several challenges in the past year. Easing the almost globally-reaching sanctions regime against Iran has created opportunities for a variety of carriers and operators to re-enter the Iran trade. Additionally, the easing of Iranian sanctions has also created opportunities for the Offshore Services and construction sector, of which the United States has a large fleet.

Similarly, thawing U.S. relations with Cuba has allowed U.S.-based industries to explore possibilities of business expansion in the United States’ nearest Caribbean neighbor. In particular, U.S.-based cruise, passenger, and offshore services stand to benefit from expanded business opportunities. The world-wide maritime community would benefit from the loosening of restrictions on calling both on Cuba and the United States.

In sum, interested parties should continue to explore business opportunities with the advice of counsel to ensure avoidance of costly penalties. Given the political uncertainty of the trajectory of sanctions in the next year, companies should be prepared to “snap back” appropriate sanctions management techniques by early 2017. — GUILL, BLANK ROME LLP

Mr. Roukakis would like to thank Blank Rome Associate Victoria Ortega and Erik Lowe for their assistance with this article.

The U.S. Imperative for New Icebreakers
BY JOAN M. BONDAREFF AND JAMES B. ELLIS

Executive Summary

The U.S. Coast Guard, under new guidance from President Barack Obama, is moving forward to acquire one new polar icebreaker for the United States. But the United States, as a leading maritime power and Arctic nation, needs more icebreakers and has yet to determine how to fund these very expensive ships. This article describes the United States’ appointment history with polar icebreakers and why they are badly needed.

Background

The U.S. Coast Guard is the primary maritime law enforce- ment agency of the United States. This role includes search and rescue, especially in the Arctic where the Coast Guard provides ships for other government agencies that have no capabilities in ice-covered areas. The Coast Guard also provides support to the U.S. research station in McMurdo Sound, Antarctica.

As early as the 1800s, the Coast Guard and its predecessor, the Revenue Cutter Service, operated vessels with ice-breaking capabilities. As recently as the mid-1970s, the Coast Guard had five heavy polar icebreakers in its fleet. In 1976, two new heavy icebreakers, the Polar Sea and the Polar Star, were built. However, by 1990, they were the only remaining polar icebreakers in the fleet. In 2000, a third, medium icebreaker, the Healy, was added. The Polar Sea and the Polar Star are approaching 40 years of service, and the Polar Sea is no longer operational, leaving the nation with only one heavy and one medium icebreaker. At the same time, the U.S. role in the Arctic has expanded due to the melting icecap, opening of new shipping lanes, and expanded tourism from cruise ships in the Arctic. Yet the United States lacks the capacity to fully monitor these activities and conduct any needed search and rescue operations. There is no viable plan for how to address the replacement of these aging vessels, much less

BIMCO’s Cybersecurity Guidelines: Shipowners’ and Operators’ Risk, Exposure, and Liability
BY KATE B. BELMONT

Introduction

On January 4, 2016, the maritime industry changed forever. With the release of “The Guidelines on Cyber Security Onboard Ships” created by BIMCO, CLUA, ICS, Intercargo, and Intertanko, the maritime industry acknowledged and recognized that cyber-threats are grave and cyber- attacks are happening. The maritime industry responded to the call for greater education on cybersecurity and greater protections, and created a set of guidelines for shipowners and operators to defend against such attacks. Accordingly, as the BIMCO Cybersecurity Guidelines make clear, shipowners and operators must be proactive in protecting against such threats, and they must be responsive. While the maritime industry has been hesitant to address cybersecurity issues and the realities of operating in a world heavily reliant on ICT (information and communication technology), with the release and publication of the BIMCO Cybersecurity Guidelines, the maritime industry no longer has its head in the sand. These guidelines have become the new standard against which shipowners and operators will be judged when addressing issues related to cybersecurity onboard ships.

The BIMCO Cybersecurity Guidelines provide instructions to shipowners and operators on how to assess their operations and put in place the necessary procedures and actions to maintain the security of cyber-systems onboard their vessels. Essentially, these guidelines serve as a “best practices” for shipowners and operators, on how to protect the cyber-systems onboard their vessels.

Cybersecurity Awareness

The first step in addressing cyber-risks, is understanding the cyber-threat. The BIMCO Cybersecurity Guidelines outline various types of cyber-threats and cyber-attacks, those who perpetrate such attacks, ranging from activists to criminals and terrorists, and examine their motivations and objectives, including reputational damage, financial gain, and commercial espionage. Shipowners and operators must be aware of a range of attacks, from a targeted attack, where a company or ship’s systems and data is being targeted, to an untargeted attack where a company or ship’s systems and data are one of many targeted. An example of a targeted attack would be spear phishing, where an individual is specifi- cally targeted with personal e-mails containing malicious software or links that automatically download malicious software. Another example of a targeted attack would be subverting the supply chain, where a company or ship is attacked by compromising equipment or software being delivered to the company or ship. It is also important to understand that attackers may attempt to access a company or ship systems and data within the company or ship, or remotely through connectivity with the Internet. Depending on the extent of the breach, an attacker may be able to manipulate ECDS or gain access to commercially sensitive data such as cargo manifests or crew lists. The BIMCO Cybersecurity Guidelines make clear that all shipowners and operators must be aware of the potential cybersecurity risks when using IT systems onboard ships.

Risk Assessment

The second step in protecting against cyber-attacks is assess- ing the risk. In addition to understanding the cyber-risks associated with using IT systems onboard ships, the BIMCO

Cybersecurity Guidelines note that senior management must be involved in cybersecurity. This is not an issue delegated to the IT department. In order to best protect your company and your vessel, cybersecurity must be incorporated pro- cedurally and operationally into all levels of your company. Senior management must be responsible for incorporat- ing cybersecurity policies and initiatives throughout the company, not just in the IT department. This includes busi- ness processes and crew training. It is also recommended that a shipping company initially perform an assessment of
Develop Response Plans

Lastly, shippers and operators must develop contingency plans in order to effectively respond to a cyber-attack or incident. It is recommended that contingency plans or response plans be tested periodically. For example, shippers and operators must know what to do and how to respond when electronic navigational equipment is disabled. There also must be procedures for handling ransomware incidents, and operational contingencies for ships in cases where land-based data is lost. When a cyber-breach or incident has been detected, it is crucial that all relevant personnel are aware of the exact procedure to follow and know how to respond. Recovery plans should be accessible to officers on board, and when and where to get assistance, for example by proceeding to a port, needs to be part of the recovery plan. Finally, investigating a cyber-incident is also important. Determining how systems were breached and what vulnerability was exploited can provide a better understanding as to how to better protect your systems in the future. External experts are often useful in conducting such investigations.

Increased Liability for Shippers

The BIMCO Cybersecurity Guidelines: make clear the responsibility of shippers and operators in protecting against cyber-threats. While these guidelines provide a great source of education and direction, these guidelines also make a clear standard against which shippers and operators can be judged. Shippers and operators are now on notice that cyber-attacks and operational incidents pose a significant risk for the maritime industry. These guidelines outline such risks and offer a series of steps to mitigate losses. Accordingly, failure to take heed will result in exposure to greater liability. “The Guidelines on Cyber Security Onboard Ships” is the new standard for the industry—a standard that will be reviewed and considered by the IMO this summer. Shippers and operators should follow these guidelines dutifully, and disregard at their peril. —D2016, BLANK ROME LLP

The fact that President Obama was the architect of the historic shift in relations with both Iran and Cuba will make it difficult for the Democratic nominee to directly contravene the current president’s policy. However, as we will see, this is far from certain.

The fact that the Republican frontrunner appears to take a different view than the Republican Party is indicative of several things. First, it shows that this has been the year of “outsiders” for the Republican Party, where established politicians have largely been unable to garner support. Additionally, Mr. Trump’s stance shows that while sanctions policy is key for the maritime industry and the business community in general, it may not be an essential policy for many voters.

Analysis

Predicting the future of American policy based on campaign primary statements is a flawed art at best. By necessity, candidates that become president usually distance themselves from many statements and policies made while campaigning. The fact that the Republican frontrunner and both Democrats running support at least some sanctions relief means that it is possible that the status quo established by President Obama could continue as the 45th president’s policy. A victory by Iranian moderates would further buttress this possibility.

However, the breadth of support for sanctions and a hard line against Iran in particular amongst several candidates of both parties should be cause for concern for the maritime community. Combined with significant opposition in Congress to President Obama’s policies on ending sanctions,
Most Candidates Take a Hard Line on Sanctions, Especially with Iran

HILLARY CLINTON

As President Obama’s first Secretary of State, Hillary Clinton, the leading Democratic Party nominee, was intimately involved in President Obama’s unprecedented “Nowruz” (the Iranian New Year) greetings to the Iranian people shortly after his first election in 2009, where he spoke in Persian, as well as the critical days of the “Green Revolution” in Iran later that summer.

Although Secretary Clinton is supportive of the results of the P5+1 talks, which has resulted in sanctions relief, she has taken a hard line on Iran. This may indicate future sanctions should she be elected. Recently, Secretary Clinton stated that “Iran is still violating UN Security Council resolutions with its ballistic missile program, which should be met with new sanctions designations and firm resolve.” In a recent debate, Secretary Clinton stated that the normalization of relations with Iran “would remove one of the biggest headwinds to progress to come.”

On Cuba, Secretary Clinton has supported the rollback of sanctions. She has taken a more nuanced view than on Iran, but seems generally to agree with the Republican platform and opposes sanctions relief. As Senator Cruz stated, “Rather than unilaterally lifting the economic embargo on Cuba, which has taken a hard line on Iran. This may indicate future sanctions should she be elected. Recently, Secretary Clinton stated that “Iran is still violating UN Security Council resolutions with its ballistic missile program, which should be met with new sanctions designations and firm resolve.” In a recent debate, Secretary Clinton stated that the normalization of relations with Iran “would remove one of the biggest headwinds to progress to come.”

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TED CRUZ

Senator Ted Cruz is a first-term Republican senator from Texas who was formerly the state of Texas’ chief legal advisor and a legal clerk to a justice of the U.S. Supreme Court. Senator Cruz’s base of support largely stems from his conservative policies and opposition to the Obama administration. While Senator Cruz is the son of a pastor and Cuban immigrant, neither the Cuban-American community nor Cuban-American relations have been key to his political rise.

On Iran, Senator Cruz has been unequivocal on his opposition to the current Iran policy and that he plans to reinstate sanctions. Senator Cruz recently said that, “On day one, a President Cruz will immediately repeal every word of President Obama’s dangerous Iran deal and will prioritize American national security interests in every instance.” Senator Cruz’s voting record in the Senate supports his position, as he voted both to override President Obama’s executive agreement with Iran and the P5+1 to roll back sanctions as well as to end debate on the issue to bring the matter to a vote. As noted above, Senator Cruz also signed the letter to Iran’s Supreme Leader.

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MARCO RUBIO

Like Senator Cruz, Marco Rubio is a first-term Republican senator of Cuban ancestry. Unlike Senator Cruz, Senator Rubio is from south Florida, a center of the U.S.’s Cuban-American demographic. Senator Rubio has made Cuba a more central theme of his campaign than other candidates, proposing a bill to change U.S. policy regarding benefits for immigrants from Cuba. Regarding sanctions, Senator Rubio has promised to “[r]evise President Obama’s attempts to normalize relations and condition any further lessening of sanctions until Cuba engages in meaningful political and human rights reform, returns U.S. fugitives, and agrees to honor American property claims and outstanding judgments.” He also takes stated that “Iran is still violating UN Security Council resolutions with its ballistic missile program, which should be met with new sanctions designations and firm resolve.” In a recent debate, Secretary Clinton stated that the normalization of relations with Iran “would remove one of the biggest headwinds to progress to come... The Cuba embargo needs to go, once and for all.”

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Accordingly, the Conference suggests that Congress amend Bankruptcy Code section 305(a)(1) to specify that abstention and dismissal is appropriate at the bankruptcy court’s discretion if a debtor does not have its center of main interests in the United States and the bankruptcy court cannot exercise effective control over the debtor or its material assets. This would render the plenary bankruptcy process consistent with section 1528 of the Bankruptcy Code, which only permits a foreign representative to file a plenary proceeding in the United States after recognition, and then, only where the foreign debtor has U.S. assets.

Likewise, the Conference urges a revision to the statute to enable suspension of bankruptcy court administration over part of a case, but to retain power over part of the case. The bankruptcy court could then continue effective administration over U.S. assets of a foreign debtor that initiated a plenary proceeding in the United States, tailoring abstention to better enhance chances of international reorganization while doing proper comity to foreign laws, courts, interests, and processes.

A Foreign Debtor’s “Center of Main Interest” Should Be Determined as of the Commencement of the Foreign Proceeding, Not as of the Chapter 15 Case’s Commencement

Bankruptcy Code section 1502 and section 1517 defines a “foreign main proceeding” as a proceeding in the country where the foreign debtor “has” its center of main interests or “COMI.” “COMI” exists where the foreign debtor has its financial and legal nerve center. Accordingly, the Second Circuit has ruled that “COMI” should be determined as of the date of chapter 15 commencement. In In re Fairfield Sentry, 714 F.3d 127 (2d Cir. 2013). Likewise, sections 1502 and 1507 require a “foreign non-main proceeding” to be in a country where the foreign debtor has an establishment, or a tangible locus of economic activity.

This Second Circuit interpretation is arguably inconsistent with the Model Law, which has been publicly and formally interpreted by its enactors in guidance to mean that the COMI/establishment determinations should be made as of the time the foreign proceeding commenced. The Conference, “attenuates” the utility of the abstenion remedy.

Mostly outside the United States.

This, in the view of the Conference, can place the American bankruptcy system in the position of having the responsibility to administer the affairs of a debtor and the assets of a debtor where both the debtor and those assets are outside of the effective control of the bankruptcy court.

At present, in extraordinary circumstances, a bankruptcy court can abstain from administering a chapter 11 case, dismissing same when the dismissal is in the best interests of both the debtor and its creditors. 11 U.S.C. §305(a)(1); see also In re Northshore Mainland Services, Inc., et al., 537 B.R. 192 (Bankr. D. Del. 2015) (dismissing a chapter 11 under Bankruptcy Code section 305(a) where all property of the subject debtor was located in the Bahamas, the government in the Bahamas had an important public interest in the development of the property, and a fair collective remedy was available to the debtor in the Bahamas). While the existing abstention law can provide a court with a general basis to address inappropriate filings, by foreign debtors in the United States, the extraordinary nature of the remedy as generally drawn, in the view of the Conference, “attenuates” the utility of the abstenion remedy.

Elections in Iran

In addition to the U.S. presidential election, Iran’s citizens are voting in what may be its most consequential election since the 1979 revolution. The results of the elections will largely be seen outside the country as a referendum on the outcomes of sanctions relief and the nuclear deal with the P5+1. A second consecutive electoral victory for moderates in Iran may impact the policy of the 45th president by validating the policy of sanctions relief President Obama’s policy. At the time of writing, polls were closing in Tehran and results were unavailable.

A Republican Victory Would Increase the Likelihood of Increased Sanctions

The fact that President Obama was the architect of the historic shift in relations with both Iran and Cuba will make it difficult for the Democratic nominee to directly contravene the current president’s policy. However, as we will see, this is far from certain. Additionally, the Republican Party’s recent policy documents have not mentioned Iran or Cuban policy as an issue.

In contrast, one of the general themes of the Republican primary campaign to date is opposition to President Obama’s legacy and policies. Additionally, the Republican Party has made opposition to rapprochement with Iran and Cuba a centerpiece of its policy. Specifically, the Republican Party’s platform on American Exceptionalism states, “We urge the next Republican President to unequivocally assert his support for the Iranian people as they protest their despot regime.” The platform takes a more detailed stance on Cuba, rejecting any “dysyncastic succession of power within the Castro family” and requiring “the legal recognition of political parties, independent media, and free and fair internationally-supervised elections” as prerequisites for the rollback of U.S. sanctions.

Additionally, 47 Republican senators wrote an open letter to the Supreme Leader of Iran, Ayatollah Ali Khamenei, stating that Republicans in the legislature and a Republican president would do their utmost to implement new sanctions against Iran. Among the signatories were Senators Ted Cruz and Marco Rubio, two of the three leading Republican candidates. Senator Bernie Sanders, one of the Democratic candidates, did not sign the letter.

Should Iran violate the terms of its agreement with the six countries that signed the nuclear accord (the “P5+1”), Senators Cruz, Rubio, and Sanders all voted to “snap back” sanctions, a concept that has broad bipartisan as well as international support.

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Mulling Sanctions: Will the 45th President Limit Trade with Iran and Cuba?

BY STEFANOS N. ROULAKIS

Likewise, there are few issues that could impact future business opportunities in the maritime sector as much as the next U.S. president’s policy towards trade sanctions. This article surveys the positions of the two main U.S. political parties towards Iranian and Cuban sanctions, as well as the views of the five leading candidates, among which are two persons of Cuban descent. The article also considers how Iran’s recent elections may contribute to the 45th president’s policy regarding sanctions. Adding to what has already been an interesting election cycle, the leading Republican candidate accepts the rollback of sanctions with Iran and Cuba, while the leading Democratic candidate has taken a hard line on Iran. This shows that the risk of sanctions exists no matter who is ultimately elected to the presidency.

In sum, businesses should explore new opportunities in Iran and Cuba with the advice of counsel. However, they should also be prepared to reintroduce sanctions compliance procedures. Additionally, it appears clear that, contrary to conventional wisdom, a victory by either party could lead to a reinstatement of sanctions against Iran or Cuba.

U.S. Electoral and Political Basics

The 2016 U.S. presidential election is currently in its “primary” phase, meaning the Republican and Democratic parties are holding elections to nominate delegates to their respective conventions. These delegates will then vote to nominate each party’s nominee for the office of president at their respective conventions. The general election will occur on November 8, 2016, and the 45th president will take office on January 20, 2017.

While sanctions remain a key issue for the maritime industry, the unpredictability of the campaign combined with a myriad of issues under discussion have resulted in sanctions becoming a secondary issue for the general electorate.
ensures will enable you to promptly access such systems and suspend normal data purge schedules as necessary once the lawsuit arrives.

4. Discovery Phase Collection Considerations

Very shortly after a complaint and answers are filed in federal court, counsel for all parties are required to participate in a “meet and confer” conference to develop a mutually acceptable discovery plan. That plan now expressly contemplates and must address issues of ESI preservation. The parties will then participate in a preliminary conference with the court, which generally results in the issuance of a scheduling order. FRCP 16(b)(2) now specifies that scheduling orders may provide for the preservation of ESI, as well as include an agreement regarding the inadvertent disclosure of electronically privileged information (often called a “clawback agreement”).

It is important that you and your outside counsel begin planning at the outset for how e-discovery is going to be handled, including educating counsel about your company’s electronic systems and establishing lines of communication between counsel and your key e-discovery personnel. Keep in mind that each e-discovery collection and review is different, and the cost and scope of the project will necessarily depend upon the size and complexity of the case. In some instances, complex review tools (such as computer-assisted “predictive coding” or other types of attorney-assisted review) can be utilized to efficiently search through large portions of data, and in other instances, the collection may involve only a small amount of ESI from a few custodians that can then be classically reviewed. The costs for such endeavors necessarily fluctuates depending on the scope and complexity of each case, but fortunately, the market is meeting the demand, and cost effective review platforms are now increasingly common in the industry.

By fashioning a review plan early and working with opposing counsel, your company will be better equipped to navigate the e-discovery process itself. Some of the things your counsel will be assisting with are as follows:

- Dealing with “overly broad and unduly burdensome” discovery requests from opposing counsel, and corollary motion practice to limit discovery, as necessary.
- Preparation and maintenance of “privileged data” sets to isolate and secure privileged communications, trade sensitive data, or other confidential commercial materials that may be potentially exposed during discovery.
- Identification and designation of one or more of your employees representative to serve as a potential FRCP 30(b)(6) witness to confirm and describe your IT footprint and the parameters and scope of your ESI.

The creation, use, and storage of electronic data is now an integral and critical part of every modern business, but costly pitfalls can arise when such information becomes implicated in threatened or pending litigation. Being proactive and taking steps to appropriately plan and prepare for the inevitable is important to help ensure your company’s safe passage through the electronic ocean we are all now operating in.

Conference finds that the Model Law enactors’ interpretation makes sense. Chapter 15 can be attempted after a foreign debtor has ceased operating or has been succeeded formally by a reorganized entity. In such contexts, the Fairfield Sentry “present tense” focused test can make it more difficult to find COMI or an establishment in the jurisdiction where the foreign proceeding was filed and where the foreign debtor actually had its locus of tangible or central economic activity. The Conference views recognition of a follow on liquidation proceeding as a possible distortion of the Model Law and chapter 15 because the liquidation might not have any real nexus to a place where the debtor had a tangible economic presence.

Accordingly, the Conference urged modifications to both Bankruptcy Code section 1502 and 1517 to confirm that COMI should be determined as of the time the foreign proceeding commenced. ©2016, BLANK ROME LLP

Indeed, some commentators assert that more than 90 percent of all information today is created and exists purely in electronic form. The maritime industry has followed the trend, with many “traditional” documents such as logs, cargo manifests, and communications now occurring in purely electronic format.

1. The FRCP are the general rules that govern processes and procedures in all civil cases brought in United States district courts. Each state also has its own rules of civil procedure for cases brought in state courts. While such rules often mirror the FRCP, there can be significant differences. State rules of civil procedure are beyond the scope of this article.

Reversal of the Marine Safety Center’s preliminary decision could pave the way for USCG type-approvals of UV systems and stave off many problems that will inevitably come to the forefront once the Convention is ratified and implementation commences.

The Ballast Water Management Convention—Three New Ratifications and More Forthcoming

The Convention establishes standards and procedures for the management and control of ships’ ballast water and sediments. It requires an approved Ballast Water and Sediment Management Plan, a Ballast Water Record book, and, generally, a type-approved ballast water treatment system.

For the Convention to enter into force, it must be ratified by a minimum of 30 parties representing at least 35 percent of the global fleet. Morocco, Indonesia, and Ghana ratified the Convention in November 2015, bringing the total number of ratifications to 47. However, IMO recently confirmed that, even with these new ratifications, the total tonnage falls just short at 34.56 percent. Significantly, Panama has announced its intention to ratify and other countries may follow suit. Panama, however, is reportedly pushing the IMO to first resolve concerns expressed by shipowners relating to the differences in the type-approval processes between IMO and the United States. Reports indicate that Belgium will also ratify soon, though it is not anticipated that Belgium’s fleet has enough tonnage to push the percentage over 35 percent. If Panama’s concerns can be alleviated, or if other countries ratify, as expected, it is likely that the Convention will enter into force sometime in 2017.

Once the Convention is in force, existing vessels will generally be required to come into compliance by the first IOPP renewal survey. To date, there are 58 treatment systems approved by administrations per the Convention. Unfortunately, these systems will not be adequate for use in the United States, at least for the long-term, as the testing protocol for treatment systems in the United States is currently more stringent than IMO’s protocol.

The United States is not a party to the Convention and has its own regime for ballast water management. It provides its own regime for ballast water management. It provides an approved Ballast Water and Sediment Management Plan, a Ballast Water Record book, and, generally, a type-approved ballast water treatment system.

USCG Regime—Want ed Dead or Alive

The United States is not a party to the Convention and has its own regime for ballast water management. It provides several options for compliance, most of which, however, are not currently type-approved by any administration. USCG approves the same standard as IMO, but it has its own test protocol. None of the 58 IMO type-approved systems are type-approved by the USCG, as yet. In fact, there are currently no USCG type-approved systems. In the simplest terms, the ETUV protocol requires organisms to be “dead,” whereas the IMO protocol requires them to be “non-viable.” This difference in approach has made it difficult for manufacturers to get their systems type-approved by the USCG.

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3. What to Do with Your Data Once Litigation is Threatened or Pending

Once litigation is threatened or pending, it is critical to quickly identify and access the potential universe of electronic information implicated in the lawsuit and make important strategic determinations ASAP to secure all relevant data.

These amendments included changes to the rules governing e-discovery, which, for purposes of this article, broadly refers to discovery focused on seeking/obtaining electronically stored information (“ESI”) from a litigant. As a preliminary matter, the basic scope of all discovery was amended to re-emphasize focus on a proportionality standard, as follows:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportionate to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the discovery already obtained in resolving issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Even though the new “proportionality” discovery standard can be viewed as perhaps limiting the scope of discovery, the parties’ obligations to produce relevant material (electronic or otherwise) remain. With this general obligation in mind, the following four topics are general guidelines that companies should consider when preparing for the inevitable.

1. Pre-Litigation Awareness of Your Electronic Footprint

A solid e-discovery strategy begins long before the process server knocks on your door. Modern businesses (regardless of size or location) should first prepare by ensuring best litigation practices in future litigation.

Understanding the importance of the issues at stake, the relevant areas at issue, and the need to maintain all critical documents (electronic or otherwise). The reason for this strict requirement is that in certain instances, U.S. courts may penalize those parties who lose, misplace, or destroy key evidence (known as “spoliation”).

Clients should avoid spoliation pitfalls at all costs by working with counsel and implementing litigation holds immediately after threatened or pending litigation. This is now particularly important in the electronic realm, because unlike your office file cabinet, many electronic data systems will automatically purge and delete data (such as emails) after a certain time period.

Once litigation is threatened or pending, it is critical to quickly identify and access the potential universe of electronic information implicated in the lawsuit and make important strategic determinations ASAP to secure all relevant data from key personnel. One of the first steps in this process is to immediately identify key employees who are likely to be “custodians” of electronic data that may be relevant to the litigation. Keep in mind that in the maritime arena, such custodians may very well include the ships themselves—they are now often given their own generic e-mails, server designations, etc. (for example, “mvgreenwave@client.com”.

Thereafter, it is critical to internally issue a “litigation hold” notice to key personnel advising them of the lawsuit, the relevant areas at issue, and the need to maintain all critical documents (electronic or otherwise). The reason for this strict requirement is that in certain instances, U.S. courts may penalize those parties who lose, misplace, or destroy key evidence (known as “spoliation”).

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Again, having a solid understanding of your company’s systems and liaising with key IT personnel before litigation

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Navigating the Electronic Ocean: An Update on E-Discovery Best Practices
BY JEREMY A. HERSHEYCHAFT AND DAVID G. MEYER

For any maritime business interest with a connection to the United States, involvement in civil litigation in U.S. courts is likely inevitable. As such, both domestic and foreign businesses should prepare themselves for involvement in U.S. civil litigation before it thrust upon them. In this regard, no area of current concern generates more discussion (and sometimes angst) amongst our international and domestic clients than “e-discovery,” its costs and scope, and the best practices that companies can adopt to prepare themselves for this unique aspect of U.S. litigation.

In contrast to many foreign legal regimes, it has long been the rule in the United States that, once a lawsuit is filed, the parties to the action exchange essentially all relevant documentary information shortly after the beginning of the case in a period known as “discovery.” The policy rationale for this process is to enable all sides to fully investigate the facts of the case early on and develop their respective legal arguments before trial, which will hopefully encourage settlement once the key facts are isolated. Until the last decade, a maritime lawyer’s factual investigation and discovery plan involved the searches and exchange of boxes, sifting through warehouses full of paper documents, and (through personal experience of the authors!) 2:00 a.m. use of the captain’s copier on the bridge while offshore during shipboard investigations to collect “hard copies” of pertinent vessel logs.

Those days are essentially over, as modern business practices have almost completely shifted into the electronic arena. Indeed, some commentators assert that more than 90 percent of all information today is created and exists purely in electronic form. The maritime industry has followed the especially those systems using ultraviolet light-based (“UV”) technologies. That said, the USCG anticipates that some chemical systems may be approved by year’s end.

Because of the practical challenges of “getting to dead” with UV systems, four manufacturers requested that the USCG’s Marine Safety Center approve the “most probable number” (“MPN”) method as an equivalent means of demonstrating compliance with the ETV protocol. The MPN method is widely used in other applications in the United States and around the world. However, in December 2015, the USCG preliminarily denied the equivalency requests, stating that the ETV protocol requires measuring the ability of a treatment system to kill organisms, whereas the MPN method measures the viability of an organism to reproduce after treatment, and thus the methods were not equivalent. The manufacturers have appealed the Marine Safety Center’s decision to the USCG Commandant. Reversal of the Marine Safety Center’s preliminary decision could pave the way for USCG type-approvals of UV systems and stave off many problems that will inevitably come to the forefront once the Convention is ratified and implementation commences.

USCG Policy Revisions and Clarifications
In November 2015, the USCG revised its policy and streamlined the process for vessel owners and operators to apply for an extension to their compliance date for installing ballast water treatment systems. These policy changes provide guidance with regards to the meaning of the “first scheduled drydocking” and modify the duration of extended compliance dates. Per USCG regulations, a vessel’s compliance date is the first scheduled drydocking after January 1, 2014, or January 1, 2016, depending on the vessel’s ballast water capacity. The USCG clarified that the “first scheduled drydocking” means the date that the vessel enters the drydock, regardless of when the vessel exits drydock. The USCG also clarified that an emergency drydocking is not considered the first scheduled drydocking unless this drydocking also includes the required bottom survey to endorse the vessel’s Certificate of Inspection or international statutory certificates. Finally, underwater inspection in lieu of drydocking is not considered the first scheduled drydocking.

The USCG also revised the duration of extended compliance dates. In the past, the extensions expired on a specific date with no relation to the vessel’s drydock schedule. For example, a January 1, 2018, expiration date meant that the vessel had to be in compliance by that date, even if not scheduled for drydock before that date. Moving forward, however, extensions will expire on the “next scheduled drydocking” after the vessel’s initial compliance date. This should make it much easier for shipowners to plan and budget for the installation of a ballast water treatment system and evaluate systems for appropriateness once they are type-approved. For those vessels with existing extension letters, there is no need to do anything now; this change will be reflected when the vessel requests a supplemental extension.

EPA Acted Arbitrarily and Capriciously
On October 5, 2015, the Second Circuit Court of Appeals unanimously ruled, in Natural Resources Defense Council v. EPA, that EPA acted arbitrarily and capriciously in issuing the ballast water provisions included in the current VGP. Most notably, the ruling stated that EPA failed to adequately explain why stricter technology-based effluent standards should not be applied, failed to give fair and thorough consideration to onshore treatment options, and failed to adequately explain why pre-2009 Lakers (i.e., vessels trading exclusively on the Great Lakes) were exempted. The court reminded the matter to EPA to better justify or revise its approach in accordance with the ruling. In the

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Blank Rome Welcomes More than 100 Attorneys from Dickstein Shapiro in D.C. and NY

Blank Rome LLP is pleased to announce that more than 100 attorneys and additional staff from Dickstein Shapiro LLP’s New York and Washington, D.C., offices have joined the Firm. As a result of this deal, Blank Rome offers its combined client base expanded and enhanced capabilities. The Firm now has more than 620 attorneys across 14 offices; a more robust presence in Washington, D.C.; that is more than triple its prior size and includes prominent insurance coverage and government contracts practices; an expanded, leading intellectual property group, both in terms of size and experience; and greater strategic depth in other core areas, including corporate and finance, real estate, and litigation.

“It is amazing to think that just 15 years ago, Blank Rome was primarily a Philadelphia law firm,” said Alan J. Hoffman, Blank Rome’s Chairman and Managing Partner. “In line with our current strategic plan, this is the latest in a robust series of targeted lateral hires, acquisitions, and combinations that our Firm has successfully completed in recent years. As Blank Rome celebrates its 70th anniversary, we are excited to help our clients tackle the full range of their most critical legal challenges now and for decades to come.”

“We have long admired Blank Rome’s deliberate and steady evolution, and its commitment to delivering top-level service to its clients,” said James Kelly, the new Chairman of Blank Rome’s Washington, D.C., office and former Chairman of Dickstein Shapiro. “The group of attorneys and professionals joining Blank Rome are proud of the success we have had in serving our clients and building premier, market-leading practices. We are excited to continue serving clients together with our new colleagues at Blank Rome.”

Mr. Hoffman added, “Over the past several weeks, a number of us at Blank Rome have had the pleasure of spending time getting to know our new partners and colleagues on both a professional and personal level. Jim and I knew early on that this was an outstanding opportunity to bring our teams together. The partners in the group have an impressive average of more than 20 years with Dickstein Shapiro and represent the core team that formed the firm and made its Washington, D.C., office among the very best in the District. There was intense competition for this fine group of attorneys, for good reason. We are delighted to welcome the team to our Firm and look forward to working with them.”

With this transaction, Blank Rome adds more than 90 attorneys in Washington, D.C., and 13 in New York. These attorneys hail from practice groups that comprise Dickstein Shapiro’s core strengths: government contracts, intellectual property, insurance coverage, corporate and finance, real estate, complex litigation, and dispute resolution. A complete list of the new Blank Rome attorneys is available at www.blankrome.com/growth.

As Blank Rome’s institutional clients have evolved, the Firm has seen a tremendous increase in the complexity and sophistication of the matters with which these clients contend. The Firm has acted deliberately to strengthen its sophisticated regional and national practices and develop new competencies in areas of critical importance to its longstanding client base. Each practice group joining from Dickstein Shapiro addresses a strategic imperative for Blank Rome’s growth or adds greater depth to an existing core strength.

Dickstein Shapiro’s preeminent government contracts team will become a new practice group at Blank Rome, led by David Nadler. The group represents federal, state, and local government contractors in a wide range of industries, including defense, healthcare, professional services, logistics, and information technology.

Insurance coverage will also become a new practice group at Blank Rome, led by James Murray. The top-ranked policyholder practice includes a deep bench of attorneys with 30+ years of experience developing specialized solutions for a wide range of industries and policy types.

The intellectual property attorneys joining the Blank Rome team have represented the world’s most innovative and dynamic companies, including Toshiba, Samsung, and SAP. Dickstein Shapiro’s Jeffrey Sherwood will serve as co-practice group leader of Blank Rome’s group.

With its June 2015 combination with Wong Cabello, which added 23 intellectual property attorneys to its Houston office, Blank Rome’s IP team now numbers more than 80, placing it among the largest IP practices in the United States.

The litigators joining from Dickstein Shapiro further strengthen Blank Rome’s high-profile litigation offering, as well as add sophisticated trial counsel for regulatory and other administrative hearings.

The corporate and finance group adds to Blank Rome’s historic strength in corporate structuring, governance, finance, and transactions for corporate and private equity clients.

Blank Rome will consolidate its Washington, D.C., presence to Dickstein Shapiro’s office at 1825 Eye Street NW in the near future.


To learn more, visit www.blankrome.com/growth.

About Blank Rome LLP

With over 600 attorneys serving clients around the globe, Blank Rome represents businesses and organizations ranging from Fortune 500 companies to start-up entities. Founded in 1946, Blank Rome advises clients on all aspects of their businesses, including commercial and corporate litigation; consumer finance; corporate, M&A, and securities; energy, environment, and mass torts; finance, restructuring, and bankruptcy; government contracts; insurance coverage; intellectual property and technology; labor and employment; maritime and international trade; matrimonial; policy and political law, real estate; tax, benefits, and private client; and white collar defense and investigations. Blank Rome also represents pro bono clients in a wide variety of cases and matters. For additional information, visit www.blankrome.com

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Navigating the Electronic Ocean: An Update on E-Discovery Best Practices

BY JEREMY A. HERSCHAFT AND DAVID G. MEYER

For any maritime business interest with a connection to the United States, involvement in civil litigation in U.S. courts is likely inevitable. As such, both domestic and foreign businesses should prepare themselves for involvement in U.S. civil litigation before it is thrust upon them. In this regard, no area of concern generates more discussion (and sometimes angst) amongst our international and domestic clients than “e-discovery,” its costs and scope, and the best practices that companies can adopt to prepare themselves for this unique aspect of U.S. litigation.

In contrast to many foreign legal regimes, it has long been the rule in the United States that, once a lawsuit is filed, the parties to the action exchange essentially all relevant documentary information shortly after the beginning of the case in a period known as “discovery.” The policy rationale for this process is to enable all sides to fully investigate the facts of the case early on and develop their respective legal arguments before trial, which will hopefully encourage settlement once the key facts are isolated. Until the last decade, a maritime lawyer’s factual investigation and discovery plan involved the searches and exchange of boxes, sifting through warehouses full of paper documents, and (through personal experience of the authors!) 2:00 a.m. use of the captain’s copier on the bridge while offshore during shipboard investigations to collect “hard copies” of pertinent vessel logs.

These days are essentially over, as modern business practices have almost completely shifted into the electronic arena. Indeed, some commentators assert that more than 90 percent of all information today is created and exists purely in electronic form. The maritime industry has followed the especially those systems using ultraviolet light-based (“UV”) technologies. That said, the USCG anticipates that some chemical systems may be approved by year’s end.

Because of the practical challenges of “getting to dead” with UV systems, four manufacturers requested that the USCG’s Marine Safety Center approve the “most probable number” (MPN) method as an equivalent means of demonstrating compliance with the ETV protocol. The MPN method is widely used in other applications in the United States and around the world. However, in December 2015, the USCG preliminarily denied the equivalency requests, stating that the ETV protocol requires measuring the ability of a treatment system to kill organisms, whereas the MPN method measures the viability of an organism to reproduce after treatment, and thus the methods were not equivalent. The manufacturers have appealed the Marine Safety Center’s decision to the USCG Commandant.

Reversal of the Marine Safety Center’s preliminary decision could pave the way for USCG type-approvals of UV systems and stave off many problems that will inevitably come to the forefront once the Convention is ratified and implementation commences.

USCG Policy Revisions and Clarifications

In November 2015, the USCG revised its policy and streamlined the process for vessel owners and operators to apply for an extension to their compliance date for installing ballast water treatment systems. These policy changes provide guidance with regards to the meaning of the “first scheduled drydocking” and modify the duration of extended compliance dates. Per USCG regulations, a vessel’s compliance date is the first scheduled drydocking after January 1, 2014, or January 1, 2016, depending on the vessel’s ballast water capacity. The USCG clarified that the “first scheduled drydocking” means the date that the vessel enters the drydock, regardless of when the vessel exits drydock. The USCG also clarified that an emergency drydocking is not considered the first scheduled drydocking unless this drydocking also includes the required bottom survey to endorse the vessel’s Certificate of Inspection or international statutory certificates. Finally, underwater inspection in lieu of drydocking is not considered the first scheduled drydocking.

The USCG also revised the duration of extended compliance dates. In the past, the extensions expired on a specific date with no relation to the vessel’s drydock schedule. For example, a January 1, 2018, expiration date meant that the vessel had to be in compliance by that date, even if not scheduled for drydock before that date. Moving forward, however, extensions will expire on the “next scheduled drydocking” after the vessel’s initial compliance date. This should make it much easier for shipowners to plan and budget for the installation of a ballast water treatment system and evaluate systems for appropriateness once they are type-approved. For those vessels with existing extension letters, there is no need to do anything now; this change will be reflected when the vessel requests a supplemental extension.

EPA Acted Arbitrarily and Capriciously

On October 5, 2015, the Second Circuit Court of Appeals unanimously ruled, in Natural Resources Defense Council v. EPA, that EPA acted arbitrarily and capriciously in issuing the ballast water provisions included in the current VGP. Most notably, the ruling stated that EPA failed to adequately explain why stricter technology-based effluent standards should not be applied, failed to give fair and thorough consideration to onshore treatment options, and failed to adequately explain why pre-2009 tankers (i.e., vessels trading exclusively on the Great Lakes) were exempted. The court demanded the matter to EPA to better justify or revise its approach in accordance with the ruling. In the

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The challenges faced by the maritime industry in implementing international and domestic ballast water requirements continue unabated. These challenges may be getting even more challenging in the next year or so.

Internationally, new ratifications to the International Maritime Organization’s (“IMO”) International Convention for the Control and Management of Ships’ Ballast Water and Sediments (“Convention”) mean the Convention is very close to entering into force. In the United States, which is not party to the Convention, the U.S. Coast Guard ("USCG") issued a revised policy addressing extensions for the installation of ballast water treatment systems and, shortly thereafter, rejected an “equivalency request” from four ballast water treatment system manufacturers, which would have helped alleviate the need for these extensions, which now number more than 4,000. In addition, the U.S. Second Circuit Court of Appeals ruled that the U.S. Environmental Protection Agency (“EPA”) acted arbitrarily and capriciously in drafting the ballast water provisions of its Vessel General Permit for Discharges incidental to the Normal Operation of Vessels (“VGP”), thus creating more uncertainty.

Once the Convention is in force, existing vessels will generally be required to come into compliance by the first IOPP renewal survey. To date, there are 58 treatment systems approved by administrations per the Convention. Unfortunately, these systems will not be adequate for use in the United States, at least for the long-term, as the testing protocol for treatment systems in the United States is currently more stringent than IMO’s protocol.

The Ballast Water Management Convention—Three New Ratifications and More Forthcoming

The Convention establishes standards and procedures for the management and control of ships’ ballast water and sediments. It requires an approved Ballast Water and Sediment Management Plan, a Ballast Water Record book, and, generally, a type-approved ballast water treatment system.

For the Convention to enter into force, it must be ratified by a minimum of 30 parties representing at least 35 percent of the global fleet. Morocco, Indonesia, and Ghana ratified the Convention in November 2015, bringing the total number of ratifications to 47. However, IMO recently confirmed that, even with these new ratifications, the total tonnage falls just short at 34.56 percent. Significantly, Panama has announced its intention to ratify and other countries may follow suit. Panama, however, is reportedly pushing the IMO to first resolve concerns expressed by shipowners relating to the differences in the type-approval processes between IMO and the United States. Reports indicate that Belgium will also ratify soon, though it is not anticipated that Belgium’s fleet has enough tonnage to push the percentage over 35 percent. If Panama’s concerns can be alleviated, or if other countries ratify as expected, it is likely that the Convention will enter into force sometime in 2017.

Reversal of the Marine Safety Center’s preliminary decision could pave the way for USCG type-approvals of UV systems and stave off many problems that will inevitably come to the forefront once the Convention is ratified and implementation commences.

USCG Regime—Wanted Dead or Alive

The United States is not a party to the Convention and has its own regime for ballast water management. It provides several options for compliance, most of which, however, are not available for the majority of ships. The USCG applies the same standard as IMO, albeit with a more stringent testing protocol known as the Environmental Testing Verification (“ETV”) protocol. None of the 58 IMO type-approved systems are type-approved by the USCG, as yet. In fact, there are currently no USCG type-approved systems. In the simplest terms, the ETV protocol requires organisms to be “dead,” whereas the IMO protocol requires them to be “non-viable.” This difference in approach has made it difficult for manufacturers to get their systems type-approved by the USCG.
ensures will enable you to promptly access such systems and suspend normal data purge schedules as necessary once the lawsuit arrives.

4. Discovery Phase Collection Considerations

Very shortly after a complaint and answers are filed in federal court, counsel for all parties are required to participate in a “meet and confer” conference to develop a mutually acceptable discovery plan. That plan now expressly contemplates and must address issues of ESI preservation. The parties will then participate in a preliminary conference with the court, which generally results in the issuance of a scheduling order. FRCP 16(b)(2) now specifies that scheduling orders may provide for the preservation of ESI, as well as include an agreement regarding the inadvertent disclosure of electronically privileged information (often called a “clawback agreement”).

It is important that you and your outside counsel begin planning at the outset for how ediscovery is going to be handled, including educating counsel about your company’s electronic systems and establishing lines of communication between counsel and your key e-discovery personnel. Keep in mind that each e-discovery collection and review is different, and the cost and scope of the project will necessarily depend upon the size and complexity of the case. In some instances, complex review tools (such as computer-assisted “predictive coding” or other types of attorney-assisted review) can be utilized to efficiently search through large portions of data. In other instances, the collection may involve only a small amount of ESI from a few custodians that can then be classically reviewed. The costs for such endeavors necessarily fluctuates depending on the scope and complexity of each case, but fortunately, the market is meeting the demand, and cost effective review platforms are now increasingly common in the industry.

By fashioning a review plan early and working with opposing counsel, your company will be better equipped to navigate the ediscovery process itself. Some of the things your counsel will be assisting with are as follows:

- Responding to general ESI discovery requests and, as necessary, establishing unique “search terms” and other search parameters with opposing parties to isolate relevant ESI that may be subject to production. This will entail the collection of ESI materials followed by a review and designation of materials to actually produce in discovery.

- Dealing with “overly broad and unduly burdensome” discovery requests from opposing counsel, and corollary motion practice to limit discovery, as necessary.

- Preparation and maintenance of “privileged data” sets to isolate and secure privileged communications, trade sensitive data, or other confidential commercial materials that may be potentially exposed during discovery.

- Identification and designation of one or more of your employees representative to serve as a potential FRCP 30(b)(6) witness to confirm and describe your IT footprint and the parameters and scope of your ESI.

- Ensuring you conduct your ediscovery review in a timely manner and will have the necessary computer systems and personnel in place when needed.

Indeed, some commentators assert that more than 90 percent of all information today is created and exists purely in electronic form. The maritime industry has followed the trend, with many “traditional” documents such as logs, cargo manifests, and communications now occurring in purely electronic format.

1. The FRCP are the general rules that govern processes and procedures in all civil cases brought in United States district courts. Each state also has its own rules of civil procedure for cases brought in state courts. While such rules often mirror the FRCP, there can be significant differences. State rules of civil procedure are beyond the scope of this article.

Mostly outside the United States.” This, in the view of the Conference, can place the American bankruptcy system in the position of having the responsibility to administer the affairs of a debtor and the assets of a debtor where both the debtor and those assets are outside of the effective control of the bankruptcy court.

At present, in extraordinary circumstances, a bankruptcy court can abstain from administering a chapter 11 case, dismissing the foreign debtor’s claim against the bankruptcy court administration over part of a case, but to retain power over part of the case. The bankruptcy court could then continue effective administration over U.S. assets of a foreign debtor that initiated a plenary proceeding in the United States, tailoring abstention to better enhance chances of international reorganization while doing proper comity to foreign laws, courts, interests, and processes.

Accordingly, the Conference suggests that Congress amend Bankruptcy Code section 305(a)(1) to specify that abstention and dismissal is appropriate at the bankruptcy court’s discretion if a debtor does not have its center of main interests in the United States and the bankruptcy court cannot exercise effective control over the debtor or its material assets. This would render the plenary bankruptcy process consistent with section 1528 of the Bankruptcy Code, which only permits a foreign representative to file a plenary proceeding in the United States after recognition, and then, only where the foreign debtor has U.S. assets.

Likewise, the Conference urges a revision to the statute to enable suspension of bankruptcy court administration over part of a case, but to retain power over part of the case. The bankruptcy court could then continue effective administration over U.S. assets of a foreign debtor that initiated a plenary proceeding in the United States, tailoring abstention to better enhance chances of international reorganization while doing proper comity to foreign laws, courts, interests, and processes.

A Foreign Debtor’s ‘Center of Main Interest’ Should Be Determined as of the Commencement of the Foreign Proceeding, Not as of the Chapter 15 Case’s Commencement

Bankruptcy Code section 1502 and section 1517 defines a “foreign main proceeding” as a proceeding in the country where the foreign debtor “has” its center of main interests or “COMI.” “COMI” exists where the foreign debtor has its financial and legal nerve center. Accordingly, the Second Circuit has ruled that “COMI” should be determined as of the date of chapter 15 commencement. In In re Fairfield Sentry, 714 F.3d 127 (2d Cir. 2013). Likewise, sections 1502 and 1507 require a “foreign non-main proceeding” to be in a country where the foreign debtor has an establishment, or a tangible locus of economic activity.

This Second Circuit interpretation is arguably inconsistent with the Model Law, which has been publicly and formally interpreted by its enactors in guidance to mean that the COMI/establishment determinations should be made as of the time the foreign proceeding commenced. The

Mulling Sanctions: Will the 45th President Limit Trade with Iran and Cuba?

The election of the 45th President of the United States could have a drastic impact on the global maritime industry. There are few issues that changed for the maritime industry in the last year of the Obama administration as much as trade sanctions against Iran and Cuba.

Likewise, there are few issues that could impact future business opportunities in the maritime sector as much as the next U.S. president’s policy towards trade sanctions. This article surveys the positions of the two main U.S. political parties towards Iranian and Cuban sanctions, as well as the views of the five leading candidates, among which are two persons of Cuban descent. The article also considers how Iran’s recent elections may contribute to the 45th president’s policy regarding sanctions. Adding to what has already been an interesting election cycle, the leading Republican candidate accepts the rollback of sanctions with Iran and Cuba, while the leading Democratic candidate has taken a hard line on Iran. This shows that the risk of sanctions exists no matter who is ultimately elected to the presidency.

In sum, businesses should explore new opportunities in Iran and Cuba with the advice of counsel. However, they should also be prepared to reinstate sanctions compliance procedures. Additionally, it is unclear that, contrary to conventional wisdom, a victory by either party could lead to a reinstatement of sanctions against Iran or Cuba.

U.S. Electoral and Political Basics

The 2016 U.S. presidential election is currently in its “primary” phase, meaning the Republican and Democratic parties are holding elections to nominate delegates to their respective conventions. These delegates will then vote to nominate each party’s nominee for the office of president at their respective conventions. The general election will occur on November 8, 2016, and the 45th president will take office on January 20, 2017.

While sanctions remain a key issue for the maritime industry, the unpredictability of the campaign combined with a myriad of issues under discussion have resulted in sanctions becoming a secondary issue for the general electorate.

Elections in Iran

In addition to the U.S. presidential election, Iran’s citizens are voting in what may be its most consequential election since the 1979 revolution. The results of the elections will largely be seen outside the country as a referendum on the outcomes of sanctions relief and the nuclear deal with the P5+1. A second consecutive electoral victory for moderates in Iran may impact the policy of the 45th president by validating the policy of sanctions relief President Obama’s policy. At the time of writing, polls were closing in Tehran and results were unavailable.

A Republican Victory Would Increase the Likelihood of Increased Sanctions

The fact that President Obama was the architect of the historic shift in relations with both Iran and Cuba will make it difficult for the Democratic nominee to directly contravene the current president’s policy. However, as we will see, this is far from certain. Additionally, the Democratic Party’s recent policy documents have not mentioned Iran or Cuban policy as an issue.

In contrast, one of the general themes of the Republican primary campaign to date is opposition to President Obama’s legacy and policies. Additionally, the Republican Party has made opposition to rapprochement with Iran and Cuba a centerpiece of its policy. Specifically, the Republican Party’s platform on American Exceptionalism states, “We urge the next Republican President to unequivocally assert his support for the Iranian people as they protest their despotic regime.” The platform takes a more detailed stance on Cuba, rejecting any “dysmocratic succession of power within the Castro family” and requiring “the legalization of political parties, an independent and free and fair internationally-supervised elections” as prerequisites for the rollback of U.S. sanctions.

Additionally, 47 Republican senators wrote an open letter to the Supreme Leader of Iran, Ayatollah Ali Khamenei, stating that Republicans in the legislature and a Republican president would do their utmost to implement new sanctions against Iran. Among the signatories were Senators Ted Cruz and Marco Rubio, two of the three leading Republican candidates. Senator Bernie Sanders, one of the Democratic candidates, did not sign the letter.

Should Iran violate the terms of its agreement with the six countries that signed the nuclear accord (the “P5+1”), Senators Cruz, Rubio, and Sanders all voted to “snap back” sanctions, a concept that has broad bipartisan as well as international support.

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Most Candidates Take a Hard Line on Sanctions, Especially with Iran

HILLARY CLINTON
As President Obama’s first Secretary of State, Hillary Clinton, the leading Democratic Party nominee, was intimately involved in President Obama’s unprecedented “nowruz” (the Iranian New Year) greetings to the Iranian people shortly after his first election in 2009, where he spoke in Persian, as well as the critical days of the “Green Revolution” in Iran later that summer. Although Secretary Clinton is supportive of the results of the P5+1 talks, which has resulted in sanctions relief, she has taken a hard line on Iran. This may indicate future sanctions should she be elected. Recently, Secretary Clinton stated that “Iran is still violating UN Security Council resolutions with its ballistic missile program, which should be met with new sanctions designations and firm resolve.” In a recent debate, Secretary Clinton stated that the normalization of relations with Iran “would remove one of the biggest obstacles to peace.”

On Cuba, Secretary Clinton has supported the rollback of U.S. sanctions on Cuba, where he spoke in Persian, as well as the critical days of the “Green Revolution” in Iran later that summer. Secretary Clinton stated that “rather than unilaterally lifting the economic embargo on Cuba, the United States should calibrate any relaxation of sanctions directly to the cessation of their repression and human rights violations.”

Mulling Sanctions: Will the 45th President Lift Trade with Iran and Cuba?

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TED CRUZ
Senator Ted Cruz is a first-term Republican senator from Texas who was formerly the state of Texas’ chief legal advisor and a legal clerk to a justice of the U.S. Supreme Court. Senator Cruz’s base of support largely stems from his conservative policies and opposition to the Obama administration. Senator Cruz stated that “on day one, a President Cruz will immediately repeal every word of President Obama’s dangerous Iran deal and will prioritize American national security interests in every instance.” Senator Cruz’s voting record in the Senate supports his position, as he voted both to override President Obama’s executive agreement with Iran and the P5+1 to roll back sanctions as well as to end debate on the issue to bring the matter to a vote. As noted above, Senator Cruz also signed the letter to Iran’s Supreme Leader.

On Cuba, Senator Cruz has taken a more nuanced view than on Iran, but seems generally to agree with the Republican platform and opposes sanctions relief. As Senator Cruz stated, “rather than unilaterally lifting the economic embargo on Cuba, the United States should calibrate any relaxation of sanctions directly to the cessation of their repression and human rights violations.”

MARCO RUBIO
Like Senator Cruz, Marco Rubio is a first-term Republican senator of Cuban ancestry. Unlike Senator Cruz, Senator Rubio is from south Florida, a center of the U.S.’s Cuban-American demographic. Senator Rubio has made Cuba a more central theme of his campaign than other candidates, proposing a bill to change U.S. policy regarding benefits for immigrants from Cuba. Regarding sanctions, Senator Rubio has promised to “[r]evise President Obama’s attempts to normalize relations and condition any further-lessening of sanctions until Cuba engages in meaningful political and human rights reform, returns U.S. fugitives, and agrees to honor American property claims and outstanding judgments.” He also taken

Respected Conclave Proposes Important Revisions to Chapter 15 of the U.S. Bankruptcy Code

BY MICHAEL B. SCHAEDLE

Chapter 15 of the U.S. Bankruptcy Code enacts the Model Law (the “Model Law”) on Cross-Border Insolvency promulgated by the United Nations Commission on International Trade Law, which has been adopted by the United States and 40 other countries. Chapter 15 is designed to enable international reorganization by creating a straightforward means by which foreign debtors can access the American judicial and bankruptcy system to assist foreign courts in their work in reorganizing, rehabilitating, and liquidating those debtors with cross-border interests, including in the United States. Since its inclusion in the Bankruptcy Code in 2005, experience and precedent in respect of chapter 15 ancillary relief has developed. This experience and precedent has led an eminent conclave of American bankruptcy judges, academicians, and lawyers, the National Bankruptcy Conference (the “Conference”), to suggest certain reforms in respect of chapter 15 to the United States Senate’s Committee on the Judiciary and the United States House of Representatives’ Subcommittee on Regulatory Reform, Commercial and Antitrust Law.

While the prospects for chapter 11 and 15 reform are uncertain (particularly in a presidential election season), the American Bankruptcy Institute recently undertook a broad-ranging study of necessary reforms to the bankruptcy law and reported to Congress in 2015, stimulating interest in bankruptcy reform. Accordingly, it is important to be aware of key points raised by the Conference on chapter 15, as the Conference will be influential Delaware bankruptcy court in the Third Circuit, have found that chapter 15 at Bankruptcy Code section 1517 establishes its own requirements for eligibility that are more specific than Bankruptcy Code section 109(a) and that are not dependent on the existence of a place of business or property in the U.S. See In re Bemarmara Consulting A.S., slip op., Case No. 13-13037 (Bankr. D. Del., Dec. 17, 2013). The Conference says that Bapetit is “wrong.” Bapetit, in the view of the Conference, invites stakeholders to challenge chapter 15 process on grounds inconsistent with the straight-forward requirements of recognition that drive 15 and the Model Law, while modifying the relevant venue law. It proposes that Congress revise Bankruptcy Code section 109(a) to make clear that it is inapplicable in a chapter 15 case.

Conversely, Abstention in a Plenary Case under Chapter 7 or 11 Should Be Permitted Where a Debtor Does Not Have Its Center of Main Interests in the U.S. and the Court Cannot Effectively Control the Debtor or Its Main Assets

The relative modest “eligibility” requirements discussed above easily create U.S. jurisdictional ties, enabling a company with its offices overseas to raise a plenary case here in the United States under either chapter 7 or 11. The Conference does not suggest that the eligibility test should change because, as is often the case in maritime matters, certain sorts of businesses can office overseas and yet have important intangible

At present, in extraordinary circumstances, a bankruptcy court can abstain from administering a chapter 11 case, dismissing same when the disclaimer is in the best interests of both the debtor and its creditors.
Develop Response Plans
Lastly, shipowners and operators must develop contingency plans in order to effectively respond to a cyber-attack or incident. It is recommended that contingency plans or response plans be tested periodically. For example, shipowners and operators must know what to do and how to respond when electronic navigational equipment is disabled. There also must be procedures for handling ransomware incidents, and operational contingencies for ships in cases where land-based data is lost. When a cyber-breach or incident has been detected, it is crucial that all relevant personnel are aware of the exact procedure to follow and know how to respond. Recovery plans should be accessible to officers on board, and how and where to get assistance, for example by proceeding to a port, needs to be part of the recovery plan. Finally, investigating a cyber-incident is also important. Determining how systems were breached and what vulnerability was exploited can provide a better understanding as to how to better protect your systems in the future. External experts are often useful in conducting such investigations.

Increased Liability for Shipowners
The BIMCO Cybersecurity Guidelines make clear the responsibility of shipowners and operators in protecting against cyber-threats. While these guidelines provide a great source of education and direction, these guidelines also make a clear standard against which shipowners and operators can be judged. Shipowners and operators are now on notice that cyber-attacks and cyber-incidents pose a significant risk for the maritime industry. These guidelines outline such risks and offer a series of steps to mitigate losses. Accordingly, failure to take heed will result in exposure to greater liability. “The Guidelines on Cyber Security Onboard Ships” is the new standard for the industry—a standard that will be reviewed and considered by the IMO this summer. Shipowners and operators should follow these guidelines dutifully, and disregard at their peril.

Reducing the Risk
The next issue to be addressed is reducing the risk. This step involves technical cybersecurity controls, and the BIMCO Cybersecurity Guidelines suggest the Centre for Internet Security (“CIS”) as a reference for measures that can be used to address cybersecurity vulnerabilities. It is noted that technical cybersecurity controls may be more straightforward to implement on a new ship than on an existing ship. One of the issues to be considered in addressing technical controls is satellite and radio communication. The guidelines suggest that the cybersecurity of the radio and satellite connection should be considered in collaboration with the service providers. For example, when establishing an uplink connection for ships’ navigation and control systems to shore-based service providers, it should be considered how to prevent legitimate connections gaining access to the onboard systems. Malware defenses must also be incorporated and onboard computers should be protected to the same level as office computers ashore. Canning software that can automatically detect and address the presence of malware in systems onboard should be regularly updated.

In reducing the risks, the BIMCO Cybersecurity Guidelines also specifically note that an awareness program should be utilized for all seafarers. For example, seafarers must understand the risks related to e-mail and how to detect a phishing attack, the risks relating to Internet usage, and the risks relating to the use of personal devices. Personal devices often do not have the same level of security and may transfer risk to the environment to which they are connected.

The fact that President Obama was the architect of the historic shift in relations with both Iran and Cuba will make it difficult for the Democratic nominee to directly contravene the current president’s policy. However, as we will see, this is far from certain.

The fact that the Republican frontrunner appears to take a different view than the Republican Party is indicative of several things. First, it shows that this has been the year of “outsiders” for the Republican Party, where established politicians have largely been unable to garner support. Additionally, Mr. Trump’s stance shows that while sanctions policy is key for the maritime industry and the business community in general, it may not be an essential policy for many voters.

Analysis
Predicting the future of American policy based on campaign primary statements is a flawed art at best. By necessity, candidates that become president usually distance themselves from many statements and policies made while campaigning. The fact that the Republican frontrunner and both Democrats running support at least some sanctions relief means that it is possible the status quo established by President Obama could continue as the 45th president’s policy. A victory by Iranian moderates would further buttress this possibility.

However, the breadth of support for sanctions and a hard line against Iran in particular amongst several candidates of both parties should be cause for concern for the maritime community. Combined with significant opposition in Congress to President Obama’s policies on ending sanctions, the position to “modernize U.S. sanctions against Cuba to restore leverage and encourage true improvements in the lives of the Cuban people.”

On Iran, Senator Rubio has taken a hard line. As president, Senator Rubio plans to “undo the deal with Iran on day one” and has threatened additional sanctions. While missing the procedural vote to end debate on the Iran agreement, Senator Rubio did vote to override President Obama’s executive agreement with Iran and signed Senator Cotton’s letter to Ayatollah Khamenei.

BERNIE SANDERS
Senator Bernie Sanders is a self-described Democratic-Socialist who represents the State of Vermont in the U.S. Senate. Although not a member of the Democratic Party until recently, Senator Sanders has surprised many pundits in his forceful rise as a contender for the Democratic nomination. Of all candidates surveyed here, Senator Sanders has been the most unequivocally open to détente with both Cuba and Iran.

In his statement after voting against the override of President Obama’s executive action, Senator Sanders cited his anti-war policies, stating that, “I voted to support the Iran nuclear deal today because it is my firm belief that the test of a great nation is not how many wars we can engage in, but how we can use our strength and our capabilities to resolve international conflicts in a peaceful way.”

On Cuba, Senator Sanders bases his opposition to the embargo on the basis of promoting “democratic values in the region and strengthening [U.S.] economic and cultural ties with its people.” Senator Sanders has also put forth the argument that sanctions against Cuba have a large economic cost on U.S. businesses.

DONALD TRUMP
At the time of writing, Mr. Trump, a businessman and television personality from New York, is the frontrunner for the Republican nomination. It is especially surprising that the Republican frontrunner appears to be the most supportive of the rollback of Iran and Cuba sanctions, given overwhelming Republican opposition to these policies. Despite not having previously held elected office, Mr. Trump has drawn on his business experience to describe his approach to the Iran and Cuba sanctions policy.

Regarding Iran, Mr. Trump said, “I’ve heard a lot of people say, ‘We’re going to rip up the deal!’ It’s very tough to do [that] … Because I’m a deal person.” However, Mr. Trump outlined his strategy as, “I would police that contract so tough that they don’t have a chance.”

Regarding the U.S. opening with Cuba, Mr. Trump took a similar view. In response to a question on the thaw in Cuba-U.S. relations, Mr. Trump stated that, “I think it’s fine, but we should have made a better deal. The concept of opening with Cuba—50 years is enough—the concept of opening with Cuba is fine. I think we should have made a stronger deal.”

The fact that President Obama was the architect of the historic shift in relations with both Iran and Cuba makes it difficult for the Democratic nominee to directly contravene the current president’s policy. However, as we will see, this is far from certain.
The U.S. Imperative for New Icebreakers

BY JOAN M. BONDAREFF AND JAMES B. ELLIS

Executive Summary

The U.S. Coast Guard, under new guidance from President Barack Obama, is moving forward to acquire one new polar icebreaker for the United States. But the United States, as a leading maritime power and Arctic nation, needs more icebreakers and has yet to determine how to fund these very expensive ships. This article describes the United States’ disappointing history with polar icebreakers and why they are badly needed.

Background

The U.S. Coast Guard is the primary maritime law enforcement agency of the United States. This role includes search and rescue, especially in the Arctic where the Coast Guard provides ships for other government agencies that have no capabilities in ice-covered areas. The Coast Guard also provides support to the U.S. research station in McMurdo Sound, Antarctica.

As early as the 1800s, the Coast Guard and its predecessor, the Revenue Cutter Service, operated vessels with ice-breaking capabilities. As recently as the mid-1970s, the Coast Guard had five heavy polar icebreakers in its fleet. In 1976, two new heavy icebreakers, the Polar Sea and the Polar Star, were built. However, by 1990, they were the only remaining polar icebreakers in the fleet. In 2000, a third, medium icebreaker, the Healy, was added. The Polar Sea and the Polar Star are approaching 40 years of service, and the Polar Sea is no longer operational, leaving the nation with only one heavy and one medium icebreaker. At the same time, the U.S. role in the Arctic has expanded due to the melting icecap, opening of new shipping lanes, and expanded tourism from cruise ships in the Arctic. Yet the United States lacks the capacity to fully monitor these activities and conduct any needed search and rescue operations. There is no viable plan for how to address the replacement of these aging vessels, much less

BIMCO’s Cybersecurity Guidelines: Shipowners’ and Operators’ Risk, Exposure, and Liability

BY KATE B. BELMONT

Introduction

On January 4, 2016, the maritime industry changed forever. With the release of “The Guidelines on Cyber Security Onboard Ships” created by BIMCO, CLIA, ICS, Intercargo, and Intertanko, the maritime industry acknowledged and recognized that cyber-threats are grave and cyber-attacks are happening. The maritime industry responded to the call for greater education on cybersecurity and greater protections, and created a set of guidelines for shipowners and operators to defend against such attacks. Accordingly, as the BIMCO Cybersecurity Guidelines make clear, shipowners and operators must be proactive in protecting against such threats, and they must be responsive. While the maritime industry has been hesitant to address cybersecurity issues and the realities of operating in a world heavily reliant on ICT (information and communication technology), with the release and publication of the BIMCO Cybersecurity Guidelines, the maritime industry no longer has its head in the sand. These guidelines have become the new standard against which shipowners and operators will be judged when addressing issues related to cybersecurity onboard ships.

The BIMCO Cybersecurity Guidelines provide instructions to shipowners and operators on how to assess their operations and put in place the necessary procedures and actions to maintain the security of cyber-systems onboard their ships. Essentially, these guidelines serve as a “best practices” for shipowners and operators, on how to protect the cyber-systems onboard their vessels.

Cybersecurity Awareness

The first step in addressing cyber-risks, is understanding the cyber-threat. The BIMCO Cybersecurity Guidelines outline various types of cyber-threats and cyber-attacks, those who perpetrate such attacks, ranging from activists to criminals and terrorists, and examine their motivations and objectives, including reputational damage, financial gain, and commercial espionage. Shipowners and operators must be aware of a range of attacks, from a targeted attack, where a company or ship’s systems and data is being targeted, to an untargeted attack where a company or ship’s systems and data are one of many targeted. An example of a targeted attack would be spear phishing, where an individual is specifically targeted with personal e-mails containing malicious software or links that automatically download malicious software. Another example of a targeted attack would be subverting the supply chain, whereby a company or ship is attacked by compromising equipment or software being delivered to the company or ship. It is also important to understand that attackers may attempt to access a company or ship systems and data within the company or ship, or remotely through connectivity with the Internet. Depending on the extent of the breach, an attacker may be able to manipulate ECDS or gain access to commercially sensitive data such as cargo manifests or crew lists. The BIMCO Cybersecurity Guidelines make clear that all shipowners and operators must be aware of the potential cybersecurity risks when using IT systems onboard ships.

Risk Assessment

The second step in protecting against cyber-attacks is assessing the risk. In addition to understanding the cyber-risks associated with using IT systems onboard ships, the BIMCO Cybersecurity Guidelines make clear the responsibility of shipowners and operators in protecting against cyber-threats. While these guidelines provide a great source of education and direction, these guidelines also make a clear standard against which shipowners and operators can be judged.
Deepwater Horizon Court Ruling Closes the Gap on Responder Immunity
(continued from page 2)

Deepwater Horizon Litigation sidestepped the immunity provision in OPA 90 by using respondents for personal injuries allegedly caused by exposure to the spilled oil and/or the dispersants that were approved for use by the U.S. government and alleged gross negligence and willful misconduct related to the response actions. Since the responder immunity provision does not apply if a responder acts with gross negligence or willful misconduct, or causes personal injury or wrongful death, the plaintiffs’ allegations exposed the respondents to liability lawsuits and protracted and costly litigation for damages they did not cause. Indeed, this case is now almost six years old, as this unfortunate incident occurred on April 20, 2010, and it continues.

Scope of Responder Immunity: Ensure that the scope of responder immunity applies to all types of responders, including Incident Command personnel not employed by the responsible party, as well as Emergency Responders, including salvors and emergency well containment responders.

Attorney Fees and Court Costs: Require plaintiffs to pay the costs of litigation if they file a frivolous case and lose.

Presumption of No Gross Negligence: Provide a statutory presumption that a responder was not grossly negligent in responding to an incident, thus placing the burden of proof on the plaintiffs to prove otherwise.

Unfortunately, the coalition’s efforts have not been successful due to the objection of one industry organization involved with only one limited sector of the marine industry, despite broad support from many entities that potentially would be a responsible party for a spill occurring from owning or operating a vessel.

This recent development may provide an impetus to revisit a possible enactment of a statutory amendment, or at a minimum to have the National Academy of Sciences (“NAS”) or the U.S. Government Accountability Office (“U.S. GAO”) conduct a study of the issue, including the impact that this district court decision may have on potential future litigation against responders following a spill incident.

Conclusion The Eastern District of Louisiana’s February 16, 2016, decision is a major break-through with respect to responder immunity. However, it took over almost six years for the judge to rule on a motion for summary judgment, and millions of dollars have been spent by the respondent defendants so far on this case. It is now time to assess the impact that this decision will have on future litigation and on whether cleanup or emergency responders will continue to take bold immediate actions at the time of spill incidents in the future. If Congress will not take action to enact amendments to OPA 90 to foster such action, then it certainly is appropriate for Congress to direct the NSA or U.S. GAO to conduct a study of the current state of affairs, including the recent court decision and costs/fees associated with defending lawsuits filed by plaintiffs against responders to assess whether more needs to be done to ensure for an immediate and effective response to spills in the future.

With this increase in commerce and recreation and renewed recognition of U.S. national security interests in the Arctic, it is more imperative than ever that the Coast Guard have the requisite fleet, especially icebreakers, to patrol these dangerous waters and monitor activities.

The United States has a vast Exclusive Economic Zone that extends around the coasts of the United States and its territories seaward to 200 n.m., and it also has an extended continental shelf under the sea adjacent to the Alaskan coast that could extend more than 600 n.m. under the boundary principles recognized by the United Nations Convention on the Law of the Sea (“UNCLOS”). The United States recognizes these maritime principles as part of customary international law even though it has not ratified UNCLOS. See Ronald Reagan, Proclamation 5030 — The Exclusive Economic Zone of the United States of America, THE AMERICAN PRESIDENCY PROJECT (Mar. 10, 1983).

The Obama Administration developed a strategic plan for the Arctic in 2013, and in 2014, it developed an implementation plan for the Arctic: Implementation Plan for The National Strategy for the Arctic Region (Jan. 2014), https://www.whitehouse.gov/sites/default/files/docs/implementation_plan_for_the_national_strategy_for_the_arctic_region_-_fi_.pdf. The Administration’s heightened commitment to the Arctic was highlighted further during President Obama’s trip to Alaska in the fall of 2015. At this writing, we are waiting to see if his FY2017 budget request reflects this commitment.

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The U.S. Imperative for New Icebreakers (continued from page 20)

Limits of the Continental Shelf ("CLCS"). See Ocean & Law of the Sea, UNITED NATIONS, http://www.un.org/Depts/los/clcs_new/submissions_files/submission_rus.htm (last updated June 30, 2009). This contrasts with the United States, which is still collecting data on the outer limits of its continental shelf and has not yet made a formal claim with the CLCS. The United States is also hampered from protecting its claim because it is not an official member of CLCS due to its failure to ratify UNCLOS.

Although the frozen Arctic landscape is less frozen these days as the ice sheets are melting due to climatic changes, there are still parts of the Arctic that will remain frozen year round for the foreseeable future. Ronald O'Rourke, Cong. Research Serv., R41153, Changes in the Arctic: Background and Issues for Congress, 16 (2015).

Even though Shell Oil halted its exploration of the Arctic, U.S. oil companies are likely to one day resume exploring the oil and gas resources of the Arctic, as it is believed to contain more than 30 percent of the world’s potential energy resources. ADM Robert J. Papp, Jr., the U.S. Envoy to the Arctic Council, made this remark and others at a recent House Foreign Affairs Committee hearing on the Arctic. Statement of Admiral Robert J. Papp, Jr., Before the Committee on Foreign Affairs, Subcommittee on Europe, Eurasia, and Emerging Threats, U.S. House of Representatives, (Dec. 10, 2014), http://docs.house.gov/meetings/FA/FA14/20141210/102783/HHRG-113-FA14-Wstate-PappR-20141210.pdf.

Shipping companies are beginning to talk of using the Northwest Passage as a shipping route, and cruise companies are already building larger cruise ships to explore the far reaches of these now-open seas. Crystal Cruise Lines, for one, is advertising a new itinerary around Alaska, into the Beaufort Sea, through the Canadian Arctic Archipelago and on to Greenland. See Crystal Cruises, http://www.crystalcruises.com/northwest-passage-cruise (last visited Jan. 25, 2016).

With this increase in commerce and recreation and renewed recognition of U.S. national security interests in the Arctic, it is more imperative than ever that the Coast Guard have the requisite fleet, especially icebreakers, to patrol these dangerous waters and monitor activities. With new icebreakers, the Coast Guard, with other agencies, can respond to its ever rapidly expanding missions in the Arctic and enhance its ability to monitor and report on the impact of the rapidly changing Arctic climate. As President Obama stated in his September 2015 visit to the Arctic, “[c]limate change is reshaping the Arctic in profound ways.” Office of the Press Secretary, The White House, Fact Sheet: President Obama Announces New Investments To Enhance Safety And Security In The Changing Arctic, (Sept. 1, 2015), https://www.whitehouse.gov/the-press-office/2015/09/01/fact-sheet-president-obama-announces-new-investments-enhance-security-and.

Certainly, Russia is building up its icebreaker fleet to explore its Arctic oil and gas resources and pursue aggressively what it views as its national interest in the Arctic. Russia has a fleet of over 40 icebreakers and is building more. See Barbara Padtova, Russia Approach Towards the Arctic Region, CENAA, (2012), http://cenaau.org/analysis/russian-approach-towards-the-arctic-region/. Russia is also willing to defend its right to Arctic oil and gas “with missiles,” according to a German newspaper article from 2015. See, e.g., Russia Will Defend Its Right to Arctic Oil, Gas With Missiles, SPLITNIK INTERNATIONAL, (Oct. 2, 2015), http://sputniknews.com/russia/20151002/1027910073/russia-arctic-resources-missiles.html.

For all these reasons, it is imperative that the United States have its own fleet of modern icebreakers.

Building and Funding New U.S. Icebreakers

During a visit to Alaska in the fall of 2015, President Obama stepped up the Administration’s efforts in the Arctic, and he also announced that he would accelerate the acquisition of new Coast Guard icebreakers to 2020 from an original planning date of 2022. Supra, “President Obama Announces New Investments to Enhance Safety and Security in the Changing Arctic,” Sept. 1, 2015. As a result of this announcement, the Coast Guard has begun initial planning to acquire at least one new icebreaker, and has initiated a program of “aggressive industry outreach” according to Coast Guard acquisition chief, RADM Mike Haycock. See Megan Eckstein, “Coast Guard To Finalize Icebreaker Acquisition Strategy By Spring; Production by 2020,” USNI NEWS, (Dec. 9, 2015, 4:53 PM), http://news.usni.org/2015/12/09/coast-guard-to-finalize-icebreaker-acquisition-strategy-by-spring-production-by-2020. The Coast Guard has also signed agreements with Canada and Finland to leverage their research on icebreaker design and capabilities. (Idem.) And, an Industry Day will be held in March 2016.

The real conundrum is how and who will pay for the new icebreakers. They are estimated to cost about one billion dollars apiece. (CRS report, above.) The Coast Guard is already strapped for resources. Its acquisition and construction budget is dedicated first to the procurement of new offshore patrol cutters and then to the replacement of its Deepwater Horizon Court Ruling Closes the Gap on Responder Immunity

BY JONATHAN K. WALDRON and LAUREN B. WILGUS

On February 16, 2016, the U.S. District Court for the Eastern District of Louisiana issued a landmark decision with respect to responder immunity. In In re DWH Oil Spill, MDL No. 2179 (ED La, February 16, 2016), the court granted the clean-up responder defendants’ motions for summary judgment with respect to claims asserted against them by plaintiffs who engaged in a variety of clean-up activities and were exposed to oil, dispersants, and other chemicals while doing so as a result of actions or omissions relating to the defendants’ use of dispersants and other response efforts during the Deepwater Horizon incident.

Derivative Immunity and Pre-emption

In short, the court adopted arguments raised by Blank Rome and other defense counsel on behalf of the responder defendants that the plaintiffs’ complaints should be denied based on a concept known as derivative immunity and pre-emption. The derivative immunity concept was established over 70 years ago by the Supreme Court for parties acting under the direction and control of the federal government in the exercise of legitimate federal authority. Indeed, this concept was extended to private parties in the context of disaster relief actions taken in response to the 9/11 terror attacks on the World Trade Center due to the unique federal interest in coordinating federal disaster assistance and streamlining the management of large-scale disaster recovery projects.

Specifically, the court ruled that the responder defendants, which although are private parties with no contractual relationship to the federal government, can and will share in the federal government’s derivative immunity under the Clean Water Act and discretionary function immunity under the Federal Tort Claims Act. Moreover, the court held that the plaintiffs’ state claims were pre-empted under the Clean Water Act and National Contingency Plan in connection with their response actions where such actions were undertaken consistent with the Federal On-Scene Coordinator’s direction during the response effort. All the plaintiffs’ claims except 11 were dismissed on this basis and that these plaintiffs failed to raise genuine issues of material fact sufficient to survive summary judgement. The court has reserved judgement on these 11 plaintiffs pending further action and review in the case.

While the February 16, 2016, decision is a great development for the responder immunity defense, responders will continue to be sued until gaps in the current responder immunity regime under the Oil Pollution Act of 1990 (“OPA 90”) are closed. Unfortunately, this development alone will likely have little effect on protracted and costly litigation in future cases until the OPA 90 responder immunity provision is amended in some manner to deter frivolous law suits.

What Are the Gaps in OPA 90?

As way of background, following the Exxon Valdez incident in 1989, Congress included a responder immunity provision under OPA 90 to protect from liability those individuals or corporations who provide care, assistance, or advice in mitigating the effects of an oil spill. The purpose of the responder immunity provision, as originally enacted by Congress, was to grant immunity from liability lawsuits to responders who act under the direction of the U.S. government. The provision was intended to afford the responder immunity and was closed. Unfortunately, litigation following the Deepwater Horizon casualty revealed an unintended gap in the current responder immunity provision. In particular, plaintiffs in...
As we gather for CMA 2016, “Volatility” seems to be the key word for this year. It is the year of the monkey in the Far East. It is a presidential election year here in the United States, with such a wide range of campaign themes and personalities in the running that a state of uncertainty and confusion is understandable both at home and abroad. Stock markets world-wide continue gyrating. And many sectors of the shipping industry seem to be in the mode of simply bracing to get through the year, wishing that 2016 would hurry up so that we can put it behind us.

To the extent the work of law firms can be said to serve as an economic indicator, what do we see happening? Our insolvency and restructuring practice continues to be very active. Regulatory compliance continues to have an important role, and we expect that to be a permanent feature of the business. Sanctions issues also remain very active. But the shipping business has been through turbulent seas many times before and the resilient spirit of the people working in this business is remarkable. It is impressive that so many sectors of the shipping business are holding to a long-term positive view. This year’s theme of the CMA is “Local Talent, Global Impact,” and that seems very apt. We look forward to participating in the discussions.

To accomplish the tasks that Congress and the Administration find est demands that Congress and the Administration find the funding to build icebreakers, even if it means “breaking the mold” in providing the appropriations to do so. The construction of new icebreakers will provide excellent work for the U.S. shipbuilding industry, will allow them to upgrade their capabilities, and will also enable the United States to compete with Russia in the Arctic and protect our national interests in the Arctic—and Antarctic—the Coast Guard needs at least two new icebreakers, and Congress must find a way to fund them, through incremental funding, borrowing from other agencies, and creative budget scoring. In any case, our national interest demands that Congress and the Administration find the funding to build icebreakers, even if it means “breaking the mold” in providing the appropriations to do so. The construction of new icebreakers will provide excellent work for the U.S. shipbuilding industry, will allow them to upgrade their capabilities, and will also enable the United States to compete with Russia in the Arctic and protect our national interests in both the Arctic and Antarctic.

Conclusions

The United States has taken the first steps towards acquiring at least one new icebreaker, but this should not be the end of the story. To accomplish the tasks that Congress and the Administration have set for it, and to protect our vital interests in the Arctic—and Antarctic—the Coast Guard needs at least two new icebreakers, and Congress must find a way to fund them, through incremental funding, borrowing from other agencies, and creative budget scoring. In any case, our national interest demands that Congress and the Administration find the funding to build icebreakers, even if it means “breaking the mold” in providing the appropriations to do so. The construction of new icebreakers will provide excellent work for the U.S. shipbuilding industry, will allow them to upgrade their capabilities, and will also enable the United States to compete with Russia in the Arctic and protect our national interests in both the Arctic and Antarctic.

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