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JOHN D. KIMBALL
PARTNER

A Note from the Chair

BY JOHN D. KIMBALL

As CMA Shipping 2018 convenes, we are more than a year into the Trump administration and it is fair to say that the U.S. regulatory framework for the shipping industry has seen some changes. In this issue of *Mainbrace,* we drill down on relevant developments in "Trump and the Maritime Industry: A Look Back and Forward." Additionally, we offer an update on the Jones Act, an important subject that continues to be a focal point for our industry, as well as offer a report on developments concerning the vexing topic of ballast water management.

In our law practice, we have continued our long-term focus on maritime environmental matters and regularly advise our clients on compliance measures. Avoiding problems is a sure way to achieve profits and value, which is the key theme of this year's CMA conference. Along those lines, this issue of *Mainbrace* includes suggested tools to strengthen environmental compliance. We also continue to encounter distressing matters involving cybersecurity, and offer a cautionary tale for the shipping industry that we hope our readers will take time to consider, as well as provide a thoughtful analysis on recent varying decisions and approaches from New York bankruptcy courts regarding territorial limits of U.S. Bankruptcy Code avoidance powers.

Lastly, technology continues to develop in the shipping industry and we provide a look ahead to developments in the areas of Smart Ships, drones, and innovative collaboration. I expect we will be focusing on these topics for some years to come.

We hope you enjoy this issue of *Mainbrace* and always welcome your feedback and suggestions for future articles.

Ballast Water Management: The Conundrum Continues

BY JEANNE M. GRASSO AND SEAN T. PRIBYL

JEANNE M. GRASSO
PARTNER

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It has been about 15 months since the U.S. Coast Guard ("USCG") type-approved the first three ballast water management systems ("BWMSs") in December 2016; three more BWMSs have been type approved since. Yet, ballast water management remains one of the most challenging and frustrating regulatory issues of the past decade because of inconsistencies in the international and domestic regimes. This is largely because the United States is not party to the International Maritime Organization's Convention on the Control and Management of Ships' Ballast Water and Sediments (the "Convention"). Rather, the United States regulates ballast water unilaterally under the National Invasive Species Act, which differs in certain ways from the Convention, especially when it comes to approving equipment to meet the standards set forth in the Convention and the USCG's implementing regulations. As such, ballast water compliance challenges remain far from resolved. In some cases, for example, especially with respect to USCG compliance date extensions, the policies continue to evolve on an ad hoc basis, often causing confusion.

Compliance Conundrum

The fact that the IMO and USCG testing protocols for BWMSs are not in sync, and that BWMSs can be type-approved under one regime and not the other, has created a conundrum for shipowners, especially now that the Convention entered into force in September 2017. Compliance with both regimes is on a phased-in schedule, and owners are striving to align these compliance dates so they can make capital investments that will allow them to comply with both regimes. This is because, for most owners, maintaining the ability to trade in the United States is imperative as it is unlikely that charterers will accept a charter if the vessel cannot trade to the United States because the BWMS is not compliant with USCG requirements. Thus, while an indemnity or guaranty between the owner and the maker of a BWMS that is not yet USCG type-approved may purport to solve some of the financial issues, it is unlikely to resolve operational issues if the BWMS is not compliant with USCG regulations when the vessel's compliance date arrives.

At present, there are six USCG type-approved BWMSs, with two more under review. Even so, because the USCG ballast water regulations require owners to retrofit BWMSs on existing ships, there have been numerous technical challenges, since the BWMSs are all different. To illustrate, two of the systems treat ballast water with filtration and ultraviolet light, three via electro-chlorination, and one via chemical injection to reduce the number of living organisms to below the regulatory limits. All six of these systems are operationally complex, and technical specifications must be evaluated in depth to determine if these systems are appropriate for a particular vessel. Key issues include method of treatment, flow rates, hold times, power level/consumption, water temperature, salinity, turbidity, trade routes, and size requirements. And this is just the beginning; the expectation is that these systems will require extensive crew training and frequent ongoing maintenance to keep them functioning properly—they are not "plug and play."

To recap, the trigger for compliance with the USCG's regulations is separate and distinct from the Convention because the United States is not party to the Convention and, understandably, this conflict in regulatory regimes still confuses some shipowners. Focusing on the U.S. regulations, the USCG trigger is the first drydock after January 1, 2014 or January 1, 2016, depending on the vessel's ballast water capacity. There are several compliance options under the USCG regulatory regime: 1) install and operate a USCG type-approved ballast water management system; 2) use water from a U.S. public water system (not practical, save for some domestic operators); 3) use an IMO-approved and USCG-authorized Alternate Management System ("AMS") for up to five years from the vessel's compliance date (not practical, absent some guaranty of USCG type-approval; 4) do not discharge ballast water into U.S. waters (generally not practical); or 5) discharge ballast water to an onshore facility or to another vessel for purposes of treatment (not currently available). So, in theory at least, an owner is not required to install a BWMS in order to comply with USCG regulations, though not having a BWMS might not be practical for most vessel owner/operators. Importantly, ballast water exchange is only allowed until a vessel reaches its compliance date.

(continued on page 3)

Ballast Water Management: The Conundrum Continues (continued from page 2)

Compliance Date Extensions and Policy Updates

To make the compliance process more reasonable, due to the lack of USCG type-approved BWMSs at the outset of the regulatory regime implementation, the USCG developed an extension policy under which it has issued compliance date extensions to nearly 15,000 vessels. Even so, there has been quite an evolution in the manner in which the extensions have, or have not, been granted as a result of more BWMSs achieving USCG type-approval. Essentially, extensions were easy to obtain at the outset, but now they are extremely difficult to secure, though not impossible.

Several policy changes and developments are worth noting, some formal and some informal, with three key issues highlighted here. More guidance, though, is expected in the near term.

1) Extensions. The USCG's policy currently allows for an extension of a vessel's compliance date. However, absent a detailed timeline and strategy, including the selection of a specific BWMS for installation on a particular vessel, an owner will almost certainly not receive an extension. Also, extensions will be shorter in duration—whereas at the outset they were tied to the vessel's next drydock, now they will likely only be for one year, absent extraordinary circumstances. And, if owners select a BWMS that is not yet type-approved, they bear the risk of not being in compliance or preparing for possible operational constraints should that BWMS not ultimately receive type-approval. As such, if their BWMS of choice does not get type-approval, owners better have a contingency plan, such as an alternative BWMS that can be installed before the extension expires.

Over the past several years, the USCG has been issuing guidance to the industry on extensions in the form of policy letters, Navigation and Inspection Circulars ("NVIC"), and the USCG Maritime Commons blog. This formal advice from the USCG is something on which owners are basing significant investment dollars, and stakeholders should continue to closely monitor any published policy developments. However, when there are unannounced changes in positions that only surface when a request for an extension has been denied, the USCG creates inconsistencies in the path to compliance, which can lead to confusion and instability for owners/operators striving for compliance.

Changes in ballast water policy are often driven by factors beyond the control of industry stakeholders, though factors such as external market conditions, legislative pressures, and international input could have an impact on the direction the USCG takes on a particular matter, including ballast water compliance. To that end, on March 1, the USCG released NVIC 01-18, a comprehensive document that offers its latest guidance on ballast water management. While this new NVIC discusses how the USCG will review extension requests, it falls short of providing an applicant with clear standards for what is required in terms of receiving an extension.

For example, within 24 hours of the release of NVIC 01-18, the USCG rejected extension requests under the NVIC, some of which had been pending for months. Those denials shed light on what the USCG is actually now requiring. Specifically, based on the denials, applicants will now need to provide evidence of a completed acquisition contract, delivery receipt, or other verifiable proof that a BWMS has been purchased; verifiable proof that the purchased BWMS will be installed on the vessel on a specific date; and documentation that the BWMS is expected to receive type approval. These "requirements" range from impractical to impossible for most ship owners. Unfortunately, NVIC 01-18 does not provide notice to the industry on these critical and burdensome details.

2) Inoperable BWMSs. The USCG released CG-CVC Policy Letter 18-02 on February 14, 2018, "Guidelines for Evaluating Potential Courses of Action when a Vessel Bound for a Port in the United States has an Inoperable Ballast Water Management System." This recent BWMS policy letter sets forth much-needed guidance on how the USCG will deal with vessels coming into U.S. ports with inoperable BWMSs. It is intended to offer guidance to USCG personnel, as well as vessel masters, owners, operators, agents, and persons in charge of vessels when evaluating potential courses of action if a vessel destined for a U.S. port has an inoperable BWMS. Importantly, this policy letter lays out compliance options for circumstances in which a vessel has, or has not, passed its compliance date and has an inoperable BWMSs when calling on a U.S. port.

Notably, the USCG makes it clear that even if a vessel has an inoperable BWMS and requests consideration to discharge ballast water for reasons of extraordinary circumstances as laid out in 33 CFR § 151.2040, requests based on bankruptcy of the BWMS manufacturer that may have factored into the inoperability will not be afforded special consideration.

However, the most recent guidance outlined in CG-CVC Policy Letter 18-02 does provide an option for compliance when a BWMS is inoperable and the vessel has passed its compliance date. Relying again on its discretionary authorities, a District Commander or Captain of the Port may approve ballast water exchange in accordance with 33 CFR 151.2025(a)(3). This requires an affirmative step from the vessel owner/operator to seek such approval. If the USCG grants approval under this policy, the vessel must perform complete ballast water exchange in an area 200 nautical miles from any shore prior to discharging ballast water. Such a policy indicates that the USCG is still striving to work with the industry on options, but those options will continue to diminish as the shift towards compliance and enforcement continues. Vessels that have not passed their compliance date as yet may continue to meet USCG requirements through ballast water exchange. NVIC 01-18 also offers similar guidance on inoperable BWMSs.

3) Enforcement. For the past few years, the USCG has been in compliance mode, with an emphasis on education and outreach as the industry has implemented the ballast water management regulations. This is understandable given that the USCG conducts Port State Control ("PSC") examinations, which include compliance with ballast water management requirements, on about 9,300 foreign vessels per year. That focus on educational outreach, though, may be changing somewhat as the USCG has signaled in the past few months a new emphasis on enforcement of ballast water violations, announcing that compliance with the USCG's ballast water management requirements is now a PSC priority. According to one USCG Sector Commander who issued a Notice of Violation and fine last year to the operator of a bulk carrier for non-compliance, "[t]he Coast Guard is committed to the protection of the marine environment through strong and robust administration and oversight of ballast water management practices."

To illustrate how that enforcement looks in practice, routine PSC inspections in the United States may include reviews of vessel documentation, visual inspections of the condition of BWMS equipment, actual operations of ballast equipment, and queries to the vessel's crew on their knowledge of BWMS operations. Since the 2012 Final Rule was released, the USCG has issued more than 600 deficiencies and taken close to 20 enforcement actions that have ranged from written warnings to fines of $5,500. Stakeholders should expect those enforcement numbers to increase in the near future.

Non-compliance with the BWMS regulations can be costly for several reasons. For example, if a vessel comes into port and has not utilized one of the compliance methods set forth previously, the vessel almost certainly will not be able to discharge ballast water in port. In such cases, the USCG may require the vessel to divert its voyage, modify cargo operations, and sail outside 12 nautical miles to discharge ballast water, which could result in incurring pilotage and launch fees, extra fuel fees, demurrage, and other financial repercussions. In recent cases, such activities ranged from $35,000 and $150,000 for one port call. The new NVIC offers insight into the USCG's enforcement posture and scope of enforcement options that range from education to criminal penalties. Put simply, non-compliance is costly, and it would behoove all owners to ensure compliance. Absent that, forethought about a contingency plan is imperative.

Put simply, non-compliance is costly, and it would behoove all owners to ensure compliance. Absent that, forethought about a contingency plan is imperative.

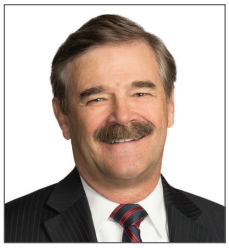
Concluding Guidance

Prior to embarking on a voyage to the United States, shipowners must ensure that they are able to properly manage their ballast water when operating in waters subject to U.S. jurisdiction, which includes utilizing one of the compliance options available or ensuring that the vessel has an extension to its compliance date. What is equally important, though, is to have a contingency plan in place and understand how to manage a non-compliance before you come into a U.S. port. There are many things an owner can do to minimize risk and manage a non-compliance, but, hiding that non-compliance is not one of those things. Lack of preparation, especially in these circumstances, will inevitably be costly. As such, based on the foregoing and despite the extensive guidance set forth in NVIC 01-18, the ballast water conundrum continues. ◻ — ©2018 BLANK ROME LLP

After Flurry of Hurricane Waivers, Calls for Coastwise Changes Recede

BY MATTHEW J. THOMAS, JONATHAN K. WALDRON, AND JEANNE M. GRASSO

MATTHEW J. THOMAS
PARTNER



JONATHAN K. WALDRON
PARTNER

JEANNE M. GRASSO
PARTNER

In September 2017, in response to Hurricanes Harvey, Irma, and Maria, the Department of Homeland Security ("DHS") issued a series of widely publicized waivers allowing carriage of cargo by non-coastwise qualified vessels in the Gulf region and to and from Puerto Rico. Public interest in the Jones Act spiked in mid-September, and some members of Congress introduced legislation for longer-term relief, particularly for Puerto Rico. Although controversial, the waivers for the most part seemed to achieve their intended goal, allowing for additional capacity to be available to move certain critical cargoes, particularly in the energy and other bulk sectors. As discussed in more detail below, the way the waivers were granted was relatively unique in the context of hurricanes, and some controversy arose with regard to the Puerto Rico waiver. The waivers, however, expired as planned with no significant fanfare or controversy, and broader political and public interest in the Jones Act subsided after a flurry of activity.

> One can only hope that the DHS and MARAD will take the opportunity to gather and examine the data from shipments made under the 2017 waivers, identify lessons learned, and use it as a basis to better support policy decisions in the future regarding the issuance, timing, and tailoring of waivers.

Jones Act Waiver Standard

The Coastwise Merchandise Statute (commonly known as the Jones Act) restricts U.S. domestic trade by water to qualified U.S.-flag vessels constructed in the United States and owned and operated at least 75 percent by U.S. citizens, otherwise known as "coastwise" vessels. 46 U.S.C. §55102. In catastrophic natural disasters, U.S. regions may experience shortages or supply disruptions in food, fuel, or other essential cargoes. Additional maritime capacity can be needed to address these conditions, and coastwise qualified vessels may not be available to meet this additional demand. In such cases, waivers of the Jones Act can be necessary for national defense and the general economic well-being of the United States.

Under the applicable navigation laws, there are two types of Jones Act waivers, both of which require a showing that the waiver is needed "in the interest of national defense." The first type of waiver is one requested by the Secretary of Defense. 46 U.S.C. 501(a). The law states that the Secretary of Homeland Security shall waive the Jones Act "upon the request of the Secretary of Defense to the extent deemed necessary in the interest of national defense by the Secretary of Defense." Thus, such waivers are granted automatically to the extent that the Secretary of Defense considers it necessary in the interest of national defense—a Type I Waiver. Historically, these waivers have been granted to address an immediate need of the Department of Defense ("DOD").

The second type of waiver may be granted at the discretion of the Secretary of the DHS. The Secretary may waive the Jones Act "either upon his own initiative or upon the written recommendation of the head of any other government agency, whenever he deems that such action is necessary in the interest of national defense." Such a waiver is therefore discretionary and may only be granted if the Administrator of the Maritime Administration ("MARAD") first determines

that no coastwise vessels are available—a Type II Waiver. To determine if there are coastwise vessels available to meet the needs, MARAD surveys the maritime industry to evaluate the capability and availability of coastwise vessels to meet the needs of the requested transportation. U.S. Customs and Border Protection also coordinates with other interested agencies, such as the U.S. Coast Guard, DOD, and U.S. Department of Energy.

Fall 2017 Waivers Requested by the DOD

The fall of 2017 saw an unprecedented flurry of waiver activity:

- On September 8, 2017, Acting DHS Secretary Elaine Duke granted a seven-day waiver of the Jones Act in the interest of national defense, in response to disruption caused by Hurricanes Irma and Harvey to the U.S. Gulf Coast and Florida. The waiver was issued to facilitate the movement of refined petroleum products to be shipped from New York, Pennsylvania, Texas, and Louisiana to South Carolina, Georgia, Florida, and Puerto Rico. This waiver applied to covered merchandise laded on board a vessel within the seven-day period of the waiver.

- On September 12, 2017, the DHS issued a new Jones Act waiver for refined products, effectively broadening and extending the earlier waiver by an additional seven days, to run through September 22, 2017. This second Jones Act waiver also expanded the number of states to which the waiver applied, covering the movement of refined petroleum products, including gasoline, diesel, and jet fuel, shipped from New York, New Jersey, Delaware, Maryland, Pennsylvania, New Mexico, Texas, Louisiana, Mississippi, Alabama, and Arkansas to Florida, Georgia, South Carolina, North Carolina, Virginia, West Virginia, and Puerto Rico.

- On September 28, 2017, the DHS issued a Jones Act waiver in response to Hurricane Maria, to facilitate movement of all products to be shipped from U.S. coastwise points to Puerto Rico. The waiver applied to merchandise laded on board a vessel within the 10-day period of the waiver and delivered by October 18, 2017.

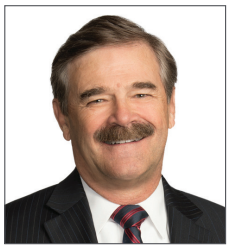
All of these waivers were requested directly by the DOD—a Type I Waiver as described under the Jones Act Waiver Standard section above. Of these, the Puerto Rico waivers proved the most controversial—criticized by the public for coming too long after the storm, but also critiqued by Jones Act interests for being unnecessary, given that breakdowns in Puerto Rico's intermodal infrastructure in inland logistics stood as a bottleneck to any additional containerized volumes reaching the port. In hindsight, it appears that arguments on all sides had at least some merit: it appears from anecdotal reports that the waivers had relatively little impact in expediting the flow of containerized cargoes to users in Puerto Rico, but did prove to be useful in aiding the flow of some bulk commodities (*i.e.,* tanker and dry bulk cargoes) to replenish lagging fuel and food stores with U.S.-sourced commodities.

Congressional Action on the Jones Act

In the wake of these hurricanes, a handful of House of Representatives members (including Reps. Palmer, Velázquez, Biggs, and Brat) in October introduced the Puerto Rico Humanitarian Relief Act, H. R. 3966, which would have implemented a five-year waiver for Puerto Rico. On the Senate side, longtime Jones Act critic Senator John McCain in September introduced S. 1894, a bill to exempt Puerto Rico from the coastwise laws, attracting Senators Lee, Lankford, and Flake as co-sponsors. Neither measure, however, moved forward in terms of attracting co-sponsors or committee attention. The lack of legislative momentum was not surprising; according to Google Trends, the public interest in the Jones Act that spiked in mid-September had abated back to negligible levels by Halloween.

While the spotlight clearly has moved off the Jones Act for now, the issue of waivers surely will recur with future emergencies. One can only hope that the DHS and MARAD will take the opportunity to gather and examine the data from shipments made under the 2017 waivers, identify lessons learned, and use it as a basis to better support policy decisions in the future regarding the issuance, timing, and tailoring of waivers. One particular feature of these waivers that might come under further review was that the DOD made the waiver requests, essentially bypassing MARAD's role to review available Jones Act capability before a waiver was granted. □ — ©2018 BLANK ROME LLP

BLANK ROME MARITIME ATTORNEY SPOTLIGHTS



JONATHAN K. WALDRON
PARTNER

Jon Waldron Named *Law360* 2017 Transportation MVP

Blank Rome LLP is pleased to announce that Partner Jonathan K. Waldron was recognized as a *Law360* 2017 Transportation MVP.

In Jon's MVP profile, *Law360* praises his noteworthy accomplishments of helping to turn back a proposed regulation that would have banned most international vessels from serving U.S. offshore energy projects in the Gulf of Mexico; advising a shipyard faced with financial ruin in its effort to secure a Jones Act waiver; and representing developers of an offshore wind farm expected to be the largest in the United States upon completion.

During his MVP interview with *Law360,* Jon discusses his biggest case of the year, reflects on what brought him to maritime law and what he loves about his practice, and offers advice to young attorneys.

For more information on Jon's *Law360* 2017 Transportation MVP profile and interview, please click here.

KEITH B. LETOURNEAU
PARTNER

Keith Letourneau Named Co-Chair of Blank Rome's Maritime and International Trade Practice Group

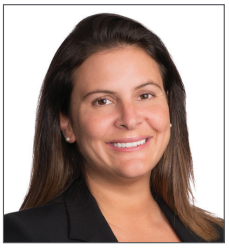
Blank Rome Partner Keith B. Letourneau was appointed to serve as co-chair of the Firm's Maritime & International Trade practice group, effective January 1, 2018. Keith will collaborate with Partner John D. Kimball, Chair, and Partner Jeanne M. Grasso, Vice Chair, to lead the group.

The maritime group would also like to thank Jonathan K. Waldron for his recent role as practice co-chair, which concluded on December 31.

Blank Rome's success is a direct reflection of the commitment, dedication, and hard work of our talented group of attorneys and professionals. We thank them for their ongoing contributions and service to the Firm.

Maritime Cybersecurity: Business E-Mail Compromise, a Cautionary Tale

BY KATE B. BELMONT



KATE B. BELMONT
ASSOCIATE

Once upon a time, a shipping company in a land far, far away fell victim to a sophisticated, yet common, e-mail scam that resulted in the loss of more than a million dollars. Due to a slight manipulation to a legitimate e-mail address, in the stroke of a key this company transferred millions of dollars into the account of a cyber-criminal. The story you are about to read is true, and should serve as a cautionary tale to all players in the maritime industry who rely on e-mail communications to conduct business and transfer funds on a regular basis.

A Cyber-Criminal Strikes Again

One day, in the not-so-distant past, a shipping company received an e-mail communication in the regular course of business from what appeared to be their counterparty, requesting the payment of an invoice. This particular e-mail communication, sent from what appeared to be their counterparty, requested that payment be made to a different account than previously advised. The e-mail communication also provided a cell phone number for the shipping company to use to confirm that the new account information was indeed correct. The shipping company subsequently exchanged a few e-mails to confirm and verify the payment and account information. The shipping company also took an additional step, and proceeded to call the alleged counterparty, using the cell phone number provided in the e-mail exchange. After confirming the new account information, the shipping company paid the invoice as instructed, transferring more than one million dollars into a cyber-criminal's account in the United States.

It Happens All the Time

This story might be familiar to many. As is common in the maritime industry, many transactions are completed by e-mail communications, and due to the growing threat of cyber-crime, many companies throughout the world become victims of hacks, data breaches, and the frequent and sophisticated e-mail scam, a Business E-Mail Compromise ("BEC"). The Federal Bureau of Investigation ("FBI") defines a BEC as "a sophisticated scam targeting businesses working with foreign suppliers and companies that regularly perform wire transfer payments. The scam is carried out by compromising legitimate business e-mail accounts through social engineering or computer intrusion techniques to conduct unauthorized transfers of funds." (*See* fbi.gov/scams-and-safety/common-fraud-schemes/internet-fraud.) It is this type of cyber scam that poses a legitimate and recurring threat to companies worldwide, which results in the loss of millions of dollars in ordinary transactions, most often unrecoverable. In May 2017, the FBI released a report noting that BEC scams worldwide have resulted in a loss of more than five billion dollars between 2013 and 2016. (*See* ic3.gov/media/2017/170504.aspx.) Between June 2016 and

(continued on page 9)

Maritime Cybersecurity: Business E-Mail Compromise, a Cautionary Tale (continued from page 8)

December 2016 alone, the FBI reported more than $300 million in U.S. financial recipient exposed loss. The number of victims and risk exposure is growing exponentially.

The Scheme of the E-Mail Scam

How a BEC scam works is simple. A party will receive an e-mail communication from an e-mail address that appears to be from a familiar, trusted counterparty. In this e-mail communication, the alleged counterparty usually asks that payment of an invoice be made to a different account. Upon further review, however, the e-mail address is not from the familiar, trusted counterparty, and is usually slightly modified and may be spelled incorrectly with a single letter misplaced, manipulated, or added. Without realizing this, payment is transferred into the account of a cyber-criminal.

> In May 2017, the FBI released a report noting that BEC scams worldwide have resulted in a loss of more than five billion dollars between 2013 and 2016.

In the story noted above, this is exactly what happened. A shipping company received an e-mail communication from an address that appeared to be its counterparty, but the e-mail address was slightly modified with a single letter having been altered. Without realizing this attempt at subterfuge, the shipping company also used the cell phone number that was provided, spoke directly with a cyber-criminal, and subsequently processed payment to an account in the United States. At this point, most stories involving a BEC scam end similarly—with the realization that a company has been scammed and there has been a loss of hundreds of thousands, or even millions, of dollars that cannot be recovered. However, this particular story has a different ending.

Targeting the Maritime Industry

This particular shipping company was quickly notified by its actual counterparty after realizing that funds were transferred to a different account. After an initial investigation, it was determined that the shipping company had been the victim of a cyber scam. Within 72 hours, the shipping company notified its attorneys in the United States to alert them of the scam in an attempt to recover the lost funds. Due to its quick actions and immediate outreach to counsel with specialty in cybersecurity and personal contacts in the FBI, the shipping company was able to recover their fraudulently transferred funds. More than one million dollars was recovered and returned within 30 days.

While the cyber scam that triggered these events may appear simple and common, there were a few additional components that make it extraordinary. It should be noted that in this instance, funds were transferred from an account abroad to an account in the United States, which is rare. Most BEC scams involve fraudulent transfers from accounts based in the United States to accounts abroad. To achieve the transfer of funds from a foreign account to an account in the United States, the cyber-criminal recruited a willing participant to open an account at a local bank. In this instance, a local resident responded to a "work from home" online scheme, and unknowingly and unwittingly became an accomplice in this BEC scam by opening an account at a local bank to facilitate the transfer of funds. Lastly, it was also determined that the cyber-criminal who had initiated the scam was in fact targeting the maritime industry. The domain registration e-mail address associated with the fraudulent e-mail address was determined to be the owner of more than 100 domain names with slight misspellings, most of which were related to the maritime industry. This was a calculated and targeted attack on the maritime industry as a whole, which will continue.

Fight for Your Happily Ever After

This story had a happy ending with the shipping company recovering its lost funds, but most BEC scams do not end in such a way. To avoid becoming a victim of cyber-crime and to mitigate loss, this tale proves instructive. It is important that when doing business through e-mail communications, e-mail addresses must be verified and scrutinized critically. Know with whom you are doing business. If you receive an e-mail communication that alters material terms, such as payment information and processes, verify the instructions with your trusted counterparty. Lastly, if you suspect you have been the victim of a BEC scam, you must act quickly. Make the call—notify your cybersecurity attorneys as soon as possible. A few hours can make the difference between a total loss and recovering most of your fraudulently transferred funds. Cyber-crime does not discriminate, and cyber-criminals create sophisticated, yet detectable, scams that can drastically affect your business. For additional information on how to best protect your company from cyber-attacks and to mitigate loss, please contact a member of our Cyber Risk Management Team. □

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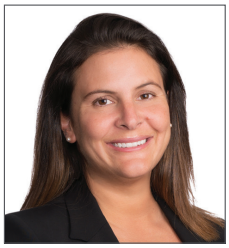

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PARTNER

Blank Rome Proudly Sponsors WISTA USA 2018 Annual General Meeting, Conference, and 20th Anniversary Gala

Blank Rome LLP is pleased to announce that the Firm is a sponsor of the WISTA USA 2018 Annual General Meeting, Conference, and 20th Anniversary Gala, taking place April 26–27, 2018, at the Parker New York hotel in New York City. "The Women Who Move The World" is the theme of this year's conference, which will recognize the significant contributions of women in the maritime industry.

Kate B. Belmont, a senior associate in the Firm's maritime group who serves as WISTA USA NY/NJ Chapter President, looks forward to welcoming attendees to this annual event, which is being hosted by the WISTA USA NY/NJ Chapter.

The conference is comprised of two panels, which will be held on Friday, April 27. Panel One, "Moving the World: Women Who Build, Create, and Advocate for the Maritime Industry," will be held from 1:30–3:00 p.m., and moderated by Christina Liviakis Gianopulos (Director of Business Development, American Ship Repair). The panelists will be Caitlin Hardy (Deputy Director of Fleet Focus, Holland America Group), Lois Zabrocky (President & CEO, International Seaways, Inc.), and Kathy Metcalf (President & CEO, Chamber of Shipping of America).

Blank Rome Partner Jeanne M. Grasso, who serves on the Executive Committee of WISTA International, will moderate Panel Two, "Ruling the Seas: Women Who Navigate Maritime, Federal and International Law," which will be held from 3:30–5:00 p.m. Jeanne's panelists will be Meredith Kirby (General Counsel, International Registries, Inc.), Sandra Gluck (President, GARD (North America) Inc.), and Rebecca F. Dye (Commissioner, Federal Maritime Commission).

WISTA USA hopes you will join in celebrating WISTA USA and all of the many amazing accomplishments of women in the maritime industry, and commemorate this 20th anniversary milestone by attending the gala celebration on April 27, 2018, which will be held at the Essex House.

For more information or to register, please visit wistausa2018.com.

RECOGNITIONS

Chambers Global 2018 Highly Ranks Blank Rome Shipping Litigation Practice and Attorneys

***Chambers Global 2018* recognized** both Blank Rome LLP and John D. Kimball, Partner and Co-Chair of the Firm's Maritime & International Trade practice group, as leaders in Shipping: Litigation—Global-wide.

Shipping: Litigation—Global-wide

BLANKROME maritime

Chambers Global: Blank Rome has "a well-regarded shipping litigation practice, with considerable expertise in dealing with high-profile disputes, as well as maritime arbitration. Handles a wide range of issues, including casualties, charter party disputes, bankruptcy and environmental matters. Acts for a mix of owners, operators, charterers, financial institutions and shipyards. Respected both within the USA and internationally for its deep industry knowledge." Sources add that the Firm is "one of the best in America…I consider them to be the top shipping firm in the States.'"

JOHN D. KIMBALL
PARTNER

Chambers Global: "Sources consider John to be 'one of the best.' He leads the firm's maritime and international trade group and has a wealth of experience in a variety of shipping disputes. Sources describe him as 'a very notable lawyer' and 'incredibly well known and connected.'"

Additionally, Blank Rome Partner Grant E. Buerstetta was ranked in Capital Markets: Securitisation—USA and Partner Anthony B. Haller was ranked in Labour & Employment—USA, for their leading industry knowledge and legal practices.

For more information on Blank Rome's *Chambers Global 2018* rankings, please click here.

All referenced quotes and commentaries were published in Chambers Global 2018.

Blank Rome Maritime Practice Ranked in *U.S. News & World Report—Best Lawyers® 2018 "Best Law Firms"*

Blank Rome LLP is pleased to announce that the Firm's maritime practice was highly ranked both nationally and regionally in the *U.S. News & World Report—Best Lawyers® 2018 "Best Law Firms"* survey.

Blank Rome's industries and services recognized in this year's survey include:

INDUSTRIES

- Energy
- Financial Services
- Gaming & Digital Media
- Healthcare
- Shipping & Transportation
- Real Estate
- Zoning, Land Use, Tax Incentives & Planning

SERVICES

- Bankruptcy & Restructuring
- Business Litigation
- Capital Markets
- Copyright
- Corporate Governance
- Employee Benefits & Executive Compensation
- Environmental
- Equipment Leasing
- Finance & Restructuring
- Insurance Recovery
- International Litigation, Defense, and Arbitration
- International Trade
- Labor & Employment
- Litigation
- Maritime
- Matrimonial & Family Law
- Mergers & Acquisitions
- Patent
- Patent Litigation
- Policy & Political Law
- Securities & Shareholder Litigation
- Tax
- Trademark
- Trusts & Estates
- White Collar Defense & Investigations

For more information on Blank Rome's *U.S. News & World Report—Best Lawyers® 2018 "Best Law Firms"* rankings, please click here.

Three Technological Developments for the Maritime Industry to Watch in 2018

BY SEAN T. PRIBYL

SEAN T. PRIBYL
ASSOCIATE

Emerging technologies continue to permeate various sectors of the maritime industry. As with the advent of steam power, electrical energy, and computerized automation in prior industrial revolutions, the maritime industry is experiencing advances in cyber-physical systems and digitalization in this "fourth industrial revolution." Innovative technologies are transforming industries across the globe, and in 2018, these three technological developments are worth watching: Smart Ships, drones, and innovative collaboration. Each will continue to impact maritime operations.

Smart Ships

In 2018, expect the marine sector to continue the trend towards advanced automation in so-called Smart Ships. We previously outlined (*see* Mainbrace: June 2017, No. 3) the benefits, practical uses, and challenges of Unmanned Surface Vessels ("USV") or Maritime Autonomous Surface Ships ("MASS") (hereafter "Smart Ships"), and how evolving ship intelligence will impact future vessels, shipyards, vendors, and design and engineering firms.

Importantly, the term "autonomous" is not tantamount to "un-manned," as there are various levels of autonomy that allow ships to operate with different capabilities either remotely or under semi-autonomous or fully autonomous control. Developing Smart Ships are utilizing the full range of these options, though in the near future, expect a human in the loop for most operations. Here are some of the developments to watch:

- DNV GL's *ReVolt* and Kongsberg's *YARA Birkeland,* both zero-emission fully electric and autonomous container ships, are being developed for short-sea shipping.
- Bourbon, Kongsberg, and Automated Ships Ltd. are engaged in the autonomous offshore utility vessel *Hrönn* project.
- The PILOT-E project in Norway is developing zero-emission, autonomous, fully electric passenger ferries.
- Werkina in the Netherlands is proceeding with an electrically powered inland container barge capable of unmanned operation.
- Boston-based Sea Machines Robotics released the Sea Machines 300, the first standardized autonomous vessel control platform for industrial purposes.
- Google and Rolls-Royce Marine partnered to further ship-based artificial intelligence integration.
- Kongsberg Maritime recently announced an endeavor to develop remote-operated unmanned fireboats.

Notably, in 2017, the International Maritime Organization ("IMO") began a regulatory scoping exercise on MASS, and the Danish Maritime released its final report on the Analysis of Regulatory Barriers to the Use of Autonomous Ships that helps identify regulatory barriers. Both efforts significantly further Smart Ships development. The U.S. Coast Guard will likely await the results of the IMO scoping exercise before making regulatory changes. Thus, the focus in the United States in 2018 will remain on compliance under current regulations based on vessel type, automation level, and location of operations—combined with dialogue with appropriate Coast Guard offices. These sentiments were echoed by Capt. Benjamin Hawkins, Chief of the Office of Design and Engineering Standards, in his comments at the 97th Annual Transportation Safety Board meeting in January 2018, in which he highlighted the Coast Guard's discretionary authority under existing statutes and regulations.

Inevitably, there will be counter-arguments to Smart Ships development. For example, cybersecurity is one of many variables to consider, although cyber risk exists for all vessels, manned or unmanned, and should not be viewed as unique to Smart Ships. Opponents also suggest Smart Ships may unduly impact mariner jobs, though in some regards, Smart Ships are a job creator in novel industries with new skill sets.

One of the primary industry concerns with the development of Smart Ships has been whether underwriters, insurers, and P&I clubs would offer cover and insurance for commercial Smart Ships. These concerns were somewhat assuaged in 2017 when insurance provider Gard agreed to provide Hull and Machinery and P&I insurance to *YARA Birkeland.* Leanne O'Loughlin, President/Regional Claims Director for Charles Taylor P&I Management (Americas) Inc., suggests the primary issue for these vessels revolves around compliance with conventions and requirements, although there should be options to find solutions and cover risks. A remaining issue to evaluate then becomes rates. Overall, the industry should expect increased discussion on coverage and contractual issues with Smart Ships this year.

Drones

In September 2016, we outlined potential advantages that drones (unmanned aircraft systems/vehicles) may offer the maritime industry (*see* Mainbrace: September 2016, No. 4). The maritime drones market showed a marked increase in interest in 2017, and here are some of the ways that drones continue to develop to offer cost-reducing, time-saving, and safety-enhancing options in operations historically conducted by humans:

- DNV GL is using drones to inspect and survey ships and offshore installations.
- Planck Aerosystems developed fully autonomous drones that can take off from and land on moving vessels to conduct surveys, assist in search and rescue operations, and map oil spills.
- The European Maritime Safety Agency issued a €67 million maritime drone contract to U.K.-based Martek Marine to monitor sulphur emissions from ships and to surveille at sea; SSE Plc also awarded Martek Marine a contract to inspect offshore wind turbines.
- Wilhelmsen Ships Service announced a new drone-based ship delivery service.
- Natilus is developing an autonomous drone capable of transporting approximately 200,000 pounds of cargo 17 times faster than a ship.
- Griff Aviation started production of a heavy-lift drone to carry up to 331 lbs., usable in offshore construction, and the Research Council of Norway recently awarded Griff Aviation a two million dollar (USD) grant for a joint-industry research project into drone operations at sea.
- Dutch tug operator Kotug is testing drone assistance in connecting a towline to an assisted vessel.

By all accounts, expect 2018 to continue this trend of interconnecting aviation and shipping. However, stakeholders should be cognizant of the jurisdictional limits and legal framework that governs combined aviation and marine operations.

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Innovative technologies are transforming industries across the globe, and in 2018, these three technological developments are worth watching: Smart Ships, drones, and innovative collaboration.

Three Technological Developments for the Maritime Industry to Watch in 2018 (continued from page 14)

Innovative Collaboration

The marine sector can also expect industry collaboration to spur more innovation to better assist clients. For example, "tech incubators" will continue to grow in popularity in 2018. To illustrate, Wärtsilä recently launched Digital Acceleration Centers in Helsinki and Singapore to serve as incubators for new digital ideas. SUNY Maritime College formed a collaborative incubator, the Maritime Global Technologies Innovation Center, to foster maritime technological developments. CMA CGM Group created a Marseilles-based startup incubator, Ze Box. And, Rolls-Royce recently opened an autonomous ship "Research & Development Centre."

Additionally, building on the recent completion of blockchain-based paperless bills of lading between Wave Ltd. and ZIM, interest in blockchain technology will likely grow, a technology on which our Firm recently published a comprehensive article, Blockchain: Staying Ahead of Tomorrow.

More recently, freight forwarder Agility agreed to collaborate with Maersk and IBM on a blockchain platform, a major development in the expansion of blockchain technology in the container supply chain space. Look for more collaboration on emerging technologies in 2018 in blockchain development and other shared endeavors.

Conclusions

Even with technological advances, change is not always swift in the traditionally conservative maritime industry. As new opportunities develop, there will be sectors that remain reluctant to adapt. For others, the fourth industrial revolution is a harbinger of things to come, and opportunities for innovation may align with their business philosophy. One size, however, does not fit all, and as with all maritime operations, stakeholders must independently evaluate risk and reward.

Overall, the key to progression of technological advances in the maritime market will require the alignment of three factors: 1) developers providing the technology, 2) industry interest in acquiring the technology, and 3) a receptive regulatory climate and legal framework that allows the technology to flourish. Without all three evolving in concert, advanced automation in the marine sector will stall. Stakeholders should consider how they can incorporate the foregoing technological advancements, among others beyond the purview of this article, into their respective business enterprises. Commercial operators looking to develop and operate Smart Ships should consult with counsel to assist in navigating the current regulatory framework and legally integrating new technologies into their operations.□

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A Bump in the Road for the Collection of Evidence for Use in Foreign Legal Proceedings

BY CAMERON BEARD AND LAUREN B. WILGUS

CAMERON BEARD
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As discussed in prior issues of *Mainbrace,* parties to foreign legal proceedings can collect evidence in the United States for use abroad by invoking a U.S. statute, 28 U.S.C. § 1782 ("section 1782"). Section 1782 is a powerful tool, and allows either foreign courts or foreign litigants to seek orders directly from U.S. federal district courts for the taking of testimony or the disclosure of documents in this country. Notably, litigants can often obtain section 1782 relief quickly and without undue burden or delay, because the statute can be invoked independently of, and does not require prior resort to, the Hague Evidence Convention.

> It is relevant that in three very recent cases, judges of the U.S. District Court for the Southern District of New York have applied the *Daimler* and *Gucci* analysis in the context of section 1782 applications.

Various disputes regarding the proper scope of section 1782 have arisen over the years. Some of the major disputes have been conclusively resolved. For example, in 2004 the U.S. Supreme Court resolved a significant conflict among the lower federal courts, and ruled that under section 1782 a foreign party may obtain broad discovery of the kind generally available in U.S. litigation, even if such discovery would not be allowed under the laws of the foreign forum where litigation is pending. Other vexing issues, however, remain unresolved. For example, the question of whether section 1782 may be used for the collection of evidence for purely private arbitrations remains unsettled. We have discussed these and other issues previously.

The *Daimler* and *Gucci* Decisions

An important issue that has arisen only fairly recently, however, relates to the requirement that a court have personal jurisdiction over a witness before the witness may be compelled to give evidence. More specifically, the question has arisen whether a 2014 decision of the U.S. Supreme Court, which limits the extent to which federal courts may exercise personal jurisdiction over foreign corporations, limits in parallel fashion the extent to which courts may issue discovery orders against foreign corporations pursuant to section 1782. The issue is rather complex from a legal perspective; however, it may have serious day-to-day implications with respect to the collection of evidence in the United States, and therefore warrants discussion.

In *Daimler AG v. Bauman,* 134 S.Ct. 746, 187 L.Ed. 2d 624 (2014), the U.S. Supreme Court laid down a rule that has been widely interpreted as requiring that, for a foreign corporation to be subject to the "general" jurisdiction of a court (*i.e.,* for a corporation to be subject to the jurisdiction of a court with respect to any cause of action, irrespective of whether the cause of action relates to the state where suit is brought), the corporation must either be incorporated or have its principal place of business in the forum state. This rule, while theoretically softened by a more recent Supreme Court decision,[1] represents in any event a significant narrowing of prior law, which had allowed for the exercise of general personal jurisdiction in a broader range of cases, with reference to the extent of the foreign corporation's in-state activities. *Daimler* did not affect, however, rules regarding the subjection of a foreign corporation to the "specific" jurisdiction of a court (*i.e.*, rules governing jurisdiction over a foreign corporation based on the corporation's activities conducted in the forum state, or activities affecting the forum or the forum state's residents).

In *Gucci Am., Inc. v. Weixing Li,* 768 F.3d 122, 141 (2d Cir. 2014), the U.S. Court of Appeals for the Second Circuit, whose decisions are binding on the lower federal courts in New York, Connecticut, and Vermont, held that the *Daimler* analysis extends not only to the exercise of jurisdiction over corporate parties to a litigation, but also to the exercise of

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A Bump in the Road for the Collection of Evidence for Use in Foreign Legal Proceedings (continued from page 16)

jurisdiction over non-party corporate recipients of subpoenas. In a nutshell, the *Gucci* decision adopted an approach whereby if a foreign corporation does not maintain its principal place of business in the jurisdiction where a subpoena is issued, a subpoena issued to that corporation can be enforced only if the party seeking the subpoena can demonstrate that the corporation is subject to the court's specific jurisdiction—essentially by establishing that the corporation's contacts with the forum relate to the evidence sought.

Section 1782 and the Requirement of Personal Jurisdiction over Foreign Corporations

For purposes of this article, it is relevant that in three very recent cases, judges of the U.S. District Court for the Southern District of New York have applied the *Daimler* and *Gucci* analysis in the context of section 1782 applications.[2] In those cases, the judges noted that section 1782, by its terms, requires a witness to "reside" or "be found" within the federal district where section 1782 relief is sought, and held that that a foreign corporation is "found" in a federal district only when it is subject to personal jurisdiction in the forum state. Faced with the rules laid down in *Daimler* and *Gucci,* the petitioners in those cases were unable to establish general jurisdiction over foreign entities that had no principal place of business in New York. More significantly, however, their section 1782 applications were denied, because they either did not seek or could not adequately establish specific personal jurisdiction by demonstrating that the target corporation's contacts with the forum related to the discovery they were seeking.

In practice, the New York case law discussed above, if it is not overruled by a higher court, will likely complicate the process of obtaining section 1782 relief against foreign corporations that do not maintain their principal place of business in the state where relief is sought, and may also limit the scope of evidence that can be obtained. Under this case law, a party seeking section 1782 evidence from a foreign corporation would be well-advised to address the issue of personal jurisdiction as a preliminary matter, and be prepared to establish the existence of specific personal jurisdiction over the foreign corporation by demonstrating a nexus between the target's forum activities and the evidence sought. Even assuming this nexus can be shown, however, it may well be more difficult (although not impossible) to obtain evidence that is held by a foreign corporation outside the district where section 1782 relief is sought, or evidence that does not relate more or less specifically to the company's activities within the state where the federal district court is located.

It bears noting that not all U.S. federal courts faced with the issue have followed the *Daimler* analysis in the context of section 1782 proceedings. A 2017 decision from the Northern District of California, for example, recognized the above-referenced Second Circuit rule, but declined to follow it, and held that section 1782 discovery could be taken from a corporation that simply maintained an office, and not a principal place of business, within the pertinent state. Accordingly, different analyses may be applied by different federal district courts, and it is too early to predict any national trends.

Conclusion and Recommendations

Nevertheless, the recent New York cases cannot be ignored, and the issue is likely to come up in an increasing number of court decisions interpreting section 1782. Accordingly, in crafting applications for section 1782 relief against foreign corporations that do not have a principal place of business in the federal district where relief is sought (for example, in preparing applications seeking evidence held by U.S. branches of foreign banks), one should be prepared to demonstrate not only compliance with the other requirements for section 1782 relief (discussed in prior issues of *Mainbrace*), but also the propriety of subjecting the target entity to specific jurisdiction by virtue of in-state activities relating to the evidence being pursued.

Creative lawyers may seek to bypass the case law referenced above by seeking section 1782 relief against individuals rather than corporations, or in appropriate cases by invoking rules specifically aimed at assisting judgment creditors or, alternatively, turning to provisions of the U.S. Bankruptcy Code that permit the collection of evidence in aid of foreign bankruptcy proceedings. The extent to which the *Daimler* analysis might come into play even in those contexts remains to be seen. In any event, it is clear that personal jurisdiction is now an issue to be considered carefully before initiating any application for section 1782 relief against a foreign corporation. □ – ©2018 BLANK ROME LLP

1. In *BNSF Ry. V. Tyrrell,* 137 S. Ct. 1549 (2017), the Supreme Court held open the possibility that "in an exceptional case" a foreign corporation without a principal place of business in a state might still be subject to general personal jurisdiction by virtue of operations in the forum state "so substantial and of such a nature as to render the corporation at home in that State." As a dissenting Supreme Court Justice noted, however, the majority's decision in BNSF was "so narrow as to read the exception out of existence entirely." (Sotomayor, J.)

2. *Austl. & N.Z. Banking Grp. Ltd. v. APR Energy Holding Ltd.,* No. 17-MC-00216, 2017 U.S. Dist. LEXIS 142404 (S.D.N.Y. Sept. 1, 2017); *In re Application of Sargeant,* No. 17mc374, 2017 U.S. Dist. LEXIS 167248 (S.D.N.Y. Oct. 10, 2017); *In re Fornaciari,* No. 17mc521, 2018 U.S. Dist. LEXIS 20182 (S.D.N.Y. Jan. 29, 2018).

Trump and the Maritime Industry: A Look Back and Forward

BY JOAN M. BONDAREFF AND STEFANOS ROULAKIS

JOAN M. BONDAREFF
OF COUNSEL

STEFANOS ROULAKIS
ASSOCIATE

We have completed one year with the Trump administration, so it is therefore a good time to assess whether he has made any drastic changes in his administration's approach to the maritime industry. In short, there have not been any major changes. But as with almost everything involving the federal government, minor changes can have great effects.

The First Year

AROUND THE DEPARTMENTS AND AGENCIES

The president has put in place his appointees to key maritime positions: Secretary of Transportation Elaine Chao, who has a significant maritime background as the former Deputy MARAD Administrator; Rear Admiral ("RADM") Mark Buzby, the new MARAD Administrator and former Commander of the U.S. Military Sealift Command; Secretary of the Interior Ryan Zinke, who oversees oil and gas development as well as offshore wind on the Outer Continental Shelf ("OCS"); and Secretary of Homeland Security ("DHS") Kirstjen Nielsen, who oversees the Coast Guard (among other agencies). Additionally, Chief of Staff John Kelly is intimately familiar with the Coast Guard from his time undertaking joint operations with the agency while he was in the military. Unlike previous administrations, at least there are political and experienced appointees in place to set maritime policy. We will discuss below what new policies they have put in place.

The president also recently gave his first State of the Union address and submitted his first full budget, outlined below. He described in general terms his request for Congress to enact a $1.5 trillion infrastructure package, but with few details. Draft guidance from the White House indicates that the president intends to leverage $200 billion in federal funds to achieve this goal, allowing state and local governments and the private sector to invest the rest. At a recent Coast Guard Subcommittee hearing, RADM Buzby was asked if he was consulted by Secretary Chao on maritime elements of the infrastructure plan, and he said that he had recommended her support for the marine highway program and small shipyard grants. No mention was made of the ever-popular TIGER grants. We will have to see the devil in the details once a real plan is announced.

FY2019 BUDGET PROCESS UNDERWAY

Further, the budget cycle is well under way in Washington. The president just presented his FY2019 budget request to Congress, which will serve to quantify his administration's priorities for the upcoming year. This process has been affected by the recent spending bill—the "Bipartisan Budget Act of 2018"—that raises the limits for both defense and

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Trump and the Maritime Industry: A Look Back and Forward (continued from page 18)

discretionary spending. In addition to providing additional funding for hurricane and wildfire relief, this act calls for the sale of some of the U.S. strategic petroleum reserves. This sale could trigger additional movements of supply in the Jones Act market.

INTERIOR SUPPORT FOR OIL AND GAS—AND OFFSHORE WIND

The secretary of the interior wears three hats—land and resource owner, resource developer, and protector of our natural resources. The direction has tilted towards development with the shrinking of two Obama monuments (Bears Ears and Grand Staircase Escalante in Utah) and the recent release of the proposed five-year plan for oil and gas leasing on the entire continental shelf of the United States. The draft plan, received with controversy by several states and non-governmental organizations, is open for comments until March 9, 2018. At the same time, the Department of the Interior ("DOI") continues to support offshore wind development on the OCS and has recently issued new draft guidelines to expedite permitting of offshore wind farms. At this time, the DOI has already issued 13 leases for offshore wind farms off the Atlantic seaboard and more are in the works.

RESPONSES TO MARITIME TRAGEDIES

At the DHS, the Coast Guard remains under the steady hand of its nonpartisan commandant, with a new commandant expected to be named soon. The Coast Guard is reacting, of course, to its own report and the report by the National Transportation Safety Board ("NTSB") on their oversight of merchant ships such as the *El Faro,* which tragically sunk at sea with all hands aboard in 2015. The Coast Guard has stated that they will make it a top priority to provide much better oversight of merchant mariners and third-party classification societies.

The Navy, under the leadership of Secretary Richard Spencer, has also taken a beating (understandably so) from the two tragic accidents at sea of the *John McCain* and the *Fitzgerald,* resulting in loss of life that, as the Navy admitted in the case of the *McCain,* was "avoidable." Training of personnel or lack thereof seems to be a problem once again.

TIME FOR A NEW POLAR ICEBREAKER?

In the meantime, the Coast Guard issued a Request for Information on the construction of one to two heavy polar icebreakers. Responses were submitted last year, and a Request for Proposal is expected sometime this year for the first polar icebreaker. Construction may take place in 2020, depending on available funding.

CONFUSION ON THE JONES ACT CONTINUES

Customs and Border Protection at the DHS has added to the confusion of how to apply the Jones Act to the OCS by first issuing, and then revoking, a letter ruling that, in turn, withdrew 26 letter rulings interpreting the Jones Act. This has resulted in litigation as well as oversight hearings by the Coast Guard Subcommittee of the House Transportation and Infrastructure Committee.

ON THE HILL

The first session of the 115th Congress came to an end at the end of 2017, and we are now in the second session. Congress accomplished a few major items in 2017—a number relevant for the maritime industry. The first, it has to be acknowledged, is the passage of the Tax Reform and Jobs Act of 2017, which dramatically reduced the corporate tax rate from 35 percent to 21 percent. Some corporations are meting out the tax breaks in bonuses and increases in employee wages; others may pay these out in dividends to stockholders. Two provisions in the tax bill addressed renewable energy: 1) *the good news*—Congress left intact the 2015 agreement on the Production Tax Credit for wind farms, phasing it out over five years; and 2) *the not-so-good news*—Congress added a new BEAT (Base Erosion Anti-Abuse Tax) tax, which is designed to encourage companies with revenues overseas to bring them back to the United States or face a higher tax. This could have a dampening effect on equity investment in renewable energy projects.

WHERE IS THE COAST GUARD BILL?

Closer to home, Congress has failed to enact legislation authorizing the programs of the Coast Guard for this year and the next. Final passage has been held up by disagreement among senators on the Vessel Incidental Discharge Act ("VIDA") provisions. The ongoing debate is on whether the Coast Guard should alone regulate these discharges or if the Environmental Protection Agency ("EPA") should also have a permitting role. Great Lakes senators in particular want states to have more of a role, which the EPA permit process allows.

Although we are more than halfway through the fiscal year, Congress has yet to enact appropriations to fund agency programs and new starts. The current continuing resolution ("CR") expires on March 23, at which time we anticipate final appropriations as well as perhaps the Coast Guard bill attached to what has come to be known as the "CRomnibus"—a combination of a CR and whatever appropriations can be agreed to by members of Congress—to be enacted. No new starts and no new contracts can be awarded under a CR.

On the plus ledger, Congress once again passed and the president signed the National Defense Authorization Act ("NDAA"). The NDAA includes provisions authorizing the programs of MARAD, including the Maritime Security Program and small shipyard grants. The NDAA also authorized funds for six polar class icebreakers.

The maritime industry should come up with its own wish list of infrastructure projects—whether it is increased support for the title XI loan guarantee program, the Marine Highway Program, small shipyard grants, or TIGER grants.

A Look Forward

The president released his FY2019 budget on February 12, 2018. It is the starting point for a congressional debate on winners and losers in the agencies. One positive sign for the maritime industry is that the president's budget for the Coast Guard includes $750 million for the construction of a new polar icebreaker. On the other hand, the Trump budget zeroes out funding for the title XI loan guarantee program and small shipyard grants, as well as decreases funding for the Maritime Security Program.

Personnel changes can be expected in the White House, but no changes have been forecast yet in the agencies with maritime jurisdiction.

If we are lucky, Congress will resolve its differences over VIDA and we will have a Coast Guard Authorization bill that the president can sign.

We anticipate continued oversight on the Coast Guard's and NTSB's recommendations on the *El Faro* sinking, and intensified oversight by the Coast Guard of third-party classification society work and maritime training. The NTSB and the Coast Guard have been asked to report back to Congress in June on their progress in implementing recommendations.

Irrespective of the Trump administration's decision to withdraw from the Paris Climate Agreement—which has not yet happened—states and municipalities are continuing to support renewable energy and reductions in greenhouse gases. Additionally, companies are buying more and more renewable energy and renewable energy credits through direct and virtual power purchase agreements.

WHO WILL FUND THE $1.5T INFRASTRUCTURE DEFICIT?

Congress will begin to take up the president's proposed infrastructure plan. How to fund a $1.5 trillion investment will be the key question. The administration supports $200 billion in federal funding to induce the rest in private sector investment; Democrats have supported one trillion dollars in direct federal funding, perhaps financed with an increase in the gas tax. President Trump himself has spoken out in favor of increasing the gas tax. The ports have already identified their needs as requiring $66 billion in port-related infrastructure investment over 10 years, some of which could be included in this year's Water Resources Development Act bill.

Conclusions

There have been no drastic shifts in U.S. maritime policy under President Trump. The administration continues to support the Jones Act, despite issuing three national security waivers during this hurricane season. The president's budget does not support popular maritime programs, such as TIGER grants, but Congress will have a final say in this matter.

The maritime industry should come up with its own wish list of infrastructure projects—whether it is increased support for the title XI loan guarantee program, the Marine Highway Program, small shipyard grants, or TIGER grants. The administration should provide the necessary resources for training of mariners, oversight by the Coast Guard of third-party societies, new polar icebreakers, and infrastructure that is badly needed to maintain our marine and commercial highways, ports, and bridges. ◻ –©2018 BLANK ROME LLP

Environmental Compliance Aboard Commercial Ships: Electronic Recordkeeping Is Overdue

BY GREGORY F. LINSIN AND KIERSTAN L. CARLSON

GREGORY F. LINSIN
PARTNER

KIERSTAN L. CARLSON
ASSOCIATE

Environmental laws and regulations in the United States impose substantial recordkeeping and reporting obligations on regulated industries. These requirements are designed to document a company's compliance with the requirements and limitations established by the regulatory scheme as well as any applicable environmental permits. Regulated companies also are required to maintain their compliance documentation and to submit periodic comprehensive reports to regulators detailing their compliance with environmental standards. These records are used by the Environmental Protection Agency ("EPA") and the delegated state regulatory agencies to monitor compliance and, if permit exceedances or irregularities in the compliance records are detected, to evaluate the need for enforcement actions.

These substantial recordkeeping and reporting requirements were particularly onerous on both industry and government, in part because records historically were required to be maintained and submitted in hard copy, which presented challenges inherent in managing enormous volumes of paper. Until recently, the U.S. Department of Justice ("DOJ") and the EPA have resisted transitioning to electronic recordkeeping systems for environmental compliance data. This resistance was rooted in concerns about the reliability and security of electronic reporting (*e.g.,* the government wanted assurance that data submitted by private parties had not been manipulated and that the government's ability to verify that the records were prepared and signed by a responsible corporate representative remained intact). Nevertheless, in the last few years and in light of the enhanced reliability of electronic information systems, the EPA decided to enter the 21st century: 1) the agency has implemented two initiatives, Next Generation Compliance and E-Enterprise, which promote electronic recordkeeping and reporting, the use of technology to monitor compliance, and electronic data sharing, and 2) the agency has moved to electronic reporting under the Clean Water Act ("CWA") and other environmental laws. Central to these initiatives was a goal to allow both regulated entities and the government to identify and address potential violations quickly through more streamlined monitoring.

Despite these advances by the EPA for U.S. land-based industries, little has been done to modernize environmental recordkeeping and reporting requirements for the maritime industry. MARPOL, the principal maritime environmental treaty, requires commercial ships to maintain a number of logbooks and other documentation to record and verify the vessel's compliance with a range of operational environmental requirements. These include waste oil storage and disposal, air emissions controls, and garbage/plastics management. With respect to waste oil, MARPOL and its implementing U.S. statute, the Act to Prevent Pollution from Ships ("APPS"), require vessels to maintain a hard-copy Oil Record Book ("ORB") in which the ship's engineers must record and verify all transfers and discharges of oily waste. ORBs covering a period of three years must be available for inspection by port state control authorities, including the U.S. Coast Guard ("USCG"). Therefore, any errors or omissions in an ORB can give rise to potential false records charges, either under MARPOL or 18 U.S.C. § 1001.

> For many years, responsible vessel owners and operators have struggled to achieve consistent compliance on their vessels, due in large part to the challenges inherent in maintaining effective, real-time oversight of shipboard compliance activities on ships that trade all over the globe.

Based largely on errors or omissions detected in ORBs, the DOJ pursues 10–15 criminal MARPOL enforcement cases a year, nearly all of which include at least one false ORB count. These cases can result in substantial criminal fines against ship owners and operators, and/or imprisonment of top-ranking ship officers. They also have substantial negative commercial consequences for the vessel owners and operators.

Most maritime companies are dedicated to compliance with MARPOL requirements, both because they are committed to responsible stewardship of the marine environment on which their businesses rely and because the immediate and long-term financial and reputational consequences of a MARPOL violation can be crippling. Yet, for many years, responsible vessel owners and operators have struggled to achieve consistent compliance on their vessels, due in large part to the challenges inherent in maintaining effective, real-time oversight of shipboard compliance activities on ships that trade all over the globe.

Trend toward E-ORBs

A recent industry trend toward adoption of electronic ORBs and related tank sounding records has the potential to substantially improve the ability of vessel owners and technical managers to monitor environmental compliance aboard their ships. Several flag administrations now permit ships sailing under their flags to use "e-ORBs." Led primarily by Liberia, several flags, including the Marshall Islands, Cyprus, and the Bahamas, have authorized the use of e-ORBs. These authorizations are not without restriction. Collectively, the authorizations contain data preservation requirements; mandate that ships retain printed copies of e-ORB entries for a certain time period, and electronically stamp and verify such entries; and require e-ORB software to be approved by the flag state prior to use. But, they nevertheless will provide a number of operational benefits to shipping companies. Additionally, e-ORBs are specifically designed to reduce minor errors such as missing entries, as well as to allow shoreside personnel to detect discrepancies in log entries in near real-time, thus enabling them to correct or mitigate potential non-compliant operations.

The IMO is working to issue formal guidance and amendments to MARPOL on the use of e-ORBs and other MARPOL logbooks by 2019. As of October 2016, the IMO's Marine Environment Protection Committee ("MEPC") had developed draft "Guidance for the Use of Electronic Record Books under MARPOL," which addresses compliance considerations for e-ORBs, such as 1) security and verification of entries, 2) data storage and preservation, and 3) the need for e-ORB software to meet company audit requirements.[1] The MEPC's Sub-Committee on Pollution Prevention and Response ("PPR") subsequently met to consider the feasibility of transitioning to electronic MARPOL record books and to begin to develop draft amendments to MARPOL allowing electronic record books.

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Environmental Compliance Aboard Commercial Ships: Electronic Recordkeeping is Overdue (continued from page 22)

In February 2017, the PPR provided a report to the MEPC, noting general support for the use of electronic record books. Unfortunately, the PPR's report also recited "concerns" raised by the United States regarding the "safety, security, protection, and availability" of electronic logbooks, and the United States' position that countries should not be required to accept electronic logbooks prior to formal amendments to MARPOL.

In a report issued in July 2017, the MEPC announced that it approved the PPR report. Subsequently, following various IMO meetings in the last quarter of 2017, the PPR was directed to take two major steps forward with respect to electronic recordkeeping on vessels. First, the PPR was charged with drafting amendments to MARPOL that would permit the use of certain forms of electronic record books so long as such records have been approved by the flag administration under which a vessel is registered. Second, the PPR was instructed to finalize non-mandatory guidelines on the use of electronic records, presumably to include the "Guidance for the Use of Electronic Record Books under MARPOL" referenced above. These items were discussed at a PPR meeting held on February 5–9, 2018, and the PPR's recommendations are under consideration by the MEPC.

Although most IMO member states support these reasonable advances toward electronic recordkeeping, the United States has opposed the approach being taken by the PPR and MEPC. The United States' primary concern appears to be that electronic record books, if permitted, should be subject to mandatory IMO guidelines, and the guidelines should be uniformly implemented by flag states. But these concerns ignore the immediate and positive impact the use of electronic record books, particularly e-ORBs, will have on the industry's ability to more closely monitor compliance aboard vessels at sea. It is regrettable that, instead of taking the lead at the IMO to modernize recordkeeping aboard commercial vessels in a way that will surely enhance environmental compliance, the United States is effectively dragging its anchor.

E-ORBs as a Compliance Mechanism

Even though the United States has not approved and, seemingly will not yet accept, e-ORBs, ship owners and operators nevertheless can increase MARPOL compliance simply by utilizing e-ORB software and transitioning other ship records to an electronic format. By doing so, companies can monitor and analyze ORB entries in real-time rather than waiting for periodic shipboard audits. The real-time verification of ORB entries by shoreside technical staff, especially when coupled with the review of other key data, such as tank sounding records, will improve shipboard compliance and help companies more readily detect and address non-compliant activities. It also will assist companies in determining whether a voluntary disclosure is needed, which in turn, will facilitate cooperation between companies and regulators, and reduce enforcement risks for responsible vessel owners and operators.□ — ©2018 BLANK ROME LLP

1. *See* Subcomm. on Pollution Prevention and Response, Use of Elec. Record Books: Outcome of MEPC 69, PPR 4/16 (Oct. 12, 2016) (draft guidance provided at Annex I). The guidance relates to e-ORBs, as well as other MARPOL-required logbooks, such as garbage record books.

NY Bankruptcy Courts Grapple with Territorial Limits of U.S. Bankruptcy Code

BY RICK ANTONOFF, MICHAEL B. SCHAEDLE, BRYAN J. HALL, AND MATTHEW E. KASLOW

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In a pair of recent opinions from the U.S. Bankruptcy Court for the Southern District of New York, two judges took varying approaches to the issues of 1) their ability to assert personal jurisdiction over foreign defendants, and 2) application of U.S. laws to transactions that occur, at least in part, outside of the United States.

The first opinion, from Judge Sean H. Lane, denied the defendants' motion to dismiss a lawsuit seeking to avoid and recover money initially transferred to correspondent bank accounts in New York designated by the defendants, before being further transferred outside of the United States to complete transactions under investment agreement executed outside of the United States and governed by foreign law. On remand after a district judge ruled that the defendants' use of correspondent banks in the United States was sufficient for the bankruptcy court to have personal jurisdiction over them, Judge Lane held that the doctrine of international comity and the presumption against extraterritoriality did not prevent application of U.S. law to avoid transfers under the Bankruptcy Code. The second opinion, from Judge James L. Garrity, Jr., dismissed a bankruptcy trustee's claims to avoid and recover transfers under U.S. bankruptcy law that occurred entirely outside the territory of the United States.

Official Committee of Unsecured Creditors of Arcapita Bank B.S.C.(c) v. Bahrain Islamic Bank (In re Arcapita Bank B.S.C.(c))[1]

Judge Lane's opinion was issued in connection with the chapter 11 bankruptcy case of Arcapita Bank B.S.C.(c) ("Arcapita"), a Bahraini entity licensed by the Central Bank of Bahrain as an Islamic wholesale bank. In March 2012, Arcapita entered into separate placement agreements (the "Placement Agreements") with Bahrain Islamic Bank ("BisB") and Tadhamon Capital B.S.C. ("Tadhamon"), also Bahraini entities.

Pursuant to the Placement Agreements, Arcapita made investments through BisB and Tadhamon on the following terms: 1) Arcapita transferred money to correspondent bank accounts in New York selected by the defendants before being further transferred to bank accounts in Bahrain or to a broker in London; 2) the defendants used the funds to make investments on behalf of Arcapita; and 3) the defendants were required to return to Arcapita on a specified date the amount of its initial investment plus a predetermined rate of return (the "Placement Proceeds"). The Placement Agreements were negotiated and signed in Bahrain and governed by Bahraini and Shari'ah law.

Arcapita filed its chapter 11 bankruptcy petition shortly after transferring money to the correspondent bank accounts and the defendants making the investments. The defendants failed to return the Placement Proceeds on the specified date and instead stated their intention, pursuant to Bahraini law, to set off the proceeds against antecedent debts owed to them by Arcapita.

The official committee of unsecured creditors (the "Committee") appointed in Arcapita's bankruptcy case sued BisB and Tadhamon seeking, among other things, to avoid and recover the Placement Proceeds under various sections of the U.S. Bankruptcy Code.

The defendants moved to dismiss the adversary proceedings, arguing that 1) the bankruptcy court lacked personal jurisdiction over them; 2) the claims were barred by the doctrine of

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NY Bankruptcy Courts Grapple with Territorial Limits of U.S. Bankruptcy Code (continued from page 24)

international comity; and 3) the claims were barred by the presumption against extraterritorial application of U.S. laws. Although the bankruptcy court initially granted the defendants' motions based on a lack of personal jurisdiction,[2] the district court reversed on appeal,[3] and on remand the bankruptcy court ruled in the Committee's favor on the remaining issues of international comity and extraterritoriality.

PERSONAL JURISDICTION

Reversing Judge Lane's ruling that the court did not have personal jurisdiction over the defendants, the district judge focused on the defendants' receipt of the allegedly avoidable transfer in New York, noting that in a lawsuit arising out of that transfer, "the defendant can hardly claim that it could not have foreseen being haled into court" in the location where the transfer occurred. The district court judge remanded the case back to Judge Lane after ruling that the bankruptcy court did have personal jurisdiction based on several grounds.

> A party seeking to apply U.S. law extraterritorially must demonstrate either that Congress intended it to apply outside of the United States or that the conduct the statute is meant to regulate occurred at least in part within the United States.

First, as noted, the district court determined that the defendants' use of the correspondent bank accounts alone constitutes the requisite minimum contacts with the United States for personal jurisdiction, because the defendants' use "was purposeful and not coincidental or adventitious." The minimum contacts would not have existed if Arcapita had selected the correspondent bank accounts instead of the defendants. However, "both banks deliberately chose to receive Arcapita's funds in U.S. dollars and designated correspondent bank accounts in New York to receive the funds, even though they presumably could have performed the Placement transactions without ever directing the funds through New York or anywhere else in the United States."

Second, the district court determined that the Committee's avoidance claims arose out of and related to the defendants' contacts. Because the Committee sought to avoid the transfers Arcapita made to the correspondent bank accounts in New York, the defendants' contacts were "at the heart of" the Committee's claims and there was "an articulable nexus" between the contacts and the claims. Therefore, the district court concluded, "[i]t should hardly be unforeseeable to a bank that selects and makes use of a particular forum's banking system that it might be subject to the burden of a lawsuit in that forum for wrongs related to, and arising from, that use."

Finally, the district court determined that the exercise of personal jurisdiction would not offend traditional notions of fair play and substantial justice because 1) the burden imposed on a defendant forced to litigate in a distant forum is mitigated by modern communication and transportation; 2) in respect of the interest of the United States in providing relief to creditors and debtors under the Bankruptcy Code, it was not "prudential" to give foreign creditors priority over domestic creditors based solely on their foreign status; and 3) it was uncertain whether similar relief would be available to the Committee in a non-U.S. forum.

The district court concluded that the bankruptcy court had personal jurisdiction over the defendants and vacated the order dismissing the adversary proceedings. On remand to the bankruptcy court, Judge Lane considered BisB's and Tadhamon's remaining arguments for dismissal based on international comity and the presumption against extraterritoriality.

INTERNATIONAL COMITY AND THE PRESUMPTION AGAINST EXTRATERRITORIALITY

Following the district court's lead, Judge Lane focused on the defendants' use of the correspondent bank accounts in New York as a basis to apply U.S. law under both the doctrine of international comity and the presumption against extraterritoriality.

He noted that analysis of international comity in the Second Circuit comprises two distinct doctrines: prescriptive and adjudicative. Prescriptive comity limits the reach of U.S. law and adjudicative comity refers to a judge's discretion to decline to act in deference to a foreign proceeding. Judge Lane discussed only prescriptive comity because there was no parallel foreign proceeding to which deference could be given. Pursuant to prescriptive comity, one country refrains from prescribing laws that unreasonably govern activities connected to another country. In applying prescriptive comity, courts rely on a variety of factors to determine if the exercise of jurisdiction is reasonable.

In *Arcapita,* Judge Lane found that prescriptive comity did not prevent his exercise of jurisdiction. The use of correspondent bank accounts in New York established a link between the parties' transactions and the United States, even though the parties were all Bahraini entities and the defendants made the investments outside of the United States. Judge Lane adopted the district court's reasoning that the use of the correspondent bank accounts defeated the defendants' alleged "justified expectations" of litigating in Bahrain. He further noted that the Bahraini choice-of-law provisions in the Placement Agreements did not limit his jurisdiction because the bankruptcy court was "competent" to apply Bahraini law. Finally, Judge Lane observed the Committee's avoidance and turnover claims form the "bedrock" of the protections available to creditors under the Bankruptcy Code and expressed a "grave concern" that, in the absence of a parallel foreign insolvency proceeding, parties might make transfers overseas to "shield[]" them from U.S. law and the debtor's creditors.

Judge Lane also concluded that his jurisdiction was not constrained by the presumption against extraterritoriality. He explained that the presumption reflects the principle that the reach of U.S. legislation is meant to apply only domestically, unless a contrary congressional intent is apparent. Courts use a two-part inquiry to determine if the presumption is rebutted, so that a U.S. law can be applied extraterritorially. A party seeking to apply U.S. law extraterritorially must demonstrate either that Congress intended it to apply outside of the United States or that the conduct the statute is meant to regulate occurred at least in part within the United States.

As to the Committee's avoidance claims, Judge Lane rejected the defendants' argument that factors such as the parties' nationalities, where the antecedent debt originated, and where the underlying agreement was negotiated and executed, determine whether a claim involves the extraterritorial application of U.S. law. Rather, "the focus of congressional concern" (*i.e.,* the "transactions that the statute seeks to regulate") was dispositive, and in *Arcapita,* the focus of the Bankruptcy Code provisions at issue was the initial transfer of property of the estate from Arcapita to the correspondent bank accounts in New York. Therefore, the Committee's avoidance claims did not involve the extraterritorial application of the Bankruptcy Code at all. As to the Committee's claims for violations of the automatic stay and turnover of the Placement Proceeds, Judge Lane concluded that Congress intended such provisions to apply extraterritorially, because they refer to property of the estate that includes Arcapita's property "wherever located and by whomever held."

Accordingly, Judge Lane concluded that the doctrines of international comity and the presumption against extraterritoriality did not require dismissing the case and denied the defendants' motion.

LaMonica v. CEVA Group PLC (In re CIL Limited)[4]

More recently, another New York bankruptcy court judge held that the avoidance provisions of the U.S. Bankruptcy Code did not apply to transactions that occurred entirely outside of the United States.

> Application of the U.S. Bankruptcy Code, including its avoidance provisions, to non-U.S. transactions raises significant implications for international financial transactions, maritime practice, and other areas of global commerce.

Judge Garrity's opinion was issued in connection with the bankruptcy case of CIL Limited (f/k/a CEVA Logistics Limited, "CIL"), a Cayman Islands holding company owned and controlled by affiliates of Apollo Global Management, LLC ("Apollo"). CIL and its subsidiaries operated a global logistics and freight management business. CIL's sole asset was its ownership of its subsidiary and operating company, CEVA Group PLC ("CEVA Group"), a U.K. entity. In April 2013, CIL and its affiliates undertook to restructure and deleverage the enterprise, particularly by transferring 99.99 percent of CIL's equity interest in CEVA Group to CEVA Holdings, a newly formed Marshall Islands affiliate of Apollo.

Three holders of PIK notes issued by CIL filed an involuntary chapter 7 petition against CIL in New York. The bankruptcy trustee appointed in CIL's bankruptcy case sued CIL's two former directors and CEVA Group, alleging that CIL's transfer of its equity interests in CEVA Group stripped CIL of its interests with no consideration, to the detriment of the PIK noteholders. The trustee sought to recover the value of CIL's equity interest in CEVA Group. The trustee alleged that the restructuring transaction was a fraudulent transfer subject to avoidance under Bankruptcy Code section 548 and under "applicable law" pursuant to Bankruptcy Code section 544(b), including New York state law, U.K. law, and Cayman Islands law. The defendants sought to dismiss the trustee's claims arguing, among other things, that the Bankruptcy

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NY Bankruptcy Courts Grapple with Territorial Limits of U.S. Bankruptcy Code (continued from page 26)

Code avoidance powers on which the trustee's claims relied do not apply extraterritorially.

Applying the same two-part inquiry as Judge Lane in *Arcapita,* Judge Garrity reached a different conclusion in *CIL Limited.*

First, Judge Garrity concluded that Congress did not intend for Bankruptcy Code section 548 to apply to international transfers. Judge Garrity distinguished other Bankruptcy Code provisions, such as section 541(a), which as explained above defines property of the estate, because section 548(a) speaks of "an interest of the debtor in property," but without the broader reference found in section 541(a). While noting judges in the Southern District of New York, and in other districts, are divided on the question of whether the Bankruptcy Code's avoidance provisions apply extraterritorially, Judge Garrity concluded that they do not.

Second, Judge Garrity observed that the trustee sought to avoid "the authorization by CIL, a Cayman Islands company, of the issuance of stock in CEVA Group, an England and Wales company, to CEVA Holdings, a Marshall Islands company." Judge Garrity found the conduct "allegedly harmed foreign creditors" and was "accomplished outside the United States" by non-U.S. entities. On these facts, Judge Garrity concluded that the conduct that was the focus of the statute occurred "plainly outside the United States." Because he concluded that section 548 does not apply extraterritorially and because the conduct at issue occurred outside of the United States, Judge Garrity dismissed the trustee's claims under section 548.

The trustee also sought to avoid the transfer of the CEVA Group equity under applicable non-bankruptcy law pursuant to Bankruptcy Code section 544(b). The trustee argued non-U.S. law, in particular U.K. law, constituted "applicable law." Judge Garrity rejected the trustee's argument that inclusion of the phrase "applicable law" in section 544(b) gives the section extraterritorial application. Because the challenged transaction was not a "domestic transfer," the trustee could not avoid the transfer of the CEVA Group equity under section 544(b).

Implications

As the *Arcapita* decision highlights, non-U.S. parties potentially may be subject to liability in U.S. courts under U.S. laws if the court determines either 1) that the statute under which the suit is brought applies outside of the U.S. territorial jurisdiction or 2) that the specific challenged transaction was domestic rather than foreign. Application of the U.S. Bankruptcy Code, including its avoidance provisions, to non-U.S. transactions raises significant implications for international financial transactions, maritime practice, and other areas of global commerce.

The holding in *CIL Limited* provides non-U.S. parties with a thorough analysis and arguments as to why a court should not apply the U.S. Bankruptcy Code avoidance provisions to transactions involving a non-U.S. transferor and a non-U.S. transferee. But courts remain strongly divided on this issue. Parties involved in international transactions should give careful consideration, and may wish to seek advice from counsel, regarding any transaction that potentially may implicate U.S. law, including Bankruptcy Code avoidance provisions.□

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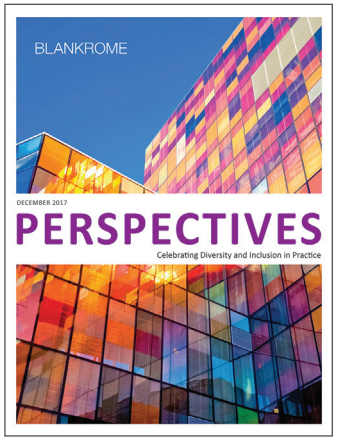
1. 575 B.R. 229, 233 (Bankr. S.D.N.Y. 2017).
2. *Official Comm. of Unsecured Creditors of Arcapita Bank B.S.C.(c) v. Bahrain Islamic Bank (In re Arcapita Bank B.S.C.(c)),* 529 B.R. 57, 67 (Bankr. S.D.N.Y. 2015).
3. *Official Comm. of Unsecured Creditors of Arcapita, Bank B.S.C. (c) v. Bahrain Islamic Bank,* 549 B.R. 56 (S.D.N.Y. 2016)
4. Adv. Proc. No. 14-2242-JLG, Case No. 13-11272-JLG, 2018 WL 329893 (Bankr. S.D.N.Y. Jan. 5, 2018).

Blank Rome Launches Inaugural Diversity & Inclusion Newsletter, *Perspectives*



Blank Rome LLP is pleased to present the inaugural edition of *Perspectives,* the Firm's Diversity & Inclusion newsletter that keeps you informed on our latest diversity news and provides insight on current diversity issues in the legal industry and beyond.

Featured in this edition:

- Highlights from the Blank Rome Women's Leadership Summit and Legal Hackathon
- Analysis of the American Bar Association's Resolution 113
- Profiles of LCLD Pathfinders in the Blank Rome Proust Questionnaire
- Initiatives on advancing women in law and promoting LGBTQ equality
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