Behind the Fog

Normally, when a fog lifts we see the world around us the way it was before. As disoriented as we might feel when fog settles upon us, we draw comfort from knowing the things we saw before are still there and will reappear.

But what if, when the fog lifts, the world as we knew it does not reemerge? What if, because of powerful forces we cannot control, the things with which we were familiar disappear? How will we know in what direction we should turn?

The economic crisis of 2008–2009 continues to leave many segments of the shipping industry under such a shroud. Most of us believe the fog will lift, perhaps sooner rather than later. Some already have plotted their new course and made their bets for the future. But this fog remains settled deeply over many in the shipping industry, amid new worries of varying degrees of importance. China is clamping down on the credit markets. Elsewhere, credit markets are just beginning to open up, and whether capital markets will bloom in the Spring is a question still to be answered. Iran remains a political problem that defies every proposed solution. Shipyards have orders buyers cannot afford to pay for. Piracy remains a surprising epidemic. These and many other challenges will be the topics of discussion during this year’s Connecticut Maritime Association Shipping 2010 Conference, March 22–24.

To learn more about how Blank Rome can help your business, please go to www.BlankRomeMaritime.com.
Enforcement of Judgments in New York: Koehler v. Bank of Bermuda Ltd.

Most participants in the marine industry are aware of the relatively short lived frenzy of Rule B attachments of electronic funds transfers (EFTs) being processed by intermediary banks in New York City. Most are also aware of the judicial holdings that such attachments could be avoided merely by submitting to the personal jurisdiction of the Courts in New York by registering to do business here. Consequently, hundreds, if not thousands, of shipping companies preferred the risk of submitting to jurisdiction to the certainty of interference with their funds transfers in the event of a claim, and registered with the New York Department of State. Fewer are aware of a decision of New York State’s highest Court in June 2009, which magnified the risk of submitting to personal jurisdiction here. Still, most of those who became aware of the decision continued to believe the avoidance of restraints on funds transfers outweighed the potential significance of the new risk.

In October 2009, the Second Circuit overruled its earlier decision that commenced the flood of Rule B cases, and held electronic funds transfers may no longer be attached. The Shipping Corp. of India v. Jaldhi, 585 F.3d 58 (2d Cir. 2009). Since then, a consistent flow of District Court decisions has frustrated every attempt to get around Jaldhi that commenced the flood of Rule B cases, and held electronic funds transfers may no longer be attached. The Court rejected the argument that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards dispenses with the necessity of a basis of personal jurisdiction. However, the same is not true with respect to entering a judgment upon a foreign judgment. In Lenchyshyn v. Pelko Electric, Inc., 725 N.Y.S. 2d 285 (A.D. 4 2001), New York’s Appellate Division for the Fourth Department (which does not cover New York City), held a judgment may be entered in New York upon a foreign judgment, pursuant to New York’s Uniform Foreign Country Money Judgments Recognition Act, despite the lack of an independent basis for exercising personal jurisdiction and the absence of any assets within the State.

Similarly, a federal statute permits a judgment in one U.S. District Court to be registered as a judgment in any other U.S. District Court, irrespective of the existence of grounds for personal jurisdiction. Koehler was just such a case.

In other words, registering to do business in New York would subject a foreign defendant to personal jurisdiction. The operators of any ship carrying polluting and hazardous cargoes in bulk or of any other vessels above 10,000gt must maintain a pollution clean-up contract with an MSA approved pollution response company prior to entering a Chinese port. The MSA has stated that four levels of contractors will be designated to have the capability to respond to a spill depending on the size and extent of the spill. Further guidance on this implementation will be released soon.

Reporting

Any pollution arising or likely to arise from an incident within the territorial waters of the PRC or beyond, but under PRC jurisdiction, must be reported to the local MSA. The incident report must include the following information:

- The ship’s name, nationality, call sign or number;
- The name and address of the owners, operators or managers of the ship;
- The type, quantity, stowage, and location of the polluting substances;
- The extent of the pollution;
- The type, quantity, stowage, and location of the polluting substances;
- The extent of the pollution;
- The pollution control, disposal measures adopted and to be adopted, and the status and the salvage requirements; and
- Any other required information.

Penalties for Violation

Penalties for violation of the Regulations will be in the range of RMB 10,000 to RMB 500,000 (about $1,500 to $75,000, USD), depending on the facts of the incident. The MSA has the discretion to assess penalties. For example, a failure to report a pollution accident may result in a fine of RMB 50,000 to RMB 250,000 on the ship or its management team. The fine can be increased from RMB 250,000 to RMB 500,000 if the ship or its management unit intentionally conceals an pollution incident. However, unlike in the United States, a criminal prosecution may not be brought against the Master or the managers who are thought to be responsible for the concealment.
China’s New Regulations on Ship-Source Pollution

The People’s Republic of China (“PRC”) recently implemented its first comprehensive anti-marine-pollution regime by promulgating the “Regulations on the Prevention and Control of Ship-Induced Pollution of the Marine Environment” (“Regulations”). The Regulations, which repeal the 1983 Regulations on Prevention of Ship-induced Sea Pollution, will become effective on March 1, 2010. For those trading with the United States, many of these requirements are similar to those contained in the Oil Pollution Act of 1990.

The following is a brief summary of the major provisions of the Regulations.

Application

The Regulations apply to any ship-induced pollution and any ship-related operation that causes, or may cause, pollution damage in the internal waters, territorial waters, contiguous zone, exclusive economic zone, and continental shelf of the PRC and/or all other sea areas under Chinese jurisdiction.

The China Maritime Safety Administration (“MSA”)

The MSA is empowered by law as the government body to administer the regime for preventing and controlling marine pollution. If a pollution incident occurs, the MSA can take cleanup, salvage and wreck removal measures, or any other necessary action to mitigate the pollution damage, the costs of which will be for the account of the party which is liable for such. The MSA will have priority to receive compensation for costs expended. The MSA is also entitled to detain the offending vessel until its investigation of the incident is completed and the costs paid for the clean-up operations—through a financial guarantee, in a form yet to be determined by the MSA—can be given in lieu of a cash payment.

Emergency Response Plans

An emergency response plan for the prevention and control of marine pollution must be prepared by shipowners, operators and/or managers, and must be
dition in a plenary law suit or in an action to confirm an arbitration award, where grounds might not otherwise exist, but it would make no difference in an action to enter a judgment on a foreign judgment, because the latter does not require a basis of personal jurisdiction. This would be of particular interest in cases involving Foreign Freight Agreements and other contracts which call for disputes to be resolved in the English Courts, rather than in arbitration. Additionally, a creditor who holds a foreign arbitration award could confirm the award as a foreign judgment, and then as a New York judgment, despite an absence of grounds for personal jurisdiction in New York.

Returning to Koehler: A post-judgment turnover proceeding is governed by Section 5225 of New York State’s Civil Practice Law and Rules. It is available in both the federal and state courts, because the Federal Rules of Civil Procedure adopt State law regarding post-judgment remedies. The proceeding is available in both maritime and nonmaritime cases.

Section 5225(a) provides for a turnover proceeding with respect to the judgment-debtor’s property held by a third-party garnishee. This section provides for a “special proceeding,” in which the garnishee is named as a defendant. The garnishee must be identified, and, in addition to a showing that the garnishee in fact possesses the
developer itself. The judgment debtor may be ordered to turn over such property, even if the property is located abroad. However, before obtaining such an order, the judgment creditor must show that the judgment debtor actually possesses property. In other words, the Court may not simply order the debtor to pay the debt, but only direct the debtor to turn over specific property or funds that it has been shown to possess.

Koehler explained that a judgment debtor may be ordered to turn over its foreign assets because the debtor is subject to the Court’s personal jurisdiction and, therefore, to orders directed at the debtor personally. However, that would suggest that a turnover order is not available against a judgment debtor where the New York judgment was based upon a foreign judgment and entered here despite a lack of personal jurisdiction.

Section 5225(b) provides for a turnover proceeding with respect to the judgment-debtor’s property held by a third-party garnishee. This section provides for a “special proceeding,” in which the garnishee is named as a defendant. The garnishee must be identified, and, in addition to a showing that the garnishee in fact possesses the
Ship Owner’s Liability for the Use of Non-Approved Electronic Charts

The Electronic Chart Display and Information System (“ECDIS”) has unquestionably improved the practice and safety of navigation. Compared with paper charts, paperless navigation has reduced overall costs and the workload on navigating officers. Most importantly, ECDIS has reduced the rate of navigation related accidents. Some crew and vessel owners, however, have attempted to reap the benefit of paperless navigation without using fully approved ECDIS. While this option may seem to be an attractive way to further reduce costs, it can subject an owner to increased liability.

For the foregoing reasons, on February 2, 2010, the District Court for the Southern District of New York denied an application for a turnover order against a debtor and “any garnishee” holding property of the debtor. The turnover application was made simultaneously with an application for a judgment, and therefore was premature, as no judgment was entered yet. Moreover, no special proceeding had been commenced against an identified garnishee, and there was no showing that either the debtor or any garnishee possessed property of the debtor.

The question of what facts are sufficient to establish personal jurisdiction over a foreign garnishee is likely to be contentious in many cases. New York law subscribes to the “separate entity” rule with respect to bank branches in pre-judgment attachment cases. It is not sufficient to serve one branch of a bank with an attachment order if funds are held by a different branch. That rule has been relaxed with respect to intrastate branches of the same bank because modern technology enables each branch to ascertain what accounts the other branches hold. However, the separate entity rule still applies to out-of-state and foreign branches because, as taught by Koeheir, pre-judgment attachments are aimed at the property itself, and not at the holder of the property. Therefore, the property must be within the Court’s territorial jurisdiction in order for it to be reached by the Court’s process of attachment.

A turnover proceeding, on the other hand, is directed against the person or entity that holds the property, not against the property itself. Therefore, the separate entity rule is inapplicable. If the garnishee is subject to the Court’s personal jurisdiction, it must comply with the Court’s orders, notwithstanding that the property which is the object of the order is located beyond the Court’s territorial jurisdiction.

Personal jurisdiction over a foreign bank or corporation is not established solely by the presence in New York of a subsidiary or affiliate, if the foreign and local offices are different corporate entities. In that event, something more will have to be shown, such as that the local branch or office is an agent of the foreign entity. In Koeheir, the judgment creditor argued that the Bank of Bermuda’s subsidiary in New York was an agent for the Bermudian entity, and that this relationship was sufficient to establish personal jurisdiction here over the latter. The parties litigated that and other issues for some ten years, until the Bermudian bank finally consented to jurisdiction. Therefore, there was no substantive holding whether in fact the subsidiary’s activities established a sufficient agency relationship.

Another basis for holding a local subsidiary’s presence here is sufficient to establish personal jurisdiction over a foreign entity is that the entities themselves disregard their separate corporate integrity. In Yossinov Sabooh Duo Shipping SDN v. Scandinavian Liquor Carriers Ltd., 335 F. Supp. 2d 441 (S.D.N.Y. 2004), a Rule B attachment served upon the New York branch of a Cayman Islands bank was upheld, notwithstanding the defendant’s bank account was located in the Cayman Islands branch, because “the Cayman Islands branch is a paper bank entirely controlled and managed by Danske Bank’s New York operation.” Yossinov involved a prejudgment attachment and branches, not separate corporate entities. Nevertheless, similar reasoning conceivably may be used to find a basis on which to exercise personal jurisdiction in a turnover proceeding against a foreign bank.

Although CPLR § 5225 itself may not support a fishing expedition in the sea of banks and potential corporate debtors of judgment debtors, that is not necessarily a reason for a sigh of relief. There are other post-judgment remedies available to judgment creditors that may serve that purpose. CPLR § 5222 provides that judgment creditors’ attorneys may serve a restraining notice upon potential garnishees, which restrains the recipient from disposing of any judgment debtor’s assets it may possess. Additionally, CPLR § 5223 and 5224 permit attorneys to serve questionnaires, known as information subpoenas, upon potential garnishees. These devices do not require a prior showing that the garnishee possesses the judgment debtor’s property. They are regularly used by collection lawyers on a sort of “mass produced” basis. Given that these remedies, like a turnover proceeding, are directed against garnishees personally, we see no reason such devices could not be used to find and restrain property located abroad, as long as the garnishee is subject to personal jurisdiction in New York.

The Legal Requirements for Charts and ECDIS

The lack of proper charts is an unsatisfactory condition that can preclude a vessel owner from limiting its liability for damages. Courts have found vessels unseaworthy when their owners have failed to provide up-to-date charts or charts with the correct scale.

Chart carriage requirements are contained in SOLAS Chapter V, which United States courts have found to have the status of general maritime law. Chapter V, Regulation 2, requires that charts must be “issued by or on the authority of a Government, authorized hydrographic office or other relevant government institution.” Regulation 27 requires that charts and nautical publications, such as sailing directions and other publications necessary for the intended voyage, shall be adequate and up-to-date.

Chart carriage requirements may be met by ECDIS. To satisfy the requirement of Chapter V Regulation 19, the ECDIS must be type approved, utilize “official” Electronic Navigational Charts (“ENC”) conforming with International Hydrographic Organization standards, and must meet the International Maritime Organization (“IMO”) ECDIS Performance Standards. The vessel must also be provided with a back-up arrangement for the ECDIS, which can be an “appropriate foil of paper charts” or an electronic back-up approved by the relevant maritime administration.

Liability for Non-Approved Electronic Chart Systems

SOLAS Chapter V chart requirements are not met by Electronic Chart Systems (“ECS”) that do not comply with the IMO Performance Standard, even if using “official” ENCs. Similarly, an ECDIS using non-government electronic chart data also does not meet SOLAS requirements, if a vessel has an ECS or non-government data, its SOLAS V chart carriage requirements can only be met by the use of a normal folio of paper charts.

Crew training and qualification can be significant issues with ECS and non-government chart data. An owner who fails to man his vessel with crew properly trained and competent to operate the ECS can face the same liability issues as for failing to provide adequate charts. Timely and accurate chart updates also can be a significant issue with an ECS or with non-government chart data, and it also can be the source of an unseaworthiness determination in casualty litigation.

A non-type-approved ECS can be used for situation awareness, but not for navigation. Navigational use of an ECS or an ECDIS with non-government chart data would normally result in a major non-conformity during an ISM audit or a Port State Control deficiency. It may, however, be difficult to tell the difference between an approved ECDIS and a non-approved ECS. Thus, it may not be obvious to an auditor, inspector or even the ship’s own navigation team that a vessel is using the ECS for navigation, especially where the vessel also is maintaining its chart portfolio.

If a navigation casualty occurs while the vessel is navigating with an ECS or with non-government data on its ECDIS, it may be difficult for the owner to demonstrate that it exercised due diligence to make the vessel seaworthy and it thus may not be entitled to limit its liability for any damages that result. An owner of a vessel carrying an ECS must, therefore, establish clear procedures on the use of the ECS and must ensure that navigation is still carried out using paper charts.

Conclusions

ECDIS has the potential to improve safety. Using non-type-approved systems, however, may raise liability issues. Watch officers need to be made aware of the types of systems they have on board and of the operational and legal limitations when using non-approved equipment. Owners with non-approved systems on their vessels must ensure that SOLAS chart carriage requirements continue to be met and that navigation is done on paper charts.
Delivery of Cargo Under a Straight Bill (continued)

In light of Carewins, carriers need to be very careful in drafting exclusion clauses. Unless a particular risk has been clearly and specifically excluded, it will be difficult to persuade the Court to give effect to the clause.

**Straight Bill—The Rotterdam Rules vs. Current English/Hong Kong law**

Neither the UK or Hong Kong has yet adopted the Rotterdam Rules. Nevertheless, for the purposes of discussions, the basic differences between the regimes in relation to a straight bill are set out below.

**Conclusion**

To summarize, under current English/Hong Kong law, a carrier should deliver the cargo only to the consignee named on the straight bill and upon production of the original bill. To deliver the cargo in any other manner will amount to mis-delivery for which the carrier will be liable.

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**Note From The Editor**

As a firm, we are always seeking new ways to communicate with our clients. Mainbrace started many years ago as a paper newsletter, and over the years we have both grown our mailing list and modernized our publishing and distribution methods. We have added periodic e-mail alerts for when important time-sensitive developments call for immediate notice to our clients, and of course the Blank Rome Maritime Web site www.blankromemaritime.com—it always a good source for current information on developments in the maritime industry.

While we strive to keep our clients informed, we understand there is a fine line between useful information and “spam” and we strive to provide the former without ever adding to the growing volume of the latter.

Mainbrace, of course, has always had the maritime industry as its core focus, and consequently its articles have always had an international bent. Blank Rome’s international practice has always covered much more than just the maritime field and encompasses everything from corporate and commercial transactions and securities issues; to real estate; to commercial and corporate litigation, arbitration, and mediation; to tax; to intellectual property; and so on.

As the firm’s international dispute resolution practice has grown, it has become increasingly evident to us that we needed to create a separate means of communicating with our clients outside of this arena. To this end, we are pleased to announce the inaugural issue of the International Litigation & ADR Update.

The carrier’s liability arising from mis-delivery is limitable by clear and unambiguous contractual terms, but not under article IV rule 5 of the Hague-Visby Rules.

**The Rotterdam Rules**

- Article 46(a) (Delivery relating to a non-negotiable transport document)
  - Consignee is required to identify itself only “on the request of the carrier.”
  - The carrier “may” refuse delivery if the person fails to properly identify itself as consignee.

- Article 59 (1) (Limits of liability)
  - The carrier’s liability arising from mis-delivery is limitable by clear and unambiguous contractual terms, but not under article IV rule 5 of the Hague-Visby Rules.

**English / Hong Kong Law**

- Consignee is required to identify itself only “on the request of the carrier.”
- The consignee must identify itself.
- The carrier “may” refuse delivery if the person fails to properly identify itself as consignee.
- The carrier must refuse delivery if the person fails to properly identify itself as consignee.

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4. Carewins Development (China) Ltd v Hongry Shipping Ltd (HCCL No.13 of 2008)
10. The CFA considered that it is an essential purpose of the contract that the goods should be delivered by the carrier only against surrender of the original bill. Although the word “mis-delivery” in the clause was capable of covering a range of situations relating to delivery of cargo to a wrong person, the CFA concluded that it did not cover the situation where the mis-delivery is “a conscious disregard of the presentation rule on the carrier’s part.” The clause thus was found to be ambiguous and not sufficiently clear to cover the circumstances under which the carrier delivered the cargo.
The absence of onward negotiability, a straight bill of lading has the same characteristics as an order bill... the requirement of delivery only against production of the bill of lading is one which identifies a named consignee. It shares all the characteristics of an "order" bill save only that it is not negotiable. This raises important issues, which are discussed below.

Recent Deadlines

Two key VGP deadlines recently passed on February 6, 2010—(1) to complete a comprehensive annual inspection, and (2) to make an annual report of VGP non-compliances. A comprehensive annual inspection must be conducted by qualified personnel at least once every 12 months. Qualified personnel include the master or owner/operator of the vessel, if appropriately trained, or appropriately trained marine or environmental engineers or technicians. These inspections must cover all areas of the vessel covered by the VGP that can be inspected without drydocking. Special attention should be paid to those areas most likely to result in an unauthorized discharge, including:

- Vessel hull for attached living organisms, flaking antifoulant paint, exposed TBT, or other organotin surfaces;
- Vessel hull for attached living organisms, flaking antifoulant paint, exposed TBT, or other organotin surfaces;
- Photo Production;
- Another issue of significance in this decision is that, in order for a discharge to be considered a mis-delivery, it must be delivered to the person properly entitled to receive it. Accordingly, the failure to deliver the cargo to the named consignee without production of the original bill would amount to mis-delivery, whether or not it is a straight bill or an order bill.

Can the Carrier be Exempted from Liability for Mis-Delivery?

Another issue of significance in this decision is that, prior to the English final appellate court's decisions in Sze Hai Tong and Photo Production, mis-delivery constituted a fundamental breach of the contract of carriage, for which the liability of the carrier could not be limited or excluded. The contract-breaker would be liable fully for the loss and/or damage suffered by the cargo interests. In Sze Hai Tong and Photo Production, however, the English final appellate court affirmed the principle of autonomy of contract—so no matter how unreasonable an exclusion clause is, a court is not entitled to reject it if the words are clear and fairly susceptible to having only one meaning.

In Carewins, after the CFA determined the issue of mis-delivery, it proceeded to consider whether liability arising from the mis-delivery could be excluded by the relevant exclusion clause in the bill, which said:

"For the avoidance of all doubt, a straight bill of lading has the same characteristics as an order bill... the requirement of delivery only against production of the bill of lading is a cardinal purpose of both straight and order bills. This is so since the presentation rule underpins the ultimate purpose of the contract, which is for the cargo to be delivered to the person properly entitled to receive it. Accordingly, the failure to deliver the cargo against production of the original bill would amount to mis-delivery, whether or not it is a straight bill or an order bill."

EPA's Vessel General Permit—Are You In Compliance?

The Environmental Protection Agency’s Vessel General Permit for Discharges Incidental to the Normal Operation of Vessels ("VGP") has been in effect for a little more than a year now. The VGP, which covers 26 discharge streams incidental to normal operations, applies when vessels operate within three nautical miles of the U.S. coast. As a general matter, vessel owners/operators must file a "Notice of Intent" to be covered by the VGP and implement "best management practices" ("BMPs") to minimize discharges, including bilge and ballast water, deck runoff, chain locker effluent, oil-sea interfaces, and cooling water, among others. Vessel owners/operators also must be cognizant of the fact that individual states may have requirements more stringent than federal requirements.

Vessel owners/operators are also required to have in place various training, inspection, and recordkeeping protocols. The VGP sets forth a routine inspection program requiring a company to establish per voyage or weekly inspections (whichever is more frequent), quarterly inspections, and annual inspections, as well as drydock inspections, all of which must be documented and made available to EPA upon request. Such records must be maintained aboard the vessel for three years. In addition to the above-mentioned inspections, the VGP also includes requirements for corrective actions, which must be conducted for each identified deficiency, documented, and certified.

One requirement that has confused some vessel operators is the requirement to report to the local EPA regional office a discharge that could "endanger health or the environment." Under this "standard condition" of EPA permits found in 40 CFR 112.2-41, an oral report is required within 24 hours, followed by a written report within five days. Vessel owners/operators must use their discretion, however, in determining whether a discharge meets (or not) this standard as there is little to no EPA guidance. It is important to note that a report to the National Response Center does not satisfy this requirement, though EPA has said, formally in at least, that a CGForm 2692 would likely satisfy the requirement for a written report.

Delivery of Cargo Under a Straight Bill—The Hong Kong Position

A straight bill of lading is one which identifies a named consignee. It shares all the characteristics of an "order" bill save only that it is not negotiable. This raises important issues, which are discussed below.

Under U.S. law, a carrier is entitled to deliver the cargo to a named consignee of a straight bill without requiring production of the original bill. This is because a straight bill is considered merely a receipt for the goods, and not a document of title. Under English law, on the other hand, it is well established that a carrier does this at his own peril.

Prior to 2009, the position in Hong Kong was somewhat uncertain. In The "Rafaela S" Waung J. considered that "the essence of straight bills is that they are not negotiable and the contractual mandate is to deliver to named consignee without production of the original document." Where a bill is a straight bill, therefore, the delivery of the cargo to the named consignee without production of the original bill would not constitute mis-delivery.

Waung J.'s view was not, however, shared by others. In a fairly recent decision in Carewins, cargo was shipped pursuant to a straight bill, and the carrier's agent, who was also the consignee's agent, delivered the cargo to the consignee without obtaining the original bill. The consignee failed to pay for the cargo, so the shipper claimed against the carrier for conversion. Stone J., in the first instance hearing, followed the Singapore Court of Appeal's decision in Voss v. APL Co. Pte. Ltd.* and held that this amounted to mis-delivery.

Does it Constitute Mis-Delivery?

This left Hong Kong with two conflicting decisions by the Court of First Instance, leaving the issue in a state of flux. This uncertainty has now been finally settled by the Hong Kong Court of Final Appeal ("CFA") in Carewins.* There, the CFA held that a straight bill is a document of title. The Court then followed the English House of Lords' decision in The "Rafaela S" and stated that "save for the absence of onward negotiability, a straight bill of lading has the same characteristics as an order bill... the requirement of delivery only against production of the bill of lading is a cardinal purpose of both straight and order bills. This is so since the presentation rule underpins the ultimate purpose of the contract, which is for the cargo to be delivered to the person properly entitled to receive it. Accordingly, the failure to deliver the cargo against production of the original bill would amount to mis-delivery, whether or not it is a straight bill or an order bill."
The Proposed Change in Jones Act Interpretation

After some urging from the primary organization representing offshore support vessel interests, the Offshore Marine Services Association ("OMSA") and CBP decided to upset the offshore support vessel regime by proposing on July 17, 2009 to revoke or modify over 20 rulings issued over a span of more than 30 years. The CBP claimed that the record needed to be set straight because it had made a multitude of errors in its interpretive rulings over many years.

Specifically, the highly technical proposal would have reversed CBP rulings dating back to 1976 on what constitutes "vessel equipment" as opposed to "merchandise" under the Jones Act. Under the proposed changes, much of the highly specialized underwater infrastructure used in deepwater work would have been made subject to Jones Act restrictions. As a result, key OCS activities such as pipe-laying, cable-laying, diving support work, and heavy-lift crane construction and installation work no longer could have been performed by foreign-flag vessels. This could have severely affected offshore energy development because there are significant issues related to the capability and availability of coastwise qualified vessels to perform this work.

Strikingly, in announcing its decision to modify these rulings, CBP followed its Customs Bulletin publication process, which would have resulted in the issuance of a final decision within 30 days of publication of its proposal and which would have become effective 60 days after issuance of the final decision despite the broad ranging implications of this action. Fortunately, through the efforts of industry, and the intervention of the Department of Homeland Security ("DHS"), this process was cut short and CBP withdrew its proposal on October 1, 2009. Industry continues to monitor the situation closely, awaiting a decision from DHS and CBP as to how the agencies intend to proceed. To date, DHS continues to say that it is reviewing the situation at the highest levels and that no final decision has been made. Meanwhile, CBP refuses to respond to any requests for rulings in this area until DHS decides which direction to steer this issue. Industry continues to generally operate offshore "as before," but CBP enforcement in the field has been inconsistent at best during this period of flux.

Going Forward

Should DHS decide to propose changes again and direct CBP to move forward with such action, any proposal should be made pursuant to publication in the Federal Register and the "Notice and Comment" procedures under the Administrative Procedures Act ("APA"), and not through publication of an "Interpretive Rule" in the Customs Bulletin. Historically, CBP has never gone through a full regulatory rulemaking process through the Federal Register in order to publish a final rule (other than a simple recitation of the statutory language), as is typical for most regulatory regimes in the United States. Most importantly, although CBP clearly has the authority to issue a proposed "Interpretive Ruling" in the Customs Bulletin to modify or revoke an interpretive Jones Act ruling, these procedures are limited to the modification or revocation of individual rulings, not broad and sweeping changes to the entire Jones Act regime.

Under existing case law, however, the July 17, 2009 CBP proposal, and any subsequent action taken by CBP that would have the practical effect of overturning 30 years of existing precedent, constitutes a "Rulemaking" requiring Notice and Comment in the Federal Register under the Administrative Procedures Act. This is because such drastic action changing the entire way the offshore industry conducts business cannot be characterized as an "Interpretive Rule." An "Interpretive Rule" can only be used to reinterpret actions previously issued by an agency to provide for consistency in agency action. In other words, the use of an "Interpretive Rule" cannot be used to completely change an existing regime.

Conclusion

In conclusion, the July 17, 2009 proposal, and any future proposal that would have such broad implications, should be considered a substantive rulemaking and thus subject to Notice and Comment in the Federal Register under the APA. It is important to give all stakeholders the opportunity to fully be heard though the notice and comment process, ultimately resulting in a final rule. It would be manifestly unjust to move forward in any other way in view of the industry investment of time and money under the current regime and the potentially significant impacts that could result from DHS and CBP final action.

- Bilges and pumps;
- Protective seals for lubrication and hydraulic oil leaks;
- Oil and chemical storage areas, and waste storage areas;
- All visible pollution control measures to ensure functioning properly.

In addition, the annual inspection must include a review of routine maintenance records to ensure that required maintenance is being performed, as well as consideration of the results of the past year's inspections to see if any trends are obvious.

While the comprehensive annual inspection is not submitted to EPA, the annual report of "non-compliances" was required to be submitted to EPA by February 6, 2010. This report should list all incidents covered by the VGP that occur within VGP waters, i.e., within three nautical miles of the U.S. coast. This annual report must be submitted to the EPA region where the most incidents occurred or, if an equal number of incidents occurred in more than one region, the region where the ship spent the most time over the prior year.

Enforcement

There has been little VGP enforcement to date, as EPA currently has limited resources to enforce the VGP. The Coast Guard and EPA are cooperating on the development of a comprehensive annual inspection program. EPA has the authority to issue fines (both civil and criminal) for VGP inspections. If significant violations are discovered, the Coast Guard would refer the violations to EPA for action.

Starting in the summer of 2009, the offshore industry found itself in an internal battle with the United States Customs and Border Protection ("CBP") with regard to the use of foreign vessels operating in support of Outer Continental Shelf ("OCS") exploration, development, and production. On one side of the battle we found U.S.-flag and U.S.-built vessel interests (Jones Act proponents) and on the other side were foreign-flag vessel interests. The implications of the battle potentially could have brought offshore OCS work to a standstill, significantly affecting U.S. energy development.

Background

To set the stage, the Jones Act was enacted in 1920 with the intent to ensure that vessels operating in the coastwise trade were U.S.-flag and U.S-built. The primary purpose of this law was to facilitate the national defense of the United States through the development of a well-equipped and suitable merchant marine with the capability to carry much of its commerce and to be available to support naval logistic operations in time of war or emergency. In essence, the Jones Act prohibits foreign-flag vessels from transporting “merchandise” between U.S. coastwise points. For over 50 years, the Jones Act essentially regulated vessels engaged in the traditional transportation of goods between ports.

Enforcement

In 1976, CBP first began to interpret and apply the Jones Act to offshore oil and gas operations and offshore "coastwise points," which are oil and gas platforms and other structures that are attached to the seabed of the OCS pursuant to the Outer Continental Shelf Lands Act. CBP issues "Interpretive Rulings" upon request, to validate proposed operations and to avoid future CBP challenges and enforcement action. This interpretive ruling process has resulted in the establishment of long-standing precedent on which the offshore industry has relied for 30 years and on the basis of which it has invested millions of dollars. This precedent allows operators to use foreign flag vessels to carry "equipment" offshore to be used in the installation of offshore infrastructure, which CBP has ruled does not fall within the meaning of "merchandise" that would otherwise be prohibited under the Jones Act.

In conclusion, for the past year EPA and the Coast Guard have been in a compliance assistance mode. In light of impending enforcement, it is time to confirm that your BMPs are in place and effective, your crews trained, your inspections conducted, and your annual report submitted.
Blank Rome Gears Up for Election Year Policy Debate

Blank Rome Government Relations LLC, principally located in Washington, DC, is gearing up for a flurry of activity for the election year end-of-session for Congress. The Administration is pushing its agenda both legislatively and through regulations. Meanwhile, Congress is trying to find its way through national legislative issues like healthcare reform while also trying to fund the government through appropriations and pass smaller measures such as the Coast Guard Authorization bill and other maritime measures. The national issues debate and the looming November mid-term elections make for an unpredictable yet interesting year for policy development in the nation's capital.

Blank Rome professionals are actively monitoring legislation, federal policy, and regulatory proposals. Accordingly, one of the most important services we provide is monitoring the activities of the U.S. Congress, White House, and the U.S. Department of Transportation, U.S. Department of Homeland Security, and U.S. Department of Defense. We assist clients not only by monitoring the day-to-day development of legislation, policy proposals, and rule-making, but also by drawing upon our network of relationships when a bill or policy change is moving behind the scenes.

Blank Rome Government Relations LLC, established in 2003 as an affiliate of Blank Rome LLP, was developed as an additional resource for clients to address business challenges through public policy, legislative or regulatory actions. Our bipartisan team is comprised of top lobbying and strategic communications professionals with substantive experience representing our clients interests in Washington and in state capitals. In 2006, Blank Rome formed a strategic alliance with Interel, a Brussels-based, European public affairs consultancy, to support our clients with international business interests.

Our services reflect the broad and unique experience of our team. We navigate the shifting political landscape in Washington to tailor business strategies to the needs of our clients. Areas of expertise include the following categories:

- Advocacy
- Appropriations & Authorizations
- Congressional Oversight & Investigations
- Government Business
- International Relations & Transatlantic Policy
- Legislation & Regulation
- Strategic Communications

Key services Blank Rome can provide in this area are:

- Analyzing public policy developments, proposed legislation, or pending regulatory actions to determine its impact and to suggest changes that may be beneficial.
- Assisting in the drafting of legislative language, comments on proposed rulemakings, and other supporting materials for its position.
- Communicating directly with congressional staff and Members of Congress and Administration officials as required.
- Seeking other supporters for a position and coordinating coalition efforts to back an initiative.
- Maintaining strategic relationships with industry groups.

Additionally, we believe it is not enough to track just the issues. At Blank Rome, we understand how the issues affect our clients’ industries. By focusing on the industry, we anticipate developments and ensure our position early in the policy debate. Key industries we are involved with include:

- Defense & National Security
- Education
- Energy & Resource Development
- Financial Services & Tax
- Healthcare
- Homeland Security
- Housing & Community Development
- International Trade
- Maritime
- State & Local Governments
- Telecommunications & Technology
- Transportation

Blank Rome uses a team approach aimed at ensuring that all initiatives undertaken on behalf of clients are managed with a common understanding of the client’s business goals and with a uniform level of dedication and effectiveness to ensure the delivery of services required to achieve stated objectives.

We have a proven record of success in government relations on behalf of small businesses, large corporations, state and local governments, and non-profit and charitable organizations. We are grateful to the clients we have the pleasure to team with in Washington and throughout the United States. We are happy to share case studies on request and the prospects of success for the coming year.

Additional information on Blank Rome Government Relations LLC capabilities and professionals can be found at http://www.blankromegr.com.
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The Proposed Change in Jones Act Interpretation

After some urging from the primary organization representing offshore support vessel interests, the Offshore Marine Services Association ("OMSA") and CBP decided to revisit the offshore support vessel regime by proposing on July 17, 2009 to revoke or modify over 20 rulings issued over a span of more than 30 years. The CBP claimed that the record needed to be set straight because it had made a multitude of errors in its interpretive rulings over many years.

Specifically, the highly technical proposal would have reversed CBP rulings dating back to 1976 on what constitutes "vessel equipment" as opposed to "merchandise" under the Jones Act. Under the proposed changes, much of the highly specialized undersea infrastructure used in deepwater work would have been made subject to Jones Act restrictions. As a result, key OCS activities such as pipe-laying, cable-laying, diving support work, and heavy-lift crane construction and installation work no longer could have been performed by foreign-flag vessels. This could have severely affected offshore energy development because there are significant issues related to the capability and availability of coastwise qualified vessels to perform this work.

Strikingly, in announcing its decision to modify these rulings, CBP followed its Customs Bulletin publication process, which would have resulted in the issuance of a final decision within 30 days of publication of its proposal and which would have become effective 60 days after issuance of the final decision despite the broad ranging implications of this action. Fortunately, through the efforts of industry and the intervention of the Department of Homeland Security ("DHS"), this process was cut short and CBP withdrew its proposal on October 1, 2009. Industry continues to monitor the situation closely, awaiting a decision from DHS and CBP as to how the agencies intend to proceed. To date, DHS continues to say that it is reviewing the situation at the highest levels and that no final decision has been made. Meanwhile, CBP refuses to respond to any requests for rulings in this area until DHS decides which direction to steer this issue. Industry continues to generally operate offshore "as before," but CBP enforcement in the field has been inconsistent at best during this period of flux.

Going Forward

Should DHS decide to propose changes again and direct CBP to move forward with such action, any proposal should be made pursuant to publication in the Federal Register and the "Notice and Comment" procedures under the Administrative Procedures Act ("APA"), and not through publication of an "Interpretive Rule" in the Customs Bulletin. Historically, CBP has never gone through a full regulatory rulemaking process through the Federal Register in order to publish a final rule (other than a simple recitation of the statutory language), as is typical for most regulatory regimes in the United States. Most importantly, although CBP clearly has the authority to issue a proposed "Interpretive Ruling" in the Customs Bulletin to modify or revoke an interpretive Jones Act ruling, these procedures are limited to the modification or revocation of individual rulings, not broad and sweeping changes to the entire Jones Act regime.

Under existing case law, however, the July 17, 2009 CBP proposal, and any subsequent action taken by CBP that would have the practical effect of overturning 30 years of existing precedent, constitutes a "Rulemaking" requiring Notice and Comment in the Federal Register under the Administrative Procedures Act. This is because such drastic action changing the entire way the offshore industry conducts business cannot be characterized as an "Interpretive Rule." An "Interpretive Rule" can only be used to reinterpret actions previously issued by an agency to provide for consistency in agency action. In other words, the use of an "Interpretive Rule" cannot be used to completely change an existing regime.

Conclusion

In conclusion, the July 17, 2009 proposal, and any future proposal that would have such broad implications, should be considered a substantive rulemaking and thus subject to Notice and Comment in the Federal Register under the APA. It is important to give all stakeholders the opportunity to fully be heard though the notice and comment process, ultimately resulting in a final rule. It would be manifestly unjust to move forward in any other way in view of the industry investment of time and money under the current regime and the potentially significant impacts that could result from DHS and CBP final action.

CBP's Proposed Reinterpretation of the Jones Act: More Disruption Offshore in 2010?

Starting in the summer of 2009, the offshore industry found itself in an internal battle with the United States Customs and Border Protection ("CBP") with regard to the use of foreign vessels operating in support of Outer Continental Shelf ("OCS") exploration, development, and production. On one side of the battle we found U.S.-flag and U.S.-built vessel interests (Jones Act proponents) and on the other side were foreign-flag vessel interests. The implications of the battle potentially could have brought offshore OCS work to a standstill, significantly affecting U.S. energy development.

Background

To set the stage, the Jones Act was enacted in 1920 with the intent to ensure that vessels operating in the coastwise trade were U.S.-flag and U.S.-built. The primary purpose of this law was to facilitate the national defense of the United States through the development of a well-equipped and suitable merchant marine with the capability and availability of coastwise qualified vessels to perform this work.

In 1976, CBP first began to interpret and apply the Jones Act to offshore oil and gas operations and offshore "coastwise points," which are oil and gas platforms and other lease areas; and CBP has ruled does not fall within the meaning of "merchandise" that would otherwise be prohibited under the Jones Act.

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The absence of onward negotiability, a straight bill of lading has the same characteristics as an order bill...the requirement of delivery only against production of the bill of lading...

The Hong Kong Position

A straight bill of lading is one which identifies a named consignee. It shares all the characteristics of an “order” bill save only that it is not negotiable. This raises important issues, which are discussed below.

Under U.S. law, a carrier is entitled to deliver the cargo to a named consignee of a straight bill without requiring production of the original bill. This is because a straight bill is considered merely a receipt for the goods, and not a document of title. Under English law, on the other hand, it is well established that a carrier does this at his own peril.

Prior to 2009, the position in Hong Kong was somewhat uncertain. In The Brij, Waung J. considered that “the essence of straight bills is that they are not negotiable and the contractual mandate is to deliver to named consignee without production of the original document.” Where a bill is a straight bill, therefore, the delivery of the cargo to the named consignee without production of the original bill would not constitute mis-delivery.

Waung J.’s view was not, however, shared by others. In a fairly recent decision in Carewins, cargo was shipped after the CFA determined the issue of mis-delivery, it proceeded to consider whether liability arising from the mis-delivery could be excluded by the relevant exclusion clause in the bill, which said:...the delivery of the cargo to the named consignee without production of the original bill would not constitute mis-delivery.

Can the Carrier be Exempted from Liability for Mis-Delivery?

Another issue of significance in this decision is that, prior to the English final appellate court’s decisions in Sze Hia Tong and Photo Production, mis-delivery constituted a fundamental breach of the contract of carriage, for which the liability of the carrier could not be limited or excluded. The contract-breaker would be liable fully for the loss and/or damage suffered by the cargo interests.

In Carewins, and Photo Production, however, the English final appellate court affirmed the principle of autonomy of contract—so no matter how unreasonable an exclusion clause is, a court is not entitled to reject it if the words are clear and fairly susceptible to having only one meaning.

In Carewins, after the CFA determined the issue of mis-delivery, it proceeded to consider whether liability arising from the mis-delivery could be excluded by the relevant exclusion clause in the bill, which said:

(continued on page 12)
In light of Carewins, carriers need to be very careful in drafting exclusion clauses. Unless a particular risk has been clearly and specifically excluded, it will be difficult to persuade the Court to give effect to the clause.

**Straight Bill—The Rotterdam Rules vs. Current English/Hong Kong law**

Neither the UK or Hong Kong has yet adopted the Rotterdam Rules. Nevertheless, for the purposes of discussions, the basic differences between the regimes in relation to a straight bill are set out below.

**Conclusion**

To summarize, under current English/Hong Kong law, a carrier should deliver the cargo only to the consignee named on the straight bill and upon production of the original bill. To deliver the cargo in any other manner will amount to mis-delivery for which the carrier will be liable.

### The Rotterdam Rules

**Article 46(a)** (Delivery relating to a non-negotiable transport document)

- Consignee is required to identify itself only “on the request of the carrier.”
- The carrier “may” refuse delivery if the person fails to properly identify itself as consignee.

**Article 59 (1)** (Limits of liability)

- The carrier’s liability arising from mis-delivery is limited as breaches of the obligations under the Convention.
- The carrier’s liability arising from mis-delivery is limited by clear and unambiguous contractual terms, but not under article IV rule 5 of the Hague-Visby Rules.

### English / Hong Kong Law

The consignee must identify itself. The carrier must refuse delivery if the person fails to properly identify itself as consignee.

### Note From The Editor

As a firm, we are always seeking out new ways to communicate with our clients. Mainbrace started many years ago as a paper newsletter, and over the years we have both grown our mailing list and modernized our publishing and distribution methods. We have added periodic e-mail alerts for when important time-sensitive developments call for immediate notice to our clients, and of course the Blank Rome Maritime Web site www.blankromemaritime.com—it always a good source for current information on developments in the maritime industry.

While we strive to keep our clients informed, we understand there is a fine line between useful information and “spam,” and we strive to provide the former without ever adding to the growing volume of the latter.

Mainbrace, of course, has always had the maritime industry as its core focus, and consequently its articles have always had an international bent. Blank Rome’s international practice has always covered much more than just the maritime field and encompasses everything from corporate and commercial transactions and securities issues; to real estate; to commercial and corporate litigation, arbitration, and mediation; to tax; to intellectual property; and so on.

As the firm’s international dispute resolution practice has grown, it has become increasingly evident to us that we needed to create a separate means of communicating with our clients in this arena. To this end, we are pleased to announce the inaugural issue of the International Litigation & ADR Update (see http://www.blankrome.com/index.cfm?contentID=37&itemID=2160), which was published on February 24, 2010.

The goal of this new newsletter is the same as with Mainbrace—to communicate with our clients about important legal developments. The focus, however, is very different. Whereas Mainbrace will continue to concentrate its attention on the maritime industry, the coverage of our new newsletter will span all industries and will aim instead to focus on issues that may be particular to international dispute resolution—be it litigation, arbitration, or mediation—but which may arise in any industry or area of business.

So, for instance, the first issue of International Litigation & ADR Update contained articles on (1) foreign data privacy laws, (2) sovereign immunity and enforcement of foreign arbitration awards, (3) the application of foreign law in US Federal Courts, (4) foreign manu-

4. Carewins Development (China) Ltd v Heung Shipping Ltd [HCC No. 15 of 2008]
6. The carrier’s liability under the presentation rule may be modified to the extent of the law and custom of the place of delivery. It should be noted that “custom” means custom in its strict sense—mere practice is not sufficient— to communicate with our clients about important legal developments. The focus, however, is very
SOLAS Chapter V chart requirements are not met by Electronic Chart Systems (“ECS”) that do not comply with the IMO Performance Standard, even if using “official” ENC. Similarly, an ECDIS using non-government electronic chart data also does not meet SOLAS requirements. If a vessel has an ECS or non-government data, its SOLAS V chart carriage requirements can only be met by the use of a normal folio of paper charts.

Ship Crew training and qualification can be significant issues with ECS and non-government chart data. An owner who fails to man his vessel with crew properly trained and competent to operate the ECS can face the same liability issues as for failing to provide adequate charts. Timely and accurate chart updates also can be a significant issue with an ECS or with non-government chart data, and it also can be the source of an unseaworthiness determination in casualty litigation.

The lack of proper charts is an seaworthiness condition that can preclude a vessel owner from limiting its liability for damages. Courts have found vessels unseaworthy when their owners have failed to provide up-to-date charts or charts with the correct scale.

A turnover proceeding is directed at the holder of the property. Therefore, the property must be within the Court’s territorial jurisdiction in order for it to be reached by the Court’s process of attachment. A turnover proceeding, on the other hand, is directed against the person or entity that holds the property, not against the property itself. Therefore, the separate entity rule is inapplicable. If the garnishee is subject to the Court’s personal jurisdiction, it must comply with the Court’s orders, notwithstanding that the property which is the subject of the order is located beyond the Court’s territorial jurisdiction.

Personal jurisdiction over a foreign bank or corporation is not established solely by the presence in New York of a subsidiary or affiliate, if the foreign and local offices are different corporate entities. In that event, something more will have to be shown, such as that the local branch or office is an agent of the foreign entity. In Koehler, the judgment creditor argued that the Bank of Bermuda’s subsidiary in New York was an agent for the Bermudian entity, and that this relationship was sufficient to establish personal jurisdiction here over the latter. The parties litigated that and other issues for some ten years, until the Bermudian bank finally consented to jurisdiction. Therefore, there was no substantive holding whether in fact the subsidiary’s activities established a sufficient agency relationship.

Another basis for holding a local subsidiary’s presence here is sufficient to establish personal jurisdiction over a foreign entity is that the entities themselves disregarded their separate corporate integrity. In Yayasan Saboh Dua Shipping SDN v. Scandolinan Lipidum Carriers Ltd, 335 F. Supp. 2d 441 (S.D.N.Y. 2004), a Rule B attachment served upon the New York branch of a Cayman Islands bank was upheld, notwithstanding the defendant’s bank account was located in the Cayman Islands branch, because “the Cayman Islands branch is a paper bank entirely controlled and managed by Danske Bank’s New York operation.” Yayasan involved a prejudgment attachment and branches, not separate corporate entities. Nevertheless, similar reasoning conceivably may be used to find a basis on which to exercise personal jurisdiction in a turnover proceeding against a foreign bank.

Although C.P.L.R. § 5225 itself may not support a fishing expedition in the sea of banks and potential corporate debtors of judgment debtors, that is not necessarily a reason for a sigh of relief. There are other post-judgment remedies available to judgment creditors that may serve that purpose. C.P.L.R. § 5222 provides that judgment creditors’ attorneys may serve a restraining notice upon potential garnishee, which restrains the recipient from disposing of any judgment debtor’s assets it may possess. Additionally, C.P.L.R. § 5223 and 5224 permit attorneys to serve questionnaires, known as information subpoenas, upon potential garnishers. These devices do not require a prior showing that the garnishee possesses the judgment debtor’s property. They are regularly used by collection lawyers on a sort of “mass produced” basis. Given that these remedies, like a turnover proceeding, are directed against garnishers personally, we see no reason such devices could not be used to find and restrain property located abroad, as long as the garnishee is subject to personal jurisdiction in New York.

This article is an abridged version of the article “ECDIS and the Law,” which was published in the February 2010 edition of Seaways, the monthly journal of the Nautical Institute. Permission to republish it here is gratefully acknowledged.

Liability for Non-Approved Electronic Chart Systems

The Electronic Chart Display and Information System (“ECDIS”) has unquestionably improved the practice and safety of navigation. Compared with paper charts, paperless navigation has reduced overall costs and the workload on navigating officers. Most importantly, ECDIS has reduced the rate of navigation related accidents. Some crew and vessel owners, however, have attempted to reap the benefit of paperless navigation without using fully approved ECDIS. While the option may seem to be an attractive way to further reduce costs, it can subject an owner to increased liability if the non-approved electronic chart system is implicated in a navigation casualty.

The Legal Requirements for Charts and ECDIS

The lack of proper charts is an seaworthiness condition that can preclude a vessel owner from limiting its liability for damages. Courts have found vessels unseaworthy when their owners have failed to provide up-to-date charts or charts with the correct scale.

Chart carriage requirements are contained in SOLAS Chapter V, which United States courts have found has the status of general maritime law. Chapter V, Regulation 2, requires that charts must be “issued by or on the authority of a Government, authorized hydrographic office or other relevant government institution.” Regulation 27 requires that charts and nautical publications, such as sailing directions and other publications necessary for the intended voyage, shall be adequate and up-to-date.

Chart carriage requirements may be met by ECDIS. To satisfy the requirement of Chapter V Regulation 19, the ECDIS must be type approved, utilize “official” Electronic Navigational Charts (“ENC”) conforming with International Hydrographic Organization standards, and must meet the International Maritime Organization (“IMO”) ECDIS Performance Standards. The vessel must also be provided with a back-up arrangement for the ECDIS, which can be an “appropriatefolio of paper charts” or an electronic back-up approved by the relevant maritime administration.

Conclusions

ECDIS has the potential to improve safety. Using non-type-approved systems, however, may raise liability issues. Watch officers need to be made aware of the types of systems they have on board and of the operational and legal limitations when using non-approved equipment. Owners with non-approved systems on their vessels must ensure that SOLAS chart carriage requirements continue to be met and that navigation is done on paper charts.
The Peoples Republic of China ("PRC") recently implemented its first comprehensive anti-marine-pollution regime by promulgating the "Regulations on the Prevention and Control of Ship-Induced Pollution of the Marine Environment." The Regulations, which repeal the 1983 Regulations on Prevention of Ship-induced Sea Pollution, will become effective on March 1, 2010. For those trading with the United States, many of these requirements are similar to those contained in the Oil Pollution Act of 1990.

The following is a brief summary of the major provisions of the Regulations.

Application

The Regulations apply to any ship-induced pollution and any ship-related operation that causes, or may cause, pollution damage in the internal waters, territorial waters, contiguous zone, exclusive economic zone, and continental shelf of the PRC and/or all other sea areas under Chinese jurisdiction.

The China Maritime Safety Administration ("MSA")

The MSA is empowered by law as the government body to administer the regime for preventing and controlling marine pollution. If a pollution incident occurs, the MSA can take cleanup, salvage and wreck removal measures, or any other necessary action to mitigate the pollution damage, the costs of which will be for the account of the party which is liable for such. The MSA will have priority to receive compensation for costs expended. The MSA is also entitled to detain the offending vessel until its investigation of the incident is completed and the costs paid for the clean-up operations—through a financial guarantee, in a form yet to be determined by the MSA—can be given in lieu of a cash payment.

Emergency Response Plans

An emergency response plan for the prevention and control of marine pollution must be prepared by shipowners, operators and/or managers, and must be carried on board the vessel. The MSA has explained that a MARPOL Shipboard Oil Pollution Emergency Plan will be sufficient to meet this requirement.

Ship Operation and Record Requirements

The Regulations cover a wide range of operational requirements for the purpose of the control and prevention of ship-induced pollution, including: (1) the discharge/reception of oily wastes; (2) dumping of waste/permission for dumping; (3) supervision of loading, lightering, and discharging of hazardous cargoes; (4) supplying/receiving bunkers; and (5) ship scrapping. Records for discharging ship wastes are required to be kept on board for 2 years; records for discharging oily waste or waste containing hazardous residues should be kept on board for 3 years.

Compulsory Insurance

All vessels trading within the territorial waters of the PRC (except those ships that are below 1,000 gt and carrying non-oil cargoes) are required to carry insurance or other financial security to cover claims arising from oil pollution damage. The insurance should comply with the provisions of the Chinese Maritime Code or the 1992 Civil Liability Convention ("CLC") and 2001 Bunker Convention, both of which China has ratified. The qualifications of the underwriters that provide for the oil pollution liability insurance coverage will be determined by the MSA.

PRC Domestic Fund

Receivers of regular oil cargoes transported by ocean to a port of China are required to contribute to a domestic fund, as China is not a signatory country to the IMO Fund Convention. The domestic fund will be used to compensate for ship-induced pollution claims that exceed the limits set by CLC. The management committee of the domestic anti-pollution fund will comprise the officers designated by relevant government agencies and representatives nominated by major receivers of persistent oil. The Ministry of Finance and the Ministry of Transportation recently finished the final draft of the implementation rules relating to the establishment and management of the fund. It is thought that the rules will be formally promulgated within the next few months.

diction in a plenary law suit or in an action to confirm an arbitration award, where grounds might not otherwise exist, but it would make no difference in an action to enter a judgment on a foreign judgment, because the latter does not require a basis of personal jurisdiction. This would be of particular interest in cases involving Foreign Freight Agreements and other contracts which call for disputes to be resolved in the English Courts, rather than in arbitration. Additionally, a creditor who holds a foreign arbitration award could confirm the award as a foreign judgment, and then as a New York judgment, despite an absence of grounds for personal jurisdiction in New York.

Returning to Koehler: A post-judgment turnover proceeding is governed by Section 5225 of New York State's Civil Practice Law and Rules. It is available in both the federal and state courts, because the Federal Rules of Civil Procedure adopt State law regarding post-judgment remedies. The proceeding is available in both maritime and nonmaritime cases.

Section 5225(a) provides for a turnover proceeding with respect to property in the possession of the judgment debtor itself. The judgment debtor may be ordered to turn over such property, even if the property is located abroad. However, before obtaining such an order, the judgment creditor must show that the judgment debtor actually possesses property. In other words, the Court may not simply order the debtor to pay the debt, but only direct the debtor to turn over specific property or funds that it has been shown to possess.

Koehler explained that a judgment debtor may be ordered to turn over its foreign assets because the debtor is subject to the Court's personal jurisdiction and, therefore, to orders directed at the debtor personally. However, that would suggest that a turnover order is not available against a judgment debtor where the New York judgment was based upon a foreign judgment and entered here despite a lack of personal jurisdiction.

Section 5225(b) provides for a turnover proceeding with respect to the judgment-debtor's property held by a third-party garnishee. This section provides for a "special proceeding," in which the garnishee is named as a defendant. The garnishee must be identified, and, in addition to a showing that the garnishee in fact possesses the (continued on page 4)
Mainbrace Update

Enforcement of Judgments in New York: Koehler v. Bank of Bermuda Ltd.

Most participants in the marine industry are aware of the relatively short lived frenzy of Rule B attachments of electronic funds transfers being processed by intermediary banks in New York City. Most are also aware of the judicial holdings that such attachments could be avoided merely by submitting to the personal jurisdiction of the Courts in New York by registering to do business here. Consequently, hundreds, if not thousands, of shipping companies preferred the risk of submitting to jurisdiction to the certainty of interference with their funds transfers in the event of a claim, and registered with the New York Department of State.

Fewer are aware of a decision of New York State’s highest Court in June 2009, which magnified the risk of submitting to personal jurisdiction here. Still, most of those who became aware of the decision continued to believe the avoidance of restraints on funds transfers outweighed the potential significance of the new risk.

In October 2009, the Second Circuit overruled its earlier decision that commenced the flood of Rule B cases, and held electronic funds transfers may no longer be attached. The Shipping Corp. of India v. Jaldhi, 585 F.3d 58 (2d Cir. 2009). Since then, a consistent flow of District Court decisions has frustrated every attempt to get around Jaldhi that the imaginations of the best maritime lawyers in New York could muster.

In view of Jaldhi, the risk-benefit analysis of registering in New York must be looked at again. Whether registering is of any benefit at all to a particular company is something to be reviewed by each client with its attorney. The purpose of this article is to explain the new risk.

In Koehler v. The Bank of Bermuda Ltd., 12 N.Y. 3d 533 (2009), New York State’s Court of Appeals held the holder of a judgment in a New York Court can obtain an order directing a foreign garnishee holding assets of a foreign judgment debtor to deliver such assets to the judgment creditor. In Lenchysyn v. Pelko Electric, Inc., 723 N.Y.S. 2d 285 (A.D. 4 2001), New York’s Appellate Division for the Fourth Department (which does not cover New York City), held a judgment may be entered in New York upon a foreign judgment, pursuant to New York’s Uniform Foreign Country Money Judgments Recognition Act, despite the lack of an independent basis for exercising personal jurisdiction and the absence of any assets within the State.

Similarly, a federal statute permits a judgment in one U.S. District Court to be registered as a judgment in any other U.S. District Court, irrespective of the existence of grounds for personal jurisdiction. Koehler was just such a case.

In other words, registering to do business in New York would subject a foreign defendant to personal juris- Pre-Contracting Requirement for Oil Spill Clean-Up

The operators of any ship carrying polluting and hazardous cargoes in bulk or of any other vessels above 10,000gt must maintain a pollution clean-up contract with an MSA approved pollution response company prior to entering a Chinese port. The MSA has stated that four levels of contractors will be designated to have the capability to respond to a spill depending on the size and extent of the spill. Further guidance on this implementation will be released soon.

Reporting

Any pollution arising or likely to arise from an incident within the territorial waters of the PRC or beyond, but under PRC jurisdiction, must be reported to the local MSA. The incident report must include the following information:

- The ship’s name, nationality, call sign or number;
- The time, place, weather, and sea conditions of the incident;
- The pollution control, disposal measures adopted and to be adopted, and the status and the salvage requirements; and
- The type, quantity, stowage, and location of the polluting substances;
- The extent of the pollution;
- Primary determination of the cause of the incident; and
- The control, disposal measures adopted and to be adopted, and the status and the salvage requirements;

Any other required information.

Penalties for Violation

Penalties for violation of the Regulations will be in the range of RMB 10,000 to RMB 500,000 (about $1,500 to $75,000, USD), depending on the facts of the incident. The MSA has the authority to increase the penalty up to RMB 250,000 to RMB 500,000 if the ship or its management unit intentionally conceals a pollution incident. How -

The International Law of the Shipmaster: Shipmasters on the Frontline

The shipmaster today is coming under greater scrutiny than ever before. As the owner’s principal agent, it is important that the owner and the master understand where the master stands in law at any time. The situation is complex. Written to fill a need voiced by owners, masters, P&I clubs, agents, labor organizations, governments and others, The International Law of the Shipmaster by John A. C. Cartner and Richard P. Fiske of Cartner & Fiske LLC, and Tara L. Leiter of Blank Rome LLP, describes the complexity of the legal situation of the modern master. This book will serve as a ready reference and as a way to become familiar with “shipmaster law.” No similar book has been written since the 1st edition of Abbott on Shipping (1912).

The book is divided into three parts. The first part comprises a survey of the international law as it relates to the master. It introduces the law of the shipmaster in the complexity of the legal situation of the modern master. This book will serve as a ready reference and as a way to become familiar with “shipmaster law.” No similar book has been written since the 1st edition of Abbott on Shipping (1912).

In the absence of attachable property located here, there must exist some other grounds upon which the New York Court may exercise jurisdiction over the person of a foreign defendant in an action on the merits or a proceeding to confirm a foreign arbitration award. The Court rejected the argument that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards dispenses with the necessity of a basis of personal jurisdiction.

However, the same is not true with respect to entering a judgment upon a foreign judgment. In Lenchysyn v. Pelko Electric, Inc., 723 N.Y.S. 2d 285 (A.D. 4 2001), New York’s Appellate Division for the Fourth Department (which does not cover New York City), held a judgment may be entered in New York upon a foreign judgment, pursuant to New York’s Uniform Foreign Country Money Judgments Recognition Act, despite the lack of an independent basis for exercising personal jurisdiction and the absence of any assets within the State.

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behind the fog

normally, when a fog lifts we see the world around us the way it was before. as disoriented as we might feel when fog settles upon us, we draw comfort from knowing the things we saw before are still there and will reappear.

the economic crisis of 2008–2009 continues to leave many segments of the shipping industry under such a shroud. most of us believe the fog will lift, perhaps sooner...