BLANK ROME
MARITIME

MARCH 2017 ■ NO. 2

MAINBRACE

www.blankromemaritime.com

INSIDE THIS ISSUE

1 A Note from the Chair

2 Ballast Water Management: Latest Developments and More Things You Should Know

4 Blank Rome Is Proud to Sponsor and Present at CMA Shipping 2017

5 Blockchain Technology: Securing and Transforming Commercial Transactions, and Its Implications for Maritime Trade

7 Concurrent Plenary Insolvency Proceedings: Additional Options for Cross-Border Reorganization and Liquidation

Innovative Uses of Chapter 15: Energy Coal and Vneshprombank

10 Enforcement of Foreign Judgments and Foreign Arbitral Awards in the United States

11 Jeremy A. Herschaft Appointed 2017 Tulane Law School Distinguished Admiralty Practitioner-In-Residence

13 U.S. Coast Guard Proposes Significant Updates to Marine Casualty Reporting Damage Thresholds

15 Your Vessel Just Discharged Oil in the Lone Star State … Have You Notified the Texas General Land Office?

17 Gulf Coast Update: Personal Jurisdiction Trend Continues to Favor the Defense

Sean T. Pribyl Presented with National Award by the Department of Justice

20 Bridging the Gap: AMLC Launches Government Relations Initiative to Further Practice Area Understanding between Private and Government Counsel

22 Risk-Management Tools for Maritime Companies

A NOTE FROM THE CHAIR

JOHN D. KIMBALL

JKimball@BlankRome.com

JOHN D. KIMBALL

PARTNER

What's different about "change" in 2017? It certainly seems that we need to redefine what we mean when we consider the term itself.

Shipping historically has been a conservative industry, but its adaptability over the long haul has been proven time and time again. Some sectors of the industry will be coming to this year's CMA Shipping 2017 conference with a more buoyant step than we have seen in recent memory, and for good reason. Only time will tell if the global markets will create the right environment for a strong economic recovery. With the Trump administration promising fiscal stimulus and interest rates still at low levels, however, there is a feeling of optimism in the room.

From a maritime lawyer's perspective, being adaptable in a "change" environment has never been more important. Classic maritime legal work, such as handling cargo claims or charter party disputes, is at a low ebb, but financial restructuring and workouts have surged. And, addressing government regulations remains a challenge; whether we will see significant deregulation in the Trump administration is a matter of guesswork. Regardless, it is certain that more change is coming—it is a time to stay on our toes! The good news is that the buzz around CMA Shipping 2017 will be more upbeat than we have felt for some time.

We hope you enjoy this issue of *Mainbrace.* As you will see, our articles are as diverse as our practice and cover a wide range of subjects, including ballast water management, chapter 15 bankruptcy actions, the future of "blockchain" technology in shipping, enforcement of foreign judgments and arbitration awards, new developments concerning the scope of U.S. court jurisdiction, and the applicability of Texas oil spill regulations.

As always, we welcome your comments and questions, and we always appreciate receiving ideas for future articles. ◻

Ballast Water Management: Latest Developments and More Things You Should Know

BY JEANNE M. GRASSO

Grasso@BlankRome.com

JEANNE M. GRASSO
PARTNER

As briefly described in my recent January *Mainbrace* article, ballast water management has been one of the most challenging and oftentimes frustrating regulatory issues of the past decade. The principal reason is that the international regime under the International Maritime Organization's ("IMO") Convention on the Control and Management of Ships' Ballast Water and Sediments ("Convention"), and the U.S. regime under the National Invasive Species Act ("NISA"), are not quite in sync when it comes to approving equipment to meet the standards set forth in the Convention and the U.S. Coast Guard's ("USCG") NISA regulations.

The fact that the IMO and USCG testing protocols for ballast water management systems are not aligned, and that ballast water management systems can be type-approved under one regime and not the other, has created a conundrum for shipowners, especially now that the Convention enters into force in September 2017 and compliance with both regimes will be required on a phased-in schedule. Ideally, these compliance schedules will be able to align because shipowners obviously want to invest capital only once to comply with both regimes, and should not be put in the position of making a significant capital investment to comply with the IMO regime unless it will also comply with the USCG regime. This may not be practically possible as things stand now. It is also imperative that shipowners are able to install a system that actually works, and some of the systems approved per the Convention have raised questions in this regard.

Compliance Triggers and Options

To recap, the trigger for compliance with the Convention's requirement for installation of a ballast water treatment system is the first IOPP renewal survey after September 8, 2017, the entry into force date of the Convention, though there are ongoing discussions about moving this date out a couple years. The trigger for compliance with the USCG's regulations, which are completely separate and distinct from the Convention as the United States is not party to the Convention, is the first drydock after January 1, 2014 or January 1, 2016, depending on the vessel's ballast water capacity. The compliance options under the USCG regime are: 1) install and operate a USCG type-approved ballast water management system (there are now three, with a fourth in the pipeline, but there are operational restrictions for each); 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, which is unlikely); 4) do not discharge ballast water into U.S. waters (not practical); or 5) discharge ballast water to an onshore facility or to another vessel for purposes of treatment (not available).

Extensions and USCG Type-Approved Systems

To make the compliance process more reasonable at the outset (because until December 2016 there were no USCG type-approved systems), the USCG implemented an extension policy and issued extensions to the original compliance dates to nearly 13,000 vessels. Much has changed now with the extension program in light of the USCG type-approvals for three systems: Optimarin, Alfa Laval, and OceanSaver. The first two systems treat ballast water with filtration and ultraviolet light, and the third with filtration and electro-dialysis, to reduce the number of living organisms to below the regulatory limits.

> ► ...while the USCG is evaluating the justifications for ***not*** installing the three current USCG type-approved systems, it will also want to know the company's plans for the future—what type of systems will the vessels need, what flow rates, how much power, how big of a footprint, likely location of installation, whether the company has had any discussions with manufacturers, and the like.

These systems are complex and technical specifications must be evaluated in depth to determine if these systems are appropriate for a particular vessel. Key issues include flow rates, hold times, power level/consumption, water temperature, and size and place requirements. These key parameters are listed in each system's individual type-approval certificate. For

(continued on page 3)

Ballast Water Management: Latest Developments and More Things You Should Know **(continued from page 2)**

example, the Optimarin and Alfa Laval systems have 72-hour hold times, which may prove challenging for many vessels trading to the United States, depending on their routes. Similarly, the OceanSaver system requires venting of hydrogen gas, which may prove difficult for some types of vessels.

These three type-approvals have prompted the USCG to reevaluate its extension program, which has become much more stringent in the past few months and even more stringent on March 6, when the USCG published the Marine Safety Information Bulletin OES-MSIB 03-17, Ballast Water Management ("BWM") Extension Program Update. To summarize the evolution:

- Before, extensions to the compliance date were easy to get as there were no USCG type-approved systems and other compliance options were generally not practical. Now that there are three type-approved systems, shipowners must justify why those systems are not appropriate for a particular vessel if an extension is desired. Plus, depending on the particular situation, shipowners will need to evaluate what they need to do to come into compliance, including providing a strategy and path forward, which may include a timeline and installation plan.

- More importantly, extensions will no longer be tied to a vessel's drydock date and will only be issued for shorter periods of time base on the analysis/information contained in the extension request.

- Original extension requests were required to be submitted 16 months to one year in advance and determinations were made expeditiously, usually within a month or so. Now, that is not necessarily the case, with determinations sometimes not being made until drydocks are less than one year away.

- Supplemental extensions were originally required to be submitted 90 days in advance, but now it is one year, as with the original extension request.

- Before, vessels with AMSs could also get extensions. Now, if a vessel has an AMS installed, it will not qualify for an extension and will be required to use the AMS, which can be used for five years after the vessel's compliance date. In fact, some extensions are believed to have been rejected for this very reason. In addition, now that USCG type-approved systems are available, a vessel will not be permitted to install an AMS—it will need to install a type-approved system if it is appropriate for the vessel.

- And, importantly, the USCG confirmed that existing extensions will be honored until the date specified in the letter.

Planning Ahead for Compliance

Some of these changes happened on a somewhat *ad hoc* basic, but now that the new policy is published, there may be some more predictability and certainty going forward. In that vein, owners should begin planning for compliance, as the USCG, when considering extensions going forward, will want to see a company's plans for coming into compliance. In other words, while the USCG is evaluating the justifications for not installing the three current USCG type-approved systems, it will also want to know the company's plans for the future—what type

of systems will the vessels need, what flow rates, how much power, how big of a footprint, likely location of installation, whether the company has had any discussions with manufacturers, and the like.

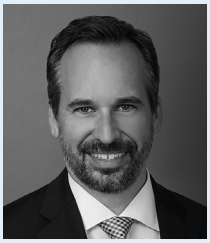
And, as noted previously, compliance with the USCG's ballast water management requirements is a Port-State Control priority. In early February, the USCG initiated what appears to be its first civil penalty proceeding against the operator of the bulk carrier after identifying ballast water discharge violations. Investigators determined that ballast water was discharged from the vessel without the use of a USCG type-approved ballast water management system and without a valid extension, which is a violation of the National Invasive Species Act—with a possible penalty of up to $38,175. The violations were found during a routine Port-State Control examination. According to the Sector Commander, "[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."

As such, shipowners must ensure the proper management of ballast when operating in waters subject to U.S. jurisdiction, which includes utilizing one of the compliance options available or ensuring that the vessel has a valid extension to its compliance date. And, very importantly, shipowners should plan now for compliance in the future. ◻

This article was published in *Maritime Executive* on March 10, 2017. Reprinted with permission.

Blank Rome Is Proud to Sponsor and Present at CMA Shipping 2017

Blank Rome LLP is proud to be a sponsor of CMA Shipping 2017, and honors CMA's annual tradition of bringing together the international shipping community in North America's leading commercial shipping center to discuss critical industry topics, trends, and updates.



MThomas@BlankRome.com
MATTHEW J. THOMAS

Please join Blank Rome Partner Matt Thomas as he presents on "The Impact on Shipping of the Trump Administration" during the "Market Opportunities in the Time of Donald Trump and BREXIT" breakout session, on Tuesday, March 21, at 2:15 p.m.

Blockchain Technology: Securing and Transforming Commercial Transactions, and Its Implications for Maritime Trade

BY KEITH B. LETOURNEAU

KLetourneau@BlankRome.com

KEITH B. LETOURNEAU
PARTNER

A recent news article about an oil commodities transaction sparked considerable interest in the maritime transportation sector when worldwide commodities trader Mercuria announced it would employ "blockchain" technology to carry it out. Previously, blockchain technology served as the foundation to secure bitcoin transactions. Now, this technology promises to supersede hundreds of years of maritime commercial practice by replacing bills of lading and attendant transactional documents and substituting a secure online mechanism to buy and sell goods. IBM CEO Ginni Rometty, in an opinion piece in the *Wall Street Journal* on November 7, 2016, wrote that "[t]oday, blockchain—the technology behind the digital currency bitcoin—might seem like a trinket for computer geeks. But once widely adopted, it will transform the world."

Blockchain in the World of Maritime Transactions

Currently, and depending upon their complexity, maritime transactions involve a litany of paper documents, including multiple bills of lading, letters of credit, contracts of sale and/or charter agreements, and the transmission of those documents and payment proceeds by various means among myriad parties. Whether those documents are received or presented in a timely fashion may implicate indemnity obligations set forth in the underlying sales contract or charter. Until present day, good reason existed for these multiple transactions and the obligations they imposed. Each party in the transaction chain wanted assurance of payment for its performance, and protection against the unauthorized delivery of the goods being transported. No foolproof mechanism existed to ensure that the carrier could deliver the goods to the authorized recipient without error.

Blockchain technology, also known as distributed-ledger technology, may sweep these documents into history's dustbin. The implications are profound given that the World Economic Forum estimates that trade finance constitutes a $10 trillion annual market. The technology's cryptographic protections make it virtually tamper-proof. Each transaction must be signed using a private key, which prevents access by unauthorized third parties, and the transaction requires several independent confirmations during the process. Blockchain technology logs every participant in the process, which supporters hope will preclude money laundering activities and create greater transparency. The technology provides for a revision-proof, public timestamp for each transaction.

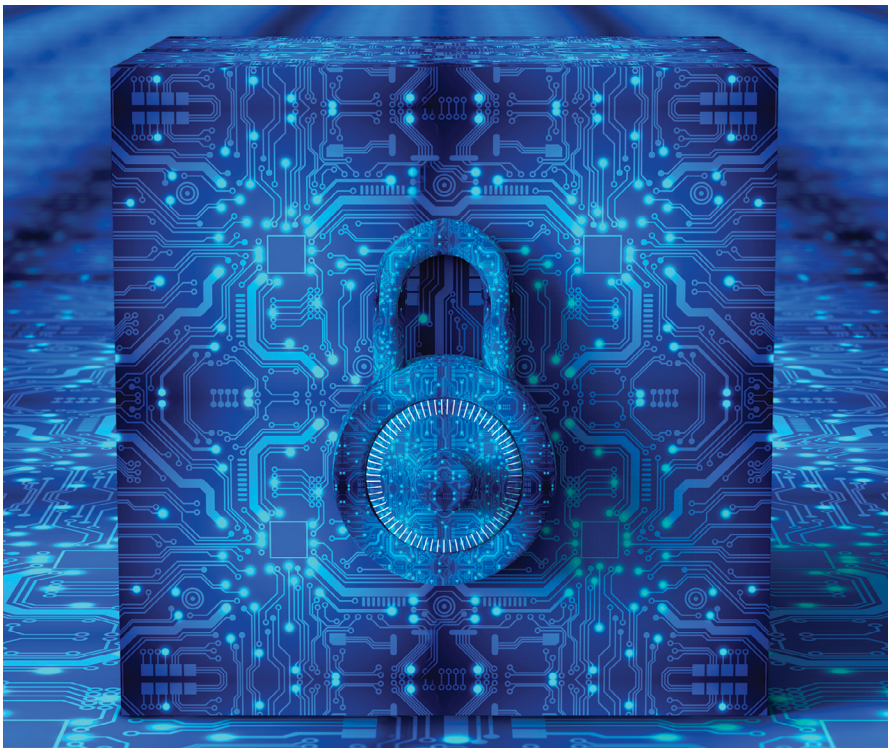
Potential Liabilities

While this new technology may result in a new way of doing business, it would seem that the underlying protections afforded by contract terms and conditions must still be part of the process. Blockchain technology may be able to provide a secure mechanism to pay for the goods and transfer title, but absent incorporating contract clauses into its architecture, it cannot address the vagaries of what happens during the actual physical transportation (for example, the vessel is delayed due to weather at the destination port, berth congestion occurs, the cargo is damaged during offloading, the vessel allides with the dock causing damage, port officials quarantine the port, etc.). Addressing these potential eventualities is the fundamental purpose of the charter and contract of sale terms and conditions. Engaging blockchain technology to buy and sell goods without including clauses addressing *force majeure,* lien rights, demurrage and its exclusions, notice of arrival, speed and consumption, and dispute resolution provisions, among many others, would leave the contracting parties exposed to a wide variety of potential liabilities. Moreover, each seller and buyer, and each charterer and owner, typically has its own terms and conditions that apply to each peculiar type of transaction. How do these parties preserve their terms and conditions in the new arena created by blockchain technology? The technology employed must somehow be configured to include the parties' terms and conditions at inception, failing which liability exposure will be wide open.

> ► Couple blockchain technology with artificial intelligence and quantum computing as the years go on, and online contractual transactions may become completely self-executing and enforcing.

Blockchain on the Internet

Presently, there is no universal blockchain technology that governs Internet transactions. A variety of companies, including IBM, Bosch, Microsoft, Samsung, Toyota, Visa, and others, are developing applications to implement the technology and expand its global reach. Nasdaq employs blockchain technology in its Linq system. To date, more than 2,500 blockchain patent applications have been filed. Other companies, including Thomson Reuters, are forming consortiums to create a broad-based blockchain structure that serves a variety of industries. For example, the Linux Foundation Hyperledger consortium is drawing hundreds of companies and organizations to create standardized blockchain software. In 2016, the European Union created a regulatory task force to study blockchain technology, which may transform EU financial transactions, and earmarked €1.1 million for a 12-month pilot project to explore the scope of regulatory technology ("regtech"). If impervious to hacking, the technology may bolster financial stability, and open more avenues for government oversight of financial transactions. Standardization of blockchain tecnology could foster the development of far more "smart contracts" (that is, computer protocols that facilitate, verify, or enforce contract performance), ease intellectual property transfers, expedite government contracting and supply-chain services, and reduce infrastructure, compliance, and auditing costs. Couple blockchain technology with artificial intelligence and quantum computing as the years go on, and online contractual transactions may become completely self-executing and enforcing.



The impact on intermediaries in the supply chain could be staggering. Seemingly, blockchain technology will reduce the need for middle men, which would adversely affect the role of commodity brokers and traders. How they will market their services when online access is readily available to create direct links between buyer and seller will make their task of creating value in the marketplace even more difficult.

Blockchain is not the only transactional technology under development, and we can expect that it will compete with other technology and perhaps morph into variant structures as the years progress. It is, however, the current wave of the future, and its implementation in a wide array of industries, including the maritime sector, appears just over the horizon.

Lingering Considerations

For naysayers in the crowd, we should point out that the maritime industry has by no means embraced blockchain technology at this stage of its development, and whether entrenched and time-honored commercial practices will willingly give way to online-based technology is not at all certain. As of today, the technology is not widely available or commonly leveraged into usable applications beyond bitcoin, and whether regulatory authorities will approve of this technology and its security protections in less than a glacial age is problematic. Moreover, there are those who believe that blockchain technology advocates are a long way from proving its viability in commercial scenarios that involve identity authentication, or the protection of financial or privacy data.

Consider, though, that when 9/11 occurred, presidential lieutenant Ari Fleischer first learned of the incident via pager and President Bush spoke to his secretary of state via landline from an elementary school; 16 years later, the nation reads tweets from President Trump almost daily. ◻

Concurrent Plenary Insolvency Proceedings: Additional Options for Cross-Border Reorganization and Liquidation

BY MICHAEL B. SCHAEDLE AND BRYAN J. HALL

Schaedle@BlankRome.com

MICHAEL B. SCHAEDLE
PARTNER

BHall@BlankRome.com

BRYAN J. HALL
ASSOCIATE

For the most part, the U.S. Bankruptcy Code formally and specifically deals with cross-border cases through chapter 15, a statute based on the Model Law on Cross-Border Insolvency promulgated by the United Nations Commission on International Trade Law ("UNCITRAL") in 1997.[1] The purpose of chapter 15 is to enhance cooperation between U.S. and foreign courts in connection with cross-border insolvencies to promote greater legal certainty for trade and investment, fairness, value optimization of a debtor's assets, and the protection of investment and employment.[2] Chapter 15 serves these goals by providing a foreign debtor's representative with access to U.S. courts to assist a foreign main or non-main proceeding, which has been raised cross-border in a jurisdiction that is either the center of the debtor's main interests or in which the debtor has an important facility.

The One Plenary Proceeding Myth

The chapter 15/UNCITRAL concept of cross-border reorganization assumes that most distressed companies will have a defined center of business and therefore will gravitate jurisdictionally to a specific court in a single country. This court then will have a dominant say—a "plenary" or full say, if you will—over the property and affairs of the debtor; a say that requires support and comity from other jurisdictions in which key debtor assets are located. Indeed, chapter 15 references "ancillary"

Innovative Uses of Chapter 15: Energy Coal and Vneshprombank

Schaedle@BlankRome.com

MICHAEL B. SCHAEDLE
PARTNER

RAntonoff@BlankRome.com

RICK ANTONOFF
PARTNER

BY MICHAEL B. SCHAEDLE AND RICK ANTONOFF

Blank Rome has the distinction of representing the foreign representatives in two recent chapter 15 bankruptcy cases that broke new ground in U.S. law by being the first to recognize foreign insolvency proceedings under the newly revised insolvency law of Italy and a bank insolvency proceeding in Russia.

Revised Italian Insolvency Law *(Concordato Preventivo)*

Energy Coal is a petroleum coke and specialty fuel merchant and supplier based in Genova, Italy, with substantial business in the United States as well as a complex capital structure. When the Delaware Bankruptcy Court recognized Energy Coal's *concordato preventivo* proceeding in Genoa, it was the first U.S. bankruptcy court to recognize a *concordato preventivo* since the recent amendments to the Italian Insolvency Law that were enacted to facilitate debt restructurings and distressed investing, while binding dissenting creditors to homologated arrangements.

Energy Coal has obtained the homologation of its *concordato* and has successfully reorganized on a stand-alone basis. The foreign representative is seeking to implement the Energy Coal restructuring plan in the United States by motion.

(or supportive) cases in its title and, for the most part, is about using the power of the U.S. bankruptcy court to assist a foreign court with plenary power in restructuring a foreign debtor. The very idea of a jurisdiction with plenary or full power over a debtor's restructuring might suggest that the existence of such power in a single jurisdiction limits the ability of other systems, nations, and courts to likewise assert plenary or full power over the debtor.[3]

This is a conceptual mistake, which can lead to strategic error in planning for a cross-border reorganization or other international collective remedy. It is critically important to recognize that bringing a plenary bankruptcy case in one jurisdiction does not preclude the filing of plenary cases for the same debtors in multiple jurisdictions[4] or the filing of plenary cases for different, but closely related, sets of debtors that are integral parts of the same business.[5] Indeed, chapter 15 explicitly recognizes that the same debtor can, and, in certain circumstances, *should,* be a debtor in an existing plenary foreign proceeding and also in a new plenary proceeding in the United States, even as the same debtor has a concurrent ancillary proceeding pending under chapter 15.

Concurrent Plenary Proceedings under the Bankruptcy Code

Bankruptcy Code section 1511 permits a foreign representative to file a plenary chapter 7 or chapter 11 case for a foreign debtor after its foreign main proceeding has been recognized in chapter 15.[6] The authority to file a plenary proceeding in appropriate circumstances exists because a foreign representative in a chapter 15 proceeding cannot take advantage of the full suite of powers that are available to a trustee in chapter 7 or a trustee or debtor-in-possession in chapter 11 to maximize the value of the debtor's property that is not otherwise subject to the pending foreign main proceeding. If (i) the foreign debtor has assets in the United States, (ii) such assets are not subject to the jurisdiction and control of the court in the foreign main proceeding, and (iii) the filing of a new plenary case in the United States would be "necessary to implement cooperation and coordination [under chapter 15]," then a plenary chapter 7 or 11 can be commenced to address the relevant U.S. assets and/or value even as the chapter 15 itself is pending.[7]

(continued on page 9)

Russian Bank Insolvency Law

Vneshprombank (also known as Foreign Economic Industrial Bank) was one of Russia's largest banks until it collapsed in December 2015 when audits uncovered a more than two-billion-dollar shortfall leading to allegations that its founder and president embezzled tens of millions of dollars. The president was arrested, the bank was declared insolvent, and a Russian governmental agency was appointed trustee for the bank.

In March 2016, the trustee learned that the former bank president may have used the embezzled money to purchase several New York City apartments. The trustee in the Russian insolvency proceeding engaged Blank Rome to commence a chapter 15 case in the U.S. Bankruptcy Court in New York for the purpose of obtaining recognition of the Russian insolvency proceeding and additional relief.

On February 10, 2017, the U.S. Bankruptcy Court granted recognition of the Russian insolvency proceeding as a foreign main proceeding and granted additional relief permitting the trustee to take certain actions in the United States in aid of the foreign proceeding. The Vneshprombank case is the first Russian insolvency case to be fully recognized by a U.S. Bankruptcy Court.[1] ◻

1. In 2006, the receiver for Yukos Oil Company filed a chapter 15 petition seeking recognition of a Russian insolvency proceeding. However, the case was dismissed on motion of the receiver prior to a hearing on recognition. *See, Order Denying Motion to Close Chapter 15 Case and Dismissing Chapter 15 Case, In re Rebgun (Yukos Oil Co.),* Case No. 06-10775 (RDD) (Bankr. S.D.N.Y. Feb. 28, 2008) [ECF #145].

Concurrent Plenary Insolvency Proceedings: Additional Options for Cross-Border Reorganization and Liquidation **(continued from page 8)**

Typically, this kind of follow-on U.S. plenary case is filed to take advantage of the ability of a trustee to pursue avoidance actions under chapter 5 of the Bankruptcy Code. A foreign representative only has the power to seek the turnover or specified actions to recover property, but cannot sue to void a transaction as a preference or because it is constructively or actually fraudulent.[8]

Broader applications of the power under section 1511 are conceivable. For example, if the chapter 15 ancillary proceeding was filed in connection with a foreign main proceeding that has a territorial approach to staying creditors, then a follow-on plenary proceeding might enable application of the U.S. worldwide automatic stay[9] to protect assets outside the jurisdiction of the court in the foreign main proceeding. Likewise, chapter 11 reorganization power can enable the issuance of plan/reorganization securities on certain terms that can be value maximizing and advantageous—perhaps, a foreign main proceeding's rehabilitative power to restructure a foreign debtor on a stand-alone basis could be augmented by direct access to chapter 11 on a follow-on basis.[10] Generally, approaches to the use of chapter 15 must be nuanced and recognize the flexibility of both the plenary and ancillary side of U.S. bankruptcy law. ◻

1. This Model Law has been adopted in varying iterations in forty-three (43) jurisdictions worldwide, including the United States. While very effective in improving cross-border reorganizational efficiency and having importantly leveraged the United States as an adopting nation with its powerful markets and courts, the Model Law is not the only rubric that is followed for cross-border reorganization. *See* S. Chandra Mohan, *Cross-border Insolvency Problems: Is UNCITRAL Model Law the Answer?,* 21 Int'l Insolvency Rev. 199 (2012).

2. 11 U.S.C. § 1501(a)(1)-(5); *Tacon v. Petroquest Res. Inc. (In re Condor Ins. Ltd.),* 601 F.3d 319, 329 (5th Cir. 2010).

3. *See, e.g., Odd-Bjorn Huse v. Huse-Sporsem (In re Birting Fisheries, Inc.),* 300 B.R. 489, 499 (B.A.P. 9th Cir. 2003) (stating that "plenary Article I bankruptcy power" includes "'the implied power to protect" exercises of plenary authority and "will be construed as exclusive" in certain contexts).

4. *See, e.g., In re BPS U.S. Holdings Inc., et al.,* Case No. 16-12373 (KJC) (Bankr. D. Del.) and *In the Matter of a Plan of Compromise or Arrangement of Performance Sports Group, Ltd., et al.,* Court File No. CV-16-11582-00CL (Ont. Sup. Ct. of Just. (Comm. List)) (identical debtors filed simultaneously in U.S. chapter 11 and Canadian CCAA, subject to cross-border protocol and joint/unitary hearing structure on all important administrative matters). It might be instructive to consider whether the mega-*Hanjin Shipping Co.* bankruptcy filed under the Debtor Rehabilitation and Bankruptcy Act in Korea might have been more successful in its initial, rehabilitational phase, which was characterized for a time by substantial, successful enforcement action by attaching creditors and blockading terminal operators outside Korea, if Hanjin Shipping Co., Ltd. had filed plenary cases in Korea and also in the United States and perhaps in China, and then created a working cross-border protocol. In such a circumstance, the practical authority of multiple courts exercising plenary bankruptcy power over a broader set of critical assets might have created a softer landing for the line and better enabled a complex multi-jurisdictional merger or acquisition.

5. *See, e.g., In re Nortel Networks, Inc.,* 532 B.R. 494, 554 (Bankr. D. Del. 2015), *appeal certified,* slip op., 2016 WL 2899225 (D. Del., May 17, 2016) (in the context of a decision, which allocated sale proceeds between three separate plenary cases/estates on a modified *pro rata* basis, the court described the three sets of Nortel debtors in their three plenary proceedings "as a unified global enterprise").

6. Bankruptcy Code section 1511 states that "(a) [u]pon recognition, a foreign representative may commence – (1) an involuntary case under section 303 [of the U.S. Bankruptcy Code]; or (2) a voluntary case under section 301 or 302 [of the U.S. Bankruptcy Code], if the foreign proceeding is a foreign main proceeding."

7. 11 U.S.C. § 1528; *see also British Am. Ins. Co. v. Fullerton (In re British Am. Ins. Co.),* 488 B.R. 205, 226 (Bankr. S.D. Fla. 2013). If a plenary chapter 7 or 11 case is commenced after the foreign main proceeding has been recognized, the bankruptcy court may modify or terminate the relief granted in the chapter 15 proceeding to the extent it is inconsistent with the new commenced plenary proceeding. *See* 11 U.S.C. § 1529(2).

8. 11 U.S.C. § 1521(a)(7); *see, e.g., In re Awal Bank, BSC,* 455 B.R. 73, 79-80 (Bankr. S.D.N.Y. 2011) (follow-on chapter 11 case commenced and was sustained, while chapter 15 was pending, for Bahraini bank in order to avoid an improper setoff); *see also In re Gold & Appel Transfer S.A.,* Bankr. Case No. 14-00089 (Bankr. D.C. 2014) (follow-on chapter 7 case commenced and sustained to enable trustee to exercise so-called strong arm powers under Bankruptcy Code section 544, enabling lien avoidance as to key property—all while a proceeding under Bankruptcy Code section 304, the predecessor to chapter 15, was pending).

9. *See, e.g., Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec., LLC,* 474 B.R. 76, 82 (S.D.N.Y. 2012) (observing that, in a plenary case under the U.S. Bankruptcy Code, the automatic stay under Bankruptcy Code section 362(a) "extends beyond the territorial boundaries of the United States" and applies to all assets of the debtor "wherever located and by whomever held").

10. 11 U.S.C. § 1145 (exempting chapter 11 reorganizations from the registration requirements of the Securities and Exchange Act of 1933); *see also In re Bd. of Dirs. of Multicanal S.A.,* 340 B.R. 154, 166 (Bankr. S.D.N.Y. 2006) (in a case where Argentine debtors filed an ancillary proceeding in the U.S. seeking recognition of a prepackaged reorganization under Argentine law, the court observed in dicta that Section 1145 would not apply because the securities were being exchanged in a proceeding under Argentine law not under the Bankruptcy Code). Depending on the circumstances, debtors in foreign proceedings may be able to avail themselves of section 1145 either by filing a chapter 15 ancillary proceeding and then filing a follow-on chapter 11 (perhaps with a prepackaged or prenegotiated plan) or by filing simultaneous plenary proceedings in a foreign jurisdiction and in the United States under chapter 11.

Enforcement of Foreign Judgments and Foreign Arbitral Awards in the United States

BY WILLIAM R. BENNETT III AND LAUREN B. WILGUS

WBennett@@BlankRome.com

WILLIAM R. BENNETT III

PARTNER

LWilgus@BlankRome.com

LAUREN B. WILGUS

ASSOCIATE

Our clients regularly seek our assistance in recovering foreign arbitral awards and foreign judgments from debtors and/or their alleged alter egos in the United States. Each case has its unique facts that dictate the level of effort that we must make to bring about a successful outcome. For example, obtaining a recovery from an alleged alter ego may require a Rule B attachment followed by significant factual discovery, while obtaining a recovery from a debtor with assets and business connections in the United States may require less effort. Regardless of the facts that may be unique to each matter, the basic framework to seek a recovery, discussed herein below, is the same.

The United States has been a signatory of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") since 1970; however, it is not currently party to any international treaty for the recognition of foreign judgments. Unlike foreign arbitral awards, which are governed by the New York Convention, no treaty outlines the circumstances under which U.S. courts may recognize foreign judgments. In the United States, for instance, only the principle of comity, the common law, and individual states' laws allow U.S. courts to recognize and enforce foreign judgments.

Is Personal Jurisdiction Required in New York?

FOREIGN JUDGMENTS

As a preliminary matter, it is important to distinguish between "recognition" and "enforcement" of foreign judgments. To "recognize" a foreign judgment is in essence to domesticate it, thus making it equal to any other U.S. court judgment. "Enforcement" of a judgment requires the aid of the courts, which, depending on the facts of the case, may or may not be afforded along with recognition of the judgment.

In the United States, a foreign judgment cannot be directly enforced without a prior court action "recognizing" that judgment as a domestic one. The procedure for gaining recognition and enforcement of a foreign judgment first requires the judgment creditor to bring an action against the debtor in a U.S. court. For maritime cases, U.S. federal courts have maritime jurisdiction over the enforcement of judgments of foreign admiralty courts. For non-maritime cases, the judgment creditor may need to proceed in state court. In either case, state law controls the question of enforceability of the foreign judgment. In New York, for example, the Uniform Foreign Money-Judgments Recognition Act applies under C.P.L.R. Article 53. As the New York Court of Appeals has explained:

> Article 53 was designed to codify and clarify existing case law on the subject and, more importantly, to promote the efficient enforcement of New York judgments abroad by assuring foreign jurisdictions that their judgments would receive streamlined enforcement here.

► To "recognize" a foreign judgment is in essence to domesticate it, thus making it equal to any other U.S. court judgment. "Enforcement" of a judgment requires the aid of the courts, which, depending on the facts of the case, may or may not be afforded along with recognition of the judgment.

Article 53 sets forth substantive requirements that must be met before a foreign money judgment will be recognized in New York. Those primarily concern whether the foreign country's court had personal jurisdiction over the judgment debtor and subject matter jurisdiction over the case; whether it was an impartial tribunal utilizing procedures compatible with due process of law; and whether enforcing the foreign country money judgment would be unfair, work a fraud, or violate New York's public policy.

(continued on page 11)

Enforcement of Foreign Judgments and Foreign Arbitral Awards in the United States (continued from page 10)

Notably, in New York, "a party seeking recognition of a foreign money judgment need not establish a basis for the exercise of personal jurisdiction over the judgment debtor by the New York courts."

FOREIGN ARBITRAL AWARDS

When a party seeks confirmation of an arbitral award under the New York Convention, "[t]he court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." These grounds are very narrow and go to the fairness of the proceedings rather than the correctness of the outcome, which is generally unappealable.

In contrast to enforcement of foreign judgments, most courts in the United States require personal jurisdiction over the defendant in order to enforce a foreign arbitral award. Thus, a movant must establish the requisite jurisdiction by asserting either traditional personal jurisdiction over the defendant based upon its contacts with the jurisdiction or *quasi in rem* jurisdiction over the defendant's property.

To establish *quasi in rem* jurisdiction, a movant must: 1) identify specific property over which the court has jurisdiction; and 2) demonstrate that the exercise of jurisdiction will not offend due process. In order to adequately identify specific property, the movant must "point to [] specific assets of [defendant's] within the jurisdiction." In other words, "the *sine qua non* of basing jurisdiction on defendant's assets in the forum is the identification of some asset."

A movant may also establish a basis for jurisdiction over a defendant under Fed. R. Civ. P 4(k)(2), which provides:

> For a claim that arises under federal law, a summons or filing a waiver of service establishes personal jurisdiction over a defendant if: (A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and (B) exercising jurisdiction is consistent with the United States Constitution and laws.

Under this provision, a defendant sued under federal law may be subject to jurisdiction based on its contacts with the United States as a whole, when the defendant is not subject to personal jurisdiction in any state.

Can a Petitioner Enforce a Foreign Arbitral Award or Judgment against a Debtor's Alter Ego in New York?

ENFORCEMENT OF A FOREIGN ARBITRAL AWARD AGAINST ALTER EGOS

In *Orion Shipping & Trading Co. v. Eastern States Petroleum Corp. of Panama,* S.A., 312 F.2d 299 (2d Cir. 1963), the U.S. District Court for the Second Circuit, which includes New York, indicated that a proceeding to confirm an arbitral award against

Jeremy A. Herschaft Appointed 2017 Tulane Law School Distinguished Admiralty Practitioner-In-Residence

JHerschaft@BlankRome.com

JEREMY A. HERSCHAFT

Blank Rome Partner Jeremy Herschaft has been appointed as the 2017 John E. Sims Distinguished Admiralty Practitioner-In-Residence at Tulane Law School, which has an internationally recognized maritime law program. He participated as practitioner-in-residence on March 14-16, 2017.

The residence program, which is managed by the school's Maritime Law Center, invites an experienced admiralty practitioner, from outside of New Orleans, to meet with law students and faculty in small group settings to discuss the practical aspects of maritime law and current trends in the industry. For more information, please visit www.law.tulane.edu/tlscenters/maritime.

At Blank Rome, Mr. Herschaft concentrates his maritime practice on international corporate litigation, arbitration, and commercial counseling, with particular emphasis on the global marine and energy industries. Based in the Firm's Houston office, he is member of Blank Rome's Maritime Emergency Response Team, assisting clients on-scene in responding to maritime casualties, marine pollution incidents, and other shipboard and offshore investigations. ◻

a corporation is not an appropriate occasion to determine whether another party is liable under an alter ego theory. In *Orion,* the petitioner sought to hold a parent entity liable for an arbitration award entered against a subsidiary, claiming the parent was the alter ego of the subsidiary "shell" company. In explaining why such a determination should not be made in the context of a confirmation action, the Second Circuit explained:

> This [confirmation] action is one where the judge's powers are narrowly circumscribed and best exercised with expedition. It would unduly complicate and protract the proceeding were the court to be confronted with a potentially voluminous record setting out details of the corporate relationship between a party bound by an arbitration award and its purported 'alter ego.'

There are two exceptions to *Orion* that limit its reach. The first applies where "the complaint specifies two grounds for subject matter jurisdiction," such that the enforcement action can "be construed as a separate action [from the confirmation action] to enforce the arbitration award against nonparties to the arbitration."

The second exception to *Orion* applies where "a claim of piercing the corporate veil…would not unduly complicate the action of the court with respect to the arbitration award." The Second Circuit has approved of this exception in a limited circumstance—where the determination to be made is whether a nonparty to the arbitration is the successor to the arbitration party.

Accordingly, unless a movant can establish one of the *Orion* factors applies, a New York court will likely not allow a movant to confirm an arbitral award and enforce it against alleged alter egos in the same proceeding.

ENFORCEMENT OF A FOREIGN JUDGMENT AGAINST ALTER EGOS

Alternatively, in New York, parties that are alter egos of each other may be treated as one and the same for the purpose of enforcing a judgment. In New York, the law is well-established that if defendants are found to be alter egos of each other, then jurisdictional contacts of each entity will be imputed by law upon the others.

ALTER EGO JURISDICTION

New York courts will find that an alleged alter ego is doing business in New York "when the subsidiary is acting as an agent for the parent, or when the parent's control is so complete that the subsidiary is a 'mere department' of the parent." Determining whether an entity is a "mere department" requires "a fact-specific inquiry into the realities of the actual relationship between the parent and subsidiary." In particular, a court must consider:

> (1) common ownership, (2) financial dependency of the subsidiary on the parent corporation, (3) the degree to which the parent corporation interferes in the selection and assignment of the subsidiary's executive personnel and fails to observe corporate formalities, and (4) the degree of control over the marketing and operational policies exercised by the parent.

Conclusion

The procedural steps that are required to obtain a recovery of a foreign arbitral award or foreign judgment are not overly complex. However, the efforts to make a successful recovery from a judgment debtor can be quite significant, especially if the judgment debtor has stopped doing business, is insolvent, or has no assets to attach, which is often the reason why our clients seek our services to recover on the foreign arbitral award or foreign judgment. Those matters often require patience, team work, and ingenuity to bring about a successful result. ◻

U.S. Coast Guard Proposes Significant Updates to Marine Casualty Reporting Damage Thresholds

BY SEAN T. PRIBYL AND JEANNE M. GRASSO

SPribyl@BlankRome.com

SEAN T. PRIBYL
ASSOCIATE

Grasso@BlankRome.com

JEANNE M. GRASSO
PARTNER

On January 23, 2017, the U.S. Coast Guard published a Notice of Proposed Rulemaking ("NPRM") that proposes to amend the monetary property damage threshold amounts for reporting a marine casualty and serious marine incident ("SMI"). Industry stakeholders should be aware of the significant changes in the NPRM, potentially easing the reporting burden.

Marine Casualty Reporting Requirements

When vessel-related accidents occur on the navigable waters of the United States, the owner, operator, master, or person in charge of the vessel involved may have an obligation to report the incident to the U.S. Coast Guard. *See* 46 CFR Subpart 4. Generally, federal regulations deem a marine casualty reportable when meeting defined criteria; for example, when the incident results in property damage meeting defined monetary thresholds. To illustrate, a vessel owner, operator, master, or person in charge must report a marine casualty involving property damage in excess of $25,000, including the cost of labor and material to restore the property to its pre-damaged condition. 46 CFR §4.05-1.

Additionally, an SMI includes any reportable marine casualty that results in property damage exceeding $100,000. 46 CFR §4.03-2. At the time of occurrence of a marine casualty, the owner, operator, master, or person in charge must make a timely, good faith determination as to whether the incident is, or is likely to become, an SMI, as SMIs require drug testing of crew members directly involved in the incident.

As stated in this NPRM, the U.S. Coast Guard has long considered monetary value as a reporting threshold based upon the premise that increased repair costs are indicative of the increased seriousness of a marine casualty. However, these thresholds have remained unchanged since the initial promulgation of casualty reporting regulations in the early 1980s. Attendant to these reporting requirements are mandatory alcohol and drug testing procedures that require the crewmembers involved in an SMI to take a chemical test. 46 CFR §4.06-3. Consequently, drug testing following SMIs has also been affected by these regulations and has been conducted for casualties that are less significant than envisioned by the originally promulgated regulations.

Notably, the responsibility for determining whether an occurrence meets the criteria for notifying the U.S. Coast Guard falls on an owner, operator, master, or person in charge. For years, these notification procedures have been the subject of much confusion and consternation as to which occurrences constitute reportable marine casualties. Moreover, the threshold amounts have generally been viewed as too low, requiring relatively minor casualties to be reported, demanding overly burdensome investment of time and effort by stakeholders in completing the Coast Guard Form 2692. In response, and as discussed in our earlier Blank Rome Maritime advisories (February 2014, August 2015), the U.S. Coast Guard has taken steps to offer guidance to assist vessel owners/operators with the casualty reporting process, including most recently in the Navigation and Vessel Inspection Circular 01-15 ("NVIC 01-15"). While guidance has assisted industry stakeholders in interpreting the regulations, the thresholds have remained stagnant for decades.

> ► The NPRM acknowledges U.S. Coast Guard and stakeholder consensus that these decades-old property damage monetary threshold amounts have not kept pace with inflation, and have resulted in excessive administrative and financial burden on vessel owners and operators.

Proposed Changes

The stated purpose of this NPRM is to update the dollar threshold amounts for property damage to specifically account for inflation. The NPRM acknowledges U.S. Coast Guard and stakeholder consensus that these decades-old property damage

monetary threshold amounts have not kept pace with inflation, and have resulted in excessive administrative and financial burden on vessel owners and operators. Consequently, the NPRM proposes the following significant changes to the current regulations:

- Replaces the dollar threshold for an SMI involving damage to property of $100,000 to "in excess of $200,000." 46 CFR §4.03-2.

- Replaces the dollar threshold for reportable marine casualty to occurrences causing property damage of $25,000 to "in excess of $72,000." 46 CFR §4.05-1.

With these upwardly adjusted monetary limit amounts, the proposed changes to the NPRM also serve a corollary purpose of reducing the cost and time burden on vessel owners and operators by an anticipated decrease in the overall number of reports received on an annual basis. According to the NPRM, between 2012 through 2014, there was an average of 5,967 marine casualty reports per year. Of the 5,967 marine casualty reports, approximately 5.3 percent were for a reportable marine casualty with property damage between $25,000.01 and $72,000, and 4.5 percent involved an SMI. As a result of this threshold adjustment, the U.S. Coast Guard expects approximately 316 fewer required marine casualty reports and a reduction of 21 SMI reports on an annual basis. Consequently, "vessel owners and operators would benefit from a reduction in the time burden associated with a crewmember no longer having to prepare and submit the required marine casualty reporting paperwork."

Moreover, since each vessel crewmember involved in an SMI is required to take a chemical test, the NPRM effectively reduces the overall number of mandatory drug testing following these reportable occurrences since fewer qualifying occurrences are expected. The U.S. Coast Guard recognizes in the NPRM that the marine employer incurs lost time and actual costs of the chemical test it takes for a crewmember to take the chemical test, such as collection kits, collector fees, alcohol-testing swabs, and overnight mailing.

Impact of New Administration

On January 20, 2017, the White House released a Memorandum for the Heads of Executive Departments and Agencies, Regulatory Freeze Pending Review ("Regulatory Freeze"), which calls on federal agencies to withdraw, postpone, or delay certain regulatory action depending on its status in the rulemaking process, including those related to notices of proposed rulemaking. And, on February 3, 2017, the White House published Executive Order 13771 ("Reducing Regulation and Controlling Regulatory Costs") mandating that "for every one new regulation issued, at least two prior regulations be identified for elimination." In this case, the U.S. Coast Guard released this NPRM for public review essentially the same day the White House published the Regulatory Freeze Memorandum, and the NPRM was published before Executive Order 13771, raising the question as to whether the U.S. Coast Guard will take any action to delay or withdraw the NPRM.

At the moment, the NPRM and docket remain unchanged, and the public has submitted only one comment to the NPRM thus far. Overall, the NPRM is relatively non-controversial, and does not raise a substantial question of law or policy. However, in determining whether the final rule is appropriate, the U.S. Coast Guard has indicated it will consider all comments received from the public while considering the impact of both the Regulatory Freeze Memorandum and Executive Order 13771. As such, stakeholders should continue to monitor the Federal Register for any changes to the comment period or NPRM.

Conclusion and Recommendation

With this NPRM, the U.S. Coast Guard has taken a significant step in addressing long overdue industry-wide marine casualty reporting concerns, and in bringing the regulations more in-line with their intended purpose. By adjusting for inflation and upwardly amending reporting thresholds, the NPRM provides real opportunity for reducing both the number of reportable casualties and the burden incurred by owners and operators. In sum, industry stakeholders should carefully review the NPRM and evaluate whether to submit comments before the comment period ends on March 24, 2017. ◻

Your Vessel Just Discharged Oil in the Lone Star State…Have You Notified the Texas General Land Office?

BY JEREMY A. HERSCHAFT

JHerschaft@BlankRome.com

JEREMY A. HERSCHAFT
PARTNER

When a marine pollution incident occurs in the United States, a vessel owner may find itself communicating with a myriad of federal and state response agencies, depending upon the size of the spill. If such an event occurs in Texas state waters, however, then one of the most important authorities that you will likely deal with is the Texas General Land Office ("TGLO").

This article provides a brief overview of the TGLO to reinforce why this particular agency will be a critical component to any owner's "Texas" marine pollution spill response plan. Keep in mind that obligations under Texas state law are in addition to obligations to abide by federal marine casualty and pollution response statutes and regulations.

The TGLO

The TGLO is the oldest state agency in Texas (established by the Constitution of the **Republic** of Texas), having been created in 1836. Among its many missions is to "promote the prudent stewardship of state lands and natural resources."[1] Following the creation of the Federal Oil Pollution Act of 1990, 33 U.S.C. §2701 *et. seq.* (1990) (commonly known as "OPA"), Texas enacted the Oil Spill Prevention and Response Act of 1991 ("OSPRA") to protect Texas coastal waters, which the legislature determined to be "a matter of the highest urgency and priority."[2] To such ends, OSPRA empowers the TGLO with the direct responsibility for administering oil spill response and clean-up efforts in the event of an unauthorized discharge of oil in Texas "coastal waters, rivers, lakes, estuaries, marshes, tidal flats, beaches, and public lands" *Id.,* §40.002(a).[3] The commissioner delegates this responsibility through various officers, agencies, and subdivisions of the TGLO, who operate across the Texas coastline (with five major field offices in Port Arthur, La Porte, Corpus Christi, Port Lavaca, and Brownsville, Texas). "Post-spill" administration matters are ultimately handled through the direction of TGLO's head office in Austin, Texas. Of note, in the event that an unauthorized discharge of oil is subject to the U.S. National Contingency Plan (*i.e.,* in addition to being subject to the provisions of OSPRA), then the TGLO commissioner is required to cooperate with the federal on-scene coordinator or other federal agency or official "to the greatest extent practicable." §40.102(b).

Contingency Plans for Vessels

For the general international shipowner, preparing for a spill ***before*** it occurs is not only good seamanship and sound business practice, but it is also required under Texas law. Under §40.114, any vessel with a capacity to carry 10,000 gallons of oil or more as fuel or cargo that operates in Texas coastal waters, or waters adjoining and accessible from coastal waters, shall maintain a written vessel specific discharge and prevention response plan. The plan must provide for response actions that include notification to the TGLO commissioner, verification of the unauthorized discharge, identification of the pollutant, assessment of the discharge, vessel stabilization, and discharge abatement and mitigation. §40.114(b)(1). The plan must also designate an on-board spill officer who is tasked with certain qualification and crew-training requirements set forth in OSPRA. §40.114(b)(2). Notably, a discharge prevention and response plan that complies with requirements under U.S. federal laws and regulations for a vessel-specific plan will satisfy the above mentioned OSPRA requirements. §40.114(c).

► For the general international shipowner, preparing for a spill *before* it occurs is not only good seamanship and sound business practice, but it is also required under Texas law.

Notifying the TGLO of a Spill

Pursuant to OSPRA §40.101(a):

> "(a)ny person responsible for an unauthorized discharge of oil or the person in charge of any vessel or a terminal facility from or at which an unauthorized discharge of oil has occurred, as soon as that person has knowledge of the discharge, shall: (1) **immediately** notify the commissioner of the discharge; and (2) undertake all reasonable actions to abate, contain, and remove pollution from the discharge."[4]

"Discharges" of oil are defined as an "intentional or unintentional act or omission by which **harmful quantities** of oil are spilled, leaked, pumped, poured, emitted, or dumped into or on coastal waters or at a place adjacent to coastal waters where, unless controlled or removed, an imminent threat of pollution to coastal waters exists." §40.003(8) (Emphasis added). In turn, "harmful quantity" is broadly defined under OSPRA to mean

"that quantity of oil the discharge of which is determined by the commissioner to be harmful to the environment or public health or welfare or may reasonably be anticipated to present an imminent and substantial danger to the public health or welfare." §40.003(12).

Although the Texas Commission on Environmental Quality (a separate state entity from TGLO) has adopted a "sheen rule" whereby the "reportable quantity" for oil is whether the discharge is sufficient to create a sheen on the water,[5] TGLO has no such rule — in theory, even minuscule discharges that do not create a "sheen" would be subject to reporting. Indeed, the author was recently involved in a case where the TGLO investigated and assessed a civil penalty for a spill that involved only **0.5** gallons of bunker fuel during a bunker transfer. This example illustrates that the TGLO takes the reporting of even the most minor of marine spills very seriously.

Post-Spill Mechanics

Once the responsible party reports a discharge, a TGLO officer will typically appear on-scene to participate in assessment and response efforts. Vessel interests should cooperate with TGLO officers to provide them with an accurate factual background. Ideally, maritime counsel should be on-scene as well to represent owners during this critical phase and assist them in dealing with TGLO representatives during their investigation.

At the conclusion of the on-site inspection, the first step in the TGLO's penalty assessment phase is to issue a "letter of state interest" to entities that "may be" or are in fact designated as "the responsible person for the incident."[6] If selected by the TGLO, an alleged "responsible person" may challenge their designation within five days from the date of the letter of state interest.

Upon completion of their investigation, the TGLO will issue (if applicable) a "notice of violation" to the responsible person. A "preliminary report" that summarizes the TGLO's factual findings will accompany the notice of violation, and it will outline the facts of the case, the statutory bases for the alleged violation, and the recommendation for the specific penalty and fine(s) to be imposed. A responsible person is given 20 days from the notice of violation to either: 1) consent in writing to the notice; or 2) request a hearing before a TGLO hearing examiner to defend against the claims. §40.254(d). In the author's experience, the TGLO is amenable to holding an informal conference with TGLO staff before setting a formal hearing to seek a resolution of the matter (if possible) vis-a-vis the penalties and fines imposed.

The schedule for the amounts and levels of penalties that can be assessed by the TGLO following a spill are fairly granular and beyond the scope of this general article. Predictably, the fiscal penalties that the TGLO can impose have the potential to be significant depending on the specific facts of the spill at issue.

Notably, pursuant to §40.203(f):

> "[i]f any actual or threatened unauthorized discharge of oil was the result of gross negligence or willfull misconduct or a violation of any applicable federal or state safety, construction, or operating regulation, the person responsible for such [actions] is liable for the **full amount of all damages** to natural resources." (Emphasis added).

As such, proper planning to prevent unauthorized discharges will obviously be a key component to any vessel interest's training regimen, as the amount of penalties for an unauthorized discharge are expansive in scope.

Conclusion

Any safe passage through Texas waters will require a vessel owner to fully appreciate the TGLO's authority and role and its potential involvement during an oil spill. Understanding your obligations to the TGLO ***before*** such an event occurs will allow owners to be prepared in advance when disaster strikes. ◻

1. *See* http://www.glo.texas.gov/the-glo/about/overview/index.html.

2. *See* TEX. NAT. RES. CODE ANN. §§ 40.002(a) (Vernon Supp. 2000).

3. "Coastal waters" are further defined as "the waters and bed of the Gulf of Mexico within the jurisdiction of the State of Texas, including the arms of the Gulf of Mexico subject to tidal influence, and any other waters contiguous thereto that are navigable to vessels with a capacity to carry 10,000 gallons or more of oil as fuel or cargo." *See* §40.003(2).

4. Emphasis added. According to the TGLO website, as of the date of this article, all spills can be reported via telephone to **1.800.832.8224.** *See* http://www.glo.texas.gov/ost/contact/index.html. Notably, § 40.251(b)(1) of OSPRA authorizes the TGLO to assess a civil penalty for failing to "immediately" notify the TGLO of an unauthorized discharge of oil into Texas coastal waters.

5. *See* 30 Tex. Admin. Code § 327.4.

6. "Responsible person" is defined at §40.003(20) as the owner or operator of a vessel or terminal facility from which an unauthorized discharge of oil emanates or threatens to emanate; the person who would be the responsible person immediately prior to abandoning a vessel or terminal facility; or any other person who causes, allows, or permits an unauthorized discharge or oil or threatened unauthorized discharge of oil.

Gulf Coast Update: Personal Jurisdiction Trend Continues to Favor the Defense

BY DAVID G. MEYER

DMeyer@BlankRome.com

DAVID G. MEYER
ASSOCIATE

Under U.S. law, personal jurisdiction is one of the fundamental aspects of a court's ability to adjudicate a particular dispute, and it often plays a role in maritime cases, given the far-flung nature of the industry. In recent years, the trend in U.S. courts has been generally favorable to personal jurisdiction challenges. This is highlighted by two separate cases, *Gulf Coast Int'l, L.L.C. v. The Research Corp. of the Univ. of Hawaii,* 490 S.W.3d 577 (Tex. App.—Houston [1st Dist.] 2016, pet. denied), and *Mitsui Sumimoto Insurance Co., Ltd. v. M/V DEFIANT, et al.,* civil action H-16-55 (S.D.Tex. Aug. 23, 2016) (Miller, G.), recently handled by Blank Rome's Houston office in which dismissals were obtained for the Firm's clients on the basis that the court in which the plaintiff had filed suit did not have personal jurisdiction over the companies being sued.

On Personal Jurisdiction

By way of background, a personal jurisdiction challenge involves a defendant asserting that it has insufficient contacts with the forum state (*i.e.,* the state in which it has been sued) to justify the court's exercise of jurisdiction over the defendant or its property. In other words, the defendant is arguing that the court cannot adjudicate the merits of whatever claims are being asserted against it. The analysis is essentially the same regardless of whether the defendant is in state or federal court, because personal jurisdiction concepts are rooted in the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution, which fundamentally protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he or she has established no meaningful contacts, ties, or relations.

Sean T. Pribyl Presented with National Award by the Department of Justice

SPribyl@BlankRome.com

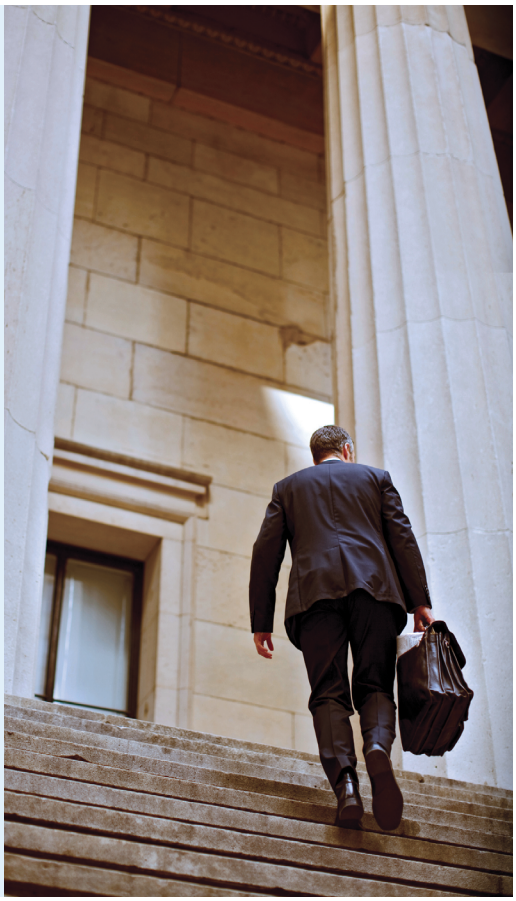
SEAN T. PRIBYL

Blank Rome Associate Sean T. Pribyl received the 2016 Organized Crime Drug Enforcement Task Forces ("OCDETF") National Award, a team award presented by the Department of Justice ("DOJ") in recognition of his outstanding contributions to cooperative law enforcement and the OCDETF Program.

Mr. Pribyl was recognized for litigation support he provided to a trial team of DOJ attorneys while on collateral assignment from the U.S. Coast Guard Judge Advocate General ("JAG") Program last year.

The complex litigation involved federal criminal charges of illicit trafficking and conspiracy against multiple international co-defendants, as well as legal arguments related to principles of Constitutional, maritime, and international law. Mr. Pribyl assisted the trial team earning convictions for all defendants.

For more information on OCDETF, please visit www.justice.gov/criminal/organized-crime-drug-enforcement-task-forces. ◻



Personal jurisdiction over a nonresident defendant is constitutional when two conditions are satisfied: (1) the defendant has established minimum contacts with the forum state; and (2) the exercise of jurisdiction comports with traditional notions of fair play and substantial justice. Minimum contacts are sufficient for personal jurisdiction when the nonresident defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. Importantly, a defendant may purposefully avoid a particular forum by structuring its transactions in such a way as to neither profit from the forum's laws nor subject itself to jurisdiction there.

The minimum contacts analysis is itself divided into two separate concepts: general jurisdiction and specific jurisdiction. For specific jurisdiction to be met, the cause of action being asserted against the defendant must arise out of or relate to the defendant's contacts with the forum state. For example, a plaintiff suing a foreign defendant in Texas for an accident that happened in Texas would be alleging that the defendant's alleged negligent conduct took place in Texas, thus satisfying specific jurisdiction. General jurisdiction is the opposite side of the coin in that jurisdictional contacts in the forum state do not relate to the cause of action being asserted. An example might include a plaintiff suing a Texas company in Texas over an accident that happened in another state or country. For general jurisdiction purposes, the plaintiff would be relying on the defendant's business activities in Texas, even though such activities had nothing to do with the accident at issue in the lawsuit.

► In recent years, the U.S. Supreme Court has trended towards restricting the scope of general jurisdiction such that foreign defendants, as well as domestic defendants with multistate operations, often have the opportunity to defeat general jurisdiction relatively easily.

Relevant Cases and Court Decisions

In recent years, the U.S. Supreme Court has trended towards restricting the scope of general jurisdiction such that foreign defendants, as well as domestic defendants with multistate operations, often have the opportunity to defeat general jurisdiction relatively easily. The relevant decisions include *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 131 S. Ct. 2846 (U.S. 2011) and *Daimler AG v. Bauman,* 134 S. Ct. 746 (2014). *Daimler* in particular set forth a very restrictive view of general jurisdiction, holding that "[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." This is a steep hurdle for establishing general jurisdiction over any company that is not headquartered, controlled, and operated out of the state in which the lawsuit is filed.

The second prong of the minimum contacts analysis, specific jurisdiction, was at the heart of the two cases referenced at the outset of this article. The first case concerned a lawsuit filed by Gulf Coast International ("GCI") in which GCI alleged it was owed money for repairs and other services it performed on a University of Hawaii research vessel. The vessel was operated by the University of Hawaii out of its home port in Honolulu, Hawaii, and had worked throughout the Pacific Ocean for two decades. The repairs at issue were performed on the vessel at various docking sites in Hawaii, Costa Rica, Panama, and Oregon. The vessel had not been to a Texas port or entered Texas waters in at least 30 years.

Despite the foregoing, GCI filed its lawsuit in Texas state court against the University of Hawaii's purchasing/contracting entity, RCUH, which was based in Hawaii and had no presence in Texas. GCI, a Louisiana company with operations in Louisiana, Texas, and Ohio, claimed that its Texas-based operations had been responsible for handling the repairs and services at issue. After being served with the lawsuit, RCUH sought dismissal of the case on the basis that the Texas court did not have personal jurisdiction over it.

GCI argued that specific jurisdiction was present because RCUH had solicited its business in Texas by sending its Houston office a request for a proposal that resulted in the repair contracts at issue, and also engaged in e-mail and telephone communications with GCI employees located in Texas; GCI personnel did work on the repair contracts out of its Houston office; and, title to certain equipment used in the repair process passed to RCUH in Texas, even though RCUH took actual possession of the equipment outside Texas. GCI also argued that specific jurisdiction was present because RCUH had been a longtime customer before the contracts at issue, and that for many years GCI's Houston personnel had been responsible for servicing the vessel.

The trial court dismissed the case for lack of personal jurisdiction, and GCI appealed. The Texas First Court of Appeals confirmed the dismissal. The court rejected GCI's "longtime customer" arguments, noting that only those RCUH contacts

(continued on page 19)

Gulf Coast Update: Personal Jurisdiction Trend Continues to Favor the Defense (continued from page 18)

that had a substantial connection to the operative facts of the litigation were relevant. The Court of Appeals also held that merely interacting with a company representative who was in Texas does not subject a nonresident buyer such as RCUH to personal jurisdiction in Texas, nor did purchasing goods and services from a Texas company that were shipped and performed outside the state of Texas. The court also held that any work done by GCI in Texas was a "unilateral act" by GCI that did not establish jurisdiction over RCUH, because RCUH established that it had never requested or contemplated that any work be done in Texas. Finally, the fact that title to equipment may have passed in Texas did not matter, because the equipment at issue was indisputably delivered to RCUH outside of Texas.

The *M/V DEFIANT* case involved a shipper's claim for damage to cargo that allegedly occurred sometime during a transit from China to Houston. The vessel's owner sought dismissal of the case for lack of personal jurisdiction. The only issue before the Texas federal court was whether it had specific jurisdiction over the owner. The court held it did not. The vessel was under charter and the charterer had the authority to determine which ports the vessel called upon. While the charter expressly contemplated that the vessel might call at one or more U.S. ports, no specific ports were named. The court held that there was simply no evidence that the owner had specifically directed business activities to the state of Texas or that it should have anticipated being sued in Texas, and thus specific jurisdiction could not be established. As a result, the court dismissed the lawsuit.

Final Thoughts

It seems unlikely that the judicial trend favoring personal jurisdiction defenses is going to change course anytime in the near future, and it is an important consideration that should be assessed at the outset of any particular case no matter which side of the docket a company finds itself on. Outside the litigation context, it is an important consideration for companies whose business operations bring them into contact with the United States. If a party wishes to minimize the risk of being forced to litigate a dispute in the United States, particular care should be taken to "structure transactions in such a way as to neither profit from the forum's laws nor subject themselves to jurisdiction there." This might include inserting valid choice of law and forum selection clauses in contracts, bills of lading, terms and conditions, tariffs, and similar documents, limiting employees' contact with a particular state to telephonic and electronic communications, maintaining strict corporate formalities with affiliated companies to ensure that U.S. contacts are not imputed abroad, and other similar measures. ◻

Bridging the Gap: AMLC Launches Government Relations Initiative to Further Practice Area Understanding between Private and Government Counsel

BY SEAN T. PRIBYL

SPribyl@BlankRome.com

SEAN T. PRIBYL
ASSOCIATE

The scenario is a familiar one to lawyers practicing in maritime and admiralty law—a frantic middle-of-the-night call, a shipboard emergency, and your client looking to you for answers in a high-stakes scenario that could amount to the beginning of a very bad day. It is in the critical moments that follow during which government and private counsel may come into contact with the other, and those moments may to some extent define the course of the investigation. Depending on the precise incident, private counsel may find themselves inundated with mutiple federal or state agencies, dealing with a litany of acronyms and governmental procedures. On the other hand, government counsel may be called to interact directly with private counsel while not fully understanding the private attorney's motivations in representing their client. Regardless of the incident, there is potential for a language and cultural barrier when parties interact while serving respective clients during a maritime investigation, and counsel are at a disadvantage if they have not taken initial steps to understand the other side's driving factors and authoritative processes before the initial interaction.

► Regardless of the incident, there is potential for a language and cultural barrier when parties interact while serving respective clients during a maritime investigation, and counsel are at a disadvantage if they have not taken initial steps to understand the other side's driving factors and authoritative processes before the initial interaction.

In order to help bridge this gap, the Admiralty and Maritime Law Committee ("AMLC") recently launched a Government Relations Initiative, an informal relationship-building effort aimed at practicing attorneys and law students. The purpose of this initiative is to foster interaction and cultivate professional relationships between private and government attorneys in collegial environments that provide a mutually beneficial opportunity for professional development and academic collaboration.

On December 1, 2016, the AMLC Government Relations Initiative hosted its inaugural panel presentation, "Best Practices in Maritime Investigations," at the United States District Court for the Eastern District of Louisiana. The Admiralty Law Section of the Federal Bar Association co-sponsored the event, which brought together a number of experienced government and private practice lawyers to offer their unique perspectives. Panelists included Sean Pribyl, Blank Rome's; Emily K. Greenfield, Assistant United States Attorney, Eastern District of Louisiana; CDR Brian McNamara, Deputy Staff Judge Advocate, Eighth Coast Guard District; LCDR Damian Yemma, Attorney Advisor, Coast Guard Investigations National Center of Expertise; and Dee Taylor, defense attorney. Laura Beck-Knoll served as the moderator.

The hour-and-a-half CLE program instructed the audience on a wide range of practical and informative topics. Below is a "top 10" list of just some of the numerous issues covered during the presentations and subsequent Q&A session:

1. Private counsel should understand the steps for quickly identifying the scope of potential government investigations and the varied agencies with possible involvement, as in some cases state and federal agencies may initiate joint, parallel, or concurrent investigations.

2. The U.S. Coast Guard ("USCG") and Department of Justice ("DOJ") offered perspectives on dealing with marine casualties and environmental crimes within the criminal referral system, including the impact of recent Fifth Circuit rulings on DOJ charging decisions.

(continued on page 21)

Bridging the Gap: AMLC Launches Government Relations Initiative to Further Practice Area Understanding between Private and Government Counsel
(continued from page 20)

3. The government has a recurring focus on prosecutions related to falsified documents, false statements, and obstruction at every level during an inspection and investigation.

4. Being an obstructionist may not be the best course of action to cast your client in a positive light and make an investigation go smoothly.

5. Counsel should weigh the benefit of seeking resolution pre-indictment in environmental crimes cases.

6. When negotiating security for environmental crimes, private counsel should understand which government agency is involved at each stage and the rationale for the security agreements.

7. Criminal risk during maritime incidents and investigations requires the specialized skill set of criminal lawyers as opposed to civil lawyers.

8. When dealing with USCG designations of Party-In-Interest status during marine casualty investigations, private counsel should be proactive when requesting such status for a client.

9. Owners and operators should understand the interaction and processes with whistleblowers, and DOJ presented views on why maintaining whistleblower protections matters.

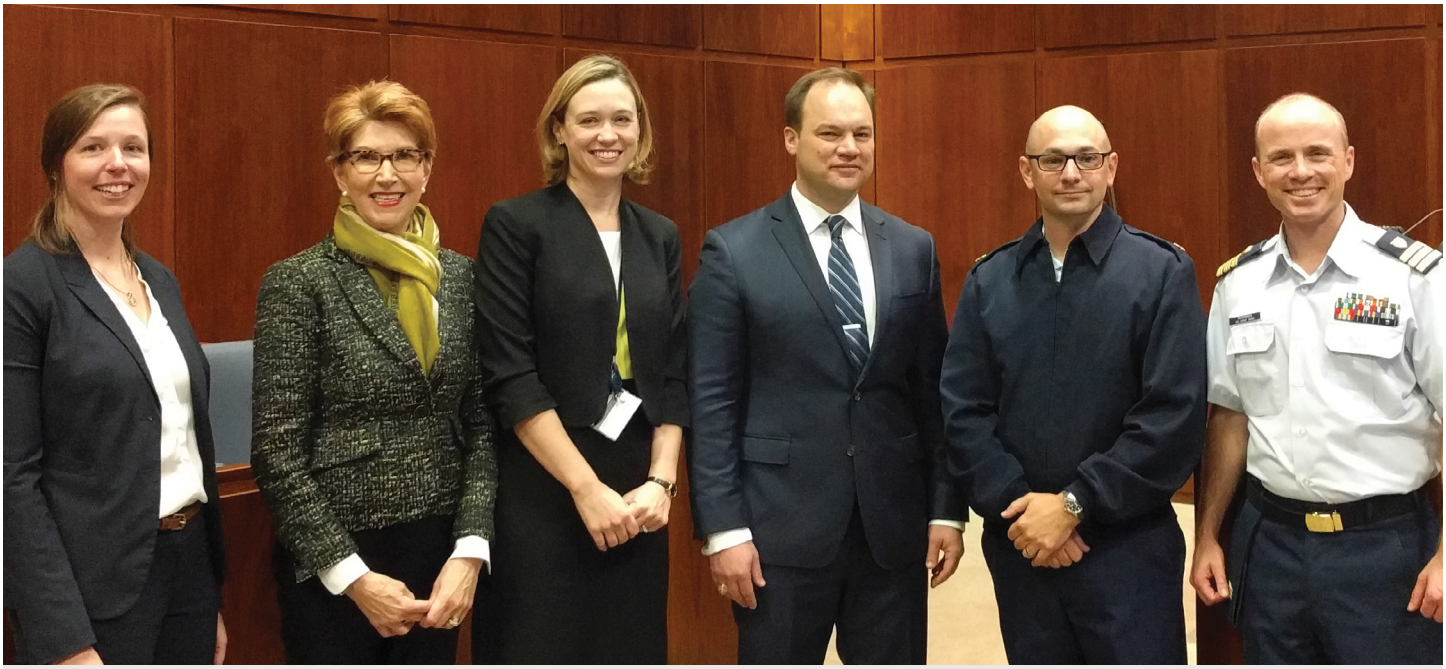
10. Private counsel have ongoing concerns with pre-criminal investigation mariner statements and "rights" advisements, specifically when and how they should be given if an inspection or investigation has the potential of becoming a criminal matter.

Overall, the panel represented a diversity of views and legal backgrounds in a collegial forum that assisted practitioners in becoming more proficient in their dealings with maritime investigations. Ideally, this panel will lead to similar follow-on opportunities across various AMLC regions in conjunction with local bar associations and their corresponding federal, state, and local government agencies, including additional potential participants from agencies such as the National Transportation Safety Board, Customs and Border Protection, Environmental Protection Agency, Maritime Administration, and the National Oceanic and Atmospheric Administration.

Stakeholders with additional questions on this panel and/or suggestions for future panels are invited to contact Blank Rome Associate Sean T. Pribyl (AMLC Vice-Chair Government Relations Initiative) directly at SPribyl@BlankRome.com or 202.772.5852. ◻

An earlier version of this article appeared in the American Bar Association Tort Trial and Insurance Practice Section's Winter 2017 *Admiralty and Maritime Law Committee Newsletter.* Reprinted with permission.

Photo Courtesy of ABA Tort Trial and Insurance Practice Section. © Winter 2017 *Admiralty and Maritime Law Committee Newsletter.*



Panelists (L to R): Laura Beck-Knoll; Dee Taylor; Emily Greenfield; Sean Pribyl; LCDR Damian Yemma, USCG; CDR Brian McNamara, USCG.

Risk-Management Tools for Maritime Companies

COMPLIANCE REVIEW PROGRAM

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

MARITIME CYBERSECURITY REVIEW PROGRAM

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

TRADE SANCTIONS AND EXPORT COMPLIANCE REVIEW PROGRAM

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

Maritime Emergency Response Team
We are on call 24 / 7 / 365

www.blankromemaritime.com

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

HOUSTON (+1.713.228.6601)	OFFICE PHONE	MOBILE PHONE	EMAIL
Michael K. Bell	+1.713.632.8635	+1.713.385.7630	MBell@BlankRome.com
Jeremy A. Herschaft	+1.713.632.8653	+1.504.236.9726	JHerschaft@BlankRome.com
Jay T. Huffman	+1.713.632.8655	+1.832.289.2412	JHuffman@BlankRome.com
Keith B. Letourneau	+1.713.632.8609	+1.713.398.8129	KLetourneau@BlankRome.com
David G. Meyer	+1.713.632.8631	+1.713.289.4289	DMeyer@BlankRome.com
Douglas J. Shoemaker	+1.713.632.8646	+1.713.446.7463	DShoemaker@BlankRome.com

NEW YORK (+1.212.885.5000)	OFFICE PHONE	MOBILE PHONE	EMAIL
Thomas H. Belknap, Jr.	+1.212.885.5270	+1.917.523.4360	TBelknap@BlankRome.com
Kate B. Belmont	+1.212.885.5075	+1.845.702.0370	KBelmont@BlankRome.com
William R. Bennett III	+1.212.885.5152	+1.646.393.7847	WBennett@BlankRome.com
Noe S. Hamra	+1.212.885.5430	+1.646.830.0816	NHamra@BlankRome.com
John D. Kimball	+1.212.885.5259	+1.973.981.2106	JKimball@BlankRome.com
Richard V. Singleton II	+1.212.885.5166	+1.732.829.1457	RSingleton@BlankRome.com
Alan M. Weigel	+1.212.885.5350	+1.860.334.7431	AWeigel@BlankRome.com
Lauren B. Wilgus	+1.212.885.5348	+1.732.672.7784	LWilgus@BlankRome.com

PHILADELPHIA (+1.215.569.5500)	OFFICE PHONE	MOBILE PHONE	EMAIL
Jeffrey S. Moller	+1.215.569.5792	+1.215.630.0263	Moller@BlankRome.com
James J. Quinlan	+1.215.569.5430	+1.267.243.9331	Quinlan@BlankRome.com

WASHINGTON, D.C. (+1.202.772.5800)	OFFICE PHONE	MOBILE PHONE	EMAIL
Jeanne M. Grasso	+1.202.772.5927	+1.202.431.2240	Grasso@BlankRome.com
Emma C. Jones	+1.202.420.2285	+1.978.609.0246	EJones@BlankRome.com
Gregory F. Linsin	+1.202.772.5813	+1.202.340.7806	Linsin@BlankRome.com
Sean T. Pribyl	+1.202.772.5852	+1.202.770.7878	SPribyl@BlankRome.com
Jonathan K. Waldron	+1.202.772.5964	+1.703.407.6349	Waldron@BlankRome.com

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