MAINBRACE

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BLANKROME maritime

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Note from the Editor

BY WILLIAM R. BENNETT III

What an amazing news cycle for shipping during the past two years, starting with the March 2021 *EVER GIVEN* grounding in the Suez Canal and running through the ongoing disruptions in shipping resulting from the Houthi attacks on vessels transiting the Red Sea. Add in sanctions, the dark fleet, cruise ship mishaps…well you get the picture. The point is the general public certainly has—or should have—become more aware of the impact global international shipping has on their daily lives.

But is that really the story of today's global shipping industry? In the short term, yes, but in the long term, no. The story of today's global shipping industry is what the maritime industry is presently doing that goes unnoticed by the public but will certainly shape the maritime industry in the future. For the foreseeable future, fossil fuels will continue to be the primary source of vessel propulsion. Nevertheless, significant investment of money and human capital is being made on issues involving the use of alternative fuels and the design of future vessels, sustainability, carbon reduction, wind as a vessel propulsion source, and offshore wind as a viable alternative source of energy (at least for the United States). And, although not every alternative fuel currently being considered for vessel propulsion will become a cost-effective and efficient workable solution, and while the full-scale installation of offshore wind along the U.S. East Coast may still be a few years away, the maritime industry has proven it is open to investing in solutions leading to "clean propulsion" and "clean energy." Consequently—being the eternal optimist—finding an alternative fuel that is a cost-effective and efficient source of vessel propulsion is not a matter of "if" but a matter of "when."

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MARPOL SOS—It's Time for the U.S. Coast Guard to Protect Seafarers

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The Act to Prevent Pollution from Ships ("APPS") is the U.S. law that implements the International Convention for the Prevention of Pollution from Ships ("MARPOL"). Since a policy shift in 2010, the U.S. Coast Guard's ("USCG") approach to enforcing APPS has trapped hundreds of foreign seafarers in a legal limbo in the United States that has deprived them of their liberty, commonly for a year or more; impaired their maritime careers; and exacted serious emotional and psychological tolls on the seafarers and their families. The USCG should urgently remedy this situation by limiting in "Agreements on Security" how long seafarers can be detained in the United States in connection with MARPOL investigations.

Legal Framework

APPS defines the conduct that would constitute a violation of the law by most commercial vessels and provides for criminal and civil penalties. It also includes several key provisions to facilitate investigations of potential violations, including *in rem* liability, as well as a provision that allows the USCG to request U.S. Customs and Border Protection ("CBP") to withhold customs clearance for a vessel if reasonable cause exists to believe that the vessel, its owner, or the operator violated APPS. The USCG determines whether such reasonable cause exists, and, if so, whether to refer the matter to the U.S. Department of Justice ("DOJ") for possible criminal enforcement.

The USCG also has authority under APPS to require the "filing of a bond or other surety satisfactory" before the vessel can continue trading. If these requirements are met, the USCG will request that CBP grant the vessel clearance to depart.

Brief History of U.S. Coast Guard Policies and Procedures Regarding Security Agreements

In the early stages of the vessel enforcement program in the 1990s, the USCG developed an "Agreement on Security" to incorporate the elements it deemed necessary to constitute "surety satisfactory" under APPS. The USCG's form Security Agreement aimed to create conditions that would enable DOJ to conduct its criminal investigation even after the vessel departed, while permitting the vessel to continue trading. These Security Agreements are signed by a USCG legal officer and the vessel owner and/or operator and contain several standard requirements, including that the vessel owner and operator must: (1) post a surety bond; (2) agree to disembark certain crew members (usually 8–10 from the engine department, plus the master) whom the government determines are necessary to its investigation; and (3) agree to continue to pay the full wages, as well as housing and healthcare costs, and a per diem for the disembarked crew members while they reside in the United States. The owner and operator also must request that the disembarking crew members surrender their passports, which are then usually held by the agent during the course of the investigation—and cannot be returned to the seafarers without 72 hours' notice to the USCG. Over the years, various parties have challenged the USCG's authority to require these commitments, but the courts have consistently rejected these challenges.

Initially, Security Agreements did not contain any time limitation. However, after about a decade, the USCG became concerned about the risks inherent in the open-ended nature of these agreements. To mitigate these risks, around 2001, the USCG inserted a 120-day time

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limit into Security Agreements based on its judgment that 120 days would give DOJ adequate time to investigate the case and determine whether an enforcement action was warranted. The 120-day time limit remained a standard feature of Security Agreements until about 2010 when, because of concerns about delay tactics used by certain defense counsel, the USCG removed the time limit entirely. Therefore, since 2010, vessel owners and operators involved in MARPOL investigations have been required to execute Security Agreements with no time limitations whatsoever in order to enable their vessels to sail, relying only on DOJ's good faith to investigate in a timely matter. In practice, however, DOJ has not investigated these factually straightforward cases efficiently, and hundreds of foreign seafarers have been stuck in the United States, many for over a year and some for more than 18 months, as a result.

The USCG's Current Security Agreement Policy Fails to Protect Seafarers' Interests

Security Agreements often negatively impact seafarers, personally and professionally, during the course of a MARPOL investigation. At first glance, the terms of a Security Agreement do not appear to be overly burdensome, as seafarers are housed in hotels and receive full wages and per diem payments. In reality, it is an unpleasant experience at best—away from their homes, families, and careers. The seafarers are all foreign citizens, some with a limited ability to speak English. While these seafarers expected to be away from home for months at a time while sailing, their stays in the United States due to a Security Agreement (signed by the USCG and the owner/operator, not the seafarers themselves) often far exceed the length of a standard contract. Not to mention that some seafarers are disembarked at or near the end of their contracts, substantially extending their time away from home. They often miss significant life events—marriages, deaths, and even the births of their own children. Their career progression may be seriously delayed—to the point where some cadets who have been involved in MARPOL investigations choose not to continue pursuing a career in shipping. And, the longer seafarers remain in the United States, the more substantial the impact—on their physical and mental health and that of their families back home.

Without any limitation on the duration of Security Agreements, many DOJ investigations have dragged on to the seafarers' detriment, as there is no incentive or requirement for DOJ to expedite the investigation. The length of time that seafarers are required to remain in the United States pursuant to a Security Agreement may vary depending on numerous factors, such as the level of their involvement in the alleged misconduct and the discretion of the individual prosecutor and his or her assessment of whether the information a particular seafarer can provide is material to the investigation. Some seafarers may be released early, but many are kept in the United States for the duration of the investigation regardless, including until a plea agreement is signed or a trial is held. And some may go to jail even after being "voluntarily" detained in the United States for more than a year.

Recent MARPOL cases have extended far beyond the prior USCG "120-day" policy, with many seafarers remaining in the United States much longer. Publicly available information reveals that, between 2010 and 2023, the time between the date of the USCG's initial MARPOL examination and the date on which a plea agreement was entered or an indictment was returned averaged approximately 265 days. The estimated average days elapsed jumps to about 300 days/case for cases in the last 10 years. Recall too, many cases involve 8–10 crew members being detained for these periods of time and we are aware of examples where seafarers remained in the United States for well over 500 days.

The length of required stays in the United States has expanded without any attendant protections and little consideration for seafarers' welfare. The USCG has the authority and responsibility to define the terms of Security Agreements, but little power to expedite an investigation (as required by the Security Agreement) because DOJ has discretion to determine a seafarer's importance to the investigation and thus how long the seafarer must remain in the United States. And, while the USCG can oversee seafarers' wellbeing during the investigation, it must do better—not only does USCG policy fail to limit the duration of seafarers' stay in the United States, its involvement during the pendency of a Security Agreement typically only involves doing a check-in on the seafarers if there is a complaint.

This leaves seafarers adrift without a safety net. Ship owners and operators pay for housing, wages, and per diem, but there is nothing these companies can do to remedy missed life events, career delays, and the mental and physical health impacts of the *de facto* confinement imposed by a Security Agreement. Indeed, a seafarer's only option is to have his lawyer demand the return of his passport, a decision likely to prompt a negative response from the prosecutor and result in the issuance of a material witness warrant and, potentially, his detention under more onerous conditions.

Reinstating a Reasonable Time Limitation in Security Agreements Would Balance the Government's Legitimate Enforcement Interests and Seafarer Welfare

The USCG's Security Agreement policy requires an urgent change. The U.S. government undoubtedly has a legitimate interest in investigating potential crimes; however, concerns regarding seafarer welfare warrant the reintroduction of a time limitation as a mandatory condition of Security Agreements.

In practice, however, DOJ has not investigated these factually straightforward cases efficiently, and hundreds of foreign seafarers have been stuck in the United States, many for over a year and some for more than 18 months, as a result.

While 120 days may be too short a time limit, 180 days is an entirely reasonable time period for DOJ to conduct interviews, issue subpoenas for documents, and compel grand jury testimony (if needed). MARPOL cases usually are not factually complex and do not warrant investigations that stretch on for a year or more. In most cases, the underlying misconduct lasted only a short time period and key facts are obtained during the USCG's expanded MARPOL examination—before a Security Agreement is even entered into. Most material facts likely either were relayed by a whistleblower who provided the USCG with photo and video evidence at the outset of the case or can be ascertained by the evidence USCG collected during its onboard investigation. Plus, if an owner/operator fails to comply with a grand jury subpoena or a witness resists testifying, DOJ can move the court to compel production of documents or testimony. There is no reason the government cannot utilize its investigative tools efficiently, within a six-month period, to assess the merits of a case and the necessity of particular seafarers to remain in the United States for extended periods of time. In the unusual case that may require more than six months to complete the investigation, DOJ has the full range of other statutory authorities relied upon by every other federal prosecutor to complete its investigation.

It is long overdue for USCG leadership to step in, reimpose a reasonable time limit in Security Agreements, and protect the rights of foreign seafarers who have little to no leverage in these cases. To do otherwise will continue to inflict an enormous injustice on scores of innocent seafarers every year. A 180-day limitation achieves this goal and strikes an appropriate balance of interests. □

The Legacy of the Oil Pollution Act of 1990

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In 1989, the tanker *EXXON VALDEZ* grounded on Bligh Reef, Alaska resulting in the spill of more than 11 million gallons of oil into Prince William Sound. The resulting ecological disaster galvanized Congress to enact the Oil Pollution Act the next year. This legislation has had far-reaching implications for the carriage of oil by ship, enforcement actions against responsible parties, funding to respond to spills nationwide, and the protection of the U.S. marine environment.

Before OPA, single-hulled tankers carried oil to, from and between U.S. ports. OPA phased in the transition to double-hull tankers, which have become the norm worldwide. In 1992, the International Maritime Organization ("IMO") modified the International Convention for the Prevention of Pollution by Ships ("MARPOL") to phase in and extend the double-hull requirement globally. Studies show that depending on the impact speed, double hulls can reduce the likelihood of a pollution incident by more than 60 percent compared to single-hull tankers. While double-hull tankers are not a panacea to stop oil discharges at sea, they provide greater protection from pollution incidents caused by groundings, or low-speed/low-impact collisions. By way of example, in 2009, the double-hull tanker *SKS SATILLA* allided with a submerged oil rig in the Gulf of Mexico creating a huge gash in the vessel's outer hull, but no oil spilled. In 2021, a tug collided with the tanker *POLAR ENDEAVOR* in Valdez, Alaska tearing a four-foot hole in the outer hull, but no oil spilled; the inner hull remained intact. On the downside, double-hulled tankers are more expensive to build and maintain and may be less stable due to a higher center of gravity and greater free-surface effect in the ballast tanks.

Under OPA, the "Responsible Party" or RP is strictly liable for an oil spill, though it may seek contribution or indemnity from other culpable parties. OPA requires the RP to immediately respond to a pollution incident by deploying an oil spill response organization ("OSRO") to clean it up, failing which the U.S. Coast Guard ("USCG") may take over the spill response and manage the operation at the RP's expense. One of the compromises that led to the passage of OPA is that cargo owners are not liable for a pollution discharge, though a variety of states also have imposed strict liability on the cargo owner in the event of a pollution discharge.

The RP must immediately report the incident to the National Response Center ("NRC"), and under Texas law to the Texas General Land Office ("TGLO"), failing which criminal and civil penalties may be imposed. Critically important is that criminal liability for an oil spill only requires proof of negligence; no intentional misconduct or mens rea is necessary. This criminal liability exposure has significantly altered the mindset of companies that transport oil by sea and has led to a far more conscious regard for safety considerations.

When a spill occurs, the USCG serves as the Federal On-Scene Coordinator ("FOSC"). The FOSC works in tandem with the RP's spill manager and OSRO through an incident command system ("ICS") to oversee response operations, which also involve natural resource damages trustees created by OPA assessing the spill's

environmental impact. Spills of National Significance ("SONS"), such as *DEEPWATER HORIZON*, require the coordination of vast response and remediation resources overseen by a National Incident Commander ("NIC"). OPA requires the RP to cooperate in the spill response, failing which it may not be able to limit its liability as permitted by OPA. Yet, the USCG in its law enforcement capacity is also responsible to investigate the cause of a pollution discharge. Overseeing the pollution response and investigating the cause at the same time creates risk issues for the RP in dealing with USCG representatives. Further, while trying to deal with the spill response, the RP may have to deal with criminal legal representation issues for crewmembers who may be subjects of the USCG's enforcement investigation.

Critically important is that criminal liability for an oil spill only requires proof of negligence; no intentional misconduct or mens rea is necessary. This criminal liability exposure has significantly altered the mindset of companies that transport oil by sea and has led to a far more conscious regard for safety considerations.

OPA has also altered two traditional aspects of U.S. maritime law. OPA permits a third party to recover economic losses occurring as the result of an oil spill without having suffered physical damage to property in which it holds a proprietary interest. This change alters the Robins Dry Dock economic-loss rule, which otherwise cuts off such tort liability. Secondly, while vessel owners can file a petition to limit their liability to the value of the vessel at the end of the voyage plus pending freight under the Shipowner's Limitation of Liability Act ("the Act"), which requires all parties to file its claims by a date set by a federal district court or face a bar to recovery, OPA claims are not subject to this concursus of claims. OPA claimants cannot be forced to file their pollution claims in a shipowner's limitation case and such claims are not subject to the Act's liability limit, but instead to OPA's liability limit, assuming the RP may limit. Under OPA, an RP can only limit its liability if it establishes that the spill was not caused by its gross negligence, or willful misconduct, or the violation of an applicable federal safety, construction, or operating regulation. RPs cannot easily meet this standard in the context of a marine casualty because oftentimes a regulatory violation contributes to an oil spill.

OPA also transformed the landscape for financing pollution discharge responses and the scope of such responses. OPA enhanced the Oil Spill Liability Trust Fund ("the Fund"). The Fund is financed primarily by a tax on domestically produced oil and imported oil refined in the United States and consists of two components—the Emergency Fund and the Principal Fund. The Emergency Fund is maintained such that $50 million is available annually to respond to maritime oil discharges nationwide. The Principal Fund responds to third-party and trustee claims for response costs and natural resource damages first presented to the RP, who fails to resolve same. If paid in whole or in part, the Fund becomes subrogated to the claimants' rights to pursue the RP. The National Pollution Funds Center ("NPFC"), run by the USCG, administers the Fund. Each vessel carrying oil in bulk must have a Certificate of Financial Responsibility ("COFR") that the NPFC must approve before the vessel may carry oil in U.S. waters. The COFR provides a minimum level of assurance that a vessel RP is financially able to respond to a pollution discharge. OPA also created a matrix of various natural resources damages that are available because of an oil spill, which has led to significant remediation efforts in various cases. The NPFC has been able to recover more than $9.0 billion dollars in oil spill settlements for use in natural resource restoration projects. Additionally, since OPA's enactment, the International Group of P&I Clubs has broadened the scope of pollution coverage to make available to member clubs up to $1.0 billion in coverage in the event of a major spill.

Oil spills in U.S. waters have decreased in both number and volume since OPA's enactment, though major incidents still occur from time to time. OPA has played a major role in altering the probability and recovery trajectory of oil spills in U.S. navigable waters. It is a congressional success story that has stood the test of time.

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BLANKROME

Maritime Shipping and Capital Markets Capabilities

Maritime shipping remains the most important means of moving goods around the world. With about 90 percent of cargo imported to the United States, maritime law and regulation, be it directly or indirectly, affects most businesses. Increased global trade, rising fuel costs, emerging environmental regulation, overcapacity in some segments of the industry, and the prospects for autonomous shipping have converged to make this industry alter course.

Blank Rome's maritime clients include major ocean and inland marine transporters, cruise owners/operators, port facility operators, national railroads, and both national and regional oil, gas, and liquids pipeline companies. Our attorneys have represented publicly traded companies throughout the world, including shipowners, vessel operators and charterers, cargo owners, ship managers, shipyards, wind farm operators, marine construction and transportation companies, waterfront facilities and terminals, energy companies, P&I clubs, shippers, and other financial institutions.

Maritime businesses with an eye toward growth need a new path, and we can help pave the way. Our attorneys have extensive experience in all areas of capital raising and regulatory compliance, including initial public offerings, uplistings and follow on offerings; Securities and Exchange Commission and Nasdaq and New York Stock Exchange disclosure requirements applicable to accelerated filers, smaller reporting companies and emerging growth companies. We also assist clients with private placements, such as Regulation D offerings, registered direct offeriings and PIPEs.

HOW WE CAN HELP

- Structuring and negotiating financing transactions
- Corporate governance and fiduciary matters
- Securities disclosure and related issues
- Proxy and consent solicitations
- Exchange listings
- Dodd-Frank
- Proxy contests and activist shareholder matters
- Sarbanes-Oxley compliance
- Audit compensation and special committee representation

INITIAL PUBLIC OFFERINGS

For any business, each IPO is unique, and it takes sophisticated and experienced attorneys to bring a company public in an uncertain market. Our firm has earned a reputation for helping emerging businesses go public as we understand the underlying business transaction, as well as the complex regulatory framework that governs the way offerings are made in today's marketplace. This combination of legal and business experience gives us a unique understanding of the underlying transaction and the legal implications of structuring securities offerings.

In addition, Blank Rome has often represented clients as underwriters on several initial public offerings and follow-on public offerings. Our clients find that our extensive experience in these matters has helped them identify, analyze, and better assist with the complex structuring of these transactions.

1934 ACT COMPLIANCE

Blank Rome regularly represents its reporting company clients in the preparation and review of their Annual Reports, Quarterly Reports, Current Reports, Proxy Statements, and other filings under the Securities Exchange Act of 1934. Our firm has also successfully represented clients in consolidated class action lawsuits regarding alleged violations of the Act, resulting in a favorable settlement for the defendants.

ATMs

At-the-market ("ATM") offerings require quick execution to ensure that the offering can be completed in a short window and the issuer is able to capitalize on a market opportunity and also receive the best execution. Our attorneys have extensive experience executing ATMs for issuers and agents and can help maritime clients meet their goals to complete a transaction quickly and efficiently.

PIPEs AND RDOs

Data on Private Investment in Public Equity ("PIPEs") transactions by PrivateRaise shows that Blank Rome is a leading player in the PIPEs markets, in addition to our strong position in other types of security financings. We handle both traditional and structured PIPEs, negotiate the terms of the transaction, and counsel clients on all Exchange-related matters, as well as SEC and other regulatory agency considerations and related registrations of the underlying securities.

Our firm also has experience representing clients engaged in Registered Direct Offerings ("RDOs"). RDOs can often be an appealing alternative to traditional PIPEs transactions when a client has shelf availability.

WHAT SETS US APART

- Ranked Tier 1 in 2022 *U.S. News & World Report–Best Lawyers®* (Woodward/White, Inc.) for M&A Law nationally and in Pittsburgh, and for Corporate Law nationally and in Los Angeles, Philadelphia, and Pittsburgh. Highly ranked for Capital Markets Law nationally and regionally in Los Angeles and Philadelphia and for M&A Law regionally in Los Angeles, New York City, and Pittsburgh.
- 2022 *Legal 500 United States* ranks Blank Rome as a Recommended Firm in M&A – Middle Market.
- *Chambers USA* ranks Blank Rome for its Corporate/M&A work:
  - "a middle-market-focused team advising clients on matters including public and private M&A, joint ventures and securities offerings."
  - "high-quality lawyers doing a breadth of work and transactions."

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Enforcing Foreign Arbitral Awards in the United States

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Sometimes, once an arbitration award is issued, the losing party accepts its lumps and pays the award, promptly and in full. At times, however, it is not so simple. The losing party may consider that the award is unfair or wrongly decided, or it may simply refuse or be unable to pay. In such cases, each party has decisions to make. For the prevailing party, the question is where and how to attempt to turn the arbitration award into money.

The Federal Arbitration Act (the "FAA")[1] consists of three chapters. Chapter 1, "General Provisions," applies generally except where there is a conflict with a provision of one of the other applicable chapters. Chapter 2, "Convention on the Recognition and Enforcement of Foreign Arbitral Awards," is the implementing legislation for the international treaty of the same name (also called the "New York Convention"), to which the United States is a party. Chapter 3, "Inter-American Convention on International Commercial Arbitration," is the implementing legislation for that convention.

Chapter 1 of the FAA expressly defines "maritime transactions" to mean "charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies, furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction." Section 2 of the FAA makes it applicable with respect to all maritime transactions, and this Section has been widely construed as preempting otherwise applicable state laws relating to enforcement and challenge of arbitration awards where the dispute involves a maritime transaction.

This is not the end of the analysis, however, because an arbitral agreement or award governed by Section 2 of the FAA also "falls under the Convention," *unless* it arises out of a relationship which is "entirely between citizens of the United States," except that even then, it will nevertheless fall under the Convention if the relationship between U.S. parties "involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states."

From these statutes, then, the courts have distinguished three categories of awards:

(1) a "domestic" award made in the United States between U.S. citizens, where the relationship does not involve property or performance abroad and has no reasonable relation with a foreign state;

(2) a "nondomestic" award, made in the United States but not falling within section 202's carve-out for domestic awards; and

(3) a "foreign" award, meaning one made outside the United States.[2]

A domestic award may be subject to Chapter 1 of the FAA but will not fall under the New York Convention or Chapter 2 (or 3) of the FAA. Nondomestic awards and foreign awards, on the other hand, are subject to the New York Convention and thus are governed by Chapter 2 (or 3) of the FAA.

It is settled law that a court must have jurisdiction over the defendant or its property in order to entertain an application to recognize and enforce an arbitration award against that party. Broadly speaking a court will assess whether it has jurisdiction over a defendant based on the nature and extent of that party's contacts with the forum. A court may exercise "general jurisdiction" over a defendant—that is, in respect of a claim that itself has no relationship to the forum or the defendant's contacts with the forum—only in narrow circumstances, principally where the defendant is incorporated in the forum or maintains its principal place of business there.

One might be forgiven for assuming that a claim to enforce an arbitration award pursuant to the Federal Arbitration Act constitutes a "federal question" for purposes of assessing the federal court's subject matter jurisdiction, but the courts have uniformly found otherwise.

Where, on the other hand, the claim somehow relates to the defendant's contacts with the forum, a court may exercise "specific jurisdiction" in respect of such claim even where the defendant's contacts with the forum are otherwise tenuous. Courts generally have found that a party's agreement to arbitrate a dispute in a particular forum represents a submission to that court's jurisdiction for purposes of enforcing or challenging the award.

A court may also exercise *"quasi in rem"* jurisdiction over a defendant's property that may be "found" in the jurisdiction. In the context of maritime claims, this most commonly arises in the context of a maritime attachment pursuant to Rule B of the Supplemental Rules for Admiralty and Maritime Claims. Thus, for instance, it is common for a party seeking to enforce an arbitration award to obtain jurisdiction in a district by attaching property of the defendant that may be found there, such as a vessel, a bank account, or a debt or other obligation owing to the defendant by a party located in the jurisdiction.

A second question is whether the action may be brought in a federal district court or whether it may only be brought in state court. This question arises because the federal courts are courts of "limited" jurisdiction, meaning that the court must have "subject matter" jurisdiction to entertain a suit. The three potentially applicable bases for federal jurisdiction here are "federal question," "admiralty and maritime," and "diversity of citizenship."

One might be forgiven for assuming that a claim to enforce an arbitration award pursuant to the Federal Arbitration Act constitutes a "federal question" for purposes of assessing the federal court's subject matter jurisdiction, but the courts have uniformly found otherwise. On the other hand, enforcement of an award governed by the New York Convention—a U.S. treaty obligation—is a "federal question," and therefore all actions concerning an award governed by the Convention may be brought in the federal courts. Indeed, Section 203 expressly provides that "[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States," and it further provides that the district courts shall have original jurisdiction over such actions and proceedings.

So, it sometimes is the case that an action to enforce a domestic award under Chapter 1 of the FAA can only be brought in state court, unless there is an alternative basis for federal subject matter jurisdiction. In *Badgerow v. Walters,*[3] the Supreme Court recently held that in an action under Section 9 or 10 of the FAA to vacate or enforce an arbitral award, the court may not "look through" the award to determine whether there was subject matter jurisdiction in respect of the underlying dispute. Thus, for instance, it is of no moment that the

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underlying arbitration arose under a maritime contract; the award is just an arbitral award like any other, and the action to enforce it is not "maritime" for purposes of subject matter jurisdiction under the FAA. Consequently, in such case, unless there is "diversity of citizenship," it will be difficult to establish jurisdiction in the federal courts for a claim arising solely under the FAA. That said, as noted above, this problem does not arise where the award is subject to the New York Convention, as many maritime arbitration awards are, so this issue may in practice be less of a problem than it may first appear.

Enforcement under the FAA is meant to be quite simple. Section 9 provides that where a party makes an application to confirm an award, "thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." Any grounds for vacating, modifying, or correcting the award would need to be asserted by the respondent in answer to the petition. Importantly, apart from a *very* narrow exception for where the arbitrators showed manifest disregard of the law, the grounds for challenging enforcement of an award are entirely limited to issues of procedural defect or arbitrator misconduct or bias, and review of the factual and legal findings of the panel normally cannot be reconsidered by the court.

Similarly, where the New York Convention applies, Section 207 provides that "[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." The grounds for contesting enforcement under the New York Convention substantially overlap with the grounds for *vacatur* set out in Section 10 of the FAA, and often the distinction between Section 10 and Article V will not be significant. Nevertheless, in a case governed by the New York Convention, the Article V defenses are exclusive, and "courts have strictly applied the Article V defenses and generally view them narrowly."[4] Thus, for instance, the defense of "manifest disregard of the law" is not available under the New York Convention.

Courts have held that the Convention does not need a party seeking enforcement of an award in a secondary jurisdiction to await the conclusion of all challenges to the award that may be pursued in the primary jurisdiction. Rather, "a court maintains discretion to enforce an arbitral award even when nullification proceedings are occurring in the country where the award was rendered."[5]

Although the New York Convention confers federal subject matter jurisdiction over actions to enforce arbitral awards governed by the Convention, that subject matter jurisdiction does not automatically extend to actions to enforce the award against alleged alter egos of a party. Two exceptions to this general rule have been recognized: (1) where "the complaint specifies two grounds for subject matter jurisdiction so that the alter ego claim can be construed as a separate action…to enforce the arbitration award against nonparties," and (2) where the alter ego claim would not unduly complicate the action of the court with respect to the arbitration award.

Conclusion

Arbitration can be a streamlined dispute resolution tool, but without the power to enforce an award the exercise can become one of futility. The United States has long shown a strong favor for the recognition and enforcement of arbitral awards, and the FAA and the New York Convention are powerful tools toward this end.

1. 9 U.S.C. § 1 *et seq.*
2. *See CBF Industria de Gusa S/A v. AMCI Holdings, Inc.,* 850 F.3d 58 (2d Cir. 2017), for a detailed discussion concerning this distinction.
3. 596 U.S. 1 (2022).
4. *Ario v. Underwriting Members of Syndicate 53 at Lloyds,* 618 F.3d 277, 291 (3d Cir. 2010) (citing *Admart AG v. Stephen & Mary Birch Found.,* 457 F.3d 302, 308 (3d Cir. 2006).
5. *Iraq Telecom Limited v. IBL Bank S.A.L.,* 597 F. Supp. 3d 657 (S.D.N.Y. 2022) (quoting *Compania de Inversiones Mercantiles, S.A. v. Gruppo Cememtos de Chihuahua S.A.B.,* 970 F.3d 1269, 99 (10th Cir. 2020), *cert. denied,* 141 S.Ct. 2793 (2021).

EPA Issues Supplemental Notice of Proposed Ruling to Implement the Vessel Incidental Discharge Act—Finally!

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The U.S. Environmental Protection Agency ("EPA") published a Supplemental Notice of Proposed Rulemaking ("SNPR") on October 18, 2023, modifying its initial proposed rule from three years ago on performance standards for vessel incidental discharges. 2023-22879.pdf (govinfo.gov) The SNPR addressed only three limited areas—ballast water, hulls and associated niche areas, and graywater—and did not make any sweeping changes to the October 26, 2020, proposal. 2020-22385.pdf (govinfo.gov) This action lays the groundwork for the finalization of EPA's final standards for the incidental discharges from vessels—finally.

Background

In December 2018, the Vessel Incidental Discharge Act ("VIDA") was signed into law. VIDA amended the Clean Water Act ("CWA") and was intended to replace the EPA's 2013 Vessel General Permit ("VGP"), which has now been in place for more than 10 years. The goal was to bring uniformity, consistency, and certainty to the regulation of incidental discharges from U.S. and foreign-flag vessels. VIDA required EPA to finalize uniform performance standards for each type of incidental discharge by December 2020 (a deadline missed by more than three years), and requires the United States Coast Guard ("USCG") to implement EPA's final standards within two years thereafter.

In October 2020, EPA published a proposed rule titled Vessel Incidental Discharge National Standards of Performance to implement VIDA, but the proposal languished with the change from the Trump Administration to the Biden Administration. EPA's delay in finalizing its performance standards prompted the Center for Biological Diversity and Friends of the Earth to file a lawsuit in February 2023 to force EPA to finalize its performance standards. *Center for Biological Diversity, et al., v. Regan, et al.,* No. 3:23-cv-535 (N.D. Cal. 2023). The premise of the environmental groups' complaint was that EPA's inaction harmed aquatic ecosystems, with the principal allegations focused on ballast water discharges. The parties thereafter negotiated a Consent Decree that requires EPA to finalize its performance standards by September 23, 2024.

> **EPA is also considering whether it should differentiate between passive and active discharges of biofouling in the standards and eliminating use of some terms in the proposed rule that were vague and difficult to interpret, such as "frequent," "gentle," "minimal," "local in origin," and "plume or cloud of paint."**

Supplemental Notice of Proposed Rulemaking

The SNPR requested comments on three limited topics—ballast water, hulls and associated niche areas, and graywater. Within these topics, EPA sought comments on the following:

(1) Decision not to propose a more stringent ballast water discharge standard.

The majority of the SNPR addressed ballast water and provided support for EPA's decision to maintain alignment with the International Maritime Organization ("IMO") and USCG ballast water discharge standards. The SNPR detailed EPA's review of the IMO and USCG type-approval processes for ballast water management systems ("BWMS") and explained why it determined a "no detectable organisms" standard was impractical based on the challenges of collecting and analyzing

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EPA Issues Supplemental Notice of Proposed Ruling to Implement the Vessel Incidental Discharge Act—Finally! (continued from page 12)

ballast water at levels lower than the proposed standard. The SNPR further detailed the extensive efforts EPA and the USCG took to ensure EPA had reviewed as much available ballast water data as possible. Ultimately, EPA concluded that the data failed to demonstrate that a more stringent discharge standard should be considered "best available technology economically achievable for controlling discharges" or "BAT," particularly considering the recognized need to have multiple BWMS options to suit different vessels and circumstances.

(2) Proposal to require ballast water management plans to address uptake practices.

EPA's initial proposal removed the ballast water best management practices ("BMPs") that were included in the 2013 VGP and that are also a current USCG regulatory requirement, *e.g.,* minimizing or avoiding uptake of ballast water in areas known to have infestations or populations of harmful organisms, areas near sewage outfalls, areas near dredging operations, and in the darkness, among other areas, because EPA determined that the BMPs were not practical to implement. The SNPR noted conflicting comments were received on whether removal of the BMPs was appropriate, with some commenters arguing that the BMPs were foundational and encouraged minimization of environmental impact from ballast water discharges. In response, EPA is considering requiring vessels' ballast water management plans to address ballast water uptake planning to minimize uptake of organisms and pathogens similar to the prior BMPs, which would allow vessels to incorporate local knowledge and tailor plans to vessel operations and avoid vague requirements that are difficult for vessels to implement.

(3) Proposal to require an equipment standard for new vessels that will operate exclusively on the Great Lakes.

The 2020 proposed rule had exempted vessels operating exclusively on the Great Lakes, known as Lakers, regardless of build date, from the numeric ballast water discharge standard based on the unique challenges these vessels face in treating ballast water, such as low salinity and high turbidity, icing, and suspended matter. This was an expansion of the exemption in the 2013 VGP, which requires Lakers constructed after January 1, 2009, to meet the numeric ballast water discharge standard. EPA noted that this decision was one of the most commented on aspects of the initial proposed rule.

Based on the comments received, the SNPR stated that EPA is considering setting a ballast water discharge *equipment* standard, but not a numeric discharge standard, for Lakers built *after* the effective date of the USCG rulemaking. EPA stated that an equipment standard "would potentially result in reduced discharges of organisms, even if the numeric discharge standard cannot be met," which it considered an incremental step towards a longer-term goal of advancing better technology and treatment of ballast water discharges on the Great Lakes.

(4) Proposals on defining new terms or eliminating vague terms related to biofouling.

EPA's original proposal included requirements to reduce biofouling organisms, principally from hulls and niche areas, by requiring biofouling management plans and implementing cleaning protocols. The SNPR discussed a number of issues that arose in comments related to biofouling and the proposed requirements to develop a biofouling management plan and follow in-water equipment and system cleaning protocols. To clarify its proposal, EPA is considering new definitions for inclusion in the biofouling discharge standards, including: "passive discharge of biofouling," "active discharge of biofouling," "anti-fouling coating," "anti-fouling system," "microfouling," and "macrofouling." EPA is also considering whether it should differentiate between passive and active discharges of biofouling in the standards and eliminating use of some terms in the proposed rule that were vague and difficult to interpret, such as "frequent," "gentle," "minimal," "local in origin," and "plume or cloud of paint."

(5) Proposal to prohibit in-water cleaning without the capture of macrofouling and exclude discharges from in-water cleaning and capture systems from the regulations.

In the proposed rule, EPA had not differentiated between in-water cleaning without capture and use of in-water cleaning and capture systems. Based on a number of comments, EPA is considering setting standards that prohibit discharges from in-water cleaning of macrofouling without capture and setting a discharge standard for in-water cleaning of microfouling. EPA is also considering adding biofouling management requirements to minimize macrofouling, such as mandating cleaning of microfouling and minimizing damage to anti-fouling coatings. Additionally, EPA is considering treating discharges from in-water cleaning and capture systems differently from other biofouling discharges and not regulating them as discharges incidental to the operation of a vessel, but more akin to a discharge to a reception facility, which EPA does not regulate under VIDA.

(6) Proposal to limit graywater standard applicability to new vessels of 400 GT or above that have a maximum capacity of 15 or more persons and provide overnight accommodations to those persons.

EPA initially proposed that graywater discharged from certain vessels, including all new vessels over 400 gross tons ("GT") be prohibited unless they meet numeric discharge standards for certain parameters. The SNPR noted that multiple comments were received requesting that EPA consider exempting vessels that carry only a small number of persons from the graywater discharge standards proposed for vessels of 400 GT or more based on the fact that they generate less graywater. Accordingly, EPA is considering limiting applicability of the graywater discharge standards to new vessels of 400 GT or more that have a maximum capacity of 15 or more persons and provide overnight accommodations to those persons.

Conclusion—Full VIDA Implementation

Full implementation of VIDA and the EPA's performance standards is still years off. Once EPA's performance standards are finalized, targeted for September 2024, the USCG will have two years to develop and finalize regulations addressing implementation and enforcement of EPA's standards. Until full implementation of the USCG regulations, likely not until late 2026 at the earliest, the 2013 VGP will remain in effect.

In light of EPA's aggressive enforcement of the 2013 VGP in recent years, it is critical for vessel owners and operators to closely review, now, VGP compliance for the vessels in their fleet and implement strict oversight and quality control, including audits, to ensure VGP requirements are complied with, crew are trained, and any deficiencies are promptly corrected. □

Red Sea Readiness: Navigating Risk Mitigation Measures for Safe Passage

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Since late 2023, the Yemen-based, Iran-backed Houthi rebel group has attacked dozens of commercial ships in the Red Sea, with no signs of slowing down. The unrest in the region threatens to impact supply chains and increase consumer prices. As activities in the Red Sea develop, appropriate precautions should be made to anticipate the instability in the region.

Ship Owner and Charterparty Considerations

Charterparty issues can arise for both Owners and Charterers. Resolution of such issues can be avoided by a careful inspection of charterparty terms. Questions as to whether Owners can refuse Charterers' instructions to transit the Red Sea and whether Charterers can place the vessel off-hire or claim damages if Owners deviate the vessel via alternative routes requires individual analysis.

> **With the evolving activities in the Red Sea, shipowners should reflect on obligations of the flag state but make individual assessments in evaluating the risks to their ships and not rely solely on flag state protections.**

Since standard clauses are often amended, it is impossible to provide a "one-size-fits-all" answer to the main issues that arise from charterparties requiring transit through the Red Sea. Clearly, the specific wording of any *force majeure* clause will have a significant impact on the analysis in any given case. Generally, however, the test for determining whether Owners should or can refuse to proceed, is based on whether an area is dangerous. Owners must provide evidence that an area may be dangerous, or can become dangerous to the vessel, cargo, or crew. Owners, in order to establish that a decision has been made in the "reasonable judgment" of the Master or Owner, must carry out individual and contemporaneous risk assessments ahead of making a decision to invoke charterparty provisions, refuse to follow Charterers' orders, cancel a charter, or deviate. Every charterparty must also be assessed for Charterers' and Owners' rights and responsibilities when "war risks" occur. As potential disputes arise, an assessment of outcome should also consider vessel ownership, trading patterns, security risks at the relevant time, and commercial considerations.

Flag State Perspectives

Flag states enforce international obligations everywhere and exclusively on the high seas over their vessels. International law contemplates the use of force by U.S. forces in peacetime to protect U.S.-flagged and foreign-flagged vessels at sea from unlawful acts of violence. *See The Commander's Handbook on the Law of Naval Operations,* COMDTPUB P5800.7A (2022), § 3.10. The doctrine of self-defense provides U.S. forces authority to use proportionate force needed to protect U.S.-flagged vessels, U.S. nationals, and their property against unlawful acts of violence beyond foreign territorial seas. *Id.* at § 3.10.1. Similarly, collective self-defense authorizes U.S. forces to use proportional force necessary to protect foreign-flagged vessels, foreign nationals, and their property from unlawful violence (including terrorism and piracy) at sea when requested by the flag state, as well as in cases where the necessity to act immediately to save human life does not allow time to obtain flag state consent. *Id.*

With the evolving activities in the Red Sea, shipowners should reflect on obligations of the flag state but make individual assessments in evaluating the risks to their ships and not rely solely on flag state protections.

P&I Coverage

Protection and indemnity ("P&I") coverage is not prejudiced solely by a decision to continue a voyage through the Red Sea. The additional risks created by the hostilities and attacks will likely fall to war risk insurance. If the primary layer of this cover is not placed, it is important that P&I club members speak to their war risks underwriters. A decision to re-route a vessel to avoid the Red Sea may, however, have serious P&I implications as this may be considered an unjustified deviation which potentially engages an exclusion to cover. Any decision to deviate should first be discussed with the Club. The impact on cover, and whether special insurance needs to be arranged, is assessed on a case-by-case basis. Those planning a new voyage through the Red Sea should consider including an appropriate liberty provision in their contract of carriage entitling them to re-route to avoid the area.

Other Considerations

After the Houthi forces hijacked a car carrier on November 19, 2023, further attacks by armed skiffs, drones, and anti-ship missiles have occurred. Information related to vessels involved in more recent attacks did not indicate any immediate affiliation with Israel, Israeli nationals, or links to the conflict. Ships should maintain a heightened awareness for potential collateral damage when transiting the region.

Ships with automatic identification system ("AIS") switched on and off have been attacked. Switching off AIS makes it slightly more difficult to track a ship but can also hinder the ability for others to provide support or direct contact. International Maritime Organization ("IMO") guidance outlines "[i]f the master believes that the continual operation of AIS might compromise the safety and security of his/her ship or where security incidents are imminent, the AIS may be switched off." *See* IMO Resolution A. 1106 (29). Limiting the information in AIS data fields or switching off AIS could make a ship harder to locate but it is unlikely to ultimately prevent an attack. Limiting AIS data to the mandatory fields and omitting the next port of call could also be considered.

Conclusion

The situation in the Red Sea is fast evolving and unpredictable. Ship owners, operators, managers, and staff should regularly evaluate the risks to their ships, including navigation and collision avoidance, and plan routes accordingly. Further, experienced counsel can assist in the evaluation of Charterers' and Owners' rights and responsibilities, P&I coverage, and evaluation of flag state responsibilities, and provide legal assistance in navigating published guidance on the unrest in the Red Sea.

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Summary of Impact of the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships

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Many *Mainbrace* readers are likely aware that the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, 2009 (the "HKC"), is set to enter into force on June 26, 2025, following its ratification by Liberia and Bangladesh last June. Since then, Pakistan, a major ship recycler, and the Marshall Islands, a major flag state, have also ratified the HKC, thereby amplifying its importance to the shipping industry.

However, not all of our readers may be aware of what the HKC requires or who it may impact within the shipping industry. Accordingly, this article summarizes some of the key provisions of the HKC and discusses certain potential impacts and considerations for various entities within the industry. (National laws applicable to ship recycling that are not based on the HKC are beyond the scope of this article.)

Key Requirements of the HKC

The purpose of the HKC is to improve the safety and standard of ship recycling practices to ensure that vessels, when recycled at the end of their operational lives, do not pose any unnecessary risks to human health and safety or to the environment. The HKC embraces a cradle-to-grave approach to vessels by controlling certain aspects of the design, construction, survey, certification, operation, and recycling of vessels, including standards for ship recycling facilities.

Vessels

With respect to vessels, a party to the HKC must:

- prohibit and/or restrict the installation or use of certain hazardous materials, including asbestos, ozone-depleting substances, polychlorinated biphenyls ("PCBs"), and anti-fouling compounds and systems, on vessels entitled to fly its flag or operating under its authority; and

- prohibit and/or restrict the installation or use of such hazardous materials on vessels while in its ports, shipyards, ship repair yards, or offshore terminals; and

- take effective measures to ensure that such vessels comply with those requirements.

All vessels covered by the HKC will be required to develop, maintain, and carry an Inventory of Hazardous Materials ("IHM"), which is to be updated throughout a vessel's life to reflect any changes in hazardous materials on the vessel.

As part of the HKC's compliance regime concerning hazardous materials, covered vessels must undergo:

- an initial survey before the vessel is put into service (which presumably generally applies to "new ships"), or before the International Certificate on Inventory of Hazardous Materials is issued confirming compliance with the IHM requirements (which presumably generally applies to "existing ships");

- renewal surveys at intervals to be specified by the relevant flag-state party to the HKC, but at least every five years;

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- if applicable, an additional survey at the request of the owner following a change, replacement, or significant repair to the structure, equipment, systems, fittings, arrangements, or materials on the ship; and

- a final survey before the vessel is taken out of service and the vessel can be recycled.

Upon successful completion of each required survey, an International Certificate on Inventory of Hazardous Materials or an International Ready for Recycling Certificate, as the case may be, will be issued for the vessel.

Further, a covered vessel may only be recycled at a ship recycling facility authorized in accordance with the requirements of the HKC discussed below and that is authorized to undertake the type of ship recycling contemplated in the vessel's ship-specific Ship Recycling Plan ("SRP").

Ship Recycling Facilities

With respect to ship recycling facilities, all ship recycling facilities subject to the HKC must be authorized by a competent authority of the relevant party to the HKC and may only accept vessels (i) that comply with the HKC or meet the requirements of the HKC for recycling (which includes having an IHM), and (ii) that they are authorized to recycle. Qualified ship recycling facilities will be issued a Document of Authorization by the competent authority to conduct ship recycling under the HKC and the related Guidelines for the Authorization of Ship Recycling Facilities (MEPC.211(63)).

In addition, the HKC includes several requirements for ship recycling facilities to enact policies and procedures to protect workers, human health, and the environment, and to ensure the safe and environmentally sound removal of hazardous materials on ships, including, for example, to have in place a Ship Recycling Facility Plan ("SRFP") for the facility and to develop a ship-specific Ship Recycling Plan for each vessel that is to be recycled.

Applicability of the HKC

There are currently 24 parties to the HKC, which include Bangladesh, Belgium, Republic of the Congo, Croatia, Denmark, Estonia, France, Germany, Ghana, India, Japan, Liberia, Luxembourg, Malta, the Marshall Islands, Netherlands, Norway, Pakistan, Panama, Portugal, São Tomé and Príncipe, Serbia, Spain, and Turkey. (The United States is not a signatory to the HKC.) These countries represent some of the largest flag states in the world (*e.g.,* Liberia, Malta, the Marshall Islands, and Panama) and the major ship recycling states (*e.g.,* Bangladesh, India, Pakistan, and Turkey).

Subject to certain exceptions, the HKC applies to (1) all vessels entitled to fly the flag of a party to the HKC or operating under its authority, and (2) ship recycling facilities operating under the jurisdiction of a party to the HKC. The HKC provides exceptions for (i) vessels of less than 500 gross tons, (ii) warships, naval auxiliary, or other vessels owned or operated by a party to the HKC and used for only governmental non-commercial services, and (iii) vessels operating throughout their life only in waters subject to the sovereignty or jurisdiction of the state whose flag the vessels are entitled to fly. Notwithstanding these exceptions, the HKC requires parties to adopt measures to ensure that such vessels "act in a manner consistent with the [HKC], so far as is reasonable and practicable."

The HKC applies to "new ships" and "existing ships." "Ship" is broadly defined under the HKC as "a vessel of any type whatsoever operating or having operated in the marine environment and includes submersibles, floating craft, floating platforms, self-elevating platforms, Floating Storage Units ("FSUs"), and Floating Production Storage and Offloading Units ("FPSOs"), including a vessel being stripped of equipment or being towed."

A "new ship" is a vessel (1) for which the construction contract is placed on or after the HKC's entry into force, (2) in the absence of a construction contract, the keel of which is laid or at a similar stage of construction on or after six months after its entry into force, or (3) the delivery of which is on or after 30 months after its entry into force. A new ship is required to have an IHM on board before it is put into service.

An "existing ship" is a vessel that is not a "new ship." An existing ship shall comply "as far as practicable" with the requirements of the HKC, "taking into account the guidelines developed by the [International Maritime

Organization (the "IMO")] and [its] Harmonized System of Survey and Certification," no later than five years after the HKC's entry into force or, if earlier, before being recycled.

Implementation and Enforcement of the HKC

Each party to the HKC is required to implement the requirements of the HKC into its national laws such that any violation of the HKC is prohibited. With respect to vessels, each party is required to establish sanctions for violations of the HKC, wherever such violations may occur, and for ship recycling facilities, each party must establish sanctions for violations by a ship recycling facility within its jurisdiction. While the HKC does not specify what the sanctions must be, under Regulation 10 of the HKC, the sanctions must be adequate in severity to discourage violations whenever they occur.

The parties to the HKC must cooperate in detecting violations and enforcing the HKC. In that regard, the HKC has provisions for parties to report, investigate, or request investigations into alleged violations and provide the results of any investigation to the relevant parties and the IMO. Vessels covered by the HKC may be subject to inspection in any port or offshore terminal of another party to the HKC for purposes of determining compliance with the HKC. If a vessel is determined to be in violation, the party carrying out the inspection may take steps to warn, detain, dismiss, or exclude the vessel from its ports and is required under the HKC to immediately inform the vessel's flag state and the IMO.

Because the HKC has not yet entered into force, it remains to be seen exactly how the various parties will implement and enforce these requirements under their respective national laws. However, to the extent the implementation and enforcement by EU countries of the EU Ship Recycling Regulation (the "EU SRR") (which is discussed below) serves as a guide, one can expect a variety of different approaches with sanctions ranging from minor monetary fines to potential jail time.

Other Related International Ship Recycling Efforts

While not the main focus of this article, we briefly touch on two other related international efforts with respect to ship recycling—the EU Ship Recycling Regulation (EU No. 1257/2013) and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1989 (the "Basel Convention"). These two regimes are relevant because of their overlap in coverage with the HKC.

The EU SRR was passed in 2013 and implements the requirements of the HKC for the safe and environmentally sound recycling of ships into EU law. However, the EU SRR goes further than the HKC in some respects by imposing additional safety and environmental requirements on vessels registered under the flag of EU member states and ship recycling facilities and is hence often considered stricter than the HKC.

The Basel Convention was designed to control the movement of hazardous waste generally between countries and, in particular, from more developed countries to less developed countries. The Basel Convention has been widely adopted, including by most EU countries and parties to the HKC. (The United States is a signatory to the Basel Convention, but it has not ratified it). While vessels are not considered hazardous waste per se by the Basel Convention, vessels being transported for recycling are deemed waste thereunder, which led to the adoption of specific guidelines for the environmentally

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sound dismantling of ships. In 1995 certain parties to the Basel Convention agreed to what is known as the "Ban Amendment," which in effect prohibits transboundary movements of hazardous waste (including vessels being recycled) from Organization for Economic Cooperation and Development ("OECD") countries to non-OECD countries (which include Bangladesh, India, and Pakistan) absent certain agreements.

Regulation 3 of the HKC requires parties to take measures to implement the HKC, taking into account relevant and applicable standards, recommendations, and guidance developed by the International Labour Organization and under the Basel Convention, but it is not entirely clear how this will work in practice. As others in the shipping industry have already noted, while the HKC, the EU SRR, and the Basel Convention address hazardous materials in ship recycling, they do so in different ways and have different requirements and standards, which raises questions regarding compliance where the three regimes intersect. The HKC's impending entry into force will bring into focus the various disconnects between these different regimes and begs the question of whether any amendments will be made to the HKC, the EU SRR, and/or the Basel Convention to try to harmonize them prior to the HKC's entry into force, in particular with respect to the status of ship recycling facilities in Bangladesh, India, and Pakistan.

Criticisms of the HKC

While many in the shipping industry have welcomed and praised the HKC's upcoming entry into force, various industry groups have criticized the HKC for certain claimed shortcomings. These criticisms include the HKC/EU SRR/Basel Convention compliance issue noted above as well as the following:

- shipowners may simply elect to reflag a vessel to a "flag of convenience" state that is not a party to the HKC shortly before recycling the vessel to avoid the HKC's requirement to recycle the vessel in an HKC-compliant ship recycling facility;
- the HKC does not prohibit the ship recycling practice of beaching, and certain ship recycling yards that engage in beaching and are located within the jurisdiction of HKC parties (such as Bangladesh and India) claim that they are already compliant with the HKC;
- the HKC does not provide adequate worker safety protections for those workers involved in ship recycling;
- the HKC does not include downstream waste management restrictions; and
- sanctions are adopted and enforced at the national level under the HKC so there are questions as to whether certain parties will adopt sufficiently strict sanctions for violations and how effective certain parties will be in enforcing compliance on vessels and ship recycling facilities under their jurisdiction.

These claimed shortcomings may create impairments for compliance by shipowners and ship recycling facilities with the HKC in certain situations or may lead to negative publicity for shipowners who believe that compliance with the letter of the HKC should be sufficient. Nevertheless, shipowners and ship recycling facilities should not expect them to lead to significant delays in the implementation and enforcement of the HKC.

Impact of the HKC

VESSELS AND SHIP RECYCLING FACILITIES SUBJECT TO THE HKC

Of course, all owners and operators of vessels flying the flag of a party to the HKC and all ship recycling facilities in countries party to the HKC will need to comply with the HKC when it enters into force. The HKC's compliance requirements will have limited impacts on vessels registered under the flags of EU members (or registered under other flags but call on EU ports) and ship recycling facilities in the EU given that the requirements of the EU SRR are generally stricter. In addition, shipowners of vessels registered under the flags of EU members may not be able to recycle their vessels in HKC-compliant ship recycling facilities in Bangladesh, India, and Pakistan until the regime conflict discussed above is sorted. With respect to vessels and ship recycling facilities subject to the jurisdiction of non-EU parties, the HKC's impact will likely depend on the respective national laws those parties adopt to implement and enforce the HKC.

VESSELS AND SHIP RECYCLING FACILITIES NOT SUBJECT TO THE HKC

Although vessels and ship recycling facilities under the jurisdiction of non-party countries, such as the United States, are not required to comply with the HKC, its entry

into force will significantly change the options of owners and operators of such vessels for recycling and put pressure on ship recycling facilities to satisfy the requirements to be an approved facility under the HKC.

For owners and operators of vessels flagged in non-party countries, the fact that Bangladesh, India, Pakistan, and Turkey are parties to the HKC and, according to the Baltic and International Maritime Council, collectively recycle approximately 95 percent of the world's recycled vessels each year, means that it will become increasingly harder to avoid compliance with the HKC when they want to recycle vessels. Similarly, the claimed "flag of convenience" loophole mentioned above will become increasingly smaller as more flag states become party to the HKC. To adjust to this new reality, owners and operators should begin implementing the periodic survey requirements of the HKC now so that an Inventory of Hazardous Materials can be issued in conjunction with the special (*i.e.,* five-year) class surveys of their vessels.

Following this practice will be beneficial to shipowners in a number of ways:

First, it will enable a shipowner to select from a wide range of ship recycling facilities at any time without having to go through the time and expense of bringing its vessel into compliance for facilities in countries that are party to the HKC.

Second, it will be valuable in case the shipowner wants to sell the vessel during its operational life because having an up-to-date IHM will presumably make a used vessel more valuable to a potential buyer because it will not have to incur that initial expense and can maintain the IHM until it is time to recycle the vessel. Similarly, if the shipowner decides to reflag its vessel, having an up-to-date IHM will facilitate reflagging the vessel to a party to the HKC, such as Liberia or the Marshall Islands.

Third, it may facilitate the financing of the vessel whether it is a newbuild or an existing vessel. Many *Mainbrace* readers will be familiar with the Poseidon Principles, which provide banks with a framework for integrating climate considerations into their lending decisions to promote the decarbonization of the shipping industry. The chair of the Poseidon Principles has noted that it would be a logical step to expand them to include ship recycling once the HKC is in force. Separate from that possibility is the very real likelihood of lenders requiring that a vessel being used as collateral for a loan possess and maintain an up-to-date IHM so that the vessel can be more easily sold in the event of a foreclosure (with the added benefit of the lenders being green).

The HKC embraces a cradle-to-grave approach to vessels by controlling certain aspects of the design, construction, survey, certification, operation, and recycling of vessels, including standards for ship recycling facilities.

For ship recyclers in countries that are not party to the HKC, the fact that Bangladesh, India, Pakistan, and Turkey are parties to the HKC means that there should be lots of options for shipowners who are looking to recycle their vessels in an environmentally responsible manner. Hence, ship recycling facilities that are not approved under the HKC (or the EU SRR) may miss out on lucrative recycling jobs, particularly considering the possible increase in vessels being recycled because they are not compliant with emerging emissions standards and are not candidates for a retrofit. In that regard, it is noteworthy that a recycling facility in Canada, which is not a party to the HKC, was recently issued a Statement of Compliance under the HKC by Lloyd's Register, thereby allowing it to compete for recycling projects requiring HKC compliance. Accordingly, ship recycling facilities that are not in countries that are party to the HKC should consider following that path.

Conclusion

Many questions remain regarding exactly how the HKC will work in connection with other related regimes such as the EU SRR and the Basel Convention and whether owners and operators will be able to exploit loopholes in the HKC to avoid compliance. However, for the reasons discussed above, there are numerous reasons for owners and operators of vessels and ship recycling facilities to start complying with the applicable requirements of the HKC before its entry into force, even if their vessel is registered under the flag of a non-party or their ship recycling facility is located in a country that is not a party to the HKC. □

A Tale of Two Canals

KEITH B. LETOURNEAU

KEITH B. LETOURNEAU
PARTNER

Ordinarily, over 36,000 merchant ships pass through the Suez and Panama Canals each year representing about 30 percent of the world's merchant fleet tonnage. This year, both canals face extraordinary events beyond their control, which are affecting vessel transits and arrivals across the globe. Following Hamas' attack on Israeli citizens and Israel's retaliatory response, Houthi rebels in Yemen funded by Iran have launched missile and drone attacks on merchant ships in the Gulf of Aden ("Gulf") as they enter and depart the Red Sea. In response to these attacks, numerous major container carriers, as well as major oil and gas tanker operators and car carriers have suspended transits through the Gulf, and the United States is spearheading a multinational task force (Operation Prosperity Guardian) now heading toward the Gulf to protect the world's merchant fleet. Meanwhile, the Panama Canal's Lake Gatun is suffering from an unprecedented drought causing significant delays for vessels transiting between the Gulf of Mexico and Pacific Ocean. Currently, traffic flow is about 7 percent of normal capacity. Water levels have plunged due to El Niño, a variant of the El Niño/Southern Oscillation ("ENSO") that generates above-average water temperatures across the eastern equatorial Pacific Ocean every two to seven years.

These two canals are vessel traffic choke points. Recall the container ship *EVER GIVEN* closed the Suez Canal for six days in 2021 when it plowed into the canal's east bank and completely blocked traffic north and southbound. That closure slowed trade between Europe, the Middle East and Asia. Similarly, the decision by major merchant vessel operators to suspend Suez routes will require the affected vessels to transit around South Africa's Cape of Good Hope adding thousands of freight miles and numerous days of delay to their respective transits. For vessels transiting to Europe, the added voyage duration will increase the air emissions subject to the European Union's Emissions Trading System ("ETS"), which took effect Jan. 1, 2024. Fifty percent of such air emissions will be subject to ETS taxation. Further, for those vessels willing to take the risk, additional war risk premiums ("AWRP") provide coverage for transits through high-risk areas with charterers directing the vessel through such areas bearing the burden.

> **These two canals are vessel traffic choke points.**

With the advent of drone strikes and the easy availability of anti-ship missiles in the hands of Iran's proxies, we can expect these maritime attacks will not stop, at least until Israel's military warfare in Gaza ends. These attacks also signal a new day in guerilla warfare at sea. Previously, security concerns were limited to piracy attacks by small bands of Somali raiders. Now such attacks can take place

at long range at relatively low cost from positions ashore that may prove elusive to find. We should expect Iran to use this new platform to hound the global merchant fleet whenever it sees fit.

In Panama, water conservation measures started in January 2023 and the Panama Canal Authority ("ACP") imposed traffic restrictions on July 30, 2023, that continue to the present day, though ACP has signaled its intention to slightly raise the number of vessels authorized to transit the canal in the new year. Vessels have stacked up on both sides of the canal with delays reaching as many as 17 days in August 2023. Freight rates have climbed significantly as a result. For example, the EIA reports that rates for very large gas carriers ("VLGCs") traveling the Houston-to-Chiba, Japan route hit their highest rate ($250 per ton) at the end of September since published rates started in 2016. The rates fell in October as VLGC charterers stayed out of the market because of the higher rates. Other petroleum product carriers and grain ships are experiencing disruptions as well. Reuters reports that bulk grain freight rates have climbed at a time when U.S. exports of corn and soy are ordinarily at peak season, and U.S. gasoline cargoes were half as much in November than the same time last year. U.S. Gulf refiners have responded by lowering bulk gasoline prices to move product and avoid inventory buildup, which has contributed to lower gasoline prices at the pump.

Vessels can avoid Panama Canal delays by paying an added fee to jump the line, but the cost is steep and usually prohibitively expensive. For vessel operators, the only other alternatives are to travel around South America or negotiate the cost of delays with charterers. Such costs fall outside the typical demurrage penumbra because they do not relate to delays during cargo operations. Arguably, they are costs brought about a force-majeure event for which charterers are not accountable. Yet, voyage charterers are pressed to accept responsibility for some or all these delays, failing which disponent owners (that is, time or bareboat charterers) are free to consider rerouting around Cape Horn or through the Straits of Magellan. Yet, disponent owners will incur the costs of supplying bunker fuels for such voyages for which voyage charterers are not responsible, creating a disincentive to reroute. The compromise solution is for the parties to share the cost of delays at the Panama Canal.

The simultaneous delays at the Suez and Panama Canals are unprecedented, and save for U.S. gasoline prices, assuredly will lead to higher transportation costs for the carriage of goods that will flow down to consumers. While the combined effects create supply-chain shocks worldwide, the global merchant fleet is already adapting as are commodities suppliers looking to alternative methods to deliver goods or markets in which to deliver them. Fortunately, the impacts should not prove as pernicious as the pandemic's supply-chain disruptions.

This article was first published in *Texas Lawyer* on January 4, 2024.

Blank Rome Highly Ranked in *U.S. News–Best Lawyers®* 2024 "Best Law Firms"

Blank Rome LLP is pleased to announce that our firm was ranked nationally in 31 practice areas and regionally in 96 practice areas in the 2024 "Best Law Firms" survey by *U.S. News & World Report – Best Lawyers®*.

Earlier this year, Blank Rome was also recognized in the 2024 Best Lawyers in America survey, which ranked 200 firm attorneys in the annual categories of "Lawyers of the Year," "Ones to Watch," and "Best Lawyers" in 50 practice groups across 12 regions.

NATIONAL 2024 RANKINGS

TIER 1

- Admiralty and Maritime Law
- Banking and Finance Law
- Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law
- Commercial Litigation
- Corporate Law
- Criminal Defense: White-Collar
- Employee Benefits (ERISA) Law
- Employment Law – Management
- Insurance Law
- Labor Law – Management
- Litigation – Bankruptcy
- Mergers and Acquisitions Law
- Patent Law
- Real Estate Law
- Trusts and Estates

TIER 2

- Energy Law
- Equipment Finance Law
- Litigation – Banking and Finance
- Litigation – Environmental
- Litigation – Labor and Employment
- Litigation – Patent
- Securities / Capital Markets Law
- Securities Regulation
- Tax Law

TIER 3

- Environmental Law
- Land Use and Zoning Law
- Litigation – Intellectual Property
- Litigation – Real Estate
- Litigation and Controversy – Tax
- Mass Tort Litigation / Class Actions – Defendants
- Securitization and Structured Finance Law

REGIONAL 2024 RANKINGS

TIER 1

CHICAGO
- Insurance Law
- Litigation – Insurance

CINCINNATI
- Commercial Litigation

HOUSTON
- Admiralty & Maritime Law
- Banking and Finance Law
- Litigation – Land Use & Zoning
- Litigation – Municipal
- Litigation – Patent
- Patent Law

LOS ANGELES
- Corporate Law
- Family Law
- Insurance Law
- Litigation – Insurance

NEW YORK CITY
- Admiralty & Maritime Law
- Family Law
- Real Estate Law
- Trusts & Estates Law

PHILADELPHIA
- Antitrust Law
- Banking and Finance Law
- Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law
- Commercial Litigation
- Corporate Law
- Criminal Defense: White-Collar
- Employee Benefits (ERISA) Law
- Employment Law – Management
- Equipment Finance Law
- Gaming Law
- Labor Law – Management
- Land Use & Zoning Law

PHILADELPHIA (CONTINUED)
- Litigation – Banking & Finance
- Litigation – Bankruptcy
- Litigation – Environmental
- Real Estate Law
- Securities Regulation
- Trusts & Estates Law

PITTSBURGH
- Commercial Litigation

WASHINGTON, D.C.
- Admiralty & Maritime Law
- Criminal Defense: White Collar
- Energy Law
- Insurance Law
- Litigation – Insurance

TIER 2

CHICAGO
- Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law

DELAWARE
- Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law

HOUSTON
- Commercial Litigation
- Employment Law – Management
- Labor Law – Management
- Litigation – Intellectual property
- Litigation – Labor & Employment

LOS ANGELES
- Banking and Finance Law
- Litigation – Labor & Employment
- Mergers & Acquisitions Law
- Nonprofit / Charities Law
- Securities / Capital Markets Law
- Trusts & Estates Law

NEW JERSEY
- Criminal Defense: White-Collar
- Insurance Law
- Litigation – Environmental

NEW YORK CITY
- Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law
- Litigation – Real Estate
- Litigation – Trusts & Estates

PHILADELPHIA
- Admiralty & Maritime Law
- Appellate Practice
- Environmental Law
- Health Care Law
- Litigation – Intellectual Property
- Litigation – Labor & Employment
- Tax Law

PITTSBURGH
- Litigation – Labor & Employment

WASHINGTON, D.C.
- Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law
- Employee Benefits (ERISA) Law
- Environmental Law
- Litigation – Bankruptcy
- Patent Law
- Tax Law

TIER 3

HOUSTON
- Corporate Law
- Litigation – Securities

LOS ANGELES
- Commercial Litigation
- Real Estate Law

NEW YORK CITY
- Banking and Finance Law
- Criminal Defense: White-Collar
- Employment Law – Individuals
- Litigation – Bankruptcy
- Mergers & Acquisitions Law
- Securities / Capital Markets Law
- Securitization and Structured Finance Law

PHILADELPHIA
- Arbitration
- Litigation – Patent
- Mediation
- Securities / Capital Markets Law

TAMPA
- Commercial Litigation

WASHINGTON, D.C.
- Commercial Litigation
- Government Relations Practice
- Litigation – Tax
- Mass Tort Litigation / Class Actions – Defendants
- Natural Resource Law
- Real Estate Law

Best Lawyers: 2024 "Best Lawyers"

The annual "Best Lawyers" category recognizes leading attorneys by region and practice area, for their acumen in the legal industry.

HOUSTON
- Michael K. Bell is recognized in Admiralty and Maritime Law and Product Liability Litigation – Defendants
- Keith B. Letourneau is recognized in Admiralty and Maritime Law
- Douglas J. Shoemaker is recognized in Admiralty and Maritime Law

NEW YORK
- Thomas H. Belknap, Jr. is recognized in Admiralty and Maritime Law
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- John D. Kimball is recognized in Admiralty and Maritime Law
- Richard V. Singleton II is recognized in Admiralty and Maritime Law
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WASHINGTON, D.C.
- Jeanne M. Grasso is recognized in Admiralty and Maritime Law
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- Matthew J. Thomas is recognized in Admiralty and Maritime Law
- Jonathan K. Waldron is recognized in Admiralty and Maritime Law

About *U.S. News – Best Lawyers®* Ranking Methodology: The *U.S. News – Best Lawyers®* "Best Law Firms" rankings are based on a rigorous evaluation process that includes the collection of client and lawyer evaluations, peer review from leading attorneys in their field, and review of additional information provided by law firms as part of the formal submission process. To be eligible for a ranking in a particular practice area and metro region, a law firm must have at least one lawyer who is included in *Best Lawyers®* in that particular practice area and metro. For more information on *Best Lawyers®,* please visit bestlawyers.com.

We invite our readers to dive into our archive of *Mainbrace* newsletters and maritime development advisories, as well as keep abeam with all of our current and upcoming analyses on trending maritime topics and legislation, in our ***Safe Passage*** blog.

safepassage.blankrome.com

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Severe Weather Emergency Recovery Team

Blank Rome's Severe Weather Emergency Recovery Team ("SWERT") helps those impacted by natural disasters, such as hurricanes, wildfires and mudslides. We are an interdisciplinary group with decades of experience helping companies and individuals recover from severe weather events. Our team includes insurance recovery, labor and employment, government contracts, environmental, and energy attorneys, as well as government relations professionals with extensive experience in disaster recovery.

Learn more: blankrome.com/SWERT

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About Blank Rome

Blank Rome is an Am Law 100 firm with 15 offices and 700 attorneys and principals who provide comprehensive legal and advocacy services to clients operating in the United States and around the world. Our professionals have built a reputation for their leading knowledge and experience across a spectrum of industries, and are recognized for their commitment to pro bono work in their communities. Since our inception in 1946, Blank Rome's culture has been dedicated to providing top-level service to all of our clients, and has been rooted in the strength of our diversity and inclusion initiatives.

Our attorneys advise clients on all aspects of their businesses, including:

- Bankruptcy & Restructuring
- Class Action Defense
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- Finance & Restructuring
- Financial Institutions Litigation and Regulatory Compliance ("FILARC")
- Government Contracts
- Government Relations & Political Law
- Insurance Recovery
- Intellectual Property Litigation
- Intellectual Property & Technology
- Labor & Employment
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For more information, please visit blankrome.com.

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Risk Management Tools for Maritime Companies

COMPLIANCE AUDIT PROGRAM

Blank Rome Maritime has developed a flexible, fixed-fee Compliance Audit 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 Audit Program can help your company, please view our Compliance Audit Program flyer.**

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 and cyber risk management awareness. Blank Rome's maritime cyber risk management team has the capability to address cybersecurity issues associated with both land-based systems and systems onboard ships, including the implementation of the *Guidelines on Cyber Security Onboard Ships* and the *IMO Guidelines on Maritime Cyber Risk Management in Safety Management Systems.* **To learn how Blank Rome's Maritime Cyber Risk Management Program can help your company, please visit blankrome.com/cybersecurity.**

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 blankrome.com/services/cross-border-international/international-trade or contact Matthew J. Thomas (matthew.thomas@blankrome.com, 202.772.5971).**

Maritime Emergency Response Team

We are on call 24 / 7 / 365

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maritime

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

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WHO'S WHO LEGAL

Blank Rome Maritime was named *"Law Firm of the Year"* in *Admiralty & Maritime Law in U.S. News – Best Lawyers® 2023 "Best Law Firms".* Our firm was ranked Band One for Nationwide Transportation Shipping Litigation and Nationwide Shipping Regulatory by *Chambers USA* for 10 consecutive years (2014 through 2023). We have also been recognized as a Top-Tier Firm by *The Legal 500* United States 2023 in Shipping–Finance, Shipping–Litigation, and Shipping–Regulation. And previously, we were recognized as a leading maritime law firm by *Lloyd's List* Excellence in Maritime Law Award in 2019.