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INSIDE THIS ISSUE

1 A Note from the Editor

2 Blank Rome Wins *Lloyd's List* 2015 Maritime Legal Services Award

3 Congress and Administration Take Cautious Approach to Crude Exports as Oil Prices Fall

6 Meet Blank Rome—*Fairfield Sentry:* Comity, Seller's Remorse, and Chapter 15

9 Summary of Recent Bankruptcy Cases

10 Insurance Issues in Offshore Marine Construction

12 The 114th Congress Begins with a Whimper

15 Are All FFAs Maritime Contract as a Matter of Law

16 Navigating Scylla and Charybdis: Greece's New Leftist Government and the Shipping Industry

18 Maximizing the Benefits of the Voyage Data Recorder: Not Just Accident Analysis

20 Coast Guard Guidance on Maritime Cybersecurity Standards

A NOTE

FROM THE EDITOR

THOMAS H. BELKNAP, JR.

The opening session for this year's Connecticut Maritime Association Shipping Conference is titled, "We've always been an industry, now we need to be a business." The subtitle explains that the session will explore how the maritime industry can "contend with a world of challenges and still make money." These are, perhaps, not new questions, but they are ones that have assumed increasing importance as we start the ninth year of what seems to many to be an eternal economic hangover.

Not all areas of the business have been stagnant, of course, and there have unquestionably been opportunities to make money in these past few years. But there have been many pitfalls as well, and we have seen the effects on many fronts, from a proliferation of maritime arrest and attachment actions, arbitrations and litigation, bankruptcies, and distressed workout deals, to ever-expanding and stricter regulatory activity, to active and aggressive criminal environmental enforcement actions. Add to that the increase in outside investment in the industry, from public share offerings to private equity investments, and it seems clear that the world's attention on the shipping industry is only increasing. With that attention comes an increased pressure to provide a return on investment and to employ "best practices" in all aspects of the business.

The need to excel goes beyond the technical and operational responsibilities of running the business; companies these days increasingly recognize that they must employ "best practices" from a legal perspective as well. That means everything from ensuring the company is protected from cyber attacks, both technologically and legally; anticipating and preparing for changing regulations on operations, navigation, and environmental impacts; analyzing corporate organization to minimize liability and tax exposure; auditing operations to prevent non-compliance with regulation and reduce risk of casualties; and so on. As a law firm, we are increasingly asked by our clients to help perform this critical self-analysis as part of their ongoing effort to improve their businesses and reduce their risk.

Blank Rome was very proud to receive *Lloyd's List* 2015 North American Maritime Award for "Maritime Services – Legal." The maritime services award, as stated by *Lloyd's List,* is awarded "for exceptional achievement or contribution to any service sector of the North American maritime industry by a company, individual or organisation." We would like to think that this award recognizes the value we place on providing a truly "full service" approach to servicing the maritime industry's legal needs. We take this opportunity to thank *Lloyd's List* for this great recognition, but more importantly, we thank our clients for continuing to give us the opportunity to prove our worth. ◻

FROM LEFT TO RIGHT:
BLANK ROME PARTNERS JOHN D. KIMBALL, JEANNE M. GRASSO (CENTER RIGHT), AND RICHARD V. SINGLETON II

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Blank Rome Wins *Lloyd's List* 2015 Maritime Legal Services Award

Blank Rome LLP is pleased to announce that the Firm's maritime group was selected as the winner of the *Lloyd's List* 2015 North American Maritime Award for "Maritime Services – Legal." The maritime services award, as stated by *Lloyd's List,* is awarded "for exceptional achievement or contribution to any service sector of the North American maritime industry by a company, individual or organisation."

> ***"In selecting Blank Rome for this highly prestigious award, Lloyd's List's panel of judges recognized that we offer a range and breadth of shipping knowledge to clients that is unmatched among U.S.-based law firms," said John D. Kimball, co-chair of the Firm's maritime practice group.***
>
> ***"We are very grateful to Lloyd's List for this recognition of top-level experience and great teamwork that we provide to our clients. We have worked very hard to create a maritime practice with a footprint throughout the United States that can handle all of the needs of our clients," added maritime practice group co-chair Jonathan K. Waldron.***

This year's annual awards event attracted more than 300 maritime industry representatives and celebrated the success of the North American maritime industry.

For a full list of winners, please click visit http://ibiawards.com/north-america/.

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Congress and Administration Take Cautious Approach to Crude Exports as Oil Prices Fall

BY MATTHEW J. THOMAS

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Two months into the 114th Congress, only tentative initial steps toward easing the U.S. crude export ban have been undertaken. The cautious approach being taken by key congressional decision-makers signals that, despite the change of control in the Senate, the process of realigning U.S. energy policy will need to be a gradual and strategic one, especially given the recent rollercoaster economics of global oil markets. The maritime and trading sectors will have to continue to watch and wait for the sort of major changes that would allow substantial volumes of light crude and condensate to move from U.S. ports.

House

In the House, on February 4, Congressman Joe Barton (R-TX) and a dozen co-sponsors introduced legislation to lift the ban on crude exports entirely. Co-sponsors have not rushed to back the measure, however. Energy exports and permitting decisions are included as part of House Energy and Commerce Committee Chair Fred Upton's recently released "Architecture of Abundance" legislative framework for 2015-16, setting out a framework for the committee's energy plans. However, the details of any particular energy export measures have yet to emerge from the committee. Additional draft legislative proposals and hearings on this issue appear likely in the House later this Congress, giving proponents more time and opportunity to make the case for uneasy lawmakers.

Senate

In the Senate, all eyes have been on Republican Senator Lisa Murkowski, the new chair of the Senate Energy and Natural Resources Committee. Although an outspoken proponent of liberalized energy trade, she has opted not to pursue a legislative solution at this juncture. Instead, she and 20 colleagues have focused their attention on a more attainable aim: persuading the Administration to authorize freer crude trade with Mexico, to align it with the treatment already provided to NAFTA partner Canada.

In a February 18th letter, Senator Murkowski and her colleagues urged Energy Secretary Penny Pritzker to approve an application by Mexican producer Pemex to undertake swap transactions, whereby heavy Mexican crude will be imported into the U.S. in exchange for export of lighter U.S. oil. Moreover, the senators urged the energy secretary to issue a finding that crude exports to Mexico (for consumption therein) are in the United States' national interest. Such a finding would be akin to the action taken by President Reagan with regard to Canada in 1980, resulting in largely unrestricted exports north of the border.

Risk-Management Tool for Maritime Companies

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 visit www.blankrome.com/complianceauditprogram.

These steps, combined with policy changes south of the border allowing for increased inbound investment, would have the potential to push North America further in the direction of a free-trade area in the energy sector, an aim that was out of reach when NAFTA was first negotiated.

Administration

On December 30, 2014, the Department of Commerce Bureau of Industry & Security ("BIS") published new policy guidance on crude oil export issues, in the form of Frequently Asked Questions ("FAQs") published at www.bis.doc.gov/index.php/policy-guidance/faqs. These FAQs set forth BIS' approach to technical issues that have been of concern to traders, including what sort of processing (through a "distillation tower") is required to make crude oil and lease condensate exportable, and whether Canadian crude shipped through the U.S. can be exported if it has incidental mixing with U.S. crude in storage and pipeline facilities.

These FAQs were under consideration for much of last year, when BIS suspended action on several pending commodity classification requests for exporters seeking rulings on whether processed condensates are considered "crude oil" under the export ban. The pause reportedly was to allow BIS to consider additional information collected from applicants and to develop its internal policy regarding the types of processing sufficient to render crude exportable.

Unfortunately, while the FAQs provide some insights into BIS' thinking, they stop short of giving the industry transparent and objective technical specifications for determining what processed commodities fall within the crude ban. As a result, the limits on the scope of the crude ban will continue to have to be determined on a case-by-case basis, a process that will hopefully now resume after Commerce's lengthy hiatus.

Treatment of Condensate under the Crude Export Ban

"Crude oil" is defined in the Commerce Department Export Administration Regulations (15 CFR Part 754) as a mixture of hydrocarbons that existed in liquid phase in underground reservoirs and remains liquid at atmospheric pressure after passing through surface separating facilities, and which has not been processed through a crude oil distillation tower. The definition set forth in the rule includes reconstituted crude petroleum, and lease condensate, liquid hydrocarbons produced from tar sands, gilsonite, and oil shale; drip gases are also included, but topped crude oil, residual oil, and other finished and unfinished oils are excluded. The newly issued FAQs recite those definitions, without much elaboration, in response to questions regarding how to determine if a commodity is crude oil, and if lease condensate is considered crude oil.

Although the current definition of crude oil has been in place for nearly two decades, little attention was paid in the past to fleshing out what was in and what was out of the regulation's imprecise wording until just this past year. Now, however, with the boom in domestic hydrocarbon production and the corresponding push to export light petroleum products, BIS has had to grapple with the issue of what hydrocarbons are considered "crude oil and lease condensate" in the modern era of shale production, and what types of processing might open the door to export by triggering the exceptions for crude "processed through a crude oil distillation tower" and for "topped crude oil, residual oil, and other finished and unfinished oils."

FAQs Factors in Classifying Processed Crude and Lease Condensate

On the much-watched issue of how much processing is needed to export crude and condensate, BIS' new FAQs set forth six factors that it will weigh to determine whether the product has been "processed through a crude oil distillation tower."

While the FAQs give a window into BIS' analysis, the multi-factor test remains complex and subjective, since it requires BIS to weigh various details of the "distillation tower" equipment, the characteristics of the output streams, and the end use of the products. No objective or quantitative cut-offs are provided, so the new factors will

(continued on page 5)

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Congress and Administration Take Cautious Approach to Crude Exports as Oil Prices Fall **(continued from page 4)**

not provide much certainty for exporters looking to "self-classify" new and unique products for export.

The six factors are below (although Commerce states that these factors are not exclusive; other unnamed factors may be considered as well):

- whether the distillation process materially transforms the crude oil by using heat (not just negative pressure) to induce evaporation and condensation into liquid streams that are chemically distinct from the crude oil input;
- the change in API gravity between the input of the process and the output of the process;
- the change in the percentage of different types of hydrocarbons between the input and output of the process;
- whether the streams resulting from distillation have purposes other than allowing the product to be classified as exportable petroleum products, such as use as petrochemical feedstock, diluent, and gasoline blendstock;
- whether the distillation process utilizes temperature gradients and has significant internal structures, such as trays or packing, and differentiated output streams; and
- whether the distillation uses towers with more mechanical complexity and heat, higher residence time, internal structures that promote condensation and better separation, and consistent quality liquid streams (also called cuts or fractions) than equipment used to separate vapors and liquids for transportation needs.

As a result, while the new crude FAQs give a window into BIS' broad reasoning and will help with preparing commodity classification requests for submission to BIS, the FAQs do not set out clear, objective technical specifications that would help exporters to self-certify commodities with a high degree of certainty and minimal risk.

WHILE THE NEW CRUDE FAQS give a window into BIS' broad reasoning and will help with preparing commodity classification requests for submission to BIS, the FAQs do not set out clear, objective technical specifications that would help exporters to self-certify commodities with a high degree of certainty and minimal risk.

Treatment of Canadian Crude Transiting the U.S.

Over the past two years, the industry has examined various options for exporting Canadian crude via U.S. ports, after carriage through the states via rail or pipeline. According to BIS regulations, "foreign-origin" crude oil can be exported (with a valid license) as long as it is not "co-mingled" with domestic crude oil. There has been considerable uncertainty and concern regarding the extent to which even *de minimus* mixing of domestic crude in transit compromised the exportability of foreign crude.

In the FAQs, BIS signaled some flexibility on incidental mixing, but again leaves the details to be considered on a case-by-case basis, explaining:

> What is the acceptable level of domestic crude that can be mixed with foreign crude and still be eligible for export?
>
> The Regulations do not specify any *de minimis* amount of U.S.-origin oil that can be co-mingled with the foreign oil. However, BIS understands that a minimal amount of mixing may occur due to incidental contact in pipelines and/or storage tanks when foreign and U.S. origin-oil is sequentially transported or stored in the same pipeline or tank. We encourage those applying for export licenses for foreign-origin crude to include in their application an explanation of the precautions they are taking to ensure that U.S. crude oil is not mixed with the foreign-origin crude, other than incidental contact.

Both the Administration and Congress are understandably cautious in modifying decades-old energy policies, but are easing into the debate gradually, carefully eyeing the potential impacts on U.S. energy prices and supplies as crude prices have plunged, and working on regional issues at the margin of the export ban. We expect further activity this year by this Congress on this matter, but it may be some time before policy makers loosen trading restrictions enough to significantly impact U.S. tanker trades. ◻

MEET

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OVER THE PAST SEVERAL YEARS, Blank Rome's maritime and bankruptcy practice groups have collaborated on significant matters, notably involving Chapter 15 of the U.S. Bankruptcy Code. Following is an article that highlights some recent developments in Chapter 15 jurisprudence that have relevance in both the maritime industry and beyond.

Fairfield Sentry: Comity, Seller's Remorse, and Chapter 15

BY MICHAEL B. SCHAEDLE AND DAVID G. MEYER

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In *In re Fairfield Sentry Limited* *(Kenneth Krys as duly appointed liquidator v. Farnum Place, LLC),*[1] the United States Court of Appeals for the Second Circuit (the judicial circuit that includes the prominent Manhattan Bankruptcy Court, a highly reputed venue for complex reorganization cases) reversed a decision of both the Manhattan Bankruptcy Court and the United States District Court for the Southern District of New York, which had accorded comity to a decision of the High Court of Justice of the Eastern Caribbean Supreme Court in the British Virgin Islands (the "BVI Court") that required Mr. Kenneth Krys, the duly appointed liquidator of Fairfield Sentry, Limited, a British Virgin Islands investment fund in liquidation, to close the sale of a Fairfield Sentry claim against Bernard L. Madoff Investment Securities, LLC ("BLMIS"). In reversing the lower courts, the Second Circuit required the mandatory application of United States Bankruptcy Code section 363 to a foreign debtor's intangible assets in a Chapter 15 that are within the territorial jurisdiction of the United States (that jurisdiction being broadly defined).[2]

BLMIS was a Madoff fraud vehicle that is in a specialized liquidation under the Securities Investor Protection Act ("SIPA"). Irving Picard, the Madoff trustee, is also the trustee for BLMIS in its SIPA case. Fairfield Sentry asserted $960 million in customer claims against BLMIS; those claims were allowed in a discounted amount, $230 million, as part of a complex settlement between Fairfield Sentry and Mr. Picard.

After the settlement on the SIPA claims, Fairfield Sentry was placed into liquidation in the BVI Court and Mr. Krys was appointed liquidator. In June 2010, Mr. Krys filed a petition seeking recognition of the BVI liquidation as a foreign main proceeding in the Manhattan Bankruptcy Court before former Chief Judge Burton Lifland.[3] Recognition was granted.

In the BVI liquidation, Mr. Krys looked to sell the Fairfield Sentry claim against BLMIS. He ran an auction and selected Farnum Place, LLC, as the winning bidder (Farnum offered to buy the claim for 32.125 percent of the allowed amount). The sale was evidenced by a trade confirmation and an assignment. The trade confirmation was signed in December 2010. According to the Second Circuit, "[t]he Trade Confirmation provided that the transaction was subject to approval by both the U.S. bankruptcy court and the BVI Court."

Just three days after the trade confirmation closed, Mr. Picard announced a massive settlement for the benefit of the BLMIS estate, which substantially increased the likely recoveries on allowed BLMIS claims, including the Fairfield Sentry claim, rendering the Farnum trade a demonstrably poor deal for Mr. Krys and Fairfield Sentry. Mr. Krys began to drag his feet on seeking approval of the Farnum deal, and by October 2011, Farnum filed an application with the BVI Court to compel Mr. Krys to honor the agreement.

The BVI Court's Decision, Enforcing the Trade Confirmation

In response, Mr. Krys asked that the BVI Court not approve the transfer at the Farnum bid price because the Picard settlement ensured that allowed claims like the Fairfield

(continued on page 7)

Fairfield Sentry: Comity, Seller's Remorse, and Chapter 15
(continued from page 6)

Sentry claim would receive higher levels of recovery than offered by the Farnum bid, and thus, the Farnum deal was not in the interests of the BVI liquidating estate (if the sale was not approved, Mr. Krys could sell the Fairfield Sentry claim for a higher price). He also maintained that U.S. bankruptcy court approval was required under Bankruptcy Code sections 1520(a)(2) and 363 for the Farnum transaction to be effective.

Mr. Krys carefully reserved this secondary approval requirement under the contract perhaps because he expected an American bankruptcy court to be favorable to his argument that the sale should not be approved. After all, sales outside of the ordinary course of a debtor's business that are approved under Bankruptcy Code section 363 must represent the best outcome for the debtor's estate (usually the best outcome is the sale that value maximizes for the estate)—a rubric that generally favored Mr. Krys' position.

ON JANUARY 13, 2015, the Second Circuit denied Farnum's petition for rehearing without providing any further discussion or analysis. There is no indication that any party is seeking further appellate review of the September 2014 opinion.

After an evidentiary hearing in March 2012, the BVI Court approved the Farnum trade, but insisted that Mr. Krys "take the necessary steps to bring before the U.S. Bankruptcy Court the question of approval (or non-approval) by that Court of the Trade Confirmation." Mr. Krys filed an application with the Manhattan Bankruptcy Court, seeking review of the Farnum deal and asking for an order disapproving the trade. The bankruptcy court denied the application.

The Bankruptcy Court's Decision, Favoring Comity

Judge Lifland ruled that Bankruptcy Code section 363 can only apply to a foreign debtor's asset that is "within the territorial jurisdiction of the United States."[4] Invoking long-standing precedent under New York law (the law applicable to the trade confirmation), which insisted on flexibility in identifying the situs of intangible rights, Judge Lifland found that the Fairfield Sentry claim was an intangible right that was most closely associated with a BVI-based business organization in liquidation in the BVI Court. It was not, therefore, within the territorial jurisdiction of the United States.[5] And accordingly, the bankruptcy court found that comity required deference to be paid to the BVI Court and insolvency system to avoid "inharmonious legal approaches" and ensure that Chapter 15's core policies were served. Mr. Krys' application was denied. The district court affirmed and issued its own opinion.

The Second Circuit's Reversal, Requiring Compliance with Section 363

The Second Circuit, however, found that the Fairfield Sentry claim was property within the United States' territorial jurisdiction, reflecting that the claim could be garnished or attached under the New York law, analogizing Mr. Picard's duty to make distributions to Fairfield Sentry on the allowed claim to a seizable, garnishable contract right.[6] The Court of Appeals then focused on what it read as the mandate of Bankruptcy Code section 1520(a)(2) by its plain language: "The bankruptcy court is ***required*** to conduct a section 363 review when the debtor seeks a transfer of an interest in property within the territorial jurisdiction of the United States."

The Court of Appeals rejected Judge Lifland's focus on the policy of comity because it found that the terms of the trade confirmation required bankruptcy court review and the BVI Court itself had invited bankruptcy court review.[7] It then noted that the district court on remand must consider whether the Farnum trade is supported by a good business reason and whether there are better transactions available to Mr. Krys than the Farnum deal.

A Continuing Battle

Farnum kept battling. On October 10, 2014, it filed its Petition for Panel Rehearing, arguing that the Second Circuit had in effect reversed its own long-standing precedent (*In re Maxwell Commc'n Corp.,* 93 F.3d 1036 (2d Cir. 1996)) requiring American bankruptcy law be interpreted deferentially as to applicable foreign law in Chapter 15, a Chapter 15 case being a proceeding ancillary to a dominant

foreign insolvency case; thereby, honoring comity—even where the results in the main proceeding would not obtain or would be inconsistent with American bankruptcy law.

Moreover, Farnum argued that the Second Circuit should instruct the district court on remand to consider certain arguments that it says were not addressed by either the bankruptcy court or the district court in denying Mr. Krys' application.[8] First, Farnum argued that application of section 363 was not required because Bankruptcy Code section 1520(a)(3) purportedly vests a foreign representative with the discretion to use section 363 as a trustee or to forego its use. Second, Farnum asserted that the recognition order "entrusted" Mr. Krys with authority to administer Fairfield Sentry property in the United States under Bankruptcy Code section 1521(a)(5) without bankruptcy court approval. And finally, Farnum argued that the transaction, the trade, was in the ordinary course of Fairfield Sentry's business.

On November 3, 2014, the Court of Appeals, by the panel of judges that issued the opinion discussed above, entered an order requiring Mr. Krys to brief the question "that the Court's opinion should not be modified to permit the District Court, on remand, to consider any issues not already adjudicated that might preclude the need for a section 363 hearing."

Mr. Krys filed a hard-edged brief in response, noting with some persuasive effect that Chapter 15 does not empower a bankruptcy court to vest a foreign representative with the authority to make decisions that would ordinarily be the court's to make, that the sale of a $230 million claim in a liquidation is hardly ordinary course decision-making, and that the district court had rejected the point at oral argument.[9]

On January 13, 2015, the Second Circuit denied Farnum's petition for rehearing without providing any further discussion or analysis. There is no indication that any party is seeking further appellate review of the September 2014 opinion. Further, it appears that as of February 18, 2015, a hearing is set for March 17, 2015, in the Manhattan Bankruptcy Court on Fairfield Sentry's post-remand motion for disapproval of the contemplated sale of the SIPA claim to Farnum.

Conclusion

Fairfield Sentry is an important case in the development of Chapter 15 jurisprudence. The Second Circuit, consistent with its approach in *Barnet,* enables U.S. bankruptcy courts to apply section 363 of the Bankruptcy Code, the core sale and use authorization provision of the Bankruptcy Code, to the seizable intangible assets of foreign debtors—assets otherwise subject to the principal jurisdiction of foreign courts and foreign laws.

In so doing, in this factually complex case, the Second Circuit favored maximizing value for creditors through the use of Chapter 15 over serving general principles of comity between two sovereigns, their courts, and insolvency systems. The *Fairfield Sentry* decision, if fully implemented on remand, will likely result in importantly higher recoveries for Fairfield Sentry creditors in the BVI liquidation. ◘

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1. 768 F.3d 239 (2d Cir. 2014).
2. In 2013, the Second Circuit insisted on the mandatory application of Bankruptcy Code section 109(a), the general eligibility requirements for debtors in American bankruptcy, to foreign debtors in Chapter 15. *See: Drawbridge Special Opportunities Fund LP v. Katherine Elizabeth Barnet, Foreign Representative, et al. (In re Katherine Elizabeth Barnet),* 737 F.3d 238 (2d Cir. 2013). In a prior article in the June 2014 edition of *Mainbrace,* we discussed how the *Barnet* decision could be seen as a divergence from the "universalist" policy underlying Chapter 15. (See 11 U.S.C. § 1501(a)).
3. Former Chief Judge Lifland recently passed away. He was one of the preeminent American bankruptcy jurists under the 1978 Bankruptcy Code and notably for the purposes of this article, Judge Lifland was a leading contributor to the development of the Model Law on Cross Border Insolvency and a strong proponent of both the passage of Chapter 15 and its "universalist" policy of integrating insolvency process across borders, maximizing fairness, efficiency, and the maximization of the value of the assets of distressed businesses with assets in multiple jurisdictions.
4. 11 U.S.C. §§ 1502(8) and 1520(a)(2). Under Bankruptcy Code section 1502(8), an asset is within the territorial jurisdiction of the United States, without limitation, if it can be seized or garnished in a federal or state court in the U.S.
5. Interestingly, Judge Shelley Chapman in *In Octaviar Administration Pty Ltd.,* 511 B.R. 361, 370-71 (Bankr. S.D.N.Y. 2014), addressing this flexible situs theory, found that Bankruptcy Code section 109(a) eligibility could be established under *Barnet, supra* where a foreign debtor has potential claims against entities located in the United States. Of course, Judge Chapman's flexible situs theory application, although facially inconsistent with Judge Lifland's decision making in *In re Fairfield Sentry,* likewise serves the policy of advancing a universalist approach to international insolvency.
6. *Fairfield Sentry,* 768 F.3d at 245. Farnum argued against this analogy, noting that a trustee is generally not subject to attachment or garnishment actions.
7. Interestingly, in seeking *en banc* review of the Court of Appeals decision, Farnum maintained that the Court of Appeals failed to address its textual argument that the trade confirmation's reference to Bankruptcy Court approval meant not the Chapter 15 court but the BLMIS SIPA court. *(Farnum Place LLC Petition for Panel Rehearing or Rehearing En Banc ("Petition for Panel Rehearing"),* Case No. 13-3000-BK, Dkt. No. 96 at 15, Oct. 10, 2014).
8. (*Brief for Farnum LLC as Appellee,* Case No. 13-3000-BK, Dkt. No. 48 at 47-48, Feb. 14, 2014).
9. (*Kenneth Krys as Liquidator's Response to Petition for Rehearing,* Case No. 13-3000-BK, Dkt. No. 99 (Nov. 21, 2014).

Summary of Recent Bankruptcy Cases

BY ALAN M. ROOT

In connection with Mr. Schaedle's *Fairfield Sentry* article (see page 6), below is a summary of some recent cases relevant to Chapter 15 practice.

In re Inversiones Alsacia SA et al., Case No. 14-12896 (MG) (Bankr. S.D.N.Y. Dec. 4, 2014): The bankruptcy court confirmed the prepackaged Chapter 11 plan of a Chilean bus operator whose operations are entirely in Chile and its only connection to New York are bank accounts that were set up prior to its filing for Chapter 11. Although arising in the Chapter 11 context, the case is important as Chapter 15 debtors, much like Chapter 11 debtors, must show they meet the eligibility requirements of the Bankruptcy Code. In this case, bank accounts as sole U.S. property were sufficient to meet the eligibility requirements.

In re Hellas Telecommunications (Luxembourg) II SCA, Case No. 12-10631(MG) (Bankr. S.D.N.Y. Dec. 3, 2014): Finding that large potential clawback litigation against U.S. entities is a sufficient property interest for a foreign entity to be eligible to be a debtor under Chapter 15 of the Bankruptcy Code.

In re Rede Energia S.A., 515 B.R. 69 (Bankr. S.D.N.Y. Aug. 27, 2014): Recognizing the Brazilian plan of reorganization that, among other things, provided for disparate treatment of unsecured creditors. The court noted that treatment was permitted pursuant to Brazilian law and was not "manifestly contrary" to United States bankruptcy policy. U.S. courts will recognize foreign plans even if they provide for treatment that is different than the U.S. Bankruptcy Code would allow if "the proceedings in the foreign court progressed according to the course of a civilized jurisprudence and where the procedures followed in the foreign jurisdiction meet our fundamental standards of fairness."

In re Suntech Power Holdings Co., 2014 Bankr. LEXIS 4748 (Bankr. S.D.N.Y. Nov. 17, 2014): Recognizing the Cayman Islands liquidation proceedings of a Chinese solar cell maker to be a "foreign main proceeding." The debtor was incorporated in the Cayman Islands but had no other substantial ties thereto, and primarily operated out of China. After filing liquidation in the Cayman Islands, provisional liquidators shifted the debtor's administration to the Cayman Islands in accordance with wishes of creditors holding approximately half of the debtor's debt. These facts, coupled with the fact that the "Cayman Islands employed a predictable, flexible, and cost effective method for dealing with restructuring," led the court to recognize the Cayman Islands liquidation proceedings as a foreign main proceeding under Chapter 15 of the Bankruptcy Code. The court also found that Suntech met eligibility to be a debtor requirement based on a bank account established in New York in anticipation of the Chapter 15 filing.

Jaffé v. Samsung Elecs. Co., 737 F.3d 14 (4th Cir. 2013) *cert. denied,* 135 S. Ct. 66 (U.S. Oct. 16, 2014): The Supreme Court denied review, letting stand the Fourth Circuit's landmark *Qimonda* decision applying Bankruptcy Code section 365(n) to protect licenses of intellectual property owned by a foreign debtor in a Chapter 15 bankruptcy case. In *Qimonda,* the Fourth Circuit denied a Chapter 15 debtor's attempts to terminate, under foreign insolvency law, various U.S. patent licensing agreements. Specifically, the Fourth Circuit found that the protections of section 365(n) applied with respect to Qimonda's U.S. patent portfolio and, therefore, licensees of U.S. patents, were permitted to elect to retain their rights under their prepetition licenses despite the attempted termination. □

Insurance Issues in Offshore Marine Construction

BY THOMAS H. BELKNAP, JR.

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The purpose of this article is to discuss insurance issues that are likely to arise in the event of a marine casualty during an offshore construction project. We can picture any number of different scenarios; but for these purposes, imagine the fairly standard scenario where the project owner has hired a general contractor to do the work, who has in turn hired any number of subcontractors to handle various elements of the project under the contractor's control and supervision.

Two Insurance Models

Obviously, a big concern in an offshore project—just like with any construction project—is what happens when something goes wrong? Even the simplest offshore construction is always more complicated than analogous work onshore, and the potential consequences of a casualty can include personal injury and death claims, damage to the project itself, damage to assets being used to perform the work, damage to third-party property, and damage to the environment. Potential exposures—especially in the case of environmental damage—can run to the billions of dollars. Given this fact, it should be obvious that insurance is a critical element of any marine construction endeavor. So how are construction insurance packages set up?

The "traditional" arrangement was for the principal, general contractor, and all subcontractors to each have a separate insurance package to cover its own risks and liabilities. Any coverage would then have to be sorted out based on who was liable for any given loss, with each party's insurance covering legal expenses for its own insured and the insurance of the liable party ultimately responding for the loss.

In many instances, this arrangement is modified, with parties agreeing to so-called "knock-for-knock" provisions in their contracts, by which each party assumes the risk of injury, loss, or damage to its own personnel and equipment, even if caused by another party's negligence or fault. The purpose of this arrangement is to reduce the likelihood and cost of disputes among the contracting parties over whose insurance should cover a loss. Insurers are often willing to insure on this basis because it reduces their overall costs, even if it exposes the insurer to the possibility of covering its own insured on the basis of a third-party's fault.

Although still a very common method of arranging insurance for offshore construction—at least with smaller projects—this model has several potential downsides. In the first place, it is commonly more expensive for multiple parties to have separate but essentially identical policies rather than having a single insurance package covering all involved parties. Moreover, when several different parties all have their own separate insurance policies, the risk substantially increases that there will be gaps in coverage—either within one party's insurance package or between multiple parties. Where multiple insurance policies are potentially implicated, the risk substantially increases of litigation between contracting parties over liability or coverage. And where each party is responsible to obtain and maintain its own insurance, it becomes significantly more difficult for the hiring company to ensure that its contractor and all subs are fulfilling their obligations to obtain quality insurance and to maintain all required insurance.

> **A BIG PROBLEM IS THAT PARTIES** usually rely solely on certificates of insurance to certify the kinds and policy limits of the coverage obtained, but without actually reviewing the policies to see whether they provide adequate coverage.

Given the many problems with this multi-insurance model, the market began to develop a model in the 80s and 90s by which the parties would procure one comprehensive "construction all risks" insurance package for the entire project, which covers all involved parties against all risk and losses, irrespective of fault. In about 2000, the WELCAR Insurance form was developed as an industry

(continued on page 11)

Insurance Issues in Offshore Marine Construction (continued from page 10)

standard. It provides first-party insurance against "all risks of physical loss of and/or physical damage" to covered property, and third-party coverage for legal or contractual liability to third-parties for bodily injury or property damage.

Although WELCAR coverage is very broad, it still does not cover all risks—particularly including many maritime risks ordinarily falling within protection and indemnity ("P&I") type coverage. This issue is further complicated because P&I policies themselves exclude coverage for "specialist operations," meaning that vessel owners have to obtain special cover for these risks. The WELCAR also does not cover loss or damage to the insured's own property—such as an adjacent oil well or platform—though this coverage can typically be added for an additional premium.

Which Policy Responds?

Let's go back and focus on the "traditional" insurance model for the moment, because that is where a lot of the problems arise. A typical insurance package will include a commercial general liability ("CGL") policy, a workers' compensation policy, P&I coverage and hull and machinery ("H&M") coverage if the party owns any vessels, and then "bumbershoot" and excess liability coverage that is intended to fill any coverage gaps and extend the policy limits on the main policies. One of the common complications in a marine casualty situation is determining where the coverage line stands between the CGL, P&I, and H&M policies.

The CGL policy normally covers liability for damage to third-party property caused by one's negligence, and if the casualty is caused by a subcontractor's vessel, then any exposure of the general contractor—say, for instance, for negligently planning the project or hiring an incompetent subcontractor—probably falls under that policy. But CGL policies ordinarily exclude liability relating to ownership or use of vessel, so if the casualty involves a vessel belonging to the contractor rather than a subcontractor, then there is probably no coverage under this policy.

If the contractor owns or charters vessels, then it should have P&I coverage. As noted above, however, P&I coverage ordinarily excludes "specialist operations," which includes pipelaying and other marine construction activities. Moreover, P&I rules typically exclude liability for risks covered by standard H&M policies, which includes at least 3/4 coverage for collision and may or may not cover liability for damage to "fixed and floating objects." And if the member has obtained 4/4 collision coverage under its hull policy, as is common in many Continental insurance policies, then there is arguably no P&I coverage at all unless the P&I becomes excess to the H&M policy limits.

Additional Insureds

In many circumstances, one party to a construction contract will require that it be named as an additional insured on the other party's insurance. This arrangement is really trying to simulate the solution reached by the WELCAR policy by giving the principal comfort that it will be covered directly by its contractor's insurance rather than having to invoke its own insurance to sue the contractor for indemnity based on its negligence or breach of contract. It is an arrangement, however, that has some potential risks.

In the first place, a contractor has to have the right to add parties to its insurance as additional assureds. This is a contractual right governed by the terms of the insurance, and while most third-party liability policies will allow it in this context, it is not always automatic. The insurer may have a requirement that it pre-approve additional assured exposure and, in particular, that it review and agree to the proposed contract.

More problematic may be language in the policy that provides that any coverage to an additional insured is "…limited to those risks covered by Contractor's insurance for which Contractor has agreed under the Contract to assume responsibility or indemnify Company." Here, the principal may have expected that it would be covered under the contractor's policy even for liability for its own negligence or fault, but this language only guarantees that the insurer will directly cover the principal for the contractor's insured negligence or fault.

A big problem is that parties usually rely solely on certificates of insurance to certify the kinds and policy limits of the coverage obtained, but without actually reviewing the policies to see whether they provide adequate coverage. And if the contractor undertakes in the construction contract to provide more coverage than is actually provided, then the company may have a claim for breach of the contract on the grounds that the contractor failed to procure adequate insurance, but that may be small consolation if the contractor becomes insolvent.

An important component of "sharing" policies between the company and contractors is that to realize the benefits, the parties need to agree to waive indemnity claims between themselves. For instance, if the company is going to be an additional insured under the contractor's insurance, it would make little sense for the parties to fight between themselves over who is actually at fault for a given incident. And it makes less sense for the contractor's insurer to pursue a subrogated claim against the company if it is also insuring the company against the very same loss. So, it is common for construction contracts with additional insured provisions to also include "waiver of subrogation" clauses. Here again, however, this is a matter that needs to be properly addressed between insurer and insured, because if the insured has waived subrogation in a context where the policy does not allow it, then the insured is jeopardizing its own coverage by improperly impairing the insurer's right of subrogation.

Another context where waiver of subrogation arises is where knock-for-knock clauses are used. Recall that these are clauses that provide that each party will bear its own risk of loss for injury to its own personnel or loss of its own property. Obviously, the purpose of such clauses would be defeated if the insurer could nevertheless pursue a subrogated claim against the other party. But each party needs to be certain that its own insurance will accept a knock-for-knock contractual arrangement, because such an agreement substantially alters the risk the insurer is undertaking.

Conclusion

Insurance matters can quickly get complicated when there is a casualty in a marine construction project, and problems can easily arise even when the parties had the best intentions of drafting their construction contract to avoid internal conflicts on liability. And while there are many good reasons to pass on the traditional insurance model in favor of a "construction all risk" policy, even that option is not without its perils. Indeed, a movement to amend the WELCAR policy is currently under way, and many of the proposed amendments would further limit its coverage. In any event, it is clear that when it comes to insurance structure analysis, an ounce of prevention is worth well more than a pound of cure. ◻

The 114th Congress Begins with a Whimper

BY JOAN M. BONDAREFF

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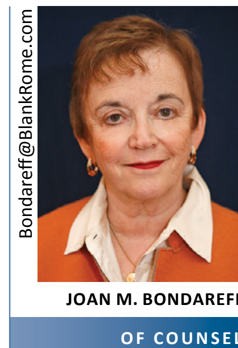

JOAN M. BONDAREFF
OF COUNSEL

It is still early days for the 114th Congress, but it may not seem that way for the Obama Administration, which for the first time is facing a Congress totally controlled by Republicans.

As we go to press, the labor dispute in the West Coast ports has been settled, leaving a backlog of container ships to unload; the new Senate Majority Leader, Mitch McConnell (R-KY), has made good on his promise to pass the Keystone XL pipeline bill, and the President has vetoed the bill; the President sent his FY2016 budget to Congress on time; and Congress has finally agreed to fund the Department of Homeland Security ("DHS") for the rest of FY2015. The DHS includes many critical maritime and transportation agencies, including the Coast Guard, Customs and Border Protection, Federal Emergency Management Agency ("FEMA"), the Secret Service, and the Transportation Security Administration.

ONE THING IS CERTAIN: the 114th Congress will have a short attention span as many senators are already beginning to position themselves to enter the 2016 presidential race.

Following, we briefly highlight the President's FY2016 budget request for maritime and related programs; summarize hearings and legislation introduced to date; and briefly forecast the rest of the year.

(continued on page 13)

The 114th Congress Begins with a Whimper (continued from page 12)

FY2016 Budget Request for Coast Guard and Other Maritime Programs

From the President's FY2016 budget, we identify the following requests—and note several missing items or what we call noticeable "non-requests":

- **Department of Transportation:**
  REQUEST: $7.5B over six years, which would more than double funding for the popular TIGER Grant program, and a Grow America infrastructure proposal that includes over $18B over six years for a multi-modal freight program to be funded by repatriated corporate taxes.

- **U.S. Maritime Administration ("MARAD"):**
  REQUEST: $186M for the Maritime Security Program, $184.6M to support the U.S. Merchant Marine Academy, state maritime academies, and MARAD operations; and $25M to offset cuts elsewhere in the President's budget for food aid shipments on U.S.-flag vessels.

  NON-REQUESTS: Small Shipyard Grants, and funds for the title XI loan guarantee program (other than for administrative expenses). Lack of funding for these important maritime programs calls into serious question the Administration's commitment to help shipyards and shipyard workers.

- **Department of Homeland Security:**
  U.S. Coast Guard:
  REQUEST: $1.01B for acquisitions, including $533.9M for new vessels and $200M for new aircraft, plus funding for pre-acquisition activities of a new polar icebreaker.

  FEMA/Port Security Grants:
  REQUEST: The Administration has proposed consolidating all state and local grant programs, including port security grants, into a single national preparedness grant program. (Stay tuned because Congress has consistently rejected this request.)

- **Federal Maritime Commission:**
  REQUEST: $27.38M, an increase of $2M over the FY2015 appropriation.

- **Army Corps of Engineers ("ACOE"):**
  REQUEST: The ACOE budget dropped 13 percent from the enacted FY15 levels, and the Harbor Maintenance Trust Fund and Mississippi River accounts were cut by more than 10 percent. (February 5, 2015, report by *Bloomberg Government.*) These cuts do not reflect the terrible situation on the Mississippi River where barges are facing immeasurable delays at "decrepit locks that were built in the 1930s and have long outlived their life expectancy." ("Barges Sit for Hours Behind Locks that May Take Decades to Replace," by Ron Nixon, February 4, 2015, *The New York Times.*) Nor do they reflect the need of East Coast ports to dredge their harbors to depths that will accommodate post-Panamax vessels, and keep them competitive.

Hearings, Legislation, and Other Hot Topics

- **The Jones Act Resurfaces**
  As part of the Senate's consideration of the Keystone XL pipeline bill, Senator John McCain (R-AZ) prepared an amendment to repeal the Jones Act, but it was never offered on the Senate floor; this effort has been stymied for the time being.

- **Energy Legislation**
  The President's new plan for offshore oil and gas drilling, which included a ban on drilling off parts of the Alaskan coastline and further restrictions for drilling in the Arctic National Wildlife Refuge ("ANWR"), elicited strong reactions from the Alaskan delegation, including Senator Lisa Murkowski (R-AK), the new chair of the Senate Energy Committee. Senator Murkowski responded by filing her own bill, S. 494, to allow development in up to 1.5 million acres of ANWR's coastal plain.

  Senator Murkowski also chaired a hearing in the Energy Committee on expediting permits for the export of LNG, during which she complimented her colleagues for introducing S. 33, the LNG Permitting Certainty and Transparency Act, to expedite permits for the exports of LNG.

- **Congress Hears Testimony and Responds to the President's Budget Request for Maritime Programs**
  As we know, the President can propose the budget, but only Congress can appropriate funding for agencies. On February 25, 2015, the House Subcommittee on Coast Guard and Maritime Transportation, chaired by Congressman Duncan Hunter (R-CA), had its first hearing of the year on the President's budget request for the Coast Guard and other maritime programs, including MARAD and the Federal Maritime Commission ("FMC").

Chairman Hunter expressed serious concerns with the cuts in the Coast Guard's acquisition budget, stating that, "[f]or the fourth year in a row, the Administration is playing a reckless game." He also noted that the General Accountability Office ("GAO") estimated that the Coast Guard needs $2B a year to recapitalize its assets—compared to the $1B request—and pressed the Commandant of the Coast Guard to produce a new mission needs statement justifying the lower request.

Chairman Hunter also pressed the MARAD Administrator on when Congress would get the overdue National Maritime Strategy. The Administrator responded that it's still undergoing interagency review. Finally, Chairman Hunter, among other members, pressed the witnesses on the value of the Jones Act to U.S. yards and national security. The Administrator responded that even discussing a repeal of the Jones Act can negatively influence financing for new ships that are being built in U.S. yards. The Chairman and Ranking Member John Garamendi (D-CA) also decried the Administration's proposal to cut food aid shipments on U.S.-flag vessels and questioned why the Administration was preparing an expansive new PL 480 program without consulting Congress.

Finally, the Chairman pressed FMC Chairman Mario Cordero on the increase in the FMC budget, questioning his attention to non-critical issues, and asked—at least theoretically—why the FMC was needed and why couldn't MARAD perform its regulatory duties. Cordero defended the agency and its budget, citing the increase in agreements under review and his small staff.

- **Vessel Discharge Hearing and Legislation**

The Senate Subcommittee on the Oceans, Atmosphere, Fisheries, and Coast Guard held its first hearing of the new Congress on the impacts of vessel discharge regulations on the shipping and fisheries industries, taking testimony from industry witnesses. As the witnesses explained, they face multiple and confusing regulations from the Environmental Protection Agency ("EPA") and the Coast Guard, as well as the potential for conflicting state standards. They urged Congress to enact a uniform national vessel discharge standard. Immediately following the hearing, the Chairman of the Oceans Subcommittee, Senator Marco Rubio (R-FL), along with the Chairman of the full Commerce Committee, John Thune (R-SD), and Ranking Member Bill Nelson (D-FL), introduced legislation to set a nationally uniform standard for small vessel discharges (S. 373, the Vessel Incidental Discharge Act). This bill would establish ballast water treatment requirements set by the Coast Guard in 2012 as the uniform national standard governing ballast water discharges by vessels; it would also permanently exempt incidental discharges by commercial vessels less than 79 feet, as well as fishing vessels including seafood processors and recreational vessels, among other purposes.

Forecast for the Remainder of the Year

The 113th Congress completed work on the Howard Coble Coast Guard and Maritime Transportation Act of 2014 (Pub. L. 113-281). We anticipate that by the end of this year the 114th Congress will consider a new authorization for the Coast Guard and other maritime programs.

Other unfinished business includes the development of U.S. policy on the export of LNG, including the use of U.S.-flag vessels; drilling off the Atlantic Seaboard and in the Arctic; funding for a new Polar icebreaker; the impact of sequestration on the FY2016 defense and civilian budgets; tax credits for offshore wind and other renewable energy sources; and funding for the rest of the year for the DHS.

One thing is certain: the 114th Congress will have a short attention span as many senators are already beginning to position themselves to enter the 2016 presidential race. But for companies interested in the budget and needing legislative help to solve critical issues, now is certainly the time to reach out and engage with your congressional delegation and get their attention. □

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Are All FFAs Maritime Contract as a Matter of Law?

BY WILLIAM R. BENNETT III

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PARTNER

The Fourth Circuit Court of Appeals, in *Flame S.A. v. Freight Bulk PTE. Ltd.,* was the first Court of Appeals in the United States to hold that a Forward Freight Swap Agreement ("FFA") was a "maritime contract," thus falling within the federal court's admiralty and maritime subject matter jurisdiction.

Recent Court Opinions

Two recent opinions from the Second Circuit are important to note. In *Blue Whale Corp. v. Grand China Shipping Dev. Co., Ltd., et al.,* the Second Circuit concluded that a district court properly applied federal maritime law to the procedural question of whether a claim sounded in admiralty; and, in *D'Amico Dry Ltd. v. Primera Maritime, et al.,* the Second Circuit reversed a district court and held that U.S. courts have jurisdiction to enforce a judgment of a foreign non-admiralty court if the claim underlying that judgment would be deemed maritime under U.S. law.

In *Flame,* the district court denied Freight Bulk's motion to vacate the Rule B attachment of the CAPE VIEWER, concluding that its jurisdiction was determined by reference to U.S. federal law, rather than English law, and that the FFAs underlying the claim were maritime contracts under U.S. federal law. Freight Bulk appealed the district court's order denying its motion to vacate the attachment, arguing that the district court lacked maritime jurisdiction to order the attachment.

A Matter of Jurisdiction

Although, as a general proposition, there is widespread agreement throughout the world as to which kinds of matters are maritime and which are not, there is no assurance that some other nation might not define its own maritime jurisdiction more broadly, or more narrowly, than the U.S. As noted by the Fourth Circuit in *Flame,* the fact that some nation, unlike ours, does not reserve a special jurisdiction for maritime matters or classify maritime matters as subject to a discrete body of laws, does not compel U.S. courts to alter their analysis of the scope of their own subject matter jurisdiction. A suit to enforce a foreign judgment entered in a non-admiralty court may be heard in a U.S. federal court exercising its admiralty jurisdiction if the claim underlying the judgment would be deemed maritime under U.S. law.

The ultimate appellate issued was framed as follows: is a FFA a maritime contract under U.S. federal maritime law? On appeal, Freight Bulk argued that the FFAs were not maritime contracts under English Law and could not be maritime contracts because they had no connection to any particular vessel or to the transport of any particular cargo. The Fourth Circuit held that U.S. federal law, rather than foreign law, controlled the procedural inquiry into whether a foreign judgment is a maritime judgment. Thus, a claim to enforce a foreign judgment issued from a non-maritime court may be within the admiralty subject matter jurisdiction of U.S. courts when the claim underlying the judgment would be an admiralty or maritime claim under federal law. Under U.S. law, whether a contract is maritime does not depend upon whether a ship or other vessel was involved in the dispute, but rather upon the nature and character of the contract: i.e., whether the contract has reference to maritime service or maritime transactions.

A Word of Caution

Although the Fourth Circuit affirmed the district court's ruling that the FFAs at issue in *Flame* were maritime contracts, a word of caution. Whether all FFAs are maritime contracts is still very much undecided. The trial court in *Flame* stated that "[u]nder federal law, it is clear that the question of whether the [FFAs] are maritime contracts is answered in the affirmative," citing a number of U.S. legal decisions holding that certain FFAs are maritime contracts. Despite this seemingly broad holding that all FFAs are maritime contracts under U.S. federal law, the Fourth Circuit pointed out that language in the district court's opinion indicates that its holding was nuanced and specific to the FFAs in that case. Accordingly, the Fourth Circuit specifically stated that it would "leave to another case the issue of whether all FFAs are maritime contracts as a matter of law." ◘

THE ULTIMATE APPELLATE issued was framed as follows: is a FFA a maritime contract under U.S. federal maritime law?

Navigating Scylla and Charybdis: Greece's New Leftist Government and the Shipping Industry

BY STEFANOS N. ROULAKIS*

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To return home to Greece, the ancient mariner Odysseus had to navigate between the two sea monsters known as Scylla and Charybdis, using his resourcefulness to chart the safest course through the narrow channel of water separating the deadly mythological creatures. As the story suggests, shipping has been the mainstay of the Greek economy since ancient times. Recently, shipping has been a target of political rhetoric for the newly elected leftist SYRIZA party.

SYRIZA, itself a union of left wing groups, ran primarily on a platform of anti-austerity, and is led by the charismatic Prime Minister Alexis Tsipras. The government has to somehow navigate the twin obstacles of agreement with its European creditors and its leftist power base, and the temptation exists to appease both by disrespecting laws protecting Greece's shipping. While Prime Minister Tsipras' government has shown resourcefulness and pragmatism in its early maritime policy, the ultimate course SYRIZA will chart as yet remains unclear.

Background

Shipping is Greece's leading economic sector, contributing eight percent of Greece's GDP. Because the industry has been a large employer for generations of Greek families and a source of national pride, the shipping industry and its tax exemptions have long been held to be sacred cows. Greece's constitution provides protections for shipowners' capital, and since 1975, Greece has enacted laws making shipowning-derived income tax exempt. The tax structure was intended to attract Greek nationals headquartered abroad "home" to Greece and make the Greek flag competitive compared to other national tax structures. Additionally, some claimed that exemptions made sense because shipping profits were earned abroad and subject to flight. As a result, shipowners currently pay a tonnage tax. Shipowners have historically come to Greece's aid, contributing their fleets when necessity and war required them, and more recently, voluntarily doubling the rate of tonnage tax paid during Greece's fiscal crisis.

SYRIZA's Early Maritime Policy

In forming his cabinet, Prime Minister Tsipras merged the Ministry of "Shipping and the Aegean," which for decades had been mostly a standalone ministry dedicated to the shipping industry, into a larger "Ministry of Economy, Infrastructure, Shipping & Tourism." SYRIZA had previously accused the Ministry of Shipping of being the "official press office" of Greek shipowners, and merging it into a larger ministry could be a signal that the industry will not have the same influence in this government that it previously had. George Stathakis, SYRIZA's appointment for Minister, is a scion of a well-known shipping family. However, Mr. Stathakis pledged during the campaign that tackling the wealthy, including shipowners, "will be a priority."

Nevertheless, early signs indicate that SYRIZA may be abandoning campaign rhetoric for pragmatism. One of the key issues of SYRIZA's campaign was rejecting the privatization of state assets, a key part of Greece's bailout deal. This included the sale of the Port of Piraeus, Athens' historic port and Greece's largest container port. Two days after the election, Theodoris Dritsas, the Alternate Minister for Shipping, stated that "the privatization of [the port of Piraeus] is finished." Despite this rhetoric, the finance ministry recently confirmed that the sale of the port would proceed.

This overt change in policy demonstrates that SYRIZA's decision-making is tied neither to leftist dogma nor to campaign rhetoric. The move also may signal a desire to

(continued on page 17)

Navigating Scylla and Charybdis: Greece's New Leftist Government and the Shipping Industry (continued from page 16)

expand the maritime industry rather than see it as source of tax revenue. Privatizing the port may lead to further investment from China, which has already generated over 1,000 maritime jobs in Greece as part of China's "Maritime Silk Road" plan. Indeed, one of Prime Minister Tsipras' first state visits will be to Beijing. While the move also could signal division within the party between ideologues and policy makers, the government's commitment to proceed with the sale may portent that the government seeks private-sector led growth in the maritime industry.

THE GOVERNMENT HAS TO somehow navigate the twin obstacles of agreement with its European creditors and its leftist power base, and the temptation exists to appease both by disrespecting laws protecting Greece's shipping.

SYRIZA's early policy statements also seem to favor private-sector led expansion in shipping, diverting sharply from its anti-shipowner campaign rhetoric. In laying out SYRIZA's domestic policy on February 9, Prime Minister Tsipras avoided shipping. Instead, Theodoris Dritsas laid SYRIZA's shipping policy, noting that the continued "return of shipowners' capital to Greek society is an absolute necessity." Perhaps signaling that expansion of shipping, rather than its taxation, would ultimately benefit the Greek fisc, Dritsas also stated that "first and foremost, Greek shipping should seek to reduce unemployment." He also averred, however, that the industry's contribution to society "also extend to other areas." This ambiguous statement has lead to speculation in the Greek media that the "other areas" may mean repealing shipping tax exemptions.

Looking Ahead: Cautious Optimism

The first month since SYRIZA's election is cause for cautious optimism for Greece's shipping industry. The government has highlighted areas of growth for the industry that would be mutually beneficial for both the industry and Greece's fisc, particularly increasing employment and facilitating investment. The largest pitfall to avoid is causing capital and employment from leaving Greece, which the Greek Union of Shipowners has stated will be a consequence if the government does not respect current tax law. This would damage secondary industries that benefit from the shipping industry, such as ship brokering and marine insurance. With unemployment hovering around 25 percent (62 percent for youth), this would be disastrous for Greece.

Ideology and politics aside, Greece will need to buttress its tax collection. The shipping industry will remain a target in the eyes of many Greeks, especially the far left portions of SYRIZA, regardless of the disastrous consequences that would follow. Also, increasing tax revenues from shipping may be one of the few areas that some SYRIZA members and Greece's creditors agree upon. The deputy parliamentary floor leader of German Chancellor Angela Merkel's CDU recently stated that, "It's about time that Greece taxes its shipowners." However, with Greece's future in the European Monetary Union uncertain, shipping may become even more essential to Greece's economy as the only serious sources of foreign exchange.

Conclusion

SYRIZA would do well to not heed the siren calls that would lead to the destruction of Greece's shipping industry. Following the successes of its ancient mariners, the modern Greek shipping industry has fostered success on the seas throughout various empires, kingdoms, and governments, establishing commercial success through innovation, thrift, and risk-taking. In fact, many current shipowning families are descendants of the earliest adapters of steamship technologies. These qualities have not been present in the governance of the modern Greek state, which has defaulted five times since its independence in 1821. Greek shipping is one of Greece's only growth industries, with tonnage growing 4.5 percent in 2014 and analysts predicting three percent per annum average increases in tonnage over the next two decades. However, Greek shipping is at a crossroads, only now starting to recover from massive losses since its economic collapse in 2008. With the prospects for long-term growth in revenue and employment being bullish, SYRIZA's temptation to meet some short-term fiscal goals by taxing shipping could lead to disaster for one of Greece's few economic bright spots. Indeed, perhaps shipping is the only industry that can propel Greece through the continued challenges it faces.

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Maximizing the Benefits of the Voyage Data Recorder: Not Just Accident Analysis

BY ALAN M. WEIGEL

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Despite the advances made in outfitting vessels with electronic navigation equipment and training bridge watchstanders in its use, collisions and groundings continue to occur. Investigations into these accidents now routinely make use of data recorded by the vessel's voyage data recorder ("VDR"). The use of information recorded by a VDR can have a significant impact on near inevitable post-accident litigation. Although the use of VDR data for accident investigation is now a normal practice, it is not uncommon to find problems with the recorded data that must be addressed before the data can be used reliably.

While information from VDRs is typically only reviewed reactively following an incident or accident, a recent report from the Oil Companies International Marine Forum ("OCIMF"), an association of oil companies with an interest in the shipping of oil and gas, suggests that the maritime industry should use VDR data proactively for more than accident investigation. In "Recommendations on the Proactive Use of Voyage Data Recorder Information," the OCIMF suggests VDR information should be used to prevent incidents from occurring in the first place and for analysis of preventive maintenance, performance efficiency monitoring, analysis of heavy weather damages, and training to improve safety and reduce running costs.

What Is VDR?

The VDR is a recording system that continuously collects and stores data from various sensors on board the vessel. The collected data includes navigation parameters, voice recordings, and other vital information related to the operation of a vessel. The last 12 or 24 hours of data are stored in a protective unit that can be recovered and replayed by the authorities or vessel owners for incident investigation.

SOLAS Chapter V requires passenger vessel and vessels other than passenger vessels of greater than 3,000 gross tonnage to carry voyage VDRs to assist in accident investigations. The simplified voyage data recorder ("SVDR") is a lower cost version VDR that records only basic vessel data.

Using VDRs in Accident Investigations

Like the flight data recorders, or "black boxes," carried on aircraft, VDRs enable accident investigators to review procedures and instructions in the moments before an incident and help to identify the cause of any accident. As the Internal Maritime Organization's protocol for accident investigation suggests, VDR information should be examined to analyze the factors causing the accident and, hopefully, to assist the industry at large in making sure that any mistakes that may have occurred can be prevented from happening again. There are, however, some common problems that must be solved before VDR information can be reliably used for accident analysis or presented in post-accident litigation.

The most fundamental problem is data preservation. The current performance specification for VDRs requires that data is stored for a minimum of 12 hours before being overwritten. If no action is taken to preserve the recorded VDR data within 12 hours of the start of an incident, the data will be lost or overwritten, thereby negating the purpose of having a VDR installed.

(continued on page 19)

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Maximizing the Benefits of the Voyage Data Recorder: Not Just Accident Analysis (continued from page 18)

Thus, prompt action is always desirable, and the vessel owner, accident investigators, and counsel must often work cooperatively at the earliest point in the investigation to preserve critical evidence. Vessel owners usually have an affirmative duty to preserve VDR data for post-accident litigation. Unfortunately, many ship owners and operators are not familiar with operating the VDR, or how to collect data post-accident. To facilitate post-accident data collection, onboard procedures and manager's accident response plans should address the requirements for retaining and preserving VDR data post-incident.

Another problem is preserving the data's chain of custody. It is often necessary to hire outside technicians to retrieve data who may not be familiar with the legal requirements for preserving evidence. Thus, the technician, investigator, and counsel may need to work together to avoid later questions about the data's authenticity, reliability, and accuracy.

Finally, it will usually be necessary to correlate data sources and find an adequate explanation for anomalies and inaccuracies. Different sensors may record the same data with differing accuracy and often will be running on different time standards. Reconciling these differences is necessary to satisfy investigators and courts that the data is reliable. To help minimize problems with VDR data, the periodic maintenance schedule and vessel pre-underway checks should include checks of the VDR recording capability.

THE OCIMF SUGGESTS VDR information should be used to prevent incidents from occurring in the first place and for analysis of preventive maintenance, performance efficiency monitoring, analysis of heavy weather damages, and training to improve safety and reduce running costs.

Lessons from the Aviation Industry

Although primarily intended for after-the-fact accident investigation, there can be other uses of VDR data. The maritime industry can learn from the experiences of other industries that use recorded data for accident prevention and to improve operational efficiency, particularly the aviation industry. Flight data recorders have been installed on aircraft since the 1950s, and many airlines have been routinely analyzing flight recorder data for more than accident investigation since the 1970s. It has been shown that the accident rate is significantly lower for those aircraft operators that had been analyzing flight recorder data for the longest period of time. In addition to safety-related benefits, airlines analyzing flight records data also have seen significant maintenance and fuel-saving cost benefits. As a result of the benefits derived from the routine analysis of flight recorder data, the International Civil Aviation Organization ("ICAO") has required operators of certain large aircraft to establish and maintain flight recorder data analysis as part of their accident prevention and flight safety program. Similar benefits are available to the maritime industry through the analysis and assessment of information obtained from a vessel's VDR.

Proactive Use of VDRs

As the OCIMF advocates, the proactive analysis of VDR data on a regular basis could provide an important tool for use in accident prevention and the reinforcement of a positive operational safety culture.

VDR software can be programmed with a range of "rules" to detect events or trends within the recorded data. The rules can easily include fairly simple checks of a single variable, such as whether the depth below the keel is less than a defined limit. More complex combinations that may require analysis with other data sources are also possible, such as speed and heading data linked to charts and route plans to analyze whether a vessel has followed the correct rules for a Traffic Separation Scheme. Analysis of such events or trends can lead to the identification of potential problems in operational practices and the need for additional training to prevent accidents before they occur.

One suggested approach to the analysis of VDR data is to undertake a central assessment of information from all ships in a fleet. This enables an analyst to correlate events and trends with particular ports, watchstanders, pilots, or weather conditions in a way that may not be obvious from single vessel/single voyage analysis. To accomplish such an approach efficiently, however, data collection and analysis should be integrated into the vessel owner's and operator's ship and shore safety management system procedures.

Challenges Using VDR Data

There are several technical and operational challenges that must be overcome before more advanced use of VDR data can become an effective tool for creating an improved operational safety culture.

Some VDRs, for example, only receive data from a single unit of each type of equipment, such as one of the radars or one VHF set, even when multiple units are installed. The OCIMF suggests that consideration should be given to providing separate feeds to the VDR from each item of equipment.

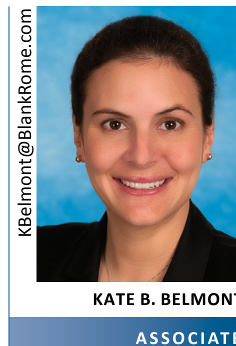
Because of the performance standard requiring data storage for only 12 hours, the current VDR configuration does not lend itself to the implementation of comprehensive voyage assessment and analysis. To address the short VDR recording times, relatively low-cost proven technology is available that can significantly extend the recording times in excess of 90 days. Units also may be fitted with removable hard disks or support a separate network connection to enable data to be downloaded for analysis. The remote downloading of selected data to a central processing facility via satellite broadband internet also is a practical option. As the OCIMF also point out, "The regular download of data also has the benefit of providing a check that all data inputs are functioning correctly."

Some Legal Implications of Implementing the OCIMF Recommendations

When implementing the OCIMF's recommendations, several cautions are in order. Most importantly, so as not to be in violation of SOLAS requirement, any modifications to VDR software or equipment cannot impair data recording for casualty analysis. Equally important, a ship owner who undertakes to have advanced VDR data made available must actually conduct the analysis of the data in a meaningful way. The analysis of advanced VDR data is not very different from the reviews of log books undertaken by many owners. But just like a log book review, the VDR data collection and analysis cannot be a "paper" exercise, written into procedures, and then not carried out in practice. Otherwise, an owner could be criticized for having failed to exercise due diligence to detect and correct unseaworthy conditions. ◻

Coast Guard Guidance on Maritime Cybersecurity Standards

BY KATE B. BELMONT



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Cyber attacks against governments, independent firms, and large multinational companies have become common headlines in today's news. Throughout 2014, there were major cyber attacks against Target, Chase, Home Depot, and the widely publicized Sony hack. Most recently, there was the cyber attack against Anthem, which is the nation's largest healthcare breach to date, with over 80 million customers affected or harmed. Cybersecurity attacks are happening with more frequency, and the extent of damages caused by these attacks is increasing as well.

Growing Cyber Risks in the Maritime Community

The maritime community has also seen a growing number of cyber attacks in recent years, ranging from intrusions on U.S. Transportation Command Contractors ("TRANSCOM"), to hacks of port IT systems and frequent cyber breaches in the bunkering community, including the cyber attack that cost World Fuel Services an estimated $18 million. As we have discussed in previous articles (Maritime Cybersecurity: A Growing Threat Goes Unanswered and Old Dogs, New Tricks: Bunker Fuel Industry Facing Growing Cyber Threat), the maritime community has grown increasingly more dependent on electronic information and technology, yet remains one of the most susceptible to cybersecurity attacks. As these attacks have been happening with more frequency and with alarming consequences, cybersecurity has now become a primary focus for the maritime industry.

The Coast Guard's Cybersecurity Initiative

To best combat cyber attacks and address growing cybersecurity concerns throughout the community, the Coast Guard has committed to a year-long process to develop cybersecurity guidance for the maritime industry. On January 15, 2015, the Coast Guard launched this initiative by hosting an interagency public meeting, "Guidance on Maritime Cybersecurity Standards," to discuss cybersecurity issues in the maritime domain. The authority for the Coast Guard's initiative comes from the Maritime Transportation Security Act, a law enacted after September

(continued on page 21)

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Coast Guard Guidance on Maritime Cybersecurity Standards (continued from page 20).

11, 2001, to address port and waterway security, which requires vessels and ports to assess security vulnerabilities and plan for their mitigation.

The Coast Guard is looking to industry and public participation to help develop policy and cybersecurity regulations. In its push to create regulations, the Coast Guard stressed the importance of full transparency and cooperation with its interagency partners and the maritime community. Due to the diversity of the maritime industry and the ever-changing and constantly evolving nature of cyber attacks, the solutions must be flexible, creative, and customized to the industry.

As public input is crucial in the development of effective cybersecurity regulations, Captain Andrew Tucci posed the following questions to the maritime community:

- What cyber dependent systems, commonly used in the maritime industry, could lead or contribute to a transportation security incident if they failed or were exploited by an adversary? What would the consequences be?

- What procedures do vessel and facility operators use to identify potential cyber vulnerabilities? Are you using existing processes from governmental agencies, insurance companies, or your own? What is your risk assessment process? Are there existing programs that the Coast Guard could recognize? To what extent do they address transportation security incident risks?

- What factors should determine when manual backups or other non-technical approaches are sufficient to address cyber vulnerabilities? Once you've identified your risk, there needs to be a variety of ways to mitigate that risk. Sometimes these solutions can be very non-technical, such as a float switch that can cut off a system if the technological system fails.

- To what extent do current training programs for vessel and facility personnel address cyber? In many cases, the largest risk is the end-user and training can mitigate a great deal of risk. How much risk could be mitigated by providing training? What should that training cover? Are there training programs out there right now that include the type of cyber training that could work for maritime industry?

- How can the Coast Guard leverage the Alternative Security Program ("ASP")? The Coast Guard has standards mostly addressing physical securities for vessels and facilities. We have programs where vessel and security operators submit plans to address physical security risks. We also have ASPs that allow certain segments of the industry to essentially develop their own alternative way of meeting security requirements. With this, you get an "umbrella" plan for all the members of that association or organization. The Coast Guard agrees that it achieves a necessary level of security that is acceptable. Perhaps this is appropriate with cyber. For all companies, under an umbrella, to adopt a cyber security plan, and apply it to all facets of the company. I offer this ASP as a potential way to address cyber standards as a compliment to their already existing security plans.

- How can vessel and facility operators reliably demonstrate that critical systems meet appropriate cyber security standards? Both the industry and the Coast Guard want to be able to say that we are confident that we have a good security system in place in regard to cyber risks. How can we be confident that a system is secure? The Coast Guard is interested in finding a credible way that both parties can be sure that there is a secure plan in place so that all concerned are confident that we have good secure systems for our ports, vessels, and facilities.

- Do classification societies, insurers, and other third-parties recognize cybersecurity practices that could help the maritime industry and Coast Guard address cyber risks? Are there existing practices in place we can look at? What is already being done "out there" that the Coast Guard can recognize? We are not looking to reinvent the wheel. We would like to know what you are currently doing within your own organizations and companies.

Next Steps

The Coast Guard is actively seeking feedback, critiques, and questions, which can be provided on the docket (https://www.federalregister.gov/articles/2014/ 12/12/2014-29205/guidance-on-maritime-cybersecurity-standards), and will be open until April 15, 2015. As cyber attacks continue to pervade the maritime community, it is critical that members of the industry work with the Coast Guard to develop the most effective cybersecurity regulations for the maritime industry. □

Maritime Emergency Response Team

We are on call 24 / 7 / 365

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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