



# MAINBRACE

MARCH 2020 • NO. 1

BLANKROME  
maritime

## CONTENTS

1. Note from the Editor
2. MARPOL Annex VI Enforcement—Are You Prepared?
5. Firm News & Announcements
6. All Aboard! Major Shipping Lines Secure Antitrust Immunity for TradeLens Blockchain Agreement
8. *Chambers Global 2020* Ranks Blank Rome Attorneys and Shipping Litigation Practice
9. Analyzing Maritime (or Non-Maritime) Contracts and Practical Considerations for Litigation Strategy
11. Diversity & Inclusion News
13. Carbon-Free Ships: The EVs of the Seas?
15. Congress Acts on Major Maritime Programs in 2019 and Postpones Work on Coast Guard Bill
17. Anatomy of a Marine Casualty Investigation
20. *Safe Passage* Blog
21. About Blank Rome
22. Risk Management Tools for Maritime Companies
23. Blank Rome's Maritime Industry Team

## Note from the Editor

BY THOMAS H. BELKNAP, JR.

**Happy (almost) spring!** Every year seems to be a new adventure and a new challenge, and this year, on top of the dramatic new International Maritime Organization 2020 bunker regulations that have now come into force after much trepidation, we find ourselves watching as the shipping world (and everyone else) wrestles with the many market disruptions that have resulted from the global spread of COVID-19, otherwise known as coronavirus. Throw in a presidential election in November, and there's plenty of uncertainty to keep everyone guessing this year.

It's not all bad news, however. Uncertainty brings risk, but it also generates opportunity, and the shipping world has always depended on its creativity and ingenuity to survive and thrive. We have every confidence that it will continue to do so in the future.

As always, we aim with this issue of *Mainbrace* to offer a diverse look at different aspects of the shipping industry: [Jeanne M. Grasso](#) and [Kierstan L. Carlson](#) take a look at the growing enforcement in the United States in respect of MARPOL Annex VI emissions violations; [Jeremy A. Herschaft](#) and [Matthew J. Thomas](#) bring us up to speed on recent developments in the emerging maritime blockchain platform, TradeLens; [William R. Bennett, III](#), [Charles S. Marion](#), and [Anthony Yanez](#) help us consider when a contract may or may not be a "maritime" one—and why it matters; [Frederick M. Lowther](#) imagines the future of carbon-free vessels; [Joan M. Bondareff](#) and [Stefanos L. Roulakis](#) give us an update on maritime-related developments in Congress; and [William R. Bennett, III](#), and [Lauren B. Wilgus](#) take us through the complicated ins and outs of a maritime casualty investigation in the United States.

Added to the mix of current maritime news and trends, we also include some timely Firm announcements regarding new partners and teams who have joined us since January 1 as well as highlight the elevation of [Lauren B. Wilgus](#) to Maritime partner and our *Chambers Global 2020* rankings. Additionally, we provide some important Blank Rome diversity and inclusion updates, including the sad news of the loss of our beloved colleague and friend Judge Nathaniel R. Jones, our Firm's first Chief Diversity and Inclusion Officer.

We hope you enjoy this issue. As always, we welcome your comments and suggestions for articles in future issues of *Mainbrace*.



# MARPOL Annex VI Enforcement—Are You Prepared?

## *Tips to Enhance Compliance and Reduce Enforcement Risk*

BY JEANNE M. GRASSO AND KIERSTAN L. CARLSON



JEANNE M. GRASSO

PARTNER



KIERSTAN L. CARLSON

ASSOCIATE

**The United States has been** aggressively enforcing compliance with the International Convention for the Prevention of Pollution from Ships (“MARPOL”) for nearly 30 years. Enforcement actions have been brought against ship owners and operators across the industry, as well as against individual masters, engineers, shoreside personnel, and other corporate officers.

To date, most MARPOL prosecutions have involved violations of MARPOL Annex I through “magic pipe” bypasses of the Oily Water Separator (“OWS”) or improper discharges of sludge, though some have involved Annex V garbage violations and, very recently, Annex VI emissions violations. Few, other than in the early 1990s, have involved illegal discharges *in U.S. waters*; rather, virtually all cases have been brought for false entries in the ship’s records, including the Oil Record Book (“ORB”) and Garbage Record Book. This is because maintaining inaccurate records while in domestic waters or presenting inaccurate records to the U.S. Coast Guard (“USCG”) during an inspection is a crime and the jurisdictional hook needed for prosecution. Most cases also involve some kind of unlawful “post-incident conduct” that constitutes an independent crime under U.S. law, such as destroying records or lying to USCG inspectors or special agents.

While most countries view recordkeeping violations for illegal discharges occurring in international waters as within the purview of the flag state, the U.S. government disagrees—evidenced by the approximately eight to 10 MARPOL prosecutions per year for at least the last decade, including eight in 2018 and nine in 2017, all of which have resulted in high penalties and/or jail time, as well as reputational harm to the ship owners and operators.

Not only are MARPOL Annex I prosecutions likely to continue, but we also expect U.S. authorities to begin focusing more heavily on violations of MARPOL Annex VI (air emissions) now that the worldwide sulfur limit of 0.50 percent is in effect. The United States brought the first Annex VI criminal case in 2019, following the same playbook it uses in Annex I cases. And, with the implementation of the 2020 sulfur cap, and all of the compliance challenges that come along with it, the risk of an enforcement action is that much greater. Ship owners and operators must take steps now to ensure compliance with Annex VI, including maintaining accurate records, or risk becoming a target in the next port state control inspection.

### **IMO 2020 and the Resulting Compliance Challenges**

Known widely as “IMO 2020” or the “2020 sulfur cap,” significant amendments to the fuel sulfur standards under MARPOL Annex VI are coming into effect in 2020. First, as of January 1, 2020, the worldwide limit for sulfur content in bunker fuel oil is 0.50 percent for ships operating *outside* of emission control areas (“ECAs”). Second, a ban on the carriage of non-compliant fuel went into effect on March 1, 2020. The only exception to this rule is that ships fitted with exhaust gas cleaning systems (often referred to as “scrubbers”) will be permitted to carry fuel with a higher sulfur content. Importantly, none of these changes impacts the fuel sulfur limit applicable within ECAs—that limit has been 0.10 percent since 2015 and will remain in effect.

The 0.50 percent limit required under IMO 2020 is a substantial reduction from the prior limit of 3.50 percent. To comply, ships must do one of three things: 1) carry and use only compliant fuel on board; 2) equip ships with scrubbers; or 3) plan for ships that can be powered through alternative means, such as liquefied natural gas (“LNG”). Undoubtedly, each of these options may present challenges for ship owners and operators. Opting to use compliant fuel will require careful planning and also presents concerns about engine compatibility and fuel blending. Plus, the USCG has signaled that ships submitting fuel oil non-availability reports will receive additional scrutiny and likely will be boarded. Comparably, opting to comply by utilizing scrubbers requires ships to manage wastes and/or washwater, which cannot be

*(continued on page 3)*



## **MARPOL Annex VI Enforcement—Are You Prepared?** (continued from page 2)

discharged in certain U.S. states and various countries, and to plan for potential equipment failures. Finally, running a ship on LNG or some other alternate fuel must be planned years in advance, generally when the ship is built, and is often not a realistic option for ships already in service.

### **U.S. Annex VI Enforcement to Date & Impact of IMO 2020**

U.S. authorities have a range of enforcement options for violations of MARPOL Annex VI, including the issuance of letters of warning (“LOWs”), which carry no penalty; notices of violation (“NOVs”), which carry a penalty up to \$10,000; the imposition of a civil penalty up to \$74,552 per violation; and referral of the matter to the U.S. Environmental Protection Agency (“EPA”) for investigation or to the U.S. Department of Justice for criminal enforcement. The trigger for a criminal enforcement action will commonly be falsifying records to demonstrate compliance when a ship is not in compliance.

Until recently, and as companies have been adjusting to the North American and Caribbean ECAs over the past few years, Annex VI enforcement has been limited primarily to LOWs and NOVs, and a few civil penalty actions from the EPA. But the tide is changing. In August 2019, the United States concluded its first-ever Annex VI criminal prosecution. Two shipping companies were convicted and sentenced to pay a total fine of three million dollars for violations of Annex VI for using non-compliant fuel in the Caribbean ECA, failing to maintain an accurate ORB, maintaining false bunker delivery notes (“BDNs”), and obstructing justice. The conduct involved the vessel siphoning off fuel from cargo tanks and creating fake BDNs to show that the fuel was acquired shoreside. That said, the BDNs indicated that the vessel was nonetheless burning non-compliant fuel, which naturally caught the USCG’s attention during a port state control exam. There is little doubt that the case serves as a warning that the United States is not going to take Annex VI violations lightly.

To that end, the USCG has issued guidelines for compliance and enforcement of the U.S. ECAs and Annex VI generally (CG-CVC Policy Letter 12-04, Change 1). The USCG also has spelled out exactly how compliance with Annex VI will be verified: the USCG will review BDNs, fuel change-over procedures, and other documentation to assess compliance; and if warranted under the circumstances—*e.g.*, the ship is missing BDNs, the BDNs indicate non-compliant fuel, the crew are unfamiliar with or not following procedures—the USCG will

expand the inspection. This mirrors how the USCG would handle the discovery of a potential Annex I violation and it is exactly how the government handled the Annex VI criminal case. We also expect that the USCG would respond to a whistleblower report of an Annex VI violation just as it would to a reported OWS bypass: the USCG would immediately proceed with an expanded MARPOL examination followed by an investigation by special agents.

**Not only are MARPOL Annex I prosecutions likely to continue, but we also expect U.S. authorities to begin focusing more heavily on violations of MARPOL Annex VI (air emissions) now that the worldwide sulfur limit of 0.50 percent is in effect.**

The USCG’s enhanced scrutiny of BDNs and other vessel records increases the possibility that some non-compliance could be found, as well as that a ship’s crewmembers could expose the company to liability by attempting to hide their misconduct. The whistleblower provisions contained in the Act to Prevent Pollution from Ships, which implements MARPOL in the United States, presents an additional layer of complexity, as it could incentivize crewmembers to report problems to the USCG rather than to shoreside managers, as we have seen with Annex I violations.

### **Recommendations to Ensure Compliance & Reduce Enforcement Risk**

The risks of a potential enforcement action for non-compliance with MARPOL remain high if companies do not have the proper compliance systems in place. The United States has been regularly prosecuting companies and individuals for decades and expects that companies operating in U.S. waters understand the risks associated with failing to comply with MARPOL. This will not change simply because the focus may be shifting to Annex VI. Ship owners and operators must become vigilant about MARPOL compliance overall and proactively review and strengthen their compliance regimes in order to minimize the risks of becoming the target of a MARPOL enforcement action, along with the financial and reputational harm that comes with it.

In some cases, enforcement actions have resulted from a company’s unwillingness to invest time and money into compliance. But in others, they have resulted from a flaw

in an otherwise adequate compliance program. Indeed, no company, even one with resources, upgraded equipment, and procedures galore, is immune from a mistake. There is always room for improvement—and room to reduce risk.

Having represented dozens of companies in MARPOL enforcement actions, our experience has demonstrated that environmental compliance is dependent primarily on: 1) the competence and training of the ship's complement; 2) a comprehensive environmental management system, which includes verification; 3) the degree of shoreside management oversight employed; and 4) the strength of the overall corporate compliance culture. There is no reason to believe this will change if/when the enforcement focus shifts to Annex VI. Therefore, we recommend ship owners and operators dedicate resources to improving the following management practices to create a culture of compliance to reduce risk:

- **Enhanced Compliance Training** – Creating a sustainable compliance culture aboard the ship is difficult due to frequent crew rotations and the unpredictability of future vessel assignments. But, enhanced training programs for both engineering officers and unlicensed crewmembers are a must—they ensure that the officers and crew are knowledgeable and prepared, but they also communicate the company's commitment to rigorous compliance standards—and that non-compliance will not be tolerated.
- **Open Reporting System** – Anonymous hotlines or other electronic reporting methods through which crewmembers can alert shoreside management of environmental deficiencies or violations aboard a ship are imperative; the lack of an anonymous reporting mechanism is viewed skeptically by U.S. enforcement authorities. Some companies have even instituted an internal monetary reward system for crewmembers who provide accurate information regarding environmental problems as a means to counter-balance incentives offered for whistleblowing.
- **Verification/Audit Program** – A periodic audit program, including unannounced audits, is a critical element of a robust environmental compliance program. Whether conducted internally or by third-party consultants, routine audits can uncover problems and allow the company to correct non-compliances before they turn into enforcement concerns. Regular spot checks of records and verification of compliance outside the audit function is also important.

- **Role of Superintendent** – Periodic shipboard visits by the technical superintendent are vital; their detailed knowledge of the ship and familiarity with the engineering officers and crewmembers allow superintendents to identify conditions in the engine room that raise environmental compliance issues. Superintendents must take the time while aboard to speak with the ratings and officers, carry the compliance message from shore to ship, and be instructed to promptly inform shoreside management of any compliance issues so they can be dealt with promptly.
- **Internal Investigations** – If the company has information suggesting that an intentional MARPOL violation (whether Annex I, V, or VI) has occurred or is ongoing aboard a vessel, a company should conduct an immediate internal investigation, in consultation with counsel. Many circumstances will warrant counsel conducting the investigation. Counsel can develop a complete factual record and provide legal advice concerning any corrective actions or reporting obligations that may exist. Taking initiative early on can help to control the potential negative consequences of any identified MARPOL deficiency, while strengthening the company's overall environmental compliance program.

Should a company find itself in the unenviable position of discovering a MARPOL non-compliance, we recommend considering disclosure to the ship's flag state and possibly to the U.S. Coast Guard if a U.S. port call is forthcoming. Consultation with counsel plays a critical role in whether, how, and to whom such a disclosure should be made. While port and coastal states are authorized to perform port state control inspections or to investigate and consider enforcement actions for pollution events occurring in their territorial waters, these functions are secondary to the primary environmental compliance assurance role reserved to the flag state under international law.

## Conclusion

The United States has long been the most aggressive enforcer of MARPOL, whether or not the violations occur in U.S. waters, and this trend will continue. With IMO 2020 coming into effect, the enforcement focus is expanding and already shifting to Annex VI. Ship owners and operators trading in U.S. waters should take steps now to reduce the risk of an enforcement action: strengthen and test your compliance program; plan for potential problems relating to compliant fuel or scrubbers; and be prepared to immediately address any non-compliance if/when it arises. ■ – 2020 BLANK ROME LLP

## FIRM NEWS & ANNOUNCEMENTS

### Lauren B. Wilgus Elevated to Maritime Partner

**Blank Rome is pleased** to announce that [Lauren B. Wilgus](#) was elevated from of counsel to partner, effective January 1, 2020. In addition to Lauren, the Firm elevated 10 associates and one additional of counsel to partner, and five associates to of counsel.



LAUREN B. WILGUS

PARTNER

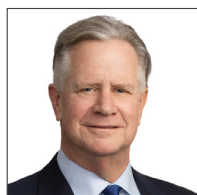
#### Lauren B. Wilgus – Maritime and International Trade • New York

Lauren focuses her practice on international and maritime litigation, alternative dispute resolution, and business matters, notably involving domestic and foreign corporate interests as well as disputes concerning international and domestic commercial contracts, marine insurance coverage, and charterparties. She counsels on claims involving the Carriage of Goods by Sea Act, maritime attachment and vessel arrest actions, marine casualty investigations, recognition and enforcement of foreign arbitration awards and judgments, and commercial negotiations and dispute resolutions. Lauren is an active member of Blank Rome's Maritime Emergency Response Team and leading maritime organizations and associations. □ – 2020 BLANK ROME LLP

To view all of the Firm's 2020 promotions, please visit [Blank Rome Announces 2020 Promotions: 12 Partners, 5 Of Counsel](#).

### Blank Rome Continues Expansion in 2020 with New Lateral Partners

Since January 1, Blank Rome has welcomed a number of lateral partners across its U.S. offices, enhancing the Firm's services and capabilities throughout its various practices.



CRAIG R. CULBERTSON

Corporate, M&A, and Securities  
CHICAGO

[Press Release](#)



JODI L. LASHIN

Corporate, M&A, and Securities  
NEW YORK

[Press Release](#)



WILLIAM E. LAWLER, III

White Collar Defense & Investigations  
WASHINGTON, D.C.

[Press Release](#)



STACY H. LOUIZOS

Corporate, M&A, and Securities  
NEW YORK

[Press Release](#)



DEAN S. NORDLINGER

Corporate, M&A, and Securities  
WASHINGTON, D.C.

[Press Release](#)



VANESSA G. TANAKA

Finance, Restructuring, and Bankruptcy  
CHICAGO

[Press Release](#)



MASHA TRAINOR

Corporate, M&A, and Securities  
PITTSBURGH

[Press Release](#)



PAUL H. TZUR

White Collar Defense & Investigations  
CHICAGO

[Press Release](#)

LATERAL PARTNER TEAM: Tax, Benefits, and Private Client | NEW YORK | [Press Release](#)



CRAIG B. FIELDS



HOLLY L. HYANS\*



NICOLE L. JOHNSON



MITCHELL A. NEWMARK

# All Aboard! Major Shipping Lines Secure Antitrust Immunity for TradeLens Blockchain Agreement

BY JEREMY A. HERSCHAFT AND MATTHEW J. THOMAS



JEREMY A. HERSCHAFT  
PARTNER



MATTHEW J. THOMAS  
PARTNER

**February 6, 2020, marked** an important milestone for the implementation of blockchain technology in the container shipping sector, as the Federal Maritime Commission (“FMC”) completed its review of an agreement among five major carriers to collaborate on a new blockchain platform called “TradeLens,” which aims to modernize the international logistics arena. Blockchain itself has already received considerable attention in other commercial areas (particularly digital currencies), and we have previously penned various articles on the basic structure of the technology, including [Heads or Tails? Making Sense of Crypto-Tokens Issued by Emerging Blockchain Companies](#) (*Mainbrace*, April 2019). The purpose of this article will specifically focus on the TradeLens concept, which leverages the shipping industry’s unique antitrust exemption to create standardized blockchain tools for a number of major carriers.

## The TradeLens Concept

TradeLens was launched on August 9, 2018, through a joint collaboration between Maersk GTD and IBM. The TradeLens model seeks to apply distributed ledger technology to the global logistics industry and is described as an effort to “reduce the cost of global shipping, improve visibility across supply chains and eliminate inefficiencies stemming from paper-based processes. In short, to bring global supply chains into

a more connected and digitized state—for everyone.”<sup>1</sup> Shippers, freight forwarders, ports, terminals, ocean carriers, intermodal operators, government authorities, and customs brokers are the intended users of the electronic platform.

The program itself is structured to function as an open, neutral electronic platform that “digitizes” the global supply chain “through innovations like a shared ledger, smart contracts, encrypted transactions, continuous audit history and transaction endorsement.”<sup>2</sup> By streamlining and digitizing the connections between the parties in the global supply chain ecosystem, TradeLens ultimately hopes to expedite decision-making and lower “the administrative frictions in trade.”<sup>3</sup>

It is no easy task to bring together all of the key parties listed above. However, major stakeholders in the logistics industry have taken keen notice of TradeLens over the



past year, and Maersk and IBM report that the concept is currently supported around the world by more than 100 diverse organizations, such as carriers MSC, Maersk, CMA CGM, ONE, and Hapag Lloyd; cargo owners, such as Procter & Gamble; global port operators, such as APM Terminals;

*(continued on page 7)*



and numerous global Customs authorities.<sup>4</sup> Notably, U.S. rail carrier CSX joined the program in November 2019. As of the publication of this article, the TradeLens website reports that the program is “already handling more than 700 million events and 6 million documents a year.”<sup>5</sup> These players—and numbers—clearly demonstrate that the market is paying considerable attention to the opportunities that blockchain technology can provide to the international logistics industry.

Major stakeholders in the logistics industry have taken keen notice of TradeLens over the past year, and Maersk and IBM report that the concept is currently supported around the world by more than 100 diverse organizations.

### The TradeLens Agreement Filing with the FMC

The TradeLens concept took a major step in clearing U.S. regulatory hurdles on December 23, 2019, when CMA CGM, Hapag-Lloyd, Maersk A/S, MSC, and Ocean Network Express filed [The TradeLens Agreement](#) with the FMC. By way of background, the FMC is an independent federal agency responsible for regulating shipping lines, marine terminal operators, and intermediaries to ensure competition and to otherwise protect the public from unfair and deceptive trade practices, in accordance with the Shipping Act of 1984. Among other things, the Shipping Act requires that carriers entering into cooperative working agreements file those agreements with the FMC. Generally, such agreements go into effect after a 45-day waiting period, although the review can be extended if the FMC seeks additional information. Once the review period concludes and the agreement takes effect, the participants enjoy antitrust immunity for matters covered by the agreement.

With this regulatory framework in mind, the TradeLens Agreement’s stated purpose is to “authorize the parties to cooperate with respect to the provision of data to a

*blockchain-enabled, global trade digitized solution that will enable shippers, authorities, and other stakeholders to exchange information on supply chain events and documents....”* Notably, the TradeLens Agreement expressly states that it is **not** designed to authorize the parties to discuss or agree upon their respective vessel capacities, the terms and conditions of their respective ocean transportation services, or the rates that are charged between the parties and their respective customers. Instead, the thrust of the TradeLens Agreement appears to be directed to the terms and conditions of the provision of data on the TradeLens platform, the input of products and services related to the platform, and the marketing of same, as well as the use of transportation-related documents on the platform itself.

The TradeLens Agreement is not the only new forum on file at the FMC for carriers to explore and harmonize new technologies to facilitate intermodal logistics and trade, however. The [Digital Container Shipping Association Agreement](#) authorizes the parties to form a nonprofit corporate entity through which they can discuss, exchange information, and agree on the development, establishment, standardization, and harmonization of terminology, guidelines, and standards for information technology used in the movement of containers. That broader forum includes the TradeLens parties as well as Hyundai Merchant Marine, ZIM Integrated Shipping Services, and Yang Ming Marine Transport Corp.

### Going Forward

The adoption of the TradeLens Agreement is significant, in that it represents a considerable step in attempting to advance blockchain technology in the maritime logistics realm. It will be interesting to see how cooperation and coordination in the area of blockchain adoption and other digital technologies will change the logistics environment, whether similar types of agreements may be submitted to the FMC going forward, and whether new legal issues will arise out of this accelerating effort to modernize the supply-chain arena. ■— 2020 BLANK ROME LLP

1. [blog.tradelens.com/news/tradelens-a-journey-from-beta-to-production-in-one-year/](https://blog.tradelens.com/news/tradelens-a-journey-from-beta-to-production-in-one-year/)

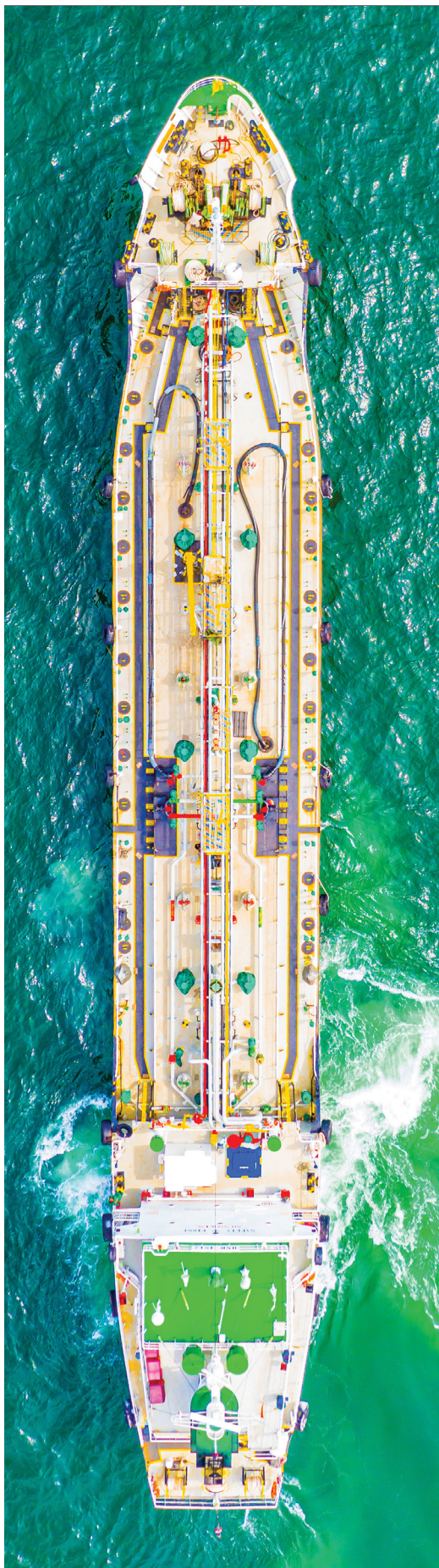
2. [blog.tradelens.com/news/tradelens-ready-to-transform-your-supply-chain/](https://blog.tradelens.com/news/tradelens-ready-to-transform-your-supply-chain/)

3. [tradelens.com/ecosystem](https://tradelens.com/ecosystem)

4. [blog.tradelens.com/news/press-releases/cai-mep-international-terminal-joins-tradelens/?\\_ga=2.160074365.1949324752.1580310045-1462440565.1579016044](https://blog.tradelens.com/news/press-releases/cai-mep-international-terminal-joins-tradelens/?_ga=2.160074365.1949324752.1580310045-1462440565.1579016044)

5. [tradelens.com/ecosystem](https://tradelens.com/ecosystem)





## **Chambers Global 2020 Ranks Blank Rome Attorneys and Shipping Litigation Practice**

**Chambers Global 2020** recognized Blank Rome as a global leader in **Shipping: Litigation–Global-wide**, as well as Partner **John D. Kimball** as a leading shipping litigation attorney.

As published in *Chambers Global 2020*:



### **Shipping Litigation – Global-wide**

#### **What the team is known for:**

"Well-regarded shipping litigation practice, with considerable expertise in dealing with high-profile disputes, as well as maritime arbitration. Handles a wide range of issues, including casualties, charter party disputes, bankruptcy and environmental matters. Also well versed in advising on non-contentious matters. Acts for a mix of owners, operators, charterers, financial institutions and shipyards. Respected both within the USA and internationally for its deep industry knowledge, and noted for its expertise in shipping issues as they intersect with environmental litigation."

#### **Strengths:**

"A source particularly praised the firm's skills in handling maritime transactions."



**JOHN D. KIMBALL**  
PARTNER

#### **John D. Kimball – Shipping: Litigation, Global-wide**

**John D. Kimball** "is 'noted for his broad expertise in shipping litigation, covering charter party and insurance disputes, as well as casualty and collision work.'"

To view all of Blank Rome's 2020 rankings, please visit [Chambers Global 2020 Ranks Blank Rome Attorneys and Shipping Litigation Practice](#).

# Analyzing Maritime (or Non-Maritime) Contracts and Practical Considerations for Litigation Strategy

BY WILLIAM R. BENNETT, III, CHARLES S. MARION, AND ANTHONY R. YANEZ



**WILLIAM R. BENNETT, III**  
PARTNER



**CHARLES S. MARION**  
PARTNER



**ANTHONY R. YANEZ**  
ASSOCIATE

In many civil disputes, the application of choice of law principles as well as the jurisdiction in which the lawsuit is filed can have a significant impact on the outcome of a case. This is especially true where one of the parties conducts business in the maritime industry and the other does not. Some parties may prefer that state law be applied to the dispute because of a favorable state statute (such as a statute of limitations) or because the state's courts have rendered decisions that support the parties' position on a substantive issue. Others may prefer that federal law apply where it is more advantageous to a party given the facts of the case. Of course, some parties prefer to litigate in federal court rather than state court, or vice versa, for cost or other reasons.

There is a small subset of cases in which the question of whether maritime or admiralty law should be applied arises. One of the most significant decisions addressing that question is *Norfolk Southern R. Co. v. James N. Kirby Pty, Ltd.*, 543 U.S. 14 (2004). In *Kirby*, the U.S. Supreme Court

held that the liability of a rail carrier that transported over land cargo that was brought to the United States from Australia on board ships, through bills of lading calling for carriage from Australia to Huntsville, Alabama, via the Port of Savannah, Georgia, for damage to the cargo that occurred during that leg of the journey should be determined by applying maritime law, because the entire contract of carriage, and not just the ocean segment of it, constituted a maritime contract. More specifically, the court in *Kirby* determined that the default liability rule in the Carriage of

In determining this type of choice of law question—that is, whether maritime law applies to a particular dispute—a court would likely analyze this issue through the lens of *Kirby* and, depending on which side of a dispute your client is on, the conclusion the court reaches can have important consequences.

Goods by Sea Act (“COGSA”) (\$500 per package) applied to a train wreck that allegedly caused \$1.5 million in damages.

In determining this type of choice of law question—that is, whether maritime law applies to a particular dispute—a court would likely analyze this issue through the lens of *Kirby* and, depending on which side of a dispute your client is on, the conclusion the court reaches can have important consequences. The determination of this question requires a case-by-case and very fact-sensitive analysis; rarely is this question black and white. However, the sooner this analysis is undertaken in a case, or even before a lawsuit is filed, the better an entity can be prepared to manage expectations and pursue an appropriate and effective litigation or resolution strategy.

## What Is a Maritime Contract?

In cases in which a contract is at issue, and at least one of the parties does business in the maritime industry, the first step in determining whether maritime law applies to the case is to review the terms of the parties' contract. Doing so, however, does not always yield a clear-cut answer. If it does not, a more thorough analysis of the relevant facts, the

respective parties' business operations, and the parties' obligations under the contract must be conducted.

It is also important to note that, “[i]n order for a contract to fall within the federal admiralty jurisdiction, it must be wholly maritime in nature, or its

non-maritime elements must be either insignificant or separable without prejudice to either party.” *Inbesa Am., Inc. v. M/V Anglia*, 134 F. 3d 1035, 1036 (11th Cir. 1998). “To qualify as maritime, moreover, the elements of a contract must pertain directly to and be necessary for commerce or navigation upon navigable waters....The test we apply in deciding whether the subject matter of a contract is necessary to the operation, navigation, or management of a ship is a test of reasonableness, not of absolute necessity.” *Id.* (quoting *Nehring v. Steamship M/V Point Vail*, 901 F. 2d 1044, 1048



(11th Cir. 1990)) (internal quotation marks omitted). As another court explained, “[i]t is the character of the work to be performed under a contract that determines whether it is maritime, not the identity of the parties to the contract.” *Beyel Bros., Inc. v. Canaveral Port Auth.*, 2006 WL 2864387, \*2 (M.D. Fla. Oct. 5, 2006); see also *Exxon Corp. v. Central Gulf Lines, Inc.*, 500 U.S. 603, 610 (1991) (analyzing whether agency contract fell within admiralty jurisdiction).

In some cases, a contract may have both maritime and non-maritime elements and the court must resolve what law applies to such a “mixed contract.”

### How Do Courts Approach the Issue?

Before the *Kirby* decision, courts applied a fairly straightforward test to resolve choice of law or jurisdictional issues concerning “mixed contracts.” Under that test, a court could exercise admiralty jurisdiction in and apply maritime law to a mixed contract dispute where the non-maritime portion(s) of the contract: 1) is merely incidental to the overall contract, or 2) can be separated from the maritime portion of the contract. See, e.g., *Steelmet, Inc. v. Caribe Towing Corp.*, 779 F.2d 1485, 1488 (11th Cir. 1986). On the other hand, if this test was applied to situations and contracts where the maritime and non-maritime portions or terms are bound together and cannot be separated, the court will not be able to exercise admiralty jurisdiction or apply maritime law.

The *Kirby* decision fundamentally changed the way courts approach whether or not they can exercise admiralty jurisdiction over a certain dispute. The rule the Supreme Court established in *Kirby* focuses on the maritime portions of a mixed contract. If the maritime portions of the contract are substantial, even where the dispute centers on non-maritime elements of the contract, the court can exercise admiralty jurisdiction and apply maritime law. If the maritime elements are not substantial, however, and the primary purpose of the

contract has nothing to do with the operation, management, or navigation of a ship, then the contract would likely be deemed non-maritime in nature, and the court would decline to exercise admiralty jurisdiction or apply maritime law.

That determination can have a huge impact on the outcome of a lawsuit, as it affects various stages of and motions filed in a case, including motions to dismiss or for summary judgment. Indeed, a party’s legal position in a case will be largely dictated by whether maritime or non-maritime law governs the dispute.

### Practice Implications

Even as early as at the contract drafting stage, entities should be very careful with respect to whether maritime law or non-maritime law would apply to a given contract and to any future disputes that may arise regarding that contract.

Parties would be best served to consider these issues at the negotiation and formation stages of the contract, because whether maritime law applies will affect a wide variety of issues and questions, including but not limited to the applicability of insurance coverage for the claims at issue, indemnification rights and obligations, forum selection, and even whether the contract needs to be in writing and signed by the parties, or an oral agreement will suffice and be enforceable.

While maritime entities doing business with each other may be less concerned about these choice of law issues, they can arise and become problematic when maritime entities are absorbed by non-maritime entities or do business with non-maritime vendors or customers whose attorneys assume that state law will

apply to the agreement—or negotiate for state law to apply to all disputes. Thus, carefully analyzing and negotiating contract terms and choice of law issues at the outset is not only recommended, but will also help the contract parties know what to expect if a dispute arises—and could help avoid costly litigation down the road. ■— 2020 BLANK ROME LLP



### In Memoriam: Judge Nathaniel R. Jones



**It is with great sadness** that we share the news that our beloved colleague and friend **Judge Nathaniel R. Jones** passed away on Sunday, January 26, at age 93. Judge Jones joined Blank Rome in 2002 and served as our first Chief Diversity and Inclusion Officer.

He was integral in helping to foster and promote our rich culture of inclusion throughout the Firm, and selfless in sharing his time and unmatched perspective with so many of us who are better people for having known him. In collaboration with Chris Lewis and Sophia Lee—his successors in the Chief Diversity

and Inclusion Officer role—we have developed a thriving and nationally recognized [diversity and inclusion program](#) that reflects his vision and passion. In 2013, we developed the Honorable Nathaniel R. Jones Diversity and Inclusion Award, which is presented annually to a Blank Rome attorney or professional who has demonstrated outstanding leadership in promoting diversity and inclusion. We are grateful to have the opportunity to honor and remember Judge Jones through this important award that will forever bear his name.

In Judge Jones' [obituary](#), our Cincinnati Office Chair Michael Cioffi notes, "Nate Jones was the kind of hero America needed that (Martin Luther) King described as 'an extremist for justice' in 'Letter from Birmingham Jail.' Nate's unwavering commitment to justice, equality, and the rule of law made him a great lawyer and great man. His genuine humility and everyday kindness made him loved by all, including those on the other side of the political spectrum. His life is an important lesson and model to us all." We couldn't agree more. While we have lost one of the brightest legal minds and civil rights advocates of our time, his groundbreaking work, steadfast compassion, and inspirational life and legacy will surely live on through the countless lives he has touched—both at Blank Rome and around the world. ■— 2020 BLANK ROME LLP

To learn more, please visit [In Memoriam: Judge Nathaniel R. Jones](#).



## Blank Rome Announces 2020 Diversity and Inclusion Leadership Update

*Sophia Lee Continues as Chief Diversity and Inclusion Officer in 2020;  
Christopher Lewis Transitions to Emeritus Role*



**SOPHIA LEE**  
PARTNER

**Blank Rome is pleased to announce** that [Sophia Lee](#) will serve as Blank Rome's Firm-wide Chief Diversity and Inclusion Officer and [Christopher A. Lewis](#) has transitioned to an emeritus role, effective January 1, 2020. Sophia and Chris have served as co-chiefs since [January 2019](#), when Sophia joined Chris in this capacity. Chris was appointed to the role in May 2011 and has transformed the Firm's [diversity and inclusion](#) efforts in significant ways.

As Chief Diversity and Inclusion Officer, Sophia will continue to work closely with the Firm's leadership on strategic initiatives and programming, including recruiting and mentoring; client partnerships, education programs, and special events; general counsel and thought leader roundtables; career development and advancement programs; and ongoing community outreach. She will also continue to chair the Firm's [Diversity and Inclusion Committee](#) and work closely with the Firm's [BR Pride](#), [BR United](#), and [Women's Forum](#) affinity groups.

"I am excited to step into the role of Chief Diversity and Inclusion Officer, leading the Firm's charge of increasing diversity, embracing inclusion, and advancing equity as we look to the future of the legal profession—from addressing the concerns of our legal communities to meeting the need of our clients," said Sophia. "Standing on the shoulders of those who have come before me, the [Honorable Nathaniel R. Jones](#), our Firm's first Chief Diversity and Inclusion Officer, followed by Chris Lewis, I will be a steadfast advocate for diversity, inclusion, and equity who recognizes the legacy of our Firm's founders, elevates our difficult discussions, and continues to push forward toward our ambitious goals and objectives. On a personal note, I am grateful to Chris for his mentorship, championship, and friendship as we have worked together over the years on the Firm's diversity and inclusion initiatives and with the broader legal community."

■ – 2020 BLANK ROME LLP

To learn more, please visit [Blank Rome Announces 2020 Diversity and Inclusion Leadership Update](#).

## Blank Rome Earns Perfect Score in 2020 Corporate Equality Index

*Firm Receives 100 Percent for the Fifth Year in a Row on Human Rights Campaign Foundation's Scorecard on LGBTQ Workplace Equality*



**Blank Rome is proud to announce** that the Firm has received a perfect score of 100 percent on the [2020 Corporate Equality Index](#) ("CEI"), a national benchmarking survey and report on corporate policies and practices related to LGBTQ workplace equality, administered by the Human Rights Campaign ("HRC") Foundation. With this score, Blank Rome has been designated for the [fifth year in a row](#) as a "Best Place to Work for LGBTQ Equality" by the HRC, and joins the ranks of major U.S. businesses that earned top marks this year.

The 2020 CEI rated 1,059 businesses in the report and evaluates LGBTQ-related policies and practices, including non-discrimination workplace policies, domestic partner benefits and transgender-inclusive health care benefits, competency programs, public commitment to the LGBTQ community, and responsible citizenship. Blank Rome's efforts in satisfying all of the CEI's criteria results in a 100 percent ranking and the designation as a "Best Place to Work for LGBTQ Equality." ■ – 2020 BLANK ROME LLP

To learn more, please visit [Blank Rome Earns Perfect Score in 2020 Corporate Equality Index](#).

# Carbon-Free Ships: The EVs of the Seas?

BY FREDERICK M. LOWTHER



FREDERICK M. LOWTHER  
PARTNER

**Much has been made** of the future of electronic vehicles (“EVs”). Governments around the world are setting ambitious goals for EVs based on the notion that the vehicles themselves are carbon-free and thus a climate-friendly alternative to internal combustion vehicles. Among other things, the prospect of millions of EVs has supercharged the battery industry and spurred efforts to develop new energy storage technologies. So why not electric vessels, or vessels which are in other respects carbon-free?

There are many obvious differences between EVs and oceangoing vessels: size, weight, distance traveled, water-resistance, etc. Nonetheless, there is no inherent limitation on using an electric propulsion system for a vessel; it’s more a matter of scale rather than feasibility. The real issues are cost (capital and operating) and, just as important, the net environmental impacts.

## Cost and Operational Considerations

On the cost and operational side, there are a number of key considerations. In listing the issues, I am focused on newly constructed vessels versus retrofits (but some of the same considerations would apply to retrofits). What is the weight of a battery/electric propulsion system versus diesel or

What few rules there are today regarding battery disposal are honored mostly in the breach, but the day will come when deposits of spent batteries will raise issues of soil and water contamination, health effects, etc.

turbine engines and a load of fossil fuel? Batteries are very heavy, and weight is a significant factor for vessel operations. What is the cost of the system(s) to keep the batteries charged, both at sea and in port? The single biggest issue with EVs is the operating distance between charges, and that would be a significantly greater issue with oceangoing vessels, especially those traveling over vast stretches of water. It’s the difference between hundreds of miles and increasingly frequent options for recharging EVs versus thousands of miles with no “in transit” recharging stations for oceangoing vessels.

To the extent that batteries are recharged in port, the time required for recharging becomes crucial since the in-port turnaround time for many vessels is very short, often measured in hours. If (as is highly likely) the vessels are hybrids (*i.e.*, include engines or other devices that can charge batteries while the vessel is in motion), that adds to the cost/weight equation (as well as the environmental equation). What is the operating life of the batteries and what is the cost of replacing them and disposing of the spent batteries (another environmental issue)? Battery life/disposal has not (yet) been a major problem with EVs, but that platform is far different from an oceangoing vessel platform where the constant demand for power over long periods of time and against the resistance of water impacts battery functionality and life. Finally, batteries stacked in large bundles (as is the case for wind and solar generator storage installations) are known to have elevated fire risks. What is the cost of appropriate onboard vessel fire suppression systems?

It goes without saying that many of the cost and operational issues will undoubtedly be addressed by changes in technology. For those of you who recall the movie *The Graduate* where the tipsy uncle whispers “plastics” to a young Dustin Hoffman, the uncle today would likely say “batteries,” because literally billions of dollars are being spent on batteries and other energy storage/delivery technologies. Improvements are inevitable, but are still (some would say “very”) far away.

## Environmental Considerations and Net Environmental Impacts

The environmental issues with electric vessels are especially important, in part because the move to carbon-free vessels would be justified primarily (if not exclusively) on environmental grounds. It is on this subject that significant disagreements exist. Batteries (assuming that’s the relevant source of power) must be charged. If the charging mechanism is renewable (*e.g.*, wind, solar, motion-over-water), charging is not a carbon emissions issue. However, if charging in port involves electricity delivered by the local utility or charging at sea involves a fossil fuel-driven engine, the carbon emissions become a factor. How the “net” impacts are measured is a subject of great controversy, but it is nonetheless an important factor in the environmental equation for electric vessels.

Batteries must be manufactured. Most propulsion batteries today are lithium ion batteries of some sort. Aside from the cost of constructing the battery itself, the mining, processing, and transportation of the chemical elements (lithium, cobalt, and graphite) and encasement materials must be considered. Further, disposal of spent batteries deserves more serious attention than has been given to date. The composition of lithium ion batteries involves elements (e.g., lithium and cobalt) on the Periodic Table. They are stable elements that do not degrade. What few rules there are today regarding battery disposal are honored mostly in the breach, but the day will come when deposits of spent

sensitivity, all of the safety, proliferation, and disposal issues that have plagued the electric utility industry have kept nuclear power out of the mix for commercial vessels. But just as it is for the electric utility industry, the nuclear option should not be swept to one side based on past perceptions.

Nuclear generating technologies are improving, and indeed some of the most significant developments involve “miniaturization” of nuclear generators (as small as 25 MWe) that are potentially suitable for large oceangoing vessels. Safety concerns and issues of spent nuclear fuel (and contaminated reactor at end of life) disposal are enduring, and I am not



batteries will raise issues of soil and water contamination, health effects, etc. We have wrestled for decades with the disposal of spent nuclear fuel, and we can expect to wrestle with spent lithium batteries in the not-too-distant future.

### **Nuclear Power as a Carbon-Free Option**

So far, the discussion has been about battery-derived electricity as the source of propulsion power. There are, of course, other carbon-free sources of propulsion. The most obvious one is nuclear power. Whether the nuclear energy converts directly to electricity powering motors or converts to steam-driven propulsion, the carbon footprint is minimal. We have had nuclear-powered submarines, aircraft carriers, and ice breakers for decades. Why not nuclear-powered commercial vessels? Up to now, in this new era of climate

suggesting that the nuclear power option is, at this point, a near-term option. But, again, it must not be swept off the table if we are intent on improving the carbon footprint of the maritime industry.

### **The Timetable**

Given the almost daily reports of climate-related disasters, the worldwide focus on climate change is more than just a “movement.” Despite the spirited (and sometimes acrimonious) debate about whether the climate crisis is man-made, it is hard to argue with the premise that measures to mitigate further damage to the environment are necessary. The maritime industry is in a position to start making responsive changes. Carbon-free ships could indeed be the “wave” of the future. ■ – 2020 BLANK ROME LLP

# Congress Acts on Major Maritime Programs in 2019 and Postpones Work on Coast Guard Bill

BY JOAN M. BONDAREFF AND STEFANOS N. ROULAKIS



JOAN M. BONDAREFF  
OF COUNSEL



STEFANOS N. ROULAKIS  
ASSOCIATE

**We are in the middle of** the two-year term of the 116th Congress. In 2019, Congress reauthorized and funded several maritime programs, described below. Impeachment and a busy Senate calendar have delayed the 2019 Coast Guard Authorization Act (“CGAA”) until the second session, which began on January 6, 2020.

## Coast Guard Bill Delayed by Jones Act Waiver in House Bill

The main delay to finalizing the CGAA is how to handle a provision regarding installation vessels. This provision seeks to affirm that the Jones Act applies to “lifting operations” while instituting a government-run waiver process that may allow use of foreign-flag vessels. (For a complete summary of the House-passed bill, please see our advisory, [Potential Impacts of Offshore Legislation on Industry](#).) In contrast, U.S. Customs and Border Protection (“CBP”) has recently issued a customs bulletin interpreting the Jones Act as specifically not applying to “lifting operations” in addition to creating new criteria for when a Jones Act vessel must be used in transporting items offshore. (For a complete summary of the CBP Notice, please see our advisory, [U.S. Customs and Border Protection Decision Makes Substantial Changes Affecting the Offshore Industry](#).) Procedurally, the Jones Act waiver provision is in the House-passed bill (H.R. 3409). The companion Senate bill (S. 2297) lacks a similar provision. As such, proponents of the CBP’s notice are encouraging Congress not to enact the House-installation vessel provision.

The specifics of the House provision would regulate lifting operations offshore. The provision states that until a coastwise qualified (*i.e.*, U.S.-built, U.S.-citizen owned, and U.S.-flagged) lifting vessel is built, “lifting operations” are not subject to the Jones Act. Once such a vessel is built, the

bill would charge the Maritime Administration (“MARAD”) with implementing a waiver provision for “lifting operations” requiring crane capacity greater than 1,000 MT. If MARAD determines that a U.S. Jones Act qualified vessel is available, only a coastwise-qualified vessel can perform the lift. As of this publication date, it remains to be seen how the House and Senate bills will be reconciled in conference.

Members of the Senate are also informally advocating to include a mandate that the government would reimburse members of the Coast Guard during a government shut-down. This language did not make it into the final House bill because the Congressional Budget Office scored it too high and there was no offset.

## Reauthorization and Funding of Major Maritime Programs

In the meantime, and despite a full legislative calendar, Congress did manage to complete work on several maritime programs during the first session of the 116th Congress.

The National Defense Authorization Act (“NDAA”) reauthorized several programs managed by MARAD, including the National Security Multi-Mission Vessel Program, the Port and Intermodal Development Program, and the Maritime Security Program (“MSP”), as well as the U.S. Merchant Marine Academy and the state maritime academies. Congress also modified the title XI loan guarantee program by directing the administrator of MARAD to establish a process for the expedited consideration of low-risk applications. The NDAA also established a “military to mariner” transition assistance program. Further, the MARAD title of the NDAA requires the General Accounting Office to report to Congress on whether the United States has sufficient vessels to address the growth in the offshore wind industry. Until we know the answer to this question, any legislation banning foreign-flag heavy lift vessels from doing this work is certainly premature.

Originally, the bill created a new Voluntary Tanker Assistance Program (“VTAP”) for Military Sealift Command. The reason for this provision was due to a documented shortage of vessels to move petroleum products to support military operations. The VTAP would have been funded along similar



lines as the MSP. The enacted version of the NDAA reduced the VTAP to a report by the secretary of defense on the capabilities of the United States to maintain adequate U.S.-flagged fuel tanker vessel capacity to support the full range of anticipated military operations through 2030. Depending on the results of the report, Congress could consider a similar provision in the future.

**Looking ahead, we anticipate Congress enacting another NDAA by the end of the year with a new MARAD title, enacting FY2021 appropriations, reauthorizing the Water Resources Development Act, and at least beginning to work on a new surface transportation (or highway) bill.**

One other item of note in the NDAA enacted in 2019 was the establishment of new sanctions against the Nord Stream 2 pipeline. The pipeline is intended to supply gas from Russia to European nations. Senator Ted Cruz (R-TX) was the original sponsor of the sanctions, which did end up in the final NDAA. As a consequence, the company laying the pipe for the project agreed to stop work on the project.

### **MARAD Program Funding**

The amounts authorized for MARAD in the NDAA were subsequently modified by the congressional appropriation for these programs (in Pub. L. 116-94), as indicated below. Congress ultimately provided a total of one billion dollars for MARAD's programs, including:

- \$300 million for the Maritime Security Program;
- \$225 million for the Port Infrastructure Development Program;
- \$300 million for the third National Security Multi-Mission Vessel;
- \$20 million for assistance to small shipyards;
- \$9 million for Marine Highway Grants; and
- full funding for Kings Point and the six state maritime academies.

Of relevance to the above, on February 15, 2020, Secretary of Transportation Elaine Chao announced the recipients of the FY2019 Port Infrastructure Development Grants. (See [FY 19 Port Infrastructure Development Grant Announcement](#).) The Department of Transportation just announced the next round of Port Infrastructure Grants, which are due by May 18, 2020, although there is no word yet on the 2020 small shipyard grants. (See [Notice of Funding](#)

### **Opportunity for Department of Transportation's PIDP under the Further Consolidated Appropriations Act, 2020.)**

Additionally, MARAD just awarded \$7.5 million for Marine Highway Grants. (See [DOT Awards \\$7.5 Million in Grants for Marine Highway Projects](#); *WorkBoat*, January 7, 2020). In June 2019, MARAD awarded the 2019 Small Shipyard Grants. (See [Small Shipyard Grant Awards Announced](#); *WorkBoat*, June 18, 2019.) We anticipate that with new funding for 2020, notices of funding opportunity for port infrastructure and marine highway grants will be issued sometime this spring, with awards by the end of the year. Of note, the [Small Shipyard Grant Program](#) application was issued on January 9, 2020; applications were due on or by February 18, 2020.

### **Coast Guard Program Funding for 2020**

While the Coast Guard Authorization bill remains in limbo, Congress has appropriated funds to keep Coast Guard programs running through 2020. These funds came from the second omnibus, the Compromise National Security Spending Package, enacted as P.L. 116-93. The final bill provided \$12 billion to the Coast Guard with \$1.77 billion set aside for Coast Guard procurement, or \$475.8 million less than FY2019. Included in the procurement budget is:

- \$312 million for offshore patrol cutters;
- \$260 million for fast response cutters;
- \$160.5 million for national security cutters;
- \$150 million to sustain the MH-60 aircraft; and
- \$135 million for a second polar icebreaker.

Although Congress has not provided the policy direction for these and other Coast Guard programs, the funding will certainly keep these programs operational for 2020.

### **Conclusions and Outlook**

Congress took care of the major maritime programs for FY2020 by funding them. Other work remains to be finished. The maritime community has time to weigh in on the final CGAA, submit applications for Small Shipyard and Port Infrastructure Development grants, among other grants, and begin to format requests for FY2021 appropriations.

Looking ahead, we anticipate Congress enacting another NDAA by the end of the year with a new MARAD title, enacting FY2021 appropriations, reauthorizing the Water Resources Development Act, and at least beginning to work on a new surface transportation (or highway) bill. All these bills will have maritime elements, including for ports and shipyards, and should be on company watchlists.

□— 2020 BLANK ROME LLP

# Anatomy of a Marine Casualty Investigation

BY WILLIAM R. BENNETT, III AND LAUREN B. WILGUS



WILLIAM R. BENNETT, III  
PARTNER



LAUREN B. WILGUS  
PARTNER

**Blank Rome’s maritime attorneys** have represented clients in some of the largest maritime casualties in the last 20 years, including the *Staten Island Ferry* allision with a maintenance pier in New York, the blow out and eventual loss of the *Deepwater Horizon* drilling rig in the Gulf of Mexico, the sinking of the *El Faro* during Hurricane Joaquin, and the collision between the Navy Destroyer *USS John S. McCain* and the tanker *ALNIC MC* in the Singapore Strait. These casualties have resulted in the catastrophic loss of life, significant personal injuries, damage to the environment, and property damage.

Our experience investigating and providing legal representation for clients because of these casualties has shown that, despite decades of implementing international safety protocols, advancements in ship design, and an industry-wide focus and dedication to improved safety, marine casualties will continue to occur; maybe not as often, but they will happen. And following all the safety protocols put in place may not be enough to avoid a casualty. Simply put, large vessels transiting the world’s oceans subjects them to influences beyond their control and creates the inherent risk of a casualty occurring.

Obviously, the shipping industry’s primary goal should always be to have zero lost days due to accidents. But, equally, the industry should also always be prepared to immediately respond to and investigate unfortunate events when they occur. In this regard, it is critical to understand the investigative process that occurs when there is a significant marine casualty.

First, it is important to note that although not required, it is not unusual for the National Transportation Safety Board (“NTSB”) and the United States Coast Guard (“USCG”) to coordinate, in part, their efforts to investigate and establish

the root cause of a marine casualty. The process by which the NTSB and USCG investigate a casualty are similar in many ways, but different in some key areas. And recommendations made by the NTSB and/or the USCG, if any, following the conclusion of their respective investigations, differ in scope.

If you are an owner, operator, or an entity with a role in the events that led to the casualty, you may be designated a party-in-interest following a marine casualty. An example of an entity that is not an owner or operator who may be designated a party-in-interest could include a port pilot or an equipment manufacturer. Whatever your role may be, it is important to understand the purpose and eventual outcome of both the NTSB’s and USCG’s investigations.

## The NTSB

The NTSB’s stated purpose can be found on their website:

“The National Transportation Safety Board is an independent Federal agency charged by Congress with **investigating every civil aviation accident** the United States and **significant accidents** in other modes of transportation—railroad, highway, marine and pipeline.”

Although the principal purpose of the NTSB is to investigate aviation accidents, it is also tasked with investigating significant marine accidents. The NTSB has five board members, each nominated by the president and confirmed by the Senate to serve five-year terms. A member is designated by the president as chairman and another as vice chairman for two-year terms. Notably, none of the current or recent board members have worked in the marine industry. However, the NTSB does have a designated marine department made up of numerous professional with significant marine experience. They include licensed masters, chief engineers, naval architects, and other experts in various marine-related fields of study.

Following notice of a major marine casualty, the NTSB’s investigation team—called the “Go Team”—begins its investigation. Depending on the severity and or technical challenges relating to the marine casualty, the “Go Team” can be a small unit or a large unit composed of personnel with a broad spectrum of technical expertise that is

needed to solve complex transportation safety issues. The “Go Team” can also consist of three to four dozen specialists from the NTSB’s headquarters in Washington, D.C. Team members are assigned on a rotational basis to respond as quickly as possible to the scene of the accident. The fact-finding mission of the investigation begins at the accident scene. The NTSB will inspect all vessels and equipment involved in the incident.

The NTSB may designate parties-in-interest following a marine casualty. The upside to the designation is it provides the party-in-interest access to information not provided to the public or others involved in the incident. The downside, however, is the NTSB may restrict a party-in-interest from independently investigating the incident, including interviewing employees and witnesses.

The NTSB’s investigation will likely include a robust review of the Safety Management System and the safety culture of all entities involved in the casualty. The NTSB may serve comprehensive document requests and interview crewmembers and employees of companies involved in the incident. A corporate representative is permitted to attend crew and

employee interviews, but witnesses are not entitled to have a lawyer present. With the consent of the NTSB, a company’s general counsel may attend the interview.

Following the completion of its investigation, the NTSB will issue a preliminary report. The NTSB will request input from the parties-in-interest and are receptive to their input because the goal of the NTSB is not to find fault, but to determine the probable cause of an accident and issue safety recommendations aimed at preventing future accidents. In our experience, the NTSB has accepted changes to its preliminary report when the recommendations are based on credible facts and well-founded expert opinion. Thus, it is vital to have respected experts available to review the NTSB’s preliminary report.

Once the investigation is complete and the NTSB reviews the input from the parties-in-interest, the NTSB will issue its final report. It is important to note that in the final report, which is made public on their website, the NTSB will not specifically attribute fault to any individual or entity. Nor will the NTSB recommend a penalty, punishment, or sanction. The NTSB report, which is not admissible in a U.S. court proceeding,

*(continued on page 19)*





will provide only a factual background and state what the NTSB thinks is the probable cause of the incident. That said, the findings of the NTSB will obviously give a roadmap for other government agencies and/or litigants to independently build a legal case of who is at fault and why, which is why a party-in-interest's participation in the investigation and comments on the preliminary report are critical.

Finally, following the issuance of its final report, the NTSB will generally hold a public hearing, at which time the findings of the report will be announced publicly.

### The USCG

As the primary agency responsible for marine safety, the USCG is tasked with investigating marine casualties. The investigations range from obtaining and analyzing evidence for minor incidents to establishing a marine board of investigation to investigate incidents involving serious personal injury, death, and significant environmental and property damage. The purpose of every USCG investigation is to analyze the facts surrounding the casualty, determine the cause(s) of the casualty, and, if necessary, initiate corrective actions.

Significant investigations are spearheaded by a USCG lead investigating officer who will have substantial experience investigating marine casualties. He will be supported by USCG and civilian casualty investigators, technical experts, legal advisers, and other support personnel from within the USCG. Significant investigations also often include cooperation between the USCG and NTSB, which increases the complement of skills investigating the casualty. The NTSB and USCG will, however, issue separate reports.

The primary mission of the USCG when investigating marine casualties is to determine the root cause(s) and to use the information gathered during the investigative process to consider promulgating new rules or advisories to prevent further casualties. Additionally, the USCG, unlike the NTSB, will determine if there were acts of negligence, misconduct, or other violations of federal law that caused the casualty. And, if so, the USCG may refer the matter to the U.S. Department of Justice for a further review to determine whether a crime was committed.

Like the NTSB, if a major marine casualty occurs, the USCG also will designate parties-in-interest, who are typically individuals or entities that have a direct interest in the outcome of the investigation. In a joint investigation, the

USCG and NTSB will agree on who to designate as a party-in-interest. Unlike a NTSB investigation, a party-in-interest may be represented by counsel at all stages of a USCG investigation, including when giving testimony. From the USCG's perspective, the primary role of a party-in-interest is to help the USCG gather the facts that led to the casualty. The USCG will request documents, access to computers, and testimony from witnesses. If an entity or witness is

**If you are an owner, operator, or an entity with a role in the events that led to the casualty, you may be designated a party-in-interest following a marine casualty.**

not voluntarily cooperating, the USCG has the authority to issue administrative subpoenas to require the production of documents and information and to summon witnesses for testimony. Testimony at a formal hearing is usually open to the public unless it involves classified materials or affects national security.

After gathering the relevant documents and witness testimony, the USCG will analyze all of the evidence to determine, as best as possible, the cause of the accident. At the completion of the investigation, a Report of Investigation will be prepared by the lead investigating officer and his or her team. The report will contain findings of fact, causal analysis, conclusions, and safety recommendations. Unlike in the NTSB investigation, a party-in-interest is not typically given an opportunity to comment on the USCG's report until after it is finalized and submitted to the commandant of the USCG for review and approval. The final report will be released to the public once approved by the commandant.

In sum, while the NTSB and USCG strive for the same goal of determining the cause(s) of a marine casualty in order to identify safety recommendations that will hopefully prevent similar events in the future, the NTSB and USCG's investigative process and the scope and ultimate results of their reports differ. Thus, it is important for a party-in-interest to understand the differences between the two, so it can safely navigate the investigative process should it ever find itself in the unfortunate position of participating in one.

□—2020 BLANK ROME LLP

**This article was first published in the January 2020 edition of [Maritime Reporter & Engineering News](#). Reprinted with permission.**





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

[safepassage.blankrome.com](https://safepassage.blankrome.com)



## About Blank Rome

**Blank Rome is an Am Law 100 firm** with 14 offices and more than 600 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:

- Compliance & Investigations
- Corporate
- Cross-Border / International
- Environmental
- Finance & Restructuring
- Government Contracts
- Government Relations & Political Law
- Insurance Recovery
- Intellectual Property & Technology
- Labor & Employment
- Litigation
- Maritime
- Matrimonial & Family Law
- Tax
- Trusts & Estates
- White Collar Defense & Investigations

For more information, please visit [blankrome.com](http://blankrome.com).

### OFFICE LOCATIONS

#### CHICAGO

444 West Lake Street  
Suite 1650  
Chicago, IL 60606

#### CINCINNATI

1700 PNC Center  
201 East Fifth Street  
Cincinnati, OH 45202

#### FORT LAUDERDALE

Broward Financial Centre  
500 East Broward Boulevard  
Suite 2100  
Fort Lauderdale, FL 33394

#### HOUSTON

717 Texas Avenue  
Suite 1400  
Houston, TX 77002

#### LOS ANGELES

2029 Century Park East  
6th Floor  
Los Angeles, CA 90067

#### NEW YORK

1271 Avenue of the Americas  
New York, NY 10020

#### PHILADELPHIA

One Logan Square  
130 North 18th Street  
Philadelphia, PA 19103-6998

#### PITTSBURGH

Union Trust Building  
501 Grant Street  
Suite 850  
Pittsburgh, PA 15219

#### PRINCETON

300 Carnegie Center  
Suite 220  
Princeton, NJ 08540

#### SAN FRANCISCO

555 California Street  
Suite 4925  
San Francisco, CA 94104

#### SHANGHAI

Shanghai Representative Office, USA  
45F, Two IFC  
8 Century Avenue, Pudong  
Shanghai 200120  
China

#### TAMPA

Fifth Third Center  
201 East Kennedy Boulevard  
Suite 520  
Tampa, FL 33602

#### WASHINGTON

1825 Eye Street NW  
Washington, D.C. 20006

#### WILMINGTON

1201 N. Market Street  
Suite 800  
Wilmington, DE 19801

# 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 visit [blankrome.com/complianceauditprogram](https://blankrome.com/complianceauditprogram).**



## 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](https://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](https://blankrome.com/services/cross-border-international/international-trade) or contact Matthew J. Thomas ([mthomas@blankrome.com](mailto:mthomas@blankrome.com), 202.772.5971).**





## Blank Rome's Maritime Industry Team

Our maritime industry team is composed of practice-focused subcommittees from across many of our Firm's offices, with attorneys who have extensive capabilities and experience in the maritime industry and beyond, effectively complementing Blank Rome Maritime's client cases and transactions.

### Maritime Emergency Response Team ("MERT")

We are on call 24 / 7 / 365

In the event of an incident, please contact any of our MERT members listed in **red** below.

**William R. Bennett, III** – NYC  
CHAIR, BLANK ROME MARITIME

**Jeanne M. Grasso** – WAS  
CHAIR, BLANK ROME MARITIME

**Keith B. Letourneau** – HOU  
CHAIR, BLANK ROME MARITIME

**Richard V. Singleton, II** – NYC  
CO-CHAIR, MARITIME INDUSTRY TEAM

**Jeremy A. Herschaft** – HOU  
CO-CHAIR, MARITIME INDUSTRY TEAM

**Matthew J. Thomas** – WAS  
CO-CHAIR, MARITIME INDUSTRY TEAM

#### Bankruptcy

##### COMMITTEE CHAIR:

**Michael B. Schaedle** – PHL

Rick Antonoff – NYC

Ira L. Herman – NYC

Regina Stango Kelbon – PHL/WIL

#### Corporate/Financial/ Transactional

##### COMMITTEE CHAIRS:

**Stephen T. Whelan** – NYC

James C. Arnold – HOU

Grant E. Buerstetta – NYC

Michael K. Clare – WAS

Brett M. Esber – WAS

Lawrence F. Flick, II – NYC/PHL

Michael Kim – NYC

Natalie M. Radabaugh – WAS

R. Anthony Salgado – WAS

Peter Schnur – NYC

Brad L. Shiffman – NYC

Scott R. Smith – NYC

#### Dispute Resolution (Litigation, Arbitration and Mediation)

##### COMMITTEE CHAIRS:

**Thomas H. Belknap, Jr.** – NYC

**Douglas J. Shoemaker** – HOU

**Michael K. Bell** – HOU

**William R. Bennett, III** – NYC

Alexandra Clark – NYC

**Noe S. Hamra** – NYC

**Jeremy A. Herschaft** – HOU

**Emma C. Jones** – WAS

**John D. Kimball** – NYC

**Keith B. Letourneau** – HOU

**Jeffrey S. Moller** – PHL

**James J. Quinlan** – PHL

**Richard V. Singleton, II** – NYC

**Alan M. Weigel** – NYC

**Lauren B. Wilgus** – NYC

#### Employment/Labor/Tax/IP

##### COMMITTEE CHAIR:

**Joseph T. Gulant** – NYC

Susan B. Flohr – WAS

Anthony B. Haller – PHL

Brooke T. Iley – WAS

#### Enforcement/Criminal

##### COMMITTEE CHAIRS:

**Jeanne M. Grasso** – WAS

**Gregory F. Linsin** – WAS

#### Government Contracts

##### COMMITTEE CHAIR:

**Brian S. Gocial** – PHL

David M. Nadler – WAS

Harvey Sherzer – WAS

#### Regulatory/Energy/ Environmental

##### COMMITTEE CHAIRS:

**Kevin J. Bruno** – NYC

**Matthew J. Thomas** – WAS

George T. Boggs – WAS

Joan M. Bondareff – WAS

Kierstan L. Carlson – WAS

Kevin R. Doherty – NYC

Frederick L. Ikenson – WAS

Dana S. Merkel – WAS

Stefanos N. Roulakis – WAS

**Jonathan K. Waldron** – WAS

C. J. Zane – WAS

Please click on attorney names  
for contact information.

Attorney Office Locations:

HOU – Houston • NYC – New York City • PHL – Philadelphia • WAS – Washington, D.C. • WIL – Wilmington