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Note from the Vice Chair

BY JEANNE M. GRASSO

JEANNE M. GRASSO
PARTNER

Happy fall! As the seasons change, so do the issues confronting the maritime industry...or not. Over the past few years, several topics have consistently remained in the headlines and as a thorn in the side of many shipowners. In the environmental arena, these issues have generally involved MARPOL enforcement, ballast water management, the Environmental Protection Agency's ("EPA") Vessel General Permit ("VGP"), and air emissions in light of the upcoming International Maritime Organization's ("IMO") 0.5-percent sulfur cap.

The MARPOL Annex I oily water separator cases have continued apace, with at least half a dozen guilty pleas in 2018 to date, and several more pending. These cases have been going on since the mid-1990s and not a lot has changed—engineers are still bypassing the oily water separator, albeit in more creative ways (*e.g.,* discharging through the sewage or graywater systems), and finding creative ways to trick the oil content meter. Most cases still arise as a result of whistleblowers reporting misconduct to the U.S. Coast Guard ("USCG"), owners still must enter into burdensome security agreements to get their ship out of port, crewmembers are commonly "voluntarily" held in the United States for upwards of a year or more, and guilty pleas with fines and stringent environmental compliance plans are the outcome. To help owners avoid this fate, we have developed a Maritime Compliance Audit Program that tests the effectiveness of a company's environmental management system to prevent MARPOL violations, a summary of which can be found here and which we are happy to discuss with you.

The ever-changing ballast water management regime continues to pose challenges as well as owners trying to navigate compliance with the IMO Convention and the USCG regulations. The USCG's policy on compliance date extensions is ever-evolving and we, along with industry partners, continue to work with the USCG to find practical compliance-focused solutions for owners endeavoring to comply with both the USCG's and IMO's requirements in an efficient manner and effective manner.

As many of you know, the EPA's 2013 Vessel General Permit, which regulates incidental discharges from vessels, is set to expire in December 2018. The expectation was that the EPA would publish a new draft for comment sometime last year or early this year, but that did not happen. That said, the Chamber of Shipping of America reports that the EPA expects the new proposed 2018 VGP to be published in March 2019, with at least a 30-day comment period. To this end, the current 2013 VGP is expected to be administratively continued until the final 2018 VGP is issued; vessels currently covered under the 2013 VGP will automatically be covered by the administrative continuance without further action; and new vessels whose keel is laid prior to December 18, 2018, ***must*** file a Notice of Intent ("NOI") to be covered by the 2013 VGP prior to December 18, 2018, otherwise they will not be covered until the 2018 VGP is finalized (and hence cannot discharge in the United States, which basically prohibits them from operating in the United States).

And, IMO's 2020 sulfur cap is looming on the horizon and investors, charterers, and owners are contemplating compliance options, as well as studying the risks and rewards of exhaust gas cleaning systems (*i.e.,* scrubbers), which will be a topic addressed in the next issue of *Mainbrace.*

So, finally, we are proud that we have another issue *Mainbrace* to share with you, full of interesting information, ranging from what is (or is not) happening in the U.S. Congress to tariffs and trade, arbitral awards, and, importantly, celebrating diversity, and much, much more.

We hope you enjoy *Mainbrace* and we would welcome any feedback you might have. Cheers! ◘

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Impact of New U.S. Import Tariffs on the Maritime Industry

BY JOAN M. BONDAREFF AND MATTHEW J. THOMAS

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President Trump, from his campaign through his time in office, has been a vocal supporter of U.S. manufacturing jobs and a critic of what he characterizes as unfair trade practices from traditional U.S. trading partners. This is one reason he withdrew from the Trans-Pacific Partnership, and currently is renegotiating the North American Free Trade Agreement ("NAFTA"). As we are putting this issue of *Mainbrace* to bed, the administration has announced the successful completion of a new trade agreement with Mexico and Canada, which is now called the U.S.-Mexico-Canada Agreement ("USMCA"). At a later date we will provide insights into the "new" NAFTA and its potential impact on the maritime industry. Keep in mind that Congress will ultimately have to approve the USMCA before it goes into effect.

> Starting January 1, 2019, the level of the additional tariffs will increase to 25 percent. The president also recently threatened further tariffs on $267 billion of other Chinese goods imported into the United States.

Although there are hints of some negotiations between the United States and China, we expect this is the last trade deal that President Trump will negotiate because of his increasing rhetoric and tougher stance on the imposition of billions of dollars of new tariffs that go into effect on January 1, 2019. This also explains his imposition of tariffs on thousands of products imported from China, and steel and aluminum tariffs for most countries, including the European Union, as well as his threats to impose tariffs on automobile imports. In this article, we analyze the potential impact of these tariffs on the broader maritime industry.

Background

The president enjoys broad authority to impose tariffs on countries that he concludes are either threatening to impair U.S. national security or engaging in discriminatory practices that burden or restrict U.S. commerce, under Section 232 of the Trade Expansion Act of 1962 and Section 301 of the Trade Act of 1974, respectively. And the president, through his secretary of commerce and U.S. trade representative, has used this broad grant of authority this year without any congressional restraints.

Duties on Steel and Aluminum Imports and Waiver Process

Duties on imports of foreign aluminum and steel went into effect on March 23, 2018, with a temporary exemption on certain country imports. The duties imposed are a 25-percent tariff on steel imports and a 10-percent tariff on aluminum imports. Temporary exemptions for the largest suppliers—Canada, Mexico, and the European Union—expired June 1, but permanent exemptions have been adopted for steel for Brazil and South Korea, and both steel and aluminum for Argentina and Australia. (All the exemptions except for Australia came with strict quota limitations.) At the same time, the secretary of commerce established a process by which companies can request waivers from these tariffs. In a statement issued by the Commerce Department, Secretary Ross stated that he would evaluate exclusion requests, taking into account national security considerations and whether a product is produced in the United States of a satisfactory quality or in a sufficient and reasonably available amount. In June, the Commerce Department began granting its first product exclusions. As of August 20, the Commerce Department had received more than 38,000 exclusion requests and 17,000 objections—far more than expected—however, only a fraction of these have been acted upon, thus far. On September 11, 2018, the Commerce Department published a Federal Register notice seeking to refine and streamline the exclusion process.

China Duties and Exclusion Process

With respect to China, President Trump, acting under Section 301 of the Trade Act of 1974, first imposed 25-percent tariffs on $34 billion worth of Chinese imports, on July 6, 2018. Subsequently, he imposed a second tranche of tariffs at 25 percent on $16 billion of goods, effective August 23.

A third tranche of tariffs covering $200 billion in additional goods was finalized on September 17, effective as of September 24, 2018, initially in the amount of 10 percent.

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Section 301 Committee Hearings and Maritime Industry Reactions

The USTR held six days of public hearings from August 20 to 26, 2018, on the proposed imposition of the third round of China tariffs. Companies were allowed to speak for five minutes and then submit their final comments requesting generic exclusions by September 6, 2018.

From our review of the public comments posted on regulations.gov (Docket USTR-2018-0026), it is reasonable to conclude that most comments were opposed to the tariffs and those requested or submitted by the maritime industry were similar in their opposition.

Here are some salient examples of concerns expressed by the leading maritime industry groups or representatives either in public statement on their websites or on the record above. For example, the American Association of Port Authorities ("AAPA") President and CEO Kurt Nagle stated that the "impact of expanding Section 301 tariffs on cargo and equipment moving through American ports would be significant." (Ports Association Urges Caution On Increasing U.S. Trade Tariffs, AAPA Press Release, August 20, 2018.) The AAPA release noted that Nagle will request that the "multi-million-dollar container cranes that U.S. ports have on order and are considering purchasing from Chinese factories, in which there are no American-made alternatives, be exempt from tariffs." Nagle's plea for an exemption was echoed by John Rinehart, CEO and Executive Director of the Virginia Port Authority, who stated that the "imposition of the proposed additional 10% or 25% *ad valorem* duty will put our $700 million infrastructure project at risk for schedule and cost—putting jobs in our communities, across our commonwealth, and around our country at risk." (Rinehart statement, August 10, 2018.) Ultimately, the cranes were part of a small list of items dropped from the final tariff list; however, the AAPA continues to sound the alarm on the negative impact that the tariffs will have on the country's ocean-borne commerce.

The American Petroleum Institute ("API"), in its request to testify, stated that it was reviewing the impact of the China tariffs on significant numbers of oilfield equipment imported from China (*e.g.,* transmission shafts and cranks). API

Impact of New U.S. Import Tariffs on the Maritime Industry
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Starting January 1, 2019, the level of the additional tariffs will increase to 25 percent. The president also recently threatened further tariffs on $267 billion of other Chinese goods imported into the United States.

As the additional China tariffs go into effect, many importers and associations, including the U.S. Chamber of Commerce and the National Retail Federation, are pushing the Office of the United States Trade Representative ("USTR") to establish a meaningful company exclusion process similar to the one established at the Commerce Department. To date, importers whose products are subject to Phase 1 of the China tariffs ($34B) have the right to file a product-specific exclusion request by October 9, 2018. However, with respect to Phases 2 and 3, a similar exclusion process has not yet been announced. This lag in establishing processes for U.S. companies suffering critical and disproportionate harm from the tariffs has heightened concerns among impacted U.S. companies. Even assuming these companies want to start new manufacturing processes in the United States, there is not enough time between now and January 1, 2019, when the 25-percent tariff goes into effect to do so.

concluded that the "breadth of the impact of the proposed Section 301 tariffs on our industry runs counter to the actions this Administration has taken to liberalize the development of domestic oil and natural gas resources and could restrict the capacity of the U.S. to enhance our energy security."

The National Marine Manufacturers Association ("NMMA"), in its July 25, 2018, request to appear at the USTR hearings, stated that its testimony will focus on how the tariffs—especially those focused on the import of vessels and component parts from China, such as fiberglass—would harm the U.S. recreational boating industry and have a detrimental impact on U.S. marine businesses, workers, and consumers. As early as March 9, 2018, NMMA issued a statement condemning the president's move to impose a 10-percent tariff on imported aluminum and a 25-percent tariff on imported steel, saying that the "president has chosen 150,000 workers in the steel and aluminum industry over 6.5 billion workers in user industries" (*i.e.,* those that rely on the metals). (Marine Industry Condemns Aluminum and Steel Tariffs, *Trade Only Today,* March 9, 2018.)

Finally, in our sampling of maritime testimony in opposition to the proposed China tariffs, even the American Wind Energy Association ("AWEA") found much with which to be concerned. AWEA's CEO Thomas C. Kiernan wrote to USTR Ambassador Lighthizer to express his concern that the "proposed tariffs would significantly raise the costs of [certain] parts and components that are incorporated into U.S. wind turbine manufacturing and construction" causing "excessive economic harm to the wind energy industry in the U.S." (Kiernan letter to Lighthizer, August 13, 2018.)

Summary and Conclusions

While we understand that some companies and industries support new tariffs, the majority of the maritime groups and importers of consumer products from China are concerned and opposed.

We have yet to see whether President Trump carries through on his threat to impose an additional $267B of new tariffs on China imports and when and whether the USTR will exercise its discretion to grant exclusions generically for some of these imports. We are waiting on how the secretary of commerce will exercise his authority to issue product-specific waivers to some importers of steel and aluminum. But, most of all, we are watching whether the president will enter into new trade deals with the European Union and China, which will preempt or modify the tariffs he has already imposed. As the current trade disputes escalate, the risks of more serious disruptions to global trade, and to the maritime and ports sector globally, will only increase. ◻

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Joan Bondareff Receives NAMEPA's 2018 Marine Environment Protection Award

JOAN BONDAREFF
OF COUNSEL

Blank Rome Of Counsel Joan M. Bondareff has been named the North American Marine Environment Protection Association's ("NAMEPA") 2018 Marine Environment Protection Individual Award winner in recognition of her lifetime career in working to protect the marine environment. Joan serves as general counsel and secretary of NAMEPA, a nonprofit organization that promotes sustainable practices for the shipping industry.

Joan will be presented with the award at NAMEPA's 2018 Annual Conference and Awards Dinner on October 25, 2018, aboard the *Hornblower Infinity* in New York City. The theme for this year's conference is "The New CSR: Ethical, Strategic, Sustainable," and the awards dinner will recognize the achievements of individuals and corporations who "Save Our Seas." ◻

Enforcing and Challenging Maritime Arbitral Awards in the United States

BY THOMAS H. BELKNAP, JR.

THOMAS H. BELKNAP, JR.
PARTNER

When we speak of maritime arbitral awards in the United States, we could mean one of three kinds: 1) "domestic" awards, 2) "non-domestic" awards, or 3) "foreign" awards. This distinction is important, because it controls what law applies to matters of recognition and enforcement. To understand the source and importance of these distinctions, we must start with the Federal Arbitration Act ("FAA").[1]

The FAA and the New York Convention

The FAA is in three chapters. Chapter 1 is titled "General Provisions," and it applies generally except where there is a conflict with a provision of one of the other applicable chapters. Chapter 2 is titled "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" and is the implementing legislation for the international treaty of the same name (also called the "New York Convention"), to which the United States is a party.

Chapter 1 of the FAA expressly defines "maritime transactions" to mean "charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies, furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction." Section 2 of the FAA states that a "written" arbitration agreement "in any maritime transaction or a contract evidencing a transaction involving commerce…shall be valid, irrevocable, and enforceable" on the same basis as any other contract term.

Thus, the FAA applies with respect to all maritime transactions, and this section has been widely construed as preempting otherwise applicable state laws relating to enforcement and challenge of arbitration awards where the dispute involves a maritime transaction. This is not the end of the analysis, however, because Section 202 of the FAA provides that an arbitral agreement or award governed by Section 2 of the FAA also "falls under the Convention," *unless* it arises out of a relationship that is "entirely between citizens of the United States"—except that even then, it will nevertheless fall under the Convention if the relationship between U.S. parties "involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states."

From these statutes, then, the courts have distinguished three categories of awards: 1) a "domestic" award made in the United States between U.S. citizens where the relationship does not involve property or performance abroad and has no reasonable relation with a foreign state; 2) a "non-domestic" award made in the United States but not falling within Section 202's carve-out for domestic awards; and 3) a "foreign" award, meaning one made outside the United States. A domestic award may be subject to Chapter 1 of the FAA but will not fall under the New York Convention or Chapter 2 of the FAA. Nondomestic awards and foreign awards, on the other hand, are subject to the New York Convention and thus are governed by Chapter 2 of the FAA.

Enforcing Arbitration Awards

Enforcement of arbitral awards under the FAA and the New York Convention is, by design, quite simple. Section 9 provides that where a party makes an application to confirm an award, "thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." Any grounds for vacating, modifying, or correcting the award would need to be asserted by the respondent in answer to the petition.

> Choosing a strategy for either enforcing or challenging an arbitral award starts with understanding what kind of award you are dealing with, and the answer to that question can have a material impact on what rights the parties have and where they should be looking to exercise them.

Similarly, where the New York Convention applies, Section 207 provides that "[t]he court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." Here, however, the distinction is important as to whether the award is a foreign award or a nondomestic award as the Second Circuit explained in *CBF Industria de Gusa S/A v. AMCI Holdings, Inc.:*

> Under the New York Convention, this process of reducing a foreign arbitral award to a judgment is referred to as "recognition and enforcement." "Recognition" is the determination that an arbitral award in entitled to preclusive effect; "enforcement" is the reduction to a judgment of a foreign arbitral award…. Recognition and enforcement occur together, as one process, under the New York Convention.[2]

The *CBF Industria* court further explained, however, that the process is different where a nondomestic award (*i.e.,* issued in the United States but subject to the New York Convention) is concerned:

> The process by which a *nondomestic* arbitral award is reduced to a judgment of the court by a federal court under its primary jurisdiction is called "confirmation." Under its primary jurisdiction in a confirmation proceeding, the district court is…free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief.

This distinction is important: the country where the award is made is the "primary jurisdiction," and any other signatory country is a "secondary" jurisdiction. As the *CBF Industria* court explained:

> The New York Convention specifically contemplates that the state in which, or under the law of which, an award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief.…Courts in countries of secondary jurisdiction may refuse enforcement only on the limited grounds specified in Article V of the Convention.

Vacating Arbitration Awards

Unlike an application to enforce an arbitration award, an application to vacate an award may only be made in the jurisdiction where the award was made (*i.e.,* the primary jurisdiction). And, because the New York Convention contains no provisions relating to vacating an award, Chapter 1 of the FAA (*i.e.,* sections 10 and 11) will govern such an application in a U.S. court irrespective of whether it is a domestic or non-domestic award that is the subject of challenge. Importantly, under Section 12, an application to vacate an arbitration award must be served within three months after the award is filed or delivered.

Grounds to Vacate Award under Section 10(a)

Sections 10 and 11 of the FAA specify the grounds on which an application to vacate an arbitration award may be made, which are quite limited. Section 10 allows vacatur upon proof by the challenging party that: a) the award was procured through corruption, fraud, or undue means; b) there was evident partiality or corruption in the arbitrators; c) there was arbitrator misconduct; or d) the arbitrators exceeded their authority. Section 11 allows a court to modify or correct an award: a) where there was an evident material miscalculation of figures or description of person, thing, or party; b) where the arbitrators have awarded on a matter not submitted to them; or c) where the award is imperfect in matter of form not affecting the merits.

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Enforcing and Challenging Maritime Arbitral Awards in the United States (continued from page 6)

Manifest Disregard of the Law
There is ongoing debate as to whether a court may also set aside an arbitration award on the basis that it was issued in manifest disregard of the law. In 2010, the Supreme Court in *Stolt-Nielsen S.A. v. AnimalFeeds Intl., Corp.,*[3] expressly declined to decide "whether 'manifest disregard' survives… as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth in [Section 10]." For now, then, a district court may still vacate an arbitral award that demonstrates a "manifest disregard of the law." An arbitration panel acts in manifest disregard of the law if the governing law alleged to have been ignored is well-defined, explicit, and clearly applicable, and the arbitrator appreciates the existence of the governing legal principle but decides to ignore or pay no attention to it. It is fair to say that successful applications to vacate on this basis are very much the exception.

Contesting Enforcement of an Award

Domestic Award under FAA
Section 9 of the FAA provides that an arbitration award subject to its provisions must be enforced "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." Thus, where a party seeks to oppose enforcement of an arbitration award governed by the FAA but not the New York Convention (*e.g.,* a "domestic" award), then the same grounds applicable in an application to vacate such an award will apply.

New York Convention, Article V
A party opposing an application in a U.S. court to enforce an award governed by the New York Convention, on the other hand, bears the burden of establishing one of the grounds enumerated in Article V of the Convention, namely where:

a) the parties to the agreement were, under the law applicable to them, under some incapacity, or the said agreement is not valid under governing law;

b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;

c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;

d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties; or

e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Recognition and enforcement of an arbitral award may also be refused where a) the subject matter of the dispute is not capable of settlement by arbitration under the law of the country where enforcement is sought, or b) the recognition or enforcement of the award would be contrary to the public policy of that country.

As can be seen, many of these grounds overlap with the grounds for vacatur set out in Section 10 of the FAA, and often the distinction between Section 10 and Article V will not be significant. Nevertheless, in a case governed by the New York Convention, the Article V defenses are exclusive and are strictly applied. Thus, for instance, the defense of "manifest disregard of the law" is not available under the New York Convention.

This last point creates a critical twist insofar as nondomestic awards are concerned: as noted above, a party seeking to vacate such an award does so pursuant to Section 10 of the FAA and may also assert manifest disregard of the law as grounds for vacatur. Once the three-month time bar to commence such an action passes, however, it can no longer do so even in response to a motion to confirm the award. At that point, the defendant is limited to asserting only the defenses available under Article V of the Convention.

Conclusion

Choosing a strategy for either enforcing or challenging an arbitral award starts with understanding what kind of award you are dealing with, and the answer to that question can have a material impact on what rights the parties have and where they should be looking to exercise them. ◘

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Note: This article is a preview of a fuller discussion of the enforcement and challenge of maritime arbitral awards, which will be included in the forthcoming book Navigating Maritime Arbitration: The Experts Speak, *published by Juris Legal Information, to which Tom is a contributing author.*

1. 9 U.S.C. § 1 *et seq.*
2. *CBF Industria de Gusa S/A v. AMCI Holdings, Inc.,* 850 F.3d 58, 72 (2d Cir. 2017).
3. 559 U.S. 662, 671 n.3 (2010).

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

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DOJ Urges U.S. Companies Acquiring or Merging with Foreign Companies to Self-Disclose FCPA Misconduct Identified during Due Diligence

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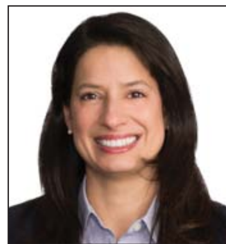
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In a keynote address at the Ninth Global Forum on Anti-Corruption Compliance in High Risk Markets, Matthew S. Miner, Deputy Assistant Attorney General of the Department of Justice's ("DOJ") Criminal Division, urged U.S. companies merging with or acquiring foreign targets to voluntarily disclose potential misconduct to the DOJ pursuant to the revised Foreign Corrupt Practices Act ("FCPA") Corporate Enforcement Policy (the "Policy").

As previously reported by Blank Rome, the Policy incentivizes companies to voluntarily self-disclose potential FCPA-related misconduct, fully cooperate with the government's investigation, and remediate the alleged misconduct through a robust compliance program. Companies satisfying these three criteria are entitled to a presumption that the DOJ will resolve the case through a declination.

> The DOJ believes that its stated approach to disclosures in the context of mergers and acquisitions will provide U.S. companies "greater certainty" when "deciding whether to go forward with a foreign acquisition or merger, as well as in determining how to approach wrongdoing discovered subsequent to a deal."

Alternatively, if aggravating factors warrant enforcement, then the company can still avail itself of a 50-percent reduction off the low end of the fine range. Under either circumstance, the company will be required to disgorge the ill-gotten gains. While acknowledging the great progress that the DOJ has made recently in its approach to corporate enforcements, particularly with the implementation of the revised Policy, Miner conceded that improvement was needed with regards to mergers and acquisitions.

Miner noted that the DOJ "understand[s] that through acquisitions otherwise law-abiding companies can sometimes inherit problems that are not of their own making." Miner further recognized that "[n]ot only can the acquiring company help to uncover wrongdoing, but more importantly the acquiring company is in a position to right the ship by applying strong compliance practices to the acquired company." The DOJ, Miner went on to note, wants to encourage this type of activity and not have "the specter of enforcement to be a risk factor that impedes such activity by good actors, and instead cedes the field to non-compliant companies." With this, Miner announced that the DOJ intends to apply the Policy to successor companies that uncover wrongdoing after a merger and acquisition.

As outlined by Miner, a U.S. company may avail itself of the benefits of disclosure during or after the merger or acquisition:

- **Discovery during Due Diligence:** If the U.S. company (issuers or domestic concerns) uncovers corruption concerns during the due diligence process, that company is encouraged to seek the DOJ's opinion as to whether the suspected activity would elicit FCPA enforcement by using the FCPA Opinion Procedure. Opinions will be issued within 30 to 45 days after the government receives all necessary information. Miner noted that the FCPA Opinion Procedure is underutilized, apparently recognizing the delay it possesses, but observed that "it sometimes makes sense to slow down to assess risks." Miner stated that this is "a tremendous resource" and the DOJ intends to make "greater use" of it in the future.

- **Discovery Post-Acquisition or -Merger:** Realizing that acquiring companies may have limited access to a target's information, particularly in high-risk markets, if the acquiring company discovers potential misconduct after a merger or acquisition, they should take the disclosure steps outlined in the Policy. Miner commented "we want to encourage [the acquiring company's] leadership to take the steps outlined in the FCPA Policy, and when they do, we want to reward them accordingly for stepping up, being transparent, and reporting and remediating the problems they inherited."

The DOJ believes that its stated approach to disclosures in the context of mergers and acquisitions will provide U.S. companies "greater certainty" when "deciding whether to go forward with a foreign acquisition or merger, as well as in determining how to approach wrongdoing discovered subsequent to a deal." Having the Policy expressly apply to mergers and acquisitions is a significant policy shift from the DOJ "may" decline prosecution to a presumptive declination if the Policy requirements are met. Miner appreciates that, for corporate management, in making the calculus of whether to disclose or not, there "is a big difference between a theoretical outcome and one that is concrete and presumptively available."

The DOJ's revised approach to corporate disclosures in mergers and acquisitions reinforces the public policy advanced by the Policy whereby companies are strongly encouraged to "invest in effective compliance programs and robust control systems to prevent misconduct" and to report any misconduct to the DOJ. In the context of mergers and acquisitions, Miner emphasized that fighting corruption remains a priority for the DOJ and that "there are many benefits when law-abiding companies…enter high-risk markets or take over otherwise problematic companies." Such behavior helps to detect and prevent corruption and encourages compliance in other companies.

U.S. companies considering a merger or acquisition with a foreign target, particularly one in a high-risk market, should be well informed of these new policy statements. This announcement shifts the calculus of self-disclosure, re-emphasizes previously underutilized options during the due diligence period, and continues to re-enforce the importance of strong compliance policies and thorough and robust due diligence to ensure that their foreign target's activities comport with the FCPA, even if the target was not subject to the FCPA prior to the transaction. ◻ – ©2018 BLANK ROME LLP

This article was first published as a Blank Rome White Collar Defense & Investigations advisory in August 2018.

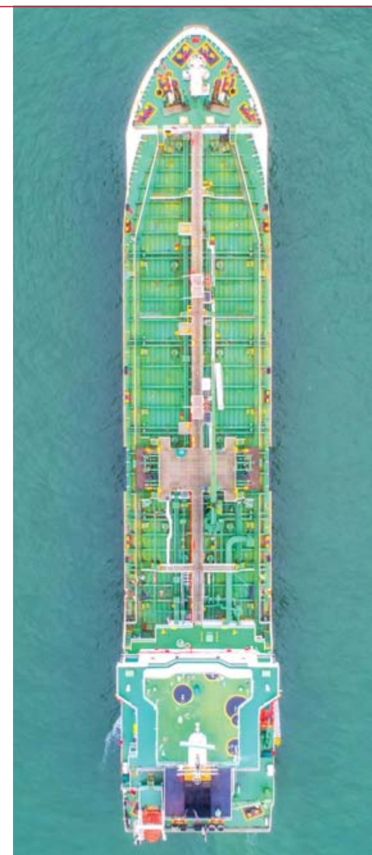
Kate Belmont Appointed to Port of NY/NJ and Port of Albany Area Maritime Security Committee's Executive Steering Committee

KATE B. BELMONT
ASSOCIATE

Kate B. Belmont, a senior associate in Blank Rome's maritime group, has been appointed to the Executive Steering Committee ("ESC") to the Port of New York/New Jersey and Port of Albany Area Maritime Security Committee ("AMSC"), a community of port stakeholders with an interest in port security who regularly advise on maritime security issues.

The ESC comprises designated individuals from the maritime industry, maritime trade and labor organizations, maritime associations, and federal, state, and local law enforcement and first responders. Kate was invited to join the ESC for her valuable insight and knowledge of maritime cybersecurity and information security.

In addition to this new role and her practice at Blank Rome, Kate serves as president of the Women's International Shipping and Trading Association USA's New York/New Jersey Chapter, is a founding member of the Maritime Law Association Cybersecurity Committee, and is an adjunct professor at The Stevens Institute of Technology where she teaches Information Security and Law. ◻



Severe Weather Emergency Recovery Team

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Enforcing Ipso Facto Clauses in International Transactions and the Importance of Being Proactive in Dealings with Troubled and Insolvent Entities

BY MICHAEL B. SCHAEDLE AND GREGORY F. VIZZA

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A proactive creditor often ends up in a better legal position, and has more negotiating power, than a reactive one. While that may seem obvious, it is a lesson driven home by a 2017 decision in the *SunEdison* bankruptcy case, which involves issues of international comity, choice of law provisions, and ultimately, the tactics employed by a Korean debtor in connection with its contractual relationship with SunEdison. In *SMP Ltd. v. SunEdison, Inc. and GCL-Poly Energy Holdings Limited,* 577 B.R. 120 (Bankr. S.D.N.Y. 2017), the *SunEdison* bankruptcy court refused to apply Korean insolvency law in a contract termination dispute, and enforced a contractual New York choice-of-law provision. Notwithstanding the chapter 15 recognition of the Korean debtor's rehabilitation, applying New York law, the court upheld the enforcement of an ipso facto ("by the fact itself") clause against the Korean debtor, thereby allowing termination of a license with SunEdison that was essential to the debtor's business.

Overview of the Dispute among SunEdison, GCL, and SMP

The relevant actors in this dispute are SMP Ltd., a Korean company involved in a rehabilitation proceeding in Korea that subsequently commenced a chapter 15 proceeding in the U.S. Bankruptcy Court for the Southern District of New York; SunEdison Inc., a chapter 11 debtor in the same bankruptcy court; and GCL-Poly Energy Holdings Ltd., which purchased from SunEdison certain intellectual property and other assets relating to SunEdison's solar materials business in a bankruptcy court-approved sale. SMP, established in 2011 as a joint venture between SunEdison and Samsung Fine Chemicals Ltd., owned and operated a polysilicon manufacturing plant located in Ulsan, Korea. Under a supply and license agreement ("SLA"), SunEdison licensed polysilicon manufacturing technology and supplied the necessary equipment to SMP in order to operate the plant, the sole purpose of which was to supply SunEdison with product for its solar materials business. The SLA contained a typical ipso facto clause, which permitted either party to terminate the SLA if the other party filed for bankruptcy or was unable to pay its debts as they came due. The SLA also contained a choice-of-law provision stating that the SLA would be governed by New York and U.S. federal law, without regard to their conflict-of-laws principles. According to SMP, the SLA was vital to its continued operation because without the technology and equipment provided by SunEdison under the SLA, it would be unable operate the plant and forced to liquidate. SMP filed its Korean rehabilitation case shortly after SunEdison filed its chapter 11 case, stating that SunEdison and its affiliates had defaulted on many millions of dollars of payment obligations owed to SMP based on SunEdison's purchase of product from SMP.

On August 26, 2016, SunEdison filed a motion (the "sale motion") requesting bankruptcy court approval of a sale agreement between SunEdison and GCL to sell the solar materials business to GCL. The sale agreement required SunEdison to either reject or terminate the SLA, as reasonably requested by GCL. SMP filed a reservation of rights to the sale motion and, following mediation, the parties reached a settlement that resolved SMP's objection (the "settlement agreement") and allowed the sale to close. The settlement agreement required SunEdison to send a notice to SMP terminating the SLA, but provided that "SMP's rights to contest and challenge [SunEdison's] rights to terminate [the SLA were] fully preserved." The settlement agreement permitted SMP to institute such a challenge in either the bankruptcy court or pursuant to Swiss arbitration under the SLA. Both the U.S. bankruptcy court and the Korean court overseeing SMP's rehabilitation proceeding approved the settlement agreement.

On March 30, 2017, in accordance with the settlement agreement, SunEdison sent a notice to SMP terminating the SLA (the "termination notice"). The termination notice invoked the ipso facto clause and stated that SunEdison was terminating the SLA "as a result of SMP's pending rehabilitation proceedings and its failure to pay debts generally as they [came] due." The sale of the solar materials business to GCL closed the next day. On May 1, 2017, more

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Enforcing Ipso Facto Clauses in International Transactions and the Importance of Being Proactive in Dealings with Troubled and Insolvent Entities (continued from page 12)

than one month after receipt of the termination notice and more than a year after SunEdison entered bankruptcy in the United States and SMP sought rehabilitation in Korea, SMP filed a petition in the Southern District of New York for recognition of the Korean rehabilitation proceeding under chapter 15 of the U.S. Bankruptcy Code. SMP's chapter 15 petition was granted on June 15, 2017, recognizing its Korean rehabilitation proceeding as a "foreign main proceeding" under Bankruptcy Code § 1517(b)(1).

Also on May 1, 2017, SMP commenced an adversary proceeding in the *SunEdison* bankruptcy case challenging the effectiveness of the termination notice. SMP's complaint sought a judgment "declaring the SLA's ipso facto clause unenforceable and SunEdison's Termination Notice invalid." SMP based its argument on underlying, statutory Korean law, which holds ipso facto clauses unenforceable against a Korean debtor in a Korean rehabilitation proceeding. Thus, once the Korean court entered an order commencing the Korean rehabilitation proceeding (the "commencement order"), SMP argued that principles of comity required the bankruptcy court to apply Korean law, thereby preventing SunEdison from using the Korean rehabilitation proceeding as the basis to terminate the SLA under the ipso facto clause. Critical to the outcome of this case, SMP did not include any language in the Korean commencement order that invalidated ipso facto clauses or prevented termination of the SLA. SMP argued, however, that the commencement order "automatically sweeps in every aspect of Korean insolvency law," and that the bankruptcy court "must apply Korean insolvency law, including Korean common law, and invalidate the Termination Notice because [SMP] wants to perform the SLA."

> Unlike *Daebo,* upon Korean commencement SMP did nothing to specifically protect against the potential termination of the SLA—arguably its most important asset. The commencement order in its Korean rehabilitation proceeding was silent on whether contract counterparties were stayed from exercising contractual rights to terminate executory contracts.

Enforcement of Choice-of-Law Provision

GCL moved for partial summary judgment, arguing that 1) the bankruptcy court was required to apply the choice-of-law rules of New York (the forum in which it sits); 2) New York choice-of-law rules require a court to honor the governing law provision in a contract; and 3) under New York law, the ipso facto clause is enforceable. SMP cross-moved for partial summary judgment, primarily arguing that comity required the application of Korean law, and that Korean law rendered the ipso facto clause unenforceable against a Korean debtor. As a threshold matter, the bankruptcy court noted that "[b]ut for the arguments relating to the effect of the Commencement Order, the resolution…would be simple and straightforward." The bankruptcy court then held that as a court sitting in New York, it was required to apply New York's choice-of-law rules, and those rules state that "the Court must abjure a conflicts analysis or consider foreign law or foreign public policy, and must instead apply New York substantive law." Under New York law, ipso facto clauses are enforceable absent fraud, collusion, or overreaching.

Next, the bankruptcy court considered whether granting comity to the Korean commencement order required the application of Korean law, notwithstanding New York's choice-of-law rules. The bankruptcy court reasoned that despite SMP's assertion that it did "not believe that this was a choice of law issue…. In fact, this is precisely what it is. SMP argues that the Court should grant comity to the Commencement Order by which it means [to] give extraterritorial effect to all of the Korean insolvency law." In support of this argument, SMP cited *In re Daebo Int'l Shipping Co.,* which held that an order from a Korean bankruptcy court that "expressly stayed creditors from enforcing or executing on their rehabilitation claims" should be applied extraterritorially to prevent attachments against the Korean debtor's property located in the United States that occurred after the stay order was entered. In *Daebo,* however, the Korean debtor (a Korean shipping company) anticipated potential enforcement actions against its property around the world and included language in its commencement order that specifically "prevented creditors from seizing the debtor's assets, and required them to file claims in the Korean proceeding to effect a payment." Therefore, the *SunEdison* court reasoned that granting comity in that case was "entirely consistent with the principles underpinning abstention comity."

Unlike *Daebo,* upon Korean commencement SMP did nothing to specifically protect against the potential termination of the SLA—arguably its most important asset. The commencement order in its Korean rehabilitation proceeding was silent on whether contract counterparties were stayed from exercising contractual rights to terminate executory contracts. Since SMP was otherwise unable to "provide…support for the remarkable proposition that SMP's Korean [rehabilitation proceeding] sweeps in the entirety of Korean insolvency law under principles of international comity, and trumps U.S. bankruptcy and state law," and because "the parties selected New York law to govern their contractual rights, and the application of Korean law ignores that choice and their presumed expectations," the bankruptcy court rejected SMP's request to apply Korean law under the principles of international comity upheld enforcement of the ipso facto clause in the SLA under New York law.

Implications for Foreign Debtors and Creditors

The *SunEdison* decision is a reminder that a foreign debtor must be proactive to protect its contractual rights. Even if SunEdison's termination of the SLA was not anticipated when SMP commenced its Korean rehabilitation case, the sale motion (filed more than seven months prior to SunEdison's termination notice) put SMP on notice that SunEdison might terminate the SLA. At any point prior to SunEdison sending the termination notice, SMP could have sought an order from the Korean court preventing termination of executory contracts, which would have provided SMP with a much stronger argument that comity required the bankruptcy court to apply Korean law and defer to a specific order of the Korean court. Alternatively, SMP could have commenced a chapter 11 proceeding in the United States, thereby taking advantage of the automatic stay under § 362(a) and also taking advantage of § 365(e) of the Bankruptcy Code, which generally invalidates post-petition enforcement of ipso facto clauses. Or SMP could have commenced its chapter 15 proceeding sooner, taking advantage of the automatic stay, and sought an order preventing counterparties from terminating any executory contracts with SMP while enforcing U.S. Bankruptcy Code section 365(e). This type of relief may have prevented SunEdison from sending the termination notice and would have provided SMP with additional negotiating leverage against SunEdison and GCL.

This case also provides an opportunity to remind foreign creditors to be proactive in enforcing their rights against troubled companies with assets in foreign jurisdictions. Indeed, a creditor or contract counterparty that better anticipates potential pitfalls in its dealings with troubled or insolvent entities will almost always end up with stronger legal positions and more negotiating power than a reactive one. While this principle may be self-evident, the failure of SMP to proactively protect itself in the *SunEdison* case illustrates that you must always practice what you preach. ◘ – ©2018 BLANK ROME LLP

Removal of Maritime Claims: Is There Still a Conflict?

BY NOE S. HAMRA

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In the United States, state and federal courts operate on a dual track, with the difference that state courts are courts of "general jurisdiction" (*i.e.,* hearing all cases not specifically reserved to federal courts), while federal courts are courts of "limited jurisdiction" (*i.e.,* hearing cases involving "diversity of citizenship" or raising a "federal question"). In some cases, however, a defendant found in state court can transfer the case to federal court (also known as "removal").

Until recently, it was well established that general maritime claims could not be removed from state court based solely on the federal court's admiralty jurisdiction under 28 U.S.C. § 1333. Section 1333(1), also known as the saving-to-suitors clause, provides "[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled…."

"As a practical matter, the saving-to-suitors clause most commonly means that maritime plaintiffs may bring their actions (1) in a state court that, under its own jurisdictional rules, is competent to hear the case, or (2) in a federal court on the 'law side' (*i.e.,* a federal court not sitting in admiralty) if there is some basis for federal jurisdiction other than 28 U.S.C. § 1333. The principal non-admiralty bases for federal jurisdiction are 'federal question' (sometimes known as 'arising under') jurisdiction and 'diversity' jurisdiction."[1] Therefore, if a plaintiff elected to bring general maritime claims in state court, the claims were not removable in the absence of diversity of citizenship (under 28 U.S.C. § 1332) unless there was another basis for jurisdiction besides admiralty.

"Although Congress has long 'saved to suitors' their right to bring maritime cases in state courts, Congress has also long-empowered defendants in certain circumstances to 'remove' a case filed in state court so that it can instead be resolved in federal court."[2] Pre-amended 28 U.S.C. § 1441 stated in its relevant part:

a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending….

b) Any civil action of which the district courts have original jurisdiction founded on a claim or right *arising under* the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. *Any other such action* shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

In 1959, the Supreme Court in *Romero v. Int'l Terminal* Operating Co., 358 U.S. 354 (1959) was confronted with the question of whether general maritime law claims properly fell within the district court's federal question jurisdiction. The court held that while federal courts have original jurisdiction over maritime and admiralty claims, such claims do not

present a federal question because they do not "arise under" the Constitution or laws of the United States.

In 2011, Congress amended § 1441 in the Federal Courts Jurisdiction and Venue Clarification Act. In reorganizing the statute, Congress retained the reference in § 1441(a) regarding the removability of cases in which courts have "original" jurisdiction unless the removability was prohibited by an act of Congress. However, Congress deleted the first full sentence of the old § 1441(b), and the new version solely refers to cases that are removable on the basis of diversity jurisdiction. This change created a split among trial courts as to whether this amendment rendered admiralty and maritime claims removable in the absence of an independent basis for jurisdiction.

Split within District Courts

Several district courts within the Fifth Circuit interpreted Congress' amendments as allowing previously nonremovable claims to be removed solely based on the federal court's original jurisdiction over admiralty claims (*i.e.,* § 1333). These courts found that because § 1441(b) is now only concerned with diversity cases, it is no longer an "Act of Congress," as stated in § 1441(a) that prohibits removal in maritime cases. In other words, after the amendment to the removal statute, these courts found that admiralty claims are removable, even in the absence of diversity of citizenship or some other federal question, because Congress had removed the § 1441(b) language that stated that an independent basis for federal question jurisdiction must exist when diversity is absent. District court cases expressing this view were prominent in 2013 and 2014 and, although these cases represented the minority view, they caused a stir within the legal community.

It is noteworthy, however, that since 2015 it appears that only one court in the Southern District of Texas, *Exxon Mobil Corp. v. Starr Indem. & Liab. Ins. Co.,* 181 F. Supp. 3d 347, 357 (S.D. Tex. 2015), has held that "general maritime claims are [now] removable under the plain language of § 1441[]." This is in contrast with the large number of courts, including district courts within the Southern District of Texas, that have reached the opposite view.

Courts within the majority view have found that Congress intended to clarify § 1441, not amend it. These courts have concluded that removal of maritime cases continues to be permissible as long as there is an independent basis for federal jurisdiction (*e.g.,* diversity of citizenship, federal question jurisdiction, or some other federal statute such as the Outer Continental Shelf Lands Act). In reaching this conclusion, several courts have argued that the saving-to-suitors clause operates independently of the removal statute to exclude from original federal jurisdiction general maritime claims brought by plaintiffs in state court. Other courts argued that because the saving clause cases filed in state court are necessarily brought at law, not in admiralty, and § 1333 alone does not grant district courts subject-matter jurisdiction over maritime claims brought on the "law side" of the court, it follows that absent diversity or a federal question, such claims do not fall within the court's original jurisdiction as required for removal under § 1441. Either way, the majority of courts agree that it is "the statutory grant of admiralty jurisdiction, 28 U.S.C. § 1333, and more than 200 years of precedent interpreting this grant" that determine the removability of plaintiffs' claims, and not the removal statute itself.

On February 5, 2018, the Fifth Circuit Court of Appeals recognized the difficulty and uncertainty surrounding this issue in *Sangha v. Navig8 ShipManagement Private Ltd.,* 882 F.3d 96, 100 (5th Cir. 2018). In reviewing whether the district court abused its discretion in addressing issues of personal jurisdiction and *forum non conveniens* before first addressing the question of subject-matter jurisdiction, the court stated that the question of "whether the saving-to-suitors clause of the federal maritime statute prohibits removal of general maritime claims absent an independent basis for federal jurisdiction in light of Congress's December 2011 amendment to the federal removal statute—is not clear." The court acknowledged that it has not yet spoken directly on this issue and this has created a split among district courts.

Unfortunately, the court passed on the opportunity to settle this issue once and for all.

Conclusion

The remarkably low number of decisions supporting the conclusion that general maritime claims are now removable under the plain language of § 1441 places into question whether the minority view can survive the overwhelming number of decisions supporting the opposite conclusion. Parties within the Fifth Circuit should be aware, however, that the last word on this issue rests with the Fifth Circuit Court of Appeals, and until such time as the court speaks, it is possible that the minority view might continue to crop up in decisions. ◻ – ©2018 BLANK ROME LLP

1. Michael F. Sturley, *Removal into Admiralty: The Removal of State-Court Maritime Cases to Federal Court,* 46 J. MAR. L. & COM. 105, 107 (2015).
2. *Id.* at 108.

Blank Rome Achieves Mansfield Certification for Participation in Diversity Lab's Mansfield Rule Program

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According to Diversity Lab's press release announcing the firms that have achieved Mansfield Certification, one of the favorable outcomes of the inaugural Mansfield Rule is the significant surge in firms that now track and measure their candidate pipelines. Additionally, there is a reported incremental increase in diverse candidates considered for leadership roles, equity partner promotions, and lateral hiring by firms that tracked their pipelines prior to adopting the Mansfield Rule. Lisa Kirby, Director of Research & Knowledge Sharing at Diversity Lab, further stated in the press release that tracking candidate pipelines for "every single path that leads to leadership" as well as increasing the diversity of these pipelines is a positive step towards diversifying law firms' next generation of leaders.

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Featured in this edition:

- Insightful and in-depth conversation with Judge James T. Giles
- Update on participation in Mansfield Rule 2.0
- Initiatives aimed at advancing women in law and promoting LGBTQ+ equality
- Highlights from heritage history months celebrations
- Overview of recent diversity and inclusion headlines, accolades, and events

To learn more about Blank Rome's diversity and inclusion initiatives, please visit blankrome.com/diversity-inclusion. ◻

Download *Perspectives*

Congress Passes Major Maritime Safety Legislation but Fails to Fund a New Icebreaker or Pass Authorization for Most Coast Guard Programs

BY JOAN M. BONDAREFF, JONATHAN K. WALDRON, AND GENEVIEVE COWAN*

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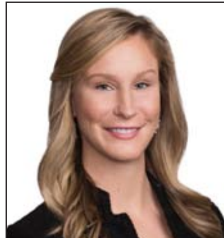

GENEVIEVE COWAN
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This article provides an update on the status of several maritime-related bills pending with the 115th Congress as of October 3, 2018, and reviews one major marine safety law that passed Congress and is awaiting presidential signature.

America's Water Infrastructure Act of 2018

The latest version of "America's Water Infrastructure Act of 2018" (S. 3021), previously referred to as WRDA, is a product of compromise. The issues that were stalling the legislation for most of the summer have been resolved, resulting in a now far broader version that includes improvements to America's water resources infrastructure; a streamlined project acquisition process for the Army Corps of Engineers that allows them to accept funds from nonfederal sponsors to advance studies and project elements; an extension of a new Environmental Protection Agency ("EPA") water loan program for two more years; an EPA study requirement on small water utilities that are repeatedly out of compliance; a Government Accountability Office ("GAO") study on whether to move the Army Corps out of the Department of Defense and into a civilian agency; and enhancements to oversight and transparency when reviewing water resources development activities by Congress. For a full summary and section-by-section review of the bill, please visit the House Transportation and Infrastructure Committee's webpage on America's Water Infrastructure Act of 2018.

Negotiated by both parties in both chambers of Congress, the more-than-300-page bill passed the House on September 13, 2018. This was the second time that the House overwhelmingly passed water resources legislation this year. The bill awaits a final vote in the Senate, which is expected to happen soon. Another issue holding up the vote on S. 3021 is the need to reauthorize funding for the Federal Aviation Administration ("FAA"), which was set to expire on October 30. The Senate passed a short-term extension for the FAA legislation, pushing back the vote on America's Water Infrastructure Act of 2018. The Senate chamber also just voted on the full five-year FAA Reauthorization bill, which should enable it to turn its attention to S. 3021.

U.S. Coast Guard Authorization Act of 2019

The House has already passed the Coast Guard authorizing measure for fiscal year ("FY") 2019, but the bill is awaiting final floor action in the Senate due primarily to disagreements over the Commercial Vessel Incidental Discharge Act ("CVIDA") provisions in the Senate-reported bill (S. 1129). CVIDA, if enacted, would grant greater authority to the Coast Guard to regulate ballast water discharges from commercial vessels, almost preempting state and EPA regulation of these discharges under the Clean Water Act. Lawmakers from the Great Lakes states in particular have objected to the provisions because they would impose a nationwide standard for the discharging of ship ballast water, which would supersede

> The House version of funding for the DHS would reallocate funding for the Coast Guard icebreaker to cover a funding gap in a veterans' program and allocate five billion dollars for the border wall sought by President Trump.

(continued on page 19)

Congress Passes Major Maritime Safety Legislation but Fails to Fund a New Icebreaker or Pass Authorization for Most Coast Guard Programs (continued from page 18)

state laws. The disputed provision was spurred by concern that invasive species—such as zebra mussels in ship ballast water—may harm sources of fresh water. Without solving the CVIDA issue or removing the provision, the U.S. Coast Guard Authorization bill will not be enacted this year.

Major Maritime Safety and Marine Debris Legislation Sent to the President for Signature

While waiting for final action on the Coast Guard Authorization bill, Congress did enact major maritime safety legislation and sent the enrolled bill to the president on October 2, 2018. The bill, S. 3508, is titled the "Save Our Seas Act of 2018" and contains three important titles, described below.

Title I: Marine Debris Program Reauthorization

Title I reauthorizes the marine debris program administered by the National Oceanic and Atmospheric Administration ("NOAA") at a level of $10 million for each of fiscal years 2018–2022 and authorizes two million dollars for the Coast Guard. The title also encourages NOAA to work with other federal agencies to address sources of marine debris; promote international action to reduce the incidence of marine debris, including providing technical assistance to expand waste management systems internationally; and respond to severe marine debris incidences.

Title II: The Hamm Alert Maritime Safety Act of 2018

Title II was named after a petition to Congress to enact legislation to address the tragic sinking of the *M/V El Faro* cargo ship in 2015, and was initiated by the wife of one of the 33 crew members and captain aboard—all of whom perished in the incident. The Maritime Safety Act adopts many of the recommendations of the Commandant of the Coast Guard's final action memo regarding the sinking of the *El Faro,* in addition to those of the National Transportation Safety Board ("NTSB"). In sum, the key provisions of the legislation would:

- no later than 60 days after enactment, publish flag-state detention rates of each type of inspected vessel and identify any recognized classification society that inspected or surveyed a vessel that was subject to a major control action attributable to a major nonconformity;

- direct the GAO to conduct an audit of the Coast Guard's oversight and enforcement of safety management plans required under the International Safety Management Code, and report to Congress in 18 months on the program's effectiveness and provide recommendations;

- require that all inspected freight vessels carry enhanced distress signals and location technology, and require companies to maintain records of all incremental weight changes made to inspected freight vessels;

- direct the Coast Guard to work with the International Maritime Organization ("IMO") to require a high-water alarm sensor in each cargo hold of a freight vessel, and amend the Safety of Life at Sea Convention to require that all voyage data recorders be installed in a float-free arrangement and contain an integrated Emergency Position Indicating Radio Beacon;

- direct the Coast Guard, subject to the availability of appropriations, to identify and procure equipment to provide search-and-rescue units with the ability to attach a radio or Automatic Identification System ("AIS") or beacon to an object that is not immediately retrievable;

- require the Commandant of the Coast Guard to establish enhanced training programs for Coast Guard marine inspectors, and take other actions to improve the marine inspection program of the Coast Guard;

- direct the Coast Guard to review its policies and procedures for making major conversion determinations;

- direct the Commandant of the Coast Guard to 1) conduct an assessment of its oversight of recognized (third-party) organizations and the impact on compliance by and safety of vessels inspected by such organizations, 2) establish within the Coast Guard an office to conduct comprehensive and targeted oversight of all such recognized organizations, and 3) review its procedures for delegating to recognized organizations to ensure that these authorities are being conducted in a manner that ensures safe maritime transportation;

- create a single United States Supplement to rules of recognized classification societies for classification and inspection of vessels;

- task the Commandant with working with the IMO to ensure that vessels receive timely and graphical weather forecasts; and

- no later than December 19, 2018, and every two years thereafter, direct the Commandant to report to Congress on the Coast Guard's implementation of each action outlined in the Commandant's final action memo dated December 19, 2017.

Title III: The Coast Guard Blue Technology Center of Expertise Act

Title III of S. 3508 authorizes the Commandant of the Coast Guard, subject to the availability of appropriations, to establish a Blue Technology Center of Expertise to help promote awareness within the Coast Guard of the range and diversity of so-called Blue Technologies—new and emerging maritime domain awareness technologies, especially more cost-effective unmanned technologies—and how the use of such technologies could enhance Coast Guard mission readiness and performance. This title also enables the sharing and dissemination of Blue Technology information between the private sector, academia, nonprofits, and the Coast Guard.

USCG Icebreaker Funding Held Up until after the Midterms

The Trump administration requested $750 million for a new heavy polar icebreaker vessel in its FY 2019 budget request. The John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232) awarded the Coast Guard procurement authority for additional icebreaker vessels; however, unless and until the project receives adequate funding in an appropriations bill, the Department of Homeland Security ("DHS") will not be able to procure a new icebreaker, which is badly needed. The House version of funding for the DHS would reallocate funding for the Coast Guard icebreaker to cover a funding gap in a veterans' program and allocate five billion dollars for the border wall sought by President Trump.

In sum, the 115th Congress has enacted major maritime safety legislation in response to the tragic sinking of the *El Faro,* but authorization for the Coast Guard's basic programs has yet to pass and will not likely be enacted after the midterm elections unless disagreements over CVIDA are resolved. ◻ – ©2018 BLANK ROME LLP

**Genevieve Cowan is a legislative analyst for Blank Rome Government Relations LLC.*

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Risk Management Tools for Maritime Companies

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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.**

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 on-board 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 or contact Kate B. Belmont (kbelmont@blankrome.com, 212.885.5075).**

TRADE SANCTIONS AND EXPORT COMPLIANCE REVIEW PROGRAM

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

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Please click on attorney names for contact information.

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Attorney Office Locations:
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