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Emissions dilemma

THE member states of the International Maritime Organization need to resolve an impending and potentially embarrassing problem with its two-tier approach to SOx emission reduction rules.

While the IMO is quite rightly pushing for a blanket ruling on CO_2 emission reduction targets for international shipping, it has clearly created the opposite for SOx and NOx emission reductions when it revised the relevant annex of the marine pollution convention and created the idea of emission control areas.

It has also admitted it does not know shipping's ability to meet the rules, otherwise it would not have written into the amendments the necessity for a low-sulphur fuel availability assessment in 2018.

The current situation is that, should a shortage of low-sulphur fuel be found, there will be an emission control area SOx limit of 0.1% from 2015, while the rest of the world remains at 3.5% until 2025 (2020 if no shortage is found).

The cause of this problem does not lie squarely with the representatives of the member states of the IMO. The lobby groups representing the shipowners were all present at the IMO meetings when the rules were discussed and amended two years ago. They had a chance to kick up a storm then.

Shortsea shippers say this difference in sulphur limits will result in the use of more expensive fuels and will eventually force freight back on to the roads when they have to hike up their rates.

The answer will lie in some timely and diplomatic input from the IMO, which created the dilemma in the first place as it pushed through the amendments.

The IMO needs to use its impending low-sulphur fuel availability assessment to determine fuel availability in the ECAs as well as around the world. To do this there should be some mechanism to exempt ships from the 0.1% emission reduction in 2015, or to bring the fuel assessment forward and ensure it covers the impact of the rules on shipping in the ECAs.

In an age of environmental politics the IMO cannot lose face on the SOx front without losing credibility in other circles as it tries to make its voice heard in the CO_2 debate. Yet it needs to nip this problem in the bud and listen to the concerns of the shipowners it is affecting.

Rogue colleges

THE Standards of Training, Certification and Watchkeeping convention was supposed to set a gold standard that would give owners confidence that all seafarers are up to the job, irrespective of where they happened to train. It is open secret that it has failed spectacularly to live up to that goal.

Unfortunately, European Commission plans to meet this challenge by debarring holders of STCW-approved qualifications from certain countries from serving on European Union-flagged vessels has all the hallmarks of being hastily conceived. Probably as a result, they are too cowardly by half.

While we do not yet know officially which nations will be targeted, the indications are that only minnows such as Morocco and Georgia will be affected. Accordingly, the value of such proscriptions will be largely symbolic.

The real problem is to be found in the Philippines. We must stress at this point, without reservation, that the majority of Filipino mariners are first rate and there is no question mark over their abilities.

But it is also true that a minority of training institutions are churning out people who should not be let anywhere near the bridge of a functioning merchant vessel that retains anything more than scrap value.

Such is the position of the Philippines in the maritime labour supply market that Brussels' restrictions against STCW documents issued by its authorities are unthinkable.

The right way forward is to take the deficient institutions themselves to task. The EU needs to ban colleges, not countries. ■

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Industry Viewpoint

John AC Cartner

Towards a modern definition of piracy

A new legal analysis and definition of piracy by a US judge makes a valuable contribution to this evolving area of international law

RECENTLY I wrote about Judge Raymond Jackson's opinion on buccaneering. Now Judge Mark S Davis offers a succinct definition of modern piracy. His analysis is well worth reading. The opinion's objective was to found an understanding of modern piracy for current and future cases. I think it will do so. The opinion is important because it brings clarity to the litigation worldwide.

Judge Davis started by reviewing the factual and procedural background and legal standard for dismissing. In so doing he obliquely referred to Judge Jackson's decision. Judge Davis asked for the defendants: "What is the definition of piracy under the law of nations?"

The defence in its arguments had relied on Judge Jackson's reasoning of the 1920 piracy statute and US v Smith, 18 US 5 (Wheat.) 153 (1820) and a few other supportive cases, some on analysis inapposite. Defence and bench presumed the rule of statutory interpretation was to read the statute contemporaneous with its enactment. In Smith, robbery was an essential part of the piracy statute of 1820.

The Founding Fathers of the US devised the constitutional "define and punish" clause for Congress to proscribe and prescribe punishment for piracies and felonies committed on the high seas and offences against the law of nations, and to ensure international law did not create US criminal liability.

Judge Davis distinguished among felonies and offences as differing from piracies. Piracy was and is a universally cognisable crime where every sovereign, irrespective of the pirate's provenance, has juridical interest. Congress caused some mischief, however, when it confused general piracy, restricted by the consensus of all sovereigns and a crime of universal jurisdiction, and municipal piracy, cognisable only by the laws of the sovereign.

In international law, a sovereign may exercise domestic jurisdiction over crimes committed in its territory, nationals committing crimes outside the territory, any persons committing crimes affecting the territory or against sovereign critical interests. Most US courts have required legal nexus between the accused for due process reasons.

Universal jurisdiction is exceptionable in that a sovereign may not exert it outside the international consensus. Thus piracy is a unique crime and the only international crime consensually under universal jurisdiction. However, only when piracy is contained within the consensus can it be prosecuted under universal jurisdiction.

There is no federal common law in the US. Congress had to enact a statute proscribing both classes of piracy. After reviewing the modern justifications for universal jurisdiction outside piracy, Judge Davis returned to piracy by dismissing modern applications as inapposite.

For example, one modern use relies on the heinousness of the act of genocide. Heinousness is not necessary in piracy.

Justice on the high seas: international treaties accept piracy does not have to involve robbery. *Nato*

Piracy turns on disorder on the high seas by stateless persons disrupting the necessary commerce among all sovereigns. Thus any state may prosecute an accused pirate.

Judge Davis turned to the US 1790, 1819 and 1820 Acts and 18 US Code § 1651, the modern piracy statute and the cases US v Palmer, 16 US 633-634 (1818) and Smith. In Palmer, the 1790 statute applied only municipally even though the language suggested otherwise. The court found that piracy was robbery at sea as in the statute, but the language thereby included the law of nations.

By 1934 in Privy Council, the Hong Kong case In re Piracy Jure Gentium, (1934) AC 586 (1934), stood for the proposition that an actual robbery was unnecessary for a general piratical act internationally and that overt intent would do. It also pointed out that two other US cases after Smith viewed things the same way. Thus, in 1934, the Privy Council concluded the definition of general piracy had widened to include piratical acts without actual robbery. A recent Kenyan case stands for the same proposition.

The convention law, including the Geneva Convention on the High Seas 1958 and the UN Convention on the Law of the Sea 1982, describe piracy. Judge Davis pointed out there are 63 state parties to the High Seas convention and 161 to the United Nations Convention on the Law of the Sea. The US has expressed no formal interest in Unclos, and Unclos accepted universal jurisdiction. In each treaty, however, the definition of piracy is clear and does not require robbery.

Piracy turns on disorder on the high seas by stateless persons disrupting the necessary commerce among all sovereigns. Thus any state may prosecute an accused pirate

Discussing the matter further, Judge Davis provided several US cases after Smith that did not require robbery within piracy to make the act general piracy.

He asked: "Has the definition of piracy evolved? The short but accurate answer is 'yes'." The answer is supported by US laws on international crime, which show such evolution because the international consensus must be followed to have universal jurisdiction for piracy.

This proposition was supported by an analysis of Supreme Court cases that shows international law is an evolving law. A detailed discussion of customary international law also supports the proposition, as do the treatises dealing with the subject.

Bottom line? Judge Davis has given us a pretty good definition of piracy with more than sufficient analyses and citations to keep prosecutors and defence counsel busy for many years. ■

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Maritime Blogspot

Ironies in the climate of environmental awareness

LET'S face it, the shift to a more environmentally aware society is playing havoc with shipping.

Shipping companies and marine engineering companies that once ignored the 'radical' environmental campaigners such as Greenpeace are now openly talking to them.

One European shipping company chief executive once confessed his long-haired hippy past to me, claiming the hippies from the 1960s were now in the boardrooms and making a difference — a bit extreme, perhaps.

But here are some of the other ironies. The rule makers are calling for a global approach to curbing CO_2 emissions, shortly after rushing through a patchwork scheme for NOx and SOx emission reductions — and shipowners are upset.

Why? Because there will be a two-tiered approach to fuel usage that will benefit some but not others, of course.

As an example, we could see a 10-year period where ships on the east coast of the UK have the 0.1% SOx emission challenge from 2015, while those on the west coast can continue to use cheaper bunker fuel with 3.5% sulphur until 2020, or even 2025.

The fuel price differential could make a big difference to the bottom line while making the British air, with its prevailing westerly wind, no cleaner.

Did the UK and the International Maritime Organization not see this? Did shipowners not see this when the IMO member states formed working groups to rewrite Annex VI of the marine pollution convention?

Now, we also have the probability of CO_2 emission curbs, coupled with rising fuel prices. This has led to ship designers putting their thinking caps on as energy efficiency become the buzzwords of the decade. I have seen ideas put forward for oil tankers to be fuelled by liquefied natural gas or even nuclear reactors. Ironic?

The double irony with LNG-powered tankers is the decision five years ago to power the largest LNG vessels with diesel engines when most of the earlier LNG tankers were designed to use the cargo boil-off as fuel. Now that is ironic — oil-fuelled gas tankers sailing alongside gas-fuelled oil tankers.

The IMO is getting into a pickle with CO_2, while the SOx debate is about to rear up and bite it on the derrière now that its attention has been diverted.

The IMO now wants to deal with CO_2 at a more sensible pace, but our environmentally aware society has other ideas. Again, the irony is not lost.

I could say what IMO members should have done in 2008 instead of focusing on NOx and SOx and deliberately excluding CO_2, but that would not help today's ironic conundrum. ■

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