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INSIDE

THIS ISSUE

A Sea Change Sweeps over Congress: A Look Back and a Look Ahead

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The 2014 mid-term elections brought a tidal wave to Washington, bringing in a sweep of the Congress for Republicans. The major impact will be in the Senate where Republicans have taken over the Committee Chairs from their Democratic counterparts. The House of Representatives remains in Republican control, with Rep. John Boehner (R-OH) remaining as Speaker and with a stronger hand for his party.

The 113th Congress has finished its work; the budget for the rest of FY2015 has been decided (with the exception of a temporary extension for the Department of Homeland Security); and the Coast Guard Authorization and National Defense Authorization bills have passed both Houses of Congress and are on to the President for his signature.

We will take a look back at what the 113th Congress accomplished for the maritime industry, identify issues remaining to be addressed, and look forward with a (clouded) crystal ball to the 114th Congress, which started in January 2015. We will also identify the key congressional leaders for maritime issues in the 114th Congress and what tacks they might take on those issues.

The Accomplishments of the 113th Congress

The 113th Congress passed three major bills affecting the maritime industry. The first is the Water Resources Reform and Development Act ("WRRDA," Pub. L. 113-221). The WRRDA authorizes dredging projects at major ports across the country to greater water depths to accommodate post-Panamax vessels; establishes a new streamlined process for the Army Corps of Engineers to prepare environmental assessments and make project decisions; and authorizes a new Water Infrastructure Finance and Innovation Authority ("WIFIA," modelled on the existing TIFIA program at the Department of Transportation) to allow the Corps to help finance new port and water infrastructure projects using private investment. (A detailed summary of WRRDA can be found here: www.blankrome.com/index.cfm?contentID=37&itemID=3329.)

After sending bills back and forth, the House and Senate finally agreed to the "Howard Coble Coast Guard and Maritime Transportation Act of 2014" (S. 2444). The bill, named after retiring Congressman Howard Coble (R-NC), authorizes the programs of the Coast Guard and the Federal Maritime Commission for FY2015, and authorizes certain activities of the Maritime Administration. We highlight here some of the key provisions of this bill. (A separate, detailed analysis of the Coast Guard bill is included in this issue on page 4.) We also identify which of the programs authorized by this bill have been funded in the budget for FY2015.

Highlights of S. 2444

- Authorizes $87 billion in discretionary funds for the Coast Guard for FY2015;
- authorizes the Secretary of Homeland Security (the Coast Guard's parent agency) to enter into a multi-year contract for the procurement of the Offshore Patrol Cutter;
- maintains the current e-LORAN system until the Coast Guard has developed a back-up GPS system;
- authorizes the Secretary of Transportation to donate historical property administered by the Maritime Administration to state and local governments or non-profit organizations;
- reauthorizes the Assistance to Small Shipyard Programs through FY2017 at the currently authorized levels;
- reauthorizes the Fishing Vessel Safety Grant Program through FY2017 at current levels;
- codifies a new Arctic Marine Transportation Program, while directing the Secretary of Homeland Security to report on the status of the Polar Code negotiations at the IMO, and directing the Coast Guard to provide Congress a strategy to maintain U.S. icebreaking capabilities in the Polar Regions and to conduct a service life extension of the POLAR SEA;
- extends the moratorium on small commercial and fishing vessel permits from the EPA until 2017;
- establishes a new Abandoned Seafarers Fund; and

- directs the Secretary of Transportation to provide Congress a national maritime strategy that reduces regulatory burdens on U.S.-flagged vessel owners, increases the use of short sea shipping, and enhances U.S. shipbuilding capacity.

Congress also passed H.R. 4870, the National Defense Authorization Act for FY2015 ("NDAA"), in the waning days of the session. The NDAA authorizes $521.3 billion in base discretionary funding for national defense and an additional $63.7 billion for Overseas Contingency Operations ("OCO"). This marked the 53rd consecutive year that Congress has passed an NDAA.

Although dealing primarily with national defense, the NDAA contains several important maritime-related provisions. For instance, H.R. 4870 authorizes FY2015 funding for the national security-related functions carried out by the Maritime Administration ("MARAD"). The bill authorizes $186 million for the Maritime Security Program ("MSP"), which utilizes U.S.-flag merchant ships to carry Department of Defense cargoes.

Additionally, the NDAA authorizes funding for the operation of the U.S. Merchant Marine Academy and State Maritime Academies through FY2015 and $73.1 million for the Title XI Ship Loan Guarantee Program. Despite the significant authorization for Title XI in the NDAA, the House and Senate Appropriations Committees provided only $3.1 million for the program—funds sufficient only to cover the administrative costs in FY2015.

The NDAA also includes a "Sense of Congress" statement (Section 3503) that expresses the critical role that the Jones Act plays in strengthening U.S. national security and the economy. This section states: *"It is the sense of Congress that United States coastwise trade laws promote a strong domestic trade maritime industry, which supports the national security and economic vitality of the United States and the efficient operation of the United States transportation system."* This pro-Jones Act statement comes at a time when some in the energy industry have urged Congress to include a provision to repeal or restrict the Act in any future energy policy legislation.

One of the final actions of the 113th Congress took place with the Senate's passage of the Tax Extenders bill. This legislation provided a short-term extension of 54 various tax breaks that were expiring, including the Production Tax Credit supported by the wind industry. The bill is retroactive to January 1, 2014, which enables tax filers to benefit from the tax breaks for this past year. President Obama is expected to sign the legislation.

The FY2015 Budget and Impact on Authorized Programs

As the door closed on the 113th Congress, the House and Senate also came to terms on an omnibus funding bill to keep most of the federal departments and agencies funded through September 30, 2015, and the President signed it into law on December 16, 2014. The only exception is the Department of Homeland Security ("DHS"), which was only funded by a continuing resolution through February 27, 2015. This measure is called a "CROmnibus" as it combines the CR for DHS and an omnibus appropriation for the rest of the federal government. The DHS budget is under a short-term CR to give the Republicans—who now control both chambers of Congress—time to react to the President's executive actions deferring deportation for an estimated four million illegal immigrants.

REGARDLESS OF THE change in congressional leadership, you can expect that the 114th Congress will be looking closely at the maritime industry and establishing new policies through legislation, including the annual Coast Guard authorization bill and the NDAA.

This is likely to delay many decisions at the DHS, which includes the Coast Guard, Customs and Border Control, FEMA, the Transportation Security Administration, and the Secret Service, among other critical agencies. Under a CR, these agencies will not be able to start any new programs, unless otherwise authorized; and it is certainly likely that major contracts will not be undertaken given the budgetary uncertainty for the remainder of the fiscal year. The temporary CR for DHS is also likely to generate delays in announcements for the popular DHS/FEMA homeland security grant programs, including port security grants.

The Maritime Administration as part of the Transportation Department ("DoT") has its regular funding for the rest of the fiscal year, but its budget was cut by $30 million. Congress also did not provide any new funding for the Title XI Loan Guarantee Program, the Small Shipyard Grant Program, or the Marine Highway or Short Sea Shipping Program, despite support for these programs in S. 2444, above. The Maritime Security Program was funded at its authorized level of $186 million.

Grants for the popular TIGER grant program (administered by DoT) were funded at $500 million for FY2015, a reduction of $100 million from last year's program and significantly below

(continued on page 3)

A Sea Change Sweeps over Congress: A Look Back and a Look Ahead (continued from page 2)

the Administration's request. This will heighten the competition for these infrastructure grants.

Finally, Congress did appropriate $1.1 billion from the Harbor Maintenance Trust Fund to implement WRRDA.

Changes in Committee Leadership for the 114th Congress

Leadership in the House remains fairly constant as Congressman Bud Shuster (R-PA) is staying as Chairman of the House Transportation and Infrastructure Committee. Rep. Peter DeFazio (D-OR) has taken over as the Committee's Ranking Member position with the defeat of Rep. Nick Rahall (D-WV). Congressman Duncan Hunter (R-CA) remains as the Chairman of the House Coast Guard Subcommittee. The House and Senate Armed Services Committees also fall under new leadership with Congressman Mac Thornberry (R-TX) and Senator John McCain (R-AZ) selected as the respective chairmen of these committees. Rep. Adam Smith (D-WA) remains as the House Armed Services Committee Ranking Member and Senator Jack Reed (D-RI) is his counterpart in the Senate. The House Appropriations Committee is chaired again by Rep. Hal Rogers (R-KY), and Rep. Nita Lowey (D-NY) is staying on as the Committee's Ranking Member.

The Subcommittee Chairs for Transportation and DHS Appropriations are, respectively, Representatives Mario Diaz-Balart (R-FL) and John Carter (R-TX).

Significant leadership changes also occurred in the Senate. Senator Mitch McConnell (R-KY) replaced Senator Harry Reid (D-NV) as Majority Leader. Senator John Thune (R-SD) is the new Chair of the Senate Commerce, Science and Transportation Committee, and the Ranking Member is Senator Bill Nelson (D-FL).

Senator Lisa Murkowski (R-AK) has assumed the Chair of the Senate Energy Committee and is joined by new Ranking Member Maria Cantwell (D-WA). Senator James Inhofe (R-OK) has taken over as Chair of the Senate Environment and Public Works Committee, and former chairwoman Senator Barbara Boxer (D-CA) became the Committee's ranking member. Senator Thad Cochran (R-MS) is the new Chair of the Senate Appropriations Committee and also leads the Committee's Defense Subcommittee. His counterpart at the full committee is former Chairwoman Senator Barbara Mikulski (D-MD).

Outlook for the 114th Congress

The 114th Congress began in January 2015 and, as noted above, is under the control of Republicans in both chambers.

SHIPPING & INTERNATIONAL TRADE LAW (SECOND EDITION 2015)

JOHN D. KIMBALL

EMMA C. JONES

■ Blank Rome New York Partner **JOHN KIMBALL** and Associate **EMMA JONES** published an overview of U.S. maritime law in *Shipping & International Trade Law* (Second Edition 2015).

Their article provides a detailed explanation of contracts of carriage with an emphasis on jurisdiction and proper law, arbitration clauses, parties to the bill of lading contract, liability regimes, and lien rights. Mr. Kimball and Ms. Jones also answer common questions with respect to collisions, salvages conventions, general average claims, and limitation regimes in addition to addressing pollution and the environment, security, and arrest.

The second edition of *Shipping & International Law* is designed to illuminate the issues in multiple maritime jurisdictions. Chapters are written by lawyers working in the industry and are laid out to allow readers to easily compare laws and regulations in different countries.

To view the full edition, please click here or visit www.blankrome.com/index.cfm?contentID=37&itemID=3465.

Passage of H.R. S. 2444 demonstrates that there is strong bipartisan and bicameral support for some maritime legislation and programs. This is especially true where the stakeholders speak with one voice. However, where the community is divided, Congress is disinclined to act. Stakeholders also have to pay close attention to funding bills to make sure that authorized programs are also funded.

We envision more support in the 114th Congress for regulatory reform, particularly when it comes to EPA air regulations and regulations that impede trade and commerce. We believe that the new Congress will show stronger support for new trade agreements, including the Trans-Pacific Partnership, and will certainly take a close look at the new détente between the U.S. and Cuba.

We also anticipate further support and legislative activity in the next Congress for LNG exports and for additional oil and gas development as well as for the infamous Keystone XL Pipeline. In fact, Senate Majority Leader McConnell recently stated that the first bill the Senate will take in the 114th Congress is legislation to approve the Keystone XL Pipeline. As the U.S. continues to produce natural gas through the fracking method, Congress will pay more attention to transportation of natural gas by rail or by ship. Extension of tax credits for renewable energy may soon be on the cutting room floor as it barely got through this year.

Senator Murkowski has also issued a new energy blueprint—"Energy 2020: A Vision for America's Energy Future"—that we expect her to pursue from her new leadership position. While the outlook for a broad energy bill seems unlikely, the Senator is expected to look for areas where smaller targeted measures can advance her broader strategic goals. These include removing barriers to oil exports, and expanded drilling in public lands and offshore, particularly in Alaska where production has been steadily declining.

We also anticipate that Senator Murkowski, who is from an Arctic state, will pay even more attention to developments in the Arctic. Greater attention is also possible as the U.S. is positioned to take over the Chair of the international Arctic Council in 2015 and former Commandant Bob Papp is the new U.S. envoy to the Arctic.

Regardless of the change in congressional leadership, you can expect that the 114th Congress will be looking closely at the maritime industry and establishing new policies through legislation, including the annual Coast Guard authorization bill and the NDAA. □

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Congress Passes Coast Guard Bill in Waning Hours of 113th Congress

BY MATTHEW J. THOMAS

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After considerable suspense and last-minute concessions on cargo preference and small vessel discharges, Congress passed Coast Guard authorization legislation for FY2015 on December 10, 2014. Like Coast Guard bills in previous years, the measure also serves as a vehicle for various legal and policy updates for maritime policies and programs government-wide. The new law, the Howard Coble Coast Guard and Maritime Transportation Act of 2014, carries the name of the North Carolina congressman retiring this month after three decades in the House, often in the forefront of maritime issues. His departure leaves Congress without a single Coast Guard veteran serving in the House of Representatives.

Key Coast Guard Policies

Coast Guard authorized discretionary funding is set at $8.74 billion for 2015, up slightly from the nearly $8.5 billion figure requested by the Administration. The bill makes modest reductions in overall personnel and officer compliment authorizations, to 43,000 and 6,900, respectively. Funding is also provided for capital investments in fleet renewal and other assets, authorizing $1.55 billion in FY2015 for the acquisition of ships, aircraft, and other assets. The bill expressly authorizes the Secretary of Homeland Security to enter into a multiyear contract for the procurement of the Offshore Patrol Cutter, the largest newbuild program in the service's history. The bill steps up the Coast Guard's budgetary and strategic management responsibilities, requiring submission of annual authorization requests, preparation of a major acquisition mission statement, and new studies and analyses of border security, icebreaker capabilities, Coast Guard property and leasing programs, and other areas. Additional authorities are added, including the use of cooperative agreements to pursue research and development activities, and additional measures relating to modernizing aids to navigation. Also, penalty amounts for violations of Coast Guard authorities are adjusted for inflation.

Environmental Protection Agency Provisions

In one of the most closely watched provisions in the bill, Congress extended for another three years the 2012 moratorium on the Environmental Protection Agency ("EPA") regulations covering small vessel discharges. Under the

(continued on page 5)

Congress Passes Coast Guard Bill in Waning Hours of 113th Congress (continued from page 4)

moratorium, commercial fishing vessels and non-commercial vessels less than 79 feet will not be required to obtain a Small Vessel General Permit ("sVGP") under the Clean Water Act. The sVGP was developed under the EPA's National Pollutant Discharge Elimination System program to authorize and regulate incidental discharges from vessels. Without the moratorium, over 100,000 vessels would have had to come into compliance. While estimates of compliance costs vary widely, the potential burdens of the new regulatory regime posed very significant financial and operational concerns for vessel operators, especially in the fishing industry. The moratorium was extended by three years in response to bipartisan Senate pressure, up from a one-year deferral included in the version of the bill, which passed the House on December 3, 2014.

U.S.-Flag Requirements

The bill does not include any expansion of U.S.-flag requirements for carriage of cargo. It does, however, require the Government Accountability Office to report to Congress on the number of jobs (including vessel construction and vessel operating jobs) that would be created in the U.S. maritime industry if liquefied natural gas exports are required to be carried on U.S.-flag and U.S.-built vessels. The study focuses on maritime jobs only, without corresponding review of the impact on the natural gas industry itself from this potential new set of restrictions.

Also, the Department of Transportation is required to unveil its National Maritime Strategy (which has been germinating behind closed doors since workships last year), within 60 days. The strategy will identify regulations and policies that reduce the competitiveness of U.S.-flag vessels, and highlight strategies to make U.S.-flag vessels more competitive, potentially fueling additional legislative activity next year.

Federal Maritime Commission Authorities

With regard to Federal Maritime Commission ("FMC") authorities, the bill makes a little-noticed but significant change to the Shipping Act of 1984, eliminating the lopsided rule that complainants—but not respondents—are entitled to attorneys' fees. The new bill shifts FMC proceedings to a "loser pays" rule for attorneys' fees, reducing financial incentives for industry players to pursue FMC complaints contesting the reasonableness of port practices and other regulated conduct. The bill authorizes the FMC at $24.7 million in FY2015, and places new limits on commissioners' tenure.

Abandoned Seafarers Fund

The bill also creates an Abandoned Seafarers Fund to cover the repatriation costs of foreign seafarers and pay the expenses of foreign seafarers who are required to stay in the U.S. to serve as material witnesses in federal criminal trials against vessel owners. The fund would be capitalized by using a portion of the penalty proceeds from MARPOL pollution prosecutions of vessel operators. The fund provides an additional backstop for abandoned seafarers, who also benefit from new financial security requirements imposed on vessels and flag states in the ILO Maritime Labour Convention, 2006, which came into force on August 20, 2013.

Other Provisions

The bill also reauthorizes key grant programs through 2017, with $3 million each per year for the Fishing Safety Training Grants Program and the Fishing Safety Research Grant Program, and reauthorizes the Assistance to Small Shipyard Programs through FY2017 at the current levels.

Passage of the bill represented a setback for proponents of cargo preference requirements for cargo shipped or financed by U.S. government programs. The House-passed version of the bill contained language strengthening the authority of the Department of Transportation to mandate other agencies' compliance with the Cargo Preference Act of 1954, which requires that 50 percent of federally funded or financed cargo be carried on U.S.-flag vessels. In the Senate, however, Senators Bob Corker and Chris Coons moved to block the Coast Guard bill, on the grounds that the new authority would adversely impact the cost and efficiency of U.S. food aid programs. Ultimately, the cargo preference language was dropped, and the House re-passed the final bill by voice vote. □

Old Dogs, New Tricks: Bunker Fuel Industry Facing Growing Cyber Threat

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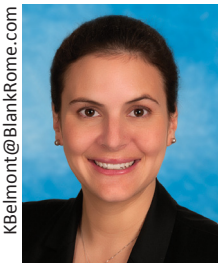
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The maritime community is sitting on the precipice of disaster. While regarded as one of the oldest and most well respected industries on the planet, the maritime community as a whole has failed to protect itself against the growing threat of cybercriminals. Methods of daily business transactions have failed to evolve, and the reliance on outdated technology with little to no cybersecurity protection has left many sections of the maritime community vulnerable to cyber attacks. The bunker fuel industry, in particular, has been recently faced with growing and continual threats due to its outmoded business practices and its failure to employ the most efficient and reliable forms of cybersecurity protection.

The Bunker Fuel Industry's Achilles Heel

As technology has evolved, dependence on technology has also increased. While technological advances may make work easier or faster, it has also created new threats and vulnerabilities for industries that rely too heavily on it without employing the proper protections. Unfortunately, the bunker fuel industry is a prime example of a community that relies on shared technology and communication information, but has failed to implement the appropriate cybersecurity protections. As a result, the bunker fuel industry is a current target for today's cybercriminals. Like money, bunker fuel is highly valuable and fungible commodity. It is estimated that by 2020, worldwide sales of bunker fuel will reach 500 million tons per year. Assuming an average price of approximately $750 a metric ton of MDO, there will be nearly $500 billion in annual bunker fuel sales. Without a doubt, the bunker industry is a critical component of the maritime community and the global economy. That said, industries that are slow to change take significant and daily risks when methods of doing business fail to evolve to meet the growing threat posed by more sophisticated criminals. In common military/security parlance, this makes the bunker fuel industry a "soft target" for cyber criminals.

In the bunker fuel industry, thousands of daily quotations, sales, and payment transactions taking place electronically. The principle means of communications for these transactions is through e-mail. This has been and continues to be the Achilles heel for the bunker fuel industry. The bunker fuel industry has been the victim of many recent cyber attacks, due to its reliance on unsecured e-mail communications for its daily business transactions. The common practice in the industry involves traders receiving e-mails from buyers requesting quotes. The trader responds to these requests and after a series of e-mail communications with a potential buyer, the transaction is often consummated and confirmed through these same e-mail communications. Eventually, the bunkers are loaded and a new series of e-mails are exchanged to facilitate payment. It is at this stage where the cybercrime is usually committed. After the physical supplier provides bunkers to the customer's vessel, the trader receives an e-mailed invoice that appears to be from the physical supplier. As this is common practice in the industry, the invoice is submitted for processing and the wire transfer is quickly made. Unfortunately, the invoice is fraudulent, the wire transfer information is fraudulent, and payment is made to the cybercriminal's account. When the legitimate invoice does arrive from the supplier with the real wire information, in many cases the trader is forced to pay twice. This is just one example of how the bunkering community is so easily susceptible to cyber attacks.

OVER 156 MILLION phishing e-mails are sent every day. They are randomly generated using very basic software programs and transmitted 24/7 across the globe. 16 million of these e-mails make it past company security systems and 8 million are opened and read.

Crimes of Opportunity

While a convenient method for transacting business, e-mails can represent a significant vulnerability that will be readily exploited by cybercriminals. The fundamental flaw with e-mail transactions is the unavoidable reality that each communication travels over multiple unsecured networks and passes through numerous computer systems, all of which are

(continued on page 7)

Old Dogs, New Tricks: Bunker Fuel Industry Facing Growing Cyber Threat (continued from page 6)

unknown to the e-mail sender/recipient. This presents cybercriminals with the opportunity to intercept communications, dissect how a particular business manages its transactions, and allows them to send e-mails impersonating legitimate individuals or businesses. Too frequently, businesses ignore these risks by falling victim to a false sense of security caused by three erroneous assumptions: (1) they assume cybercrime requires a high level of sophistication, (2) they assume a successful attack is a time-consuming endeavor, and (3) they assume they are not big enough to be targeted or worth the criminals' effort.

Make no mistake, cybercriminals are smart, determined, and have a good understanding of how to use a computer. But they are far from the image of a highly sophisticated group of computer geniuses sitting in a dimly lit room using banks of cutting edge computers to sift through lines of source code. Rather, most cybercriminals are members of an organized crime group who concluded they can steal more money using a mouse than a gun. Geographically, these groups operate out of Africa, Russia, South East Asia, and various countries in Eastern Europe. They prefer locations that are economically challenged, and where local politicians and law enforcement can be compromised. Contrary to popular belief, they are not highly educated because they buy rather than develop the software used to facilitate their crimes.

CYBERCRIME IS NOT ONLY focused on large targets, which require time-consuming effort and preplanning. Commonly, cybercrime is the complete opposite—it is a crime of opportunity.

The second and third assumptions are perhaps the most easily exposed. Cybercrime is not only focused on large targets, which require time-consuming effort and preplanning. Commonly, cybercrime is the complete opposite—it is a crime of opportunity. This is reflected in the cybercriminals' use of phishing e-mails. Phishing involves the use of what otherwise appears to be legitimate email messages or websites that trick users into downloading malicious software or handing over your personal information under false pretenses. For example, by unknowingly downloading malware, a user provides the criminals with the ability to access their computer, read their files, and send messages from their e-mail account. Or, an employee may receive an e-mail allegedly from the IT department stating they are performing routine security upgrades and asking that user to confirm their user name and password in order to not be locked-out of the system.

Many reading this article may question the utility of using such an approach and believe reasonable people would not fall victim to a phishing attack. The figures tell a different story. Over 156 million phishing e-mails are sent every day. They are randomly generated using very basic software programs and transmitted 24/7 across the globe. 16 million of these e-mails make it past company security systems and 8 million are opened and read. This results in over 80,000 people, every day, clicking on the corrupted link, unknowingly downloading malware and providing user identification and long-on credentials. As a result, after an evening of sending millions of emails, cybercriminals have 80,000 new victims to choose from.

Combating Cyber Crime in the Maritime Community

By now, many in the maritime community are aware of the e-mail scam that cost one large bunker supplier an estimated $18 million. The scam exposed the numerous flaws in the way most bunker fuel is sold. Impersonating the U.S. Defense Logistics Agency, cyber criminals used fake credentials to send an e-mail seeking to participate in a tender for a large amount of fuel. The company received the offer to participate in the tender, took the e-mail at face value, and purchased 17,000 metric tonnes of marine gas oil that was then delivered to a tanker off the Ivory Coast. Upon submission of the invoice, the government agency responded that it had no record of the fuel tender. As discussed above, crimes like this one are frequently done by e-mail. Typically, the cybercriminals impersonate sellers and send e-mail messages that include payment information. The bank details, however, are for accounts belonging to the criminals and not the legitimate seller.

There are several facts about the bunker fuel industry that we know to be absolutely true: the bunker industry involves hundreds of billions of dollars in annual transactions; the transactions are consummated almost exclusively through electronic communications; there are minimal security protocols used to validate these transactions; cyber criminals pursue crimes of opportunity that present low risk; and every organization will at some point be compromised by malware or a phishing scam. This begs the question, what should be done to combat this threat? Fortunately for the bunker industry, there are several common sense steps that will dramatically reduce the potential for falling victim to a cybercrime.

The first and most obvious step is to retain professionals who can help harden your company from a cyber attack. Both cybersecurity lawyers and consultants can provide assistance in developing systems and protocols to protect your company from cybercriminals and the potential liability that results from a cyber attack. Being a hardened target means adopting the policies and procedures that will make your company less susceptible to an attack. Present cybercriminals with a choice between expending resources trying to overcome your defenses or moving on to a more vulnerable victim. More often than not, they will choose the path of least resistance.

Unfortunately, there is not one simple solution for becoming a hardened target, because each business operates differently with a different clientele. But there are things nearly all companies can do to become more secure and hardened. For example, do not rely solely on e-mail communications to consummate large purchases or transactions. In addition to e-mail, require a second channel of communication with the buyer, such as a phone call, fax, or form of identification/authorization not readily accessible to cybercriminals. There are other options, such as utilizing a secure web portal for bunker fuel transactions. Routing orders through a portal requiring log-in credentials would dramatically limit the ability of hackers to perpetrate a fictitious transaction.

Ultimately, it is critical that each company review its own operations and adopt policies that increase security without unnecessarily impeding core business operations. Whatever path is taken, it is wise to remember: the more sophisticated and varied your procedures for consummating a transaction, the more work required by the criminals. The more work required by the criminals, the more likely they will select a different target. To avoid the continued targeting by cybercriminals and the tremendous financial implications that result there from, the bunker fuel industry must evolve to meet the threats posed by reliance on unsecured shared technology and communication information, and work with cybersecurity professionals to develop or strengthen its cybersecurity practices. To date, the bunker fuel industry has failed to even moderately protect itself from cyber attacks and must now act to arm itself against these attacks, or suffer continued disastrous financial implications.

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Sulfur Emissions Limit Reduced and U.S. Ramps Up Enforcement

BY GREGORY F. LINSIN, JEANNE M. GRASSO, AND DANA S. MERKEL

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For vessels trading to ports in any of the four Emissions Control Areas ("ECAs") (North American, U.S. Caribbean Sea, Baltic Sea, and North Sea), compliance with the sulfur emissions limits just became ten times more difficult—and the regulators are monitoring compliance more closely than ever before. There are, though, concrete measures that vessel owners and operators can implement now to reduce their risk of becoming an enforcement statistic.

Background

Since July 1, 2010, vessels subject to Annex VI of the International Convention for the Prevention of Pollution from Ships ("MARPOL"), with certain exceptions, have been required to burn fuel oil with a sulfur content not exceeding 1.00% (10,000 ppm) while operating in the Baltic Sea and the North Sea ECAs. The same sulfur limit became applicable to vessels trading to ports in the North American ECA effective August 1, 2012, and to vessels operating in the U.S. Caribbean ECA as of January 1, 2014. Effective January 1, 2015, the permissible sulfur limit was further reduced to 0.10% (1,000 ppm) in all four ECAs, which will result in significantly increased fuel costs for vessels operating in those areas.

Ramping Up Enforcement Efforts

The maritime agencies in Canada and Europe have indicated that they intend to closely monitor compliance with lower sulfur emissions limits. In the United States, there has been mounting evidence over the past year that the U.S. Environmental Protection Agency ("EPA") and the U.S. Coast Guard are ramping up their coordinated inspection and enforcement efforts to monitor compliance with the sulfur emissions restrictions and to consider enforcement actions, if violations of the Annex VI regulations are identified. Going forward, we expect to see these heightened inspection and enforcement efforts continue, potentially resulting

(continued to page 9)

Sulfur Emissions Limit Reduced and U.S. Ramps Up Enforcement
(continued from page 8)

in significant and costly investigations and penalties under the Act to Prevent Pollution from Ships ("APPS"), the statute which implements MARPOL in the United States.

Sulfur Emissions Compliance

Vessels may comply with the sulfur limits by either burning fuel oil with a sulfur content below the sulfur limit or by using an alternate compliance method approved by the flag State, such as exhaust gas scrubbers or a fuel averaging system. In addition, the EPA recently issued a guidance stating that, effective January 1, 2015, vessels must use any compliant fuel that is available to meet the reduced sulfur content standard, including distillate fuel or marine gas oil with a much lower sulfur content. This is a change from the 1% sulfur regime, where vessels were not required to use distillate fuels. Annex VI, and thus APPS, requires a vessel to notify the port State and flag State when it is unable to purchase ECA compliant fuel oil. The EPA strongly encourages a vessel to file a Fuel Oil Non-Availability Report ("FONAR") with the agency, if it is unable to purchase ECA compliant fuel oil or distillate fuels. While Annex VI does not mandate a particular form for making the required notification, the FONAR recommended by the EPA invites the submission of explanatory information, which could be helpful in mitigating possible penalties.

In addition to the ECA requirements, California's Ocean-Going Vessel Fuel Regulation remains in effect while the California Air Resources Board reviews whether the new federal fuel requirements will achieve equivalent emission reductions. Although both the federal and California sulfur limit (which applies out to 24 miles) are now 0.10%, California's regulations do not permit alternative emission control technologies. Further, the California regulations require the fuel to also meet specifications for distillate grades. In light of these differences, California will allow vessels using alternative emission control technologies or using non-distillate fuel meeting the 0.10% sulfur limit to comply with California regulations under a research exemption. Vessels intending to use the research exemption must notify California using the form attached to California Air Resources Board Marine Notice 2014-1.

In June 2011, in anticipation of the North American ECA going into effect, the Coast Guard and the EPA entered in a Memorandum of Understanding ("MOU") outlining the procedures whereby the Coast Guard and EPA will cooperate on the inspection and enforcement procedures regarding the sulfur emissions regulations. Pursuant to the MOU, the Coast Guard has been inspecting bunkering records and fuel usage entries in the ship's logs during Port State Control inspections. The Coast Guard is then providing evidence

of non-compliance to the EPA for evaluation of a potential enforcement action. To date, we are aware of three Coast Guard detentions for Annex VI violations—one related to a vessel having low sulfur fuel onboard but not using it, and two related to vessels not using ECA compliant fuel and not providing the required notifications to the EPA. At least one of these detentions is subject to an ongoing enforcement action by the agency. In addition, the EPA has been scrutinizing FONARs and related vessel documentation and has taken fuel samples from vessels during joint Coast Guard and EPA inspections for testing and analysis. In a recent statement, the Coast Guard stated that planning is underway for further joint boardings, fuel oil sampling, and in-the-field screening of fuel oil samples for sulfur levels. The EPA is also experimenting with using helicopters and planes to fly through and sample vessel emission plumes to calculate sulfur content.

IN THE UNITED STATES, there has been mounting evidence over the past year that the U.S. Environmental Protection Agency ("EPA") and the U.S. Coast Guard are ramping up their coordinated inspection and enforcement efforts to monitor compliance with the sulfur emissions restrictions and to consider enforcement actions, if violations of the Annex VI regulations are identified.

The EPA has emphasized that the submission of a FONAR does not constitute compliance with the regulations. In fact, the submission of a FONAR can be viewed as a required admission of non-compliance, albeit with potentially mitigating information regarding the non-availability of ECA compliant fuel, which may be taken into account by the EPA when reviewing the violation. As such, it is recommended that vessels trading to U.S. ports file FONARs, to satisfy the notification requirement of Annex VI, instead of hoping that the violation will not be discovered. But, the vessel needs to ensure that the information contained in the FONAR is complete and accurate, and maintain appropriate documentation to demonstrate the accuracy of the information submitted.

The EPA is putting significant effort into analyzing FONAR submissions and comparing ECA compliant fuel availability along various trade routes, beyond the vessel's last port of call. Vessels most likely to be targeted for investigations are those that have submitted a large number of FONARs or those that have submitted a FONAR that is out of the norm for vessels on similar trade routes. FONAR submissions have dropped from nearly 90 submissions per month in late 2012 to a handful, if any, per month in 2014. Historically, the majority of vessels submitting FONARs have come from Asia, particularly China and Japan. With the new reduction in the sulfur limit for fuel oil, the number of FONAR submissions may rise again.

In February 2014, based on its analysis of FONARs submitted by four shipping companies, the EPA served administrative subpoenas on each of the companies requiring the production of extensive documentation regarding the representations contained in the FONARs. It has been reported that the subpoenas required the companies to produce records regarding the bunker suppliers that do business in the ports of call the vessel visited prior to entering the North American ECA, and similar information regarding each port the vessel visited after receiving orders to proceed to a U.S. port, plus copies of the vessel's correspondence with each of the bunker suppliers listed. Reportedly, the subpoenas also required the companies to produce copies of their corporate policies and procedures related to MARPOL Annex VI compliance, along with fuel procurement contracts for the vessels in question. The EPA has not yet announced any decision with respect to possible enforcement actions against the four companies.

In recent months, the EPA has informally requested similar information from other shipping companies on a "voluntary" basis, and stated that, if the company declines to provide the requested information "voluntarily," the agency intends to issue an administrative subpoena for the records.

One other compliance issue that has confronted vessel owners and operators involves third-party fuel testing for quality assurance, as sometimes the third-party's sulfur results are different from the value on the Bunker Delivery Notes, *i.e.,* the results exceeded the 1% sulfur limit. In such cases, the EPA is recommending that the vessel owner/operator file a Notice of Protest with the bunker provider and with the EPA. Because such third-party results indicate a possible non-compliance, it may be prudent to notify both EPA and the flag State, as this transparency may help mitigate any possible penalties. The EPA also emphasized in a December 2014 guidance document addressing ECA Marine Fuel that anyone

(continued on page 11)

Sulfur Emissions Limit Reduced and U.S. Ramps Up Enforcement (continued from page 10)

in the ECA marine fuel distribution system may be liable for downstream violations of the sulfur standard, not merely the shipping company involved.

We expect the EPA will continue to pursue its investigative efforts regarding potential violations of the North American and U.S. Caribbean ECA sulfur emissions regulations—"[m]aking sure that everyone plays by the rules will help level the playing field for companies that comply," stated the EPA's assistant administrator of the Office of Compliance and Enforcement. In this regard, the Trident Alliance, a coalition of shipping owners and operators currently numbering 31, have called for strict enforcement worldwide to help ensure that compliant companies are not placed at a competitive disadvantage through lax enforcement.

The financial costs and administrative burdens associated with an investigation can be very substantial. If violations are identified, enforcement actions could involve administrative or civil penalties or even criminal prosecutions for violations of MARPOL Annex VI, as implemented by APPS and its regulations, particularly if records are falsified or fabricated after-the-fact to cover up non-compliances. Violations might involve not only the burning of fuel that fails to meet North American and U.S. Caribbean ECA sulfur requirements, but could also involve the maintenance or submission of false records regarding fuel switching, a company's efforts to obtain ECA compliant fuel, or other conduct that is intended to thwart or obstruct the EPA's investigation.

Conclusions and Recommendations

In view of these increased compliance risks, there are a number of practical steps that vessel owners and operators can take to minimize their potential vulnerability. First, if they are not already in place, corporate policies and procedures should be implemented addressing MARPOL Annex VI and compliance with North American and U.S. Caribbean ECA requirements, in particular, including the fuel procurement process. Shoreside and shipboard personnel involved in the procurement of fuel oil should receive specific training on these policies and procedures.

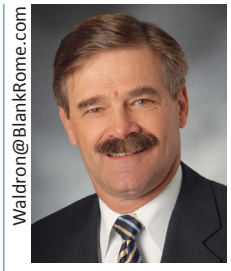
Second, fuel procurement personnel should develop and maintain complete lists of bunker suppliers in all ports of call visited after a vessel receives notice that it will be bound for a port in the North American or U.S. Caribbean ECAs. Each and every bunker supplier should be contacted in an effort to obtain ECA compliant fuel, and correspondence should be maintained to document the attempts to procure the fuel. It is not sufficient for the vessel's normal bunker supplier to state that there is no compliant fuel in the port; all bunker suppliers in the relevant ports should be contacted.

Third, for each FONAR submitted, accurate records should be maintained to document all the information and representations contained in the form. Finally, when compliant fuel is unavailable and violation is unavoidable, detailed records should be maintained regarding the routes and distances travelled in the North American and U.S. Caribbean ECAs while burning non-compliant fuel.

In light of the reduced sulfur content limits for fuel oil, it is likely that the EPA's enforcement initiative will only intensify in 2015. And, we understand that the EPA will soon be coming out with an enforcement and penalty assessment policy for Annex VI violations. As such, responsible vessel owners and operators should act now to identify and close any gaps that may exist in their Annex VI compliance and documentation program. □

Demystifying the Repeal of the Jones Act and Jones Act Waivers

BY JONATHAN K. WALDRON AND JEANNE M. GRASSO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There always seems to be constant chatter about whether the Jones Act will be repealed and whether it is possible to obtain a waiver until it is repealed some day. In reality, despite some recent publicity concerning Arizona Senator John McCain's recent statements that the Jones Act will be repealed sooner or later, don't count on it. Senator McCain introduced a bill in 2010 to repeal the Jones Act, but it never went anywhere. Indeed, even Senator McCain himself admitted that the Jones Act lobby was as powerful as any he had come up against in his political career.

Lending further support to the vitality and sanctity of the Jones Act, this year's recently passed National Defense Authorization Act for FY2015 includes a "Sense of Congress" expressing the critical role that the Jones Act plays in strengthening U.S. national security and the economy. The section states that: *"It is the sense of Congress that United States coastwise trade laws promote a strong domestic trade maritime industry, which supports the national security and economic vitality of the United States and the efficient operation of the United States transportation system."* This pro-Jones Act statement comes at a time when many in the energy industry have urged Congress to repeal or revamp the Jones Act when it considers energy policy legislation.

So, rather than spend too much time on this unlikely event, this article will focus mainly on Jones Act waivers to demystify the thought that it is easy to obtain such waivers. To set the stage, in one of her first press conferences after taking the chairmanship of the Senate Energy & Natural Resources Committee, Senator Mary Landrieu of Louisiana (who was just voted out of office in the 2014 elections) exclaimed that "[w]aiving the Jones Act literally hands over work to foreign shippers." The fact that Senator Landrieu's comments were not directed against any potential waiver of the Jones Act exemplifies the controversy that Jones Act waivers can create in the maritime and energy sectors.

In reality, however, there exists a misconception amongst many about the ease of obtaining a waiver of the Jones Act. Accordingly, this article will dispel the myth that waivers are possible simply because Jones Act vessels are not available, discuss the requirements for obtaining a waiver, analyze key past Jones Act waivers, and look to possibilities for future Jones Act waivers.

Jones Act Waivers in Law and Practice

The Jones Act prohibits the "transportation of merchandise by water, or by land and water, between points in the United States…either directly or via a foreign port" unless the vessel is U.S.-built, U.S.-flag, and 75 percent U.S.-owned (commonly called "coastwise qualified vessels"). The general standard for waiving the Jones Act is if doing so is "necessary in the interest of national defense." There are two types of Jones Act waivers. One type relates to a request by the Secretary of Defense, which is granted automatically. The other type of waiver may be granted at the discretion of the Secretary of the Department of Homeland Security ("DHS"). Such a discretionary waiver may only be granted if the Administrator of the Maritime Administration ("MARAD") first determines that no U.S.-flag vessels are available and the waiver is in the interest of national defense.

> **WAIVING THE JONES ACT** requires meeting a high standard, namely, that a waiver is necessary "in the interest of national defense."

Waivers Requested by the Secretary of Defense

All waivers requested by the Secretary of Defense must be granted. Specifically, the Waiver Provision states that "[o]n the request of the Secretary of Defense, the head of an agency responsible for the administration of the navigation or vessel inspection laws shall waive compliance with those laws to the extent the Secretary considers it necessary in the interest of national defense."

Historically, these waivers have been granted to address an immediate need of the Department of Defense ("DOD"). For example, in 2005, the Secretary of Defense requested a waiver permitting transportation of a portion of a sea-based

(continued on page 13)

Demystifying the Repeal of the Jones Act and Jones Act Waivers (continued from page 12)

radar system aboard a non-coastwise vessel. Similarly, in 2006, the Secretary of Defense requested a waiver of Jones Act requirements for the transportation of military helicopters from Tacoma, Washington, to Anchorage, Alaska.

Waivers Requested by Others

Although subject to the same national defense standard, waivers requested by other agencies, entities, or commercial interests are not automatic, but rather are at the discretion of the Secretary of DHS. A 2009 amendment to the law provides that the DHS cannot grant a waiver unless and until MARAD determines that no coastwise qualified vessels are available and capable to provide the proposed transportation. Only after MARAD makes this determination can the Secretary of DHS evaluate and determine whether the proposed transportation is "in the interest of national defense."

Process to Obtain a Discretionary Waiver

To request a Jones Act waiver, the first step is to submit a request to U.S. Customs and Border Protection ("CBP"), a DHS agency, for processing. Upon receipt of a waiver request, the CBP forwards the request to MARAD, the Secretary of DHS, DOD, and—if the transportation is energy-related—the Department of Energy ("DOE"). To determine if there are Jones Act vessels available to meet the need, MARAD surveys the maritime industry to establish the capability and availability of coastwise qualified vessels to meet the need of the requested transportation.

The DHS then goes through a variety of consultations. To establish the "national security" standard, the Secretary of DHS generally consults with the DOD. Additionally, if an area under another agency's jurisdiction is affected, the relevant agency may weigh in as well, such as the U.S. Coast Guard. For example, if timber must be moved, the Department of Interior may provide advice. Finally, the domestic maritime industry will consult with the DHS and the MARAD Administrator. Once all this input is received, the Secretary of DHS will determine whether (or not) a waiver is warranted.

Examples of Past Jones Act Waivers

Exxon Valdez: Following the grounding of the *Exxon Valdez* in 1989, Exxon requested a waiver to allow foreign-flag oil skimming barges to assist in clean-up efforts. MARAD, DOD, and the U.S. Coast Guard supported the waiver, with the Coast Guard adding that it supported their use until Jones Act vessels could effectively replace the foreign-flag skimmers. The DOE also recommended approval, citing the interest of national defense since the failure to act promptly and effectively could jeopardize the country's energy supplies. The U.S. Customs Service (CBP's predecessor) ultimately granted the waiver, but mandated that the vessels could not be used for supply purposes. This waiver and other associated waivers were subsequently extended until the threat passed.

Hurricanes Katrina and Rita: Following a DOE request, the DHS granted a general waiver after Hurricane Katrina in 2005 to move certain petroleum products. The DHS stated that the catastrophic destruction brought about by Hurricane Katrina dramatically impeded the production and transportation of oil, gas, and other energy sources. Additionally, the Administration decided to draw down the strategic petroleum reserve ("SPR") and needed foreign-flag vessels to transport the supply. There was nationwide support, especially with a spike in gas prices following the catastrophe. The domestic maritime industry, which also supported the waiver, acknowledged there was not capacity to handle distribution. After Hurricane Rita struck the Gulf Coast a few weeks later, the DHS issued another general waiver. This time, however, the domestic industry protested, claiming that there were coastwise-qualified vessels ready and able to assist. Following the expiration of the general waiver, the Administration issued waivers on a case-by-case basis.

Libya: In 2011, President Obama decided to draw down the SPR after commencing hostilities in Libya. The President authorized the release of 30 million barrels of oil, apparently anticipating shortages due to the unavailability of Libyan crude. Out of 45 shipments of crude, 44 used foreign-flag vessels. Following this SPR drawdown, Congress enacted legislation requiring future SPR waivers to provide a written justification for not using coastwise-qualified vessels.

Hurricane Sandy: Following Hurricane Sandy in 2012, the DHS issued a general waiver to allow foreign-flag vessels to transport petroleum products to New England and the Mid-Atlantic regions. The waiver did not allow for the transport of crude oil or blendstock components. The DHS issued the waiver four days after Hurricane Sandy's landfall in New Jersey, and the waiver lasted almost three weeks.

Polar Vortex 2014—Waiver Request Denied: With the arrival of a difficult winter in 2013-2014, New Jersey ran low on salt to clear roadways. The State requested a Jones Act waiver, which was denied because transporting road salts did not meet the "national security" standard. The State has been criticized for making the request due to its own poor planning and the availability of U.S.-flag vessels to provide the transportation.

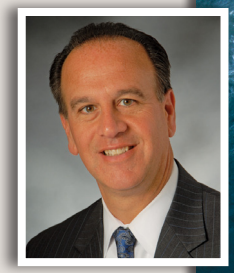
BRETT ESBER NAMED TOP TEN SHIPPING LAWYER BY *LLOYD'S LIST*

■ Blank Rome Partner **BRETT ESBER** was named one of the top ten lawyers for shipping law in *Lloyd's List* "One Hundred" (Edition Five), which promotes the most influential people in the shipping industry, from the top one hundred influential industry leaders to the top ten port operators, insurance personalities, regulators, classification societies, brokers, and finance executives.

Regarding Mr. Esber, *Lloyd's List* states:

> *The Blank Rome partner practices in the areas of international and domestic commercial transactions, corporate law, and finance. In the past year, he has worked on multimillion dollar transactions for U.S. flag operators, oil majors, and U.S. shipyards. His recent representative matters include work for an international liner shipping company in investigations before the U.S. Federal Maritime Commission. He is a new addition to this list.*

To view the full list of top ten shipping lawyers and *Lloyd's List* "One Hundred," please visit www.lloydslist.com.



BRETT M. ESBER

Looking Ahead: Are There Waivers in Our Future?

The last time the United States became involved in a Middle Eastern conflict—Libya in 2011—the President preemptively authorized a release from the SPR and the DHS issued a Jones Act waiver. Although U.S. forces have been involved in attacks in Iraq since August, drawing down on the SPR has not yet occurred. Gas prices and petroleum supply have not been interrupted, largely due to expansion in domestic supplies. However, a variety of factors may change this equation. At the time of writing, U.S. forces were increasing their participation in connection with the hostilities in Syria, and the conflict has raised supply risks in key oil-producing countries such as Iraq, Syria, Yemen, and Libya. Additionally, international sanctions against Iran and Russia have further depleted potential suppliers of oil. Should domestic production slow or the conflict in oil-producing regions increase, the Administration may need to take a hard look at another SPR drawdown.

Additionally, the increase in domestic production could also be a factor leading to Jones Act waivers. Currently, only about 50 Jones Act tankers exist, and growth in oil supply outpaces domestic transportation capacity. Additionally, under current law, crude oil cannot be exported, leaving producers in a potential conundrum of not being able to get their product to any market. While this in itself may not meet the "national security" standard for issuing a waiver, as we have seen in the past, disruption to energy supplies has been grounds for a Jones Act waiver.

Waiving the Jones Act requires meeting a high standard, namely, that a waiver is necessary "in the interest of national defense." Although requests from the DOD trigger an automatic waiver, discretionary waivers by the DHS require a number of factors to be met. In addition to demonstrating a national security need, Jones Act vessels must not be available to undertake the proposed transportation. Historically, waivers have not been granted absent a catastrophe, war, or a severe and substantial disruption to energy supplies.

In conclusion, Senator John McCain loves to stir the pot, or in his words, "appeal to the patron saint of lost causes," because of his fundamental belief that consumers could save billions of dollars if the Jones Act were repealed. This premise is, of course, hotly contested by the domestic industry. And, don't expect a Jones Act waiver to be granted unless there is an imminent and substantial threat to the national security of the United States, including an energy crisis. Rather, spend your time on determining how your operations should be conducted to comply with the Jones Act and plan appropriately well in advance. □

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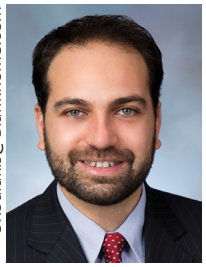
The Story of the Jones Act and the U.S.' Caribbean Territories

BY STEFANOS N. ROULAKIS



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The story of why the Jones Act does not apply to the U.S. Virgin Islands is not well known, but it has had and will have implications for the U.S. In particular, the Virgin Islands trade is often compared in policy discussions about the Jones Act to the Puerto Rico trade. The Virgin Islands also present a unique set of circumstances, as they are the only jurisdiction that is part of the United States and the U.S. customs zone, thus allowing the shipment of crude oil to the Virgin Islands without violating the crude export ban, and are exempt from the Jones Act. As policymakers and investors examine reviving the Virgin Islands' dormant refining industry to serve light U.S. crudes, there is renewed interest in the unique status and history of this territory.

The Virgin Islands, Puerto Rico, and the Jones Act

Puerto Rico and the Virgin Islands have different statuses and became part of the United States in different ways. Spain ceded Puerto Rico to the United States in 1898 under the Treaty of Paris, thereby ending the Spanish-American War. The United States acquired the Virgin Islands from the Kingdom of Denmark in 1916 pursuant to the Treaty of the Dutch West Indies. 39 Stat. 1706.

The two territories were differently situated—Puerto Rico had long been an important Spanish colony, with several large cities and ports. The Virgin Islands were relatively insignificant, with a scant population and a maritime industry that was largely limited to a family-owned bunker operation.

With the passage of the Jones Act in 1920, Congress originally applied cabotage provisions to the territories and possessions of the United States, subject to a two-year grace period to allow the territory to establish adequate shipping services. After this grace period, the President could exempt by Executive Order, on an annual basis, a territory or possession from the cabotage laws if an adequate shipping service had not yet been established. Puerto Rico was never exempted from the Jones Act cabotage provisions because it has long been considered a "producing possession," with trade large enough for "one line to devote all of its business." *Exempting Virgin Islands from Coastwise Laws: Hearing on S. 754 Before the H. Comm. on Merchant Marine and Fisheries,* 74th Cong. 17 (1936).

However, the situation of the Virgin Islands was markedly different than Puerto Rico. In 1931, Herbert Hoover found the island's poverty situation so dire that he labeled it a "poorhouse," something that Congress found significant when it solidified the Virgin Islands' exemption from the Jones Act in 1936. The drafters of the Virgin Islands exemption sought to ameliorate the economic situation of the Virgin Islands by allowing its port to benefit from foreign-flag trade and foreign direct investment. Additionally, there is evidence that Congress sought to protect the Danish-owned bunker trade to ensure the ability of friendly vessels to cross the Atlantic after transiting the Panama Canal.

In granting this exemption, Congress found that in contrast to Puerto Rico, the Virgin Islands were not a "producing" territory, and were largely reliant on foreign-flag trade coming into the port of St. Thomas. The economic disparity remains true today, as Puerto Rico's GDP is 41 times as large as the Virgin Islands', and Puerto Rico's exports total $61 billion more than the Virgin Islands'. Further, Puerto Rico's ratio of exports to imports is almost double that of the Virgin Islands.

Congress was also cognizant of the exemption's minimal effect on the development of a merchant marine. *Exempting Virgin Islands from the Coastwise Laws: Hearing on S. 754 Before the H. Comm. on Merchant Marine and Fisheries,* 74th Cong. 17 (1936). The committee was aware of the tremendous population and size differences between Puerto Rico and the Virgin Islands, which have only increased today. *Id.* at 23. While Puerto Rico has a population of 3.99 million, the Virgin Islands only has a population of 105,000. Puerto Rico's largest city, San Juan, has a population of 389,000, while Charlotte Amelie, the Virgin Islands' largest urban center, is a town of 18,000. Today, as in 1936, the Virgin Islands' small population ensures a minimal effect on the coastwise trade, conforming to the original intent of the exemption for the Virgin Islands from the Jones Act. Changing the exemption of the Virgin Islands under the Jones Act would require either an Executive Order or an act of Congress, while the applicability of the Jones Act to Puerto Rico can only be changed by an act of Congress.

THE VIRGIN ISLANDS also present a unique set of circumstances, as they are the only jurisdiction that is part of the United States and the U.S. customs zone, thus allowing the shipment of crude oil to the Virgin Islands without violating the crude export ban, and are exempt from the Jones Act.

Differences in Applicability of Jones Act Reflect Differences in the Status of the Two Territories

In addition to the socioeconomic differences between the two territories, Puerto Rico also differs from the Virgin Islands in the applicability of federal law. The District Court for Puerto Rico is organized pursuant to Article III of the U.S. Constitution, as are district courts located in the U.S. However, like federal courts in Guam and the Northern Mariana Islands, the District Court for the Virgin Islands is organized under the Territories Clause of the U.S. Constitution. U.S. Const., Art. IV, § 3.

While federal law is supreme when applicable in each territory, the application of federal law is automatic in Puerto Rico, while specific congressional intent is needed to apply a federal law to the Virgin Islands. Congress has determined that "[t]he statutory laws of the United States…shall have the same force and effect in Puerto Rico." 48 U.S.C. § 734. No analogous law exists for the Virgin Islands. Indeed, while the Supremacy Clause of the U.S. constitution is applicable to the Virgin Islands, local law cannot conflict with federal law only as regards "the laws of the United States *made applicable* to the Virgin Islands" 48 U.S.C. § 1574(a)(emphasis added).

This difference has manifested itself in many ways. For example, federal sentencing guidelines are not applicable to the Virgin Islands because Congress did not intentionally apply them to the Virgin Islands. *Gov't of V.I. v. Dowling,* 866 F.2d 610, 614 (3d Cir. 1989). In contrast, the Sherman Act is applicable to the Virgin Islands because of express congressional intent. *Norman's on the Waterfront, Inc. v. Wheatly,* 444 F.2d 1011 (3d Cir. 1971). Congress has declined to extend most federal income tax laws to Puerto Rico. Similarly, "mirror" tax provisions are in place in the Virgin Islands, meaning that the territory itself collects and keeps income taxes.

Congress has also extended some federal admiralty law to the Virgin Islands. Notably, the Passenger Vessel Services Act does not apply to the Virgin Islands, while it does to Puerto Rico. 46 U.S.C. § 55101. This accounts for the fact that the Virgin Islands are one of the largest cruise destinations in the region. The Seaman's Remedies Provisions of the Jones Act are applicable in the Virgin Islands. *Etu v. Fairleigh Dickinson Univ. W. Indies Lab., Inc.,* 635 F. Supp. 290, 292 (D.V.I. 1986) (noting the Jones Act provides federal seaman's causes of action in addition to traditional admiralty remedies).

Conclusions and Looking Ahead

It is an adage that "all politics are local," and the unique status of the Virgin Islands under the Jones Act is largely explained by local politics and history. Indeed, parochial interests such as the bunker trade and the economic development of the island were the key factors in exempting the Virgin Islands from the Jones Act. However, the relatively small size of the Virgin Islands made this possible while the larger and more advanced economy of Puerto Rico has historically made its law and economy more integrated with the United States. The unique status presents opportunities for many entities, including those in the energy and cruise industry. □

ECDIS: Are Your Watch Standers Ready for the Challenges?

BY ALAN M. WEIGEL

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The Volvo Ocean Race is a nine-month, around-the-world sailboat race covering 39,000 thousand miles in nine separate legs across four oceans. The 65-foot, high-tech sloops that compete in the race are crewed by some of the most highly trained and experienced professional ocean yachtsmen in the world. Nevertheless, on November 29, 2014, one of those yachts, TEAM VESTAS WIND, grounded on a charted coral reef, part of the St. Brandon archipelago, 268 miles off the coast of Mauritius.

The yacht's skipper and navigator have both admitted that they were not aware that the shoal was directly on their planned route; neither had time to fully check out the new track before the start of the leg and assumed they would be able to do so while racing. TEAM VESTAS WIND was using a vector-based electronic chart system, where the software decides what features get drawn on a screen at any particular location and zoom level. Both the skipper and navigator have admitted that they never zoomed in close enough on the electronic chart to see the shoal, and the crew sailed on to the reef at roughly 20 knots at night, having no idea it was there.

The TEAM VESTAS WIND grounding bears a striking similarity to the grounding in the English Channel of the MS PRIDE OF CANTERBURY, a cross-channel ferry operated between Dover and Calais. PRIDE OF CANTERBURY grounded off the English coast on a charted wreck because the watch officer was using incorrect display setting and the wreck was not visible on the vector-based electronic chart.

The carriage of Electronic Chart Display and Information Systems ("ECDIS"), which use vector-based electronic charts, is required for most tankers as of July 2015 and for most other cargo ships over the next three years. The TEAM VESTAS WIND grounding is a good reminder that even the most highly trained and experienced watch keepers need standard procedures and checklists that account for the unique operating characteristics of navigation systems. Are your shipboard procedures ready for the challenges of navigating with ECDIS vector-based electronic charts? □

2014 Revision to the Himalaya Clause for Bills of Lading and other Contracts of Carriage

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A Himalaya clause is a clause used in bills of lading and other contracts of carriage to confer a benefit to entities that are not a party to that contract. The purpose of the clause is to protect those acting on behalf of the carrier from direct action by extending the same rights, defenses, exemptions, and protections from liability enjoyed by the contractual carrier to the carrier's servants, agents, and subcontractors.

In 2010, the International Group of P&I Clubs and BIMCO reviewed the language of the Himalaya clause and published a recommended revision to the clause. The 2010 revision defined "Servant" as a "servant, agent, direct or indirect subcontractor, or other party employed by or on behalf of the Carrier, or whose services or equipment have been used in order to perform this contract…." The 2010 revision did not expressly include vessel managers.

Since the 2010 revision, however, U.S. courts have held vessel managers do not fall within the scope of the Himalaya clause and, thus, are not entitled to the COGSA defenses and limitations that protect carriers. As a result, in 2014, the International Group of P&I Clubs and BIMCO jointly agreed to a further revision to the clause. The 2014 revision defines "Servant" as follows:

> For purposes of this contract, the term "Servant" shall include the owners, managers, and operators of the vessel (other than the Carriers); underlying carriers, stevedores and terminal operators; and any direct or indirect servant, agent, or subcontractor (including their own subcontractors), or any other party employed by or on behalf of the Carriers, or whose services or equipment have been used to perform this contract whether in direct contractual privity with the Carrier or not.

Bills of lading and other contracts of carriage should be amended to incorporate the 2014 revision to the Himalaya Clause. The revised clause can be downloaded from the BIMCO website at www.bimco.org. □

NY Court of Appeals Upholds Separate Entity Rule at the Expense of Judgment Debtors

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On October 23, 2014, the New York Court of Appeals upheld the "separate entity" rule, which provides that "even when a bank garnishee with a New York branch is subject to personal jurisdiction, its other branches are to be treated as separate entities for certain purposes, particularly with respect to CPLR article 62 prejudgment attachments and article 52 postjudgment restraining notices and turnover orders." *Motorola Credit Corp. v. Standard Chartered Bank,* 2014 WL 5368774, *1, *2 (Oct. 23, 2014).

Accordingly, the court held that a judgment creditor could not, by way of restraining notice on a garnishee bank's New York branch, freeze assets held in the bank's foreign branches, and denied Motorola the opportunity to collect on a judgment in excess of $3 billion through Standard Chartered Bank's ("SCB") New York branch, despite the fact that $30 million in assets to partially satisfy the judgment were known to be located in one of SCB's branches in the United Arab Emirates ("UAE"). *Id.* at *6.

Distinguishing Motorola from *Koehler v. Bank of Bermuda Ltd*

The court's holding in *Motorola* is somewhat surprising in the wake of its decision in *Koehler v. Bank of Bermuda Ltd.* in 2009. There, the Court of Appeal's held that "a court sitting in New York that has personal jurisdiction over a garnishee bank can order the bank to produce stock certificates located outside New York, pursuant to CPLR 5225(b)." 12 N.Y.3d 533, 541 (2009). The court in *Motorola,* however, distinguished Koehler on two fronts. First, the bank in *Koehler* admitted that New York courts had secured personal jurisdiction over it. *Motorola,* 2014 WL 5368774 at *5. Second, the *Koehler* case had not implicated an analysis of the separate entity rule because the foreign bank did not raise it as a defense, but, even if it had, "that case involved neither bank branches nor assets held in bank accounts." *Id.*

The Separate Entity Rule

The *Motorola* court appears to base its holding primarily on the policy reasons underlying the separate entity rule.[1] Namely, (1) "the importance of international comity," *i.e.,* the fact that "any banking operation in a foreign country is necessarily subject to the foreign sovereign's own laws an regulations," (2) the need to "protect banks from being subject to competing claims and the possibility of double liability," and (3) the need to avoid the "'intolerable burden' that would otherwise be placed on banks to monitor and ascertain the status of bank accounts in numerous other branches." Id. at *3-*4 (internal citations omitted).

Notably, in connection with the *Motorola* action, SCB froze the $30 million in assets in its UAE branch in accordance with a restraining order served on SCB's New York Branch by Motorola, which prompted regulatory authorities in the UAE and Jordan to intervene. *Id.* at *2. The Central Bank of Jordan seized documents at SCB's Jordan branch, and the UAE Central Bank unilaterally debited $30 million from SCB's account with the bank. *Id.* These interventions and the contradictory directives that SCB received, the court found, exemplified the policies that necessitate the separate entity rule. *Id.* at *6. Additionally, the court reasoned that international banks have "undoubtedly…considered the doctrine's benefits when deciding to open branches in New York, which in turn has played a role in shaping New York's 'status as the preeminent commercial and financial nerve center of the Nation and the world.'" *Id.* at *5 (citing *Ehrlich-Bober & Co. v. University of Houston,* 49 N.Y.2d 574, 581 (1980)). Thus, the court found that "the abolition of the separate entity rule would result in serious consequences in the realm of international banking to the detriment of New York's preeminence in global financial affairs." *Id.* at *6.

The dissent criticizes the majority's affirmation of the separate entity rule as "outmoded" based upon the "current public policy regarding the responsibilities of banks" and "centralized banking and advanced technology" that permits bank branches to "communicate with each other in a matter of seconds," as well as its blanket application of the separate entity rule "where a judgment creditor seeks to reach assets held in a foreign branch." *Id.* at *11 (Abdus-Salaam, J. dissenting). The dissent also highlights the majority's ardent adherence to the common law, but failure to follow to the court's own decision in *Koehler. Id.* at *10, *12-*13 (Abdus-Salaam, J. dissenting). □

1. The court also found that the separate entity rule is deeply rooted in New York law, *Id.* at *4, and does not conflict with CPLR article 52. *Id.* at *5.

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