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Maritime Cybersecurity: A Growing Threat Goes Unanswered

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The maritime industry may be one of the oldest in the world, but in-depth reports issued by the United States Accountability Office ("GAO") and the European Network and Information Security Agency ("ENISA") confirm that our industry is as susceptible to cybersecurity risks as the most cutting-edge technology firms in Silicon Valley. With the ability to commandeer a ship, shut down a port or terminal, disclose highly confidential pricing documents, or alter manifests or container numbers, even a minor cyber attack can result in millions of dollars of lost business and third-party liability. Unfortunately, cybersecurity on board merchant vessels and at major ports is 10 to 20 years behind the curve compared with office-based computer systems and competing industries throughout the world. Like other industries critical to the global economy, such as the financial services sector and energy, it is time for the maritime industry to adopt a proactive response to the growing cybersecurity threat.

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Economic and Security Perspectives

Although not yet treated as a significant business risk, cybersecurity has for some time been viewed as a considerable threat by the governmental agencies responsible for both national and international maritime security. In late 2011, ENISA issued a sobering report focused on the cybersecurity risks facing the maritime industry, and provided recommendations for how the maritime industry should respond. Unfortunately, the most recent report issued by the GAO in June of this year confirms that the threat has grown more significant, but that the maritime industry has failed to make cybersecurity a priority. Copies of both the ENISA and GAO reports can be obtained by visiting Blank Rome's cybersecurity blog, Cybersecuritylawwatch.com.

ENISA was prompted, in part, to issue its 2011 report because the maritime sector is universally viewed as critical to the security and prosperity of European society. ENISA noted that in 2010, 52 percent of the goods trafficked throughout Europe were carried by maritime transport, compared to only 45 percent a decade earlier. The ENISA report further noted that, throughout Europe, approximately "90% of EU external trade and more than 43% of the internal trade take place via maritime routes." The industries and services belonging to the maritime sector are responsible for approximately three to five percent of EU Gross Domestic Product. This vast amount of trade flows into and out of the numerous ports located in 22 EU member states.

From both an economic and security perspective, the ability to disrupt the flow of maritime goods in Europe or the United States would have a tremendous negative impact on the respective local economies, and would also be felt worldwide. According to ENISA, "The three major European seaports (i.e., Rotterdam, Hamburg, and Antwerp) accounted in 2010 for 8% of overall world traffic volume, representing over 27.52 million TEUs." Additionally, these ports "carried in 2009 17.2% of the international exports and 18% of the imports." For its part, the GAO noted that, as an essential element of America's critical infrastructure, the maritime industry "operates approximately 360 commercial sea ports that handle more than $1.3 trillion in cargo annually." The Long Beach port alone services 2,000 vessels per year, carrying over 6.7 million TEUs, which accounts for one in five containers moving through all U.S. ports. Long Beach ranks among the top 21 busiest ports internationally, with significant connections to Asia, Australia, and Indonesia.

Given the interconnectivity of the maritime industry and paramount need to keep ports moving with speed and efficiency, a cyber attack on just one of the major EU or U.S. ports would send a significant negative ripple throughout the entire industry. With the ability to impact so many nations and peoples at once, the maritime industry presents a fruitful target for both private and political actors. Threats of cyber attacks can range from rival companies, to those wishing to advance a political or environmental agenda, to nation states advancing a national agenda, to terrorist organizations, and even cyber attacks from pirates or freelance hackers.

What Would a Cyber Attack Look Like?

Both the GAO and ENISA agree that the soft underbelly of the maritime industry is its reliance on Information and Communication Technology ("ICT") in order to optimize its operations. As was clearly noted by ENISA, ICT is increasingly used by all levels of the maritime industry "to enable essential maritime operations, from navigation to propulsion, from freight management to traffic control communications, etc." Examples of these technologies include terminal operating systems, industrial control systems, business operating systems, and access control and monitoring systems. ICT systems supporting maritime operations, from port operations management to ship communication, are commonly highly complex and utilize a variety of ICT technologies.

Further complicating cyber defense efforts, ICT systems used by ships, ports, and other facilities are frequently controlled remotely from locations both inside and outside of the U.S. Presenting an even higher level of concern, some ports have adopted the use of automated ground vehicles and cranes to facilitate the movement of containers.

Consistent with the threat facing other critical infrastructure sectors, cyber threats to the maritime industry come from a wide array of sources. As noted by the GAO, these include:

> ***"Advanced persistent threats—where adversaries possess sophisticated levels of expertise and significant resources to pursue their objectives—pose increasing risk. Threat sources include corrupt employees, criminal groups, hackers, and terrorists."***

While the source of the threat may vary, there is no doubt that the desire and willingness to act against the maritime industry is real. Major shipping companies have already begun to suspect that they have been victims of deliberate hacking attacks. It is well known that between 2011 and 2013, there was a cyber attack on the port of Antwerp orchestrated by organized criminals who breached the port IT system, facilitating the smuggling of heroin and cocaine.

Government and Industry Response

Numerous governmental agencies in both the EU and U.S. are starting to respond to the cyber threats facing the maritime industry. They have not yet, however, promulgated concrete guiding plans and policies. Instead, the governmental agencies have assumed the role of loudly sounding a clarion call to action and taken a supporting role for industry participants.

Responsibility to actively defend against the risks of a cyber attack and be in a position to effectively respond to an incident rests squarely on the shoulders of individual ship owners, shipping companies, port operators, and others involved in the maritime industry. The failure to assume this responsibility will undoubtedly lead to serious and potentially devastating consequences, including government fines, direct losses, third-party liability, lost customers, and reputational damage that cannot be repaired.

Mitigating the Threat

Companies looking to learn more about the steps they can take to meet the evolving cyber threat head-on should consult with cybersecurity professionals and available literature. Widely available resources include the National Institute of Standards and Technology, which issues the Framework for Improving Critical Infrastructure Cybersecurity and the National Infrastructure Protection Plan ("NIPP"), developed pursuant to the Homeland Security Act of 2002 and Homeland Security Presidential Directive 7 ("HSPD-7"). These documents, along with numerous others, can assist companies in developing a risk management framework to address cyber threats and use proven risk management principles to prioritize protection activities within and across sectors. □

Valuation in Maritime Chapter 11 Cases under the U.S. Bankruptcy Code: Genco and "NAV"

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On July 2, 2014, several months after Genco Shipping Trading Limited, a dry bulk shipping company with a fleet of at least 53 vessels, and affiliated entities entered Chapter 11 with a prepackaged plan of reorganization, U.S. Bankruptcy Judge Sean Lane entered a confirmation order overruling objections to the plan from the Official Committee of Equity Holders of the Debtors (Mohawk Capital, Aurelius Capital Partners, and OZ Domestic Partners). In his order, Judge Lane held that the reorganization plan was fair and equitable and did not unfairly discriminate against the equity holders under 11 U.S.C. Section 1129(b) and was brought in good faith as required by 11 U.S.C. Section 1129(a)(3).

Disputing Genco's Calculated Value

The main disagreement centered on the debtors' value used in the plan and the method used by the debtors and the plan's opponent, the Equity Committee, to calculate that value. A minimum value of $1.48 billion was necessary for the equity holders to recover and not be "out of the money." The Equity Committee contended that the debtors' valuation analysis, which produced a value below the $1.48 billion mark, was improper and flawed, while the debtors and supporting creditors responded that the equity holders were fortunate to receive the recovery called for by the plan (warrants covering six percent of the new equity in exchange for the surrender or cancellation of their existing equity interests).

The debtors put on experts that testified that the value of the Genco company was in a range between $1.36 billion and $1.44 billion. The upper end of the range was near the $1.48 million floor, arguably justifying the warrant issue to old equity, which was characterized by the debtors as a gift. The Equity Committee put on experts that testified that the value of the Genco company was in a range between $1.54 billion to $1.91 billion. If the Equity Committee was found to be correct, then the debtors' complex reorganization plan would not be fair to old equity and could not be confirmed.[1]

When a shipping line is viable—when any business is viable—then Chapter 11 bankruptcy often becomes a fight over value between stakeholders at different levels of the capital structure; a fight over differing visions of "'the present worth of future anticipated earnings' of the debtor corporation."[2] And that fight can be messy as "valuation is not an exact science."[3] To quote the U.S. Supreme Court, "[M]ankind's foresight is limited. The uncertainties of future estimates are recognized."[4]

Valuation Methodologies

Generally, valuation methodologies are various and the precise use of a given appropriate method or appropriate methods will vary depending on the company in question, its market profile, and the proposed use of the valuation in bankruptcy.[5]

The Genco company, of course, was in bankruptcy because of a balance sheet problem. It was and is a viable dry bulk shipping line with a valuable fleet and substantial cash flow. Genco was and is a going concern, and the challenge before the Court was to determine its reorganization value. Generally, in the valuation of such a firm, the Court should focus and account fully for the tangible and intangible value of the firm, consider the quality of the Genco management team, and the projected future cash flows.[6]

Judge Lane noted that there are three primary methods for valuing a company in a Chapter 11 reorganization: (1) discounted cash flow analysis ("DCF"); (2) market multiple or comparable company approach; and (3) comparable/precedent transaction approach. However, the debtors' valuation relied on a fourth method: net asset value, or "NAV," which is "based on independent appraisals that incorporate an impartial assessment of the broadest, most concrete consensus regarding future earnings." The debtors did address other methodologies as a "sanity check" to confirm their NAV-based valuation outcome. In contrast, the Equity Committee contended that all four methods should be used together, with DCF weighted most heavily as the methodology that best captured the tangible and intangible value of a reorganizing going concern.

The Court did a fine and comprehensive job of describing the methodologies in question. Judge Lane noted that the DCF method finds for the "net present value" of a company by projecting unlevered free cash flows over a forecast period, discounting those cash flows using a rate based on the company's weighted average cost of capital, and then adding in a present value normed "terminal value" for free cash flows after the forecast period. Comparable company analysis refers to comparable company value, norming the values by reference to variables such as revenue, earning, and cash flows, and applying a market multiple. Precedent transaction methodology looks at comparable transactions, weighting varying circumstances and using purchase prices and earnings/cash flow/EBITDA information for a subject company to derive a total enterprise value.

Understanding the "NAV" Analysis

The "NAV" value is as described above, and is a sum of fleet component appraisal values and other asset values (investment property, cash, and key contracts). The debtors' expert on vessel values did not appear to have physically inspected Genco's fleet vessels. Rather, the expert evaluated each vessel by reviewing three sets of fleet appraisals (including a set from his own firm and from the firm that was analyzing cash flow information) and then applying three assessment tools to find a final value: (1) econometric modeling (based on the expert's own proprietary models and algorithms and the normed earning power of each vessel, yielding a $1.215 billion fleet value); (2) time series analysis (market vessel price averages, yielding a $1.26 billion value); and (3) "last done" analysis (reports on recent sales and "market intelligence" on comparable vessel sales, yielding a $1.121 billion value).

The debtors' expert also evaluated survey data, operational history, vessel age, and similar factors, which adjusted these measures, yielding a "charter free market value" for the debtors' vessels of $1.211 billion. Then the Blackstone firm, the debtor's primary strategic/financial advisor, took the vessel expert's NAV vessel analysis and combined the vessel value with attributed values for net working capital, investment property, service contracts, and some other fixed assets to create the final NAV range of $1.364 billion to $1.444 billion with a $1.393 billion median.

In fighting the plan, as noted, the Equity Committee largely relied on a DCF analysis, which supported a $1.661 billion to $2.274 billion valuation range for Genco. The Committee had their expert on charter rates create adjusted rate projections, which were then used by Rothschild, the Committee's primary strategic advisor from the financial side, to calculate a terminal value based on certain factors, and to otherwise assert the valuation range above.[7]

The Court's Determination

Judge Lane found that DCF was not an appropriate method for the Genco case "largely due to the highly speculative nature of rate projections for the dry bulk shipping industry."[8] Instead, he found NAV to be appropriate as the main driver of a valuation analysis in the Genco case given the unique nature of the dry bulk shipping business, in combination with the comparable company analysis and to a lesser extent comparable transaction, and agreed with the debtors in concluding that the proper valuation does not reach the $1.48 billion mark. Based on the foregoing, under Judge Lane's order, the equity holders would be "out of the money" by approximately $87 million and only entitled to receive the warrant package under the approved plan.

> The Court carefully considered the evidence presented by the debtors and the Equity Committee on valuation, and its decision is thoughtful and detailed—well worth reviewing in contexts where fleet valuation is an issue.

The Court carefully considered the evidence presented by the debtors and the Equity Committee on valuation, and its decision is thoughtful and detailed—well worth reviewing in contexts where fleet valuation is an issue. A number of key themes emerged in the Court's decision:

- According to the Court, the Equity Committee "did not question [the debtors' vessel valuation expert's] methodology," but relied on argument and expert opinion that NAV is the wrong method to value an ongoing business in Chapter 11. Testing an expert's informational sources to identify biases, hearsay, and comparable data set variances is critical in assisting a court in evaluating and weighing such testimony.

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Valuation in Maritime Chapter 11 Cases under the U.S. Bankruptcy Code: Genco and “NAV” (continued from page 4)

- The debtors’ primary valuation opinions were sourced from experts who were not key debtor strategic advisors. The Equity Committee’s primary valuation opinion was offered by one of its key strategic advisors, the Rothschild firm. Use of a strategic advisor in this capacity can enable broad discovery on client goals and approaches, which can inform how a court approaches testimony and opinions on value.

- When each team put up experts to address charter rates (the key to the Equity Committee’s DCF-based valuation), the Equity Committee used an expert who is an industry leader, a former shipping concern CEO with a strong market-making reputation, whereas the debtors used a firm that forecasts shipping rates as a core part of its business. This Court responded more favorably to the deeper quantitative grounding of the debtors’ expert’s opinions on rates, as opposed to the qualitative expertise of the Committee’s expert in evaluating such forecasts.

- When the Court evaluated all other valuation methodologies, the debtors smartly led the Court back to how NAV values either mirrored certain results or was a methodology used in a related process, like the giving of a transaction fairness opinion.

- The Court found that it was notable that no player on the Equity Committee was willing to buy into the debtors’ capital structure post-emergence at the valuation levels suggested by the Committee. □

Is the U.S. Prepared Legally and Operationally to Protect Its Arctic Interests?

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The answer to this question is a resounding “no.” The U.S. is not prepared to protect its interests in the Arctic over the next decade. The primary legal regime that is being relied upon by all members of the Arctic fraternity, the Law of the Sea Convention, has not been adopted by the U.S. The operational resources needed to pursue our interests have not been funded, and there is currently little prospect that they will be funded in the near future. U.S. interests in the Arctic are vast. They include oil and gas, shipping, environmental concerns, climate change, and the rights and interests of Alaskan native communities. This article describes why we are so unprepared.

A Legal Regime for the Arctic

The U.S. is one of eight member nations of the Arctic Council. The others are Canada, Denmark, Finland, Iceland, Norway, the Russian Federation, and Sweden. Next year, the U.S.

Valuation in Maritime Chapter 11 Cases under the U.S. Bankruptcy Code: Genco and “NAV” (endnotes)

1. There were a number of other issues litigated at the Genco confirmation, including the “good faith” of the plan proposed (an argument that rode largely and practically on the Equity Committee being successful in convincing the Court that their position on value was correct) and the extent of third-party releases granted under the plan. This note does not address these points.
2. *In re Genco Shipping & Trading Limited, et al.*(“Genco”), 513 B.R. 233, 243 (Bankr. S.D.N.Y. 2014) (citations omitted). “The basic question in a valuation for reorganization purposes is how much the enterprise can earn.” *Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific Railroad,* 318 U.S. 523, 540, rehearing denied, 318 U.S. 803 (1943).
3. *Id.* at 242.
4. *Reconstruction Finance Corp. v. Denver & Rio Grande Western Railroad Co.,* 328 U.S. 495, 522 n.29, rehearing denied, 329 U.S. 824-25 (1946).
5. *Genco,* 513 B.R. at 243; I. Ratner, G.T. Stein, J.C. Weitnauer, Business Valuation and Bankruptcy at 25 (2009) (“When valuing a business as a going concern, [an asset valuation approach, an income valuation approach, and a market valuation approach] should be considered prior to choosing the most appropriate valuation approach (or approaches) to use. Entities that are going concerns are typically valued using the market approach and/or the income approach. However, depending on the industry, the asset approach may also be appropriate. For example, asset-intensive businesses with low profitability relative to their invested capital may be more appropriately valued using the asset approach under a going-concern assumption”); *see also Assocs. Commercial Corp. v. Rash,* 520 U.S. 953, 955-56 (1997) (method of valuation varies depending on debtor’s use of its assets).
6. *Genco,* 513 B.R. at 247 (noting that the Equity Committee argues that an asset-based valuation methodology violates what Judge Lane likewise regards as a generally accepted reorganization valuation approach and thus is inappropriate; Judge Lane nevertheless focused on the specific characteristics of the dry bulk carrier sector in the maritime industry and as developed further in the opinion, found the “NAV” approach the best method for Genco, its plan, its reorganization, and its sector).
7. The debtors had Blackstone create a parallel DCF analysis, which, unsurprisingly, yielded a valuation range similar to that identified by the debtor NAV model. *Id.* at 255 fn. 32.
8. *Id.* at 244. The decision conceded that DCF is a “traditional” analysis often used to determine reorganization value, but noted that DCF only works when a company accurately projects future cash flows. On cross examination, the Equity Committee’s experts conceded that dry bulk shipping rates are “volatile and the industry can be characterized as cyclical.” *Id.* at 255. Blackstone, the debtors’ strategic advisor and NAV valuation aggregator, concluded that “[i]n the global drybulk shipping industry, charter rates are inherently volatile and can change drastically on a daily basis. This makes charter rates difficult to predict and cash flow projections inherently unreliable.” *Id.* Accordingly, on what it described as largely undisputed testimony, the Court ruled that the dry bulk market was fragmented, with low barriers to entry, and little opportunity for market participants to differentiate themselves. This leads to a context according to the Judge where daily market supply and demand conditions determine rates on a daily basis, constraining the ability to project cash flows in DCF analysis. *Id.*

takes over as Chair of the Council. But the Arctic Council is a voluntary organization with few resources to implement or monitor its own guidelines. It has no formal treaty status and no enforcement authority.

The only international framework that presently applies to claims and resolution of conflicts in the Arctic is the Law of the Sea Convention. As then-U.S. Coast Guard Commandant ADM Robert Papp, Jr., testified before the Senate Committee on Foreign Relations at a June 12, 2012 hearing, “[T]he Coast Guard needs the Convention to ensure America’s Arctic future.” Admiral Papp also stated that “[o]f the eight Arctic nations, only the U.S. is not a party to the Convention.” Further, in testimony before the House Transportation and Infrastructure (“T&I”) Committee on July 23, 2014, Ambassador David Balton, Deputy Assistant Secretary of State for Oceans and Environment, echoed this view, stating, “The United States could significantly advance our national security interests in the Arctic by joining the Law of the Sea Convention. Notwithstanding the strong support of past administrations (both Republican and Democratic), the consistent backing of the military, and the support of all relevant industries and environmental groups, the Convention remains a key piece of unfinished international business for the United States. Further delay serves no purpose and deprives the United States of the significant economic and national security benefits we will gain by becoming a Party to the Convention.”

> The U.S.’s strategic and economic interests in the Arctic are too great for the nation to continue to fail to come to grips with both the legal and operational requirements of protecting those interests, and we will have squandered our opportunity to do so if Congress and the Administration do not act soon.

Why the Law of the Sea Convention?

It is only with ratification of the Convention that the U.S. will have a formal seat on the Commission on the Limits of the Continental Shelf established under the Convention and be able to protect its claims to a vastly extended continental shelf of up to 600 miles containing potentially extensive oil and gas deposits. The Russian Federation has already filed its claim to an expanded continental shelf, as have Norway, Denmark, and Canada. The U.S. can only observe and protest publically to other nations’ claims with which it may disagree. There is no international forum in which the U.S. can currently bring a legal challenge. With the rapidly deteriorating relations between the U.S. and Russia, it is foolish to think that other members of the Arctic community will stand up to protect U.S. interests with regard to Russian claims in the Arctic when they have their own interests to protect, and when the U.S. has not acted to protect its interests on its own.

Resources for the Arctic

While the State Department has the lead policy role for the Arctic and Secretary of State Kerry will chair the Arctic Council next year, it is the U.S. Coast Guard that has the primary responsibility for patrolling the Arctic and protecting U.S. shipping and maritime interests there. The Coast Guard also has the role of responding to any future oil spills in the Arctic. A number of U.S. companies have expressed interest in drilling in the Arctic, but none have done so to date. The main missions of the Coast Guard in the Arctic are described in its Arctic Strategy of May 2013 (see www.uscg.mil/seniorleadership/DOCS/CG_Arctic_Strategy.pdf).

But, the Coast Guard’s resources are limited by competing missions and declining budgets. One of the key challenges facing Congress is whether to fund the Coast Guard to build new icebreakers. Already, the Russian Federation has committed to building a new fleet of nuclear-powered icebreakers. Yet, Congress has withheld funds for a new Coast Guard icebreaker and some have even called for the Coast Guard to lease an icebreaker from the private sector. The cost to build new polar icebreakers is estimated at $1 billion each, but the long-term cost of not providing this vital platform will be measured in the tens of billions.

The Coast Guard has two heavy polar icebreakers and one medium icebreaker. (The status of these ships is described in detail in a June 5, 2014 report by the Congressional Research Service, entitled “Coast Guard Polar Icebreaker Modernization: Background and Issues for Congress.”) The heavy icebreakers are the *Polar Star* and the *Polar Sea*—both built by Lockheed Shipbuilding of Seattle, WA, in the early 1970s. Both ships are now beyond their expected 30-year life. *Polar Star,* commissioned in 1976, was placed in caretaker status on July 1, 2006, but Congress provided $57 million to repair the ship and she was returned to service in the Antarctic last year in support of NSF missions there. Due to an engine failure, the *Polar Sea* was placed in inactive status in 2011.

(continued on page 7)

Is the U.S. Prepared Legally and Operationally to Protect Its Arctic Interests? (continued from page 6)

Congress is still debating what to do about the *Polar Sea.* In the Coast Guard and Maritime Transportation Act of 2012 (P.L. 112-213), Congress directed the Coast Guard to conduct a business case analysis of the options for and costs of reactivating the *Polar Sea* until September 20, 2022. In this year's Coast Guard bill, the House continues to press the Coast Guard to provide an analysis of the cost effectiveness of acquiring or leasing new icebreaker assets. (H.Rept. 113-384). At the recent House T&I Committee hearing in July, VADM Neffenger stated that the Coast Guard is still studying the issue of the reactivation of the *Polar Sea.* The Coast Guard has also made clear that there is no room in the existing Coast Guard budget to fund a new icebreaker without cannibalizing other high priority missions.

In the meantime, the House Appropriations Committee deleted $6 million requested by the Coast Guard to continue design work on a new icebreaker because the Coast Guard has carryover funds. At the same time, the Senate Appropriations Subcommittee for the Department of Homeland Security, which includes the Coast Guard, included the $6 million request and added $8 million to reactivate the *Polar Sea.* These differences will have to be worked out in any conference at the end of the year. If there is only a Continuing Resolution, no new funds will be provided for this project and the status quo will be maintained.

Another key goal of the Coast Guard and the U.S. in the Arctic is to maintain maritime domain awareness or knowledge of what is happening in the Arctic. This is one of the Coast Guard's key missions in the Arctic as the lead for this activity in the Administration. The Senate's Coast Guard authorization bill directs the establishment of an Interagency Arctic Maritime Domain Awareness Committee (Section 206 of S. 2444). At a recent Senate markup of the defense appropriations bill for FY2015, $5 million was added to the defense budget for DARPA for Arctic Domain Awareness programs.

The Senate DARPA funding increases raises a valid question, which was also raised by ADM Papp in talking to reporters following his final State of the Coast Guard address in Washington, D.C., on February 27, 2014: "Who should pay for the U.S. polar icebreakers?" Papp answered this question by saying, "[T]he Coast Guard shouldn't bear the full brunt of the cost of the icebreaker because it serves the entire country not just the United States Coast Guard" (as reported by *USNI News Editor* on February 27, 2014). The capability is needed for defense as well as other purposes, and the Coast Guard should not be the only agency whose budget is tapped for this capability.

New Advisors for the Arctic

On July 16, 2014, Secretary of State Kerry named two top officials to advise him on Arctic issues. This may have been partly in response to calls from certain members of Congress, e.g., Congressman Larsen (D-WA), to have a special envoy to the Arctic. ADM Papp will serve as the first special representative to the Arctic. Fran Ulmer, who presently leads the U.S. Arctic Research Commission, and was a former Alaskan Lieutenant Governor, will be his special adviser on Arctic science and policy (as reported in *Greenwire* on July 17, 2014: "ARCTIC: Kerry names 2 top-level advisers for region").

Both advisers will bring a wealth of knowledge and experience to these issues. They will also be critical to providing policy advice to Secretary Kerry as he gets ready to chair the Arctic Council next year.

We can only hope that, with their leadership and the leadership of key members of Congress, the U.S. will be better prepared to pursue ratification of the Law of the Sea Convention and to provide the resources needed to manage and protect its interests in the Arctic. The congressional actions noted above are mere band-aids and fail to begin to substantively address the solutions required to address the national interests of the U.S. The U.S.'s strategic and economic interests in the Arctic are too great for the nation to continue to fail to come to grips with both the legal and operational requirements of protecting those interests, and we will have squandered our opportunity to do so if Congress and the Administration do not act soon. □

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Collection of Evidence in the U.S. for Use in Foreign Legal Proceedings under 28 U.S.C. Section 1782: Recent Highlights

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Critical evidence, needed for the resolution of a dispute abroad, may be located in the United States. A key witness, whose testimony is essential to the foreign litigation, may reside in the U.S., or important financial or other documentary evidence may be found only in this country. As we have discussed in previous articles, section 1782 of the United States Code ("section 1782") offers a powerful tool for the collection of evidence in the U.S. for use in foreign legal proceedings. The statute allows either a foreign tribunal *or* a *party to foreign proceedings* to apply directly to a U.S. federal court for an order directing that a witness be examined or that evidence be disclosed for purposes of a foreign legal proceeding. The procedure is highly efficient; by taking advantage of section 1782, foreign litigants can often avoid and bypass the unwieldy and time-consuming requirements of letters rogatory or requests for evidence collection under the Hague Convention on the Collection of Evidence Abroad in Civil or Commercial Matters.

Foreign Private Arbitrations

The value of section 1782 has been conclusively demonstrated in connection with foreign court proceedings or similar judicial or quasi-judicial proceedings. As we reported in a 2013 article, however, there remains an important open question whether section 1782 may be used to collect evidence in the U.S. for *foreign private arbitrations* to which a governmental entity is not a party.

At the moment, the law remains unsettled, and the federal courts across the U.S. are still divided on the question whether section 1782 may be used to gather evidence in this country for use in foreign private arbitrations. In January 2014, the U.S. Court of Appeals for the Eleventh Circuit withdrew an earlier opinion, issued in 2012, which had held that foreign private arbitral bodies are "foreign tribunals" in connection with proceedings before which evidence may be collected in the U.S. pursuant to section 1782. Thus, the only currently binding appellate rulings on the issue are from the Courts of Appeals for the Fifth and Second Circuits, which do not recognize foreign private arbitral bodies as foreign tribunals for section 1782 purposes. Notwithstanding these appellate rulings, however, a number of federal district level courts have found to the contrary, and have allowed use of section 1782 to collect evidence for use in purely private foreign arbitrations.

The scope of the rulings of the various federal courts, whether at the district or appellate level, is in any event limited geographically to the areas under the particular courts' jurisdiction. Thus, when considering whether to seek evidence for use in a foreign private arbitration, one must look carefully at the controlling case law in the U.S. federal district where the evidence or witness is listed. Also, for reasons more fully discussed in our prior article, where an arbitration arises out of a contractual arbitration clause that prohibits judicial review, a section 1782 application may face an uphill battle no matter where in the U.S. the section 1782 application is made. The U.S. Supreme Court may ultimately step in to resolve the issue reflected in the conflicting case law referenced above, but until then great care must be taken, and counsel should be consulted, before deciding whether to launch an application seeking evidence for use in a foreign private arbitral proceeding.

Collecting Evidence from a Foreign Sovereign's Lawyers: The "Prestige" Litigation

Section 1782 was the subject of a July 2014 ruling by the Second Circuit Court of Appeals in a case arising out of the 2002 oil spill from the vessel *Prestige* off the coast of Spain. At issue were records in the possession of attorneys in New York, who had represented the Spanish government some years ago in New York proceedings relating to the oil spill. Litigants in later proceedings in Spain, including the captain of the *Prestige,* asserted that certain witness statements, which had been submitted in the prior New York proceedings and prepared with the assistance of the New York attorneys, contained falsehoods. Those litigants asserted that the true facts were helpful to them, and would help to exonerate them in the Spanish proceedings. Accordingly, they made an application under section 1782 to take the testimony of the New York attorneys and for disclosure of the attorneys' records relating to the preparation of the declarations.

The Court of Appeals held that the district court had not abused its discretion in denying the section 1782 request because, *inter alia,* the Spanish proceedings for which the evidence was sought were essentially at a close. The Court of Appeals also ruled, however, that the evidence might be relevant to future appellate proceedings in Spain, and therefore ordered the New York attorneys not to destroy the relevant records for a period of five years. In so doing, the court specifically overruled the objection that the section 1782 application was essentially one against a foreign sovereign (Spain), such that the documents would be protected under the Foreign Sovereign Immunities Act.

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Voyage Charters (4th Edition)

Blank Rome Partner John Kimball recently co-authored the fourth edition of ***Voyage Charters,*** published by Informa Law from Routledge.

Widely regarded as the leading authority on voyage charters, this book is the most comprehensive and intellectually-rigorous analysis of the area, is regularly cited in court and by arbitrators, and is the go-to guide for drafting and disputing charterparty contracts.

Voyage Charters provides the reader with a clause-by-clause analysis of the two major charterparty forms: the Gencon standard charterparty contract and the Asbatankvoy form. It also delivers thorough treatment of COGSA and the Hague and Hague-Visby Rules, a comparative analysis of English and U.S. law, and a detailed section on arbitration awards.

To learn more, or to order a copy of ***Voyage Charters*** (4th edition), please visit http://www.taylorandfrancis.com/books/details/9780415833608.

Time Charters (7th Edition)

Blank Rome Partners John Kimball and Thomas Belknap recently co-authored the seventh edition of ***Time Charters,*** published by Informa Law from Routledge.

Acclaimed as the standard reference work on the law relating to time charters, this new edition provides a comprehensive treatment of the subject, accessible and useful both to shipping lawyers and to shipowners, charterers, P&I Clubs, and other insurers. It also provides full coverage of both English and U.S. law, now updated with all the important decisions since the previous edition.

To learn more or to order a copy of ***Time Charters*** (7th edition), please visit http://www.wildy.com/isbn/9780415833660/time-charters-7th-ed-hardback-informa-law. □

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Why Arbitration? Why Not?

BY DOUGLAS J. SHOEMAKER

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In negotiating and drafting agreements for maritime and energy transactions, the parties inevitably consider whether and, if so, how to define the process for dispute resolution. With respect to "bluewater" charterparties, arbitration is fairly common. However, in other agreements, such as master service, supply, purchase and sale, bunkering, towing, stevedoring, and terminal agreements, among many others, it appears the parties more often agree to litigation in a particular court or city or the contracts are silent with respect to dispute resolution. So, why aren't parties to other maritime and energy-related transactions considering arbitration? The purpose of this article is to examine the most common arguments for and against arbitration as well as weigh the pros and cons.

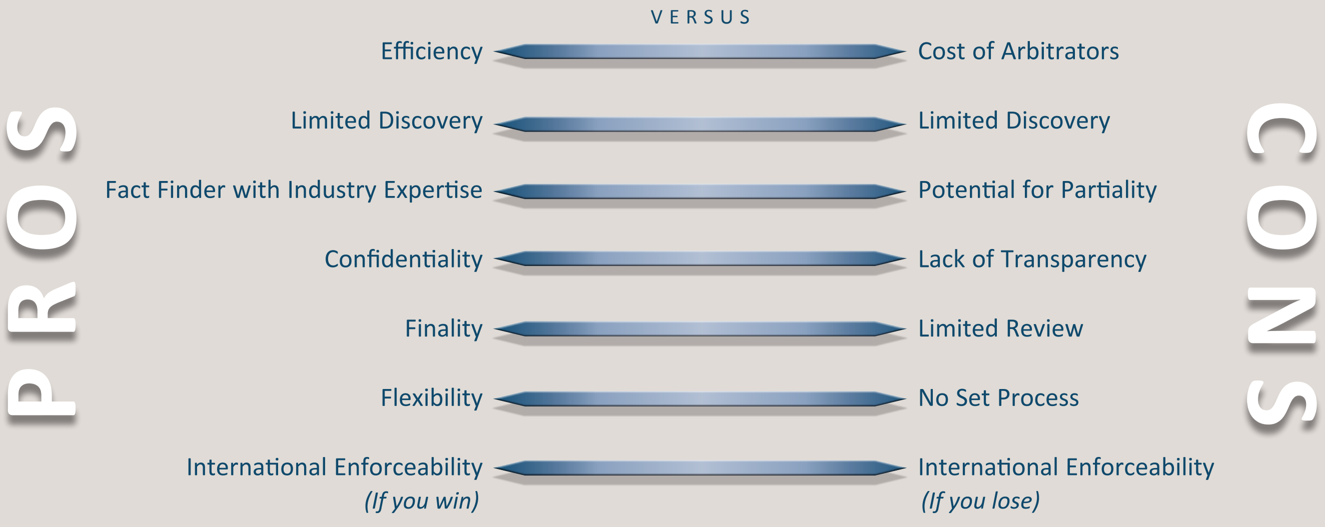
I admit at the outset that I am generally a proponent of arbitration with respect to contractual disputes. My experience includes both domestic and international arbitrations under a variety of rules, including the Society of Maritime Arbitrators ("SMA"), London Maritime Arbitrators Association ("LMAA"), American Arbitration Association ("AAA"), and JAMS (formerly "Judicial Arbitration and Mediation Service"). Recently, we have participated in several arbitrations under the rules of the Houston Maritime Arbitration Association ("HMAA").[1] Our experience with the HMAA and SMA has been particularly good.

In 21 years of contract negotiations, I have heard the usual arguments against arbitration. Interestingly, what may be a reason against arbitration for one person may well be a reason in favor of arbitration for another. Also, in some cases, a party may be adamantly opposed to arbitration, but either the reasoning is based on inaccurate information, or the specific issue could be resolved by simply revising the arbitration provision. Stated well by the U.S. Supreme Court, arbitration "is a matter of consent, not coercion."[2] The parties are generally free to structure their arbitration agreements as they see fit.

Efficiency v. Cost of Arbitrators

One of the most important considerations for any commercial party is that arbitration is (or should be) more efficient than litigation. In my experience, arbitrations are quicker and less costly than litigation. While it is true that the parties must pay for the arbitrators' time, this is offset by the streamlined process. Subject to the circumstances of the case, discovery is substantially limited in arbitrations as compared with litigation, and there is usually less need for expert witnesses since the arbitrators generally have expertise in the industry. The briefing and hearing schedule is usually flexible depending on the circumstances and, if unforeseen issues arise, it is usually easier to set up a hearing with arbitrators than fitting in a court's often full docket.

Here are some of the most common arguments for and against arbitration:



PROS	VERSUS	CONS
Efficiency		Cost of Arbitrators
Limited Discovery		Limited Discovery
Fact Finder with Industry Expertise		Potential for Partiality
Confidentiality		Lack of Transparency
Finality		Limited Review
Flexibility		No Set Process
International Enforceability *(If you win)*		International Enforceability *(If you lose)*

But is arbitration really faster than litigation? Generally, arbitrations in the U.S. are completed in less time than it would have taken to get to trial. According to the 2013 "Slowpoke Report" put out by *Texas Lawyer,* of the 24 federal judges in the Southern District of Texas, 17 had cases pending over three years. According to data provided by the AAA, the average time from filing to award in commercial arbitration is approximately 7.9 months. Under SMA rules, an arbitrator or panel must render an opinion within 120 days following the close of proceedings. Under the HMAA Rules, the arbitrators must render a written award within 30 days following the hearing or post-hearing memoranda, or within 60 days if a reasoned award is requested. The parties can agree to an additional 30 days, if necessary. According to the HMAA, large cases generally take 6 months from start to finish. Although it depends on the circumstances of the dispute, this is generally consistent with my experience. The last arbitration we participated in under HMAA rules took 6 months and 20 days. Had we filed the case in federal court, we would likely have just started depositions by that time.

> In my experience, the protections afforded to parties with respect to partiality of the fact finder are as good as or better in arbitration when compared to litigation.

Further, most arbitration rules provide for shortened procedures. Often, an arbitration provision will call for application of the shortened procedures for disputes below a certain threshold value. Under the SMA Rules for Shortened Arbitration Proceedings, the matter is heard by a sole arbitrator on documents only, the award will be issued within 30 days after the proceedings close, and the arbitrator's fee will not exceed $3,500 (or $4,500 if there is a counterclaim). HMAA rules similarly provide for "Fast Track Arbitration" for claims below $100,000, and, not to be outdone, the LMAA offers Intermediate Claims Procedure, Small Claims Procedure, and Fast and Low Cost Arbitration ("FALCA") rules.

Notwithstanding the relatively limited discovery and streamlined briefing and hearing process, it is axiomatic that arbitration will be less time consuming (and thus less costly) than litigation because arbitration eliminates or limits most evidentiary issues and activities particular to trial, such as *voir dire* and preparation of the jury charge or findings of fact and conclusions of law. Because attorney fees are generally the most significant cost in dispute resolution, it follows that a shorter process will result in less cost. Also, in considering the relative cost of litigation versus arbitration, parties often overlook the internal business cost in lost productivity while key employees are engaged in the discovery or trial processes.

Limited Discovery

The relatively limited discovery allowed under arbitration proceedings can be a double-edged sword. Some parties may look to this as a benefit of arbitration, while others may view this as a clear deficit. But, if you have ever drafted responses to voluminous requests for production or sat through depositions running on for hours, you will appreciate that discovery is one of the more costly aspects of litigation. The Federal Rules of Civil Procedure and the similar state court rules generally allow for very broad discovery via interrogatories, requests for production, and depositions. Clients from other countries often have a very difficult time understanding the broad scope of discovery permitted in the U.S. courts. While the federal rules and some states have imposed limitations on the scope of discovery, it is often left to the discretion of the judge.

Certainly, in some cases, extensive discovery is entirely appropriate and necessary. Although limited discovery is the general rule of arbitration, this is always subject to agreement of the parties and is ultimately subject to the discretion of the arbitrators. We have been involved in arbitrations where there has been significant written discovery and numerous depositions. Assuming the parties have selected qualified arbitrators, it is hard to argue that a party will be less likely to obtain the requisite information in arbitration as opposed to litigation.

Fact Finder with Industry Expertise v. Potential for Partiality

As discussed earlier, it would seem that having an arbitrator with experience in the industry at issue in a commercial dispute would benefit both parties. However, we have had many instances where parties refuse to accept an arbitration provision based on their belief that the potential for partiality may be greater with an arbitration panel than with a judge or jury.

While certain state and federal judges in Houston are well experienced in the maritime and energy industry, it is rare to find jurors that have such an understanding. In these particular areas, an understanding of the industry is crucial for the

(continued on page 13)

Why Arbitration? Why Not? (continued from page 12)

fact finder. For this reason, when maritime and energy cases do go to trial, extensive expert testimony is almost always required. In our experience, having a case before a federal judge who is well-versed in maritime law and familiar with the maritime industry generally results in a more efficient process and an appropriate result that is less likely to be appealed. However, in jurisdictions like Houston, where there are 11 federal district court judges and 24 state civil district court judges, the cases are assigned randomly. As Forrest Gump would say, "Life is like a box of chocolates. You never know what you are going to get." In a commercial setting, it would appear the parties are better served having some control over the fact finder's selection.

As many arbitrations call for a three arbitrator panel, wherein one arbitrator is selected by each party, and the third is chosen by the two so selected, assuming you have chosen a qualified arbitrator, who in turn selects a qualified arbitrator, it would seem the risk of partiality is substantially diminished. Further, under SMA rules, Section 9, prior to any hearing or submissions, the arbitrators must disclose all close personal ties and business relations with any one of: (a) the parties to the arbitration; (b) other affiliates or associated companies of the parties; (c) counsel for the parties; and (d) the other arbitrators on the panel. Thereafter, the parties may accept or reject the panel. Similarly, under HMAA rule 4.3.1, within 21 days after contact for possible appointment, an arbitrator must disclose to the parties any information that might cause the person's impartiality or independence to be questioned. Rule 4.3.2 requires subsequent disclosure throughout the arbitration proceedings. As discussed later, one of the bases for vacating an arbitration award is where evident partiality exists.

> The last arbitration we participated in under HMAA rules took 6 months and 20 days. Had we filed the case in federal court, we would likely have just started depositions by that time.

As in some states, where state court judges are elected and often spend time raising funds for those elections, or in smaller towns where opposing counsel visits with the judge about recent hunting and fishing trips, it is often difficult to explain to clients that partiality is not an issue. In my experience, the protections afforded to parties with respect to partiality of the fact finder are as good as or better in arbitration when compared to litigation.

Confidentiality v. Lack of Transparency

When a lawsuit is filed in state or federal court, the pleadings become part of the public record, subject only to an order from the court placing the documents under seal. If the case goes to trial, those proceedings will usually be open to the public and any resulting opinion will generally be posted electronically. In some circumstances, this transparency is an important and necessary aspect of dispute resolution. However, in commercial contract disputes, it is more likely the parties would prefer to maintain confidentiality, particularly if sensitive commercial terms are at issue. Unlike litigation, arbitrations are not conducted publicly, and the result may or may not be confidential depending on the agreement of the parties and/or the arbitration rules to be applied.

While the SMA generally publishes arbitration awards, the HMAA makes a point to maintain confidentiality. HMAA President Thomas Damsgaard told *TradeWinds,* "When you have commercial contracts, they are private and confidential. They are not public. So we are maintaining the privacy and confidentiality throughout the entire contractual period, including into the arbitrations scenarios, too." Parties favoring the SMA may prefer the ability to research previous awards concerning a particular issue, arbitrator, or arbitrators. Whether the parties choose to maintain confidentiality may depend on the nature of the contract or dispute. Under either HMAA or SMA rules, the parties can agree to maintain or give up confidentiality. In litigation, on the other hand, every aspect of the judicial process is open to public scrutiny, with limited exceptions.

Finality v. Limited Review

Parties often refuse to accept an arbitration provision because they feel the process for appeal or review is insufficient. While limited, both the Federal Arbitration Act[3] ("FAA") and the Texas Arbitration Act[4] ("TAA") provide for judicial review of arbitration awards. The grounds for vacating an arbitration award under the FAA or TAA are substantially the same:

1. where the award was procured by corruption, fraud, or undue means;
2. where there was evident partiality or corruption in the arbitrator(s);
3. where the arbitrator(s) were guilty of misconduct, such as refusing to hear material evidence; or
4. where the arbitrators exceeded their powers.[5]

Further, the Texas Supreme Court has ruled that under the TAA, the parties are permitted to contractually agree to expanded judicial review of arbitration awards.[6]

Other parties recognize the benefit of a process that has finality, such that the parties can get on with their business, which presumably does not focus on litigating or arbitrating disputes.

Flexibility v. No Set Process

Unlike litigation, where the procedures are set out in generic rules and the hearing and trial schedules must fit into the court's busy calendar, arbitration allows flexibility in its process as well as the result. Arbitration procedures can usually be specifically tailored to the circumstances. Arbitration hearings can often be set to fit the schedules and convenience of the parties and counsel, and minor matters can often be dealt with via telephone. Furthermore, because the parties are more directly involved in the process and because the arbitrators have expertise in the industry, the results of an arbitration are more likely to be tailored to the commercial and practical requirements of the specific dispute.

International Enforceability

Since many, if not most, maritime and energy-related transactions concern international issues and entities, arbitration is clearly favorable to litigation with respect to enforceability. Because most developed countries, including the U.S., have ratified the New York Convention, enforcement of an arbitration award is far more reliable in an international setting than litigation. The New York Convention has been ratified by 142 countries. The Convention significantly limits the grounds for challenging or refusing to enforce awards. To the contrary, civil court judgments are far more difficult to enforce across international borders.

Lagniappe

Notwithstanding everything else, although not as common as in personal injury disputes, when commercial disputes arise, we sometimes see parties who somehow feel personally aggrieved and "want their day in court." As we all know, it is more and more rare that a case actually reaches trial. Often, after extensive discovery is completed and significant costs have been incurred, the parties reach a settlement at mediation or "on the courthouse steps." With arbitration, it is more likely that the party principals will have an opportunity to be heard. With a shorter timeline, lower cost, and fewer evidentiary hurdles, witnesses in arbitrations are generally able to speak their piece. (As noted earlier, one of the few bases for vacating an award is where an arbitrator refuses to hear material evidence.) In some situations, it appears that the closer involvement of the parties in the arbitration process itself foments commercial resolution.

Conclusion

While there is no question that certain disputes are not appropriate for arbitration, generally, in the maritime and energy transaction setting, the "pros" of arbitration outweigh the "cons." Arbitration, unlike litigation, affords the parties considerable autonomy and flexibility in resolving their dispute. If the parties are careful in drafting the arbitration provision and in selecting the applicable rules or organization, and they select qualified arbitrators, arbitration can be an efficient and effective process for dispute resolution. □

[1] According to a recent article in *TradeWinds,* the HMAA is hearing more cases and being specified in more contracts. "Texas Arbitrators Expand Role in Dispute Resolution," by Eric Martin, May 23, 2014. We are seeing more tanker charterparties calling for arbitration in Houston under HMAA rules. This is not surprising since Houston is growing rapidly, is the hub for the U.S. energy industry, and is the home of one of the world's busiest ports.

[2] *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 559 U.S. 662, 681 (2010).

[3] 9 U.S.C. §§ 1-16.

[4] TEX. CIV. PRAC. & REM. CODE §§ 171.001-.098.

[5] See 9 U.S.C. §10(a) and TEX. CIV. PRAC. & REM. CODE § 171.088(a).

[6] See *Nafta Traders, Inc. v. Quinn,* 339 SW 3d 84 (Tex. 2011).

Maritime Legislation Left Pending as Congress Exits Stage Right for the Mid-Term Elections

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Since the 113th Congress passed the Water Resources Reform and Development Act of 2014 (“WRRDA,” Pub. L. 113-121), Congress has not been able to accomplish much. A variety of bills are left to be considered, if at all, during the lame duck session that is scheduled to begin the day after Veterans Day (November 12, 2014), according to Majority Leader Harry Reid. Any legislation not considered and passed by the end of this year will have to be reintroduced in the next Congress, the 114th, which begins in January 2015. (Each Congress lasts two years; legislation not passed by the end of the second year of a Congress dies.)

The Continuing Resolution

A Continuing Resolution (“CR”) will keep the U.S. government open through December 11, 2014, after Congress returns from the mid-term elections. The CR includes a three percent across-the-board cut in all discretionary spending. The CR also includes authorization for the President to support Syrian rebels with air strikes aimed at the Islamic State of Iraq and the Levant (“ISIL”).

As of this writing, it is impossible to predict whether the leadership of the Senate will change hands in the next Congress. If it does, however, the CR is likely to be extended into next year, leaving specific budget decisions with a new Congress.

The Coast Guard Authorization Bill

The perennial Coast Guard Authorization bill passed the House on April 1, 2014 (H.R. 4005). Its companion bill, S. 2444, is left hanging in the Senate, however, as a result of Senate Commerce Committee Chairman Jay Rockefeller’s wanting to incorporate language to increase federal oversight of cruise passenger protections against the objections of the cruise industry.

There are several key differences between the two Coast Guard bills. Some of the more pertinent provisions of interest to the maritime industry in the House bill include: extending assistance to small shipyards through 2016; allowing third-party classification societies to issue certificates of inspection, or any other certificates issued by the Coast Guard, to offshore supply vessels; a mandate to equip new build vessels that operate in cold waters with survival craft to ensure that no part of an individual is immersed in water; and requiring that 75 percent of food aid cargo must be carried on vessels owned by U.S. citizens, thereby restoring the cut that took place in last year’s Defense Authorization bill. The House bill also authorizes a report on the effect LNG exports would have on U.S. job creation.

The Senate bill also contains different provisions, which prominently feature safety and information, including: mandating the Coast Guard to publish a final rule on Automatic Identification Systems (“AIS”), which would have to be consistent with existing statutory provisions on vessel operations, and create a permitting process to allow a vessel traffic information service to use AIS to transmit navigation and safety information to vessels; mandating the federal government to provide notice of marine casualties to state and tribal government officials; and creating a fund to ensure the protection and fair treatment of seafarers during investigations.

Pollution and response legislation is also considered in the Senate bill, which would mandate the Coast Guard to make public all written incident plans within 12 hours of an oil spill. The vessel response plan for Mobile Offshore Drilling Units (“MODU”) would have to incorporate information for a planned response to a worst-case discharge from its facility response plan.

New Seafarers Fund Proposed

Another major topic addressed in both the Senate and House bills is the treatment of foreign seafarers that have been abandoned in the U.S. or are required to remain in the U.S. to appear as witnesses at Coast Guard or other criminal enforcement proceedings. The Coast Guard has been advocating for this legislation for some time. The House was initially reticent, but has now included a provision in its bill (Section 310); the Senate bill also has a section on the protection and fair treatment of seafarers (Section 503). The concept is to provide, through a system of payments paid into a new Abandoned Seafarers' Fund established in the Treasury, for the care of seafarers who have been abandoned in the U.S. by their ship owners and operators, or who have to remain in the U.S. as witnesses to potential federal crimes. The Fund is funded in the House bill by penalties assessed against ship owners for violations of the Act to Prevent Pollution from Ships. The Senate bill has a broader payment scheme but, in contrast to the House bill, allows for the provision of a bond or surety by a vessel owner in lieu of detaining a vessel in port. Both bills would allow the Fund to reimburse ship owners who have provided support for seafarers paroled into the U.S. to assist in Coast Guard investigations.

House Hearings on the Arctic and the Merchant Marine

The House Coast Guard and Maritime Transportation Subcommittee (Coast Guard Subcommittee) held hearings on the Arctic and the State of the Merchant Marine on July 23, 2014, and September 10, 2014, respectively. The focus of the Arctic hearing was on the Coast Guard's role in implementing the National Strategy for the Arctic Region and whether other agencies would contribute to the cost of a new polar icebreaker—highly unlikely. (For further information on the status of the Coast Guard icebreakers, see "Is the U.S. Prepared Legally and Operationally to Protect Its Arctic Interests?" on page 5 of this newsletter.) The focus of the hearing on the merchant marine was the impact of food aid and other cargo cuts on the U.S. flag fleet. The hearing also discussed legislation introduced by Chairman Duncan Hunter and Ranking Member Garamendi (H.R. 5270), which would require that liquefied natural gas exports be shipped on ships built in the U.S.

> In a disappointing performance, the 113th Congress has been one of the least active Congresses in recent history. This has meant gaps in the passage of maritime and maritime security legislation.

Chairman Hunter stated at the hearing on the merchant marine that he would ask MARAD Administrator "Chip" Jaenichen to appear before the Subcommittee after MARAD releases its long-awaited maritime strategy. The strategy, a result of two public meetings, is expected to be released sometime this year. We expect that industry will be given an opportunity to comment on the strategy.

The Future of Freight

In the meantime, the Department of Transportation ("DOT") held a series of webinars on developing a vision for transportation for the next 30 years, called "The Future of Freight" and "Moving America Forward." Comments on the DOT future agenda can be submitted to: 30years@dot.gov. Led by the DOT Policy office, the discussion identified the need to include ports in the next highway bill. Congress did pass a short-term extension of the highway bill through May 2015, but hasn't addressed the long-term funding issues.

Funding for the Maritime Security Program

We are also waiting for the outcome of the debate on funding for the Maritime Security Program ("MSP"). The Administration requested $186 million to fully fund MSP in FY2015. Although the Senate Transportation/Housing and Urban Development ("THUD") Appropriations Bill provided the full amount requested for MSP, the House THUD Appropriations bill contains only $166 million for the program. At this writing, the House and Senate Appropriations Committees have not yet settled on the level of funding for MSP or worked out a final version of the FY2015 THUD bill.

The issue of MSP funding was also raised during the House Coast Guard Subcommittee hearing, mentioned above. Two witnesses, one representing a MSP carrier and the other a U.S. maritime labor organization, urged for an increase in the per vessel support levels currently authorized for ships in the MSP. The witnesses cited declining Department of Defense ("DOD") and non-DOD government cargoes, and a need to achieve a more level playing field and commercial viability for MSP vessels, when competing against foreign flag vessels as justification for the MSP per vessel stipend increase.

TIGER Grants Announced

While the outcome of the FY2015 budget is unclear, agencies are continuing to spend FY2014 dollars. For example, DOT just announced the award of 72 TIGER grants in 46 states and the District of Columbia. The awards for intermodal projects of national and regional significance included a number of port-related projects, including $20 million for a modernization project at the Port of Seattle, $15 million for a new international terminal at the Virginia Port Authority, and $10.84 million for the rehabilitation of a terminal in Charleston, South Carolina. Looking ahead to 2015, there is a major discrepancy in the budget for this very popular infrastructure grant program between the House ($100 million) and the Senate ($600 million) bills, which will have to be resolved in any final FY2015 spending bill.

Conclusion

In conclusion, in a disappointing performance, the 113th Congress has been one of the least active Congresses in recent history. This has meant gaps in the passage of maritime and maritime security legislation. Hope springs eternal that after the mid-terms, Congress will focus its attention for the rest of the year on needed legislation, including funding for the Maritime Security Program and needed authorization of Coast Guard programs. Do not hold your breath, however, as there is good chance that we will have to wait until next year to see any action on key maritime legislation.

BLANK ROME LLP

YoungShip International Welcomes Texas and the United States!

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ASSOCIATE

YoungShip International (www.youngship.com) is a professional non-profit organization whose core purposes are to provide a competent, network-enhancing arena for its members and to promote young professionals in the global maritime industry. Since its inception in Bergen, YoungShip has grown to 18 branches on four continents in less than 10 years. Membership in YoungShip provides access to over 3,000 members within central maritime clusters in Norway, Singapore, Brazil, Mexico, Italy, Sweden, the Netherlands, Dubai, Cyprus, Kenya, Liverpool—and now, Texas!

Recently approved by the board of YoungShip International, YoungShip Texas is now the 18th branch in YoungShip's global network. YoungShip Texas provides YoungShip with exposure to the Houston and greater Texas maritime cluster (along with all other Texas port cities and industry hubs) that runs the gamut of maritime activity, including: all manner of vessel traffic (crude oil, refined petroleum and chemical product tankers, bulk and breakbulk carriers, container ships, passenger vessels, mobile offshore drilling units, inland and ocean-going barge traffic, heavy lift, and special project cargo vessels, etc.); maritime terminals to handle all of the foregoing vessels; and maritime support services, including legal, ship's agents and husbandry, shipyard repair work, marine surveyors, and insurance underwriters, agents, brokers, and adjusters. The Ports of Houston and Galveston constitute one of the largest commercial ports in the U.S., and handle 65 percent of all major U.S. project cargoes. The Ports are also ranked first in the U.S. in foreign waterborne traffic, first in U.S. imports, first in U.S. export tonnage, and second in the U.S. in total tonnage.

YoungShip Texas was founded in January 2013 by Blank Rome Associate Mitchell Machann and TITAN Salvage's Lindsay Malen. Together with the group's board, their vision has been to increase awareness of the younger generation coming into the maritime community and to strengthen their presence as growing leaders in the U.S. maritime sector. The group has acted as a networking platform for young professionals who are already in the maritime industry and support sectors, and has encouraged Texas maritime companies to support these growing young professionals. The group decided to join YoungShip to expand its presence in the international maritime community and to promote further awareness throughout the U.S. The board currently hosts bi-monthly networking events, attracting around 40-50 people at each event from various industry sectors. □

If you're interested in receiving more information about **YoungShip Texas** and the opportunities it provides, please contact **Mitchell Machann** at MMachann@BlankRome.com or 713.632.8636.

International Politics and Maritime Law Collide in Texas: *Ministry of Oil of the Republic of Iraq v. 1,032,212 Barrels of Crude Oil, et al.*[1]

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$100 million worth of disputed crude oil remains onboard a tanker about 60 miles offshore of Galveston, Texas, awaiting lightering, while a federal judge in Houston weighs the intricacies of international and maritime law.[2]

On July 28, 2014, the Ministry of Oil of the Republic of Iraq ("Iraq") filed suit in the Galveston Division of the Southern District of Texas, seeking to seize the cargo pursuant to Rules B, C, and D of the Federal Rules of Civil Procedure, Supplemental Rules for Admiralty or Maritime Claims. Iraq alleges the crude oil was illegally produced by the Kurdistan Regional Government of Iraq[3] ("Kurdistan"), pumped through the Iraq-Turkey Pipeline and loaded onboard the *MT UNITED KALAVRYTA*.[4] A warrant of attachment issued, but the cargo never came into the jurisdiction.[5]

Kurdistan entered a restricted appearance under Rule E(8) and filed a motion to vacate the attachment order. Kurdistan argued that 1) it was premature for the Court to consider vacatur, because the cargo had not yet been seized; 2) the Court lacked jurisdiction because the alleged conversion, if any, took place on land, within the Kurdistan region of Iraq; and 3) seizure of the cargo is barred under the Foreign Sovereign Immunities Act ("FSIA"). Iraq argued among other things that the conversion occurred at the time the oil was transferred from Turkish possession and loaded at Kurdistan's instruction onboard the *MT UNITED KALAVRYTA* as she lay in navigable waters off of Ceyhan, Turkey. After a reply and sur-reply, the Court heard oral arguments on August 22, and ruled on August 25.

As to prematurity, the plain language of Rule E(4)(f) suggests that a motion to vacate is only cognizable after property is arrested or attached.[6] However, in treating Kurdistan's motion to vacate as a jurisdictional challenge, Judge Miller found the motion ripe for consideration, stating that "it would be illogical and inconsistent with the court's independent review duties to permit a jurisdictional attack only *after* an arrest has occurred."

On jurisdiction, the Court noted the current state of the law: "A party seeking a federal forum for an alleged maritime tort claim 'must satisfy conditions both [1] of location and [2] of connection with maritime activity.'"[7] Based in part upon statements in Iraq's pleadings, the Court found that Kurdistan's alleged act of conversion occurred on land when Kurdistan exercised dominion over the crude oil without Iraq's consent. Thus, failing the location test for admiralty jurisdiction, Iraq's maritime claims under the supplemental admiralty rules were dismissed without prejudice, and the attachment vacated.[8]

And the Saga Continues

Over Kurdistan's objection, the Court granted Iraq leave to file an amended complaint, wherein Iraq asserts jurisdiction under admiralty and the FSIA, and brings multiple *in personam* claims against Kurdistan and any subsequent buyer of the crude oil, including claims for tortuous interference with a contract, and seeks to attach or arrest the cargo under Supplemental Rules B, C, and D, and also requests sequestration under Texas state law. As of this writing, the *MT UNITED KALAVRYTA* remains outside the Court's jurisdiction, off Galveston. □

[1] C.A. G-14-249, pending before Judge Gray H. Miller.

[2] Judge Miller is well suited for the task as his work prior to being appointed to the bench included practicing maritime law.

[3] Identified in subsequent pleadings as Kurdistan Region of Iraq, represented by the Ministry of Natural Resources of the Kurdistan Regional Government.

[4] Initially identified as *UNITED KALAVRTA*.

[5] On August 1, Iraq filed an amended complaint clarifying that the issues of ownership of the oil should be heard and determined by the courts in Iraq.

[6] In pertinent part, Rule E(4)(f) provides, "Whenever property is arrested or attached, any person claiming an interest in it shall be entitled to a prompt hearing…" Fed.R.Civ.P.Supp. E(4)(f) (emphasis added).

[7] Quoting *Jerome B. Grubart, Inc. v. Great Lakes Dredging & Dock Co.,* 513 U.S. 527, 534 (1995).

[8] Although it would appear admiralty jurisdiction may be available under Rule D, particularly because the bill of lading for the ocean carriage was issued "unto order" of Kurdistan, it is possible Iraq chose not to press Rule D at the time, as this would be an action to try title of the oil, and its first amended complaint called for ownership issues to be determined by Iraqi courts. Because of the dismissal, it was unnecessary for the Court to address Kurdistan's assertion of FSIA immunity. However, Judge Miller granted Iraq's request for leave to amend its complaint again to assert in personam claims against Kurdistan arising under any applicable exception to FSIA immunity under 28 U.S.C. § 1605.

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