
Prevention of pollution by oil

A selection of articles previously
published by Gard AS



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Introduction

This booklet contains a collection of loss prevention material relating to the prevention of pollution by oil, which over the years has been published by Gard.

Discharges of oil from shipping, offshore extraction of oil, and transport of oil in pipelines is the result of either accidents or "normal", deliberate operational discharges. Accidental discharges (oil spills) may occur when vessels collide, are in some sort of distress at sea (engine breakdown, fire, explosion), run aground, or when there is a blowout of an offshore oil well, or when a pipeline breaks. Much can be done to avoid accidents, but there will always be unfortunate circumstances and situations that give rise to accidents. Operational (i.e. non-casualty-related) discharges often arise during routine bunkering operations and are usually caused by negligence/lack of care. Other operational discharges, e.g. discharge of bilge water, fuel oil sludge, tank washings

etc., are deliberate in the sense that the discharge is intended (and permitted by the relevant legislation), however, because the amount of pollutant contained in the discharged liquid exceeds the permitted amount, this results in the discharge being performed negligently. Such discharges can be avoided.

The most important regulations governing the prevention of pollution by oil from ships are contained in the International Convention for the Prevention of Pollution from Ships (MARPOL) Annex I and cover prevention of pollution by oil from operational measures as well as from accidental discharges. With seaborne oil trade growing steadily since 1970, apart from a fall in the early 1980s during the worldwide economic recession, the aim of many of the safety measures included in MARPOL Annex I is to ensure that the majority of oil tankers are safely built and operated, and are constructed to reduce the

amount of oil spilled in the event of an accident (e.g. segregated ballast tanks, protected location of fuel tanks and double hull). Although the greater volume of the oil spilled can be linked to tanker incidents, commercial vessels other than tankers also contribute to oil pollution and MARPOL Annex I contains the required safety measures to prevent and minimise also this type of discharges (e.g. specific requirements for discharge of oil residue (sludge) and bilge water from machinery spaces).

Although all aspects related to the prevention of pollution by oil are not covered in this compilation, and local authorities may have additional, and sometimes stricter, requirements than those contained in MARPOL Annex I, this compilation will hopefully be a useful aid in providing guidance, some answers, or at the very least a pointer in the right direction when it comes to prevention of pollution by oil.

Shipping industry guidance on the use of Oily Water Separators Ensuring compliance with MARPOL

The global shipping industry is committed to a zero tolerance approach to any non-compliance with the International Convention for the Prevention of Pollution from Ships (MARPOL). In particular, the industry is committed to strict adherence to International Maritime Organization (IMO) requirements concerning the use of Oily Water Separators and the monitoring and discharge of oil into the sea.

National maritime authorities with responsibility for the environmental protection of their coastlines quite properly adopt a similarly strict approach to the enforcement of MARPOL.

Companies and seafarers need to understand that even the most minor violations of MARPOL will be detected by the authorities. In addition to large fines amounting to literally millions of dollars, both company management and seafarers can be liable to criminal prosecution and imprisonment for any deliberate violation of MARPOL requirements or falsification of records.

The following industry guidelines are intended to highlight some of the issues concerning the use of oily water separators (OWS) and to remind company management, and shipboard personnel, how they can act to prevent MARPOL infringements.

Ship operators have ultimate responsibility for establishing a compliance culture within their companies, and it is important that every effort is made to ensure that seafarers do not engage in any illegal conduct in the mistaken belief that it will benefit their employer. Every seafarer should be made fully aware of the severe legal consequences, both for the company and the seafarers themselves, of even minor non-compliance with environmental rules.

At first glance, the following advice may appear to contain nothing new; for the vast majority of shipping companies, these are issues which should already be fully addressed by their Safety Management Systems, as required by the International Safety Management (ISM) Code. Nevertheless, it is strongly recommended that the following guidance is carefully analysed by company management, and that a firm message of zero tolerance of non-compliance with MARPOL is circulated as widely as possible amongst seagoing personnel.

Ensuring compliance with MARPOL

Shipping companies should:

- Ensure that the ISM Safety Management System* is used to good effect
- Conduct internal and external audits on environmental compliance and act upon the findings, in full compliance with the ISM Code
- Require accountability on environmental compliance issues within the shore-side and shipboard management team
- Minimise waste leakage through good housekeeping and maintenance
- Make the best use of the available technology
- Establish a realistic operating budget for environmental compliance
- Provide meaningful and targeted training in environmental awareness and MARPOL compliance
- Provide specific and targeted training in oily water separator (OWS) operation
- Recognise the value of open communication with the crew
- Verify compliance through appropriate physical inspection, operational tests and document analysis
- Reward compliance and address potential non-compliance.

Technical approaches

General

Shipping companies should consider:

- Installing the latest equipment, or an upgrade in capability, if existing equipment does not perform to requirements
- Upgrading related equipment to minimise the production of waste
- The advantages of the pre-processing of waste
- Increasing tank capacity for waste where possible
- Modifying systems to facilitate in-port testing of treatment systems

- Implementing the periodic testing of the oil discharge monitoring equipment
- The use of cleaning agents consistent with equipment capability.

Control devices

Shipping companies should consider:

- Fitting uniquely numbered environmental tags on flanges to prevent unauthorised by-passing
- Using seals on overboard valves and cross-connections
- Installing strategically placed placards concerning compliance with MARPOL on board ship
- Fitting surveillance cameras
- Using tamper resistant recording systems, alarms and printouts to verify equipment operation, valve position, flow, OWS ppm, incineration, ship's position etc.
- Installing locked boxes or cages over monitoring equipment
- Fitting interlocks to prevent falsification of monitoring equipment inputs
- Using meters to record equipment running time for all engine room pumps.

Management approaches Role of shore management

Shipping companies should:

- Assign environmental responsibility to senior management and ship superintendents, Masters and Chief Engineers on board ships
- Ensure adequacy of internal audits and implementation of corrective actions
- Review maintenance records and procedures, log entries and handover notes
- Monitor workloads imposed by the operation and maintenance of oily water separators, and assess the impact on crew priorities
- Analyse waste streams to determine content, volume, means and capacity for storage, and estimate realistically the cost of treatment and disposal

- Ensure that the operating budget for waste removal and spare parts is adequate
- Establish comprehensive check lists for inspections/audits
- Verify that tests have been performed to ensure the continued correct operation of oily water separators
- Discuss findings and concerns with all levels of the engineering department
- Explore the potential gains from the installation of new technology.

Training

Shipping companies should:

- Ensure that training, whether shipboard, in-house or from an outside authority, is specific on relevant MARPOL requirements
- Consider supplementary training on MARPOL issues
- Document the training and assess its relevance
- Establish formal policy documents and procedures on MARPOL compliance and training.

Audits and inspections

Shipping companies should:

- Ensure that audits target the correct operation and maintenance of oily water separators
- Ensure that audits are designed to investigate environmental compliance
- Use a comprehensive audit check list and try to investigate beyond the check list
- Conduct unannounced inspections
- Verify:
 - routine maintenance
 - internal record keeping policies
 - the accuracy of records by cross-referencing
 - the progress of training
 - that written policies are available
- Test equipment under routine operational conditions
- Interview crew members
- Produce written audit reports
- Conduct post-audit meetings
- Ensure senior management review the audit reports
- Track audit findings until corrective action is complete.

The role of senior management on board the ship

General

The Master, Chief Engineer and senior officers in the engine department should:

- Promote awareness that any attempt to circumvent MARPOL requirements is totally unacceptable
- Determine the most appropriate procedures to maintain equipment and systems
- Minimise and if possible eliminate leakage through good housekeeping
- Correctly maintain the oil record book (ORB) and the record of discharges of oily water separator effluent into the sea
- Ensure that all routine shipboard and ISM safety meetings include time to discuss a specific agenda item on environmental matters
- Use sign on/off check lists for duty personnel.

Use of Oily Water Separators

The Master, Chief Engineer and senior officers in the engine department should:

- Instruct users of OWS equipment and verify the standard achieved
- Verify that maintenance schedules are being followed
- Ensure that audits include operational tests and a reconciliation of records
- Ensure that scheduled tank sounding logs are maintained and signed for
- Keep records of verification of correct operation through testing at sea
- Ensure that on board spares are adequate to meet the demand
- Create a culture where complacency in operation and maintenance standards is unacceptable.

Record keeping

The Master, Chief Engineer and senior officers in the engine department should:

- Ensure that all entries in the tank sounding log, ORB (oil record book[†]) and incinerator logs are completed by the crew member who performed the task
- Ensure that the ORB is examined and signed by the Chief Engineer and/or the Master
- Require signatures from those conducting overboard discharges and operational tests
- Ensure that ship familiarisation procedures verify that company environmental policy and operability of equipment are understood and followed
- Require the status of pollution prevention equipment to be

recorded in the handover notes of the responsible engineer and the Chief Engineer

- Record the independent verification of the correct operation of the oil discharge monitoring equipment
- Raise awareness of the need for an open chain of command and accurate record keeping that can be substantiated with Port State Control.

Tracking waste and maintenance

The Master, Chief Engineer and senior officers in the engine department should:

- Conduct analyses of waste disposal records
- Compare waste output to volumes purchased
- Compare waste disposal records with maintenance records
- Remove disincentives to off-loading waste, or purchasing additional material or parts related to safety and the environment.

The following publications may also be helpful:

*Guidelines on the Application of the IMO International Safety Management (ISM) Code (published by ICS/ISF)

†Guide for Correct Entries in the Oil Record Book (published by Intertanko).

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An electronic version of this leaflet is available at
www.marisec.org/ows

Clearing of shore pipelines following cargo operations at terminals

Introduction and background

Over the years, Gard has seen some extensive structural damage incidents as a result of overpressure in the liquid cargo tanks during loading operations. Such damages result in time consuming and costly repairs and unfortunately, for reasons unknown, the frequency of such incidents has increased, despite ship procedures addressing the risks involved.

In Gard's experience such incidents often occur during the loading operation phase when shore pipelines are being cleared, either by line blowing or by pigging¹. In one such incident, failure to maintain close communication with the terminal and a lack of ship personnel's attention to and awareness of the hazards related to an unattended open manifold valve during shore pipeline clearing operations seem to be the main causes. After the completion of loading of one tank and initial clearing of the line, the terminal requested the re-opening of the manifold valve for further blowing of the cargo line. The line was then left open and the ship reportedly did not receive any further information from the terminal. Some five hours after the request for the re-opening of the manifold valve, a "bang" was heard on deck and cargo was seen emitting from the tank vent. The results were significant damage to the transverse bulkheads between the tanks and cargo mixing between tanks.

The purpose of this circular is therefore to highlight the main issues involved in

order to minimize the risk of pollution and damage to the cargo tanks during cargo operations involving clearing of shore pipelines.

Reducing risks related to shore pipeline clearing operations. The immediate causes of any damage are gas being supplied at a too high pressure compared to the capacity of the ship's tank vent system arrangement; or that the amount of cargo being pushed into the ship's cargo tank is too large compared to the tank ullage available, or the cargo coming at too fast a rate. The root causes are, however, often complex and may involve lack of detailed planning of the overall operation, lack of communication between the parties involved during the operation, and personnel having a lack of training and awareness of procedures applicable to the actual operation.

The procedure for clearing shore pipelines between the shore tank and the ship manifold will depend on the facilities available at each terminal and the type of cargo loaded. Ship and terminal procedures will address all relevant aspects of the cargo and line clearing operations but it has become

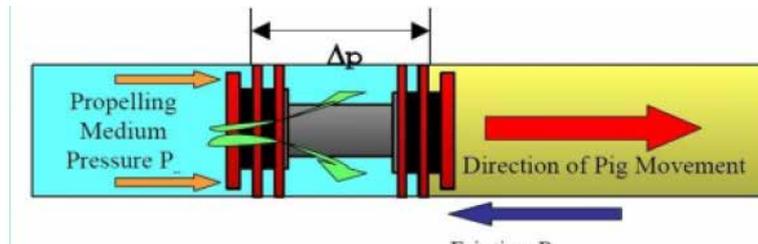
evident that enforcement of good communication between the involved parties prior to and during the entire operation is a key factor in order to prevent incidents. The following should therefore be observed:

Planning and responsibilities

All cargo operations must be carefully planned and documented well in advance of their execution. The details of the plans must be discussed with all personnel, both on the ship and at the terminal and the manner in which responsibility is to be shared between the ship and terminal must be agreed².

The Master or Responsible Officer should ensure that ship's personnel assigned duties during the cargo operation are made aware of the hazards associated with pipeline clearing operations.

A pre-cargo operation meeting between personnel responsible for the operation from ship and terminal should confirm all critical interface parameters, including those important in the pipeline clearing operations³.



Hazards to be aware of

- pressure surges in line
- tank overpressurization
- dramatic increase in the filling rate
- cargo tank overflow due to excess cargo
- cargo tank overflow due to entry of compressed gas

Parameters to be discussed in pre-cargo operation meeting:

- stages at which the line clearing will be carried out
- notice period required by the ship prior to line clearing operations
- propelling medium to be used
- length and size of the shore line
- time required for a pig to travel along the line
- pressures and venting capacity of the ship's reception tank
- volume of residual cargo in the line and the amount of ullage space available in the ship's reception tank
- capacity of the vapour return line to shore
- amendments to the cargo operation plan as a result of pipeline clearing operations, including volumes available for topping off
- communication routines during the entire operation

Specific hazards that the ship's personnel should be aware of and related interface parameters to be discussed with the terminal during the pre-cargo operation meeting are listed below.

Precautions and procedures

At the commencement of loading, and at each change of watch or shift, the Responsible Officer and the Terminal Representative should each confirm that the communications system for the control of loading is understood by them and by the personnel assigned duties during the cargo operation.

Precautions and procedures requiring special awareness by the ship's personnel are presented below. During the operations, there should be continuous and direct communication between the terminal and the ship until the operation has been completed and all valves have been closed.

Recommendations

Procedures for cargo operations should be reviewed to ensure that the correct procedures are followed when dealing with shore pipeline clearing operations. A key issue in order to prevent incidents is the enforcement of good communication, both prior to and during the entire operation.

- Hazards to be aware of: Prior to the commencement of the cargo operation, and in order to raise awareness, specific hazards associated with pipeline clearing operations should be communicated to the ship's personnel who are assigned duties during the operation.

- Parameters to be discussed in the pre-cargo operation meeting: Through the pre-cargo operation meeting, the responsibilities, time frames and critical interface parameters, including those important for line clearing operations, should be agreed between the Responsible Officer and the Terminal Responsible. Specific communication routines to be adhered to during the actual operations should be established.

- Precautions and procedures requiring special awareness by the ship's personnel: Precautions and procedures during cargo operations should ensure that all ship manifold valves are kept closed unless specific operations that require open valves are ongoing, that each operation is continuously monitored by responsible personnel, and that there is direct communication between the terminal and the ship until operations have been completed and all valves have been closed.

Gard strongly recommends that only properly trained and experienced personnel is assigned duties related to operation of ship manifold valves during pipeline clearing operations.

Footnotes

1 Pigging is a form of line clearing in which an object, most often in the form of a rubber sphere or cylinder and known as a "pig", is pushed through the line by a liquid or by compressed gas. A pig may be used to clear the line completely, in which case it will usually be propelled by compressed gas, or to follow a previous grade to ensure that the pipeline remains as free of product as possible, in which case it is likely to be propelled by the next grade.

2 Gard's Guidance to Masters Ch.2.12.3.4 could be useful reading in this respect.

3 See also Ch.11.1.15 of the International Safety Guide for Oil Tanker and Terminals (ISGOTT) 5th Edition.

Precautions and procedures requiring special awareness by the ship's personnel:

- avoid using tanks that are loaded close to 98% as reception tanks for line clearing
- add a safety margin when estimating required ullages for reception tanks, this to take account of the potential for inaccurately declared "pigging quantities"
- consider to include provisions for a standby cargo tank to be lined up and ready to be opened
- keep manifold valves closed during idle periods
- ensure that the vapour return line to shore is open during the operation (when available)
- throttle the main manifold valve as required
- monitor the manifold pressure closely
- monitor the available amount of cargo tank ullage space and pressure in tank
- during freezing weather conditions, inspect tank vents (P/V valves) at regular intervals
- close manifold valves immediately (in agreement with the terminal) once a pig has reached its receiver/trap, this to avoid compressed propelling gas entering a loaded cargo tank
- report immediately any abnormalities or deviations from existing procedures

US Pollution - California Certificates of Financial Responsibility (COFR) Requirements

Member Circular No. 3/2013
March 2013

Members are requested to note the relevant provisions in the CA Code of Regulations (CCR) on evidence of financial security and renewal procedures for CA certificates of financial responsibility (COFRs) published by the Californian (CA) Office of Spill Prevention and Response (OSPR) and currently effective.

Before operating in CA marine waters, tank and non-tank vessels are required to submit their certificate of entry (CoE) at least ten (10) calendar days prior to operating or entering these waters, in order to apply for a CA COFR. This requirement supersedes the requirement to submit the CoE at least three (3) working days prior to entering CA waters.

Members are also advised that the thirty (30) and ninety (90) day timeframe required for self-certifying renewal with the P&I Club and the timeframe for providing the renewal documentation, i.e. the CoE – are replaced with a single timeframe of forty-five (45) calendar days following expiration of the P&I Club coverage to submit all necessary documentation including the CoE.

Members should contact the Manager/ Association should they have any queries regarding any of the above.

This circular supersedes the Circular issued in January 2012 No 16-11.

All Clubs in the International Group of P&I Clubs have issued similar circulars.

Any questions with regard to the above may be addressed to Sara Burgess, Gard (UK) Limited; Knut Goderstad, Gard AS or Frank Gonynor, Gard (North America) Inc.

Yours faithfully,
GARD AS



Claes Isacson
Chief Executive Officer

Australian Pollution Law – Oil Pollution Indemnity Clause for Penalties and Fines

Member Circular No. 2/2013
March 2013

In October 2012, an International Group recommended charterparty clause was drafted to address the concerns raised by owners and charterers in respect of the amendments to Australian legislation introducing increased penalties for pollution from ships and damage to the Marine environment. Since the recommended clause was circulated to Members, there have been further developments in relation to the Australian legislation and further consideration of the wording of the recommended clause, which has been updated as attached and further explained below;

Increase in the amount of penalties

On 28 December 2012, a new regulation came into force in Australia escalating the monetary value of financial penalties for Federal offences. The increase in penalty unit valuations is only applicable to offences committed on or after 28 December 2012.

The changes affect fines calculated on penalty units, such as fines imposed under the Protection of the Sea Act 1983, which imposes fines ranging from 500 penalty units to 20,000 penalty units for the offence of discharging oil or oily mixtures into the sea.

Under the previous penalty unit calculation, this resulted in maximum fines of AUD 2.2 million for an individual and AUD 11 million for a corporation. Under the new penalty unit calculation, the applicable maximum fines are now AUD 3.4 million for an individual and AUD 17 million for a corporation.

Amendments to the International Group recommended clause and explanatory notes

- Legal/Defence costs
A new subparagraph (b) iii. has been inserted to address the concerns that prosecution legal costs and/or expenses might be passed onto the defending party. Subparagraph (b) iii. clarifies that the indemnity in the recommended clause extends to the recovery of any reasonable legal costs and/or other expenses incurred by or

awarded against either party in respect of any proceedings instituted against them for the imposition of any fine or other penalty, in circumstances set out in subparagraph (b), irrespective of whether any fine or other penalty is actually imposed.

- Indemnity in the event of contributory fault

The proviso to subparagraphs (b) i. and ii. has been amended to specifically address the consequences of liability arising in circumstances where there is contributory fault on the part of the party seeking indemnity. The amendment restricts the amount of the recovery where there is contributory fault, provided this is not prohibited under the law governing the charter party.

The recommended clause and explanatory notes are attached.

This Circular supersedes Member Circular No. 10-12 issued on 23 October 2012.

Should Members have any questions they should contact the Managers in the normal way.

All Clubs in the International Group of P&I Clubs have issued similar circulars.

Any questions with regard to the above may be addressed to Helenka Leary in Gard (UK) Limited and Arne Sætra in Gard AS.

Yours faithfully,
GARD AS



Claes Isacson
Chief Executive Officer

ANNEX OIL POLLUTION INDEMNITY CLAUSE FOR PENALTIES AND FINES

(a) Subject to the terms of this Charterparty, as between Owners and Charterers, in the event of an oil pollution incident involving any discharge or threat of discharge of oil, oily mixture, or oily residue from the Vessel (the "Pollution Incident"), Owners shall have sole responsibility for responding to the Pollution Incident as may be required of the vessel interests by applicable law or regulation.

(b) Without prejudice to the above, as between the parties it is hereby agreed that:

i. Owners shall indemnify, defend and hold Charterers harmless in respect of any liability for criminal fine or civil penalty arising out of or in connection with a Pollution Incident, to the extent that such Pollution Incident results from a negligent act or omission, or breach of this Charterparty by Owners, their servants or agents,

ii. Charterers shall indemnify, defend and hold Owners harmless in respect of any liability for criminal fine or civil penalty arising out of or in connection with a Pollution Incident, to the extent that such Pollution Incident results from a negligent act or omission, or breach of this Charterparty by Charterers, their servants or agents,

provided always that if such fine or penalty has been imposed by reason wholly or partly of any fault of the party seeking the indemnity, the amount of the indemnity shall be limited accordingly and further provided that the law governing the Charterparty does not prohibit recovery of such fines.

iii. The rights of Owners and Charterers under this clause shall extend to and include an indemnity in respect of any reasonable legal costs and/or other expenses incurred by or awarded against them in respect of any proceedings instituted against them for the imposition of any fine or other penalty in circumstances set out in

paragraph (b), irrespective of whether any fine or other penalty is actually imposed.

(c) Nothing in this Clause shall prejudice any right of recourse of either party, or any defences or right to limit liability under any applicable law.

(d) Charterers shall procure that this Clause be incorporated into all sub-charters and contracts of carriage issued pursuant to this Charterparty.

EXPLANATORY NOTES

It is understood that, under the revised Australian law, charterers can be strictly liable for penalties and fines imposed on them as a result of a pollution or threat of pollution caused by the act or negligence of the owner (e.g. navigational error). Conversely, owners can be strictly liable for penalties and fines imposed on them as a result of a pollution or threat of pollution caused by the act or negligence of the charterer (e.g. unsafe berth). As this involves circumstances beyond owners' and charterers' control, a charterparty clause is recommended to achieve the effect that whoever causes the Pollution Incident should bear the criminal fines or penalties through indemnification.

Under the clause, owners have overall responsibility for responding to a discharge or threat of discharge of oil, oily mixture or oily residue (subparagraph (a)). This is in line with the Australian legislation and with the international compensation regime.

The indemnity in subparagraphs (b) i. and ii. is designed to protect owners and charterers by incorporating an equal indemnity by the party whose negligent act or omission, or breach of charterparty, causes pollution or threat of pollution.

The proviso to subparagraphs (b) (i) and (ii) ensures that club cover is not prejudiced on the grounds that liability has been contractually assumed by virtue of the clause in circumstances where there may not be an underlying legal liability. The proviso restricts the amount of recovery where there is contributory fault. The recovery of fines under the clause is also subject to such recovery not being prohibited under the law governing the charterparty.

The indemnity in this clause extends to the recovery of any reasonable legal costs and/or other expenses incurred by or awarded against either party in respect of any proceedings instituted

against them for the imposition of any fine or other penalty in circumstances set out in subparagraph (b,) irrespective of whether any fine or other penalty is actually imposed.

The indemnity in this clause will not respond to the situation where the pollution or threat of pollution is entirely caused by a third party's act, without involving any act of the owner or of the charterer, but where the owner or charterer still incurs the penalty or fine under the new Australian law.

The clause only addresses the specific situation of criminal fines and civil penalties, not civil liability which is within the sphere of the Conventions.

Any right of recourse of either party, defence or right to limit is preserved under subparagraph (c).

Subparagraph (d) is designed to ensure that the same recovery and indemnity provisions apply where there is a charterparty chain.

Limitation of liability for pollution clean-up costs in China

Gard News 211, August/
October 2013

In the recent case of Jiangmen Maritime Safety Administration of PRC v. the Owners of M/V ZEUS the Supreme Court of the People's Republic of China (PRC) held that the costs incurred in cleaning up bunkers spilled from a vessel which is sunk, wrecked, stranded or abandoned shall not be subject to limitation of liability in accordance with Article 207 of the Chinese Maritime Code (CMC). The facts of the case are as follows.

Facts

On 24th September 2008, Typhoon Hagupit caused the M/V ZEUS to run aground off Shangchuan Island, Guangdong, China. As a result, the bunkers on board spilled from the vessel and caused oil pollution. All the crew members died or went missing.

After the incident, the Jiangmen Maritime Safety Administration (MSA Jiangmen) sent various local fishing boats and vessels from other MSAs to conduct the clean-up operations. The final clean-up costs incurred were more than RMB 10 million (around USD 1.63 million).

On 21st October 2008, the owners of the ZEUS applied to Guangzhou Maritime Court (GMC) for constitution of a limitation fund (in the amount of SDR 796,256, around USD 1.22 million) for the maritime claims arising from the said accident, including the claim for the clean-up costs.

MSA Jiangmen raised objection to the constitution of the limitation fund by the owners but the GMC dismissed this objection. MSA Jiangmen then registered the clean-up claim under the limitation fund and filed a claim with the GMC for the total clean-up costs.

About 40 local aquatic breeders also registered their claims for loss of income under the limitation fund. Later, these local aquatic breeders filed claims before the GMC.

Regarding the wreck and bunkers remaining on-board the vessel, the owners entered into a wreck and bunker removal contract with a local company. The wreck/bunker removal fee was paid as per the contract.

There were also claims for search and rescue fees, and costs for setting up navigation warning equipment. These claims were settled amicably outside the court proceedings.

The claim for clean-up costs in the court of first instance (GMC)

The owners' main arguments In the first instance trial, the owners argued that the clean-up costs should be subject to the limitation provided for under Article 207 of the CMC.

Article 207 of the CMC states that except as provided otherwise in Articles 208 and 209 of the CMC,¹ with respect to the following maritime claims, the person liable may limit his liability in accordance with the CMC, whatever the basis of liability may be:

"(1) Claims in respect of loss of life or personal injury or loss of or damage to property including damage to harbour works, basins and waterways and aids to navigation occurring on board or in direct connection with the operation of the ship or with salvage operations, as well as consequential damages resulting therefrom; [...]

(4) Claims of a person other than the person liable in respect of measures taken to avert or minimise loss for which the person liable may limit his liability in accordance with the provisions of this Chapter, and further loss caused by such measures.

All the claims set out in the preceding paragraph, whatever the way they are lodged, may be entitled to limitation of liability. However, with respect to the remuneration set out in sub-paragraph (4) for which the person liable pays as agreed upon in the contract, in relation to the obligation for payment, the person liable may not invoke the provisions on limitation of liability of this Article."

The owners argued that Article 207 (4) should be applicable, since the owners signed no contracts with the parties participating in the clean-up operations. In addition, Article 207 (1) could also be applied.

The owners also cited various judicial interpretations and judicial guidances to demonstrate that the limitation under the CMC should be applicable to this case.

MSA Jiangmen's main arguments

MSA Jiangmen argued that Chinese law does not have specific provision for this particular claim, so it should either not be subject to limitation or be subject to limitation under the CLC 92.

In addition, MSA Jiangmen argued that, although they signed various contracts with clean-up vessels and vehicles, MSA Jiangmen should be deemed to have entered these contracts on behalf of the owners. Since the fee rate was agreed in these contracts, the owners should not have the right to limit liability.

MSA Jiangmen also referred to Article 9 of the Provisions of the Supreme Court on Several Issues Concerning the Trial of Ship Collision Cases, effective from 23rd May 2008 (the 2008 Provisions),² and argued that the pollution in this case was not different from the pollution caused by a ship which is sunk, wrecked, stranded or abandoned resulting from a ship collision accident in terms of its nature and consequence.

Article 9 of the 2008 Provisions provides that for claims in respect of the re-floating, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned due to the collision, as well as the cargo on board, the responsible party should not be able to limit its liability in accordance with the CMC.

MSA Jiangmen's reasons for applying the CLC 92 to the ZEUS (a non-tank vessel) are as follows:

– The 2001 Bunker Convention should not have retrospective application, as the convention came into force in March 2009 and the incident occurred in 2008.

– Even if the 2001 Bunker Convention could be applicable, the convention itself did not state which should be the limitation amount or whether this particular claim should be subject to limitation of liability or not. According

to Article 6 of the convention, an answer should be found under Chinese law.

– MSA Jiangmen did not think that the CMC limitation of liability could be applied to this case based upon the above arguments.

– Hence, the only limitation the owners could refer to under Chinese law would be that of the CLC 92. As the limitation amount under the CLC 92 is much higher than that of the CMC and actual clean-up costs, this limitation is in fact meaningless for the owners.

The GMC's decision

The GMC upheld the arguments of MSA Jiangmen and ruled that the matter should not be subject to limitation of liability under the CMC. The GMC also thought it would be unfair if the owners were allowed to limit their liability in spite of the fact that owners did nothing in the clean-up operations (there was no doubt that if the owners had done something, like appointing clean-up companies or staff, they would not be able to limit liability).

Comments on the GMC's judgment Chinese law does not state that in this case MSA Jiangmen had the right or authorisation to sign clean-up contracts on behalf of the owners. Since the right of an administrative bureau (such as MSA Jiangmen) should expressly be provided in law, the GMC's decision in this respect may be incorrect. In addition, the owners had no information about these contracts before the litigation.

The nature of clean-up operations and rendering harmless of a ship should of course be different. In fact, in this case, in order to render the wrecked ship harmless (i.e., disposing of the bunker remaining on board and the wreck itself), the owners had already entered a contract with a local company and appointed it to carry out the bunker and wreck removal work.

Fairness should not be an issue in this dispute. The GMC should have followed the CMC and correctly interpreted it.

The appeal to Guangdong High Court

The above comments were added to the statement of appeal filed at the Guangdong High Court (GHC), in addition to the main arguments raised by the owners during the GMC's proceeding. Unfortunately, the GHC did not overturn the GMC's judgment and held almost the same opinions as those of the GMC.

China: the practical implications of the ZEUS decision remain to be seen.

The Supreme Court

Shortly after the GHC issued its decision, a judgment was issued by Qingdao Maritime Court (QMC). In that case, Yantai Maritime Safety Administration (MSA Yantai) organised clean-up operations by sending vessels (as per agreed fee rate) to take part in an oil clean-up after a collision incident (which resulted in a vessel sinking and spilling oil). Similarly, the owners established a limitation fund in the QMC and MSA Yantai claimed against the owners for the clean-up costs. The QMC determined that the clean-up costs should be subject to limitation under the CMC. Although China does not adopt the doctrine of judicial precedent, the owners of the ZEUS added this decision to their arguments when appealing to the Supreme Court.

The Supreme Court, while deciding that the clean-up costs in the ZEUS case should not be subject to limitation of liability under the CMC, overturned the GMC's and GHC's findings that MSA Jiangmen could enter into clean-up contracts on behalf of the owners.

The Supreme Court in fact formed a new theory to apply Article 9 of the 2008 Provisions to this case. The Supreme Court's logic analysis goes as follows:

– As per Article 9 of the 2008 Provisions, the claims in respect of the re-floating, removal, destruction or rendering harmless of a ship which is sunk, wrecked, stranded or abandoned or claims in respect of the removal, destruction or rendering harmless of the cargo on board the ship should not be subject to limitation under the CMC.

– In the ZEUS case, although the bunkers spilled from the vessel (or the wreck), it should still be considered as a part of the wreck.

– Therefore, cleaning the spilled bunkers should be deemed as rendering harmless of the wreck and the owners should not be able to enjoy limitation of liability under the CMC.

The Supreme Court obviously took a step forward by widening the definition of a wreck.

Conclusion

The ZEUS is an interesting decision of the Supreme Court on an issue that had not been considered by it previously. It now remains to be seen how the lower courts will apply the principles established in the judgment and what

implications there will be in practice to future pollution incidents in China.

Footnotes

1 Article 208 mainly refers to other kinds of limitation or claims not subject to limitation, such as the limitation under the CLC 92 and claim for general average contribution. Article 209 mentions that a party will lose the right to limit liability if he committed gross negligence or wilful misconduct. Articles 208 and 209 have no relevance to this case.

2 Article 2 of the 1976 LLMC states that subject to Articles 3 and 4 the following claims, whatever the basis of liability may be, shall be subject to limitation of liability:

(a) claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting therefrom;

(b) claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;

(c) claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connection with the operation of the ship or salvage operations;

(d) claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship;

(e) claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship;

(f) claims of a person other than the person liable in respect of measures taken in order to avert or minimise loss for which the person liable may limit his liability in accordance with this Convention, and further loss caused by such measures.

The CMC applies most of the 1976 LLMC. Unfortunately, (d) and (e) are not included in Article 207 of the CMC (dealing with which kind of claims could be limited under the CMC), so the CMC only has four items under Article 207. At first, there were a lot of disputes over whether the claims of (d) and (e) should be limitable under the CMC. Then, the Supreme Court issued the judicial interpretation in 2008, which expressly stated that the "rendering harmless" costs could not be subject to limitation of liability under the CMC. What the Supreme Court did in the ZEUS case was simply to widen the definition of what constitutes a wreck.

The silent sentinels – Increased use of remote marine pollution sensors

In this era of increased vigilance in the detection of marine pollution, there have been various efforts by both government and industry to ensure detection of hydrocarbon spills, as well as to enhance spill response. This has included the use of varied technologies, including aerial detection of floating oil, use of infrared/ultraviolet cameras to allow for spill detection at night, the increase in sophistication of oily water separators aboard ships, and the matching of spilled pollutant to the point of source through the employment of precise “chemical fingerprinting” of samples in a laboratory.

The further mechanisation and automation of these efforts has been a driver of this theme. One recent example in major spill events has been the use of small drone aircraft and watercraft,¹ and even satellites, all of which can survey large areas of ocean and shoreline continually, for many hours or even days, controlled remotely by an operator, at a distance on the ground at a control centre, viewing things via an audio/video telecommunication link.

Remote sensors

A more recent development, which focuses on spill detection at more localised areas, is the now more widespread use of remote pollution sensors that offer continuous monitoring for pollution at a fixed point. These weatherproof units use optical sensors aimed downward at a patch of water within a small radius of the unit. Within the sensors, a high power Xenon lamp is used to produce a high-energy light beam which will cause any oil present in the target area to fluoresce and emit light of its characteristic wavelengths.

The cameras can detect extremely minute quantities of hydrocarbons (+/- 3 microns in thickness) floating upon, or even slightly below, the surface of the water within the range of the unit, in a radius up to 10 metres from the device.



“Slick Guard” environmental monitoring platform for offshore, coastal, ports and harbour applications.

All photos courtesy of InterOcean Systems Inc., San Diego.

Once a pollutant is detected there may be an alarm, either visual or a klaxon, and transmission of a report about the detection to ship crew or dock personnel, either nearby or hundreds/thousands of miles away, via text message, e-mail, or voice message, using one or more modes of telecommunication – radio, data or phone line, mobile phone, Wi-Fi or satellite.

Implications

The implications of this technology are far-reaching. Incidents of pollution in a restricted area, e.g., the side of a ship or dock, a marina or harbour area, the deck of a ship or facility, can be immediately detected and then instantaneously reported to local personnel, who can rush to the scene and verify the situation, or sent to supervisory personnel across the planet. This can occur day or night, on a 24-hour basis, in any weather

or setting. These units can even be fitted with flotation, and be deployed like buoys, in both inshore waters and offshore settings. The sensitivity of the units can be adjusted, so that alerts are only sent for higher concentrations of hydrocarbons, or kept highly sensitive.

The use of non-contact optical scanning technology means the unit keeps clean and requires little maintenance. The camera settings can be set up so that, if an attempt is made to cover the lens, an alarm will be transmitted, to thwart vandalism or deliberate masking of an ongoing pollution, and if fitted with a video camera, the identity of persons trying to interfere with the device can be detected.

These devices could greatly enhance the detection of pollution incidents in port areas, as well as aboard ships and offshore facilities. They can also be placed in remote locations where it is impractical to have persons on watch, particularly at night. Such devices never grow tired, do not miss things, and always report timely. The cost of the devices, when amortised over time, are far lower than having workers observing an area on a continuous basis, freeing such workers to perform more critical functions.

It also allows a redundancy of spill detection efforts, avoiding gaps in observations of a particular area. It allows shore-side managerial staff, at long distances from a dock, ship or facility, to be aware of pollution events quickly, gain valuable time in activating response plans, and ask a verification that personnel on the scene are detecting spills and acting appropriately after they are spotted.

By getting the very early detection that these devices offer, pollution response can be instituted more quickly – and it is clear that the earlier one can respond to a pollution event, the greater the odds for a more contained, less serious situation.



Typical mounting platform for harbour and terminal pier applications.



Example of a loading pier.

Limitations

Of course, no technology is perfect, and these devices can have limitations. The units themselves could break, or power interruptions could impair their function (although such units might be fitted with batteries/solar panels to allow for this contingency). A telecommunications issue could prevent the news of a pollution event from being transmitted to a remote recipient.

Also, it must be said that some workers might resent the presence of an automated "spy" in their workplace, and in the case of a spill caused by human error, might attempt to block detection by the unit with some form of tampering or interference.

The units can only detect hydrocarbon pollutants in highly localised zones. This could mean that in the case of a non-hydrocarbon pollutant being emitted, the device would fail to report it. Or, if a large amount of pollution occurred, but for some reason did not flow or float within the range of the device's camera, that, too, would go unreported.

Conclusion

All in all, the increase in use of these sophisticated "silent sentinels" means that the gaps in detection of pollution in specific docks, terminals, ships, marinas, offshore facilities or other particular areas could be narrowed to almost nil, making for higher detection rates and increased number of reported incidents, eventually leading to a cleaner environment.

Footnotes

1 See article "No place to hide – The expansion of remote surveillance of shipping activity" in Gard News issue No. 206, May/July 2012.

New Greek marine pollution legislation

Gard News 207, August/
October 2012

Law 4037/2012 has recently been passed in Greece, implementing Directive 2005/35 EC (on ship-source pollution and on the introduction of penalties for infringements) and Council Framework Decision 2005/667/JHA.

Scope of application

Law 4037/2012 deals with the discharge by ocean-going vessels of the substances referred to in Annex I and II of MARPOL (oil and noxious liquid substances) in the following geographical areas:

- internal waters and the territorial sea of any EU member state;
- straits used for navigation subject to the regime of transit passage over which any EU member state exercises jurisdiction;
- the exclusive economic zone of any EU member state;
- the high seas.

Violations

Any discharge, wilful or not, operational or accidental, is considered an infringement of the law and results in the imposition of penalties, except if it is permissible under the following MARPOL Regulations:

- 15 of Annex I, regulating operational discharges of oil or oily mixtures from any ship;
- 34 of Annex I, regulating discharge of oil or oily mixtures from the cargo tanks of a tanker; and
- 13 of Annex II, regulating the discharge of noxious liquid substances.

Exceptions

Article 4 of the new law incorporates part of the exceptions of MARPOL. Specifically, the discharge of oil or liquid noxious substances is not considered an infringement if it was necessary for the purpose of securing the safety of the ship or saving life at sea, or when a discharge is being done with the approval of the administration (both flag and territory, if any) for the purpose of combating pollution (Regulations 4.1, 4.3 of Annex I and 3.1.1, 3.1.3 of Annex II).

For all of the above areas, except internal and territorial seas of an EU member state, a discharge is not considered an infringement if it was caused due to damage to the ship or her equipment, provided all reasonable

precautions have been taken after the occurrence of the damage, or discovery of the discharge, for the purpose of preventing or minimising the discharge, and under the condition that the owner or Master did not act with intent to cause the damage, or recklessly and with the knowledge that the damage would probably result (Regulations 4.2 of Annex I and 3.1.2 of Annex II).

From the above it would appear that accidental pollution in internal waters or territorial sea of an EU member state is not exempted, contrary to MARPOL Regulations.

Criminal penalties

Law 4037/2012 provides severe penalties of imprisonment and fines not only to crew members but also to any other person that has contributed to a punishable discharge, either wilfully or by gross negligence, without exempting accidental pollution (as provided in MARPOL).

The court may impose the criminal penalties (reduced as per the provisions of the Greek Penal Code) against any person whatsoever, in addition to the actual perpetrator or accomplice, who may have contributed in any way in the wilful or negligent discharges that are punishable. This may result in the possibility of indictment of any person from the ship management office (such as directors or DPA), the charterers, cargo owners, etc.

The new law established criminal penalties in the case of wilful discharges as follows: a) Imprisonment from five to 10 years and pecuniary penalty from EUR 3,000 to EUR 300,000, in cases of significant pollution that caused risk to human life, or risk of severe bodily damage, or of wide environmental disturbance or disaster; b) Imprisonment from one to five years and pecuniary penalty from EUR 1,500 to EUR 50,000 in all other single pollution incidents; and c) Imprisonment from six months to five years and pecuniary penalty between EUR 1,000 to EUR 15,000 in case of repeated minor discharges which in conjunction result in the deterioration in the quality of sea water.

The new law established criminal penalties in the case of discharges due to gross negligence or recklessness as follows:

- a) Imprisonment from six months to five years and pecuniary penalty from EUR 1,000 to EUR 15,000, in cases of significant pollution that causes risk to human life, or risk of severe bodily damage, or of wide environmental disturbance or disaster;
- b) Imprisonment from three months to five years and pecuniary penalty from EUR 200 to EUR 3,000 in all other single pollution incidents and also in case of repeated minor discharges which in conjunction result in the deterioration in the quality of sea water.

However, if the party responsible for a negligent discharge significantly minimises the pollution or contributes to that effect by promptly notifying the authorities, the above penalties may be reduced or even dismissed altogether.

Discharges caused by simple negligence (i.e., not gross negligence or recklessness) are not punishable under Law 4037/2012.

It should be noted that the above penalties of imprisonment are provided by Law 4037/2012 irrespective of the geographical place of the discharge and of the flag of the offending vessel, which seems to contradict the provisions of Article 230 of UNCLOS (United Nations Convention on the Law of the Sea of 1982) providing that monetary penalties may only be imposed with respect to violations of national laws and regulations, or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment, committed by foreign-flagged vessels, except in case of a wilful and serious act of pollution committed within the territorial sea of a member state.

Administrative fine

In addition to the above criminal penalties, an administrative fine of up to EUR 60,000 may be imposed. In case of a serious incident the fine may vary from EUR 60,000 to EUR 1,200,000. The authorities may prohibit the sailing of the liable vessel until the fine is paid

or until the submission of a letter of guarantee from a bank operating in Greece.

Liability of legal entities

Legal entities may face a fine of up to EUR 500,000 for any of the offences, which are punishable under the law, committed for their benefit:

- by any person acting, either individually or as part of a body of the legal entity, who has power of representation or the authority to take decisions for the legal entity, or an authority to exercise control within such legal entity; or
- by any person under the control of the legal entity when the offence was committed due to lack of supervision by any of the persons of the legal entity who have power of representation, authority of decision making and exercise of control.

Entry into force

The law came into force on 30th January 2012.

Conclusion

Law 4037/2012 provides severe penalties of imprisonment not only to crew members but also to any other person that has contributed to a punishable discharge, thereby increasing criminalisation of the shipping industry and conflicting with Article 230 of UNCLOS 1982 as regards to foreign-flagged vessels.

According to Greek precedents, European Union legislation (and implementing laws) prevails over any sub-constitutional legislation. Therefore, if a case were brought before a Greek court chances are that the provisions of Law 4037/2012 would be found to prevail over the provisions

of MARPOL and UNCLOS mentioned above.

We are grateful to KGDI Law Firm, Kyriakides Georgopoulos & Daniolos Issaias, Greece, for the above information.

New wine from old wineskins? - Current efforts to retrieve oil from sunken vessels

Gard News 207, August/
October 2012

When a ship sinks one of the main concerns is whether it contains oil and whether that oil should be removed.

For thousands of years vessels have sunk to the bottom of the sea, the result of man-made events - collision, grounding, explosion, acts of war or piracy - or the forces of nature, in the form of storms and other consequences of inclement weather. In that time, sunken ships might have attracted some attention - from salvors or treasure hunters, or authorities if they posed a hazard to navigation. But for the most part, they took on a status of anonymity in perpetuity.

However, with the advent of ships that carry oil and other liquid substances, either as cargo or fuel, this permanent dwelling in obscurity has changed to one of sometimes notoriety. This is because such cargoes can and will leak out from the wrecked ships, floating upwards and causing pollution, both to the seas above and eventually to nearby coastal areas.

This phenomenon has been accelerated due to a single man-made activity: naval warfare. During both the First and Second World Wars, thousands of vessels were sunk during hostilities. After peacetime returned, the pace of sinkings abated, but never ceased completely.

With the increase in shipping activity world-wide, even with lower rates of sinking incidents, the number of sunken wrecks that emitted, or were capable of emitting, petroleum or other liquids grew, along with that of ships that contained solid cargoes of a toxic nature that, if exposed to seawater, could create poisonous solutions equally or potentially more damaging.

What are the figures involved?
- A study in 2005, performed by Environmental Research Consulting (www.environmental-research.com), indicated that on a world-wide basis, there were a total of 8,569 sunken ships of various types that were leaking, or capable of leaking, oil or other liquid substances, in a range of at least 747

million gallons, and perhaps as much as six billion gallons.

- The US National Oceanic and Atmospheric Administration (NOAA, www.noaa.gov) estimates that near the United States coastal areas there are 400 sunken tank ships and barges and 1,300 other vessels >400 grt in size that contain 180 million gallons of oil and are in a position to threaten pollution to coastal areas.

- In 2007, Swedish researchers conducted a study of wrecks in the Skagerrak area, and found 261 wrecks that were in such a state as to be potential leakers of oil or other hazardous substances.¹

- In 2008, ITOPF stated that one out of five cases of ship casualties it was asked to attend involved a sunken wreck and the potential need for removal of the oil from it.

Legal regimes

These factual circumstances point out that the risk of pollution from sunken ships bears significant potential environmental damage. However, the applicable legal regimes have, thus far, given only an incomplete response to this issue. Sinkings in various jurisdictions have resulted in the triggering of a wide variety of domestic laws ordering removal of the oil from such sunken ships, the most well-known recent examples being the PRESTIGE and the ERIKA off Spain and France, and the COSTA CONCORDIA, on the Italian coast. On the international level, some incidents have seen the International Oil Pollution Compensation (IOPC) Funds funding the removal of oil under CLC (Convention on Civil Liability for Oil Pollution Damage) regimes, such as the SOLAR 1 case in the Philippines in 2006.

Currently, it is safe to say that whenever a ship sinks in the sea or wrecks upon a shoreline, one of the prime concerns is the question of whether the vessel contains significant quantities of oil, and if so, whether that oil should be removed. However, the Nairobi International Convention on the Removal of Wrecks, adopted by the IMO in 2007 to address the issue of oil in sunken ships, thus far has only been

ratified by four nations, so its ability to address this issue in the future is far from a certainty.

Technology

While there may be some lag in legal regimes keeping up with this issue, the technology for removal of oil from sunken ships has developed fully in response. Various salvage companies and sub-sea technology firms have developed various methods and specialised equipment that can remove oil from sunken ships, even if they lay on the seabed at depths of 1,000 metres or more. Most methods rely in one way or another on a technique called "hot tapping". This involves the placement of equipment that is affixed to the outer hull of the ship and can drill through the hull plating without leaking the contents, pumping into ship tanks water with solvent chemicals that pushes the oil contents into outlet piping, which carries the oil to the surface to be collected. This operation is enabled through the employment of remotely-operated submarine vehicles (ROVs), subsurface tool sleds, ship tank volume sensors and other marine technologies, many of which were developed in connection with the offshore energy industry.

Challenges

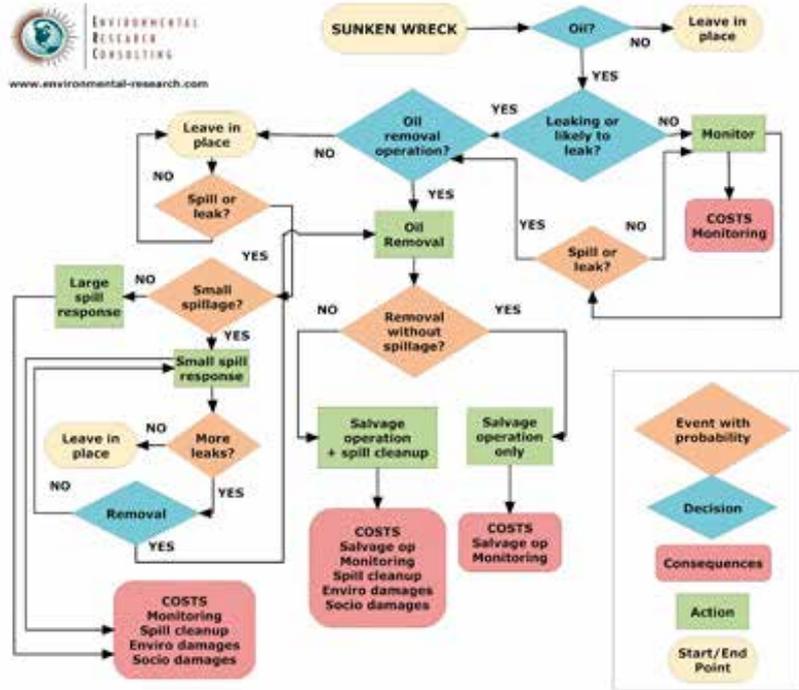
The various sunken ships offer many challenges to recovery, not only from deep depths, but also from inaccessible positioning, coverage with silt and sediment, and dispersal of the oil in numerous locations in the ship itself. In addition, there can be other sorts of impediments posed, due to the history of a particular wreck. With many of these ships having met their fate in wartime, it is a tragic fact that many wrecks contain human remains of those crew and passengers who perished with the ship when it sank. That fact alone poses a sensitive social issue as to the ability to carry out oil recovery operations in an efficient manner, with many local governments and authorities deciding against such activities, which might be viewed as acts of desecration of a de facto burial site. Such is not always the case, however, when a wreck poses significant environmental

problems for nearby activities, such as fishing and aquaculture. That was the case with the wreck of the ROYAL OAK, a British warship sunk by a German U-boat in the Scapa Flow area of Scotland in 1939. For many years, it remained deliberately undisturbed, as a memorial. But when it began to leak large quantities of oil that affected nearby salmon farms, the decision was to engage a company to carry out a "hot tapping operation", and almost all of the oil from the ship was successfully removed.

The major limiting factor in the removal of oil from sunken ships can be summarised in one word - money. Such operations are not only difficult, but they are extremely expensive, many times running in the tens of millions of dollars. With the number of eligible sunken ships around, there are simply not enough funds from governmental and private sources to enable oil to be removed from even a large fraction of these wrecks.

Thus, a complex set of factors must be considered in order to determine whether a particular sunken ship clearly needs immediate remedy, using the limited funds available for such projects. Various nations, as well as the IOPC, have developed sets of criteria and a process for evaluation. One of the most complete is shown in Graph 1 below, developed by Environmental Research Consulting for NOAA, for its Wreck Oil Removal Project, known as WORP.

By taking into consideration numerous potential risks, a decision can be



Graph 1. Courtesy of Environmental Research Consulting.

logically reached as to the eligibility of a particular site of a sunken ship, and action then taken.

Conclusion

The days of straightforward wreck removal are long over. Even if the wreckage of the ship itself cannot be retrieved or disposed of by a salvor, the issue of what the ship contains and its possible removal is a separate and significant question that arises in almost every case of a vessel sinking.

The fact that a ship disappears beneath the sea's surface does not mean that it can be forgotten.

Footnotes

1 Hassellöv, I-M., 2007. Pre-Study of Ship Wreck Assessment and Remediation. Alliance for Global Sustainability, Gothenburg, Sweden

Australia toughens pollution laws

As reported previously in Gard News,¹ there has been a number of significant and highly publicised pollution incidents in Australian waters in recent years, such as the one in March 2009 involving the Hong Kong registered general cargo ship PACIFIC ADVENTURER and the one in April 2010 involving the Chinese bulk carrier SHEN NENG. As a result the Australian Maritime Safety Authority (AMSA) undertook a review of the legislation and the Maritime Legislation Amendment Act 2011 came into force on 4th-6th December 2011.

The Act represents the first steps taken by the Federal Government to implement the shipping industry reform package announced by Minister Albanese in September 2011. The Act amends the Navigation Act and Protection of the Sea Act and creates new offences for oil pollution from ships and widens the scope of liability to include a wider range of liable parties. It also significantly increases the penalties from pollution offences.

Amendments to the Protection of the Sea Act

The purpose of the amendments to the Protection of the Sea Act is to make the regulation more consistent with other Commonwealth and state legislation such as the regulatory regime that applies in the Great Barrier Reef Marine Park. The main changes to the Act are:

- The liability is extended to include charterers, probably time, voyage and demise charterers, as well as master and owners of ships for offences involving discharge of oil, an oily mixture or an oily residue from a ship into Australia's Exclusive Economic Zone (EEZ). The master is personally liable and may face criminal proceedings. The defences available under the Act, such as discharge for the purpose of securing the safety of the ship or saving life at sea, have been extended to cover charterers.

- Penalties have been significantly increased. A maximum fine for a corporation has increased from AUD 1.1 million to AUD 11 million and from AUD 220,000 to AUD 2.2 million for an individual.² Furthermore, the

amendments will bring the offence provisions in line with the Great Barrier Reef Marine Park Act, which provides for penalties of up to 20,000 penalty units per year in comparison with the earlier 2,000 penalty units per year.

Amendments to the Navigation Act
The Navigation Act is an important piece of legislation regulating a wide range of marine matters which primarily include ship safety and marine environment protection. However, the Act is old and has now been recast in plain language and simplified to reflect current drafting standards. The main changes of the Act are:

- The master of a ship must ensure that the ship is not operated in a negligent or reckless manner that causes pollution or damage to the marine environment in Australian waters or in waters of the high seas outside Australia. The penalties are significant particularly where the contraventions have caused or had the potential to cause serious harm to the marine environment. If a corporation is found guilty of an offence it may be liable for fines up to AUD 3.3 million. The maximum penalty for a master who is found in breach of such provisions is AUD 666,000.

- Amendments also require mandatory reporting by the master of a ship in relation to the movement of the ship in prescribed areas, such as the Great Barrier Reef. If the master fails to report in a mandatory way he will be strictly and personally liable for the damage, meaning that the master's state of mind or degree of fault is not needed to be proved and criminal liability can be imposed on the master. The prosecution is not required to prove intention, knowledge, recklessness or negligence. In addition to criminal prosecution, the court may now make a "civil penalty order", which imposes large fines.

Conclusion

The amendments under the Maritime Legislation Amendment Act 2011 are of high importance and increase the risk exposure for individuals and companies, especially charterers, who operate within Australian waters. Penalties have significantly increased

(both civil and criminal) and the liability is extended to also include charterers. Furthermore, strict liability is imposed on masters to report movement of ships in prescribed areas and, according to the amendments, the master of a ship has an obligation to ensure that a ship is not operating in a reckless or negligent manner.

At last, there are further bills that have been released/will be released shortly. The Federal government is aiming to have all shipping reform legislation in force by 1st July 2012.

Footnotes

- 1 See article "Australia - Tougher penalties for Queensland environmental offences" in Gard News issue No. 202.
- 2 AUD 1 = USD 1.06 in February 2012.

New Pollution Regulations in China - FAQs II

Gard News 204, November 2011/January 2012

The article "New Pollution Regulations in China - FAQs", published in Gard News issue No. 197, contained answers to frequently asked questions (FAQs) about the Regulations of the People's Republic of China on the Prevention and Control of Marine Pollution from Ships (the main Regulations) which were effective on 1st March 2010. Since the first FAQs, further implementing legislation, rules and interpretation have been issued to give effect to the main Regulations and in relation to the handling of disputes in a pollution incident. This article contains a new set of FAQs to update Gard News readers on the developments.

Updates

Are there any further legislation and updates following Gard News' first FAQs? Yes. Various implementing legislation, rules and interpretation have been issued since then, providing further explanation and detailed rules to implement and supplement the main Regulations. The table below provides an at-a-glance chart setting out the major legislation, rules and interpretation.

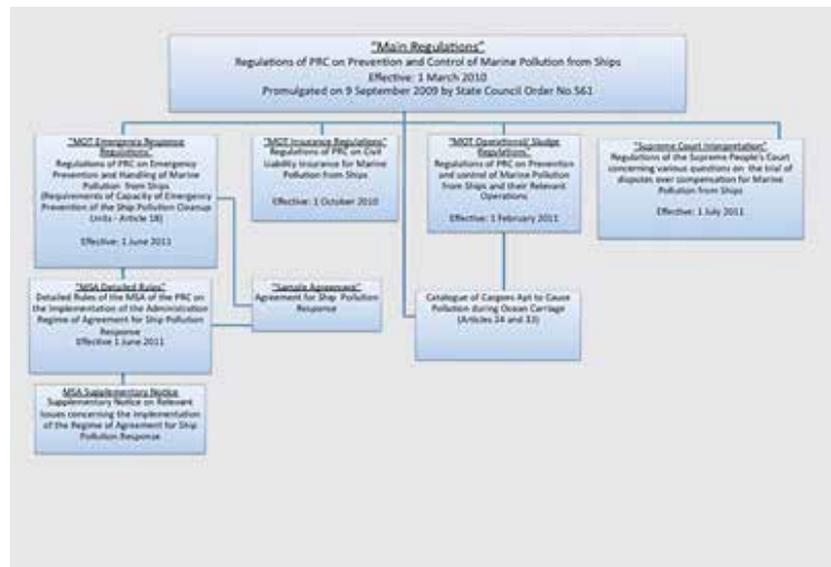
The above table provides an at-a-glance chart setting out the major legislation, rules and interpretation.

Pollution liability

Who is liable for pollution damage? The previous FAQs discussed who is liable for pollution damage, defences and limit of liability as provided under the main Regulations. On pollution liability, the Supreme Court's Interpretation (Article 3) gives further guidance that if the oil pollution is caused by oil leakage from two or more ships and if the claimants request the leaking ships to compensate, each shipowner shall be individually responsible for the damages which can be reasonably apportioned to his particular ship. If the damages can not be reasonably apportioned, the shipowners shall bear joint liability subject to any applicable defences and exemptions.

Will Club LOU be accepted as security in a pollution incident?

The new legislation has not changed the existing position. It is still the case



that only guarantees/undertakings from local recognised financial institutions/ insurance companies will be accepted by the MSA (Maritime Safety Agency) and the maritime courts as security for pollution liability, with very few exceptions. It is possible, however, to negotiate with claimants to provide a Club LOU or other alternative forms of security if they agree to that.

Pollution clean-up contract

When do I need to sign the clean-up contract? Readers may recall from the previous FAQs that the operators of (a) any ship carrying polluting and hazardous liquid cargoes in bulk or (b) any other vessel above 10,000 GT is required under the main Regulations to sign a pollution clean-up contract with an approved pollution response company prior to the vessel's operations or entry into/ departure from Chinese ports. The enforcement date of this requirement has now been postponed to 1st January 2012.

Those who trade regularly into the PRC are recommended to sign the pollution clean-up contract before 1st January 2012, otherwise they will be subject to administrative penalties and other measures.

Who should sign the clean-up contract? Under the main Regulations, the

"operator" of the ship should sign the pollution clean-up contract. "Operator" has now been defined in the MSA Detailed Rules as "the owner, manager or actual operator" of a ship. In respect of those operators not domiciled in China, it is understood that the ship's agent in port, Club correspondent, local law firm or another legal entity located in mainland China (not Hong Kong or Macau) may sign the contract on behalf of the operator if authorised by the operator to do so. It is understood that the Master may also sign the contract, which may be necessary in certain circumstances, for example where there is urgency, although an authorisation would still be necessary for the Master to sign on behalf of the operator. The International Group of P&I Clubs (IG) is considering the development of a standard form authorisation letter for overseas operators for this purpose.

Who are the approved clean-up contractors?

Approved clean-up contractors will be categorised by the MSA in accordance with their qualifications and response capabilities and will be assigned 1, 2, 3 or 4 status.

Operators will need to contract with an approved clean-up contractor in accordance with the size, type and intended operation of the ship as set out in the MOT (Ministry of Transport)

Emergency Response Regulations and MSA Detailed Rules.¹ It is understood that the list of all approved contractors will be issued in October 2011 on the dedicated MSA website at www.osp.cn. As mentioned above, the requirement to contract with an approved clean-up contractor will be enforced in all Chinese ports from 1st January 2012. There will therefore be a relatively short period of time for operators to contract with approved clean-up contractors.

What will be the content of the clean-up contract?

On 20th May 2011 the MSA published a Sample Agreement, which is in both English and Chinese, together with an introduction to the agreement. The introduction states that the articles of the agreement on rights and obligations are mandatory and the parties can not amend them, whilst for matters not covered in the agreement the parties may enter a supplementary agreement. Members are recommended not to sign any clean-up contract until the list of approved clean-up contractors is issued and their contracts reviewed to see whether they conform with IG guidelines on vessel response contracts. The IG is currently reviewing the Sample Agreement and will provide further guidance after the review. The IG will also consider the development of supplemental clauses for inclusion in the Sample Agreement.

Sludge disposal contract

Is the oil clean-up contract requirement the same as the sludge disposal contract requirement?
No, they are different. The requirement in relation to disposal and discharge of

ship's garbage, residue water waste, oil waste and sludge is set out in the MOT Operational/Sludge Regulations which came into effect on 1st February 2011. Owners/operators of all vessels are required to discharge all waste residues (primarily sludge) at least once at a PRC port, and are required to contract with a registered service provider of such services. Shipowners/operators should check with their local agents and the local MSA websites to ascertain the updated lists of such registered service providers for each Chinese port. The websites of the MSA head office and their major branch offices are the following:

MSA head office:
<http://www.msa.gov.cn/>

Shanghai MSA:
<http://www.shmsa.gov.cn/>

Liaoning MSA:
<http://www.lnmsa.gov.cn/>

Hebei MSA:
<http://www.hebeimsa.gov.cn/>

Shandong MSA:
<http://www.sdmsa.gov.cn/>

Jiangsu MSA:
<http://www.jsmsa.gov.cn/>

Zhejiang MSA:
<http://www.zjmsa.gov.cn/>

Fujian MSA:
<http://www.fjmsa.gov.cn/>

Guangdong MSA:
<http://www.gdmsa.gov.cn/>

Guangxi MSA:
<http://www.gxmsa.gov.cn/>

Hainan MSA:
<http://www.hnmsa.gov.cn/>

Shenzhen MSA:
<http://www.szmsa.gov.cn/>

Changjiang MSA:
<http://www.cjmsa.gov.cn/>

Heilongjiang MSA:
<http://www.hljmsa.gov.cn/>

Ship Oil Pollution Compensation Fund

Are the details of the Ship Oil Pollution Compensation Fund available now? The detailed rules as to the collection and administration of the funds have not been released but there is currently a draft on this.

Further questions

Whom should I contact if I have further queries?
Any further enquiries can be sent to sara.burgess@gard.no or catherine.wong@gard.no.

Footnotes

¹ Readers should refer to Gard Circular No. 4/2011 for details.

Charterers' pollution liability in Brazil

Gard News 204, November 2011/
January 2012

Pollution liability fines and pollution damage compensation claims brought by governmental agencies are an increasingly costly potential liability for vessel owners, and are often difficult to defend, as in most cases they are imposed as 'strict' liability (i.e., there is no requirement to show fault on the part of the defendant). It is sometimes the case that where owners have been held liable for such incidents, they are subsequently able to recover these losses from the vessel's time or voyage charterers in the form of contractual claims under the charterparty. It is almost unheard of, however, that such charterers may be held directly liable for pollution fines or penalties by government agencies, as most legal systems focus on the vessel owner as the party primarily liable for such incidents. Brazil seems to be a notable exception to this rule.

Charterers' exposure - the international norm

In most jurisdictions, a vessel's charterer (whether bareboat, time or voyage charterer) is not exposed to direct liability for government bodies' fines or compensation claims in the event of a pollution incident originating from the chartered vessel, as the international compensation regimes to which most countries subscribe (Civil Liability and Fund Conventions, Hazardous and Noxious Substances Convention)¹ impose primary liability solely on the owner of a vessel and the owner's insurer. This is in line with the generally accepted "polluter pays" principle which underlies liability for marine pollution incidents.

The notable exception is the United States, where federal law and certain states' laws can be interpreted to permit bareboat charterers to be held directly and strictly liable for statutory pollution-related fines or compensation. This is because the operative statutes define either vessel 'operators' or demise charterers, both of which are interpreted to include bareboat charterers. However, even in the US it is generally accepted that time and voyage charterers are not capable of being held directly liable as the definitions clearly do not include them

as being persons who exercise control over or bear responsibility for a vessel's day-to-day operations.

However, Brazil is one jurisdiction with laws which operate as an exception to the generally accepted international position, in that both time and voyage charterers can be held directly and strictly liable for pollution incidents, alongside shipowners and bareboat charterers.

Brazilian legal framework for pollution liability

Brazilian law is a codified legal system and identifies three distinct spheres of law within which liability may be established. These spheres are each separate and independent from one another and empower different state agencies. They are the administrative, civil and criminal law spheres. This article will not consider the criminal law sphere, as in practice criminal liability for pollution incidents is not commonly imposed on shipping interests in Brazil.

Administrative law

Liability under administrative law is regulated by Federal Laws 9.605 of 1998 and 9.966 of 2000. These laws, which are enforced by the Brazilian Navy, apply to vessels, platforms and offshore support installations and provide for fines of up to BRL 50,000,000 per incident, as well as more severe penalties such as the suspension or prohibition of activities of the vessel responsible for the pollution. Although this is a form of strict liability, in order for liability to attach it must be shown that there was a causal connection between the pollution and an act or omission of the party concerned. This requirement for a causal connection is the main reason why administrative penalties are unlikely to be successfully imposed on time or voyage charterers, notwithstanding occasional attempts to do so. Accordingly, this sphere is not the most problematic for time or voyage charterers.

Civil law

Civil liability is governed by Federal Law 6.938 of 1981. Legal measures in this sphere are pursued by the Federal and State Public Attorneys. This is a much

more rigorous regime, in which time and voyage charterers are exposed to direct liability.

Penalties are not based on punitive principles, but are intended to recognise and enforce a duty to compensate the State for damage caused to the environment, and to compensate third parties for damage to their assets, adverse effects on their activities, and for economic losses flowing from the pollution incident.

As under administrative law, liability under this statute is not dependent on fault. Unlike administrative law, however, there is no requirement for a causal connection between a party's conduct and the pollution damage. The test which determines whether any particular party has a duty to compensate for environmental damage is to ask whether the party was involved in and benefited from the economic activity which caused the pollution.² This is a very wide test.

By applying the test it is immediately obvious that time and voyage charterers, and potentially cargo interest, can be held to have a duty to compensate for environmental damage caused by pollution from a chartered ship operating in Brazilian waters. Charterers are also jointly and severally liable with owners, as well as a number of other potential parties.

Gard has recently been notified of a compensation claim against a charterer member for a bunker spill from the chartered vessel during operations in a Brazilian port. Other than to resist the application of the test mentioned above and to dispute that the chartered vessel was the source of the pollution, there is very little which can be argued by charterers in defence of this type of claim.

Recourse and risks for foreign charterers

The situation is not entirely gloomy for charterers who have no control over a ship's day-to-day operations but find themselves subject to a duty to compensate the Brazilian State for pollution damage.

Firstly, charterers' liability is joint and several with owners. In most cases owners will respond proactively to such claims, as their vessel is directly at risk of enforcement procedures and therefore they have the most to lose.

Secondly, the law does not prohibit a recourse action against other parties. Such recourse may be a contractual claim between charterers and owners, or an action against third parties whose conduct may have been the cause of the pollution (for example, in the cases of negligent tug operations, uncharted or unmarked obstacles within port approaches for which port authorities are responsible). Such recourse is possible once the penalty imposed has been satisfied by the charterer. Charterers are encouraged to review the terms of their charter agreements relating to risk allocation for pollution liabilities when giving instructions for vessels to call at Brazilian ports.

Thirdly, as a matter of practice charterers who are Brazilian entities or who have a registered presence in Brazil are more likely to find themselves subject to civil liability claims than those who do not. This is simply due to the ease of enforcement against local companies in Brazil, as compared to doing so against foreign-based entities. It is also worth noting that, in

the event that the defendant-charterer is not Brazilian and has no assets in the country, the law does not permit any action to be taken against other vessels chartered by the same charterers which subsequently enter Brazilian jurisdiction. This may of course not be the case where an owned vessel subsequently enters the jurisdiction, and the risks should be assessed separately in each case.

Summary

Under Brazilian law both time and voyage charterers may be exposed to claims for fines and compensation by authorities where a pollution incident has occurred from the chartered vessel in Brazilian jurisdiction.

Under administrative law charterers are likely to escape liability simply by demonstrating to the court that they were not in control of the vessel's day to day operations and therefore were not the cause of the pollution incident. However, under civil law the test to establish a duty to compensate environmental damage is sufficiently wide to accommodate charterers, who are then held jointly and severally liable with the owners and other parties involved in and benefiting from the vessel's activities in Brazil. This is strict liability and there is little defence available.

However, as a matter of practice, Brazilian charterers are more exposed to civil law claims for compensation than foreign charterers, and there is no power for other chartered vessels to be the subject of enforcement actions for these claims. Furthermore, while charterers will often be summoned alongside owners, it is expected that most owners will take positive steps to avoid detention of the vessel, thereby relieving charterers from direct liability. Furthermore, there is no bar to charterers seeking recourse against the party responsible for the pollution or bearing the contractual allocation of risk for such liability.

We are grateful to Carbone Law Office, Rio de Janeiro, for their invaluable assistance in the preparation of this article.

Footnotes

1 Civil Liability Conventions 1969 and 1992; Fund Convention 1992; Hazardous and Noxious Substances Convention 1996.

2 Article 14, §10.

Perfecting pollution prevention? - The State of Washington enacts a new statute

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Since the passage of the federal Oil Pollution Act of 1990 (OPA 90), which specifically allows the individual states in the US to make their own marine pollution laws and standards (staying within legal limitations), the State of Washington first tried to augment OPA 90 with its own comprehensive regulatory scheme, incorporating what it called "Best Achievable Protection" practices (BAP), controlling vessel manning, tank vessel design and construction, repairs, operations, etc. This far-reaching regulatory programme was opposed by industry, as an impermissible over-reaching into the province of the US federal regulatory field and insisting that it would set up severe inconsistencies with the rest of the US, rendering compliance expensive and practically impossible. In March 2000, the industry group Intertanko successfully obtained a ruling from the US Supreme Court to that effect, striking down 11 of the regulations as illegal, and they were repealed by the State of Washington in June of that year.

But since that time, Washington State officials have periodically issued pollution protection regulations that do not run afoul of legal limitations, and in April 2011 the Washington State legislature passed, and the governor signed into law, the latest set of regulations for tank vessels, due to come into effect on 22nd July 2011.

These new statutory mandates include:

- Enhancement of vessel contingency plan provisions, including a large scale equipment deployment every three years, that would be focused on operational readiness of response efforts in the first few hours of a spill. New planning standards by the Department of Ecology will be issued every five years, starting with tank vessels, with new rules set forth by 31st December 2012.

- The Washington State Department of Ecology is required to establish a volunteer co-ordination system, to handle the numerous citizens who

volunteer to participate in spill clean-ups, and grants civil immunity to the state for what said volunteers might do. This is similar in aim to what the State of California has done with its creation of regulations for the handling of volunteers post spill, the need for which was seen in the 2007 'Cosco Busan' spill in San Francisco. Not only are the needs for human volunteers to be addressed, but the new statute also requires that more provisions be made to incorporate into spill responses 'vessels of opportunity', like fishing boats, so that they can be used for oil spill recovery efforts. This seems to acknowledge the large role such small vessels have in spill response, most recently seen in the 'Deepwater Horizon' incident off Louisiana.

- The reporting of an emergency at sea or a discharge or substantial threat of discharge must be made within one hour to the Washington Department of Ecology, in addition to the US Coast Guard. This is similar to requirements in effect in several other states.

- Approval of contingency plans by the State of Washington must be made and notified within 65 days of submission.

- The use of 'umbrella plans' for both tank and non-tank vessels as per Washington State law is still permitted, but the omnibus plan must take into account the maximum worst case discharge amount of both vessel types, and provide for additional equipment to meet the challenge.

- The level of state fine to be assessed for such an incident had been tripled, to USD 3-300 per gallon for more than 1,000 gallons discharged, although any oil recovered within the first 48 hours after the spill will be credited against the amount spilled.

These laws appear to dwell well within the legal boundaries as set by the US Supreme Court for such state statutes. So, compliance planning for these regulations will be necessary for tank vessel operators (and those with mixed fleets of tank and non-tank vessels),

who have vessels that will operate in Washington State waters, and will require work in the modification of plans to conform to these enhanced expectations.

Other coastal states in the US will certainly take note of what the State of Washington has done, and may mimic those aspects of the new statute that are not currently found in equivalent terms within their own laws. In this way, the states in the US that set the trend are likely to be followed in kind by other states in due course, and so developments tend to eventually spread throughout the US and become the 'new standard'. This is also fed by developments in federal pollution regulations, which states also watch with interest, then tend to tailor, adopt, and append to their own state laws, further driving forward developments in the area.

The matrix of state laws, and their interplay with federal laws, is a hallmark of marine pollution response in the US, and is a peculiar feature that requires vigilance in planning and flexibility in compliance. Gard will continue to monitor such developments and report on them as warranted, in what has proven to be a dynamic venue for the evolution of marine pollution response planning and regulation.

The state of environmental crime enforcement in the US

By Steven P. Solow and Anne M. Carpenter,
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Introduction¹

It has been over a year since the 20th April 2010 explosion on the DEEPWATER HORIZON drilling rig in the Gulf of Mexico. The resulting oil spill (the Gulf spill) has been the subject of multiple investigations and analyses. According to the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, created on 20th May 2010, the "immediate cause" of the spill was a "series of identifiable mistakes" by the companies in charge of the rig.²

A hundred spills could be similarly described. The significance of the Gulf spill, given its size and the tragic human losses that occurred, will be analysed in many different ways. For the purposes of this article, we first look at the spill in terms of what it may mean for the criminal prosecution of environmental violations.

This article then moves to an analysis of current international projects that highlight cross-national co-operation in vessel pollution enforcement. Finally, we provide a review of significant vessel pollution enforcement cases from 2010, and the start of 2011.

The Clean Water Act: proposals to expand restitution and increase sanctions

Legislation introduced in the wake of the Gulf spill seeks to expand the scope of restitution that may be imposed following a criminal conviction of an environmental crime. At present, a federal judge has the discretion to impose restitution to an identifiable victim, but not, for example, for harm caused to natural resources.³ In 1996, the U.S. Senate attempted to revise the federal sentencing statutes to expand the scope of restitution in criminal cases by allowing judges to order restitution to communities harmed by environmental crimes.⁴ That attempt failed. The proposed post-spill legislation would expand the scope of restitution by mandating that judges order restitution to victims of criminal violations of the Clean Water Act.⁵ The bill does not propose to authorise the order of restitution to communities as a whole.⁶

The bill also would direct the United States Sentencing Commission to review the sentencing guidelines for Clean Water Act offences "in order to reflect the intent of Congress that penalties for the offences be increased [to] appropriately account for the actual harm to the public and the environment from the offences."⁷ If this effort goes forward, we may see similar efforts with regard to the other major environmental statutes, or a comprehensive effort, such as that proposed in 1996, to expand the scope of restitution to all environmental criminal convictions.

Environmental crime investigation and prosecution as a zero sum game

Absent from the many analyses in the media has been any meaningful reporting on the impact of the criminal investigation of the Gulf spill on the rest of the government's environmental crime enforcement efforts. This is especially of note with the news that the Department of Justice (DOJ) has transferred the criminal investigation of the Gulf spill from the Environmental Crimes Section in the Environment and Natural Resources Division to the Criminal Division.⁸

Given the relatively small amount of federal resources typically devoted to environmental criminal matters, the impact of investigating and (if appropriate) prosecuting cases arising out of the Gulf spill is significant. EPA recently touted the growth of its Criminal Investigation Division to a "full" complement of 200 special agents.⁹ To put this into perspective, the FBI has somewhere north of 13,000 special agents.¹⁰ While other agencies are involved in environmental crime investigations, EPA is unquestionably the lead agency in this area, and the commitment of numerous agents to the Gulf spill investigation inevitably raises questions about EPA's ability to cover other matters.

The same resource questions existed for the Environmental Crimes Section at DOJ. During the government's investigation and prosecution efforts after the March 1989 EXXON VALDEZ

spill, it has been said that, at one point or another, nearly all of the Justice Department's environmental crime prosecutors were working on the case. While it has grown in the past 20 years, the Justice Department's Environmental Crimes Section has approximately 35 trial attorneys. Even if only four or five of those attorneys are spending a significant amount of time on the Gulf spill investigation, that would be more than 10 per cent of the section's total. It is as yet unknown whether the department's decision to move the Gulf spill case into the Criminal Division will inject new resources into the case and free resources from the Environmental Crimes Section.

With regard to EPA, particularly in an atmosphere of budget cutting,¹¹ it is similarly unknown whether another impact of the Gulf spill will be a reduction in the federal government's ability to more broadly investigate environmental crimes. If EPA were so constrained it could impact more than federal cases. In recent years EPA has expanded and strengthened its role in training and supporting the work of state and local environmental investigators and police. Hundreds of state law enforcement officers have been trained by EPA at the Federal Law Enforcement Training Center in Georgia. Cuts to training budgets and other forms of state assistance could impact these resources as well.

As a means of comparison that may or may not be an artifact of resource allocation related to the spill, we can compare the reports of cases coming out of EPA Region 6 from 2009 to 2010. In 2009, a total of eight matters involved cases in Region 6.¹² A review of 2010 indicates one.

As in any major case, the government will have to decide just how much investigation of the Gulf spill it can afford. As one former Justice Department lawyer has observed, "A prosecutor is not obligated to take every possible step in the investigation of a suspected criminal offence. Rather, the prosecutor should consciously engage in an analysis of proportionality in choosing which

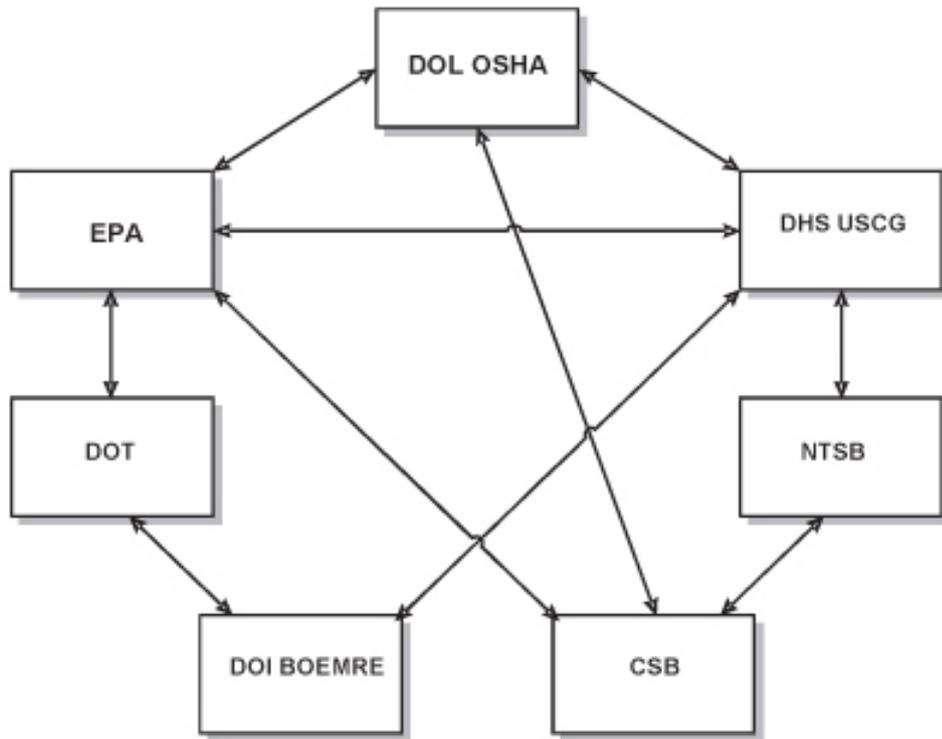
investigative steps to pursue, and how aggressively to pursue them".¹³ The availability of resources is a legitimate consideration in determining the scope and extent of a government criminal investigation.¹⁴ The underlying reason for the shift of the Gulf spill case to the Criminal Division is not publicly known. Whatever the reason, moving sole responsibility for prosecuting the spill case to that division may allow the Department's Environmental Crimes Section to continue to play a leading role in investigating and prosecuting other environmental crime matters around the country.

Who's in charge after a major incident?

Another issue receiving scant coverage is the remarkable, and remarkably confusing, number of agreements that address the federal government's inter-agency co-ordination following a significant event such as the Gulf spill. There is insufficient space here to address each memorandum of understanding that exists between and among the various agencies responding to the spill. Indeed, several MOUs were created specifically to co-ordinate work involving the Gulf spill.

Part of what is remarkable about these agreements is that they are generally the result of bilateral discussions between two government agencies and do not reflect other MOUs that exist between these same agencies and other agencies. To provide a shorthand way of visualising the MOUs between and among the federal agencies with authority to investigate environment and safety matters, we have provided the illustration below.

Federal Agencies with Memorandums of Understanding in Environmental and Safety Investigations



Agencies identified above (clockwise starting from top): Department of Labor, Occupational Safety and Health Administration; Department of Homeland Security, U.S. Coast Guard; National Transportation Safety Board; Chemical Safety Board; Department of Interior; Bureau of Ocean Energy Management, Regulation, and Enforcement; Department of Transportation; Environmental Protection Agency.

From the perspective of those who must represent entities and individuals who are the subject of such inquiries, these MOUs create more questions than answers. If an individual or entity is approached by one agency to provide information or to be asked for an interview, it is often impossible to know whether the agency is the "lead" agency, or whether it is operating in co-ordination with, or independently from, other agencies. This situation not only creates issues for those outside the government, but also raises questions

within the government because it can result in a lack of clear lines of authority and communication with regard to issues such as evidence preservation and forensic analyses. Without doubt, as the government's criminal investigation of the Gulf spill moves forward, increasing attention should be paid to whether and how its handling of this case impacts other cases involving multiple agencies and parallel safety, civil, and criminal investigations.

International co-operation in vessel

pollution enforcement and prosecution Over the last few years, governments have increased their co-ordinated efforts to investigate and prosecute vessel cases. Although many are familiar with these developments as they have occurred, we have summarised them below in an effort to provide an overview of what we see as a growing culture of international co-operation to investigate and bring enforcement actions involving maritime vessel pollution.

The Interpol Pollution Crime Working Group

As is widely known, Interpol's Pollution Crime Working Group is a consortium of criminal investigators from Interpol's 188 member countries, which shares information to develop new strategies to control global environmental crime.¹⁵ The Group includes various project-teams including the Clean Seas Project, led by an officer of the Australian Maritime Safety Administration. The Group developed a manual on investigating vessel pollution and plans to develop and deliver a training course to international law enforcement officers using the manual as a guide.¹⁶ In an effort to provide enforcement guidance, and publicise shipping companies and ships that violate pollution law, the Clean Seas Project also maintains a Ship Pollution Prosecution Database that contains information on completed prosecutions by various countries for the period 2001 to 2006.¹⁷

Aquapol

Aquapol is a self-governing association of maritime and inland navigation-related law enforcement authorities from the member states of the European Union and Switzerland.¹⁸ The organisation, founded in 2002 by the Dutch, German and Belgian Water Police Forces, is an effort to improve co-ordination of inland and maritime shipping-related law enforcement in Europe through the exchange of good practice, joint training, joint international control operations, and joint legislation and lobbying efforts.¹⁹

The North Sea Network

The North Sea Network of Investigators and Prosecutors (NSN), a group of coastal countries bordering the North Sea, works to enforce international rules and standards under the United Nations Convention on the Law of the Sea (UNCLOS), the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78), and the numerous regulations of the International Maritime Organization (IMO).²⁰ Because of the density of ship traffic and close proximity of the coastal states, the NSN has facilitated joint efforts to investigate and prosecute cases crossing national borders.²¹ The participating coastal states include Belgium, Denmark, France, Germany, Ireland, the Netherlands, Norway, Sweden and the United Kingdom. The NSN was begun by Norway in 2002, and facilitates the exchange of information between the member states regarding legal and evidentiary requirements, as well as surveillance data.²² The NSN has created an international manual that offers guidance on the detection of maritime oil pollution offences,

collection of evidence, and imposition of penalties for offenders.²³

Maritime MOUs

Under the leadership of the IMO, various MOUs have been established between consortiums of port states to co-ordinate compliance inspections under Marpol 73/78. To date, MOUs have been signed covering all of the world's oceans: the Paris MOU covers Europe and the North Atlantic; the Tokyo MOU covers Asia and the Pacific; the Acuerdo de Viña del Mar covers Latin America; the Caribbean MOU covers the Caribbean; the Abuja MOU covers West and Central Africa; the Black Sea MOU covers the Black Sea region; the Mediterranean MOU covers the Mediterranean; the Indian Ocean MOU covers the Indian Ocean; and the Riyadh MOU covers six Persian Gulf states.²⁴ As time passes, and enforcement efforts rise, these documents are becoming increasingly meaningful. For example, it appears that vessel pollution enforcement training in the Arab countries that operate under the Riyadh MOU (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and UAE) has increased in recent years. While the Riyadh MOU was enacted in 2004,²⁵ the increases in enforcement training suggest that it may only be a matter of time before these countries begin to step up enforcement on vessels transiting their waters.

An example of international co-operation to effectively and efficiently prosecute vessel pollution can be seen in *United States v. Ionia Mgmt S.A.*²⁶ In *Ionia*, the US Court of Appeals for the Second Circuit upheld the conviction of the shipping company Ionia Management S.A. for violations of the Act to Prevent Pollution from Ships for failure to maintain an accurate Oil Record Book for the M/T KRITON while in US waters. The crew of the M/T KRITON, a 600-foot oil tanker managed by Ionia, routinely discharged oily waste into the ocean through a "magic hose" at the direction of the ship's Chief Engineers.²⁷ The crew also made false entries into the Oil Record Book to conceal the discharges and hid the "magic hose" from US Coast Guard inspectors. The Netherlands Royal Military Police provided the US Coast Guard with evidence of illegal dumping which helped secure the conviction against the company for violations of the Act to Prevent Pollution from Ships.²⁸

Vessel enforcement cases of note²⁹

*United States v. Koo's Shipping Company*³⁰ - Koo's Shipping Company, a Taiwanese Corporation, pleaded

guilty in federal court to charges of making false statements, knowingly failing to fully and accurately maintain an oil record book, and knowingly discharging oily bilge waste into Pago Pago Harbor, American Samoa, without using proper pollution prevention equipment. A Coast Guard inspection of the company's ship M/V SYOTA MARU on 17th August 2010 revealed evidence of the violations. The company was sentenced to pay a USD 750,000 criminal fine and USD 250,000 in community service payments for projects in American Samoa. The company was also placed on three years' probation.

*United States v. Cardiff Marine, Inc.*³¹ - Cardiff Marine, Inc., a Liberian-registered shipping company, was sentenced in a Baltimore federal court for a felony violation of the Act to Prevent Pollution from Ships after the company pleaded guilty to making false statements to the Coast Guard, falsification of discharge records from the M/V CAPITOLA, and other acts of concealment. A Coast Guard investigation of the company was launched on 3rd May 2010 after a crew member informed a clergyman, who was on board on a pastoral visit, about "monkey business in the engine room" involving a "magic pipe." The crew member gave the clergyman a flash drive containing a video taken of the ship's engine room and asked him to alert the Coast Guard. The investigation revealed that the "magic pipe" was a bypass hose that enabled the dumping of waste oil overboard. The company was sentenced to pay a USD 2.4 million fine and three years' probation, during which time third-party auditors will administer an environmental compliance plan for the company.

*United States v. Stanships, Inc., et al.*³² - Stanships, Inc., Stanships, Inc., Standard Shipping, Inc., and Calmore Maritime, Ltd. pleaded guilty on 12th April 2011 to violations of the Act to Prevent Pollution from Ships, Ports and Waterways. Investigation into the defendants began on 29th November 2010 after a crew member reported to the Coast Guard that the ship M/V AMERICANA had a "magic pipe" that bypassed pollution controls to dump oily waste overboard. The crew deliberately pumped engine waste overboard and created false Oil Record Books to conceal the illegal dumping. Efforts were made to hide the pipe when the ship was in port. The defendants were also charged with failing to report a situation hazardous to US waterways because the ship entered the Mississippi River without a fully-functioning generator and the crew was unable to power the ship. Under

the terms of the plea agreement all defendants are banned from operating in the United States for a period of five years. Defendants must also pay USD 1 million in restitution, of which USD 250,000 will be devoted to conservation and protection of wildlife in the area.

*United States v. Dimitrios Grifakis*³³ - Dimitrios Grifakis pleaded guilty to obstructing a federal Coast Guard investigation that was examining the use of a "magic pipe" to bypass required pollution controls on the M/V CAPITOLA. Grifakis admitted he instructed subordinates to dump oily waste overboard via the pipe between March 2009 and 3rd May 2010. Grifakis obstructed the investigation into the dumping by falsifying the M/V CAPITOLA's Oil Record Books and failing to produce Daily Sounding Records for the ship, which could have helped pinpoint days when dumping occurred. Cardiff Marine, Inc., the shipping company responsible for the M/V CAPITOL, pleaded guilty on 3rd February 2011 to violation of the Act to Prevent Pollution from Ships. The company was fined USD 2.4 million and will serve three years' probation.

*United States v. Fleet Management Ltd.*³⁴ - Fleet Management Ltd., a Hong Kong-based ship management firm, pleaded guilty to a criminal violation of the Oil Pollution Act of 1990, as well as felony obstruction of justice and false statement charges. The firm was ordered to pay USD 10 million and sentenced to three years' probation for its role in the COSCO BUSAN oil spill and related cover-up after the ship struck the San Francisco Bay Bridge in November 2007. Fleet Management concealed ship records and falsified and forged documents to influence the Coast Guard's investigation. The collision killed at least 2,000 migratory birds including Brown Pelicans, Marbled Murrelets and Western Grebes. Pursuant to the plea agreement, Fleet Management was ordered to direct USD 2 million of the USD 10 million penalty to fund marine environmental projects in the San Francisco Bay. The firm was also ordered to implement a comprehensive compliance plan to heighten training and voyage planning for ships engaged in trade with the United States.

*United States v. Irika Shipping S.A.*³⁵ - Irika Shipping S.A., a ship management corporation, pleaded guilty to felony obstruction of justice charges and violation of the Act to Prevent Pollution from Ships. Irika was ordered to pay more than USD 4 million in fines and community service restitution for deliberately concealing vessel pollution from the M/V IRANA, one of

the company's cargo ships that made port calls in US cities. The ship's chief engineer directed the dumping of approximately 6,000 gallons of waste oil overboard through a bypass hose that circumvented pollution prevention equipment. Irika also received five years' probation, during which the company is required to develop an enhanced environmental compliance plan covering all its ships, including any new vessels.

United States v. Avaz,³⁶ *United States v. Mogultay*,³⁷ *United States v. Atlas Ship Management Ltd.*³⁸ - Gunduz Avaz, a Turkish citizen and the chief engineer on the cargo ship M/V AVENUE STAR, operated by Atlas Ship Management Ltd., was sentenced to five years' probation for failing to fully and accurately maintain an oil record book in violation of the Act to Prevent Pollution from Ships. Avaz failed to record illegal discharges of oil-contaminated waste from the engine room of the ship that was transferred to a ballast storage tank, and then disposed of at sea as the vessel travelled from Honduras to Tampa, Florida. Yavuz Mogultay, the second assistant engineer, was charged separately for the use of a bypass hose to discharge waste and the failure to record the discharges in the ship's oil record book. Mogultay was sentenced to five years' probation. Atlas Ship Management Ltd. separately pleaded guilty to making false statements and knowingly failing to accurately maintain an oil record book. The company was sentenced to three years' probation and a USD 800,000 fine. The company was also ordered to pay USD 100,000 to the National Fish and Wildlife Foundation, and implement an environmental compliance programme covering inspection and audit of its ships that sail into the United States.

*United States v. Aksay Denizcilik Ve Ticaret A.S.*³⁹ - Aksay Denizcilik Ve Ticaret A.S., a Turkish corporation that operated the ship M/T KERIM, pleaded guilty to making a false statement and failure to fully and accurately maintain an oil record book. Between 2006 and 2009 officers and crew of the M/T KERIM, under the direction of Aksay, used a pipe to bypass the ship's oil pollution prevention equipment and discharge oil-contaminated waste directly into the ocean. Aksay was sentenced to three years' probation and a USD 725,000 fine, and ordered to implement an environmental compliance programme.

United States v. DRD Towing Co. LLC,⁴⁰ *United States v. Dantin*⁴¹ - DRD Towing Co. LLC pleaded guilty to a felony violation of the Ports and Waterways

Safety Act, and a misdemeanor violation of the Clean Water Act. Randall Dantin, a co-owner of the company, also pleaded guilty to a separate charge of obstruction of justice. DRD Towing assigned employees to operate vessels without proper Coast Guard licensing, paid captains to operate without a relief captain, and created environmentally hazardous conditions by negligently discharging oil. The company admitted that the M/V MEL OLIVER was pushing a tanker barge of fuel oil when it crossed the path of the M/T TINTOMARA and caused a collision resulting in the discharge of 282,686 gallons of fuel into the Mississippi River. DRD Towing was sentenced to two years' probation and a USD 200,000 fine, while Dantin was sentenced to 21 months in prison, two years of supervised release, and a USD 50,000 fine.

*United States v. The China Navigation Co. Pte. Ltd.*⁴² - The China Navigation Co. Pte. Ltd., a marine cargo vessels operation, pleaded guilty to a felony violation of the Act to Prevent Pollution from Ships based on its failure to maintain an oil record book. The oil record book failed to note that the crew had discharged approximately 275 gallons of oil-contaminated waste collected by crew members after an on-board oil spill in violation of the International Convention for the Prevention of Pollution from Ships. Pursuant to the plea agreement, the company agreed to pay a USD 75,000 fine, serve two years' probation, implement an environmental compliance plan, and pay USD 25,000 to the Columbia River Estuarine Coastal Fund.

*United States v. Cooperative Success Maritime S.A.*⁴³ - Cooperative Success Maritime S.A., the operator of the M/T CHEM FAROS, a cargo ship that regularly transported cargo between foreign ports and the United States, pleaded guilty to violation of the Act to Prevent Pollution from Ships and making false statements. The crew of the M/T CHEM FAROS discharged approximately 13,200 gallons of oil-contaminated waste into the ocean, and falsified entries in the oil record book to conceal the amount of oil-contaminated bilge waste that was actually stored aboard the ship. The company was sentenced to a USD 850,000 fine, of which USD 150,000 was directed to the National Fish and Wildlife Foundation, five years' probation, and the implementation of an environmental compliance programme.

*United States v. Sikharulidze*⁴⁴ - Vaja Sikharulidze, former chief engineer of the M/T CHEM FAROS, operated by Cooperative Success Maritime S.A.,

pleaded guilty to violating the Act to Prevent Pollution from Ships for failure to properly maintain an oil record book recording disposal of contaminated waste. On at least one occasion, Sikharulidze directed subordinate crew members to bypass the ship's oil-water separator, and pump oil-contaminated waste directly overboard. Approximately 13,200 gallons of oil-contaminated waste was discharged into the ocean. Sikharulidze received one year's probation and seven days of home confinement for his conduct.

United States v. Dimitrios Dimitrakis⁴⁵ - Dimitrios Dimitrakis, chief engineer of the M/V NEW FORTUNE cargo ship, was sentenced to three years' probation, and a USD 5,000 fine for aiding and abetting the failure to maintain an oil record book. Dimitrakis routinely ordered his crew to bypass the oil pollution prevention equipment and discharge oil-contaminated materials directly into the ocean when entering US waters. Dimitrakis concealed these discharges via false entries into the ship's oil record book. Volodymyr Dombrovskyy, another crew member, was sentenced to two years' probation, and a USD 500 fine for aiding and abetting the failure to maintain an oil record book. Transmar Shipping Co. S.A., the ship's operator, was separately sentenced for failure to maintain an oil record book and false statements made to a federal official, three years' probation, a USD 750,000 fine, a USD 100,000 community service payment to the National Fish and Wildlife Foundation, and was ordered to implement an environmental compliance programme.

Footnotes

1 Portions of this article previously appeared in: Steven P. Solow & Anne M. Carpenter, *The State of Environmental Crime Enforcement: A Survey of Developments in 2010*, Daily Env't Report (BNA) No. 50 DEN B-1 (Mar. 15, 2011).

2 National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, *Report to the President, Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling*, p. vii (January 2011), available at <http://www.oilspillcommission.gov/final-report>.

3 See 18 U.S.C. §§ 3553, 3663.

4 Environmental Crimes and Enforcement Act of 1996, S. 2096, 104th Cong. (1996).

5 Environmental Crimes Enforcement Act of 2011, S. 350, 112th Cong. (2011) (proposing to amend 18 U.S.C. § 3663A(c)(1)(A)). See <http://www.gpo.gov/fdsys/pkg/BILLS-112s350is/pdf/BILLS-112s350is.pdf> [BILLS-112s350is.pdf](http://www.gpo.gov/fdsys/pkg/BILLS-112s350is/pdf/BILLS-112s350is.pdf)

pdf.

6 See *id.*

7 *Id.*

8 "Justice Department Sets Up Task Force for Gulf of Mexico Oil Spill Investigation"(46 DEN A-11, 3/9/11).

9 "Giles Says EPA Pursuing High-Impact Cases, Adding Criminal Investigators to Staff" (184 DEN A-7, 9/24/10).

10 See <http://www2.fbi.gov/quickfacts.htm>.

11 The President's proposed budget for FY2012 cuts, among other things, the EPA budget for "Forensic Support" by thousands of dollars - a pittance in the deficit abyss, but potentially significant to EPA's ability to provide functional support for investigations. See <http://www.epa.gov/planandbudget/annualplan/fy2012.html>

12 EPA Region 6 covers Arkansas, Louisiana, New Mexico, Oklahoma, Texas and the areas covered by 66 Native American Tribes.

13 See Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role*, 68 *Fordham L. Rev.* 723, 770 (1999).

14 See ABA Criminal Justice Standards on Prosecutorial Investigations, 2.1(c)(vi), available at http://www.americanbar.org/groups/criminal_justice/policy/standards.html.

15 See Interpol, *The Pollution Crime Working Group*, available at <http://www.interpol.int/Public/EnvironmentalCrime/Pollution/WorkingGroup.asp>.

16 *Id.*

17 *Id.*

18 See Aquapol, *International Police Cooperation on the Water*, available at <http://www.aquapol-police.com/>.

19 *Id.*

20 See The North Sea Network of Investigators and Prosecutors, available at http://www.ospar.org/content/content.asp?menu=00580623000000_000000_000000.

21 *Id.*

22 *Id.*

23 *Id.*

24 See International Maritime Organization, *Port State Control*, available at <http://www.imo.org/OurWork/Safety/Implementation/Pages/PortStateControl.aspx>.

25 See Riyadh Memorandum of Understanding on Port State Control, available at <http://www.riyadhmu.org/>.

26 555 F.3d 303 (2d Cir. 2009).

27 555 F.3d at 306.

28 See Press Release, U.S. Dep't of Justice, *Tanker Company Fined \$4.9 Million for Falsifying Records and Obstruction of Justice* (Dec. 14, 2007).

29 Like other sources, our data on environmental criminal cases is probably incomplete. Our sources, among others, include the websites of EPA and DOJ, as well as BNA's Daily Environment Report, and the always useful Environmental Crimes Blog of

Walter James, accessible at <http://www.environmentalblog.typepad.com>.
 30 No. 1:11-cr-00034-GK-1 (D.D.C. guilty plea entered Mar. 31, 2011).
 31 No. 1:11-cr-00058-MJG (D. Md. guilty plea entered Mar. 17, 2011).
 32 No. 2:11-cr-00057-CJB (E.D. La. guilty plea entered April 12, 2011).
 33 No. 1:11-cr-00011-MJG (D.Md. guilty plea entered May 5, 2011).
 34 No. 3:08-cr-00160-SI (N.D. Cal. sentencing Feb. 19, 2010).
 35 Nos. 1:10-cr-00403-JSM and 1:10-cr-00372-JSM (D. Md. sentencing Sept. 21, 2010).
 36 No. 8:10-cr-00286-JSM (M.D. Fla. sentencing Sept. 7, 2010).
 37 No. 8:10-cr-00264-JDW (M.D. Fla. sentencing Aug. 26, 2010).
 38 No. 8:10-cr-00363-SDM (M.D. Fla. sentencing Dec. 2, 2010).
 32 No. 2:11-cr-00057-CJB (E.D. La. guilty plea entered April 12, 2011).
 39 No. 8:10-cr-00116-RAL (M.D. Fla. sentencing May 21, 2010).
 40 No. 2:10-cr-00191-ILRL (E.D. La. sentencing Jan. 19, 2011).
 41 No. 2:10-cr-00190-ILRL (E.D. La. sentencing Jan 19, 2011).
 42 No. 3:10-cr-05181-BHS (W.D. Wash. sentencing Mar. 22, 2010).
 43 No. 4:10-cr-00035-D (E.D.N.C. sentencing June 7, 2010).
 44 No. 4:10-cr-00032-D (E.D.N.C. sentencing Aug. 17, 2010).
 45 No. 4:10-cr-00552-DLJ (N.D. Cal. sentencing Sept. 30, 2010).

US law – Criminal prosecutions of MARPOL violations

The Second Circuit Court of Appeals confirms US jurisdiction to criminally prosecute ship operators for crew violations of MARPOL.

The Second Circuit Court of Appeals has joined the Fifth Circuit Court of Appeals in confirming that shipowners and operators may be criminally prosecuted and held vicariously liable for entering US waters with false entries in the Oil Record Book (ORB) designed to hide discharges of waste oil in violation of MARPOL. On 20th January 2009 a three-judge panel ruled in the case *United States v. Ionia Management*¹ that the Act to Prevent Pollution from Ships (APPS), the US version of the MARPOL Convention, "imposes a positive duty on the subject ships to ensure that their oil record books are accurate (or at least not knowingly inaccurate) upon entering the ports or navigable waters of the United States".

Ionia was the ship manager of the tanker *KRITON*, which delivered oil products to various US east coast ports. At the trial the jury found that the engine room crew under the direction of the chief engineers routinely discharged waste oil into international waters by bypassing the oily water separator and made entries in the ORB to make it appear that the vessel was in compliance. The jury also determined that senior engine room personnel obstructed justice by directing junior crew members to lie to the Coast Guard and by destroying evidence. The company was convicted under the rule of vicarious criminal liability, meaning that there was no proof required that the company management was aware of any of the criminal activity on board the vessel.

The Second Circuit followed the Fifth Circuit's decision in *United States v. Jho*² in holding that the crime under APPS is the failure to "maintain" the ORB.³ Both courts found that maintenance of the ORB implies a duty upon a foreign flag vessel to ensure that the entries are accurate and that this is a continuing duty that applies when the vessel calls at US ports. The MARPOL treaty provides for flag state jurisdiction for compliance within

international waters. The court ruled that because the failure to maintain the ORB occurs within US waters, the US as port state has jurisdiction to prosecute the company and the individuals and that there is no positive duty under international law for the port state to refer the matter to the flag state.

Vicarious corporate liability is here to stay

The Second Circuit also considered arguments made by amici curiae⁴ that urged the court to review the standards for corporate vicarious criminal liability. Vicarious liability of a corporation for acts of its agents or employees is well known within the civil law under the rubric "respondeat superior": let the master answer. It is well established within tort principles that the employer is responsible to pay compensation when an employee's negligence harms another. This is so even when the employee has acted against corporate policy and instructions, as long as the act leading to the injury can be said to be within the employee's scope of employment. Amici attacked the wholesale incorporation of the respondeat superior principle into the criminal law on the ground that APPS did not provide for corporate vicarious liability and, absent specificity in the statute, criminal conviction requires some form of intent at least on the part of the corporate management.

The *Ionia* jury was instructed that "a corporation may be held criminally liable for the acts of its agent done on behalf of and for the benefit of the corporation, and directly related to the performance of the duties the employee has authority to perform". As is the norm in this type of case, the illegal discharges were in contravention of company policy and the management company was not aware of the illegal discharges or the false entries in the ORB. Indeed, as the result of a prior conviction, *Ionia* had a court-approved compliance plan at the time of the alleged violations.

The Second Circuit affirmed the jury's guilty verdict against the company because the operation of the engine room and record keeping were clearly within the scope of employment for

the engine room crew. Further, based upon expert testimony put forward by the government, the Second Circuit held that the jury was entitled to find that the bypassing and false entries were performed for the benefit of the company based on the extra time and expense involved in properly disposing of the oily waste water.

Finally, the court rejected the argument made by amici that the government was required to prove within its case that *Ionia* lacked effective policies and procedures to deter and detect the criminal acts of its employees. The court held that the lack of an effective environmental compliance plan is not an element of proof for the government but instead an effective plan is a defence available to the defendant in showing that the crew member at issue was not acting for the benefit of the company and within the scope of employment.

The Federal Appellate system in the United States is divided into twelve Circuits with each of the Circuit Courts of Appeal responsible for interpreting the federal law within the cases brought before it, subject only to review by the Supreme Court.⁵ The Second and Fifth Circuits are considered to be leaders in matters of maritime law and their decisions are frequently followed in the other Circuits deciding similar questions. Thus, it is now without doubt that the owner and operator of any vessel entering US waters with an inaccurate ORB are vulnerable to criminal investigation and, if it is shown that the entries were made for the purpose of hiding discharges in violation of MARPOL, the owner and operator will be subject to criminal prosecution and vicarious liability for criminal acts of crew members resulting in severe fines, onerous probation terms and prolonged disruption of their operations. Lack of knowledge of crew non-compliance is no defence. A jury may consider a company's compliance efforts but, in itself, those efforts are not an absolute defence. Rather, the compliance efforts are facts that may be considered by the jury in determining whether the crew was acting "to benefit" the company. Compliance efforts are also relevant

and mitigating factors considered by a court in determining the proper fine after conviction.

Corporate responsibility for environmental compliance requires a vigorous and proactive approach

For many years, Gard has been warning members about the severe penalties for violations of MARPOL through circulars, Gard News articles and seminar presentations. This risk is not just in the US but includes European port and flag states as well. Despite such warnings by Gard, other Clubs and shipping associations, shipowners and operators continue to be charged for vicarious liability for record keeping violations masking illegal discharges. The US prosecutors offer a reward in the form of a portion of the fine to crew members who report violations. So-called "whistleblower rewards" are now well-known in the crewing community and an undeniable incentive to report wrongdoing not to the company but to the authorities. Gard has repeatedly advised members that in order to minimise risk they must implement a vigorous environmental compliance programme and actively audit compliance aboard their vessels. Gard recommends that members benchmark their programme against the guidance document prepared by the International Chamber of Shipping (ICS) and the International Shipping Federation (ISF) "Industry Guidance on Environmental Compliance – A Framework for ensuring compliance with MARPOL".⁶ The guidance document includes such topics as management responsibility, corporate and individual responsibility, training, awareness and competence, waste stream analysis and budget, technical equipment, control devices, documentation, internal reporting, external reporting and audit systems. While each company must compose and execute its own environmental compliance programme in conformity with its culture and needs, all programmes should address the components set out in the ICS/ISF framework.

In introducing the framework, ICS and ISF acknowledge the prosecution of companies, particularly in the US, for MARPOL violations and comment that "prosecuting authorities have identified the absence of a systematic approach to identifying and managing compliance with environmental requirements as a common failure". An effective compliance plan with demonstrable crew training in proper use of the pollution prevention equipment and company environmental policy will, as the Second Circuit has indicated in the *Ionia* decision, provide a defence to vicarious corporate criminal liability in rebutting the contention that an illegal discharge and false record keeping were for the "benefit" of the company and within the "scope of employment".

The guidance is relevant to preventing all forms of pollution but can be read in conjunction with the "Shipping Industry Guidance on the Use of Oily Water Separators", also published by ICS/ISF. Gard recommends both documents to members. Both can be found at www.marisec.org/environmental-compliance.

The MARPOL requirement that oily waste water be processed by an oily water separator and discharges properly recorded in an ORB were first implemented in 1983, more than 25 years ago. MARPOL is one of the most widely subscribed international treaties with virtually all of the maritime nations as signatories. The risks of violation of the treaty requirements have been very well publicised by the P&I Clubs as well as other shipping organisations. No prudent ship operator can send ships to sea today without an environmental compliance plan that includes proper crew training and regular audits.

It is important to remember that the mere institution of a compliance plan alone will not exonerate an owner/operator from culpability for MARPOL/ APPS violations. The shipowner and operator must be proactive in ensuring that their environmental polices are

understood and followed by personnel serving aboard their ships. While many ship operations can be sub-contracted, liability for proper performance remains with the owner and operator. Regular, documented on-board audits of shipboard environmental compliance with oversight by senior shore side management are an absolute necessity for effective compliance efforts. Vigorous and proactive management of shipboard environmental compliance will in most instances prevent practices leading to prosecution in the US and, in the event a crew member does violate company policy, will provide the owner and operator with the best defence available under APPS to corporate vicarious liability for the wrongful actions.

Further information

For more information about MARPOL violations in the US readers should refer to:

Gard News articles:

- US law – Oil record book violations (issue No. 192);
- The greening of the deep blue sea – Corporate environmental compliance today (issue No. 191);
- US Coast Guard formal policy on voluntary disclosure of MARPOL violations (issue No. 189);
- Oily water separator bypass in the US – The tables are turned (issue No. 189);
- ICS/ISF guidance on environmental compliance (issue No. 189);
- US Coast Guard new Oil Record Books (issue No. 188);
- MARPOL Annex VI – New risks and challenges for owners and charterers (issue No. 187);
- Waste management – From oily water to plastics (issue No. 186);
- US law – MARPOL violations in the US (issue No. 184);
- MARPOL Annex VI – Solving the low sulphur issue (issue No. 184);
- Recent changes in US regulations (issue No. 182);
- Oil and water don't mix (issue No. 180);

Footnotes

1 *United States v. Ionia Management S.A.*, No. 07-5801-cr, 08-1387-cr (2d Cir. 2009), 2009 U.S. App. LEXIS 902 (decided Jan. 20, 2009); 2009 AMC 153.

2 *United States v. Jho*, 534 F.3d 398 (5th Cir. 2008). The *Jho* decision is discussed in the article "US law – Oil record book violations" in Gard News issue No. 192.

3 The Act to Prevent Pollution from Ships is intended to implement the MARPOL Convention but the requirement to "maintain" the ORB is not explicit in MARPOL. Rather, the MARPOL regulations refer to making full and complete entries and keeping the ORB for examination for at least three years following the last entry. See "Implications of the *Jho* Doctrine", by Dennis Bryant, Senior Maritime Counsel, Holland and Knight, August 2008 at www.marinelink.com.

4 *Amicus curiae* (plural *amici curiae*) is a legal Latin term, literally translated as "friends of the court" and refers to someone who volunteers to advocate a position before a court even though they were not a party to the case itself. In the *Ionia* case a number of business and legal defence associations were amici, namely: Chamber of Commerce of the United States, Washington Legal Foundation, Association of Corporate Counsel, National Association of Criminal Defense Lawyers, National Association of Manufacturers and New York State Association of Criminal Defense Lawyers.

5 Review by the US Supreme Court is discretionary and relatively rare.

6 See article "ICS/ISF guidance on environmental compliance" in Gard News issue No. 189.

- Pollution – Ships, crews and shore side management face ever-increasing fines and prison sentences (issue No. 175);
- Environmental crime – Myths and reality (issue No. 167);
- The United States Ocean Dumping Act (issue No. 159);
- Discharge of oil prohibited (issue No. 152).

Loss Prevention Circulars:

- New Permit Requirements for Vessels

- US Environmental Protection Agency (No. 16-08);
- US Coast Guard – Formal policy on voluntary disclosure of MARPOL violations (No. 13-07);
- Environmental crime – Oil water discharges off the East Coast of Canada (No. 14-02);
- Environmental Crime – Myths and Reality (No. 05-02);
- Oily water separation and discharge: Discharge of oil prohibited (No. 07-01);
- Oily water separation and discharge:

Risk of oil pollution versus vessel's safety (No. 06-01).

P&I Member Circulars:

- International Convention for the Prevention of Pollution from Ships 73/78 MARPOL – Oily Water Separators (No. 03/05).

ICS/ISF guidance on environmental compliance

Gard News 189,
February 2008/April 2008

ICS and ISF publish guidance for ensuring compliance with MARPOL.

The International Chamber of Shipping (ICS) and the International Shipping Federation (ISF) have published a new leaflet: "Shipping Industry Guidance on Environmental Compliance – A framework for ensuring compliance with MARPOL". The framework is intended to be used by shipowners and operators as a template for review of company environmental compliance programmes. The framework is supported by BIMCO, Intertanko, Intercargo, OCIMF and SIGTTO.

The guidance document includes such topics as management responsibility, corporate and individual responsibility, training, awareness and competence, waste stream analysis and budget,

technical equipment, control devices, documentation, internal reporting, external reporting and audit systems. While each company must compose and execute its own environmental compliance programme in conformity with its culture and needs, all programmes should address the components set out in the ICS/ISF framework.

In introducing the framework, ICS and ISF acknowledge the prosecution of companies, particularly in the United States, for MARPOL violations and comment that "prosecuting authorities have identified the absence of a systematic approach to identifying and managing compliance with environmental requirements as a common failure". The framework is a tool for companies to use in reviewing

their own practices and determine any additional steps that may be needed to ensure compliance with environmental protection obligations. The guidance is relevant to preventing all forms of pollution but can be read in conjunction with the "Shipping Industry Guidance on the Use of Oily Water Separators", also published by ICS/ISF. Gard commends both documents to members. Both can be downloaded at www.marisec.org/environmental-compliance.

Oil and water don't mix

By Captain Helge Oliverson, Project Manager,
Norwegian Training Center, Manila

Gard News 180,
November 2005/January 2006

Introduction

Everybody knows that oil and water don't mix. But in the maritime industry separating oil from water is not a simple matter, although it is a very important one. Any breach of MARPOL 73/78 can have severe consequences for the shipowner and the officers and crew involved. Failing to separate one from the other could pollute the world's bodies of water and cost shipowners and responsible officers a lot of money in fines, or even land them in jail.¹ In tonnage terms, the most important pollutant resulting from shipping operations is oil.

The Norwegian Training Center - Manila

(NTC-M), which was established in 1990 to provide relevant training to Filipino seafarers serving on its members' ships, has joined with Hoegh Fleet Services to create a five-day course entitled "Bilge Water/Waste Oil Operational Management". The course is supported with training material from Gard.

Contents of the course

The course is designed for marine deck officers and marine engine officers and provides participants with an effective refresher on waste oil management. Aside from reminding them of the details of bilge water and waste oil management, the course aims to heighten their awareness of the need to be responsible officers, especially in dealing with waste matters that can pollute the sea. This is in line with NTC-M's key objective to improve the human factor in ship operations.

The contents of the course are as follows:

Theoretical upgrading and awareness

The course covers applicable marine pollution laws and regulations extensively. Among the regulations is MARPOL 73/78. This is one of the most important global conventions for the prevention of pollution from ships. It governs the design and equipment of ships, establishes a system of certificates and inspection and requires states to provide reception facilities for the disposal of oily waste and

chemicals. In addition, MARPOL 73/78 requires water from engineering spaces to pass through the oily water separator (OWS) before discharge to meet the requirement of the 15 ppm limit to the oil content of water that can be discharged to the sea. A corollary to the requirement to separate oil from water before discharge is the requirement for all vessels to maintain a sludge tank to store oil wastes. Sludge generated by the OWS must either be incinerated or pumped ashore.

MARPOL 73/78 has six annexes. Annex I details regulations for the prevention of pollution by oil. A very important regulation under this Annex is the requirement that every ship should have an Oil Record Book, which should have accurate and complete daily records of relevant machinery space operations. Proper use of the Oil Record Book is emphasised in the course. Another important regulation covered in the course is the outcome of the 49th session of the IMO Marine Environment Protection Committee (MEPC49).

Practical training and exercises

The course has six practical exercises that take the participants through the stages of bilge water and waste oil management. For this purpose, a laboratory has been set up inside the premises of NTC-M simulating all the components that make up a bilge water/waste oil management system. The laboratory simulates a bilge well where bilge water and waste oil accumulate, an oily bilge holding tank with a separated oil tank containing mostly oil and a bilge holding tank containing mostly water and an OWS that filters oil from water down to less than 15 ppm (the permitted amount of oil in water that can be thrown overboard), a separate oil tank, an incinerator waste tank and a holding tank to port facilities. The exercises focus on the OWS systems and operation. The heart of the system – or, should we say, kidney or liver – is the OWS, which takes care of filtering oil from water. As such, the course stresses that the OWS should not be overly taxed. As a person should not take excessive levels of alcohol so as not to destroy the liver, marine deck officers

or marine engine officers in charge of waste oil management should not feed excessively oily water to the OWS.

The system of waste oil management is designed to separate oil from water in the oily bilge holding tank so that the water fed to the OWS will no longer contain so much oil. However, knowing from experience that this system is prone to malfunction due to human negligence, NTC-M has designed a support sub-system called physical separation, composed of cascading tanks of differing elevations. Using the well-known fact that oil floats above water, the cascading tanks capture water that settles below each tank and forward the oilier portion to the succeeding tanks. Only the water captured in this process is finally fed to the OWS for further filtration. In this way, the effect of possible human negligence is reduced in the process and the OWS is not taxed excessively. This will of course prolong the life of the OWS.

Conclusion

The Bilge Water/Waste Oil Operational Management Course has been warmly received by the industry since it was introduced as a pilot course by NTC-M in 2004. Attendance has always been very good. Now that Bilge Water/Waste Oil Operational Management is offered as a regular course, NTC-M hopes it will be able to contribute to protecting the environment from oil pollution, having a positive impact on the human factor in ship operations.

Environmental Crime – Myths and Reality

Loss Prevention Circular
No. 05-02

Prosecutions of shipowners and crewmembers in the United States criminal courts for environmental crimes have recently hit the headlines in both industry and general news media. The purpose of this article is to explain the background for the spate of high profile criminal investigations and prosecutions as well as to explode the myths that may lead some in the industry to wrongly conclude that they have little or no exposure for similar treatment.

The regulatory background

To put it in simple terms, the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78) provides that oily water discharge from bilges shall not exceed 15 parts per million (ppm) unless the discharge is necessary for securing the safety of the ship or saving life at sea. MARPOL 73/78 further requires ships to process oily water in an oily water separator and to monitor the discharge with detection and an alarm system that shuts off discharge in the event it exceeds 15 ppm while triggering an alarm.

MARPOL 73/78 further requires the ship's crew to maintain an Oil Record Book (ORB) and to record discharges, both those meeting the 15 ppm requirement and those exceeding it (for example, in an emergency). Port State control authorities may inspect the ORB. In the United States, the United States Coast Guard (USCG) does port State inspections for compliance with MARPOL 73/78. MARPOL 73/78 is implemented in the various signatory countries by domestic legislation. MARPOL 73/78 regulations call for administrative proceedings and fines and penalties for violation. It is the flag state that administers the penalty provisions under domestic regulations.

Shipboard practice

Oily water that collects in the engine room bilges was often pumped overboard in international waters before MARPOL 73/78 became effective in 1983. At the time of implementation, the technology for oily water separation was less effective than it is today. The bilge tank capacity tended to be small and the OWS were inefficient in processing the oily water.

Since the MARPOL requirements have been in force and to save themselves time and trouble in dealing with the less effective older units, some creative engineering crewmen have devised ways to circumvent the OWS or the monitoring equipment in order to discharge oily water overboard. According to government allegations in the US investigations, this has been done by either piping around the OWS or flushing the oil content meter with seawater to push more water through the meter and fool it into registering oil content at less than 15 ppm. This is not to suggest that many crewmen fail to comply with environmental requirements. But for those few that do, the sanctions for the shipowner or operator can be devastating.

Myths, Dangerous Half Truths and Painful Reality

We now turn to some widely held but incorrect assumptions about violation of MARPOL regulations with respect to the current criminal prosecutions in the United States for environmental crimes.

Myth: "Violation of MARPOL in International Waters is of interest only to the Flag State."

It is true that the convention contemplates that enforcement actions will be taken by the Flag state, that is, where the vessel is registered. This does not mean, however, that the authorities in the United States are uninterested in policing worldwide violations of international pollution laws. Read on.

Myth: "The United States has no jurisdiction to prosecute without pollution in U.S. waters."

Wrong. Recent criminal prosecutions have not involved pollution of US waters. MARPOL 73/78 requires that entries be made in the ORB for discharges. The ORB is routinely reviewed during port State inspections conducted by the USCG. If the crew has bypassed the OWS or flushed the sensors and discharged oily water overboard but recorded the discharges as "clean" the company may be charged with violation of US law for presenting a materially false document to a US authority. This is a crime under general criminal law in the United States

and provides jurisdiction in the federal criminal court over both the individuals involved and the company.

Myth: "The penalty for bypassing the OWS is a \$5,000 administrative fine under MARPOL"

This is a dangerous half-truth. In the United States the crime charged is presenting a false ORB and the maximum fine against the company under the US criminal sentencing guidelines is \$500,000. This fine may be doubled if the violation resulted in financial gain for the company. For example, Carnival Cruise Line in a plea agreement recently accepted an \$18,000,000 fine for presenting false ORBs on six of its ships.

Additionally, crew involved may be prosecuted individually and put in jail! The maximum penalty upon conviction for individuals is five years incarceration and \$250,000 in fines.

Myth: "The P & I Club will reimburse the fine under its cover for pollution"

Gard's Protection and Indemnity cover, like that of all Clubs in the International Group, is a named risk cover. The risks covered are set out in Gard's Statutes and Rules. Gard's Rule 38 – "Pollution" expressly excludes fines. Gard's Rule 47 – "Fines" covers fines and penalties imposed upon a Member by any court tribunal or other authority of competent jurisdiction for or in respect of the accidental escape or discharge of oil. Intentionally bypassing the OWS or flushing the sensors and pumping oily water overboard is not considered by the Association to be accidental.

Gard's pollution and fines rules were clarified and narrowed in policy year 2000 in line with a model rule adopted by the International Group of P & I Clubs. Thus, under the current rules, no Club in the International Group covers fines as a matter of right for intentionally pumping oily water containing 15 ppm overboard or for falsification of an Oil Record Book.

A final word of Warning

The USCG has intensified its focus on Oily Water Separators and Oil Record Books, specifically looking for violators.

The USCG inspections involve both large operators and single ship companies. USCG Inspectors aided by other state and federal agencies look for evidence of bypass piping, including wear patterns indicating removal of fittings or even fresh painting to cover wear patterns. If there is suspicion of bypassing, the crew may be detained for questioning under Grand Jury Subpoena, the ship records and equipment will likely be seized and vessel detained.

The only effective way to avoid investigation and prosecution is not to violate the MARPOL 73/78

requirements in the first place. That means the company must have a well-monitored environmental compliance program including ship audits, upgrading of equipment as required and training. If caught up in an investigation, the shipowner will need to immediately obtain advice of qualified criminal counsel. One of the biggest mistakes that can be made is to destroy or conceal evidence in a criminal investigation for to do so will bring additional criminal charges of obstruction of justice.

The single most frequent port State detention deficiency item for vessels

covered by Gard is the result of oily water separation, overboard discharge and oil record book anomalies. As a result, Gard released two loss prevention circulars on environmental and safety concerns regarding oily water separation (Loss Prevention Circular 05-01 and 06-01). Please see the Gard website at www.gard.no for copies of these circulars.

Oily water separation and discharge: Risk of oil pollution versus vessel's safety

Loss Prevention Circular No. 06-01

Introduction

As part of our overall loss prevention activities, Gard Services regularly monitors port State detentions from the Paris Memorandum of Understanding (MoU), Tokyo MoU and United States Coast Guard (USCG). In 2000, there was a total of 131 detentions of ships entered in the Gard P&I portfolio. Oily water separation and discharge related items were the single most frequent deficiency cited. Similar results were also observed in the detention of vessels entered in the Gard Marine portfolio for 2000 (147 detentions and the second most cited deficiency). We are not satisfied with these figures. As a result, we believe it is necessary to revisit this issue for Gard Services Members and Clients.

The article "Discharge of oil prohibited", which appeared in Gard News issue No. 152 (December 1998/February 1999) (also reproduced as Gard Loss Prevention Circular 07-01) warned against the implications of pumping oil and oily bilge water overboard, and was followed by another article on the same topic in Gard News issue No. 155 (September 1999/November 1999), titled "Risk of oil pollution versus vessel's safety". The

present circular contains a summary of that second article, which we hope will assist Members and Clients in staying vigilant in light of the potential costs associated with an incident, fines, port State detentions and the safety implications related to oily water separation and discharge.

Environmental and safety matters

During condition surveys of vessels, the Association normally notes that Masters and Chief Engineers enforce a strict policy regarding pumping of bilge water, in order to avoid any oil spill. Port State control officers inspect engine room pipelines and oily water separating equipment to ensure compliance with the MARPOL regulations. Fines and detentions are not popular. To guard against accidentally pumping overboard engine room bilge water which has not been cleaned, shipside valves are sometimes chained and padlocked or lines are even blind flanged, all in an effort to reduce the risk of an oil spill. At times, such remedies are requested by port State control officers, and are willingly installed by the ship's crew.

All efforts to avoid polluting the seas and coastal areas are appreciated,

of course, but it should be noted that there is also an overriding issue involved: the safety of the vessel in an emergency situation. In case of water ingress and flooding of the engine room or the cargo holds, the vessel needs a fully working and readily operational bilge pumping system. Therefore, the overboard connections from the bilge pump should not be blocked by locked hand wheels, blank flanges or by removed spool pipes. It should be noted that SOLAS, Chapter II-1, Regulation 21, as well as relevant Class rules, require a vessel to be equipped with a bilge pumping system that should be operational under all practical conditions. In case of a sudden flooding of the engine room, the bilge pumping system must be able to be started without undue delay.

So is there a problem in complying with both MARPOL and SOLAS? Not really, if one keeps in mind that the MARPOL 73/78 regulations are meant for non-emergency operational situations. In Annex I of MARPOL 73/78, Regulation 9 deals with the control of oil discharge and Regulation 10 covers methods for prevention of oil pollution from ships within a special area, but Regulation 11 provides exceptions from both, in the



Oily water separator.



case of an emergency. The exceptions under Regulation 11 are the following: "Regulation 9 and 10 shall not apply to:

Oily water separator

(a) the discharge into the sea of oil or oily mixture necessary for the purpose of securing the safety of a ship or saving life at sea; or

(b) the discharge into the sea of oil or oily mixture resulting from damage to a ship or its equipment:

(i) provided that all reasonable precautions have been taken after the occurrence of the damage or discovery of the discharge for the purpose of preventing or minimising the discharge; and

(ii) except if the owner or the master acted either with intent to cause damage, or recklessly and with knowledge that damage would probably result; or

(c) the discharge into the sea of substances containing oil, approved by the Administration, when being used for the purpose of combating specific pollution incidents in order to minimise the damage from pollution. Any such discharge shall be subject to the approval of any Government in whose jurisdiction it is contemplated the discharge will occur."

In view of Regulation 11, MARPOL and SOLAS are not in conflict with each other and it is important that all authorities inspecting a vessel for compliance with MARPOL understand this.

Blocking the overboard pipe from the main bilge pumps should never be done, as this would seriously affect the safety of the vessel and would be in conflict with SOLAS and Class requirements. In the interest of the coastal States, at times port State control officers seem to pay more attention to the MARPOL regulations than to the corresponding SOLAS regulations. A conflict of interest may occur when the bilge pump of a vessel is also used for ballast water and in some cases even for emptying a sump tank. Oil remains in the pipeline may not be large in quantity, but will put harbour authorities on full alert if inadvertently pumped overboard with ballast water. In some such cases port State authorities have required blanks inserted in the pipeline or the locking of valve handles. This may secure against oil pollution, but as pointed out, may

Overboard line for cleaned bilge water from the oily water separator. The hand wheel has been chain locked by the vessel's Chief Engineer at the request of port State control authorities. A seal has also been fitted to the chain.



Overboard valve for main bilge/ballast line. The hand wheel has been fitted with a chain and padlock at the request of the port authorities. This is not a good practice as the vessel's bilge pumping system is no longer readily operational.

reduce the safety of the ship in an emergency situation.

On the other hand, there should be no excuse for pumping oil overboard through pumps serving a dual purpose. It should always be ensured that all pipelines, whether used for clean bilge or ballast water, are free from oil contamination prior to using the bilge/ballast pumps for direct overboard discharge. Such verification should be included in the operational procedures.

It should also always be clear to a vessel's crew that sludge tanks, waste oil tanks and oil drain tanks are not allowed to have any direct connection overboard (MARPOL 37/78 Annex I, Regulation 17(3)), and that the content of such tanks must be discharged to reception facilities ashore through the standard discharge connection required (MARPOL 37/78 Annex I, Regulation 19), if not disposed of in an incinerator on board. If required by harbour authorities, pipelines from such tanks may be closed off to prevent oil pollution, but not the overboard pipeline from the main bilge pump.

In case Members face conflicting requirements from various authorities concerning the issues addressed above, they should always consult the vessel's Class Society, which has approved the vessel's bilge pumping system and normally has also issued the International Oil Pollution Prevention Certificate. In any case, all changes to a vessel's bilge system should always be informed in advance to the vessel's Class Society, for proper approval.

The finer points of oil pollution

Gard News 157,
March/May 2000

Fines are monetary impositions made by a competent court, tribunal or authority in respect of breach of, or non-compliance with, any law or regulation. Whether the fine is referred to as administrative, civil or criminal, all are penal in nature, irrespective of the exact words used.¹ A penalty is generally defined as punishment for an offence, but given the level of fines and attitude to their defence in some countries, there is sometimes a feeling that other motivations may exist.

Whilst a fine can also act as a necessary and important deterrent, fairness is sometimes brought into question when it is apparent that certain cases are being made examples of, perhaps for political reasons and/or because this is expected in an ever more environmentally friendly world. Of course, in some cases the authorities take a fair and reasonable approach. This approach, however, varies enormously, irrespective of the facts of a case. In a recent case, where there was quite extensive oil pollution, a harbour master imposed an on-the-spot

fine of a few thousand US dollars on the Master.² In the US prosecutions are often complicated and protracted,³ with large amounts involved. In Italy a legal peculiarity permits payment of what can best be described as a donation to avoid prosecution.

P&I COVER

It is important to understand that the Association's cover for fines is strictly controlled, and in addition to the limitations set out in the Statutes and Rules,⁴ a Member's conduct is, in each case, closely considered. Clearly, there is an important duty on any organisation not to condone or encourage the breaking of laws, but on the other hand, most pollution incidents are not caused intentionally, the majority result from human error.⁵

STRICTER ATTITUDE

Oil pollution fines are no longer limited to the offence of the spill itself, and as will be discussed below, in some jurisdictions fines now exist for failed and/or late notification, and non co-operation with the authorities. In

addition to this wider scope, pollution fines have recently been the subject of a stricter attitude in many countries.

In 1997 Greece increased its maximum fine for polluting the marine environment and breaching related legislation to GRD 250 million (around USD 738,400) in serious cases.

In September 1997 the UK increased its maximum fine for the offence of discharging an oily mixture into the sea (which is unlimited if the case is referred to a higher court) five fold from GBP 50,000. A recent case resulted in the maximum level of GBP 250,000 being imposed.⁶

In 1997 the US imposed punitive damages of USD 5 billion in respect of the EXXON VALDEZ spill (currently under appeal) and more recently penalties of USD 9.5 million for a spill off Rhode Island in January 1996.

More often than not, the fine itself is only part of the actual cost involved. Security demands to cover possible



Factual and accurate reporting is very important.

prosecutions are now commonplace, even for the smallest of spills, and often owners are faced with non-negotiable demands for cash security or bank guarantees. Such demands are particularly costly when they cause the ship to be delayed. Delays can also result from on board investigations by the authorities, who have detention powers available under national laws and relevant international conventions. There is also the cost of attending any legal proceedings, which may involve crew witnesses and invariably lawyers. If the court imposes a fine, the guilty party may also be faced with having to pay the costs of the authority bringing the prosecution. One should also not forget the hidden cost of possible adverse publicity.

Whilst the Association is always on hand to give advice, and where appropriate, assistance, a general guide is outlined below as to what should be borne in mind in terms of potential pollution fines and when a spill occurs or is alleged to have originated from an owner's vessel.

NOTIFICATION

No matter how small the spill, the applicable and designated coast state authorities must be notified at the earliest opportunity.⁷ Failed or late reporting will often result in a larger fine⁸ and polluters can no longer expect not to be caught. Increased co-operation between states with regard to surveillance⁹ and improved "fingerprinting" techniques are just two of the factors involved in the increased number of prosecutions being witnessed world-wide. The recent US case concerning the vessel *COMMAND* illustrates the lengths the US authorities are now prepared to go to seek justice. After fingerprinting the vessel's oil to an illegal discharge in San Francisco Bay in September 1998, the vessel was pursued by a US aircraft and Coast Guard cutter and boarded in Panama. Penalties of USD 9.3 million were subsequently imposed.

There is also the obligation on ships and offshore units to report, without delay, any observed event at sea involving a discharge of oil or the presence of oil.¹⁰ It should be noted that some legislation permits prosecution of both the Master and owner for failure to notify. This should be borne in mind particularly by Masters who might assume that their owners would be carrying out the notification (and vice-versa).

Factual and accurate reporting is also very important, primarily so as to avoid misleading the authorities and/or potentially hampering any spill

response efforts. For example, it is often found that the amount of oil spilt is underestimated. There is also a danger the authorities could infer that there is an attempt to cover up the true amount spilt. Care should also be taken to avoid making admissions of responsibility/liability, particularly in circumstances such as collisions or bunkering, where the source of the spill may be uncertain.

CO-OPERATION

Whilst genuine disagreement with the authorities may arise, for example, as to the source of the spill and response methods employed, co-operation should be extended as much as possible. The authorities may also want to investigate the cause of the spill and again co-operation should be afforded. Depending on the circumstances it may be advisable to arrange legal representation for the owner and/or Master/crew. Guidance should be sought from the Association via the local correspondent.

The US Oil Pollution Act of 1990 (OPA 90)¹¹ expressly provides for fines in respect of the failure to co-operate, and in most other states one could expect a larger fine in case of such failure. The appointment of a marine surveyor or spill expert (as the case warrants), with local knowledge and contacts, will likely be of assistance in resolving any disagreement, but if this assistance is not available it may be advisable (depending on the circumstances) to limit action to issuing a protest, so as to avoid hampering the response efforts.

OWN INVESTIGATION AND EVIDENCE

The appointment of a surveyor/expert should be considered to assist in investigating and gathering information at the scene (such an appointment may be inevitable, for example, to explain technical aspects in court). Even if the spill is small, the cost involved is far outweighed by the risk of not obtaining contemporaneous evidence. Such evidence can be vital if it becomes necessary to challenge the evidence of the authorities and to support any defences or mitigating arguments available (see below). One will also appreciate that, following a spill, the Master and crew will likely have many other and often more important things to do than collecting evidence. Inevitably, however, there will be occasions when a surveyor can not attend before evidence may be lost, particularly, for instance, when the vessel spills at sea. In such circumstances the Master and his crew have to act themselves (nothing should pre-empt safety and environmental concerns) and in view of this, the sort of information required is outlined below.



Some of this information should form part of the vessel's standard reporting requirements.

- (1) An estimation of the amount of oil spilled.
- (2) The type of oil spilled.
- (3) The date and time the spill occurred or was first reported on board (and by whom).
- (4) The position of the spill (e.g., latitude and longitude, berth, etc.).
- (5) Details of whom the spill was notified to, by whom, when and with what information.
- (6) A description of any slicks (e.g., direction of movement, length, breadth and appearance) against time.
- (7) Details of any alleged/reported/observed pollution damage.
- (8) Details of any risks of pollution damage (e.g., to beaches, marinas, etc.).
- (9) Details of response and clean-up measures.
- (10) Details of weather and tide/current.
- (11) Details of initial investigations into source and cause.

If the source of the spill is not certain, properly labelled and sealed samples of all oils on board and of the spilled oil should be retained for future comparative analysis. Depending on the circumstances, it may be advisable to have an independent surveyor obtain these samples in the presence of the state authority representative, so as to avoid disputes regarding credibility. Details of other possible spill sources in the vicinity may also be valuable and a record should be made of the type, position, movements, and work of the object observed against time.

To support the information mentioned above, it is important to retain relevant documentary evidence, e.g., ullage/sounding and maintenance records. Photographic and/or video records will also be of significant value.

OIL RECORD BOOKS

It is perhaps worth mentioning here that on numerous occasions during the investigation into a spill, the vessel's log and record books have been found to be incomplete and/or wrong. Being one of the first items to be inspected by the authorities, the Oil Record Book (ORB),¹² is a particular source of errors and omissions. This book is a requirement of the International Convention for the Prevention of Pollution from Ships (Marpol) 1973 (as amended), which most maritime states are parties to.¹³ Most of these states are aware that, under the convention, they have the power to take penal action for any failure to keep the Oil Record Book up to date and accurate. More often than not fines are imposed, sometimes against both the Master and owner, and in many states these are by no means small.¹⁴

LETTERS OF RESPONSIBILITY

Letters of responsibility should not be confused with letters of undertaking, which are offered for the purpose of security. A letter of responsibility is usually sought to obtain at least an admission of liability. Letters of responsibility are becoming a usual requirement of many authorities before releasing the ship/crew, and it is advisable to consult the Association or its correspondents before any signature is added. If the Association is not consulted, potentially damaging admissions may be made. In some circumstances even the most innocent remark can be misconstrued and it

may be very difficult to overcome this at a later date. The same applies to reports made pursuant to internal investigations into a pollution incident. Copies of such reports are often requested by authorities to assist in their investigations, and if these are not disclosed because they contain potentially damaging information, adverse inferences may be drawn.

THE PROSECUTION PROCESS

If an owner is invited to an interview or to assist an authority with its investigations, or if a notification of a prosecution is received, it is advisable to contact the Association and seek immediate legal advice. It may be that the legislation under which the prosecution is being brought is not applicable or that other more lenient legislation is applicable. As previously mentioned, defences are available, and in some cases action may be limited to issuing a formal warning - this was achieved in a recent case handled by the Association in the UK and the Member's proper investigation, co-operation and honesty were key factors. Fines can often be reduced if there are good arguments in mitigation, and if claimed costs can be shown to be unreasonable - it has been known for some authorities to try and recover some costs which are arguably not directly attributable to the spill, like for example the whole cost of a surveillance aircraft's routine flight.

The amount of the fine usually depends on a number of factors, such as the

size of the spill, the type of oil spilled, the environmental sensitivity of the area, the effects of the spill (e.g., environmental/property damage and economic impact), co-operation with authorities, previous offences/spills, investigative efforts, steps taken to prevent re-occurrence, financial hardship, response and clean-up measures, and whether a guilty or not guilty plea is made. Hopefully, there will be a number of these factors, which can be relied upon as mitigation. Exposure may also be reduced, in cases where the owner and Master are prosecuted, if the authorities can be persuaded to drop their prosecution against the Master.¹⁵

To conclude, it is now the case that, with more fines being pursued, more vigorously, and for increasing amounts, an alleged polluter can no longer run the risk of not being caught and/or not being prepared for prosecution. No matter how small the spill or how confident owners may be that they are not to blame, the above steps should be considered. Whilst in some instances the authorities may appear unconcerned, this does not mean they will not pursue a fine when the ship, or her sister, next visits the port. ■

1 See pages 442 and 443 of the Gard Handbook on P&I Insurance.

2 The case was featured in Gard News issue No. 154 in the article "P&I incidents - Bunkering - How not to do it".

3 See for instance "P&I incidents - The criminal aspect of oil spills in the US" in Gard News issue No. 155.

4 Rule 47 has recently been amended and is effective as of 20th February 2000. Under paragraph 1c, the Association shall cover "...fines imposed upon the Member in respect of the accidental escape or discharge of oil or any other substance, provided that the Member is insured for pollution liability by the Association under Rule 38, and subject to the applicable limit of liability under the P&I entry in respect of oil pollution risk." Under paragraph 2c the Association may, in its sole discretion, cover whole or in part "...any fine imposed not upon the Member but the master or Crew member of the Ship or on any other servant or agent of the Member or on any other party, provided that the Member has been compelled by law to pay or reimburse such a fine or that the Association determines that it was reasonable for the Member to have paid or reimbursed the same."

5 The International Maritime Organization estimates that 90 per cent of pollution incidents are due to human error, the remaining 10 per cent generally considered to be due to some type of technical or mechanical fault. For further information see Gard's Handbook on Marine Pollution, Second Edition, pages 255 onwards.

6 The fine was reduced on appeal to GBP 25,000.

7 This information should be contained in the vessel's Shipboard Oil Pollution Emergency Plan (SOPEP) or equivalent emergency response documentation and checks should be made to ensure that the information is correct and up to date.

8 Section 4301 of the US Oil Pollution Act of 1990 expressly states that an organisation can be fined up to USD 500,000 and an individual up to USD 250,000 for such a failure.

9 Surveillance aircraft now use specialist radar equipment, which enables them to detect oily mixtures on the sea surface at night.

10 Article 4 of the Oil Pollution Preparedness, Response and Co-Operation Convention 1990.

11 Section 4301.

12 The ORB must be provided for ships over 400 GT and above and for oil tankers of 150 GT and above. The book has two parts: part I deals with machinery space operations and part II deals with cargo and ballast operations and need only be carried on oil tankers. The book lists various operations (e.g., the discharge of bilges), the details of which must be recorded against the signature of an officer. The Master also signs each completed page of the book.

13 The main part of Marpol 73/78, which includes the ORB requirements under Annex 1, has been accepted by 100 states, accounting for approximately 93 per cent of the world's gross tonnage. For further information see Gard's Handbook on Marine Pollution, Second Edition, pages 98 onwards.

14 It should be noted that Rule 47.2.b.vi of the Association's Statutes and Rules excludes cover for fines resulting from the non-compliance with the provisions of Marpol.

15 The attitude of the UK authorities appears to be that a ship's Master would usually only be prosecuted if the offence arose from the Master's personal fault or negligence and if the Master was acting against the owner's instructions.

US Coast Guard formal policy on voluntary disclosure of MARPOL violations

Gard News 189,
February 2008/April 2008

A formal policy on voluntary disclosure of MARPOL violations has been issued by the United States Coast Guard.

The United States Coast Guard (USCG) has issued a formal policy on voluntary disclosure which applies to MARPOL violations that may result in prosecution of owners and operators of foreign flag vessels in the United States. The policy is similar to existing policies of other US government agencies, including the US Justice Department, in describing the factors that will be considered in evaluating a violation for possible criminal investigation or prosecution. These policies require that companies have in place a compliance management system to prevent, detect and correct violations of environmental regulations. The "Shipping Industry Guidance on Environmental Compliance", published by ICS/ISF,¹ would appear to address all of the requirements for a compliance management system as contemplated by the USCG policy.

If a company promptly and voluntarily discloses a violation to the USCG discovered within the company's environmental compliance plan, including ship audits, and the disclosure

otherwise meets the requirement of the USCG policy, the USCG may exercise discretion not to recommend to the US Justice Department prosecution of the company. The policy does not apply if there is a pattern of prior violations, or if the violation would likely have been discovered by the USCG. The full policy document can be found at www.uscg.mil/foia/docs/CH-4%20Appendix%20V.pdf.

Recall that under US law foreign flag shipowners and operators can be and often are prosecuted for entry into US waters with a false oil record book that conceals discharges of oily wastes that have taken place outside US waters. Discharges in violation of MARPOL in international waters are violations that are subject to the law of the flag state but the United States does not have jurisdiction to prosecute foreign flag operators for the discharge itself because the vessels were outside US waters at the time of the discharge. According to the "Industry Guidance on Environmental Compliance", "non-compliance with MARPOL regulations should be reported to the vessel's flag administration. In the event of the discovery of evidence of intentional discharges of waste, the

flag administration must be notified immediately and a request for an investigation should be initiated".

If the vessel trades to the United States, the vessel owner or operator may, in addition to the flag state, also consider reporting the discovery and the correction of any false entries in the oil record book to the USCG in order to comply with the voluntary disclosure policy. In deciding whether to report to the USCG, prudence suggests foreign flag owners and operators should seek immediate legal advice from a lawyer familiar with the USCG and Justice Department policy guidelines and MARPOL criminal prosecutions in general.

Gard's Loss Prevention Circular No. 13-07, which can be found at www.gard.no, contains details of the policy.

¹ See article "ICS/ISF guidance on environmental compliance" above.

Oily water separator bypass in the US - The tables are turned

Gard News 189,
February 2008/April 2008

US Coast Guard prosecutes one of its own staff for alleged oily water separator bypass.

For some time now the shipping press has contained cautionary stories of the ferocity with which the authorities in the US pursue shipping companies, usually foreign companies and their employees, for alleged oily water separator bypasses. Usually, the accused is faced with a range of allegations, the main one often being the entry of false information in the vessel's oil record book. If the alleged discharge overboard has taken place outside US waters, the vessel can not be prosecuted for that act under US law, but it can be prosecuted under MARPOL. Flag states are responsible for prosecuting MARPOL violations.

However, the situation is different when the alleged discharge overboard is said to have happened inside US waters. In such circumstances, the full weight of the US legal system can be brought to bear on the accused. Somewhat embarrassingly for the Coast Guard, one of their own seafarers is facing allegations that he knew of and

authorised the direct discharge (i.e., not through the oily water separator) of bilge waste overboard into Honolulu harbour.

The individual in question was a Main Propulsion Assistant (MPA) – presumably an engineer – aboard a USCG cutter. It seems that some of his shipmates complained (anonymously) that they had been ordered by the MPA to pump into the harbour approximately 2,000 gallons of bilge waste without using the oily water separator (OWS). In May 2006, the complaint was investigated by the US authorities. They interviewed engineer colleagues of the MPA, who stated that they had taken part in the operation described above. Evidence was also obtained that untreated bilge water had been discharged overboard on ten previous occasions, when the vessel was off Central and South America.

It is understood that the MPA initially denied the allegations, but later confessed that he had been aware of what was going on, but had turned a blind eye to it. The MPA has been indicted on charges of obstruction of

justice and making a false statement in connection with the release of oily bilge water into Honolulu Harbour. If convicted, he faces a sentence of up to five years in prison on each count. It is understood that the investigation is continuing and that, depending on its outcome, the MPA could face further charges from federal and the State of Hawaii authorities, fines and/or lawsuits. It seems that, as his employer, the Coast Guard itself may also face charges, fines and/or lawsuits.

There are many who feel that the US authorities are over-zealous and punitive in their pursuit and treatment of seafarers accused of bypassing the OWS and it is not known whether the MPA was taken from the vessel in handcuffs and escorted by armed officers, but it would, at least, appear that they do not have one rule for their own people and one rule for everyone else.

US law - MARPOL violations in the US

Gard News 184,
November 2006/January 2007

The Third Circuit Court of Appeals rules in favour of a seaman in a prosecution for MARPOL violations.

On 18th August 2006 the United States Court of Appeals for the Third Circuit issued its decision in the case of *United States of America v. Noel Abrogar*.¹ This was the first time an appellate court has considered the sentence of a foreign seaman convicted of violations of the Act to Prevent Pollution from Ships (APPS), the United States' version of the MARPOL Convention.

Mr Abrogar, a citizen of the Philippines, served as chief engineer aboard the *MAGELLAN PHOENIX*, a Panamanian-flag vessel. Mr Abrogar admitted by plea agreement that he knew that those under his command had on occasion discharged oily water direct to the sea and he admitted he made false entries in the vessel oil record book to conceal the violations. Following the plea agreement a district court judge sentenced Mr Abrogar to serve one year and a day in federal prison for failure to maintain an accurate oil record book, a crime under APPS.

Those convicted in the federal courts of the United States are sentenced to fines and imprisonment according to Federal Sentencing Guidelines that assign points to certain types of conduct for the purpose of guiding the sentencing judges. Here the conduct that provided enhancement was "the ongoing, continuous or repetitive discharge, release or emission of a pollutant into the environment".

Mr Abrogar's counsel appealed the sentence on the ground that the district court had improperly enhanced the criminal penalty based on government's assertion that a six-point enhancement should be applied for the acts of discharge that had occurred in international waters. Mr Abrogar argued on appeal that the enhancement should not be applied since the discharges, while clearly MARPOL violations, were not violations of US law.

In analysing the scope of MARPOL and APPS, the court found that Congress did not make every violation of MARPOL by every person a crime under US law. To the contrary, under APPS "Congress and the Coast Guard created criminal liability for foreign vessels and personnel only for those substantive violations of MARPOL that occur in US ports or waters. Stated differently, a MARPOL violation is only an offence under US law if that violation occurs within the boundaries of US waters or within a US port."

The Third Circuit held that the district court could not consider the MARPOL violations that occurred outside US waters in its sentence calculation because these were not offences under US law and the acts were not conduct relevant to Mr Abrogar's failure to maintain the oil record book while in US waters. Hence the court determined that the sentence as imposed was too harsh and sent the case back to the district court for re-sentencing. It should, however, be noted that implied in the court's ruling is the recognition

that, as soon as a foreign-flagged vessel with a faulty Oil Record Book crosses into US waters, an APPS violation has occurred, even though the entries were made outside US waters.

The decision is important to seamen charged with or facing charges in the US for MARPOL violations. The decision must be followed by the district courts in the Third Circuit and is persuasive authority for the other federal courts.² The Third Circuit decision should not be read as implying that seamen and non-US flag shipowners can avoid penalties simply by correctly recording illegal discharges in the oil record book.³ Flag states do have jurisdiction to punish MARPOL violations in international waters and are increasingly likely to impose hefty fines for deliberate discharges.

¹ Case No: 06-125 (3d Cir.) decided 18th August 2006, not yet reported. The full text of the decision is available at www.ca3.uscourts.gov/opinarch/061215p.pdf.

² There are 11 numbered federal appellate courts plus the District of Columbia (Washington D.C.). The Third Circuit takes appeals from the district courts in Pennsylvania, New Jersey, Delaware and the US Virgin Islands.

³ Those vessels flying the US flag are subject to jurisdiction under APPS for violations within international waters as well as US ports and coastal waters.

Environmental crime - Oily water discharge off the East Coast of Canada

Introduction

The Government of Canada recently increased its commitment to the protection of wildlife and the environment on the Canadian east coast through increased surveillance of vessels entering Canadian waters and illegally discharging oily water. The discharge of oily water is of particular concern during the months of November to January when migratory birds, who are especially susceptible to these oily water discharges, are in Canadian east coast waters.

Recent incidents have shown that shipowners and ship managers should continue to take considerable precautions to prevent non-accidental discharges of oily water. Pollution fines for hundreds of thousands of Canadian dollars have been handed down.

The problem

The illegal discharge of oily water in non-compliance with MARPOL 73/78 is a problem that continues to concern the maritime industry. The problem tends to be particularly acute off of the coast of eastern Canada during the months of November to January. Many vessels transit closer to shore to take advantage of the ice covers that form during the winter. The discharge of oil has had a significant impact on migratory birds that transit through the area during the winter months. It is estimated that as many as 300,000 seabirds are killed on the Canadian Atlantic east coast annually. Such devastation has led the Canadian authorities to focus their attention and resources on prevention of such incidents and the prosecution of violators.

Canadian response to this problem

The Canadian authorities have enhanced their monitoring of vessels through the use of surveillance and ship-traffic monitoring to catch violators. This includes both air and sea surveillance, and satellite technology. For example, recent satellite technology such as RADARSAT has improved marine surveillance by the use of Synthetic Aperture Radar. This radar can pierce cloud cover both day and night. In addition, significant fines are being handed down to

violators caught discharging oily water in Canadian territorial waters.

Recommendations

Oily water separation related problems and associated fines can create significant problems for both seafarers and companies. Therefore, please consider the following recommendations:

- Gard Service' Protection and Indemnity cover, like that of all Clubs in the International Group, is a named risk cover. The risks covered are set out in Gard P&I's Statutes and Rules. Gard's Rule 38 – "Pollution" expressly excludes pollution fines. Gard's Rule 47 – "Fines" covers fines and penalties imposed upon a Member by any court, tribunal or other authority of competent jurisdiction, for or in respect of the accidental escape or discharge of oil.
- The oily water separator installed on board must be of an approved type and function properly.
- The oil content meter, the monitoring device and the alarm/automatic-stopping device must function correctly.
- Reduce the oil leakages to the bilges by collecting oil in drip trays and gutters draining into a waste oil tank. Ensure that the drain pipes from the gutters are not clogged by deposits or rags. It is, therefore, important that crew does not leave rags or other material in drip trays and gutters.
- Oil sludge from engine rooms must not to be pumped overboard. If not disposed of in an incinerator, the oil must remain on board until discharged to shore-based reception facilities.
- Accurately record all information required to be entered in the Oil Record Book. All handling of waste oil must be recorded, including quantities sent for incineration to shoreside reception facilities, and to sludge

tank through separation. If any equipment is not operating correctly, such information must be recorded and proper precautions taken to prevent discharge. Oil Record Books are routinely inspected by port State control authorities. Detention of the vessel and/or fines may result if the Oil Record Book is incomplete or has been tampered with.

For more information, guidance and recommendations on oily water separation related issues, please refer to Gard Services Loss Prevention Circular 05-02, Environmental Crimes— Myth or reality?, Loss Prevention Circular 06-01, Oily water separation and discharge: Risk of oil pollution versus vessel's safety, and Loss Prevention Circular 07-01, Oily water separation and discharge: Discharge of oil prohibited. For more information on the impact of oil discharge in Canadian waters, please see the World Wildlife Fund report "Seabirds and Atlantic Canada's Ship-Source Oil Pollution" at the following website address: www.wwf.ca/en/news_room/pdf/02_09_24_seabirdsreport.pdf.

Pollution - The hard line taken by the French criminal courts on oil discharge from ships

By Oliver Purcell and Guillaume Brajeux, Holman Fenwick & Willan (Paris)

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There is growing public interest in environmental issues in France.

There has recently been considerable press coverage of the attitude adopted by French prosecutors in relation to oil discharge from ships, and reports of increasing fines ordered by French criminal courts.

Introduction

Whilst the law has recently changed, and in particular has significantly increased the level of fines which can be awarded by the courts, the principal change is probably in the attitude adopted by French prosecutors, who are now applying powers which they have arguably always had.

The change in attitude results from growing public interest in environmental issues, and from increasing public discontent with marine pollution. Recent casualties, such as the ERIKA and the PRESTIGE, have not only generated public

outrage, but finally caused politicians to take certain measures.

New approach

The recent changes in the law which have generated the most interest from the press do not concern oil pollution resulting from casualties (such as those mentioned above), but rather pollution resulting from the discharge of oil or oily residues from ships, whether voluntary or accidental (but unrelated to a marine casualty). The French authorities have been relatively slow in taking effective measures to deal with such pollution; they are in effect now trying to catch up for time previously lost.

The manner of achieving this has been twofold:

1. By tinkering with jurisdictional rules, greater responsibility has been given to local prosecutors in Le Havre (for the

English Channel), Brest (for the Atlantic), and Marseille (for the Mediterranean), who are now using all their powers, in particular that of detaining ships. This has proved to be a much more effective way of securing the payment of fines, and provides publicity intended both to demonstrate to the public that government policy is being applied, and to deter the shipping community from causing pollution in French waters.

2. Maximum fines have been considerably increased. The categories of persons who may be found liable to pay the fine have also been broadened to include ship operators and the "real" or effective owner or manager of a vessel; however, the courts have to date not had to apply these changes, intended to facilitate payment of the fine, wherever a ship has been detained and an owner has paid cash into court in order to secure payment of the fine.

Power over EEZ

France's power to exercise control over not only its territorial waters but also over its Exclusive Economic Zone (EEZ)¹ results both from the 1982 Convention on the Law of the Sea and from MARPOL Conventions.

Pursuant to the Convention on the Law of the Sea, a state has jurisdiction over both its territorial waters and its EEZ, for certain purposes. Pursuant to article 4(2) of MARPOL:

"Any violation of the requirements of the present convention within the jurisdiction of any Party to the Convention shall be prohibited and sanctions shall be established therefor under the law of that party.

Whenever such violation occurs, the party shall either:

- (a) cause proceedings to be taken in accordance with its law; or
- (b) furnish to the Administration of the ship such information and evidence as may be in its possession that a violation has occurred." (our emphasis)

Thus pursuant to international conventions, the French courts and criminal prosecution authorities are entitled (and even obliged) to ensure compliance with international rules on the prevention of oil pollution within their jurisdiction, which includes for these purposes France's EEZ.

Prohibition

The basic rule under Rule 9 of MARPOL is as follows:

"... any discharge into the sea of oil or oily mixtures from ships to which this Annex applies shall be prohibited except where all the following conditions are satisfied: ...

- (b) from a ship of 400 gross tonnage and above ...
 - (i) the ship is not within a special area;
 - (ii) the ship is proceeding en route;
 - (iii) the oil content of the effluent does not exceed 15 parts per million (ppm); and
 - (iv) the ship has in operation equipment as required by Regulation 16 ..."

Regulation 10 of MARPOL specifies that, within special areas, any discharge is prohibited; as far as France is concerned, these special areas are the Mediterranean and the English Channel and its approaches.

Outside special areas, only discharge not exceeding 15ppm is authorised, provided the ship is operating equipment which complies with Regulation 16; the latter is oil filtering equipment (oily water separator) which will ensure that any oily mixture discharged into the sea after passing

through the system has an oil content not exceeding 15ppm.

Increased surveillance

Whilst some pollution cases have occurred in the Mediterranean, the vast majority have arisen in the Atlantic, usually midway along a line drawn between Finisterre (in Spain) and Ouessant (in Brittany); this is one of the principal routes for all sea traffic to or from Northern Europe, and is well within France's EEZ. This is the main area patrolled on a regular basis by French Customs aircraft, although Navy aircraft or other authorities also patrol the area, and have similar powers.

The Customs officer or other authorities on board these aircraft will follow what they consider to be slicks or traces of oil. If they locate a vessel which they consider to be the cause or origin of pollution, they will contact such vessel, inform the master of the fact that his vessel appears to be discharging oil or oily residues, and seek information on the vessel and her future destination.

Response

If a vessel is contacted or spots a Customs or Navy aircraft in the vicinity, a number of practical steps may be taken:

- The master and chief engineer should check that the oily water separator equipment is functioning correctly;
- If the vessel is operating its oily water separator, and this is functioning properly (and thus discharge is less than 15ppm), the vessel should not stop discharging when the aircraft flies overhead;
- The master should respond immediately to any VHF call;
- The master should ask for a thermographic image and/or for samples of any alleged slick to be taken;
- The master should encourage the authorities to come on board at the next port of call;
- Nothing should be modified in the engine room;
- The owners or managers should compile evidence that the vessel regularly uses discharging facilities in ports;
- The owners or managers should arrange for a joint survey of the vessel with the authorities at the next port.

Evidence

The authorities will invariably also take photographs. These photographs, together with the official report drawn up by the officer on duty, will constitute the principal (and often exclusive) evidence upon which the prosecution will rely to pursue a criminal action against a master.

Under article L218-28 of the French Environment Code, reports prepared by certain sworn officers of the state, including Customs agents, constitute proof of the events related therein until such time as their contents are disproved. This provision in effect reverses the burden of proof which normally applies in criminal matters; as a result of this provision, the accused has the burden of proving that the vessel was not polluting, rather than the reverse.

The prosecution may also rely on other evidence, for example that there were no other vessels in the vicinity, that discharge seemed to stop as soon as the Customs aircraft flew overhead, or that the Oil Record Book is not properly kept (this list is obviously not exhaustive). Nevertheless, it is essentially the official report prepared by Customs, together with the photographs taken, which form the main evidence on which French criminal courts have found vessels to be guilty of breaches of the relevant MARPOL regulations.

The photographs taken are quite often of poor or questionable quality; this has not, however, prevented the French courts from considering such evidence to be sufficient for a finding of guilt. The reason for this is that the majority view of experts who attended discussions which led to the signing of the Bonn Agreement² considered that residues with less than 15ppm oil content would not be visible from the sky, whereas residues with an oil content in excess of 15ppm would be visible. This simple but relatively arbitrary approach has convinced a number of courts that the evidence before them showed oil pollution, rather than simply showing the trace left by the wake of a vessel or other natural phenomena such as the effect of wind on the water's surface.

Detention

Prosecutors have also now taken the initiative of ordering vessels suspected by Customs officers to be polluting to deviate to the nearest French port. Pursuant to article L218-30 of the Environment Code, prosecutors have this power, and may require payment into court (to secure payment of the future fine, the presence of the master at the criminal action and payment of any damages awarded to civil claimants) before allowing the vessel to sail. The level of security required by prosecutors is often indicative of the level of fine which they may seek from the courts.

Increased fines

The "Perben 2" law,³ which came into force in March 2004, increased the

potential fine to EUR 1 million, or the value of the vessel, or four times the value of cargo on board and freight. To date, the maximum reported fine ever ordered has amounted to EUR 500,000; however, further increases can be expected.

The new provisions have also extended the categories of persons who may be ordered to pay the fine, to include an owner, operator, or the effective owner or manager of a vessel. Whilst the trend had been for owners to be joined as co-accused, this practice may disappear if prosecutors systematically detain vessels to obtain security for payment of the fine. In this respect, it should be remembered that a vessel may be detained as the instrument of the alleged offence, irrespective of the person or entity which may subsequently be pursued.

Whilst other methods of enforcement are available once a judgment has been rendered, it appears that the future

practice will be for prosecutors to take the preventive measure of ordering a vessel into the nearest French port. Failure to comply with such orders from the French authorities exposes a master (and in certain circumstances owners) to an additional fine.

Two additional points should be mentioned:

– We have considered above the most common cases, namely oil discharge within France's EEZ, and the fines which are payable. If discharge occurs within France's territorial waters, a foreign master will also face the risk of imprisonment (French masters face this risk even in France's EEZ).

– Other interested parties, such as environmental associations, may join in the criminal action as civil claimants. The damages which they are usually awarded remain for the time being relatively modest, but are likely to increase in the future. The court in Marseille has very recently awarded EUR 18,000 to each such claimant.

Conclusion

It should be borne in mind that President Chirac has made the fight against oil pollution one of the three priorities of his presidency. The above changes in approach reflect this shift in policy, and ship owners or operators can expect that ever-increasing levels of fines will be sought by prosecutors. Courts should, however, be encouraged to take a more balanced or better informed view of all the evidence available; for the time being, however, acquittals remain rare. Caution must therefore be exercised.

1 200 nautical miles from base lines as defined by the 1982 United Nations Convention on the Law of the Sea, signed at Montego Bay.

2 Agreement for Cooperation in Dealing with Pollution of the North Sea by Oil and Other Harmful Substances, 1983.

3 A French law on organised crime and delinquency, named after the French justice minister, Dominique Perben.

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