



# MAINBRACE

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## NOTE FROM THE MARITIME INDUSTRY TEAM

BY KEITH B. LETOURNEAU



**Welcome to the summer 2017 edition of *Mainbrace*.** To say we live in interesting times would be a serious understatement. We read headlines on a daily basis that challenge traditionally accepted notions of how governments operate, creating uncertainty as to how they will do so in the future. When you couple that uncertainty with the stiff headwinds faced by the maritime industry in recent years—vessel overcapacity in certain sectors, tight margins, cutbacks in the offshore-service sector, and the promulgation of new and expensive ballast water and air emissions regulatory regimes—the pressure to operate in a fiscally sound, fundamentally safe, and legally responsible manner has never been greater.

As ethical and legal compliance issues dominate the news, we thought it would be a good time to consider a variety of statutory and regulatory compliance matters that affect the maritime industry in the United States. Members of our **white collar defense and investigations practice group** have contributed a primer on the Foreign Corrupt Practices Act, which may inform your perception of national political developments. **George T. Boggs** and **Stefanos M. Roulakis** of our international trade group have provided an article addressing U.S. anti-boycott provisions, which include reporting requirements that may surprise you. Our internationally recognized partner who focuses on Jones Act issues, **Jonathan K. Waldron**, in conjunction with **Matthew J. Thomas** and **Patricia M. O’Neill**, explain the latest developments involving the Executive Branch’s recent proposal to roll back 40 years of Jones Act coastwise-trade rulings.

**W. Cameron Beard** and **Lauren B. Wilgus** of our New York maritime practice group offer an article addressing how and when foreign litigants may be able to obtain discovery in the United States to support such foreign actions, and **William R. Bennett** and **Alexandra Clark** bring us up to date on the vexing issue of when punitive damages may be available in injury and death claims.

We also thought it appropriate to take stock on what has and has not been accomplished legislatively during the early days of the new Trump administration. Through insight gained from years on the Hill, **Joan M. Bondareff**, in conjunction with **Jonathan K. Waldron**, give us an overview of developments relating to the federal government’s fiscal year 2017 budget and legislative agendas.

While we look at compliance issues, we are mindful that our focus needs to include a watchful eye towards the future of the maritime industry. In that light, **Alan M. Weigel** and **Sean T. Pribyl** offer an article addressing developments relating to unmanned vessels and attendant legal implications.

We hope you find this edition informative and entertaining, and look forward to your suggestions for future articles. Enjoy the summer season! □

# What's Next? The U.S. Customs and Border Protection's Withdrawal of Its Jones Act Proposal Relating to Equipment of a Vessel

BY JONATHAN K. WALDRON, MATTHEW J. THOMAS, AND PATRICIA M. O'NEILL



## Background

In the last days of the Obama administration, U.S. Customs and Border Protection (“CBP”) proposed a major change in coastwise policy in its *Proposed Modification and Revocation of Ruling Letters Relating to Customs Application of the Jones Act to the Transportation of Certain Merchandise and Equipment Between Coastwise Points* (the “Notice”). The Notice, which was published in the *CBP Customs Bulletin*, proposed the modification of HQ 101925 (October 7, 1976), a seminal letter ruling upon which CBP and the industry have relied on for over 40 years when applying the Jones Act to vessels engaged in offshore construction, maintenance, and repair activities. (See *CBP Customs Bulletin and Decisions*, Vol. 51, No. 3, January 18, 2017, available [here](#).)

The Notice also proposed to revoke over 20 other letter rulings, issued pursuant to the 1976 ruling, and related to oil and gas activities offshore under the Jones Act upon which the industry has relied on for decades. Specifically, for more than 40 years following the 1976 Ruling, CBP ruled on numerous occasions that non-coastwise qualified vessels could carry a variety of offshore equipment and supplies from U.S. ports to offshore sites for installation by that vessel, on the basis that those articles were “equipment of the vessel” and not “merchandise” subject to the Jones Act.

The CBP Notice on January 18, 2017, would have extended the reach of the Jones Act restrictions to certain categories of equipment and supplies carried by foreign-flag offshore construction vessels, including ROVs, pipe, cable, jumpers, flow-lines, manifolds, umbilicals, and other components that have long been held not to be merchandise within the purview of the Jones Act when installed from such a vessel. The Notice’s significance was heightened by the fact that CBP has not promulgated

detailed regulations guiding the application of the Jones Act to the offshore sector, but has instead developed a practice to issue case-by-case interpretive rulings, upon which the Jones Act regime has evolved and which have become a key part of the law and precedent (*i.e.*, a sort of regulatory common law).

The Notice was issued under the *CBP Customs Bulletin* process, pursuant to which, CBP may issue interpretive rules and decisions, including modifications and revocations. 19 U.S.C. § 1625. The *Customs Bulletin* process mandates that, “[i]n the absence of extraordinary circumstances, within 30 calendar days after the close of the public comment period, any submitted comments will be considered and a final modifying or revoking notice or notice of other appropriate final action on the proposed modification or revocation will be published in the *Customs Bulletin*.” 19 C.F.R. § 177.12. Any decision issued by CBP then goes into effect 60 days following the issuance of a CBP decision. The Notice initially requested comments from the public to be submitted within 30 days; however, CBP subsequently extended the deadline by 60 days, with the comment period ending on April 18, 2017.

On May 10, 2017, based on the over 3,000 comments received in response to the Notice—both supporting and opposing the Notice—CBP published its *Withdrawal of Proposed Modification and Revocation of Ruling Letters Relating to Customs Application of the Jones Act to the Transportation of Certain Merchandise and Equipment Between Coastwise Points* (the “Withdrawal Notice”). According to the Withdrawal Notice, which was also published in the *Customs Bulletin*, “Based on the many substantive comments CBP received, both supporting and opposing the proposed action, and CBP’s further research on the issue,

*(continued on page 3)*

**What's Next? The U.S. Customs and Border Protection's Withdrawal of Its Jones Act Proposal Relating to Equipment of a Vessel (continued from page 2)**

we conclude that the agency's notice of proposed modification and revocation of the various ruling letters relating to the Jones Act should be reconsidered. Accordingly, CBP is withdrawing its proposed action relating to the modification of HQ 101925 and revision of rulings determining certain articles are vessel equipment under T.D. 49815(4), as set forth in the January 18, 2017 notice." (See *CBP Customs Bulletin and Decisions*, Vol. 51, No. 19, May 10, 2017, available [here](#).)

**Impact of the Withdrawal Notice on Current Jones Act Rulings and Enforcement**

CBP has indicated that it may pursue a rulemaking published in the *Federal Register* to address the issues set forth in the Notice. A similar approach was pursued by CBP in 2009, but was withdrawn before a proposed rule was published. Thus, whether CBP will seek a rulemaking remains unclear. In the meantime, however, the Withdrawal Notice preserves the status quo of the CBP letter rulings that were subject to the Notice on January 18, 2017. Specifically, the letter rulings remain in effect and applicable to current offshore operations, as they were prior to the CBP Notice on January 18, 2017. CBP and industry stakeholders remain generally in the same position as prior to the CBP's 2009 Notice.

While the CBP's revocation or reversal of these rulings was withdrawn, there remains a question of whether enforcement actions going forward will evolve to take a more restrictive approach to the construction, installation, and repair operations conducted by foreign-flag vessels as described in the Notice. Generally, the penalty for violating the Jones Act is seizure and forfeiture of the merchandise or, alternatively, an amount equal to the value of the merchandise or the actual cost of the transportation—whichever is greater. The penalty may be assessed against any person transporting the merchandise, or causing it to be transported, which would include the importer, consignee, master, vessel agent, or vessel owner.

**Conclusion**

With the publication of the Withdrawal Notice, the longstanding CBP letter rulings applying the coastwise laws to foreign-flag offshore construction, maintenance, and repair vessels will not be modified or revoked, and thus their validity as a guiding precedent for offshore operators should remain unaffected for now. However, given the uncertainty with regard to CBP's future actions, stakeholders should seek guidance from legal counsel with regard to future operations and investments potentially affected by this decision and future CBP initiatives in this area. □

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# Collection of Evidence in the U.S. Pursuant to 28 U.S.C. Section 1782 for Use in Foreign Private Arbitrations

BY W. CAMERON BEARD AND LAUREN B. WILGUS



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## Can evidence be collected under the statute for use in maritime arbitrations abroad?

### Critical evidence, needed for the resolution of a dispute

abroad, may be located in the United States. A key witness may reside in the United States, or important financial or other documentary evidence may be found only in this country. As we have discussed in previous articles,<sup>1</sup> section 1782 of the United States Code (“section 1782”) offers a powerful tool for the collection of evidence in the United States for use in foreign legal proceedings. The statute allows either a foreign tribunal *or a party to foreign proceedings* to apply directly to a U.S. federal court for an order directing that a witness be examined or that evidence be disclosed for purposes of a foreign legal proceeding. The procedure is highly efficient; by taking advantage of section 1782, foreign litigants can often avoid and bypass the unwieldy and time-consuming requirements of letters rogatory or requests for evidence collection under the Hague Convention on the Collection of Evidence Abroad in Civil or Commercial Matters.

The value of section 1782 has been conclusively demonstrated in connection with foreign court proceedings or similar judicial or quasi-judicial proceedings. As we have reported previously, however, an important open question is whether section 1782 may be used to collect evidence in the United States for *foreign private arbitrations* to which a governmental entity is not a party. Recent decisions by the federal courts in Manhattan and elsewhere suggest that the law on this point remains unsettled. These decisions, however, also suggest that it may be possible, in certain federal districts or before certain federal judges, to obtain evidence for use in a foreign private arbitration.

### Decisions of the United States Courts of Appeals

In January 2014, the United States Court of Appeals for the Eleventh Circuit withdrew an earlier opinion, issued in 2012, which held that foreign private arbitral bodies are “foreign tribunals” in connection with proceedings before which evidence may be collected in the United States pursuant to section 1782.<sup>2</sup> Thus, the only standing appellate rulings on the issue are 1999 decisions from the Courts of Appeals for the Fifth and Second Circuits, which do not recognize foreign private arbitral bodies as foreign tribunals for section 1782 purposes.<sup>3</sup>

### District Court Decisions

Notwithstanding the referenced appellate court decisions, a number of federal district level courts have allowed use of section 1782 to collect evidence for use in purely private foreign arbitrations. Indeed, in November 2016, a judge of the United States District Court for the Southern District of New York held that section 1782 could be used to collect evidence for use in proceedings before the London Maritime Arbitrators Association

- ▶ Various courts have focused on the availability of judicial review, one of the factors touched upon by the Supreme Court in the *Intel* decision, as an important feature rendering an arbitral body a “foreign tribunal” within the meaning of the statute.

(“LMAA”).<sup>4</sup> And, in 2014 and 2010, two other district judges, in New Jersey and Florida, respectively, reached the same conclusion, finding the use of section 1782 permissible in connection with LMAA arbitrations.<sup>5</sup>

In his recent decision, the New York district judge found that he was not bound by the above-referenced Second Circuit precedent from 1999, because a subsequently issued ruling of the United States Supreme Court from 2004, while not addressing the issue directly, could be read to support the proposition that a foreign arbitral body is a “foreign tribunal” for purposes

(continued on page 5)



### Collection of Evidence in the U.S. Pursuant to 28 U.S.C. Section 1782 for Use in Foreign Private Arbitrations (continued from page 4)

of section 1782. Other very recent decisions from across the United States have reached the opposite conclusion,<sup>6</sup> however, and the issue remains contentious and unsettled—even in the Southern District of New York where there does not seem to be unanimity of opinion among the district judges who sit there.<sup>7</sup>

### The Supreme Court's 2004 *Intel* Decision

In 2004, in *Intel Corp. v. Advanced Micro Devices, Inc.*,<sup>8</sup> the U.S. Supreme Court clarified most of the rules applicable with respect to section 1782. Most significant among the court's rulings was that there is no requirement that the evidence sought in the United States pursuant to section 1782 be "discoverable" under the laws of the forum country.<sup>9</sup> In other words, for purposes of most foreign proceedings, a foreign litigant may be able to obtain a broader range of evidence through section 1782 proceedings in the United States than might generally be obtained under the laws of the jurisdiction where the dispute is pending. For example, the pretrial deposition of a witness might be taken in the United States pursuant to section 1782, even if such depositions are not permitted under the laws of the forum state. Similarly, a foreign litigant might be able to seek production pursuant to section 1782 of broad classes of documents, notwithstanding that the forum state's laws might require a greater degree of specificity with respect to the documents requested.

The court also held that foreign legal proceedings need not actually be pending at the time of the section 1782 application, but need only be within reasonable contemplation.<sup>10</sup> The court identified three statutory requirements for section 1782 relief, specifically: 1) the request for evidence must be made by a foreign or international tribunal or by any interested party; 2) the person to be examined or the evidence to be disclosed must be found within the district in which the federal district court sits; and, most important for the current discussion, 3) the evidence must be "for use in a proceeding in a foreign or international tribunal."<sup>11</sup> However, the court also made it clear that, even if the three requirements are met, the grant of section 1782 relief remains within the district court's discretion.

In *Intel*, the Supreme Court did not address the question of whether a foreign arbitral body is a "foreign or international tribunal" for purposes of the final statutory requirement

noted above. Rather, the question in that case was whether the Directorate-General of Competition of the European Communities ("DGC"), an antitrust enforcement unit of the European Union, qualified as such a tribunal. In finding the DGC to be a foreign tribunal within the meaning of section 1782, the court stressed that a DGC proceeding "leads to a dispositive ruling, *i.e.*, a final administrative action both responsive to the complaint and reviewable in court."<sup>12</sup> Since 2004, appellate and district courts have struggled to determine whether, applying such criteria, foreign arbitral panels may be considered foreign or international tribunals within the meaning of section 1782.

### Foreign Private Arbitrations and Section 1782

Many courts, both prior and subsequent to the *Intel* decision, have made a distinction between foreign private arbitrations on the one hand and arbitrations conducted pursuant to international treaty obligations or under international arbitration regimes on the other hand, finding section 1782 relief to be available with respect to the latter, whether or not also available with respect to the former. As noted above, however, a number

of courts have taken the position that even private arbitrations not conducted pursuant to international treaty obligations or under international arbitration regimes fall within the meaning of "foreign tribunal" for purposes of section 1782. Other courts have simply flagged the issue, leaving its resolution for another day.

Various courts have focused on the availability of judicial review, one of the factors touched upon by the Supreme Court in the *Intel* decision, as an important

feature rendering an arbitral body a "foreign tribunal" within the meaning of the statute. Thus, where the parties to a foreign private arbitration have been able to demonstrate that a contractual right or statutory scheme permits judicial review of an arbitration award, these courts have seemed willing to deem the arbitral body a foreign tribunal and thus to allow section 1782 discovery to proceed. The availability of judicial review under the English Arbitration Act, for example, seems to be a significant factor underlying those decisions, referenced above, which have found that arbitral panels constituted under the LMAA are foreign tribunals under section 1782.

One corollary to an approach that stresses the importance of judicial review as a factor rendering an arbitral body a foreign tribunal for purposes of the statute is that, where it can be demonstrated that there is no opportunity for judicial review,

► The significantly different views on the issue expressed by various U.S. federal courts suggest that, for the time being, the precise geographical location of the witness or evidence will be one of the most important factors dictating whether section 1782 relief will be available.

section 1782 relief may well be denied. Thus, if an arbitration clause in a contract specifically prohibits the parties from seeking judicial review of any arbitration award, section 1782 relief may be unavailable—even in jurisdictions otherwise reading the statute broadly to include foreign private arbitrations. A threshold question in any specific case should therefore be whether there is a prohibition against judicial review in the governing contractual arbitration clause.

It remains an open question of whether the courts that have focused on the availability of judicial review as the determinative factor rendering private arbitral bodies “foreign tribunals” for purposes of section 1782 are correct in their analysis. Stated differently, it is not a foregone conclusion that the U.S. Supreme Court, if faced with the question, would deem foreign private arbitral bodies to be “foreign tribunals.” In *Intel*, the Supreme Court was addressing the status of a quasi-governmental administrative body, the decisions of which would appear to have been subject to full judicial review—in essence, to appellate review on all questions of law and fact. The scope of judicial review of arbitral decisions, however, is often quite strictly circumscribed by law, as it is in the United States and other jurisdictions—and indeed even under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Judicial involvement in the arbitration under such statutory schemes may therefore be limited to oversight of the arbitral process rather than the kind of judicial review the U.S. Supreme Court had in mind when it stressed such review as a characteristic feature of a “foreign tribunal” for purposes of section 1782. We take no position on the issue, but merely note, again, that the Supreme Court could ultimately rule either way.

The U.S. Supreme Court may also find that other considerations militate against a finding that foreign arbitral bodies are “foreign tribunals.” For example, certain courts, including the U.S. Courts of Appeal for the Fifth and Second Circuits, have noted the anomaly that would arise if, through the use of section 1782, a participant in a foreign arbitration could obtain broader discovery than U.S. law would allow to a participant to a purely domestic U.S. arbitration. Similarly, allowing broad section 1782 discovery in connection with private arbitrations could be argued to undermine the simple and streamlined arbitral resolution of disputes for which parties have bargained. Here, too, we take no position, but note only that the U.S. Supreme Court has as yet had no occasion to provide its views on such arguments.

Until the U.S. Supreme Court resolves the matter, we can only advise our clients and the legal counsel with whom we cooperate abroad that there is no clear answer at present to the question of whether evidence may be gathered in the United States for use in a foreign private arbitration. A contractual provision prohibiting judicial review of an arbitral decision could well make seeking such evidence an uphill battle. Even absent such a prohibition, however, the significantly different views on the issue expressed by various U.S. federal courts suggest that, for the time being, the precise geographical location of the witness or evidence will be one of the most important factors dictating whether section 1782 relief will be available. In light of the foregoing, the decision of whether to seek evidence in the United States for use in a foreign private arbitration pursuant to section 1782 should be made only after both a review of the controlling contractual documents and close consultation with counsel. ■ — ©2017 BLANK ROME LLP

1. This article updates pieces previously published in the [January 2013](#) and [October 2014](#) issues of *Mainbrace*.
2. *Application of Consorcio Ecuatoriano de Telecomunicaciones S.A.*, 685 F.3d 987 (11th Cir. 2012).
3. *National Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999); *Republic of Kazakhstan v. Biedermann Int’l*, 168 F.3d 880 (5th Cir. 1999). The continuing viability of the *Biedermann* decision was recently affirmed by the Fifth Circuit Court of Appeals in *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica*, 341 Fed. Appx. 31, 2009 U.S. App. LEXIS 17596 (5th Cir. 2009). The states within the geographical boundaries of the U.S. Second and Fifth Circuits are: New York, Connecticut, Vermont, Texas, Mississippi, and Louisiana.
4. *In re Kleimar N.V.*, No. 16-mc-355, 2016 U.S. Dist. LEXIS 165297 (S.D.N.Y. November 16, 2016) (Marrero, J.).
5. *In re Owl Shipping, LLC*, No. 14-5655, 2014 U.S. Dist. LEXIS 148088 (D.N.J. Oct. 17, 2014). See also *In re Application of Winning (HK) Shipping Co. Ltd.*, 2010 U.S. Dist. LEXIS 54290 (S.D. Fla. 2010).
6. *In re Gov’t of the Lao People’s Democratic Republic*, No. 1:15-MC-00018, 2016 U.S. Dist. LEXIS 47998 (D. Mariana Islands April 7, 2016); *In re TJAC Waterloo, LLC*, No. 3:16-mc-9-CAN, 2016 U.S. Dist. LEXIS 56381 (N.D. Ind. April 27, 2016); *In re Grupo Unidos por El Canal, S.A.*, No. 14-mc-80277, 2015 U.S. Dist. LEXIS (N.D. Cal. April 21, 2015); *In re Grupo Unidos por el Canal, S.A.*, No. 14-mc-00226, 2015 U.S. Dist. LEXIS 50910 (D. Colo. April 17, 2015); *In re Dubey*, No. SACV 13-677, 2013 U.S. Dist. LEXIS 83972 (C.D. Cal. June 7, 2013).
7. Cf. *In re Kleimar, N.V.*, above, note 4, with *In re Asia Marit. Pac. Ltd.*, No. 15-CV-2760, 2015 U.S. Dist. LEXIS 113307, note 8 (S.D.N.Y. Aug. 26, 2015) (Caproni, J.) (“Following *Intel*, it is unclear whether private foreign arbitration proceedings qualify for § 1782 discovery.”)
8. 542 U.S. 241 (2004).
9. 542 U.S. at 259-63.
10. 542 U.S. at 258-59.
11. 542 U.S. at 264-65.
12. 542 U.S. at 255.

# Understanding the U.S. Anti-Boycott Provisions

BY GEORGE T. BOGGS AND STEFANOS N. ROULAKIS



**Question:** I have to certify that my subsidiary that owns a vessel is not on the Arab League’s boycott blacklist. Can I do that?

**Answer:** If you are subject to the U.S. anti-boycott rules, the answer is “no,” but your subsidiary can provide the certification for itself. This is discussed more fully below.

A frequent issue that vessels and cargo bound for ports in the Middle East encounter is compliance with U.S. anti-boycott provisions. The issue may also arise in connection with restrictions in charter agreements for vessels. These provisions provide that a U.S. person engaged in almost any type of commerce cannot comply with or support an unsanctioned foreign boycott. These anti-boycott provisions were promulgated in response to the Arab League’s boycott of Israel, which remains the primary focus of the U.S. anti-boycott regulations. To avoid penalties, persons that trade with or in countries with a non-sanctioned boycott, such as the Arab League’s boycott of Israel, should familiarize themselves with the requirements of U.S. law.

## Background

The Arab League’s boycott dates back to the founding of the Arab League in 1945 and continues to the present day. The United States first began to legislate on this issue in 1965 when Congress passed an amendment to the Export Administration Act (“EAA”), but the anti-boycott provisions took their current shape in 1979 amendments to the EAA and in the Export Administration Regulations (“EAR”) at 15 C.F.R. Part 760. Additional anti-boycott provisions exist in the U.S. tax code and can have tax consequences for U.S. persons, but such provisions are outside the scope of this article. The U.S. anti-boycott rules are complex and often drafted with specific requirements that are too detailed to be explained here in their entirety. This article seeks only to summarize some key points to be considered.

## Prohibitions

The U.S. anti-boycott provisions generally prevent U.S. persons (including foreign affiliates) engaged in U.S. commerce from taking actions intended to support an unsanctioned foreign boycott. U.S. commerce is viewed broadly and includes commercial activity with only a limited U.S. connection. Such actions can include:

- refusing, or agreeing to refuse, to do business with a boycotted country or entities based there;
- furnishing information about business relationships with a boycotted country or nationals thereof;
- implementing a letter of credit that contains a prohibited boycott-related requirement, including certain shipping requirements; and/or
- furnishing information about the race, religion, sex, or national origin of any U.S. person or any employee, owner, officer, or director of any U.S. person.

Violations of these prohibitions can lead to criminal or civil penalties.

## Exceptions

Despite these restrictions, several exceptions exist to the boycott rules. One key exception that impacts the maritime industry relates to a boycotting country’s import requirements. In most cases, U.S. persons can comply with a boycotting country’s import requirements that prohibit imports from a boycotted country. Also, a U.S.

person may state it is not on a blacklist or restricted from doing business in a boycotting country, but a company can make that statement only about itself and not about its subsidiaries or affiliates. Additionally, when shipping goods to a boycotting country, U.S. persons can also agree to a specific voyage routing that may avoid a port of a boycotted country and to exclude the use of a carrier of the boycotted country.

However, this shipping exception does **not** allow a U.S. person to agree to use a vessel that has never called in a boycotted country. Further, this exception does **not** permit a U.S. person to agree to a blanket agreement to never do business with a boycotted country, and it does **not** permit a shipper to agree to refrain from using a vessel blacklisted by a boycotting country.

▶ Receiving a request to comply with a boycott must be reported to the Commerce Department regardless of whether the recipient intends to comply.



Another exception relates to compliance with shipping document requirements. This exception allows a company to furnish certain information that would otherwise be prohibited in order to comply with the import and shipping document requirements of the boycotting country. For example, under this exception, a shipping company could provide a positive or affirmative certificate of origin for the goods, the name of the supplier, and where the cargo did or did not transit. In addition, the rules permit a shipping certification appended to the bill of lading for a cargo destined for the boycotting country to certify that the vessel is not registered in a boycotted country, is not owned by nationals or residents of a boycotted country, and will not pass through a boycotted country port en route to its boycotting country destination.

On the other hand, a certification that the vessel is eligible to enter the ports of the boycotting country in conformity with its laws and regulations can be made only by the vessel's owner, charterer, or master. It **cannot** be made by anyone else (such as the vessel's shipping agent), unless one can establish that such certification was not required for boycott reasons.

It is important to note that these exceptions authorize furnishing the information only on the shipping documents, and that self-certifications are permissible. For example, a certification by a subsidiary on behalf of a parent company or by a vessel agent would not comply with the rule.



## Reporting Requirements

Subject to limited exceptions, U.S. persons must report to the Commerce Department any requests to participate in or support an unsanctioned foreign boycott. Specifically, a request is "reportable" if someone "knows or has reason to know that the purpose of the request is to enforce, implement, or otherwise further, support, or secure compliance" with an unsanctioned foreign boycott. Receiving a request to comply with a boycott must be reported to the Commerce Department regardless of whether the recipient intends to comply. Requests to take actions that are permissible must be reported unless a specific reporting requirement exception, as discussed above, exists.

For example, a request to ship goods to a boycotting country via a prescribed route, or to refrain from shipping via a

proscribed route (or a request to certify to either effect) is not reportable since this is a specific exception established in the EAR. In addition, a request to supply a certificate by the owner, master, or charterer that a vessel is eligible, permitted to enter, or not restricted from entering a particular port, country, or group of countries pursuant to the laws, rules, or regulations of that port, country, or group of countries, is not reportable. Conversely, a request for an exporter to certify that the vessel to be used for the shipment is eligible to enter the port of a boycotting country would be reportable and prohibited, while such a certification could be made by the vessel's owner, master, or charterer and need not be reported. Also, a request to use a ship that had never called on a country subject to an unsanctioned boycott would be reportable in addition to violating the anti-boycott rules.

## Conclusions and Recommendations

Given the longstanding nature of the Arab League's boycott and the U.S. anti-boycott provisions, any company with a U.S. presence that does business in the Middle East or that may receive requests to comply with an unsanctioned boycott, should have a plan in place to ensure compliance. While the exceptions noted above are important, requests to participate in a non-sanctioned boycott should raise red flags that personnel should be trained to recognize and apply appropriate procedures. Finally, in the event of non-compliance, it is critical to undertake a proper course of action to remedy any systemic failure(s) that lead to a violation, and to consider options, including a voluntary disclosure, for mitigating any penalties. ■ — ©2017 BLANK ROME LLP



## ANNOUNCEMENT

### Blank Rome's Insurance Coverage Practice Recognized as *The National Law Journal's* "D.C. Litigation Department of the Year"

Blank Rome LLP is pleased to announce that the Firm's [Insurance Coverage](#) practice group has been named a 2017 "D.C. Litigation Department of the Year" by *The National Law Journal* ("NLJ").

Each year, the NLJ takes the pulse of litigation departments in D.C.'s top law firms, taking into consideration their shops, including their biggest wins in 2016, their clients, and their opponents.

The NLJ published a profile on Blank Rome's insurance practice, where Partner [James R. Murray](#), who serves as chair of the group, was interviewed on the Firm's high-profile cases regarding specialized coverages and his personal keys to success.

To read the full profile, please click [here](#).

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#### About Blank Rome's Insurance Coverage Practice

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# A Seaman's Claim for Punitive Damages: The Gray Area between the Jones Act and General Maritime Law

BY WILLIAM R. BENNETT III AND ALEXANDRA CLARK



**A recent state court decision highlights a division among** state, district, and circuit courts on the availability of punitive damages for general maritime law claims. In a unanimous opinion, the Washington State Supreme Court in *Tabingo v. American Triumph LLC* ruled that punitive damages are recoverable by seaman with a claim for unseaworthiness where the employer acts recklessly.<sup>1</sup> Plaintiff Allan Tabingo was working as a trainee deckhand on a fishing trawler when he was seriously injured by a hatch cover closing on his hand, resulting in the amputation of two fingers. Tabingo alleged the vessel was unseaworthy because the vessel operator was aware of the faulty control handle for at least two years, but failed to take any measure to repair the handle. He brought suit against the vessel owners and operators, claiming negligence under the Jones Act as well as a general maritime claim of unseaworthiness, for which he requested punitive damages. A unanimous Washington Supreme Court reversed the trial court's decision to hold that punitive damages are an available remedy in a claim for unseaworthiness.

The Supreme Court has yet to address the precise question of whether punitive damages are an available recovery in a general maritime claim for unseaworthiness. To fully understand the significance of the *Tabingo* decision, a brief review of the history of claims under the general maritime law and jurisprudence is required.

## Causes of Action under the General Maritime Law

By way of background, the general maritime law historically provided injured seaman with two causes of action against their employer: (1) a claim for maintenance and cure benefits, and (2) a claim for injuries caused by the unseaworthiness of the vessel. Vessel owners have a non-delegable duty to provide a

seaworthy vessel. A vessel is seaworthy if the vessel, including equipment and crew, is reasonably fit and safe for the purposes for which it is intended to be used. Liability on a claim of unseaworthiness does not require a finding of negligence; vessel owners may be found liable without fault.

By the time the Jones Act was enacted in 1924, general maritime claims such as unseaworthiness were well-established in the United States. The Jones Act provided injured seaman or their representatives a negligence cause of action against their employer.<sup>2</sup> While the Jones Act does not define the available remedies for claimants under the act, courts have interpreted the Jones Act to only provide for pecuniary loss.

General maritime claims are distinct from Jones Act claims. Seaman may bring a Jones Act negligence claim and a claim for unseaworthiness in the same action and may recover damages under both claims in the same action.<sup>3</sup>

► The Supreme Court has yet to address the precise question of whether punitive damages are an available recovery in a general maritime claim for unseaworthiness.

## Jurisprudence

The federal and state courts of the United States have struggled with the question of whether the restriction of available recovery under the Jones Act extends to claims under the general maritime law. In *Miles v. Apex Marine Corp.*, a unanimous Supreme Court held that non-pecuniary damages were not recoverable in a general maritime law wrongful death action.<sup>4</sup> In so holding, the

court established the *Miles* uniformity principle providing that if a category of damages is prohibited under a statutory maritime cause of action, it is unavailable for a parallel general maritime law cause of action. The court in *Miles* was clear, however, that "[t]he Jones Act evinces no general hostility to recovery under general maritime law" and "[i]t does not disturb seaman's general maritime claims for injuries resulting from unseaworthiness."<sup>5</sup>

In *Atlantic Sounding v. Townsend*, a sharply divided Supreme Court held that punitive damages may be recovered in a general maritime claim for maintenance and cure.<sup>6</sup> The plaintiff filed suit under the Jones Act and the general maritime law alleging his employer willfully failed to provide maintenance and cure. The majority in *Townsend* limited its reading of *Miles* to the question of whether the general maritime law provided a cause of action for wrongful death. In a decision written by Justice Thomas, the

(continued on page 11)

### A Seaman's Claim for Punitive Damages: The Gray Area between the Jones Act and General Maritime Law (continued from page 10)

court reasoned that because punitive damages were available at common law and, by extension, to maritime claims without evidence that maintenance and cure was excluded from the general maritime rule, it followed that punitive damages remained a remedy available to claimants seeking maintenance and cure. Further, Congress had not exhibited any intent to limit recovery for general maritime claims to non-pecuniary damages. The Jones Act, the court explained, did not proscribe the previously existing general maritime claims of maintenance and cure and unseaworthiness, but rather expanded a seaman's right to recovery.

The dissent in *Townsend* criticized the majority, arguing that while punitive damages may have been available, they were not frequently awarded for general maritime claims. The dissent was written by Justice Alito and joined by Chief Justice Roberts and Justices Scalia and Kennedy. The dissent is correct about this fact—punitive damages are an extraordinary remedy that require a finding that the defendant's conduct is “willful, wanton and reckless indifference for the rights of others.”<sup>7</sup> Indeed, in *Exxon Shipping Co. v. Baker*, decided a year before *Townsend*, the Supreme Court approved an award of punitive damages under the general maritime law where the conduct of the defendant was reckless. Though *Exxon* was not a Jones Act case, at issue was the availability of remedies to fisherman under the general maritime law. The decision has been cited in conjunction with *Townsend* as the Supreme Court's acquiescence to the availability of punitive damages for general maritime law claims where Congress has not limited recovery. Thereafter, numerous district courts applied the holding in *Townsend* to claims for unseaworthiness and found that punitive damages are an available remedy on unseaworthiness claims.

However, in 2014, the Fifth Circuit in *McBride v. Estis Well Service, LLC* held that punitive damages were not an available remedy for general maritime claims of unseaworthiness, abruptly reversing its earlier panel decision. In *McBride*, two injured seaman and a representative of a deceased seaman stated causes of action for negligence under the Jones Act and unseaworthiness under the general maritime law. The majority opinion equated a claim for unseaworthiness with a claim for negligence under the Jones Act, such that the Jones Act restriction of available remedies proscribed the availability of punitive damages to injured seaman with general maritime unseaworthy claims. The majority relied heavily on *Miles*, and only briefly mentioned *Townsend* by limiting its application to claims for maintenance and cure. It is worth noting that at issue in *McBride* was the availability of punitive damages in unseaworthiness claims for both wrongful death and personal injury. The Fifth Circuit did not distinguish the recovery available for the different claims.

### Future of Punitive Damages

The Washington Supreme Court's decision in *Tabingo*, another Jones Act and general maritime unseaworthiness cause of action, revived the discussion with regards to the availability of punitive damages under a general maritime law claim. *Tabingo* is directly at odds with the Fifth Circuit's decision in *McBride*. If Congress does not specify the available recovery in an unseaworthiness claim, there will continue to be disparate applications of *Miles* and *Townsend*. The sharp division of opinions between state, district, and circuit courts on the issue of punitive damages may necessitate a response from the Supreme Court.

*Townsend* is the court's most recent decision with regards to recovery under the general maritime law. The majority opinion was authored by Justice Thomas and joined by Justices Stevens, Souter, Ginsburg, and Breyer, the liberal side of the bench. Justice Alito dissented and was joined by the other conservatives—Chief Justice Roberts and Justices Scalia and Kennedy. While Justice Thomas' opinion was clear that categories of damages historically available in general maritime actions will continue to be available so long as they are not proscribed by statute, Justice Alito's dissent demonstrated a very restricted view of the availability of punitive damages in maritime law. The composition of the bench has changed since the court's 2009 decision in *Townsend*. Justices Kagan, Sotomayor, and Gorsuch now sit on the bench in place of Justices Stevens, Souter, and Scalia, and their views on punitive damages and recovery under the general maritime law are largely unknown.

The division between the state and district courts with the Fifth Circuit creates ambiguity in maritime cases. Consequently, maritime practitioners and their clients are left with the uncertainty created by disparate applications of *Townsend* and *Miles* in maritime personal injury litigation. The one certainty is that punitive damages are awarded only where there is a finding of lawless misconduct. Maritime employers should be diligent in keeping their vessels, including equipment and crew, in a seaworthy condition so that claimants do not have a reason to claim punitive damages. ■ — ©2017 BLANK ROME LLP

1. *Tabingo v. Am. Triumph LLC*, 188 Wn.2d 41 (Wash. 2017).
2. 46 U.S.C. § 30104.
3. *McAllister v. Magnolia Petrol. Co.*, 357 U.S. 221 (1958).
4. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990).
5. *Id.* at 29.
6. *Atl. Sounding Co. v. Townsend*, 557 U.S. 404, 414-15 (2009).
7. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 492 (2008).



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## *Chambers Global 2017* Ranks Blank Rome Attorneys and Shipping Litigation Practice

*Chambers Global 2017* recognized Blank Rome LLP as a global leader in **Shipping: Litigation**, as well as Partners **Anthony B. Haller** and **John D. Kimball** for their industry knowledge and leading practices.

Regarding Blank Rome's shipping litigation capabilities, *Chambers Global* notes the Firm has an "excellent U.S.-based shipping litigation practice, handling an array of complex disputes both domestically and internationally. Strong capabilities in shipping company bankruptcies and restructurings, as well as casualties and related investigations. Also offers a wealth of experience in maritime arbitration. The group's impressive client list includes international owners, operators, shipyards, charterers, P&I clubs and financial institutions." *Chambers Global* reports that clients "praise the group highly, stating that 'they have the depth for anything you need,' and 'the service is always prompt and efficient.'"



On Blank Rome's recognized attorneys,  
*Chambers Global 2017* states:

**John D. Kimball** "is very knowledgeable and is a very thorough and strong advocate."



**Anthony B. Haller** "is held in high regard for his handling of complex disputes, including trade secret and unfair competition litigation. Interviewees describe him as a 'very good problem solver' who is 'very skilled at coming up with solutions and positive outcomes in complex situations.'"

For more information on *Chambers Global 2017*, please visit  
[www.chambersandpartners.com/global](http://www.chambersandpartners.com/global).





# Chambers USA 2017 Honors Blank Rome Maritime Attorneys and Practices

## Band One

### Shipping Litigation (New York) – Nationwide

**Chambers 2017:** Blank Rome Maritime’s “esteemed” shipping litigation practice (New York) has “significant experience handling high-profile maritime litigation for national and international clients.” The practice is “highly regarded for crisis response and offering additional expertise in alternative dispute resolution” and “maintains an excellent reputation for advising maritime industry entities in federal investigations arising from intentional misconduct allegations and casualty events, as well as in a host of cybersecurity issues.” The practice is also “increasingly active in shipping bankruptcy disputes, having recently acted in a number of Chapter 15 cases.”

**Client sources say:** “There is a professional and thorough approach to their handling of cases. They’re heavy-hitters who can be innovative or aggressive when they need to be.” One source considers the Blank Rome group to be “a very strong, dedicated team,” and notes: “They’re good at coordinating work in several states.”



**Thomas H. Belknap, Jr.** ranked as a **band two** attorney.

**Chambers USA states:** “Thomas Belknap has years of experience across a range of contentious matters in the shipping arena, with noted strength in contract disputes, charter party disputes, cargo claims, and insurance litigation.”



**John D. Kimball** ranked as a **band two** attorney.

**Chambers USA states:** “John Kimball offers ‘excellent knowledge and experience in supporting the client.’ Clients trust him with a range of sensitive matters, such as advising on a case involving the largest containership loss ever. Mr. Kimball is lauded by one client as ‘one of the best maritime lawyers in the USA.’”



**Richard V. Singleton** ranked as a **band four** attorney.

**Chambers USA states:** “Richard Singleton maintains an active litigation practice in the shipping space, and is strong in marine disaster and casualty claims, bankruptcy litigation and environmental issues. His ‘advice is concise, accurate and helpful, and he will actually provide solutions and suggestions.’”



**Lauren B. Wilgus** ranked as **an associate to watch**.

**Chambers USA states:** “Lauren Wilgus is a highly regarded associate who practices extensively on behalf of foreign and domestic maritime clients in litigation and alternative dispute resolution.”

The quotes, rankings, and commentary referenced above are published in *Chambers USA 2017*.

## Band Two

### Shipping Litigation (Outside New York) – Nationwide

**Chambers 2017:** Blank Rome Maritime's shipping litigation practice (outside New York) is an "in-demand team with substantial experience across the full suite of contentious issues in the maritime sector." The practice has a "deep bench of expert lawyers routinely engaged to act on behalf of significant shipowners and operators, P&I clubs and energy companies" and an "impressive nationwide footprint complements the firm's Gulf Coast-focused practice."

**Client sources say:** "Their staffing and breadth of knowledge is fantastic. The people there know how to do pretty much everything, and they do it quickly and efficiently." And, "They have the ability to technically evaluate what's going on in a case. They possess a practicality that I value and appreciate."



**Michael K. Bell** ranked as a **band two** attorney.

**Chambers USA states:** "Michael Bell is an 'exceptionally skilled technical lawyer.' He concentrates his practice on dealing with maritime disasters and casualties, charter party disputes and environmental issues. Clients admire that he 'tends to speak freely and directly' and that 'he's well connected to the industry so gets different perspectives.'"



**Keith B. Letourneau** ranked as a **band three** attorney.

**Chambers USA states:** "Keith Letourneau maintains a comprehensive maritime practice. He regularly supports clients in collisions, vessel arrests and maritime pollution incidents, and has a solid grasp of contractual matters. He is also well-versed in maritime issues coinciding with the energy sector."



**Douglas J. Shoemaker** ranked as a **band three** attorney.

**Chambers USA states:** "Douglas Shoemaker is a 'terrific' attorney with years of experience handling a broad scope of maritime issues. He is particularly capable in personal injury matters, Jones Act litigation, navigational error claims and cargo damage defense. One observer reports: 'His greatest strengths are his practical application of his broad experience and an ability to identify the critical issues.'"



**Jeremy A. Herschaft** ranked as an **up and coming** attorney.

**Chambers USA states:** "Jeremy Herschaft is 'very smart, thorough and thoughtful in terms of thinking things through.' He handles domestic and international cargo claims, marine casualties and charter party disputes, and also advises on insolvency disputes."

## Band One

### Shipping Regulatory – Nationwide

**Chambers 2017:** Blank Rome Maritime's "highly acclaimed" shipping regulatory practice is "well-known for its representation of significant shipping clients in a range of regulatory matters" and has "expertise in Jones Act compliance, environmental investigation defense of companies and individuals, and government relations." The practice "advises on maritime cybersecurity issues, including attacks and security breach avoidance" and has "further strength in counseling shipowners and operators on U.S. trade sanction issues."

**Client sources say:** "I think their work is sterling. They are smart, alert, aware and treat their clients' problems like their own and take their needs very seriously. When I have had a problem, I've always been confident in their advice and counsel."



**Jeanne M. Grasso** ranked as a **band two** attorney.

**Chambers USA states:** "Jeanne Grasso is prized by a broad client base for offering valued expertise in pollution incident response, compliance and enforcement actions involving a number of federal agencies, including the DOJ and U.S. Coast Guard. Sources describe her as 'a smart, hard-working person and a good role model' who is 'very tapped into the community worldwide.'"



**Matthew J. Thomas** ranked as a **band three** attorney.

**Chambers USA states:** "Matthew Thomas maintains an active regulatory practice utilized by a range of industry participants, including shipowners, flag states, P&I clubs and terminal operators. The trade and sanctions specialist is described by one source as 'a bright lawyer and someone I respect.'"



**Jonathan K. Waldron** ranked as a **band one** attorney.

**Chambers USA states:** "Jonathan K. Waldron is 'the ultimate professional. He's knowledgeable, wise, well known in the industry and a pleasure to work with.' His extensive knowledge is regularly applied to matters concerning environmental compliance, Jones Act issues and maritime security. He has particularly deep expertise in major spill and pollution response work."

## Notable Practitioners for Shipping Litigation (Outside New York)

## Notable Practitioners for Shipping Regulatory – Nationwide

# The Global Anti-Corruption Corner: A Primer to the Foreign Corrupt Practices Act

BY SHAWN M. WRIGHT, CARLOS F. ORTIZ, MAYLING C. BLANCO, AND ARIEL S. GLASNER



Any company doing business abroad is subject to the long reach of the Foreign Corrupt Practices Act (“FCPA”). Small or privately held companies, just like large or public companies, are subject to the criminal specter of the FCPA. The operative inquiry is whether the company is operating and/or transacting any type of business abroad with the government, government-owned entities, or involving foreign officials—either directly, through joint ventures, or indirectly, through agents. A foreign official also includes employees of entities owned by the government.

Although the FCPA was first enacted in 1977, it was not widely enforced until the turn of this century; since then, the law has resulted in a steady flow of significant corporate settlements. Indeed, in approximately the last two decades, enforcement of the FCPA has increased exponentially, with the second-largest number of enforcement actions having been

brought in 2016 (2008 had the greatest number). Before the FCPA, no country considered bribing a foreign official for business purposes to be illegal—it was simply considered a cost of doing business abroad. The United States was the first country to outlaw the practice and recently published a comprehensive resource guide to compliance with the act.

Presently, for companies that are engaged in international business, some of the countries that are considered high risk for FCPA exposure include Mexico, Panama, Russia, China, Ukraine, Brazil, Nigeria, and Lebanon.

The following is a primer about FCPA and its basic provisions.

## What Is the Foreign Corrupt Practices Act?

The FCPA targets public corruption and fraud in the international marketplace. It does so in two main ways:

1. The FCPA prohibits any U.S. person or entity (including privately held companies), or any issuer of U.S. securities, from making any corrupt payment or offering anything of value to any foreign official for the purposes of obtaining or retaining business, or gaining any improper advantage. The statute covers U.S. companies, citizens, and permanent residents (and their agents) anywhere they act in the world.

The act also specifically covers foreign individuals and entities so long as any aspect of the transaction touches U.S. soil.

2. The FCPA requires all companies whose securities are listed on U.S. stock exchanges to maintain accurate accounting records and implement an adequate system of internal controls. This provision of the FCPA is generally referred to as the “book and records” provision and can have a very broad interpretation.

Very importantly, the FCPA ascribes liability to companies both for the actions of its own employees and for any third-party acting on the company’s behalf, as well as individuals involved or authorizing such conduct.

## What Is a “Thing of Value?”

A “thing of value” has had an evolving focus. While the initial FCPA violations involved cash and luxurious gifts, more recent cases have reflected an increasing sophistication of the term to include cash equivalents (gift cards); excessive travel and entertainment; loans; political and charitable contributions or donations; and employment, internships, or scholarships. The “thing of value” may be for the benefit of the official directly, but also includes anyone in their family.

► In approximately the last two decades, enforcement of the FCPA has increased exponentially, with the second-largest number of enforcement actions having been brought in 2016 (2008 had the greatest number).





## PRESS RELEASE

June 2017

### Blank Rome's Kate Belmont Appointed as President of the WISTA New York/New Jersey Chapter

**Blank Rome LLP is pleased to announce** that [Kate B. Belmont](#), an associate in the Firm's maritime group, has been appointed as President of the Women's International Shipping and Trading Association's ("WISTA") New York/New Jersey chapter.

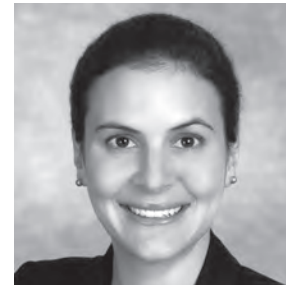
WISTA is an international organization for women in management positions involved in the maritime transportation business and related trades worldwide. WISTA USA, founded in 1998, will celebrate its 20th anniversary at its Annual General Meeting and Conference in April 2018, which Ms. Belmont will spearhead in New York City as part of her role as Chapter President.

Blank Rome has a long-standing relationship with WISTA. Partner [Jeanne M. Grasso](#) is the immediate past president of WISTA USA and currently serves on WISTA International's Executive Committee. Meanwhile, Associate [Patricia M. O'Neill](#) is President of the WISTA D.C. Metro Chapter. Furthermore, Blank Rome attorneys are often called upon to speak at WISTA events. Most recently, Ms. Belmont and Ms. Grasso [participated](#) in panels at the WISTA International General Meeting and Conference, held aboard Holland America Line's newest cruise ship, the *ms Koningsdam*, this past November.

"Blank Rome has always promoted the important role of women in shipping, and has enthusiastically supported WISTA's mission from its earliest days," said Partner [John D. Kimball](#), who co-chairs the Firm's [Maritime and International Trade](#) practice. "We will continue to do so into the future as women take on even more prominent roles in shipping and international trade."

For more information on WISTA, please visit [www.wista.net](http://www.wista.net).

At Blank Rome, Ms. Belmont concentrates her practice in the areas of admiralty and maritime law, commercial litigation, and arbitration. She represents clients in a wide variety of both domestic and international maritime and commercial matters. Ms. Belmont is member of the Maritime Law Association's cybersecurity committee. In 2015, she was [honored](#) by *The National Law Journal* for her cutting edge work combining maritime litigation and cybersecurity issues.



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## What Are Penalties for Violations of the FCPA?

For companies, violations of the FCPA carry hefty financial penalties that amount to hundreds of millions of dollars. In addition to the financial penalties, negotiated settlements with the government typically require the disgorgement of any profits resulting from the unlawful conduct, an agreement to cooperate with government investigations for a period of multiple years, and the implementation of an enhanced compliance program. Companies can also be fined by multiple countries if the conduct violates the other country's anti-corruption statute.

In recent years, the government has also sought to hold individuals accountable for FCPA violations. Accordingly, corporate resolutions of FCPA investigations are now often accompanied by prosecutions of individuals the government considers responsible for corporate wrongdoing.

	Maximum Fine Per Count (Corporations)	Maximum Fine Per Count (Individuals)	Maximum Imprisonment Per Count (Individuals)
Anti-Bribery Violations	\$2 million	\$100,000	5 years
Accounting Violations	<b>\$25 million</b>	<b>\$5 million</b>	<b>20 years</b>

## How Are FCPA Violations Discovered?

FCPA violations are discovered in numerous ways, both inside and outside of the company.

Internally, potential FCPA violations can be discovered through the report of a whistleblower to company management or via a report from an internal compliance hotline. Routine business activities, such as the reimbursement of expenditures, can trigger investigations by a company's compliance or legal department, as can less routine activities such as compliance audits and due diligence related to company acquisitions. The Securities and Exchange Commission ("SEC") also has a very user-friendly whistleblower website that is available to individuals across the globe.

Externally, FCPA investigations can be triggered by whistleblower reports, court filings in lawsuits brought by private plaintiffs, enforcement actions brought by foreign governments, or even by anonymous tips.

## Who Enforces the FCPA?

The FCPA is primarily enforced by the U.S. Department of Justice ("DOJ") (anti-bribery provisions) and the SEC (books and records and internal controls provisions). The DOJ and SEC have increased their concerted efforts to coordinate their

investigations with foreign prosecutorial agencies, an initiative that has been enhanced by the proliferation of anti-bribery laws in other countries. Accordingly, many FCPA investigations now expand into multi-lateral prosecutions and investigations.

## What Should a Company Do When a Potential Violation Arises?

If a company suspects that a potential FCPA violation has occurred or that it is being investigated by a government agency, it may, in coordination with its legal counsel, consider one or a combination of several steps. These steps may include, for example, the company conducting its own investigation to assess the scope of the alleged wrongdoing; considering a voluntarily disclosure of unlawful conduct to the government; cooperating with a government's investigation into a specific industry or number of companies; improving its compliance

program; and remediating the harm that has resulted from the alleged unlawful conduct.

## How Can a Company Protect Itself?

While a given company's FCPA exposure depends on various factors, including the industry in which the company operates, as well as the countries in which it

does business, FCPA compliance programs typically include the following:

- a clear set of policies and procedures regarding anti-corruption compliance;
- a comprehensive training program to educate employees about anti-corruption laws (including the FCPA) applicable to the company's operations and compliance of such laws; and
- processes for ensuring that appropriate due diligence is undertaken for new hires, including third-party agents, and for the acquisition of any new ventures, particularly with respect to foreign entities.

**This article was first published in the March 2017 edition of Blank Rome's [White Collar Watch](#), and authored by members of the Firm's [White Collar Defense and Investigations](#) practice group.** □ — ©2017 BLANK ROME LLP



# Congress Moving Full Steam Ahead on Coast Guard and Related Maritime Bills

BY JOAN M. BONDAREFF AND JONATHAN K. WALDRON



**Despite the continuing turmoil in Washington, D.C., over** the Russian investigation into the Trump campaign, Congress is continuing to carry out its regular business of funding the federal government and authorizing agency programs. This article reviews the status of Coast Guard and related legislation, the FY 2017 final budget, and the proposed budget for FY 2018.

## Movement on Coast Guard, MARAD, and FMC Bills

Both the Senate Commerce, Science and Transportation Committee (“Commerce Committee”) and the House Transportation and Infrastructure Committee (“T&I Committee”) have reported out bills to authorize the programs and operations of the U.S. Coast Guard. As of this writing, the bills have to go to their respective floors for final votes and then be reconciled in conference, but we expect a favorable outcome before the August recess.

The Senate reported its bill (S. 1129) on May 18, 2017. The “Coast Guard Authorization Act of 2017” reauthorizes the activities of the Coast Guard for fiscal years 2018 and 2019, and contains the following significant provisions:

- makes training available on a reimbursable basis to nongovernmental emergency responder personnel;
- reduces the time period for commissioned officer retirement from 10 to eight years;
- authorizes leave for the birth of an adopted child;
- codifies and extends for 10 years the operations of numerous Coast Guard advisory committees, including the Chemical Transportation Advisory Committee, Commercial Fishing Safety Advisory Committee, Merchant Marine Personnel Advisory Committee, National Boating Safety Advisory Committee, National Offshore Safety Advisory Committee, and Towing Safety Advisory Committee;

- directs the Coast Guard, as it recapitalizes its assets, to ensure continuity of coverage of its maritime response programs;
- establishes a new deadline for fishing vessels to comply with alternative safety compliance programs;
- requires recreational vessels less than 25 feet in length to have engine cut-off switches;
- authorizes the Coast Guard to issue certificates of documentation for recreational vessels with effective periods of up to five years with a fee schedule based on the term of the certificate of documentation;
- requires the Coast Guard to submit a plan to Congress to replace the aging fleet of inland waterway and river tenders and bay class icebreakers no later than 545 days after the date of enactment;
- establishes alternative planning criteria for the captain of the Port Zone that includes the Arctic, if the commandant verifies that the equipment included in the plan can operate in Arctic conditions;
- directs the commandant, in one year, to submit to Congress a report on the progress made towards implementing the U.S. Coast Guard Arctic Strategy, dated May 2013; and
- directs a report to Congress on fleet requirements and assessment strategy.

In addition to authorizing the Coast Guard for the next two years, S. 1129 reauthorizes the programs of the Federal Maritime Commission for two years.

The Senate bill also reauthorizes the Hydrographic Services Improvement Act of 1998 for four years while directing the secretary of commerce to develop and implement a strategy for increasing contracting for hydrographic data collection with nongovernmental entities.

At the markup, Senators Cantwell (D-WA) and Sullivan (R-AK) offered an amendment to require a report for extending the service life of the Coast Guard Cutter POLAR STAR; and Senators Baldwin (D-WI) and Peters (D-MI) offered an amendment to

*(continued on page 19)*

**Congress Moving Full Steam Ahead on Coast Guard and Related Maritime Bills (continued from page 18)**

authorize the use of Coast Guard funds for the construction of an icebreaker for the Great Lakes. Both amendments were accepted and included in S. 1129.

**Vessel Incidental Discharge Act Part of Senate Coast Guard Bill**

Finally, and perhaps the most controversial action taken by the Senate Commerce Committee, was to include in the Coast Guard authorization bill the Vessel Incidental Discharge Act (“VIDA”). VIDA addresses the administrative scheme to regulate ballast water discharges from ships entering U.S. waters. Under current law, both the Coast Guard—by regulation—and the Environmental Protection Agency (“EPA”)—through its general permit process—have a role in regulating ballast water discharges. VIDA attempts to simplify this arrangement and grant the Coast Guard primary authority over these discharges. After enactment of VIDA, a discharge of ballast water into navigable waters of the United States is no longer subject to the Clean Water Act and the EPA general permit. VIDA also attempts to establish a single national best management practice for ballast water discharges, while allowing states to petition the secretary of homeland security home of the Coast Guard to establish stricter standards if the state can establish that 1) the revised best management practice would reduce adverse effects of discharges, and 2) the revised practice would be economically achievable and operationally practicable.

Despite the inclusion of the state petition process in VIDA, a number of Democratic senators asked to be recorded “No” on the bipartisan Coast Guard bill because of its inclusion of VIDA. Chairman Thune (R-SD) urged that action be taken this year on ballast water management. It remains to be seen whether VIDA survives intact or at all on a Senate floor vote and the conference with the House.

The companion House Coast Guard bill, described below, does not include VIDA.

**House Transportation and Infrastructure Committee Reports Coast Guard and FMC Bills**

Prompted by Senate action on its Coast Guard bill, the House T&I Committee ordered its own Coast Guard bill (H.R. 2158) reported from the committee. The bill also reauthorizes the programs of the Coast Guard for two years. Following are some of the highlights of the House bill that are not also included in the Senate bill:

- requires the commandant to establish a land-based unmanned aircraft program to support and assist the Coast Guard;
- requires the National Academy of Sciences to review and recommend existing and emerging unmanned, autonomous, or remotely controlled maritime domain awareness technologies;

- authorizes the commandant of the Coast Guard to enter into multi-year acquisition contracts, subject to the availability of appropriations;
- authorizes two million dollars in funding for marine debris programs and requires implementation of the Atlantic Coast Port Access Study report;
- requires the commandant, before certifying an eighth National Security Cutter as Ready for Operation, to report to Congress on its cost and performance; and
- requires the secretary of homeland security (“HLS”) to establish a reliable land-based eLORAN system.

At the committee markup, Congressman Duncan Hunter, Chair of the Coast Guard Subcommittee, offered the manager’s amendment to H.R. 2518, which would also 1) add an authorization of \$165M for the acquisition of six Fast Response Cutters in addition to the current 58; 2) add an authorization of three million dollars for ice trials of icebreaker vessels; 3) add an authorization of \$165M for shoreside infrastructure improvements; and 4) similar to the Senate bill, require the secretary of HLS to not approve vessel response plans for the Arctic unless the equipment in the plan has been tested and proven capable.

The House T&I Committee also ordered reported H.R. 2593, reauthorizing the Federal Maritime Commission.

**MARAD Authorization Reported from Senate Commerce Committee**

The Senate Commerce Committee also reported S. 1096, the Maritime Administration Authorization and Enhancement Act for Fiscal Year 2018. This bill reauthorizes the programs of the U.S. Maritime Administration, including the U.S. Merchant Marine Academy, state maritime academies, and training vessels, and provides \$36M for the National Security Multi-Mission Vessel Program. The Small Shipyard and Maritime Communities grant program was also reauthorized for three years and increased to \$27.5M a year. A new Buy America requirement for steel, iron, and manufactured goods used in the Small Shipyard program was added.

As is the custom, the MARAD Authorization bill will be added on the House side to the National Defense Authorization Act and addressed by the House Armed Services Committee.

**The Budget for Coast Guard and MARAD Programs**

The authorizing committees and bills discussed above provide direction to the agencies on what Congress expects them to accomplish in the next two years. But, until the appropriation committees complete their work, it is not possible to say whether the agencies will get sufficient funds to carry out their programs and congressional edicts.

A brief review of the FY 2017 enacted and FY 2018 proposed budgets for the Coast Guard and MARAD follows.

### **FY 2017 Funding for Coast Guard and MARAD**

On May 5, 2017, Congress finally concluded its work on the FY 2017 budget for most of the government when the Consolidated Appropriations Act, 2017, was signed into law (Pub. L. 115-31). Despite President Trump's urging that the bill include funding for the southern border wall, no funding for the wall was included in the Appropriations Act. Funding could be considered in the FY 2018 budget bill, below.

The Coast Guard received \$10.5B—an increase of \$344M above the previous request and a decrease of \$467M below 2016 levels. Of this amount, \$1.37B was provided for modernization and recapitalization of vessels, aircraft, and facilities, including funding to start a new Polar Ice Breaking Vessel program, the acquisition of an Offshore Patrol Cutter, C-130-J aircraft, six Fast Response Cutters, and facility improvements.

MARAD received \$523M, which represented an increase of \$123M above the 2016 level; full funding for the Maritime Security Program (\$300M); five million dollars for small shipyard grants; and five million dollars for marine highway program grants.

The transportation section of the funding bill also included \$500M for the ever-popular TIGER grant program, the same as the 2016 level.

### **Trump Budget Proposal for FY 2018**

On May 23, 2017, President Trump released his proposed budget for FY 2018, entitled "A New Foundation for American Greatness."

A skinnier version had been released earlier. Even staunch Republicans like Senators McCain (R-AZ) and Graham (R-SC) called the budget "dead on arrival," and the Democrats opposed it because of its cuts to social programs. But, it does represent a starting point for the FY 2018 budget negotiations that are already underway. A few highlights of the FY 2018 Trump budget in relevant areas follow.

Contrary to rumored support of the program by Transportation Secretary Elaine Chao, the Trump budget proposal zeroes out TIGER grants. Will they miraculously reappear in the Trump infrastructure package? It remains to be seen. There are few details in the Trump-proposed infrastructure package, but the buzzword appears to be "public-private partnership" as reflected in a proposal for \$200B in federal spending to leverage one trillion dollars in total investments. A Democratic proposal calls for IT in direct federal spending.

President Trump spoke at the 2017 Coast Guard Academy commencement exercises and promised more money for polar icebreakers—the United States barely has one functioning polar icebreaker—but the budget request doesn't contain sufficient funds to build even one polar icebreaker.

On the MARAD side, things look even bleaker as small shipyard grants are zeroed out; there is no funding for the marine highway program and not even a single dollar to administer the



title XI loan guarantee program, let alone breathe new life into the shipbuilding program. Level funding is requested for the Maritime Security Program (\$210M).

### **Conclusions**

The authorizing committees are doing their job by reporting out Coast Guard, MARAD, and FMC bills. The main policy difference in a House-Senate conference on the Coast Guard bill will be the inclusion of the VIDA title. For MARAD, there appear to be no controversial provisions. It also looks as if the House and Senate are thinking alike when it comes to FMC reforms. While it is too soon to predict the outcome of the FY 2018 budget, as Senate Majority Leader Mitch McConnell said to reporters, the Trump budget proposal is "only a recommendation" from the president. ■ — ©2017 BLANK ROME LLP



## Blank Rome and Marshall Islands Registry Co-Host Seminar on U.S. Regulatory, Financial, and Political Issues Affecting Shipping

On Wednesday, April 26, Blank Rome and the Marshall Islands Registry co-hosted a maritime seminar in Athens, Greece, covering U.S. regulatory and enforcement issues, factors to consider in going public, and an update on the current political landscape in Washington, D.C. This successful event seminar drew in nearly 200 attendees, predominantly Greek shipowners, operators, and law firms. A significant focus of the seminar was the many recent issues relating to compliance with ballast water and MARPOL requirements.

Blank Rome's maritime and international trade attorneys—[Jeanne M. Grasso](#), [Gregory F. Linsin](#), [R. Anthony Salgado](#), [Stefanos N. Roulakis](#), and [Matthew J. Thomas](#)—participated in this event, as well as [Scott D. Hatch](#) and [Stephen C. Peranich](#), principals at [Blank Rome Government Relations LLC](#). Other panelists in the seminar included officials from the Marshall Islands registry, a compliance manager from a private Greek vessel operator, executives from publicly traded companies based in Greece, and officers from the U.S. Coast Guard. □



**PICTURED LEFT TO RIGHT:**

Stefanos Roulakis, Laura Sherman (IRI), Greg Linsin, Theo Xenakoudis (IRI), Jeanne Grasso, Tony Salgado, and John Ramage (IRI)

# The Future Is Now: Unmanned and Autonomous Surface Vessels and Their Impact on the Maritime Industry

BY ALAN M. WEIGEL AND SEAN T. PRIBYL



**Once thought to be a mere concept on the distant horizon,** Unmanned Surface Vessels (“USVs”) are garnering increasing attention in the maritime industry as a means to cut costs, increase efficiency, and enhance safety. While some view USVs as more akin to futuristic science fiction, in reality, unmanned vessels are far from a novel concept—Nikola Tesla envisioned maritime drones in his November 8, 1898, patent for “Method of and apparatus for controlling mechanism of moving vessels or vehicles.” More recently, unmanned and autonomous technology has been developed in multiple industries, in particular in the subsea sector.

Projections of practical implementation into the maritime surface sector have rapidly shifted from a mere concept decades away to the immediate future. Today, innovators are not only developing USV technology, but are also conducting on-the-water testing of USVs. As a result, the potential applications and benefits of unmanned technologies are driving investment and shaping the conversation of both regulators and the industry. The question is no longer *if*, but *when*. And the answer to *when*, in some regards, is *now*.

As with unmanned technologies in other industries, USVs have the potential to provide enhanced safety and cost savings by removing the human element from certain operations. Generally, two options are currently being evaluated for operating vessels with unmanned technologies: 1) new purpose-built vessels, or 2) retro-fitting current vessels to operate to some level of autonomy. USVs may operate with various levels of autonomy, including remotely operated (by humans); partially autonomous vessels (with human input); or fully autonomous (using artificial intelligence decision-making). For the foreseeable future, while humans will remain in the operational loop for the majority of operations, long-term goals include transportation of cargo and passengers with fully autonomous vessels. Regardless of the approach to the construction or level of autonomy, unmanned vessels offer the possibility of advantages to the maritime industry. But the advantages will not come without addressing serious challenges.

## Benefits of USVs

USVs can offer advantages in terms of safe vessel operations. Even with advanced and integrated bridge navigational systems aboard current vessels, studies indicate that approximately 96 percent of marine casualties and accidents are still caused by some level of human error. Seafarers also account for around 40 percent of the ship operating expenses, second only to fuel costs. Such expenses include wages, but also costs of litigating personal injury and other accident cases. Over the past century, advances in technology have resulted in a steady decline in the number of mariners required to operate commercial vessels. Yet, manning is still an area in which owners/operators seek to reduce operating costs, and these costs are potentially mitigated by a crewless vessel. And, by removing seafarers entirely from vessels, owner/operators limit the risk of piracy and hostage-taking. Such unmanned operations may therefore lead to lower insurance coverage rates for vessels operating in high-risk pirate waters.

In cases where unmanned vessels are purpose-built, overall construction costs may be reduced as vessels will no longer require seafarer amenities and superstructure components, such as berthing accommodations, air conditioning/heating, galleys, and sewage treatment systems. Space aboard vessels previously allotted to accommodating the crew will allow for increased cargo capacity as well as reduced maintenance costs. To mitigate the threat of piracy, crewless vessels can be designed to severely limit access to interior spaces, with remote disabling capabilities to leave the vessel dead in the water during a pirate attack.

USVs potentially offer more environmentally sustainable operations as well. Crewless vessels no longer need to manage garbage or treat sewage. Ships can also be designed to afford greater fuel efficiency, and alternate fuel sources may be used. For example, the *Yara Birkeland*, a container vessel being developed by Kongsberg Gruppen ASA and Yara ASA and intended to operate autonomously by 2020, will operate with zero emission and no ballast as it transits Norwegian waters. Such an ambitious endeavor moves the time for implementation of an autonomous vessel from decades to only a couple years. This has the potential to drive the maritime industry towards more rapid acceptance of autonomous technology.

## Practical Uses for USVs

Remotely operated to fully autonomous USVs are envisioned for use in a wide variety of vessel operations, such as offshore supply, towing, passenger ferries, salvage, oil spill response, carriage of cargo, marine scientific research, underwater surveys,

*(continued on page 23)*





## Blank Rome Attorneys and Practices Highly Ranked in *The Legal 500 United States 2017*

Blank Rome LLP is pleased to announce that its practice groups and attorneys have been highly ranked and recommended in the *The Legal 500 United States 2017*. Rankings are determined by a team of experienced researchers at *The Legal 500* who conduct in-depth research into the market as well as review submissions and information from the law firms themselves. In addition, *The Legal 500* gathers feedback from peers and over 300,000 clients worldwide to assess law firms' overall visibility and reputation, culminating in detailed rankings and editorial.

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For more information on *The Legal 500 United States 2017*, please visit [www.legal500.com](http://www.legal500.com).

### The Future Is Now: Unmanned and Autonomous Surface Vessels and Their Impact on the Maritime Industry (continued on page 22)

security patrols, and military purposes. Some in the commercial maritime industry believe autonomous shipping can revolutionize the oceangoing cargo trade. Thus, companies such as Rolls Royce Marine are pursuing the development of crewless vessels over the next several decades. In the near-term, USVs will be developed by retro-fitting existing vessels with various levels of autonomous technology to support shipboard operations traditionally considered hazardous, tedious, and requiring coordinated maneuvering—essentially, the “workboat” rather than vessels capable of transoceanic passages. Also, domestic short sea shipping is already under development in Europe, alleviating concerns related to international trade.

On-the-water commercial USV testing is already taking place domestically in the United States, although the United States lags behind Europe in the development, testing, and investment in commercial USVs. In the United States, investment has focused on USVs for military purposes, while European countries have largely invested in commercial projects. To illustrate, the European Commission (“EC”) has funded a collaborative research project specifically related to the autonomous ship: the Maritime Unmanned Navigation through Intelligence in Networks (“MUNIN”). More recently, the Norwegian Maritime Authority and the Norwegian Coastal Administration designated a testing site for commercial autonomous ships in the Trondheimsfjord, the only commercial USV test area in the world. The world’s first unmanned and fully automated vessel for offshore supply operations, the *Hrønn*, may conduct sea trials in the Trondheimsfjord as early as 2018. In addition, the Port of Rotterdam is investing in surveillance and inspection by unmanned vessels, intended to operate in locations deemed too dangerous or undesirable to use manned vessels. Finally, European-based companies such as Wärtsilä Corporation have joined a project aimed at creating an autonomous marine transport system for cargo ships and freight transportation in the Baltic Sea.

### Challenges to Implementing USVs

All vessels operating in the marine transportation system must adhere to the applicable navigational rules and comport with vessel traffic patterns—USVs are no exception. As USV operations increase on waterways, operators must evaluate how their respective USVs fit within the existing framework of international regulations, such as:

- International Regulations for Preventing Collisions at Sea (“COLREGS”);
- International Convention for the Prevention of Pollution from Ships (“MARPOL”);
- International Convention for the Safety of Life at Sea (“SOLAS”); and
- International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (“STCW”).

Besides these international obligations, owner/operators must also be cognizant of domestic maritime laws, rules, and conventions in their respective area of operations. USV operators also should evaluate the current guidance in best practices, such as those established by the U.S. Navigation Safety Advisory Council (“NAVSAC”) and the U.K. Marine Industries Alliance Code of Conduct. Questions relating to safely implementing USVs into current maritime operations have garnered sufficient attention at the international level—as a result of receiving numerous papers from the international community, the IMO will now take up the issue at MSC 98 in June. While stakeholders will aim to comply with current legal obligations under the existing “rules of the road,” and regulators develop the next steps in addressing unmanned technologies, innovators will continue to develop collision sensing and avoidance technology to assist USVs in maneuvering to avoid other vessels, navigational aids, and obstructions.

Similar to unmanned technologies in other industries, USV operators are finding gaps in both the regulatory frameworks and general acceptance of USVs as an alternative in the near-future to manned vessels. As technology and guidance on safely implementing USVs into the maritime transportation system continue to develop, several legal issues will require further analysis regarding their applicability to USVs. Notably, concepts such as who is the master when operating a USV remotely or autonomously, the ability of a USV to maintain a “look out,” limitation of liability concerns, standard definitions as to “vessel,” navigation lights and shapes, vessel design and manufacturing standards, and applicability to minimum manning requirements, may require changes to account for autonomous capabilities. U.S. courts have not considered specific USV operations in any of these areas; as such, there is a lack of legal precedent with which to guide such issues. As a result, regulators and operators must continue to look to best practices and current legal standards to ensure safe operation.

### Conclusion

While USVs present numerous benefits, critics of various levels of autonomous technology question whether the concept can overcome problems of public perception and acceptance of the technology, reliability of the equipment, regulatory compliance, and challenges with safely operating in the complex marine environment. Additionally, labor organizations may oppose autonomous shipping out of concern that the technology will render seafarers obsolete. Even with obstacles to implementation, such as developing a regulatory and legal framework necessary to safely implement USVs into the maritime domain, it appears that various maritime industry factors will continue to drive integration of USVs, making the question not *if* they will be commonly employed, but *when*—at least in certain aspects of the maritime industry. Stakeholders interested in developing and implementing USV technology should seek counsel in order to ensure compliance in this complex environment. Moreover, the maritime community should expect that USVs become incrementally more commonplace in the near future, not the distant horizon. ■ — ©2017 BLANK ROME LLP



**Blank Rome was founded in 1946** in Philadelphia by a small group of entrepreneurial corporate and commercial lawyers. Now, more than seventy years later, Blank Rome has grown to be annually ranked in the Am Law 100 and is among the fastest growing law firms in the country, with over 600 attorneys serving businesses and organizations ranging from *Fortune* 500 companies to start-up entities around the globe.

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