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Inside This Issue

EXCULPATORY CLAUSES IN MARINE TERMINAL OPERATOR SCHEDULES UNDER THE OCEAN SHIPPING REFORM ACT OF 1998

By William P. Ryan

Introduction

This is the second of two articles on Marine Terminal Operator ("MTO") Schedules under the Ocean Shipping Reform Act of 1998 ("OSRA").[1] The first article addressed the general applicability and limitations of liability that may be included in MTO Schedules under the OSRA, and was published in the Second Quarter 2018 edition of Benedict's Maritime Bulletin (16 BENEDICT'S MAR. BULL., pp. 59 et seq. (Second Quarter 2018). This article will discuss restrictions on exculpatory provisions in MTO Schedules imposed by the Federal Maritime Commission ("FMC") through regulations issued pursuant to the OSRA, and based on decisions of the FMC and the courts, both before and after the enactment of the OSRA.

As discussed in the prior article, the OSRA is intended to "amend the Shipping Act of 1984 to encourage competition in international shipping and growth of United States exports, and for other purposes."[2] One of the objectives of the OSRA is to establish a nondiscriminatory system for the carriage of goods by water.[3]

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[1] Pub. L. No. 105-258, 112 Stat. 1902.

[2] Pub. L. No. 105-258, 112 Stat. 1902.

[3] 46 U.S.C. § 40101

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Managing Editor's Introductory Note

We begin this edition with the second of two articles on Marine Terminal Operators Schedules created under the auspices of The Ocean Shipping Reform Act of 1998 ("OSRA"). These Schedules address the terms and conditions which may govern marine terminal operations. Our author, William P. Ryan, ably and in detail describes the purpose and effect of such Schedules established by marine terminal operators and the benefits of performing services under their terms. This article discusses restrictions on exculpatory provisions in MTO Schedules imposed by the Federal Maritime Commission ("FMC") through regulations issued pursuant to the OSRA, and based on decisions of the FMC and the courts, both before and after the enactment of the OSRA.

Our next presentation is an article by James E. Mercante on the maintenance and cure obligations of ship owners to seaman, traditionally treated as "wards of the admiralty." The article first appeared in the February 21, 2018 edition of the New York Law Journal. James reviews a recent verdict in excess of $70 million in favor of a marine stewardess after an assault by a fellow crewmember in which it appears that the courts may be signaling that ship owners need a system to weed out those seafarers equipped with violent dispositions.

In his regular column, Window on Washington, Bryant Gardner provides us with a look at upcoming maritime legislation in the 115th Congress. He discusses some of the intricacies affecting the legislative process in passage of the Coast Guard Authorization Act and the National Defense Authorization Act in this time of division between the political parties, and the differences between House and Senate versions that will have to be resolved in order to move forward.

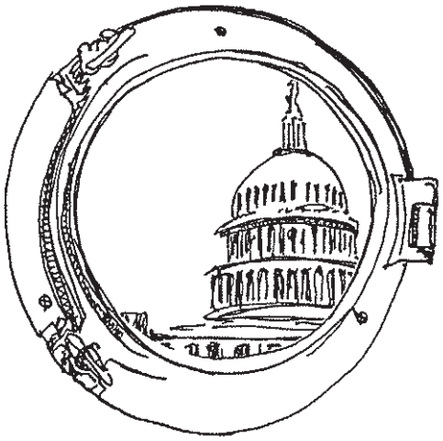
We follow with our Recent Developments case summaries to keep you informed on developments in various aspects of maritime law.

We include in this edition a photographic tribute to our American Merchant Marine submitted by Marva Jo Wyatt. We encourage our readers to submit their own photos, artwork, poems, or thought pieces to enhance the enjoyment of reading our publication.

As always, we hope you find this edition interesting and informative, and ask you to consider contributing an article or note for publication to educate, enlighten, and entertain us.

Robert J. Zapf

WINDOW ON WASHINGTON



Shipyard Chum, Yachts, Zebra Mussels, and Coastie ROTC: A Peek at Maritime Legislation on Deck for the 115th Congress

By Bryant E. Gardner

As long-suffering readers of *Window on Washington* may recall, most maritime legislation in recent years ultimately gets pinned onto either the National Defense Authorization Act or the Coast Guard Authorization Act—the two main legislative vehicles that typically pass each year. Although the bills provide the basic authorization for the uniformed services, they also serve as the legislative vehicles for all manner of national defense and maritime-related measures. This year, the Coast Guard Authorization Act[1] itself became mired in disputes, and as a result the Coast Guard provision failed numerous times to clear the hurdles necessary to move forward. Therefore, Coast Guard and Maritime Subcommittee Chairman Duncan Hunter (R-CA) offered the entire Coast Guard bill as an amendment tack-on to the National Defense Authorization Act,[2] in hopes of getting it through, which was accepted by the House Armed Services Committee. Therefore, as of this writing, the two provisions look set to be considered together, subject to clearing the higher hurdles in the Senate stemming from the procedurally stronger position of the Democrats in that chamber, where the Coast Guard Bill remains a standalone bill.[3] While the fate of the legislation remains unclear, passage of both measures remains a high bipartisan priority on both sides of the Hill, and they are worth a peek to see what to expect this year.

Naval Vessel Repair Work Coming Home. The House measure requires that all vessels that are part of the U.S. Navy fleet be treated as though they are assigned to home ports in the U.S. or Guam, which would bring the requirement that they be maintained in U.S. shipyards (including Guam).[4] Currently, overseas home port Navy vessels are exempt from the U.S. yard requirement, in particular vessels stationed in Bahrain, the Western Pacific, Japan, Italy, and Spain. The Navy reports that approximately 20 ships will be affected, with 13 transiting back to the U.S. annually. The Congressional Budget Office estimates that the new

[1] H.R. 2518, 115th Cong. (2017) (the initial standalone House Coast Guard Authorization Act).

[2] H.R. 5515, 115th Cong. (2018) (the House National Defense Authorization Act as reported with all amendments, including the Coast Guard bill as placed on the Senate calendar). S. 2987, 115th Cong. (2018) (Senate National Defense Authorization Act).

[3] S. 1129, 115th Cong. (2017) (Senate Coast Guard Authorization Act).

[4] H.R. 5515 § 322.

requirement will cost approximately $400 million during 2019-2023. The Navy further indicated that the requirement will reduce operational status by requiring vessels to transit an additional 26 days each way for repairs. So-called "voyage repairs," necessary for mission safety or continued deployment overseas, would be exempt. Furthermore, both the House and Senate bills would impose a new 10-year limitation on forward deployment of vessels overseas, following which they must be assigned a U.S. home port.[5]

More Shipyard Tweaks. The bill also includes new twists on the limitations regarding purchases and repairs using the Navy's National Defense Sealift Fund. Components for auxiliary ships, including pumps, propulsion system components, and cranes, would be required to be purchased from suppliers that are part of the national industrial base.[6] Moreover, the measure provides a good indication of what might be next, by requiring cost reporting on expansion of the requirement to include all naval vessels built using Shipbuilding and Conversion funds, and expanding the list of components sourced from the national industrial base to include waterjet marine propulsion systems, azimuth thrusters, and bow thrusters.

Historically, funds from the Navy's National Defense Sealift Fund could be spent to maintain and recapitalize the stand-by National Defense Reserve Fleet and Ready Reserve Fleet[7] only if built or restored in U.S. shipyards. However, changes to the law permitted expenditures to acquire vessels built in foreign yards if such vessels participated in the Maritime Security Program, a program which provides reserve payments of $5 million per year to militarily useful U.S.-flag vessels in exchange for their availability to the Federal Government in times of war or national emergency.[8] The House bill would expand this exception from two foreign-built vessels to ten, but if more than two are purchased, the bill would require the development of an acquisition strategy for no less than ten U.S.-built sealift vessels to be delivered beginning in 2026.[9] Moreover, the bill restricts the Military Sealift Command's access to twenty-five percent of appropriated funds until it has entered into a contract for the procurement of two used foreign-built vessels and completed a development document for a common hull multi-mission platform which could be used to recapitalize aging state maritime school training ships.[10] However, the White House objected to the funding limitation.[11] The Senate Bill, on the other hand, would only increase the purchase authority for foreign-built Maritime Security Program vessels from two to seven, until 2030.[12]

Elsewhere, in the Coast Guard section of the bills, provisions are made for the Coast Guard to enter into new "cost plus incentive fee" contracts for the construction of Coast Guard vessels, which provide incentive fees to wage-grade employees for improved delivery schedules or technical performance.[13] Furthermore, both the House and Senate bills restrict the time-honored practice of directing that certain conversions, alterations, or repairs be conducted in certain types of yards or geographic areas, usually tied to a particular congressional district, and instead encourage assignment based upon economic and military considerations.[14]

The House bill also authorizes $350 million for the development of new state maritime school training ships, the oldest of which is 57 years old, and prohibits the purchase of used vessels for the schools because the committee "is concerned that such a short-term strategy would not support the long-term maritime academies' interest."[15] The U.S. Maritime Administration had proposed the purchase of two used ships as a bridge to newbuilds. Pending the addition of new ships, the

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[5] H.R. 5515 § 323; S. 2987 § 1013.

[6] H.R. 5515 § 841. Notably, the provision specifically excludes icebreakers from the definition of "auxiliary ships," likely in hopes of easing the Coast Guard's long pursued holy grail of new heavy polar icebreaker capacity.

[7] These are the Government-owned standby surge sealift fleets, crewed by U.S. civilian mariners.

[8] 19 U.S.C. § 2218(E)(3)(A).

[9] H.R. 5515 § 1022(a).

[10] *Id.* § 1022(b). Congress has grown increasingly alarmed at the age of the state academy training ships. Most notably Fort Schuyler's EMPIRE STATE and Buzzards Bay's KENNEDY.

[11] Executive Office of the President, Office of Management and Budget, Statement of Administration Policy: HR 5515—National Defense Authorization Act for Fiscal Year 2019 (May 22, 2018).

[12] S. 2987 § 1016.

[13] H.R. 5515 § 4307; S. 1129 § 504.

[14] H.R. 5515 § 4310; S. 1129 § 508.

[15] H.R. 5515 §§ 3501 & 3503; H. Rep. 115-676, 115th Cong., May 15, 2018.

measure directs the Department of Transportation to develop a program for the sharing of existing academy vessels to ensure training requirements are met.[16]

Changes for Federal Contractors Providing "Commercial Items." Under provisions of the Federal Acquisition Regulation, Defense Department contractors, including ship operators and managers, have long been required to flow-down a plethora of various policy-related provisions to their subcontractors, including repair technicians, stevedores, space charterers, and multimodal move partners such as air, rail, and over highway carriers. However, the regulations permit prime contractors to limit those flow-downs in the case of "commercial items," the definition of which has always been geared toward things produced for the government, such as weapons systems or vehicles, and not well-suited toward the provision of maritime transportation services. The House Defense bill would bifurcate the definition of commercial items into "commercial products" and "commercial services".[17]

Specifically, "commercial services" would include "services of a type offered and sold competitively, in substantial quantities, in the commercial marketplace: (A) based on an established catalog or market prices; (B) for specific tasks performed or specific outcomes to be achieved; and (C) under standard commercial terms and conditions." Tariff-based ocean transportation would seem to fall under this definition; the case for service contract-based services is less clear, but probably also within the definition. Carriers will be left to make a determination as to whether the specific vessel charters, such as those to the Military Sealift Command, or U.S. Transportation Command service contract movements, fall within the new "commercial services" definition and thereby avoid the sometimes costly and burdensome requirement of negotiating the flow-down of numerous clauses to commercial subcontractors unaccustomed to the peculiarities of Government work. Moreover, the House bill would specifically exclude commercial products and services from the application of requirements under Executive orders unless such orders explicitly provide for application to such items, potentially relieving maritime contractors from additional requirements.[18]

Deepwater, Hot Water. Ever since things went awry with the Coast Guard's Integrated Deepwater System Program, ending with the termination of its authorization in Fiscal Year 2012, Coast Guard procurement has remained under the congressional microscope. That scrutiny continues in the bills on deck. One provision of the House Defense bill would require Coast Guard vendors to maintain, for one year, all work product associated with any contract valued at $1 million or more that is terminated by the service.[19] This provision drew fire from the Trump Administration, which objected to the provision on the grounds that it would impose new requirements outside of the Federal Acquisition Regulation, which would apply only to the Coast Guard.[20] Furthermore, the bill imposes new requirements for the Coast Guard to brief the relevant congressional committees on potential risks associated with all of its major acquisition programs,[21] and requires the Coast Guard to send all flag officers and senior executive service assigned to the National Capital Region to complete a training course on the workings of Congress.[22]

Ahoy Polloi! Under the proposed law, the Coast Guard would be required to adopt, within one year from enactment, a "Large Commercial Yacht Code" for recreational vessels over 300 gross tons, comparable to the United Kingdom Code of Safe Practices for Large Commercial Yachts.[23] The U.K. Code applies to vessels operated commercially for sport or pleasure. It sets forth over 100 pages of rules addressing all manner of construction, equipment, and safety aspects of such vessels, their medical stores, personnel certification, manning,

[16] H.R. 5515 § 3505.

[17] H.R. 5515 § 831.

[18] H.R. 5515 § 833. In contrast, the Senate defense measure would require the Defense Department to provide an analysis of the extent to which commercial service and commercial product contracts should be treated in a similar manner. S. 2987 § 851.

[19] H.R. 5515 § 3523.

[20] Executive Office of the President, Office of Management and Budget, Statement of Administration Policy: HR 5515—National Defense Authorization Act for Fiscal Year 2019 (May 22, 2018).

[21] H.R. 5515 § 3526.

[22] H.R. 5515 § 3532.

[23] H.R. 5515 § 3529.

accommodation standards for all persons on board, galley arrangements, and ship-shore transfer of personnel.[24]

Streamlining Marine Inspections. Operators occasionally find that they are subject to varying and inconsistent inspection requirements and interpretations, depending upon which local Officer in Charge, Marine Inspection ("OCMI") is administering the inspection, much to their frustration. The House bill would require consistent interpretations of inspection requirements, and establish an internal procedure for the Coast Guard to resolve inconsistencies. As part of that procedure, the Marine Safety Center could be brought in when needed to resolve vessel design or plan reviews between disagreeing OCMIs. Disputes would be finally resolved by the Commandant through the district commander.[25]

Alliances Under Scrutiny; Protecting US-Based Service Providers. Recent congressional hearings, in particular pointed questioning by Rep. Peter DeFazio (D-OR), have highlighted increasing congressional concern with new ocean carrier alliances' ability to exercise consolidated purchasing power over U.S.-based service providers, and the ability of carrier groups to exercise market power over shoreside service and Jones Act tug service providers (shoreside service providers and Jones Act operators being congressional constituents, and most common carriers being foreign-flag operators).

Taking aim at this, the House bill requires the Federal Maritime Commission ("FMC") to submit to Congress reports on the alliances' impacts on competition for the purchase of services related to berthing or bunkering of vessels, loading or unloading of cargo, buoy placement, and towing services.[26] Furthermore, the bill would prohibit two or more common carriers from negotiating with tug or towing service providers on any matter relating to rates or services, and would further prohibit two or more carriers from negotiating for the purchase of shoreside services unless the negotiations and resulting agreements do not violate the antitrust laws and are consistent with the purposes of the Shipping Act of 1984.[27] The measure also makes clear that the Shipping Act affords no antitrust immunity regarding any agreements with tug operators relating to transportation within the United States.[28] Finally, the proposed changes would bolster the FMC's ability to compel marine terminal operators to provide information requested by the FMC, equal to its power to obtain such information from carriers.[29]

Vessel Incidental Discharge Act. The American Waterways Operators, the Shipping Industry Coalition, and other U.S. vessel operator interests have been engaged in an all-out push to obtain regulatory relief with respect to incidental discharges of water from their vessels. Currently, commercial vessels over 79 feet in length are required to obtain coverage under the Environmental Protection Agency's Vessel General Permit ("VGP"), which contains Federal requirements for 27 types of vessel discharges, including ballast water, as well as Federally enforceable state- and waterbody-specific discharge conditions added to the permit by states as part of the National Pollution Discharge Elimination System ("NPDES") state certification process. In addition to Federal and state VGP requirements, vessels must also meet Federal standards for ballast water and hull fouling discharges under Coast Guard rules. The Commercial Vessel Incidental Discharge Act ("CVIDA" or just "VIDA") would make the U.S. Coast Guard the single regulator in charge of enforcing vessel discharges, eliminating overlapping patchworks of two dozen state regulatory regimes and conflicting interpretations by the Environmental Protection Agency ("EPA"), but preserving EPA's role as a science advisor to allow the development of future vessel discharge standards. From inception, VIDA has been a lightning rod for controversy, exciting opposition among environmentalists and various state regulators, in particular from those areas along inland waterways and lakes which have been hardest hit by invasive species attributable to ballast water, such as the redoubtable zebra mussel. Opposition to VIDA, which was included in the Coast Guard bill, caused the bill to fail when opponents blocked a vote on the bill. As of this writing, the Senate Coast Guard bill remains mired in the VIDA controversy, and opponents

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[24] United Kingdom Maritime and Coastguard Agency, LY3: The Large Commercial Yacht Code, May 1, 2014, *available at* https://www.gov.uk/government/publications/ly3-the-large-commercial-yacht-code (*last visited July 18, 2018*).

[25] H.R. 5515 § 4501.

[26] H.R. 5515 §§ 4703–4707.

[27] H.R. 5515 § 4709; S. 1129 § 708.

[28] H.R. 5515 § 4709; S. 1129 § 708.

[29] H.R. 5515 § 4709; S. 1129 § 706.

to the bill have advocated for stripping it off the Senate bill so that the Coast Guard bill can pass independently.

AMERICA'S FINEST. Also of note, the tragic saga of the fishing vessel AMERICA'S FINEST looks like it may finally be resolved. Although accounts vary, the nutshell version is that the owner spent $75 million to build a new vessel for employment in U.S. waters with a fishery endorsement, but an excessive amount of foreign fabricated steel was accidentally included in the vessel, making her ineligible for the contemplated service following her final construction at Dakota Creek Industries in Anacortes, Washington. Like Jones Act cabotage service vessels, vessels eligible to be documented in the U.S. with a fisheries endorsement must be U.S. built, but some foreign content is acceptable. With the foreign content threshold exceeded, the owner had a $75 million vessel that it could not use in U.S. waters as intended, but the U.S. build cost of the vessel made her uncompetitive outside U.S. waters. The House Coast Guard bill would permit waiver of this prohibition for AMERICA'S FINEST, subject to a Coast Guard investigation concluding that the shipyard did not knowingly exceed the steel limitation, and further limiting the vessel's haul to the historical haul of her predecessors.[30] The waiver amendment was proposed by Rep. Rick Larsen (D-WA), representing the district in which the shipyard operates. Congressman John Garamendi (D-CA), a great supporter of the maritime industry, said the action was "apparently an accounting error," but expressed concern that a waiver could send the wrong signal to the shipbuilding industry and weaken the Jones Act's protections for U.S. yards.

Flotsam. Many of the perennial issues plaguing the Coast Guard also make an appearance in the bills. The Committees call for reports on the service's Polar and Bay-class icebreaker capabilities and service life extension, its capabilities in the arctic regions and plans for expanding its visibility and presence in the arctic, assessment of maritime domain awareness, and recapitalization of the ancient inland waterways tender fleet.[31] Moreover, the Coast Guard would be directed to look into the establishment of a Reserve Officers' Training Corps program, and to establish a Great Lakes Oil Spill Preparedness and Response center.[32] Another provision eliminates the requirement for the Coast Guard to enforce numbering of undocumented barges.[33] In addition, recreational vessel owners would be able to start applying for Federal certificates of documentation valid for up to five years, instead of just one year.[34]

Not all of these provisions will necessarily be enacted, but they provide a good indicator of the coming legislation, and serve as a barometer of those issues which have garnered the attention of the committees of jurisdiction over the past year. Of course, all it takes is one disaster to cause a pivot in legislative priorities, as occurred with the swift passage of the Oil Pollution Act of 1990 after the EXXON VALDEZ incident. Currently, proposals are circulating to establish new vessel safety requirements in the wake of the EL FARO tragedy, likely to surface in new legislation this year.

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[30] H.R. 5515 §§ 4835 & 4836.

[31] H.R. 5515 §§ 4812, 4819–4823 (enhanced maintenance program for the existing POLAR STAR polar ice breaker, reports on capabilities and needs, Great Lakes and Bay-class icebreakers); S. 1129 §§ 214 (extending POLAR STAR service life), 215 (Great Lakes ice breaker acquisition authority), 314 (inland waterway tenders and Bay-class icebreakers), 315 (arctic planning requirement), & 405 (requiring a report on progress toward implementing strategic objectives in the Arctic region); S. 2987 § 153 (authority to procure up to 6 polar-class ice breakers).

[32] H.R. 5515 §§ 4805 & 4807; S. 1129 §§ 212 & 512.

[33] S. 1129 § 304; H.R. 5515 § 4513.

[34] S. 1129 § 312; H.R. 5515 § 4512.