In this edition:

MARPOL Annex I – Remember!.pdf

Does a Rotterdam Guarantee Form protect a vessel against the enforcement of a 'maritime lien' of a bunker supplier?

Wreck removal – changes in the Danish Merchant Act

Newsletter

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pr@dupi.nl | dupi.com

MARPOL, Annex I - Remember!

P&I Clubs frequently remind their members of the importance to comply with MARPOL regulations. By non-compliance with MARPOL regulations ships risk huge fines and substantial cleaning costs and, besides, they form a risk to the environment.

Quoting from various P&I Club publications, we too would like to remind our Newsletter readers about the importance of complying with MARPOL regulations.

The most important regulations governing the prevention of pollution by oil from ships are contained in the International Convention for the Prevention of Pollution from Ships (MARPOL) Annex I and cover prevention of pollution by oil from operational measures as well as from accidental discharges. With seaborne oil trade growing steadily since 1970, apart from a fall in the early 1980s during the worldwide economic recession, the aim of many of the safety measures included in MARPOL Annex I is to ensure that the majority of oil tankers are safely built and operated, and are constructed to reduce the amount of oil spilled in the event of an accident (e.g. segregated ballast tanks, protected location of fuel tanks, and double hull). Although the greater volume of the oil spilled can be linked to tanker incidents, commercial vessels other than tankers also contribute to oil pollution and MARPOL Annex I contains the required safety measures to prevent and minimize also this type of discharges (e.g. specific requirements or discharge of oil residue (sludge) and bilge water form machinery spaces).

Annex I to MARPOL requires that machinery space bilge water be processed through a functioning Oily Water Separator (OWS), with an Oil Content Meter (OCM) sampling the effluent to ensure the oil concentration is 15 ppm or less prior to discharge overboard. MARPOL is implemented into United States law by the Act to Prevent Pollution from Ships (APPS) which governs the accidental and operational discharge of oil from ships within US jurisdictional waters.

Under APPS, it is a crime to bypass, or trick, the OWS or OCM, as well as to maintain an inaccurate Oil Record Book (ORB) when in US waters. If the OWS or OCM is bypassed, or tricked, and that discharge is not logged, or is logged wrongly, it will follow that the ORB is inaccurate, which is also a breach of APPS and can result in prosecution under APPS and/or other statutes.

APPS also enables the US authorities to offer very substantial rewards to those who report alleged violations, often referred to as 'whistleblowers'. These awards can amount to as much as 50% of any criminal fine paid for APPS violations, in the discretion of the court. Corporations can be found vicariously liable under APPS for the illegal acts of their employees if the acts are done during the scope of an employee's employment and, at least in part, for the benefit of the Company. There does not have to be an actual benefit, but rather something that did or could have benefited the Company, in the employee's subjective view.

It is commonly known that ship owners and individual crew members can face huge fines or even imprisonment if they breach applicable regulations (Marpol regulations). Not only in the USA, but also in other areas of the world the consequences of breaching environmental regulations can have serious impact. So remember MARPOL – Annex I (!)

See also: www.imo.org/OurWork/Environment/PollutionPrevention/OilPollution/Pages/Default.aspx

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Does a Rotterdam Guarantee Form protect a vessel against the enforcement of a 'maritime lien' of a bunker supplier?

Bunkers for a vessel are often ordered by the time charterer of the vessel. Unfortunately, it does happen sometimes that the time charterer fails to pay the bunker supplier, who is then looking for a way to obtain payment of his outstanding invoice. In that situation bunker suppliers quite regularly try to take measures against the vessel to which the bunkers were supplied. One of these measures can be the enforcement of a 'maritime lien'.

The situation mentioned above is illustrated by a recent discussion on the question whether or not a Rotterdam Guarantee Form 2008 ("RGF") issued to the bunker supplier does protect the vessel against the enforcement of a 'maritime lien' in the United States. Below will be explained that it is advisable to alter the standard RGF in order to make sure that the vessel is indeed protected.

Background
The background of the issue mentioned above can be summarized as follows. A bunker supplier sold a certain

quantity of bunkers and oil to the sub-time charterer of the vessel. The terms and conditions of the bunker supplier applied to the sales contract concluded and provided for the application of US law. The bunkers were eventually delivered to the vessel at Gibraltar by another bunker supplier. No reference to the aforementioned sales contract was made in the bunker receipt that was signed by the Chief Engineer of the vessel. Shortly after the delivery of the bunkers the vessel was redelivered to the long term time charterer of the vessel. The sub-time charterer failed to pay the outstanding invoice regarding the bunkers.

A few months after the delivery of the bunkers the bunker supplier arrested the vessel in the Netherlands, stating that he had a 'maritime lien' and that he could therefore enforce his claim against the vessel. The owner and the long term time charterer of the vessel were of the opinion that the bunker supplier could not enforce his claim against the vessel. An opinion that especially from a Dutch legal point of view holds true. As the vessel was loaded and ready to sail, it was now experiencing significantly delays by the arrest. In order to prevent further operational delays, it was decided to provide the bunker supplier with a security in form of a RGF. This resulted in the arrest being lifted.

The RGF issued to the bunker supplier was amended in such a way that the guarantee was provided only under the condition that a court would rule that the claim was indeed enforceable against the vessel. The sentence that the guarantee was issued *"for the purpose of the release from and/or the prevention of a prejudgment attachment of the vessel"*, which forms part of the standard wording of the RGF, was not altered.

A few weeks afterwards, while parties were still discussing an amicable solution of this matter, the vessel was chartered for a voyage to the United States. Despite the fact that the RGF mentioned above, including its provision regarding the prevention of a second arrest, was still in place, the vessel was rearrested by the bunker supplier. Consequently, a discussion arose regarding the admissibility of this new arrest.

Discussion

First of all, the bunker supplier argued that the basis of the arrest in the United States was different from the arrest in the Netherlands due to the fact that it concerned an action in rem while in the Netherlands it had been an action in personam. The main point of discussion, however, was whether or not the enforcement of a 'maritime lien' was prevented by the aforementioned provision of the RGF *("for the purpose of […] the prevention of a prejudgment attachment"*). In the light of this provision one could surely argue that the bunker supplier had waived its right to rearrest the vessel. The bunker supplier was also aware of the fact that the RGF was issued especially in order to prevent further disturbance of the operation of the vessel. The bunker supplier argued that the enforcement of a 'maritime lien' does not qualify as a 'prejudgment attachment' but should be seen as part of the execution.

Everything was lined up for challenging the arrest in summary proceedings. However, the matter was settled out of court the day before the hearing. Thus, the US Court did not have to decide upon the admissibility of the second arrest. Nevertheless, this matter was afterwards discussed with the Dutch commission which had drafted the RGF. The commission first of all emphasized that the Dutch legal system is not familiar with this kind of 'maritime liens'. Thus, the commission was of the opinion that the attempt to enforce such a 'maritime lien' in the

Netherlands by arresting the vessel could have been successfully challenged in summary proceedings. The RGF, however, had been drafted with the intention to cover situations which fit into the Dutch legal system. The commission was therefore of the opinion that the words "*prevention of a prejudgment attachment*" did not necessarily exclude the enforcement of a 'maritime lien' in another country where the legal system recognizes 'maritime liens'. The commission therefore advised that if it is the intention of the guarantor to prevent the enforcement of a 'maritime lien' in whatever country, parties should amend the wording of the standard RGF.

Final remarks
If the vessel is arrested in the Netherlands by a bunker supplier in a situation as described above and, the owners, for instance, want to provide security in the form of an RGF in order to free the vessel (instead of challenging the arrest in summary proceedings) it is advisable - in the light of the aforementioned - to amend the standard wording of the RGF in such a way that the RGF is clearly issued not only to prevent "*a prejudgment attachment*" but also to prevent the enforcement of a 'maritime lien'. It goes without saying that the RGF should also be amended in such a way that the guarantee is granted under the condition that the arrest is lawful, i.e. under the condition that the claim against the vessel is indeed enforceable.

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Wreck removal – changes in the Danish Merchant Act

The Danish Maritime Authority reports that Denmark has acceded to the Nairobi International Convention on the Removal of Wrecks (Wreck Removal Convention).

A minimum of ten countries must accede to a convention in order to put it in force. Denmark is the tenth country that accedes to the Wreck Removal Convention. This means that the Convention will take effect on 14 April 2015.

The most important new provision of the Convention is that it ensures improved possibilities of having the expenses incurred in connection with the removal of wrecks covered on the ship owner's account. Thus, the risk of the public sector having to pay is reduced.

The regulations mean that the ship owner becomes liable for the removal of a wreck following a marine accident. Ships with a gross tonnage of or above 300 must have a certificate from the flag State proving that insurance has been taken out to cover the expenses for the removal of a wreck.

The provisions of the Convention have already been inserted in the merchant shipping act, but the entry into force of the Danish regulations has awaited the international entry into force of the Convention.

Denmark has chosen that the Convention shall not only apply in the Danish Exclusive Economic Zone, but also in Danish territorial waters. The Danish regulations also contain requirements on the insurance of ships with a gross tonnage below 300 since these ships have also wrecked in Danish waters.

As a consequence, the Danish Merchant Act will be amended as well. It would appear that the proposed changes to the Danish Merchant Act will be as follows*.

Section 166. The registered owner of a ship shall, irrespective of guilt, be liable for the costs of locating, marking and removing a wreck when the wreck is located in the Danish territory or in the Danish exclusive economic zone.

Section 166, subsection 6. Anyone towing a ship, wreck or any other object shall, irrespective of the size of that object under tow and without considerations of guilt, be liable for the costs related to the locating, marking and removal and salvage thereof when that object under tow is located in the Danish territory.

Section 168. The registered owner of a ship flying the Danish flag with a gross tonnage of or above 20 shall have approved insurance or any other guarantee covering the owner's liability pursuant to this part and a certificate if the ship has a gross tonnage of or above 300, cf. section 170, in order to engage in trade. The insurance sum may be limited to the liability limit stipulated in section 175.

Section 168, subsection 2. Anyone towing a ship, a wreck or any other object in the Danish territory shall, irrespective of the size of that object under tow, be obliged to have that object under tow insured.

Section 168, subsection 3, paragraph 2. Any claim for costs may be made directly against the insurer.
This obviously deviates from normal practice in the business on at least two important points.
First, a ship towing another ship or object has to be certified and both the owner of the tug and the owner of the object under tow are obliged to have that object under tow insured. Second, any claimant will be able to directly raise a claim against the insurer under the certificate issued. The Danish Parliament has rectified this legislation, but amendments have not yet been implemented. It is expected that these new rules will come into force in April 2015.

*) Unofficial translation: http://www.dma.dk/sitecollectiondocuments/legislation/acts/2012/l-1384-23122012-%C3%A6ndring%20af%20s%C3%B8loven,%20lov%20om%20till%C3%A6g%20til%20strandingslov%20og%20andre%20love.pdf

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COLOPHON
With this quarterly newsletter we'd like to inform you on interesting topics relevant to the shipping industry and Dutch P&I.
Editors: Niels van der Noll, Monique Lardot and Frank Mathiesen.
Contributors: We'd like to thank Jan Eckoldt and Allan Houtved for their contribution to this edition.
We'd like to hear from you. Please send your news and feedback to pr@dupi.nl.

DUPI Rotterdam (head office) | Phone: +31 10 440 55 55 | info@dupi.nl
DUPI Antwerp | Phone: +32 3 2060050 | antwerp@dupi.com
DUPI Amsterdam | Phone:+31 20 681 46 92 | amsterdam@dupi.nl
DUPI Copenhagen | Phone: +45 3315 4778 | copenhagen@dupi.com