THE MARITIME YEAR IN THE UNITED STATES

BY

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I can get booklets on OPA from him

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The maritime year in the United States in 1996/1997 has included the usual judicial fine tuning, and sometimes tortured explanations, of prior decisions involving issues relating to cargo matters, collisions, oil pollution, groundings, charter party disputes, jurisdictional disputes, arrests and attachments. In short, the decisions, as usual, have cut across all traditional maritime law disciplines. Unfortunately, none of the recent holdings are momentous or interesting enough for a lengthy discussion in this paper.

The year did, however, produce some interesting developments in respect to proposed changes to the U.S. Carriage of Goods By Sea Act (COGSA)[1], as well as, the promulgation and implementation of certain rules and regulations relating to the Oil Pollution Act of 1990 (OPA, '90)[2]. Ironically, and interestingly, the proposed changes to COGSA are ostensibly intended to bring the United States more in conformity, and uniformity, with the rest of the maritime commerce nations of the world, while OPA, and its subsequent regulations, are driving the U.S. further away from all the existing treaties and liability regimes pertaining to oil pollution.

In the first part of this paper, I have set forth, in a table form, a comparison of the provisions of the present U.S. COGSA to the proposed changes thereto. In the second part, I discuss the Oil Pollution Act of 1990 and the implementation and implications of recent regulations relating to natural resource damage assessments (NRDA) and Certificates of Financial Responsibility (COFR), as well as some of the nuances of the Act, as they have been interpreted by recent court decisions.

[1] Ch. 229, 49 Stat. 1207 (1936), amended at 46 U.S.C. App. §1300-15 (1988).
[2] 33 U.S.C. § 2701 et. Seq. (1990).

A. PROPOSED AMENDMENTS OF THE UNITED STATES CARRIAGE OF GOODS BY SEA ACT

Maritime practitioners in the United States are well accustomed to the fact that very few maritime cases ever reach the Supreme Court. However, in the maritime year 1995, a case called Vimar Seguros Y Reaseguros, S.A. v. M/V SKY REEFER, 515 U.S. 528, 1995 AMC 1817, did reach the Supreme Court, and the ultimate holding sent shivers down the spines of American maritime law practitioners which, in turn, caused them, and many of their clients, to give new focus, attention and impetus to the previously proposed changes to the Carriage of Goods By Sea Act of 1936 (COGSA).

The SKY REEFER case dealt with a contract of carriage containing a clause requiring arbitration in a foreign country (Japan). The question before the Supreme Court was whether a foreign arbitration clause in a bill of lading is invalid under COGSA because it tended to lessen the liability of the carrier. The Court held that COGSA does not forbid foreign arbitration forum selection clauses, and that the governing Federal Arbitration Act (FAA) provisions are in accord with COGSA on this issue. The Court did, however, rule that the U.S. District Courts would retain jurisdiction of any case dismissed on the grounds of a foreign arbitration forum selection clause to ensure that the foreign arbitration tribunal properly made, and applied, the correct choice of law, presumably, so as not to lessen the carrier's liability under COGSA.

In a concurring opinion, Justice Sandra Day O'Connor held that:

> "Foreign arbitration clauses of the kind presented here do not divest domestic courts of jurisdiction, unlike true foreign forum selection clauses such as that considered in Indussa Corp. v. S.S. Ranborg, 377 F.2d 200 (2 Cir. 1967 en banc), 1967 AMC 589 [the prior leading case on this issue]. That difference is an important one – it is, after all, what leads the Court to dismiss petitioner's argument as premature - . . . . " 515 U.S. at 528.[3]

During the pendency of this case before the lower courts and, subsequently, the Supreme Court, maritime practitioners, as well as, many of their clients became concerned that there was a real possibility that foreign forum selection clauses in bills of lading might be upheld. It was anticipated that such holding would result in U.S. claimants (mainly underwriters) being forced to litigate their claims in far away forums, not to mention the resulting loss of business to U.S. lawyers. At about the same time, serious discussions had commenced on revising COGSA to bring it more in line with other international regimes such as Hague/Visby and the Hamburg Rules. There had, of course, been previous attempts to amend COGSA, which had not been modified since its enactment in 1936, but such efforts were for the most part unfruitful because the various interested parties and lobbies could not agree on whether the changes should be more in line with Hague/Visby or the Hamburg Rules.

Over the years there has been a very strong shippers' and cargo underwriters' lobby in the United States, which deems itself a shipping nation, clamoring for adoption of the Hamburg Rules

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[3] Recent decisions, however, have upheld even so called "true foreign forum selection clauses", dismissing cases in favor of a foreign court forum selection clauses. See Mitsui & Co. (USA), Inc. v. M/V MIRA, 111 F3d 33 (5th Cir., 1997); Duferco Steel inc. v. M/V KALISTI, 1997 U.S. App. Lexis 21496 (7th Cir., decided August 14, 1997); Armando Talatala d/b/a/ Brightstar Hawaii Enterprises v. Nippon Yusen Kaisha Corp. 1997 AMC 1398 (D.C. Hawaii 1997) Bison Pulp & Paper Limited v. M/V PERGAMOS, 1996 AMC 2022 (SDNY 1996).

instead of Hague/Visby. However, those efforts had been strenuously opposed by carrier groups, both ocean and inland, P&I underwriters, freight forwarders and many defense minded maritime lawyers who preferred no changes to the current COGSA, or some minor changes in line with the more familiar Hague/Visby language and liability scheme. However, it was not until the SKY REEFER litigation, with its potential negative effects on cargo and lawyer interests, that the discussions to amend COGSA became more serious and focused.

Within a two-year period from 1994 to 1996, an ad hoc committee of the Maritime Law Association, with input from the various interested industry groups, drafted amendments to COGSA. After one false start in 1995, these proposed amendments were put before the MLA delegates for a vote at the annual meeting held in New York on May 3, 1996.[4] The amendments were overwhelmingly approved. Thereafter, the revised COGSA was submitted as proposed bills to both houses of Congress for their action and approval. At present, there are bills pending in both the House of Representatives and the Senate, with passage expected either later this year or early next.

The stated objective of the proposed changes to COGSA is to bring the United States law in respect to the carriage of goods by sea into uniformity with the rest of the world. Presently, COGSA differs in significant areas from the majority of the U.S.'s trading partners which have adopted Visby and the SDR protocols (Hague/Visby). Under the current COGSA, the U.S. package limit is $500 per package, whereas, under Hague/Visby, utilizing the Special Drawing Rights (SDR) measure, the package limit is approximately $1,000.00. Moreover, the U.S. courts have held that generally, with some exceptions, a pallet is a package for limitation purposes. Of course, under the Hague/Visby Rules a pallet is not generally deemed to be a package.

Compounding the lack of uniformity is the fact that about twenty countries have adopted the Hamburg Rules. Norway, Sweden, Finland and Denmark, while subscribing to Hague/Visby have adopted the liability definition of the Hamburg Rules. Australia, I understand has passed a statute providing for the adoption of Hamburg Rules. However, my friends on the U.S. MLA committee involved with the drafting the proposed amendments advise that your MLA is closely monitoring the American effort to amend COGSA, and that you intend to study the proposed changes before finally deciding whether to support the proposed change to the Hamburg Rules or not.

The proposed changes to COGSA retain the basic liability definition of Hague/Visby, with the exception of the "Error of Navigation or Management" defense. In exchange for the loss of this defense, the carrier receives more favorable burden of proof rules, which are discussed in more detail below. The proposed changes are intended to provide a uniform set of laws which would apply to all parties involved in handling multi-modal traffic. Vessel operators, non-vessel operating common carriers barge operators, terminal operators, rail carriers and truckers will, for the most part, now all be covered by COGSA. The application of one set of laws is intended to avoid the "multimodal muddle" of laws that now govern the various aspects of multimodal transportation.

The highlights of the proposed changes are:

1) The current Hague/Visby defenses will remain the same except for the error in navigation or management.

2) The rules relating to burden of proof will be changed to require all parties to bear an equal burden to prove which of more than one event combined to cause the damage complained of. Liability would be apportioned by the

[4] See MLA Report of the Committee on the Carriage of Goods, Document No. 724, May 3, 1996.

court amongst the responsible parties in the same fashion as courts generally apportion liability in collision and grounding cases.[5]

3) The carrier issuing the bill of lading will be liable, in the first instance, for the entire carriage.

4) The proposed rules will cover all the parties involved in the performance of the carriage once a bill of lading is issued. (Interstate truckers and rail carriers are not, at present, completely on board, but it is my understanding that the bills pending before Congress will extend the coverage of COGSA to them as well).

5) The rules relating to packages and weight limitation will be the same as Hague/Visby.

6) The most interesting proposed change involves the limitation of foreign forum selection clauses. Again, the intent of this proposed change is to overturn the SKY REEFER decision. The new provision, Section 3(8), 46 U.S.C. App. §1303(8) will not recognize any foreign forum selection clause for cargo shipped to or from the United States. If the choice of forum clause provides for arbitration outside the United States, any party may move a United States Court to order arbitration in the United States – hopefully – New York.

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[5] See United States v. Reliable Transfer Co., 421 U.S. 397 (1975), 95 S. Ct. 1708, 44 L.Ed 2d 251, 1975 AMC 541.

Set forth below is a comparison of the present versus the proposed provisions of COGSA.

QUESTIONS	PRESENT U.S. COGSA	PROPOSED U.S. COGSA
1. Which voyages covered?	Shipments to and from the United States in foreign trade. 46 U.S.C.A. § 1300	Shipments to and from the United States and U.S. coastwise trade. (Enacting Clause)
2. Which contracts covered?	Contracts of carriage covered by a B/L or any similar document of title issued under or pursuant to a C/P from the moment at which such document of title regulates the relations between a carrier and a holder of the same. 46 U.S.C.A. § 1301(b)	Every contract of carriage except charter parties. § 1(b)
3. Geographical application	Covers the period from the time when the goods are loaded until the time when they are discharged from the ship. 46 U.S.C.A. § 1301(e)	From time of receipt up to delivery to an authorized receiver. § 1(e)
4. Who is the Carrier?	The carrier includes the owner or the charterer who enters into a contract of carriage with a shipper. 46 U.S.C.A. § 1301(a)	Much broader – includes all who render services under the contract of carriage (cures Himalaya problems), such as inland carriers, stevedores, terminal operators, consolidators, warehousemen,. § 1(a)
5. Contract and Tort claims	Act is silent, but by construction of courts COGSA has been limited to contract claims.	Same as present COGSA.
6. Carrier's general duty of care	1. Carrier must exercise due diligence before and at beginning of voyage to: (a) Make ship seaworthy; (b) Properly man, equip and supply the ship; (c) make holds etc. fit and safe for reception, carriage and preservation of cargo. 2. Carrier must properly and carefully load, handle, stow, carry, keep, care for and discharge goods carried. 46 U.S.C.A. § 1303(1)(a-c), (2)	Same as Hague Rules & present COGSA. § 3

QUESTIONS	PRESENT U.S. COGSA	PROPOSED U.S. COGSA
7. Carrier's Defenses	The following defenses apply: (a) Act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship; (b) Fire, unless caused by the actual fault or privity of the carrier; (c) Perils, dangers and accidents of the sea or other navigable waters; (d) Act of God; (e) Act of war; (f) Act of public enemies; (g) Arrest or restraint of princes, rulers or people, or seizure under legal process; (h) Quarantine restrictions; (i) Act or omission of the shipper or owner of the goods, his agent or representative; (j) Strikes or lock-outs or stoppage or restraint of labor from whatever cause, whether partial or general; (k) Riots and civil commotions; (l) Saving or attempting to save life or property at sea; (m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods; (n) Insufficiency of packing; (o) Insufficiency or inadequacy of marks; (p) Latent defects not discoverable by due diligence; and (q) Any other cause arising without the actual fault or privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage. 46 U.S.C.A. § 1304(1), (2)(a-q)	Same as Hague Rules & present COGSA *except* eliminates Negligent Navigation/Management defense- but burden on shipper to prove negligence. Also allows court to apportion loss between 2 causes without carrier bearing burden of this allocation (unlike present cases required), or to divide 50/50, if can not allocate.

QUESTIONS	PRESENT U.S. COGSA	PROPOSED U.S. COGSA
8. Burden of proof	Shipper must show cargo delivered to carrier in good order and condition and received at discharge in damaged condition. Clean B/L is *prima-facie* evidence of this. Once this established, burden shifts to carrier to show either due diligence or the application of one of the defenses.	Same as Hague Rules & present COGSA.
9. Fire	Neither the carrier not the ship shall be responsible for loss or damage arising or resulting from fire unless caused by the actual fault or privity of the carrier. 46 U.S.C.A. § 1304(2)(b)	Same as Hague Rules & present COGSA. § 4(2)(b)
10. Live animals	Excluded from Act. 46 U.S.C.A. § 1301(c)	Same - live animals not covered. § 1(c)
11. Deck cargo	Excluded from Act. (If stated in B/L to be carried on deck and is so carried, then this Act will apply by K, but not *ex proprio vigore*.) 46 U.S.C.A. § 1301(c)	Deck cargo now included in coverage of Act. § 1(c)
12. Dangerous Cargo	Same as Hague Rules.	Same as Hague Rules & present COGSA. § 4(6)

QUESTIONS	PRESENT U.S. COGSA	PROPOSED U.S. COGSA
13. Limits of liability	(a) *Goods Lost or Damaged*: Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the B/L. 46 U.S.C.A. § 1304(5) (b) *Goods Delayed*: No specific provision.	666.67 SDR per package, or 2 SDR per kilo, whichever higher. (Containers treated same as now if contents enumerated in B/L). § 4(5)
14. Loss of right to limit liability	No specific provisions. (Unreasonable deviation will oust limitation as a result of case law/precedent.)	Lose limitation if act is intentional or reckless, with carrier's privity and knowledge or unreasonable deviation where carrier knew or should have known damage would occur. § 4(5)(e)
15. Lower limits by agreement?	Not permitted. 46 U.S.C.A. § 1304(5)	Can only *increase* carrier liability if negotiable bill of lading issued. If no negotiable bill of lading, can also *decrease* carrier liability by agreement. §§ 5&6
16. Higher limits by agreement?	Permitted if recorded in bill. 46 U.S.C.A. § 1305	Can only *increase* carrier liability if negotiable bill of lading issued. If no negotiable bill of lading, can also *decrease* carrier liability by agreement. §§ 5&6
17. Deviation	**Similar to Hague Rules** -- Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: Provided, however, That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable. 46 U.S.C.A. § 1304(4)	(See 14 above – otherwise OK to deviate to save life, etc.)

QUESTIONS	PRESENT U.S. COGSA	PROPOSED U.S. COGSA
18. What information must the bill contain?	After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things: (a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage; (b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper; (c) The apparent order and condition of the goods: Provided, That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking. 46 U.S.C.A. § 1303(3)(a-c)	Description of goods may be qualified if no reasonable means to check bill of lading information (weight, contents, etc.). ["Qualification" may include such phrases as "said to contain", "shipper's count only", etc.] Also, Burden of Proof on shipper where seal integrity is maintained. § 3
19. What is the effect of statements in the bill?	Prima-facie evidence of the receipt by the carrier of the goods as therein described in accordance with the information contained in the bill of lading. 46 U.S.C.A. § 1303(4)	Same as present COGSA, except as noted in No. 18, hereinabove. § 3

QUESTIONS	PRESENT U.S. COGSA	PROPOSED U.S. COGSA
20. Duties of shipper in supplying carrier with information	Same as Hague Rules. 46 U.S.C.A. § 1303(5)	Same as Hague Rules & present COGSA. § 3(5)
21. Letters of indemnity	No specific provisions. (If issued, carrier may be estopped from proving pre-shipment condition by case law.)	No specific provisions. Same as present COGSA.
22. Notification of damage	Same as Hague Rules. 46 U.S.C.A. § 1303(6)	Same as Hague Rules & present COGSA. § 3(6)
23. Consequences of failing to notify carrier of loss under 22 above	Same as Hague Rules. 46 U.S.C.A. § 1303(6)	Same as Hague Rules & present COGSA. § 3(6)
24. Limitation of actions	Same 1 year statute of limitation as Hague Rules. 46 U.S.C.A. § 1303(6)	Same as Hague Rules & present COGSA, but carrier has 3 months extra, if cargo files a timely action to bring in third party for indemnity. § 3(6)(d)

QUESTIONS	PRESENT U.S. COGSA	PROPOSED U.S. COGSA
25. Where can cargo owner commence proceedings?	No specific provision.	Foreign forum selection clauses will be void. Likewise, foreign arbitration clauses, except a U.S. court can then order arbitration *in U.S.* based on such a clause. § 3(8)
26. Arbitration	No specific provision.	See 25 above.
27. General Average	Same as Hague Rules. 46 U.S.C.A. § 1305	Same as Hague Rules & present COGSA.
28. Provisions which conflict with the Act	Void.	Same as Hague Rule & Present COGSA *except* for "service contracts" filed under U.S. Shipping Act of 1984 (but clauses lessening carrier liability will even then only bind signatories to service contract, and *not* holders in due course of negotiable bills of lading).

B. THE OIL POLLUTION ACT OF 1990

The grounding of the EXXON VALDEZ on March 24, 1989 was a watershed event in American history. It resulted in America's biggest oil spill and, unlike any previous event, it focused the American public's attention on the problem of oil pollution and its deleterious effect on the environment. As a direct result of this catastrophic event, Congress enacted on August 18, 1990 the United States Oil Pollution Act of 1990 (hereinafter "OPA" or the "Act").[6] The bill's passage was intended to placate an outraged public which demanded increased accountability by the oil and tanker industries in response to the environmental damage caused by the EXXON VALDEZ grounding. Unlike the proposed changes to COGSA which are intended to bring the U.S. law in conformity with the rest of the world, OPA was purposely intended to do the opposite. The drafters of the Act did not consider any of the oil pollution liability schemes or regimes in effect around the world. Nor were they moved by the pleas of various industry groups that the U.S. would legislatively alienate itself from its trading partners. The drafters were mainly concerned with the politics of the moment.

The Act provides, among other things, for: increased civil and criminal liability for oil spills; enhanced regulation of clean-ups; stricter prevention procedures; the establishment of an oil spill compensation fund; and required double hull tankers for shipments of oil to or from the U.S. The Act has now been in effect for six years and, despite the initial outcries of doom and gloom voiced by many in the shipping and insurance industries after its passage, it seems that

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[6] 33 U.S.C.A. §2701,et. Seq.

the maritime industry has learned to live with it. Significantly, there is some evidence to support the proposition that oil is being transported more safely since the Act's passage.

In this part of the paper, I will first give a brief overview of the major provisions of the Act. Then, I will discuss some of the significant developments relating to the Act since its passage, such as the implementation of final rule concerning Natural Resource Damage Assessments and the final rules concerning Certificates of Financial Responsibility (COFR's). I have also included some statistics analyzing the effect the Act may have had on reducing the number of spills in recent years. I will also briefly discuss some aspects of criminal liability resulting from oil spills, as the threat of criminal prosecution has become an effective and very convincing, tool for authorities to get the responsible parties' attention in the first instance and to exact prompt payment of expenses and claims resulting from a particular spill.

I. Overview Of OPA 90 Provisions

Strict Liability

The basic thrust of the OPA 90 legislation was to increase the limits of liability for oil spills, and to dramatically expand the possibility of unlimited liability for responsible parties who are found to be grossly negligent or operating in violation of regulations. It would be fair to say that this approach initially struck fear into the hearts of oil tanker owners, operators, and their insurers. A brief review of the Act's liability provisions will explain the reasons for their reaction.

OPA imposes strict liability upon a responsible party for removal costs and damages. The Act defines a "responsible party" to include owners, operators, and bareboat charterers of vessels, owners and operators of on-shore and offshore oil facilities and pipelines, and licensees of deep water ports. It is significant to note that "responsible party" under OPA '90 does not include time charterers of vessels (unless found to be operators within the meaning of the statute), or cargo owners.

Under OPA, the removal costs for which a responsible party is strictly liable can be substantial for they not only include costs for clean-up, but also for the costs of restoration of natural resources incurred by the Federal and State governments.

In addition to removal costs, there are "damages" for which a responsible party is strictly liable under OPA. They are broad ranging and include: a) damages to natural resources which encompasses injury to "land, fish, wildlife, biota, air, water, ground water, drinking water supplies and other such resources'," including the reasonable cost of assessing such damages and their restoration; b) damages to real or personal property, which includes damages for injury to or economic losses arising from other destruction of real or personal property; c) damages to subsistence use of natural resources; d) the net loss to the Federal and local governments of taxes, royalties, rents, fees, or net profit shares due to the injury, destruction or loss of real property, personal property or natural resources; e) profits or impairment of earning capacity due to injury, destruction or loss of real or personal property or natural resources, which shall be recoverable by any private party; and f) the net cost to state and local

governments of providing increased or additional public services during or after removal activities.

A responsible party who is strictly liable for all of the above damages under OPA may, however, limit his liability under certain circumstances. For instance, the limit of liability for a responsible party for a tank vessel is not to exceed the greater of $1,200 per gross tons or $10 million for tank vessels over three thousand tons, and for tank vessels of less than three thousand tons, the greater of $1,200 per ton or $2 million. With respect to vessels other than tank vessels, the limit is the greater of $600 per gross ton or $500,000. Onshore facilities, except for deep water ports, have a liability limit of $75 million plus all removal costs. Offshore facilities and deep water ports have a limit of $350 million.

However, the limitations provided by the Act may in many instances be illusory, for in practical terms, in a vessel accident resulting in a major oil spill, a vessel owner can be confronted with the potential of unlimited liability through an allegation of gross negligence, willful misconduct, or the violation of a safety regulation. Such allegations are always likely in a vessel collision or grounding resulting in a major spill. In fact, there are many circumstances enumerated in OPA which make the liability of a responsible party unlimited. In this regard, according to OPA, the limits of liability discussed above do not apply if the incident was proximately caused by (a) gross negligence or willful misconduct or (b) the violation of an applicable federal safety, construction or operation regulation by a responsible party, an agent or employer of a responsible party or a person acting pursuant to a contractual relationship with a responsible party. Also, limitation of liability will not apply if a responsible party fails or

refuses to report an incident, of fails to provide all reasonable cooperation and assistance requested by a responsible official. These circumstances and the unlimited liability that they trigger are perhaps the most controversial aspects of the Act and, in terms of the monumental costs and liabilities involved in U.S. oil spills, the most frightening for responsible parties.

The exceptions to the limitation provisions of the Act have the effect of dramatically increasing the circumstances under which a responsible party will be subject to unlimited liability for an oil spill, and would seem to make unlimited liability always a significant possibility in a vessel grounding or collision situation where gross negligence and/or willful misconduct and/or failure to comply with some safety regulation can always be alleged.

It should be noted, however, that there are some defenses to strict liability, but they are severely restricted. The defenses are limited to an Act of God, Act of War, or act or omission of a third party other than an employee, agent or contractor of the owner or operator of the vessel or facility. However, in order to assert any of these defenses, the responsible party must establish by a preponderance of the evidence that he exercised due care with respect to the transportation of the oil concerned, took precautions against the foreseeable acts or omissions of a third party and the foreseeable consequences of those acts or omissions. However, none of the above defenses apply if the responsible party fails or refuses (a) to report the incident as required by law if the party knows or has reason to know of the incident, (b) to provide all reasonable cooperation and assistance requested by a responsible official in connection with removal or (c) without sufficient cause to comply with an order issued under section 311 of the Clean Water Act.

Oil Spill Liability Trust Fund

A major provision of OPA concerns the use of the Oil Spill Liability Trust Fund. Interestingly, the Fund was established in 1986, prior to the enactment of OPA. But after its establishment in 1986, as a result of some political Machiavellian plan, or more likely a form of Congressional Alzheimer's disease, Congress did not pass legislation to authorize the use of money or the collection of revenue to maintain it. It was only after the EXXON VALDEZ grounding and the passage of OPA that authorization was granted. The Fund is supported by a tax on imported oil. The amount available from the Fund for any one incident is $1 billion dollars; and within that overall limit, the amount available for injury to natural resources is five hundred million ($500,000,000.00), per incident.

OPA provides that the President of the United States may use the Fund for such items as: 1) payment of federal and state removal costs; 2) costs of assessing natural resource damages and for implementing plans for restoration; 3) removal costs and damages resulting from an oil spill from a foreign offshore unit; and 4) uncompensated removal costs and damages and federal administrative and personnel costs and expenses incurred to administer, implement and enforce the Act.

Payment of any claim or obligation by the Fund under the Act shall entitle the U.S. Government to acquire by subrogation all rights of the claimant or State to recover from the responsible party.

All claims for removal costs and damages under the Fund must first be presented to the responsible party unless: 1) the President permits claimants to proceed to the Fund first; 2) the

governor of a state asks for removal costs incurred by the state; or; 3) where a foreign offshore unit has discharged oil and the claimant is a U.S. claimant.

If a claim is presented to responsible parties and each responsible party denies liability, or the claim is not settled within 90 days of presentation, the claimant may elect to commence an action in court against the responsible party or its guarantor, or, in the alternative, present the claim to the Fund.

Also, and very significantly, a responsible party who has a defense to liability or who is entitled to limited liability may make a claim directly to the Fund to be reimbursed for amounts it paid for clean up or settlement of claims beyond the limit of liability.

Non-Preemption Of State Pollution Laws

A significant provision of OPA involves the clear intention not to preclude the states from providing for additional environmental legislation. Parenthetically, it is this concept of state's right that has presented the U.S. from signing any of the existing international treaties on pollution, such as the CLC and its protocols. The Act specifically provides that it does not preempt the individual states from imposing any additional liability or requirements with respect to the discharge of oil within a state or any removal activities in connection with such a discharge. The Act also provides that it is not meant to affect or modify existing state law including common law dealing with pollution or liability therefor.

This is very important because previously, federal pollution statutes, with respect to discharge and removal activities, automatically preempted state laws when their provisions were in conflict. That is no longer the case under OPA, no federal law, including the Limitation

of Liability Act, can be relied on by responsible parties as a way of limiting more stringent state statutes. Accordingly, under the express authority of OPA, individual state laws that impose or provide for additional or greater liability as a result of oil spills, will be upheld and enforceable.[7]

II. Developments Since The Passage Of OPA

OPA directed various government departments to establish new regulations to implement the Act. In this regard, the Coast Guard implemented a final rule on July 1, 1994 concerning the issuing of Certificates of Financial Responsibility (COFR) and the National Oceanic and Atmospheric Administration (NOAA) on January 5, 1996 issued a final rule concerning Natural Resource Damage Assessment (NRDA). Both sets of regulations are major developments and are important in the implementation and enforcement of OPA.

NRDA

On January 5, 1996, the final regulations concerning Natural Resource Damage Assessment were implemented. They are to say the least, a very complicated set of procedures which will keep legions of lawyers, government bureaucrats, biologists, politicians, and assorted environmental activists, busy for years to come.

Ostensibly, the Herculean purpose of the rule is to make the environment and public whole for injuries to natural resources and services expended as a result of an incident involving

[7] Two recent cases have held that state laws permitting recovery for economic loss caused by oil pollution were not preempted by the rule first declared in Robbins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927) 48 S. Ct. 134, 1928 AMC 61, to the effect that pure economic loss is not compensable in admiralty. Ballard Shipping

a discharge of oil. This goal is to be achieved through a government directed miraculous return of the injured natural resources to their pre-spill condition. The regulations provide a natural resource damage assessment process for developing a plan for restoration of the injured natural resources and services and pursuing implementation of this plan by responsible parties (15 CFR § 990.10).

NOAA contends that the new regulations replace the old method of just adding up specific damages sustained by natural resources with a system designed to insure restoration of the environment. In a press release dated April 15, 1996, the U.S. Department of Commerce put it this way:

> As part of the Administration's initiative to reinvent government and lessen regulatory burdens, NOAA took a fresh look at the assessment process in developing the rule. The agency worked closely with interested parties... in the rulemaking process to resolve issues and further the legitimate goal of restoring natural resources injured by an oil spill. The new OPA rule changes the old way of determining environmental liability following an oil spill. In the last several years, NOAA has conducted natural resource damage assessments for oil spills with a goal oriented approach. Instead of collecting damages, (the old way) then determining how to spend the money on restoration, the (new) goal of assessment is timely, cost effective restoration of the natural resources that have been injured. This is the approach adopted in the new OPA rule. Under this rule, damages are based on the costs to restore injured natural resources and replace or acquired equivalents for services lost pending recovery.

The NRDA regulations contemplate three phrases in the process of establishing a natural resource damage assessment: 1) the preassessment phase, 2) the restoration planning phase, and 3) the restoration implementation phase. The NRDA regulations are implemented by

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Co. v. Beach Shellfish, 32 F. 3d. 623 (1st Cir. 1994); 1994 AMC 2705 In the Matter of the Complaint of Nautilus Motor Tanker Co. Ltd., 900 F. Supp. 617 (D.N.J. 1955), aff'd 85 F. 3d. 105, 1996 AMC 2308.

the action of Trustees, who are officials of the federal government, state governments, and, where appropriate, of Indian Tribes and foreign governments.

The first phase or "preassessment phase" provides a process by which the Trustees determine whether OPA applies to the particular incident in question. They must determine whether they have jurisdiction to pursue restoration. (15 CFR § 990.41, 990.42). If it appears that there has been environmental injury, the Trustees will give notice to the responsible parties and invite the responsible parties to participate in the conduct of restoration planning. The determination of the timing, nature, and extent of the responsible party's participation will be determined by the Trustees on an incident specific basis. (15 CFR § 990.44 (d)).

The second phase, restoration planning, begins after the Notice has been issued. (15 CFR § 990.51). The purpose of this phase is to provide a process by which Trustees can evaluate and quantify injuries to the environment and use that information to determine the need for and scale of restoration actions. The rules provide a detailed process by which the Trustees must determine: 1) what the environmental injuries are (15 CFR § 990.51); 2) what is the "quantification" of the injuries, meaning in addition to whether there was injury, what is the degree of the injury in comparison to the condition of the natural resource before the injury; 3) what are the restoration alternatives available to return the environment to its natural state (15 CFR § 990.53); 4) what is the restoration plan that should be used after a draft restoration plan has been submitted for public comment. (15 CFR § 990.55, 990.56).

The last phase is the restoration implementation phase. After the restoration phase has been selected, the Trustees must present a written demand on the responsible parties. The

demand must invite the responsible parties to either 1) implement the final restoration plan subject to Trustee oversight and reimbursement for assessment and oversight costs; or 2) advance to the Trustees the money to implement the plan, including the assessment costs. (15 CFR § 990.62). The responsible party must respond within ninety days in writing by paying or providing binding assurance they will reimburse the Trustees for assessment costs and implement the plan, or, in the alternative, pay the assessment costs and the cost of implementation (15 CFR § 990.62)

If the responsible parties do not respond within ninety days after the demand is made, the Trustees may either file a judicial action for damages or seek an appropriation from the Oil Spill Liability Trust Fund.

Certificates of Financial Responsibility (COFRs)

On July 1, 1994, the Coast Guard published the interim rule implementing the vessel financial responsibility provisions of OPA. The rule established three compliance dates: December 28, 1994, for self-propelled tank vessels; July 1, 1995, for tank barges and mobile offshore drilling units; and, for all other vessels (that is, passenger vessels, dry cargo vessels, etc.), the date their pre-existing COFRs expire, beginning December 28, 1994.

As is commonly known, there was great resistance to these rules by P&I insurers and the shipping industry. The fear of insurance companies was based on being subject to direct action in the United States and of being subject to unlimited liability. This fear threatened to make it impossible for vessel owners to procure the necessary certificates. However, the catastrophic oil supply disruptions predicted by many opponents of the rule, as a result of this

situation, did not materialize. Indeed, according to Coast Guard Statistics, by December 28, 1994 most tank vessel owners and operators desiring to obtain new COFRs had done so.

The rules concerning COFRs were designed to ensure a major goal of OPA. This goal was to make certain that all vessels operating in U.S. waters would be able to meet the enhanced financial liabilities imposed by the new law. In conjunction with this objective, Congress passed specific provisions mandating certain minimum financial responsibility requirements for owners and operators of vessels operating in U.S. waters (33 U.S.C. § 2716). These requirements were intended to be more stringent than the previous requirements under the Clean Water Act of 1972, and were specifically fashioned to ensure that vessel owners could and would demonstrate that they possessed the financial resources to meet the increased maximum amount of liability imposed by the new legislation. Vessels which did not meet the law's financial responsibility requirements would not be permitted to operate in U.S. waters.

According to the regulations, proof of financial responsibility may be established by any of the following methods: (a) evidence of insurance, (b) surety bond, (c) guarantee, (d) letter of credit, (e) qualification as a self insurer, or (f) other evidence of financial responsibility (33 CFR § 138.80 (b)). All of these methods are designed to ensure that a vessel operator has the financial resources to meet the limits of liability under OPA in case of a spill.

In addition to outlining specific ways to demonstrate financial responsibility, the regulations also contain a rather ominous provision providing for direct action against any insurer or other guarantor (33 CFR § 138.80 (d)). According to this regulation, any COFR

must contain an acknowledgment by the insurer or guarantor that an action in court by a claimant, including a claimant by right of subrogation, for costs and damage claims arising under the provisions of OPA may be brought directly against the insurer or other guarantor. The COFR must also provide that, in the event an action is brought under OPA directly against the insurer or other guarantor, the insurer or guarantor may invoke only the following defenses: 1) the incident was caused by the willful misconduct of the person for whom the guarantee is provided; 2) any defense that the person for whom the guarantee is provided may raise under OPA; 3) a defense relating to the amount of a claim or claims, filed in any action in any court or other proceeding, that exceeds the amount of the guarantee with respect to an incident, 4) a defense relating to the amount of a claim or claims that exceeds the amount of the guarantee, which amount is based on the gross tonnage of the vessel as entered on the vessel's International Tonnage Certificate or other official certificates of measurement, except where when the guarantor knew or should have known that the applicable tonnage certificate was incorrect, and; 5) the claim is not made under the Act. (33 CFR 138.80 (d)(1))

It should be noted that the rule makes it clear that in no instances will an insurer or guarantor be subjected to unlimited liability on the basis of issuing a COFR. (33 CFR 138.80 (d)(2)). The Coast Guard has taken the firm position that insurer's fears of incurring unlimited liability are unfounded. Insurers are only liable to the limits of the policy or guarantee.

The U.S. Government contends that the implementation of the COFR regulations has been a success despite P&I club resistance. In support of their contention, government records break down the issuance of new COFRs pursuant to the new rule as follows. As of June 1996,

1,839 self-propelled tank vessels, 3,978 tank barges, and 5,823 other vessels have complied with the rule. Thirty-seven percent of these 11,640 vessels are covered by self-insurance and financial guaranty, sixty-two percent by insurance guaranties, and about one percent by surety bond guaranties. Looking only at the self-propelled tank vessels, just over one third chose to self-insure.

One of the controversial and uncertain issues which arose at the time OPA was passed was whether the non-P&I club portion of the world's marine liability insurance industry would fill the COFR guaranty void which was created by the threatened non-participation of the vessel owners' P&I clubs. According to the Government, the answer appears to be yes. The U.S. Government contends that tanker owners who did not wish to purchase commercial COFR guaranties, could and do self-insure. Those that could not self-insure found other viable COFR guarantee options available to them. Accordingly, the Government maintains that the commercial insurance market has been active in filling the void left by the P&I clubs' refusal to continue to issue financial responsibility guaranties under OPA. Furthermore, the U.S. Government also contends that had the world's commercial insurers not come forward, the American surety bond market, which is very closely related to the American insurance market, stood ready to issue the requisite guaranties in order for maritime commerce to continue unabated.

It is interesting to note that Government statistics show that of the owners that self-insured, many were foreign, independent tanker owners. Also, much of the self-insurance was set up by parent companies as special purpose corporations whose sole function is to act as

financial guarantors. A financial guarantor must meet the self-insurance criteria of the rule; that is, it must meet the so-called U.S. net worth formula. Mobil Oil was the first to use this method.

The U.S. Government, in its public relations campaign to publicize the success of the COFR rules, likes to remind the public that opponents of the philosophy embodied in OPA had argued that no commercial COFR guaranties would ever be made available by the commercial market and that, even if they were made available, the result would be unreasonable and excessive costs on industry. However, the Government states that the Coast Guard has been advised by the commercial insurance and surety bond programs that their gross, combined annual premiums for COFR guaranties will be about $70 million for the 1995 policy year and somewhat less for the current year. This is significantly less than the feared hypothetical worst case scenario of $450 million.

Accordingly, the U.S. Government contends that the COFR regulations passed pursuant to OPA have been a great success and likes to brag that for a relatively small cost, victims of oil and hazardous substances incidents in the United States now, because of the COFR rules, have written assurance of compensation by a responsible party, up to statutory limits, in a United States venue.

III. OPA's Effect On Oil Spills

A review of oil spills since the enactment of OPA in 1990 supports the proposition that there has been a decrease in the number of significant oil spills in U.S. waters. Whether this is coincidence or because vessels are being operated more safely cannot be said for sure, but it would seem that OPA has been a significant factor in this phenomenon.

For instance, a look at marine casualty statistics compiled and published by the U.S. Coast Guard reveals a dramatic decline in major oil spills (defined as 100,000 gallons or more) from 1990. For example, according to the Coast Guard, there were seven major spills in 1990, only two each in 1991, 1992, 1993, and only one in 1994. Prior to 1990, major spills were much more prevalent. For instance in 1986 there were eight major spills, in 1987 seven, 1988 five, 1989 six.

There also was a less dramatic decline in medium size spills (defined as 10,000 to 99,999 gallons). For instance in 1988, there were twenty one, in 1989 there were twenty, in 1990 there were twenty four. On the other hand, in 1991 there were fifteen medium spills, in 1992, sixteen, in 1993, thirteen, and in 1994, twelve.

All these decreases in oil spilled occurred with no decrease in the amount of oil shipped. Accordingly, the empirical evidence would suggest that OPA has been effective in achieving its objective of safer transportation of oil on U.S. waters.

The following table will give illustration to the overall decrease in the number of major and medium spills:

YEAR	MAJOR SPILLS	MEDIUM SPILLS	TOTAL	TOTAL VOLUME SPILLED IN MILLION OF GALLONS
1986	8	15	23	3.58
1987	7	12	19	4.00
1988	6	21	27	8.13
1989	6	20	26	13.96
1990	7	24	31	6.68
1991	2	15	17	1.42
1992	2	16	18	1.67
1993	2	13	15	1.49
1994	1	12	13	7.07

There is no question, of course, that spills in the U.S. have become more expensive as a result of OPA. The average cost of clean up of persistent, heavy oil is on the average $100 - $150 per gallon. The average cost for natural resource damages assessment and restoration is about $200 - $250 per gallon depending on the size of the spill and the geographic area where the spill occurs.

IV. Criminal Liability

Since the grounding of the EXXON VALDEZ, there has been a greater likelihood of criminal prosecutions as a result of oil spill accidents.[8] As a result of the EXXON VALDEZ, OPA also made a provision for enhanced criminal penalties for the violations of already existing U.S. environmental criminal statutes. By increasing the criminal penalties for various environmental statutes, OPA has had the indirect effect of making criminal prosecution of oil spills a more serious issue. Accordingly, it would be wise to go over a brief review of some basic legal and practical elements in criminal liability which are relevant to oil spills.

There are two categories of crimes which come into play when considering U.S. criminal liability resulting from ship groundings, collisions and allisions. First, assuming there is a pollution incident, liability under state and federal criminal environmental statutes may be imposed. Second, local, state and federal general criminal statutes mandating criminal liability for damage to property, personal injury, and loss of life may also be considered.

It is logical that in a criminal investigation of a maritime accident the focus of criminal liability will first be on the crew members, then the ship owning or operating corporation, and then the corporate officers.

The crew members in navigation and control of the vessel would be the most likely, and obvious candidates to bear criminal liability for their actions under both United States environmental statutes and United States general criminal statutes. In all cases where criminal liability is predicated upon navigation and control, it is safe to assume the ship's Master will be a target, even if he is not

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[8] For a more detailed analysis of the elements of criminal liability, see Russo, Criminal Liability in Maritime Accidents, 7 U.S.F. Mar. L.J. 151.

actually on the bridge at the time of the accident. The ship owner and operating corporation would also have vicarious criminal liability for the acts of crew members acting within the scope of their employment under both United States environmental statutes and United States general criminal statutes. Corporate officers could also have individual criminal exposure for violation of general criminal statutes depending on their actual knowledge and commission of acts contributing to the accident. Additionally, such corporate officers could have criminal exposure under environmental statutes under the "responsible corporate officer" doctrine merely because of their position of responsibility in the company, regardless of their actual knowledge or participation in any culpable conduct.

In addition to the U.S. Coast Guard, the cast of law enforcement characters one may encounter at the scene of a serious maritime accident may include the Federal Bureau of Investigation (FBI), the Criminal Division of the Environmental Protection Agency (EPA), local State Police, the United States Attorney, the local District Attorney and the State Attorney General. Each of these are separate and distinct organizations; each with it own hierarchy, policies, and agenda. With the possible, albeit ambiguous exception of the United States Coast Guard, their only purpose is to investigate and prosecute crimes. To them, the scene of the accident is a crime scene. The criminal division of the EPA, FBI, and State Police are investigators who gather facts and evidence and bring it to the prosecutors for evaluation. The U.S. Attorney, District Attorney, Attorney General, are the prosecutors. They are the lawyers who will make the ultimate decision to prosecute and handle the case through trial.

The United States system provides two avenues for criminal prosecution. The Federal Government has its own prosecutors, investigators and courts to prosecute violation of United States Federal Statutes. Additionally, each individual State of the United States also has its own state prosecutors, investigators and courts to prosecute violations of State criminal statutes. It is, therefore, possible, and likely that in a serious accident in U.S. waters, which impacts on the waters or shore of a particular state, to have both a Federal and State investigation and prosecution occurring simultaneously.

In conjunction with this discussion of criminal liability, it is also important to consider the relationship between criminal liability and civil liability in a maritime accident situation.

First of all, we can assume that in every major maritime accident in the United States where there is an oil spill and an environmental impact there will also be a deluge of civil cases against the ship owner and crew members, for damages based on negligence, and punitive damages based on willful or reckless conduct. As we have seen in our discussions in previous sections, criminal liability based on gross negligence, willful misconduct or violation of safety regulations can trigger unlimited liability under OPA.

Just about all of the issues which could be the basis for huge civil recoveries or unlimited OPA liability will be the same issues involved in most criminal prosecutions arising out of the same accident.

Invariably, any criminal case will be tried before the civil case. Most jurisdictions mandate that a defendant must be brought to trial speedily after being charged unless he consents to

adjournments. Even with foot dragging, criminal cases will usually be brought to trial within a year of the indictment.

What this means in practical terms is that long before the civil case even gets into serious discovery the issues relating to negligence, recklessness, and the very facts as to what happened will have already been determined by a court and jury. A finding of guilt in the criminal action based on recklessness or negligence for instance, because it is a finding beyond a reasonable doubt, could be introduced as a final determination of that issue in a subsequent civil trial. In other words, a party's civil liability, including liability for punitive damages, can for all intents and purposes be decided by a criminal conviction arising out of the same incident dealing with the same issues and parties.

CONCLUSION

So goes the tale of two statutes, one is intended to bring us closer with our maritime brethren around the world, when Congress finally gets around to passing the proposed legislation, while the other, passed by the same legislative bodies, was so politically motivated that its draconian provisions have set us far apart from most of the rest of the treaty subscribing nations.

Of course, the proposed changes to COGSA are, for the most part, not controversial and there is something for everyone in its terms. Consequently, I foresee a fairly easy road towards its passage. To many of us who have labored under the restrictive provisions of COGSA, we say its about time! To those who think the new Act will give rise to more litigation because every new legislation needs court interpretation, we say great! To those who believe that the Act will result in

lower costs of doing business, we say wonderful! As I said previously, there is a little something for everyone in the Act.

OPA, on the other hand, is another story. Or is it? Government statistics support the proposition that it is working. The perceived success of OPA's mission by the U.S. government means that it will continue to be lauded by politicians as America's first defense against oil pollution. The political and public feeling in the U.S. is pro-environment, defiantly anti-oil and anti-pollution. Indeed, the Vice-President of the U.S., Al Gore, in his book Earth in the Balance referred to the EXXON VALDEZ spill as "an indictment of our civilization." Such sentiment, at such a high level of government, can only ensure continued stress on environmental regulation. As time goes by, there will no doubt be some refinements of OPA, which may somewhat placate some in the maritime industry, but the major provisions will not change. Nevertheless, those involved in the carriage of oil are learning to live with it and, in some cases, profit from it.

I am confident that both statutes will achieve their aims and will be accepted, albeit reluctantly in some quarters, and dealt with effectively and profitably by those who wish to do business in the United States.

Ladies and Gentlemen, I thank you for inviting me to your beautiful country and for your kind attention.

October 15, 1997

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