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India arrest jurisdictions countrywide

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A successful appeal in India on 14 October 2011 has led to three significant results: the possibility of a pan-India arrest jurisdiction when working through the Bombay High Court (for all other high courts, such as Calcutta, Chennai and Gujarat, jurisdiction is within state territorial waters only); that admiralty jurisdiction can be acquired when the warrant of arrest is executed on the ship even while it is outside territorial waters (whereas before, in India, this could only be executed when the vessel was in Indian waters); and the recognition that one-ship companies need to be scrutinised closely to ensure they are legal entities – or just shell companies being used to cover up the link between sister ships in order to avoid arrest of a sister ship.

What happened

The appeal was launched by Great Pacific Navigation (Hong Kong) at the Bombay High Court to arrest Chinese-registered *Tongli Yantai* in Chennai, for security in respect of a claim pending arbitration, against Tongli China. It was argued that *Tongli Yantai* was the sister ship of the *Nasco Diamond* that Great Pacific had chartered to Tongli China and which had sunk.

The result of this successful appeal concluded: *Tongli Yantai* was registered as a one-ship company and was owned by Halycon Ocean Shipping Companies.

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Therefore, it was argued, it was not a sister ship to the *Nasco Diamond*. But Great Pacific argued that Halcyon was a

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Bunker suppliers feel the pressure

Unni Einemo, managing editor, *Petromedia Group*

Bunker suppliers, as much as shipowners, will be challenged by upcoming global, regional and local variations in marine fuel sulphur limits. Key changes worldwide are due in 2012 and 2015 under MARPOL Annex VI, in the EU under the amended sulphur directive, and in the US.

What is happening

In the European Union, sulphur limits apply not just to fuels being used by ships, but also to fuels being sold for marine use.

The EU Sulphur Directive bans the sale and use of marine gas oil (MGO) with sulphur content exceeding 0.1%. Proposed changes to the directive could ban the sale and use of all marine fuels with sulphur above 3.5%.

This differs from the IMO's MARPOL Annex VI, which does not actually ban the use of higher-sulphur fuels in conjunction with emission reduction technology, and places no upper sulphur limit on fuels as sold.

Another notable exception from IMO sulphur regulations is found in California. From 1 August 2012, the North American Emission Control Area (ECA) will require ships to observe a 1.00% sulphur limit when 200nm from the coast. Many ships are likely to use low-sulphur fuel oil (LSFO) to meet the 1.00% limit, as they currently do in European ECAs.

The California situation departs from IMO regulation in two ways. First, the state has decided that the sulphur limit inside its own 24nm zone will drop to 0.1% from 2014, a year before this limit takes effect in worldwide ECAs.

Second, it continues to dictate the use of distillate fuels, which means ships will not be able to use LSFO or a regular HFO in conjunction with abatement technology. This means vessels will need to switch to either MGO, which typically has a sulphur content well below 1.00%, or use a marine diesel oil (MDO) with no more than 0.50% sulphur for the final leg of the journey through the ECA into California.

Bunker suppliers will have no problem supplying compliant marine gas oil, a pure distillate where sulphur content is often 0.2% or lower, but caution is needed with marine diesel oil, which more commonly exceeds the 0.5% sulphur limit.

Apart from the special case of California, the North American ECA could be one of the biggest challenges for bunker suppliers in 2012.

shell company and that the true owner was Tongli China, thus making the vessels sister ships.

The appeal court overturned the original ruling, which had refused to consider Halycon as a shell company or to record any fraud, releasing the *Tongli Yantai* from arrest. It observed that the test of a company as a shell company is to see whether it exists as an autonomous unit or as an essential organ to a network of companies.

This decision will help to untangle the complex web behind one-ship companies that masks the real owner and, in this case, effectively detaches a ship from sister vessels, thus making it difficult to access these assets because the real owner is unknown. The one-ship company concept limits the financial liability of the individual company or group of such companies. As such, they are valid commercial entities but they are expected to have their own corporate structure, sufficient for their separate distinct presence.

Courts cannot countenance the presence of an entity that causes injury, damage or injustice to creditors or other third parties. A one-ship company must show that it is a distinct legal entity with capability to meet its distinct and separate liabilities. It should have: a place of business, shareholders and management distinct and separate from the group of companies so as not to rely upon the assets or control of those companies for its survival. If this is not the case, the one-ship company would not be a distinct incorporated entity at all and would be merely a cover for the companies or the individual behind it. F

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> Sulphur content challenges

2010 IMO tests found 15% of heavy fuel oils tested above 3.50% sulphur. This is a challenge for ports worldwide.

In the Gulf region, Fujairah, the region's key bunkering hub, found that 60% of heavy fuel oils supplied exceeded the 3.50% limit. Other regional ports were also affected.

In Italy a number of ports are in a similar position.

In Asia and the United States some of the largest ports found 10-30% of heavy fuel oils tested above 3.50%.

The sulphur limit will hit the high viscosity fuel market – fuels above 400 centistokes tend to exceed the 3.50% sulphur limit.

This market has been growing in popularity in recent years and a result of lower prices but could shrink significantly in 2012 because blending heavy fuel oils to reduce sulphur content typically reduces the viscosity and puts the price up.

LSFOs are often blended very close to the upper sulphur limit, but predicted soaring demand from ships heading into the North American ECA will test to the limit the ability to provide compliant LSFO blends. F

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UK Bribery Act

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Nearly five months ago, the Bribery Act 2010 came into force and the new 'corporate offence' referred to in the act applies to all companies that operate their business (or part of their business) in the UK. As a result, these companies must have in place procedures to ensure compliance with the act.

The new corporate offence is the failure by commercial organisations to prevent bribery. This is a strict liability offence, where a person associated with the company bribes to obtain or retain business for the company, or gain an advantage in the conduct of business.

The only defence for the company is to demonstrate that it has in place adequate procedures designed to prevent bribery.

It is vital that shipping companies with a UK presence ensure they implement effective anti-corruption policies throughout the organisation that apply to the conduct of all their subsidiaries or agents overseas, regardless of the different business cultures in which those subsidiaries or agents operate.

These procedures must be embedded in company policies and procedures and audited to ensure their effectiveness.

'Adequate procedures' are not defined under the act. The Ministry of Justice states that these should be 'reasonable and proportionate' to the size of the company and the risks of bribery faced.

However, there is no one-size-fits-all approach and individual companies must carry out their own risk assessment to establish what is reasonable and proportionate.

A 'bribe' can include a financial or other 'advantage', however small. This means that many facilitation-type payments – small payments made to ensure a local official performs in a timely manner and typical in the shipping industry – are unlawful.

Effective policies must deal with issues such as facilitation payments and must be adhered to throughout the organisation.

The Serious Fraud Office, the UK body charged with enforcing the act, has recently issued guidance on facilitation payments to shipping companies. Masters, protecting agents and others in the front line should receive training and clear guidance on what do when faced with demands for such payments.

It is important that companies can show both the authorities and their business counterparts that a zero-tolerance approach to bribery is in place. Business counterparts will increasingly demand high anti-corruption standards as part of the relationship, including specific contractual terms.

The act's effects will spread beyond those companies with a connection to the UK, as more global firms, such as charterers and energy majors, insist on compliance as part of their business terms.

Like the management of safety, the management of anti-corruption cannot requires systems to be put in place and personnel trained if companies are to be compliant, retain business and avoid costly investigations and prosecutions. F

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