

# Environmental crimes: Is outsourcing the answer to steer clear of US prosecutors?

When opinion polls are taken in the United States of the issues that matter most, environmental concerns consistently rank among the most important to the American public. This has not gone unnoticed by companies that place value in maintaining their reputation as good corporate citizens.

**T**hroughout the global petro-chemical industry, the current trend is to advertise environmental achievements and promote investments in global-friendly endeavours.

Because of the heightened environmental consciousness in the United States, politicians have taken notice. Governmental officials acting through the Department of Justice (DOJ) seek to protect the environment by aggressively prosecuting to the fullest extent of the law those who ignore or purposefully circumvent the restrictions on discharge of pollutants into the marine environment.

Over the last ten years, there has been a rapid expansion in the number of prosecutions of crew members and their shipping companies for violations of environmental regulations. The DOJ has established task forces to take action against violators not only to show they are engaged in protecting the environment, but also to exact monetary and criminal penalties in order to deter seafarers and their employers from polluting US waters.

The DOJ's environmental prosecution programme generates a steady flow of press releases notifying the maritime industry of convictions of crew members and plea deals or fines imposed against shipowners who are not vigilant in monitoring environmental compliance. Given the severe penalties at stake, shipowners must take affirmative action to reduce their exposure to environmental prosecutions which could result in serious fines and damaging negative publicity.

In particular, outsourcing environmental compliance can provide key assistance nec-

essary to comply with both International and United States regulations, and to be in the best position to respond to a prosecution should an environmental event occur. This paper and presentation provides a primer on the legal relationships between a shipowner and ship manager, the non-delegable legal duties of a shipowner to avoid illegal discharges, the penalties involved, and the benefits to a shipowner of using outsourced vessel management to enhance the company's maritime compliance programme under United States law.

## I. Vessel owner and ship manager: The legal relationship

In-house vessel management is governed by the master-servant relationship, a common law doctrine which is incorporated into the general maritime law of the United States. A vessel-owning corporation has the legal right of control over its ship management staff. It is liable under the theory of *respondeat superior* for acts of employees performed within the scope of their employment. The scope of questions can sometimes involve fact-intensive analysis of the actual versus apparent authority an employee received from its shipowner. That is why the relationship is often explicitly stated in the written agreement between the parties.

For example, a standard ship management contract (SHIPMAN 98) establishes a principal and agent relationship between the vessel owner and ship manager. The ship manager, acting as agent, has a fiduciary relationship with vessel owner in which the ship manager is authorized to act on behalf of the vessel owner. In this situation, the vessel owner is the principal for whom the



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ship manager acts pursuant to the scope of the agreement. Bear in mind that the degree of control over a ship manager can vary depending on terms of the contract, and this in turn can affect the extent of the liability of a shipowner.

Under SHIP MAN 98, the ship manager provides: "management services as agents for and on behalf of the owners in accordance with sound ship management practice and to protect and promote the interests of the owners in all manners relating to the provision of services hereunder." (SHIPMAN 98, Part 2, ¶ 4.1). Moreover, "the managers shall not be liable for any of the actions of the Crew, ►

even if such actions are negligent, grossly negligent or willful, except only to the extent that they are shown to have resulted from a failure by the managers to discharge their obligations" (SHIPMAN 98 Part II ¶11.2(ii)).

## II. The shifting definition for outsourcing

Although the concept of outsourcing work that would usually be handled by a company in-house to an entity outside the organization is nothing new, there is no one-size-fits-all definition for the practice under United States law. According to the Practicing Law Institute, "[o]utourcing is the process by which a company retains a third party to perform some process or function that was or would be performed by the company itself." *Recent Trends in Outsourcing: Understanding and Managing the Legal Issues and Risk*, Scott W. Pink, Practicing Law Institute 2004. In an oil spill situation, one appellate court has offered the following precept, "[a]lthough there is no generalized 'due care' defense, a defendant may always, of course, show that someone other than himself was responsible for the discharge. It might be a defense that



Oil spill from the *Global Peace 2* off Gladstone, QLD, Australia. (Photo: AMSA/MSQ)

the spill was caused by an independent contractor who was entirely outside the defendant's control." *United States v. White Fuel Corporation*, 498 F.2d 619, 624 (1st Cir. 1974) (emphasis added).

Because a vessel owner will invariably exercise some control over its outsourced ship manager, it is difficult to envision a scenario where the ship manager is "entirely outside the [vessel owner's] control." Accordingly, the vessel owner will remain exposed for neglect of its ship manager that results in illegal pollution.

## III. Corporate liability for environmental crimes: In-house v. outsourced vessel management

### A. Responsibility of the vessel owner

A vessel owner has a public duty to operate vessels in compliance with laws and regulations that prohibit pollution of the environment. The United States Court of Appeals for the Seventh Circuit has stated this principal as follows: "[o]ne who owes a certain duty to the public and entrusts its performance to another, whether it be an independent contractor or agent, becomes responsible criminally for the failure of the person to whom he has delegated the obligation to comply with the law, if the non-performance of such duty is a crime." *United States v. Parfait Powder Puff Co.*, 163 F.2d 1008, 1010 (7th Cir. 1947).

It follows that a ship manager hired to carry out the vessel owner's public duty to avoid pollution of the environment is considered an "instrumentality" of the owner. As a result, the liability associated with the vessel

owner's public duty cannot be shifted to the instrumentality to insulate the vessel owner from liability.

### B. Corporate criminal liability for acts of agent/servant

In order to be found criminally liable for the acts of an agent or servant, the following circumstances must occur: (a) the individual must be acting within the scope of his or her employment or contract; (b) the individual must be acting to benefit the corporation (actual benefit not required if agent/servant believed actions would benefit corporation); and (c) the act and intent must be imputed to the corporation. See *Corporate Criminal Liability*, 25 AM. CRIM. L. REV. at p. 550 (1997). Of the three factors, the third factor merits special attention.

In order to impute knowledge to the corporation, no actual benefit to the corporation is necessary. An agent acting against a corporation's expressed instructions or policies can still impute liability to the corporation even if the corporation derives no actual benefit for the action. See *id.* at p. 554, fn 34. The imputation of knowledge is not limited to one employee either. Under the collective knowledge doctrine, a corporation can be criminally liable when no single employee or agent is at fault, but where a corporation's employees or agents collectively knew or reasonable should have known that a criminal violation existed.

A corporation can also be held criminally liable for deliberately disregarding criminal activity. Under the "willful blindness" ▶

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or “deliberate ignorance” doctrine, the deliberate avoidance of investigating environmental crimes can subject a party to liability. “Willful blindness” or “deliberate ignorance” will not avoid criminal liability for environmental crimes in the United States. Conversely, a corporation may avoid liability when an employee or agent acts in breach of its fiduciary duty to the corporation, i.e., misconduct (reckless, illegal, illicit actions) which can be considered outside scope of agency or employment.

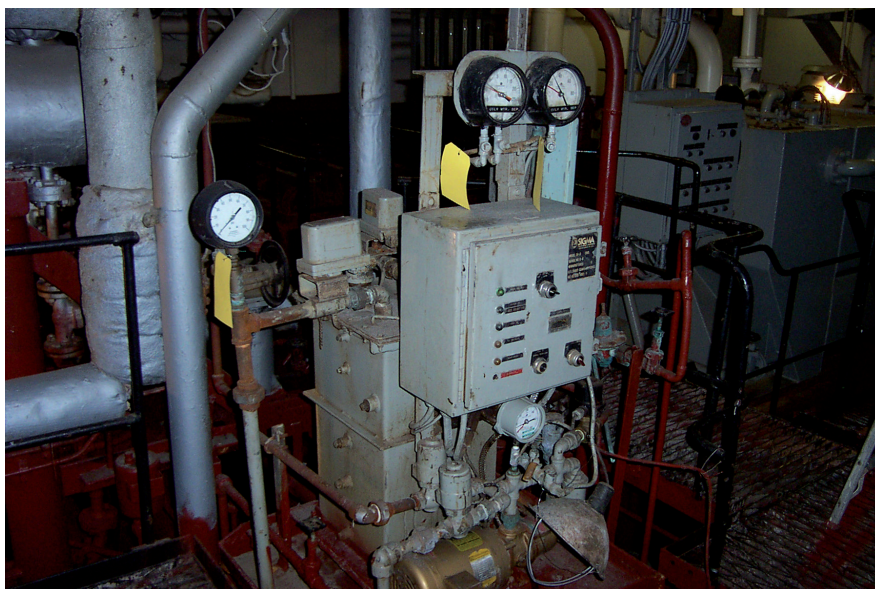
### C. Vessel owner responsible for failures of ship manager that result in illegal pollution from the vessel

A vessel owner is responsible for its employees’ actions with respect to environmental compliance, maintenance and upkeep of environmental equipment on board vessels, as well as conduct and operation of the vessel while trading in US ports. Although the ship manager assumes responsibilities of vessel owner for compliance with environmental laws and regulations, the vessel owner remains responsible for failures in complying with environmental laws and regulations that result in illegal pollution. This is the case because of the vessel owner’s knowledge that, if improperly handled, the vessel would violate the public duty to avoid polluting the environment. Commentators have observed that “the rationale presumably lies in preventing corporations from avoiding liability by simply contracting out the more risky elements of their business.” *Corporate Criminal Liability*, AM. CRIM. L. REV. at p. 553.

However, a vessel owner should be aware of an exception contained in the Oil Pollution Act of 1990. The exception provides relief from civil liability for a “truly passive” owner or a lender that “holds indicia of ownership primarily to protect a security interest in a vessel or facility” 33 U.S.C. § 2701 (26). It remains an open question whether this caveat can or would be extended to criminal liability for oil pollution.

### D. In-house management benefits

There are certain tangible benefits a vessel owner obtains by managing its affairs in-house. It allows for more direct control over the environmental compliance programmes. Effective environmental compliance programmes implemented by in-house staff can reduce penalties and fines imposed as a result of illegal pollution. Criminal liability can be imposed on a vessel owner for any illegal environmental pollution, so being able to provide evidence of an effective environmental compliance programme is critical.



Oily Water Separator (OWS) (Photo: US Merchant Marine Academy)

### E. Outsourcing advantages

An outsourced ship manager is expert in International Safety Management (ISM) code, ISO Quality Management Standards (ISO 9000 Series), ISO Environmental Management Standard (ISO 14001), and can co-ordinate various programmes to establish effective maritime compliance programmes.

The delegation of environmental compliance to an outsourced company permits in-house management staff to focus on core company business. This benefits the vessel owner’s bottom line while concomitantly protecting itself from potentially crippling prosecutions and resulting fines and penalties in the US

### IV. US Statutes used to prosecute vessel owners for environmental crimes

#### A. Four key statutes to be mindful of:

When considering the prosecution of environmental crimes, there are a handful of key statutes a vessel owner (and its counsel) should be cognizant of:

*The Clear Air Act*, (“CAA”), 42 U.S.C. § 7401 *et seq.* imposes a penalty for knowingly violating federal or states regulations design to achieve ambient air quality standards established by the US Environmental Protection Agency (“EPA”).

*The Federal Water Pollution Control Act*, 33 U.S.C. §1319(c)(1) (1994) (CWA or *Clean Water Act*), imposes a criminal penalty for willfully or negligently discharging pollutants into navigable waters.

*The River and Harbor’s Act of 1899 (Refuse Act)*, 33 U.S.C. §§ 407, 411- 412, imposes strict liability for release or discharge of pollutant into navigable waters.

Finally, the *Act to Prevent Pollution from Ships (APPS)*, 33 U.S.C. §1908(a), imposes criminal penalty for knowingly violating the MARPOL protocol.

The vessel owner should keep in mind this list is not all-inclusive. Environmental incidents may call into play other United States statutes.

### B. US implementation statute used to prosecute MARPOL violations, the APPS

The APPS merits special attention. The APPS statute provides, “a person who knowingly violates the MARPOL protocol, this chapter, or the regulations issued thereunder commits a Class D felony. In the discretion of the court, an amount equal to not more than one-half of such fine may be paid to the person giving information leading to conviction.” 33 US Code § 1908. The APPS statute specifically provides for monetary rewards to “whistleblowers” for reporting illegal discharges of pollutants. The fines and penalties imposed on shipowners for environmental pollution are substantial resulting in hundreds of thousands of dollars awarded to “whistleblower” crew members for reporting illegal discharges to US authorities. A vessel owner simply cannot allow a situation where the crew of its ship are allowed to ignore illegal environmental discharges. ►

## **V. Penalties for environmental crimes: US sentencing guidelines and use of outsourcing to score "points" with the Department of Justice**

### **A. Sentencing for corporate crimes and the calculation of penalties (base fine and culpability points)**

The US Sentencing Guidelines are followed by Department of Justice prosecutors in order to ascertain a fine and penalties imposed upon corporations for criminal violations of the law. Sentencing Guidelines have been established in an effort by the US sentencing commission to set sound and consistent policies for corporate crimes. The Guidelines provide that a sentence can be adjusted "to account for the efforts of some corporations to ferret out a crime and the total indifference to, or encouragement of it by other corporations." *Corporate Criminal Liability*, 35 AM. CRIM. L. REV. at p. 557 (1998).

For sentencing, the Court determines the initial fine by calculating a "base fine" level, which is then adjusted up or down based on the corporation's "culpability score." A company with an effective compliance programme may be entitled to a reduced sentence (i.e. reduction of culpability points). Favourable consideration is granted with regard to both the bringing of criminal indictments and the settling of charges. See Dennis L. Bryant, *The Maritime Compliance Program: foghorn protection for the shipowner*, 24 Tul. Mar. L.J. 591 at 596 (2000).

### **B. Elements of US Sentencing Guidelines for effective compliance programme**

The environmental compliance programme should be reasonably capable of reducing the prospect of criminal conduct. In particular, high level personnel "must be given overall responsibility to oversee compliance." The corporation also must take steps to ensure that "substantial discretionary authority" is not given to agents who possess a propensity to engage in illegal activities. The corporation must disseminate effective standards to

its employees and take reasonable steps to ensure compliance, e.g. monitoring. There must be consistent enforcement of the standards (i.e. disciplinary mechanisms for failure to detect an offence), and finally, the corporation must respond reasonably once an offence is detected to prevent further occurrences. See *id.* at pgs. 596-97.

While these requirements may at first seem cumbersome, experienced ship managers and compliance consultants can prepare and implement a maritime compliance programme incorporating the ISM, ISO and other quality programmes with relatively little time and additional expense.

## **VI. Conclusion**

A vessel owner may not insulate itself from exposure to criminal liability for environmental pollution from its vessel by outsourcing its responsibility to a ship manager. Outsourcing allows the vessel owner to bring in particular expertise that can reduce the cost of ship operation and enhance effectiveness of its environmental compliance programmes. Outsourcing to enhance your environmental compliance programme can result in favourable consideration for a vessel owner to avoid US prosecutors bringing indictments, assist with settling charges or reducing penalties for environmental crimes. Outsourcing expertise also assists a vessel owner to keep current on multiple and complex regulations applicable to environmental pollution, oily discharges, air emissions and other potential criminal liabilities associated with operation of a vessel. ■

**Editor's Note:** Vincent J. Foley is a partner in the Holland & Knight LLP Maritime Practice Group. Mr. Foley practices primarily in the area of international complex litigations arising out of vessel casualties in-

cluding collisions, groundings, explosions, fires and oil spills. He has represented clients in multi-jurisdictional limitation of liability actions, and has advised clients on environmental policy and compliance issues, defence of civil claims and penalties, and in defence of criminal prosecutions for environmental crimes and oily water separator issues.

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