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## **Lemons, tiles, and false assumptions**

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The past three and one-half years have undoubtedly provided us with enhanced maritime security, but it has also had its occasional misfires, based largely on false assumptions by those involved in particular incidents.

### **Establishing compliance standards**

Following the horrific terrorist attacks of September 11, 2001, the international community quickly realized the significant vulnerabilities present in the maritime transportation system. Over the previous 50 years, the system had evolved into one that was both highly efficient and highly open. It is the openness of the maritime transportation system that makes it at risk for infiltration by terrorists and use as an unwitting tool for terrorist activity.

Even before the terrorist attacks in 2001, the U.S. Senate was considering ways to reduce the openness of the system. In 2000, Senator Hollings (D-SC) introduced a bill to establish a program to ensure greater security for United States seaports. The primary focus of the bill was deterrence of crime and cargo theft on the waterfront, but provisions were included for reducing the risk of terrorism. The measure was reintroduced in mid-2001. Following the terrorist attacks, emphasis of the bill was changed from crime to terrorism prevention. The bill was merged with a similar bill in the House of Representatives to become the Maritime Transportation Security Act of 2002.

On the international front, State Parties to the International Convention on the Safety of Life at Sea (SOLAS Convention) adopted the International Ship and Port Facility Security (ISPS) Code. The ISPS Code and related amendments to the SOLAS Convention mandated the State Parties to require security plans and enhanced security measures for covered ships engaged in international commerce and the port facilities servicing the covered ships. The ISPS Code came into effect on July 1, 2004.

### **Port state control measures**

Port state control is the process by which a nation exercises limited authority over a foreign vessel in its waters. The purpose of this limited exercise of authority is to determine whether the foreign vessel is in substantial compliance with applicable international

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requirements. The foreign vessel's certificates are to be accepted unless there are clear grounds for believing that the condition of the vessel or its equipment does not correspond substantially with the particulars of any certificates. If the vessel's certificates are invalid or expired or if the condition of the vessel or its equipment do not substantially correspond with the certificate's particulars, the port state control officer is authorized to exercise control measures with regard to the vessel. The usual control measures consist of: requiring corrective action prior to returning to that nation; requiring the vessel to proceed elsewhere for repairs; denying entry into port; detaining the vessel; or monitoring the vessel's operations while in port.

The 2002 amendments to the SOLAS Convention include specific control and compliance measures supplementary to the general port state control provisions. For ships in the port of a State Party, specific maritime security control measures are as follows: "inspection of the ship, delaying the ship, detention of the ship, restriction of operations, including movement within the port, or expulsion of the ship from the port." Such control measures may additionally or alternatively include other lesser administrative or corrective measures.

For ships intending to enter the port of a State Party, the State Party may require the ship to provide information (e.g., an advance notice of arrival) to ensure that the ship is in compliance with applicable maritime security requirements. If the State Party has clear grounds for believing that the ship is not in compliance with those requirements, the State Party may: (1) require rectification of the non-compliance; (2) require that the ship proceed to a specified location in the territorial sea or internal waters of the State Party; (3) inspect the ship in waters of the State Party; or (4) deny entry into the port.

In the first six months that the maritime security regulations have been in effect (1 July – 31 December 2004), the U.S. Coast Guard has taken the following security control actions: 74 detentions; 6 denials of entry; and 14 expulsions from port – for a total of 94 such actions. During this same period, records of the Paris Memorandum of Understanding (MOU) on Port State Control indicate that 77 ships were detained for reasons that included non-compliance with maritime security requirements. Records of the Tokyo MOU are less specific and do not lend themselves to easily determining whether a control measure was undertaken for non-compliance with maritime security requirements as opposed to maritime safety requirements.

One practical problem with the port state control program for maritime security is that, for security reasons, port state control officials (particularly the U.S. Coast Guard) frequently fail to disclose the specific rationale for imposing a control measure. This lack of information sometimes makes it difficult for affected private parties to allocate added costs associated with the control measure. With daily hire rates for modern ships generally exceeding \$25,000 per day, cost allocation can be an important issue.

## **Misfires**

On July 29, 2004, an unnamed bureaucrat in the U.S. Department of Agriculture received an anonymous e-mail reporting that an unspecified harmful biological substance could be found

in one of five containers of lemons on the CSAV RIO PUELO, scheduled to arrive in Port Elizabeth, New Jersey the next day from Argentina. The report was passed to the U.S. Coast Guard for action. The ship was detained offshore. Officials from the Coast Guard and the Customs and Border Protection boarded the ship and quickly located the containers. Customs wanted to bring the containers ashore and examine them with Vehicle and Cargo Inspection System (VACIS) technology to determine whether any dispersal devices were in the containers. But, by that time, approximately 40 federal, state, and local agencies and authorities were involved. State and local officials insisted that the ship and its suspect containers be kept offshore until all risk of danger was eliminated. The ship was finally allowed to dock and unload its cargo on August 6. As a precaution, the containers were fumigated with chlorine dioxide. No "harmful biological substance" was ever located and it now appears that the original e-mail was probably sent by an economic rival of either the exporter or the importer of the lemons. By that time though, the lemons were spoiled and had to be incinerated.

The full costs have never been computed, as they were borne by many different organizations, commercial and governmental. The lemons themselves were valued at \$70,000. Demurrage costs for the container ship were probably in excess of \$150,000. Costs incurred by parties associated with the other "innocent" containers on the ship are unknown, as is the cost incurred by all the federal, state, and local agencies involved. Total costs for what some refer to as "Lemongate" probably approached \$1 million.

On September 10, 2002, U.S. Coast Guard personnel were conducting a routine examination of the container ship PALERMO SENATOR when their radiation detectors were activated. A security zone was immediately established around the vessel, which had recently arrived in Port Elizabeth, New Jersey from Valencia, Spain. The vessel was escorted to anchorage near the Ambrose Light Tower where it was fully examined by personnel from the Coast Guard, Customs Service, FBI, Department of Energy, and U.S. Navy Seals. It was eventually determined that the radiation was being naturally emitted by a container carrying clay tiles from Italy. Low level radiation is sometimes found in clay deposits. It has been reported that the vessel operator incurred demurrage costs well exceeding \$50,000 while the vessel was being examined. Other costs are unknown.

On August 8, 2002, Customs Service personnel in the Port of Miami were conducting a random x-ray examination of a container that had arrived from Israel. The x-ray and other non-intrusive tests revealed what appeared to be munitions. The bomb squad was called in and the container was carefully opened. Inside, along with other household goods, were two metal flower pots. One was made from a spent 155 mm artillery shell and the other was made from part of an exploded test missile. Neither was dangerous, but a portion of the port was shut down during the inspection. It was eventually learned that the items belonged to an Israeli citizen relocating to the Miami area. He had acquired the items in Israel and converted them into conversation pieces for his home. Costs incurred in this partial shutdown of a major U.S. port have not been computed.

At about 8:30 pm on Wednesday, January 26, 2005, Customs and Border Protection officers in the Port of Los Angeles were performing a routine inspection of the container ship TOLEDO, which had arrived from Gwangyang, South Korea. The officers were alerted by their personal radiation detectors (worn on the belts) to the possible presence of radioactivity. The greatest intensity of radiation was found near the overhead of the storage room in the engineering spaces. The area was secured and the Radiation Assistance Program (RAP) team was called in from the Department of Energy facility in Las Vegas. By noon on January 27, the source of the radiation was confirmed to be cobalt in the device used on board to test fire detection and suppression equipment. The ship and its cargo were delayed almost a full day.

Customs sometimes requires cargo (mostly containers) to be unloaded for unscheduled examination at the first U.S. port of call, rather than at the ultimate port of discharge. Customs bases this action on its analysis of the cargo, its origin, routing, the parties involved, and intelligence reports. This “box pulling” may result in added costs of \$10,000 or more, not including subsequent costs due to delayed departure from the first U.S. port and delayed arrival at subsequent ports.

These are all examples of unanticipated costs and delays that can be incurred by fully compliant ships and cargoes. The cost of non-compliance can be expected to far exceed the cost of compliance.

### **Partial solution**

So as to minimize the risk of non-compliance with applicable maritime security requirements, it is recommended that your company utilize a vigorous maritime security program. This consists of meeting and, in some cases, exceeding the minimum standards provided for in the ISPS Code and the USCG regulations. It also means requiring your partners in the marine transportation system (e.g., ship owners and operators, exporters, importers, shippers, non-vessel operating common carriers, etc.) to also fully participate in the program. A chain is only as strong as its weakest link – and in this area, having a weak link can be fatal for all involved.

So as to minimize the risk that your company will bear the cost of a non-compliant event, it is recommended that you include in your charter parties, bills of lading, and other relevant documents specific provisions regarding which party is responsible for compliance with which maritime security requirements and who bears the burden of added costs resulting from any non-compliance. One can never foresee all the possible future events, but one can anticipate certain generalities and provide for their occurrence. Such careful drafting now is certainly preferable to the throw of the dice when a judge has to allocate damages without meaningful guidance from the parties.

Be careful – it’s an uncertain world out there!