

August 2008

Implications of the *Jho doctrine*

Dennis L. Bryant

On June 30, 2008, in the case of United States v. Jho, the United States Court of Appeals for the Fifth Circuit reversed a ruling of the US District Court for the Eastern District of Texas and held that it was not a violation of international law for the federal government to prosecute an owner of a foreign ship and a chief engineer for violation of the Act to Prevent Pollution from Ships (APPS) by failing to correctly maintain the ship's oil record book (ORB). The court went further and ruled that each time the ship called on a US port with the falsely maintained ORB constituted a separate offense. The sentencing aspects of those separate violations were remanded to the district court for consideration. The implications of that decision are only beginning to be understood.

The relevant facts, as found by the court, are as follows. The tanker PACIFIC RUBY was registered with the Government of the Marshall Islands. During the period at issue, it operated as a shuttle tanker in the Gulf of Mexico, carrying crude oil from offshore tankers to refineries along the Gulf coast of the United States. Kun Yun Jho, a citizen of South Korea, served as chief engineer on the tanker. He was responsible for, among other things, proper disposal of oily waste from the ship and proper maintenance of the ship's ORB. The record is somewhat unclear, but it appears that on approximately 16 occasions, Jho (or persons acting under his direction) discharged oily waste water directly into the ocean through an unauthorized system (sometimes referred to as a magic pipe) that bypassed and tricked the oily water separator (OWS). After each improper discharge, Jho made an entry in the ship's ORB indicating that the discharge had been properly made by means of the OWS. During the period of this improper disposal and improper recordkeeping, the ship made eight separate calls in US ports. On two of these occasions, the US Coast Guard made port state control boardings and, among other things, examined the ship's ORB. During the first boarding, no violations were discovered. On the second boarding, though, the improper ORB entries were detected and the bypass equipment was discovered, with assistance from a whistle-blower.

The International Convention for the Prevention of Pollution from Ships (MARPOL) seeks to prevent marine pollution by, among other things, requiring that commercial ships engaged on international voyages only discharge oily waste at sea by processing that waste through an approved OWS that limits discharges to waste water containing no more than 15 parts per million of oil. Transfers of oil on the ship, including discharges by means of the OWS, are

E-mail

dennis.l.bryant@gmail.com

Internet

<http://brymar-consulting.com/>

Maritime Reporter & Engineering News

<http://marinelink.com/en-US/magazines/Archive.aspx?MID=3>

required to be entered into the ORB. Both the United States and the Marshall Islands, as well as almost every other nation, are party to the MARPOL Convention. Party States are obligated to enforce the Convention.

The United States adopted APPS for the specific purpose of enforcing MARPOL. The statute provides, in pertinent part, that it applies to foreign ships while within the navigable waters of the United States. The statute also provides that it is unlawful to act in violation of the MARPOL Convention and US implementing regulations. The Coast Guard promulgated regulations with regard to the ORB that basically repeat the obligations established by the MARPOL Convention, Annex I, Regulations 17 and 36. There is one material difference, though, between the MARPOL regulations and the USCG regulations. The MARPOL regulations do not use the word “maintain”. Rather, the MARPOL regulations discuss the making of full and complete entries in the ORB and keeping the ORB onboard for examination by government officials for at least three years following the last entry. The Coast Guard regulations specifically require that ships “maintain” an ORB and provide that the master or other person in charge is responsible for the maintenance of such record.

In the instant case, Jho and the shipowner were charged with the following: one count of conspiracy; one count of making a false statement by presenting to the Coast Guard an ORB they knew to include fraudulent entries; and eight counts of knowing failure to maintain the ORB (one such count for each US port call). On a motion filed by the defendants, the district court dismissed the eight counts of knowing failure to maintain the ORB. The government appealed the dismissal. The decision of both the district court and the appellate court contain lengthy discussions of international law. That is not, though, the primary point of this article. Rather, this article examines the consequences that may be expected to ensue from the *Jho doctrine* that has now been adopted, at least in the Fifth Circuit. It is not so much a question of where we are, but, more significantly, where we are headed.

The district court and the appellate court agreed that Jho (and, through the principle of vicarious liability, the shipowner) had an obligation to properly dispose of the oily waste water and an obligation to properly record the actions with regard to the oily waste water in the ship’s ORB. The two courts also agreed that Jho violated those obligations. Where the two courts differed was with regard to the liability under United States law. The district court focused on where the unauthorized disposal and the fraudulent entries in the ORB occurred. All of the volitional acts by Jho occurred while the ship was on the high seas outside the jurisdiction of the United States. The district court decided that federal law could not reach those volitional acts and dismissed the charges relating to failure to maintain an ORB in violation of APPS. The appellate court focused on what it found to be a continuing duty to maintain an accurate ORB, rather than a one-time obligation to make correct entries in the ORB. While the appellate court did not disagree with the district court’s finding that the fraudulent ORB entries were made while the ship was on the high seas, it determined (contrary to the district court) that the violation occurred when the ship called in a US port with the ORB containing known fraudulent entries.

The appellate court further found that these violations were consummated by each port call despite the fact that the ORB was “presented” to Coast Guard boarding officers on only two of the eight port calls. This is significant because traditionally a chief engineer and the shipowner only were charged with making a false statement to the government for presenting the fraudulent ORB to the Coast Guard. If there was no presentment, then there was no crime (or at least no crime was charged). Recently, the Coast Guard and the Department of Justice have adopted a more expansive approach, charging shipowners and chief engineers with failure to maintain the ORB in addition to the traditional charge of making a false statement during presentment of the ORB. From the government’s perspective, there are at least three advantages to this approach. First, it allows the government to charge separately for each set of fraudulent entries in the ORB. Second, it allows the government to pay rewards in circumstances where a whistle-blower was involved. Third, it allows the government to put added pressure on the defendants to enter into a plea bargain by increasing the charges (and the potential maximum sentence) that the defendants face if they go to trial and are found guilty.

Some might respond: “So what. These are intentional crimes involving pollution and the culprits get what they deserve.” Others would say: “This is another example of the government piling on charges for the purpose of getting an accused (who is presumed innocent) to cave in and plead guilty.” A third group might respond: “This is another attempt to get members of the crew to turn against the officers and the shipowner in an effort to garner a reward, possibly leading some poor individuals to falsify evidence in the process.” There is some truth in each statement.

More serious consequences ensue, though, from application of the *Jho doctrine*. First, what happens when, despite the best efforts of the shipowner, one chief engineer makes one fraudulent entry in the ORB to avoid disclosing a mistake? The chief engineer departs the ship, never to return. Under the *Jho doctrine*, the shipowner is potentially liable to criminal charges for each call that ship makes in a US port for the next three years, even though the owner may not have actual knowledge of the fraudulent ORB entry. It is currently unclear whether that potential liability is carried forward in the event that the ship is sold or comes under new management in the interim. Arguments could be made for either approach.

While the charges in this case related to the ORB, there are many other recordkeeping requirements for ships (and the number continually increases). Ships must file ballast water management reports and detailed cargo reports. They must keep track of refuse, hazardous material, medical supplies, loading, cargo securing, cargo handling gear, life boat servicing, and fuel quality, to name only a few. The door is now open to charging the shipowner and the responsible crew member (generally the master) with a violation for each entry that is fraudulent, or even fudged ever so slightly.

The instant case involved a foreign ship where the actions and record entries were made on the high seas. Thus, the federal government could only charge a violation for each call in a US port. What happens when the situation involves a vessel of the United States? Federal law applies to US vessels at all times, wherever they may be located. If the *Jho doctrine* were

applied to a US vessel in the same circumstances, it is possible (even likely) that the shipowner and the chief engineer would have been charged with making the 16 separate improper discharges. Rather than being charged for the eight port calls with the fraudulent ORB, they could be charged for each day the fraudulent ORB was in effect, since this would be a continuing crime.

Combining the three aspects of the *Jho doctrine* with its natural follow-on leads one to the conclusion that the case of United States v. Jho represents a watershed for maritime law enforcement in the United States. No longer can a shipowner just tell the crew to do the right thing and then assume it will happen. Constant vigilance and a rigorous maritime compliance program are more important than ever for a shipowner seeking to avoid violations and prosecutions.