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Challenges Abound for the Cruise Industry

By Jeanne M. Grasso and Conor T. Warde

Many of 2007's major news stories about the maritime industry involved such unsavory topics as oil spills, intentional discharges, and criminal prosecutions resulting from actions or inactions of owners, operators, and managers of tankers and other cargo vessels. Even so, the cruise ship industry remains the most visible example of the maritime industry to the general public. While very few people will ever set foot on a tanker or a bulk carrier, thousands and even millions of people will board cruise ships at ports around the world to experience "life at sea" (or, at least, what "life at sea" aboard a cruise ship offers - exotic destinations, casinos, night clubs, and other entertainment).

Of course, all of this foot traffic brings the general public up close to this segment of the shipping industry and, therefore, it tends to attract a great deal of attention from state and federal legislators and regulators. Furthermore, rarely is "good news" reported - the only news stories one usually hears or reads involve the occasional pollution incident, an outbreak of illnesses, or crimes at sea. As such, the result is a consistent flow of legislative and regulatory activity on the federal and state stages related to the cruise industry. An overview of some recent and upcoming challenges for the cruise industry follows.

Federal Challenges

While the focus of the industry is generally on major new legislation proposed or enacted by Congress, often in response to a casualty or some other real or perceived concern, some of the most impactful requirements arrive in the form of federal regulations or interpretations. This is true again in the recently proposed interpretation issued by U.S. Customs and Border Protection ("CBP") on November 21, 2007 (22 Fed. Reg. 65487) regarding the Passenger Vessel Services Act ("PVSA"). By way of background, the PVSA, originally enacted in 1886, generally provides that no foreign vessel shall transport passengers between ports or places in the United States, either directly or by way of a foreign port. CBP regulations, however, allow a round-trip voyage that begins and ends at the same port or place, with interim U.S. port stops along the way, so long as the voyage includes a foreign port stop. The proposed interpretation involves what it means to stop at a foreign port.

More specifically, the proposed interpretation relates to whether foreign-flag cruise ships should be in violation of the PVSA when passengers board the ship at a U.S. port, the ship calls at several Hawaiian ports, and then proceeds to a foreign port, such as Ensenada, Mexico, before returning to the original port of embarkation where the passengers finally disembark. Such a voyage is consistent with the PVSA, implementing regulations, and a long history of CBP rulings as currently in effect. Regardless, and just of late as captured in the above-mentioned Federal Register notice, "CBP believes these itineraries are contrary to the PVSA because it appears that the primary objective of the foreign stop is evasion of the PVSA."

This proposed interpretation arose in response to the former U.S.-flag Pride of Hawaii, owned by Norwegian Cruise Lines, being reflagged foreign and redeployed to Europe, allegedly due to increased competition from foreign-flag cruise ships operating in Hawaii. As a result of the reflagging, the Maritime Administration ("MarAd") requested that CBP take action to ensure enforcement of the PVSA and prevent foreign-flag cruise ships from competing directly with the U.S.-flag vessels operating in Hawaii. The objective, at the outset at least, seemed to be to ensure that the foreign-flag cruise ships make "legitimate" port calls in foreign countries so as not to end-run the PVSA. The proposed interpretation, however, goes far beyond approximating anything similar to a "normal" port call and would change how the cruise ship industry has been operating, legally, for decades.

In essence, MarAd believes that the foreign-flag cruise operators are violating the PVSA, or at least the spirit of the PVSA, by using a brief stopover in Ensenada, sometimes without allowing passengers to disembark, as a way to get around the PVSA's requirements. To address this concern, the proposed CBP

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interpretation will presume that a stop at a foreign port is not a "legitimate port call" unless: (1) the stop lasts at least 48 hours at the foreign port; (2) the amount of time at the foreign port is more than 50 percent of the total amount of time at the U.S. ports of call; and (3) the passengers are permitted to go ashore temporarily at the foreign port.

Over 400 comments, both pro and con, from the affected industry were submitted in response to the CBP notice, as would be expected because cabotage issues always generate much attention. There is little question, though, that this proposed interpretation, should it be finalized as is, will be potentially devastating to U.S. ports, service providers, and tour operators, among others. While pegged as only intended to deal with the Hawaiian trade, as written, the proposed interpretation would encompass Caribbean, Alaskan, and New England cruises as well. This interpretation would mean a wholesale restructuring of the cruise market, as well as the end of the shorter cruise itineraries currently being offered from the United States, and would likely cause the foreign-flag cruise ships to simply begin or end their voyages, or both, in a foreign port, which would not implicate the PVSA, but would have significant impacts on the economies of U.S. ports.

State Challenges

States have an immense amount of autonomy and state regulation can have significant impacts on the cruise industry. Two such examples follow.

California

Always a leader on environmental issues, for better or worse depending on one's perspective, California has taken the lead in maritime environmental regulation at the state level. The California Air Resources Board ("CARB") promulgated new regulations, which entered into force on January 1, 2007, generally mandating the use of low-sulfur marine diesel and gas oil by most ocean-going vessels, including cruise ships, operating within 24 miles of the California coastline. The Pacific Merchant Shipping Association sued on federal preemption grounds, and the court issued an injunction ordering CARB to cease enforcement on August 30, 2007. CARB appealed and the 9th Circuit Court of Appeals stayed the injunction pending the appeal on October 25th, thus allowing the regulations to go back into effect. As of the date of this article, this regulation is in full force in California and is being enforced by CARB.

The ramifications of this on again, off again, on again regulation are quite obvious and highlight the constant uncertainty faced by shipowners and operators that operate in the United States. While there are questions regarding the State of California's authority to regulate emissions from vessels in this manner, including out to 24 miles, the regulations are nevertheless in effect at this time.

Alaska

Another issue affecting the cruise industry that is being implemented at the state level is the "Alaska Cruise Ship Ocean Ranger Program" for cruise ships sailing in Alaskan waters. Alaska Statute 46.03.476, which became law in December 2006, requires the owner or operator of a passenger vessel to have on board an Ocean Ranger, i.e., a U.S. Coast Guard licensed engineer hired or retained by or on behalf of the Alaska Department of Environmental Conservation, Division of Water ("DEC"). These Ocean Rangers are intended to serve as independent observers for monitoring state and federal requirements "pertaining to marine discharge and pollution requirements and to insure that passengers, crew and residents at ports are protected from improper sanitation, health and safety practices." While they are onboard the vessels, the Ocean Rangers will gather information based upon a schedule of observations, including, but not limited to, inspecting wastewater systems, reviewing environmental records, and serving as the onboard contact for the DEC. The observations and data collected by the Ocean Rangers will be reported to the DEC and the Coast Guard, and the DEC may share such information with other state and federal agencies.

In essence, these Ocean Rangers will serve as the eyes and ears of the State of Alaska and the Coast Guard on board cruise ships operating in Alaskan waters. While some may view this as a means to preventing or deterring marine pollution by cruise ships, it could also be perceived as a direct challenge to the integrity of the cruise industry. While some Ocean Rangers have already sailed with cruise ships, DEC plans to have the Ocean Ranger Program fully staffed and operational for the 2008 cruise ship season.

Challenges on the Horizon

The increasing amount of environmental legislation and regulation of the maritime industry shows no signs of abating. Some examples include a proposed bill entitled the Clean Cruise Ship Act, introduced by Senator Durbin (D-IL) in both the 108th and 109th Congresses, but not yet in the 110th, which would prohibit cruise vessels entering U.S. ports from discharging sewage, graywater, and bilge water into the waters of the United States, with certain exceptions, including when in compliance with international effluent limits and management standards. Other bills, such as the Marine Vessel Emissions Reduction Act of 2007, sponsored by Congresswoman Hilda Solis (D-CA) and Senators Barbara Boxer (D-CA) and Diane Feinstein (D-CA), and the Maritime Pollution Prevention Act of 2007, introduced by Congressman Jim Oberstar (D-MN), did not make much headway last year, but should nonetheless be monitored in 2008. Congress watchers should also closely monitor the two Coast Guard Authorization Bills, pending in the House of Representatives and the Senate, as those bills are often magnets for amendments that could impact the cruise industry and could be the vehicle for ballast water amendments, among others.

Bottom line, as indicative in the above examples, the cruise industry will remain a target of environmental regulation and activism for the foreseeable future. The industry in the United States will feel the pressure from both the state and federal levels and, while change has happened and will continue to happen in the years to come, cooperation among the players in the industry is vital to developing a reasonable approach to maritime environmental issues. Accordingly, it is imperative that the cruise industry closely monitor what is happening in Washington, D.C. and in the various coastal states to stay ahead of the curve and influence proposals when the opportunity is there.