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Brussels' bright idea

BRUSSELS has not endeared itself to shipowners over the years. The one-size-fits-all approach to regulation has often appeared unnecessarily awkward, uninformed and too often featured large sticks to beat offenders with while offering nothing in the way of carrots for those prepared to make an effort.

The latest move to name and shame substandard operators may on the face of it look like yet another indiscriminate salvo being fired in the direction of the shipowning community, but happily there is more sophistication here than many may assume.

Quality is finally being recognised as a positive force in Europe. The concept of rewarding operators with a good record with fewer inspections, while targeting resources on substandard offenders, is by no means a new idea, but the fact that it has now gained some traction in Brussels is a welcome turn of events.

The devil will inevitably be found in the detail, but if European Union transport commissioner Siim Kallas can genuinely implement a system of greater transparency and fair inspections then he will have offered the shipping industry a positive step forward and owners the opportunity to lessen their own regulatory burden into the bargain.

Bigger sticks are not in themselves an inherently bad thing. Substandard shipping is a justifiable target for any serious regulator and while those caught in the net may claim they are being unfairly discriminated against, we need robust standards to be set and policed.

In an ideal world, port state control should not be necessary if flag states and shipowners are doing their job effectively. But the reality is that inspections routinely find vessels riddled with even basic regulatory violations that are lucky to still be afloat.

We have said it before, but all regulatory shake-ups need time to bed in, and there is no reason to believe that these impending changes will be any different. What counts is how well these things work in the longer term and we have every confidence that given a fair chance, tastier carrots and bigger sticks could be a winning combination for all concerned.

Safe, or sorry?

READERS may recall the massacre of 17 Iraqi civilians in Baghdad by five private security operatives employed by the US military contractor Blackwater in 2007. The incident demonstrated how private security personnel operated in Iraq with apparent impunity, shooting at will, at whomever they pleased and generally wreaking further havoc in the country.

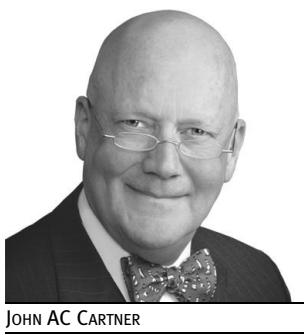
Do we really want that situation to be replicated in the Gulf of Aden? That is the danger of allowing companies such as Sea Marshals, the newly formed operation based in Cardiff, which is sending four naval patrol boats to the area, with the offer to shipowners to guard their vessels as they navigate their way through pirate-infested seas. The ships will be crewed by Ukrainian ex-special forces and will be for hire at the trifling rate of $10,000 per day.

It is unclear how these modern day cowboys riding shotgun will do much in the way of making the Gulf of Aden any more secure. The potential dangers they represent, as well as the possible illegality of any military action they may engage in, far outweigh any security benefits they may bring.

How they are to interact with the naval forces operating in the region remains unanswered; notwithstanding the fact that they have no military mandate to be there in the first place and there is no apparent chain of command for the existing naval forces to engage with.

How are existing naval forces supposed to discern who are and who are not pirates? This is especially pertinent given that under the laws of the sea, any military force that is not state-sanctioned is in effect committing piracy itself if it is engaged in action. It seems obvious that if one of these vessels comes under attack from Somali pirates, its armed, military-trained crew is going to have only one response: fire back. ■

Industry Viewpoint



John AC Cartner

Rule by bureaucracy is not always by right

A complex legal case involving a ship engineer seeking refuge highlights the problems of interpreting maritime and human rights law

IT IS devilishly difficult for governments, courts or parties to distinguish among crimes and political crimes and crimes against humanity. The path is walked among the flames of legitimate national security — usually overstoked — and the fires of the rights of those accused (often overdamped) and the legitimate and truthful perceptions of the accused, which are always distorted.

From the Antipodes is a report illustrating this position and the problems of commissions and courts and their differing rules. The last voyage of the *Yahata* is a sea story containing didactic truths on security, rights and perceptions and rule by bureaucracy.

TX (his protective name), a Sri Lankan Tamil, responded to the Supreme Court of New Zealand. The appeal examined exclusions from refuge in the Convention Relating to the Status of Refugees 1951 by serious criminal acts of the applicant. The crimes? Against peace, in war, against humanity, serious non-political offences outside the refuge before application and acts contrary to the principles of the United Nations.

TX, sailed as junior engineer from 1981 and lived in his fishing port village, Velvetiturai. The village was a Tamil Tiger transhipment port for military from Trang and Phuket, Thailand.

An agent in 1992 offered TX a chief engineer's berth for an undisclosed Thai company. TX accepted, met the agent in Trang and joined *Yahata* for six months in Phuket, trading southeast Asia. He socialised little with the master and seven seafarers, all from Velvetiturai, and was unaware of their Tiger proclivities.

In early 1993, the *Yahata* in Phuket was loading breakbulk from a trawler. Ten passengers boarded. After departure on January 4, TX was told *Yahata* was a Tiger ship and Kittu, the Tamil Tiger leader, was on board. TX knew him by repute. TX asked for discharge, but he was ordered to stay until *Yahata* called at Sri Lanka.

Chennai was 440 miles distant when the master ordered arrival, stop engines, rig the breakdown lights, down the Thai flag, standby the Honduran flag and use the new name — creatively, *Ahat* owned in Singapore. Indian coastguards hailed *Ahat* for boarding. The master advised 110 tonnes of explosives were on board — and further interference would be unseemly.

Ahat, raw power under its throbbing two-hatched deck barely containable within its steel form, ran and was chased and later interdicted.

The master agreed to enter Chennai. *Ahat* was corralled by warships; and the master advised the eight that the Indian Navy had agreed to repatriation to Sri Lanka. But the Ahat Ten opened rocket-propelled grenade and small-arms fire. The navy returned fire at the ship.

The sailors prudently leapt overboard and were arrested. Kittu and co stayed on board and died in the fire. The Ahat sank.

The case makes Jarndyce v Jarndyce , a fictional and long-running court case in the novel Bleak House by Charles Dickens seem simple in comparison. It is a play in seven acts:

Delivering justice is difficult when courts and commissions operate conflicting rules. *Shutterstock*

Act 1 — In 1996, the crew are tried in common law India. Not guilty. Appealed by prosecution.

Act 2 — Reversed. Three years imprisonment for serious crimes unrelated to terrorism (interfering with public servants, wrecking). Released after service.

Act 3 — Refuge denied. In 2001-2002, TX and co were admitted to New Zealand and asked for refuge. Admission investigation is inquisitorial — not at court but within immigration. TX did not persuade the status officer that he would be harmed on repatriation. He credibly explained his employment on *Yahata*. Appealed.

Act 4 — Refuge denied. The Refugee Status Appeals Authority is enabled as a inquisitorial commission. The responsibilities of proof are on the applicant to establish a claim. The authority gathers facts as it will, applies them to the rules in law and decides. It follows the paths of evidence in the convention. It may draw on any source for evidence. But it does not follow the rules of evidence of court in New Zealand. The authority developed two notebooks of information on TX and the Tigers over three years. The Tigers were human rights abusers. TX confirmed they were not model citizens. An *Ahat* oiler testified his supporting the Tigers and knowing military were on board. *Yahata* was found of the Tigers' fleet and so engaged. TX was incredible in denying knowledge as the denials were inherently implausible; wilfully blind as to the cargo and the Tiger affiliations; and denying to occlude his position of trust in the Tigers because he was chief engineer. TX therefore knew the arms furthered human rights abuses and, thus, he was dedicated to the aims of the Tigers and thereby was a willing and knowing Tiger accomplice. He should be excluded. Application for review by respondent.

Act 5 — Dismissed. The High Court deferred with mild concern that no person's position was mentioned by the Indians. Appealed by respondent.

Act 6 — The Court of Appeal. International conventions define such crimes; the Rome Statute of the International Criminal Court refers to crimes against humanity and outlines international criminal liability. Complicity in the crimes of others is defined by the principles of joint criminal enterprise liability by international tribunals. TX's mere presence and implausible story did not mean intent for a crime against humanity by joint criminal enterprise. TX's purpose was Tamil separatism. The scuttling was not a political act. Appealed by prosecutor.

Act 7 — The Supreme Court of New Zealand. The factual evidence of the authority was accepted. The Tamil Tigers committed crimes against humanity. The authority may establish the elements of a crime against humanity. It does not follow that such a crime was committed. TX used no arms; no crime was committed. There must be a predicate offence committed by someone not the accomplice for TX to be complicit. TX was capable of a crime but there was no predicate offence linked to him. He committed no crime against humanity. With TX's political purpose, any offence committed by him was political and not a serious crime. Remanded.

Conclusion — TX was not shown to be excluded from refugee status by crimes against humanity or prior serious offences.

I will continue the case with my analysis and conclusions in my next column. ■

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Maritime Blogspot

UKHO charts a collision course with shipowners

THROUGH my work, I am intimately acquainted with what feels like a scandal in the making. Right now, it's only a big deal in the small hydrographic community, but — as mandatory Ecdis drives more attention to the market — it may explode into headlines.

Mandatory Ecdis will require shipowners to get ENCs (the official Electronic Navigational Charts proscribed by the International Maritime Organization and International Hydrographic Organization), or risk port state detention. Contrary to its own intentions to make ENCs widely available to a non-profit, central and independent organisation, the UK Hydrographic Office is withholding hundreds of ENCs. It has betrayed its multilateral intentions and gone bilateral, using governmental muscle.

But it did not have to be like this. A principle called WEND stated that hydrographic offices would make all ENCs available through non-commercial entities called Regional ENC co-ordinating centres.

Today, there are two: the Primar RENC in Norway and the UK's IC-ENC; the UKHO runs the latter. These non-profit entities make the full database of ENCs available to distributors.

The beauty of the RENC is this — a quality-controlled and professional channel for hydrographic offices to make charts available to the market. Without RENCs, shipowners and distributors would need to patch together dozens of agreements with individual hydrographic offices. Most offices, distributors and owners are not prepared for such a scenario.

It is disturbing that the UKHO has neglected to make hundreds of ENCs available to the RENCs. Hydrographic offices and distributors have complained that this move compromises safety and innovation. One insider said: "Chart suppliers should not compete on access to charts, but on the price, the service and value they add to delivery."

This issue pops up frequently in the Ecdis Yahoo! group. Why has the UKHO ventured into these murky waters? It possesses two conflicting missions, one as governmental regulator and another as market actor. But the latter role, which is exposed to competition, is leveraging the former, which is granted by the queen. The result bends any definition of fairness.

Anyone doubting the UKHO's profit motives need only go to its website. I quote the vision: "To become the world leader in the supply of digital hydrographic information and services."

Time will tell if the UKHO's move blows up in its face. As more shipowners scrutinise this market, they will start screaming. After all, we all know what monopolies do to prices, and if there is anyone in the world who is price conscious, it is shipowners. ■

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