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September-October 2009

# The MARITIME EXECUTIVE

INTELLECTUAL CAPITAL FOR EXECUTIVES



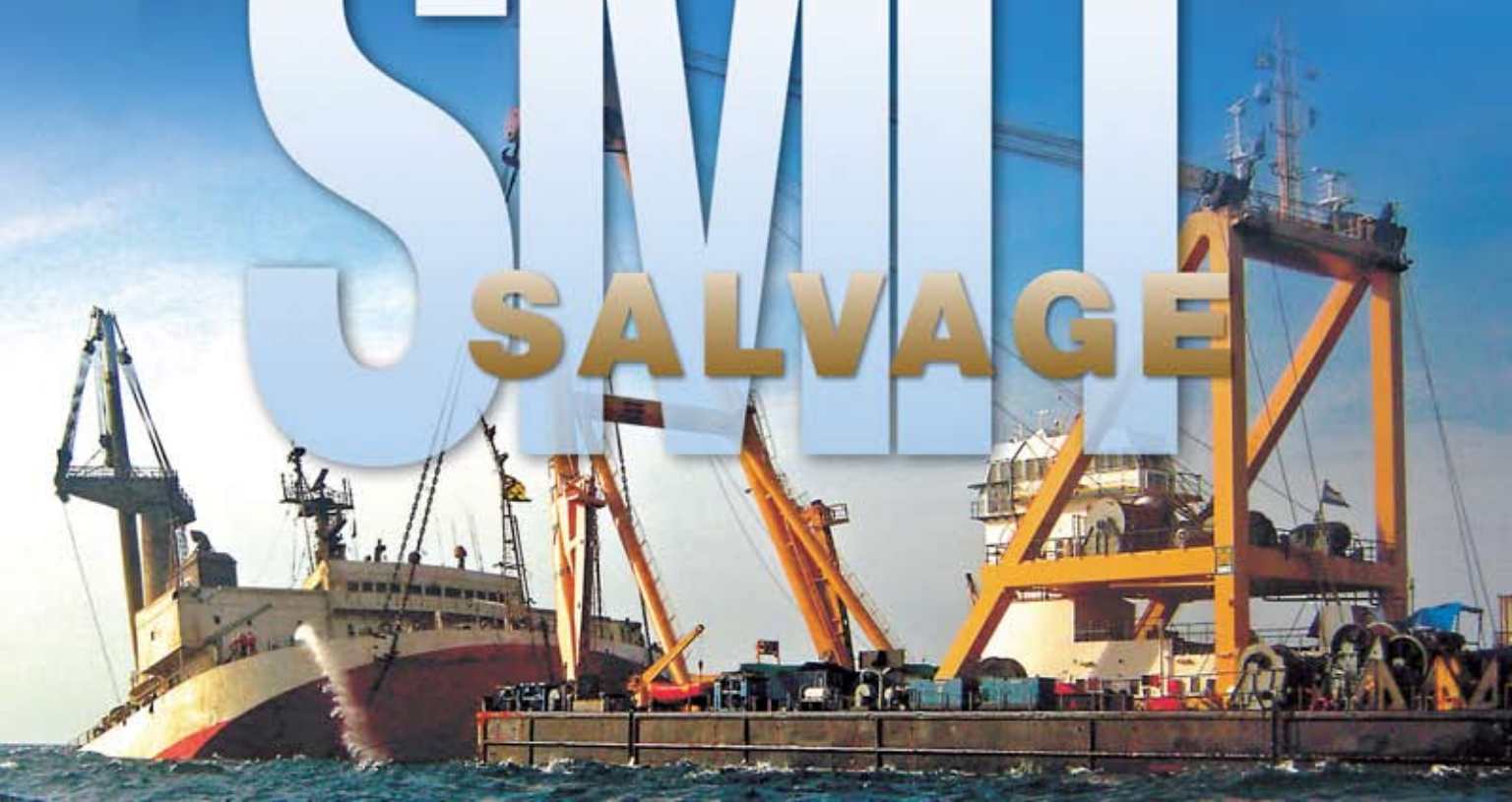
➤ **Captain Douglas Martin**  
President & General Manager  
SMIT Salvage Americas



➤ **Caspar Domstorff**  
Director  
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# SMIT

## SALVAGE



# The MARITIME EXECUTIVE

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# Contents

## 26 Case Study:

### SMIT Salvage

*MarEx* takes an intimate look at one of the world's oldest and most recognizable maritime brand names.

BY JOSEPH KEEFE

## 32 Executive Interview:

### Caspar Domstorff & Douglas Martin

A Conversation With the Director SMIT Salvage, Caspar Domstorff, and the President & General Manager, SMIT Salvage Americas, Douglas Martin.

BY JOSEPH KEEFE

### 11 | Bunker Profile

Todd McKenna, Partner,  
Glander International Inc.

BY MAREX STAFF

### 40 | Maritime Claims

Phil Brickman on the complex issue of obtaining security for....

BY PHILIP C. BRICKMAN

### 44 | Protecting the Supply Chain

World commerce will continue despite the threat of...

BY GORDON FELLER

### 48 | Silent but Deadly Undersea Threat: Four Billion Gallons of Oil

BY JOSEPH KEEFE

### 56 | Deck Machinery Directory

Find the right company to fit your machinery needs.

### Executive Achievement

#### 8 | Joseph E. Farrell

Founder & President,  
Resolve Marine Group, Inc.

BY MAREX STAFF

### Washington Insider

#### 13 | Cosco Busan Guilty Plea Highlights Complacency and Bolsters the Case for Reform

On August 13, 2009, the ship manager of the *Cosco Busan*...

BY LARRY KIERN

### MarEx OP-ED

#### 18 | Security & Defense

Shipboard Security and Vessel Defense

BY CAPTAIN JEFFREY L. KUHLMAN

### Upgrades and Downgrades

#### 22 | When Will Tanker Stocks Rebound?

Earnings Touched Bottom in the Second Quarter. The Third Quarter Could Be Worse.

BY JACK O'CONNELL

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# Washington Insider

## **Cosco Busan Guilty Plea Highlights Complacency and Bolsters the Case for Reform**

ON AUGUST 13, 2009, the ship manager of the *Cosco Busan*, Fleet Management Ltd. of Hong Kong, pleaded guilty in federal court in San Francisco and accepted responsibility for the costly oil spill that polluted San Francisco Bay on November 7, 2007. Details disclosed in the company's factual statement accompanying its plea agreement and the terms of the rigorous compliance program tell a cautionary tale and bolster the need for key marine safety reforms pending before Congress.

### **The Guilty Plea**

Following almost two years of legal wrangling with prosecutors, Fleet Management found itself boxed in and pleaded guilty to two felony charges for false statements and obstruction of justice and a misdemeanor charge for negligent oil pollution in violation of the Clean Water Act. The company agreed to pay \$10 million in monetary penalties and to implement an "enhanced" compliance plan (ECP).

Fleet Management admitted fault because it failed to provide adequate training to the ship's new captain and crew, who under the circumstances should never have gotten the vessel underway in the dense fog in the first place. They also failed to properly monitor the pilot's naviga-

tion and misdirected him into the bridge tower. The pilot was previously sentenced to 10 months in federal prison after pleading guilty to misdemeanor charges of oil pollution causing the deaths of migratory birds. Importantly, Fleet Management also admitted to obstructing justice and lying to the Coast Guard investigators after the incident.

### **A Cautionary Tale of Mismanagement**

The company's factual statement highlights its multiple material failures to ensure fundamental safe manning and navigation practices. Two weeks before the incident, the company changed out the entire crew without providing for a proper turnover. Only one crewman, the third officer, previously served on the vessel and worked for the company. The company provided the new crew no training on the critical navigational equipment and bridge management procedures for the vessel. Although the company initially assigned a deck superintendent with the new master and crew, he failed to verify that they were competent and skilled at operating navigational equipment and that they were complying with the company's safety management system for navigation.

On the morning of the incident,

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the vessel's master failed to exercise proper independent professional judgment in the interest of safety and simply deferred to the pilot's opinion that the vessel should proceed despite the dense fog. According to the master, "he was concerned that if he caused an unwarranted delay in the ship's departure and resulting expenses that he could suffer adverse personal consequences." The master also failed to ensure that there was a proper navigational passage plan, including proper briefing and discussion with the navigational team before getting underway. Once underway, the master and crew left the vessel's navigation to the pilot. They failed to perform the most basic navigational tasks, including taking fixes, monitoring the vessel's progress, and warning of hazards. Then, to make matters worse, the master and pilot failed to communicate clearly about the location of the bridge tower – the critical object to avoid -- and the master directed the pilot right into it. This performance demonstrated both an astonishing level of complacency and a remarkable absence of situational awareness.

Moreover, as a practical matter the Coast Guard failed to perform its basic marine safety responsibilities. According to the National Transportation Safety Board investigation, the agency failed to provide proper medical oversight to the licensed pilot and unambiguous information to the vessel about its proximity to the bridge tower. Thus, important systemic government safeguards were absent.

The company's statement further admits that immediately after the incident its key personnel lied to the Coast Guard and obstructed justice by presenting falsified navigation charts showing fixes that were never taken. "[I]n the month following the incident while the crew remained aboard the vessel, company representatives, including two of its superintendents, the master, and other ship's

officers, concealed ship records and created materially false, fictitious, and forged documents . . . including multiple berth to berth passage plans." No doubt this lying and obstruction of justice explain the heavy fine and the third-party oversight ordered in this case.

### The "Enhanced" Compliance Plan

As part of the plea agreement, the company consented to ECP terms aimed principally at ensuring safe navigation. First, the company must designate a "senior corporate officer" as the "Corporate Compliance Manager," charged with responsibility to "assure compliance" and "supplied with funds, support staff, and other resources . . . necessary to implement the ECP." Second, the company must communicate to its personnel its "commitment to navigational safety" and "transparency in audits" while taking appropriate action, including dismissal, against employees hindering the plan. Third, the company must submit to additional audits by an independent third-party and reviewed by a court-appointed monitor. Fourth, the ECP mandates specific training programs aimed at key aspects of the company's operation that failed, including command orientation, safety management, and the operation of electronic navigation equipment. Finally, the ECP requires specific certification and documentation of key navigational operations, including voyage planning and master-pilot communication and planning.

The failure of our nation's marine safety system to prevent the *Cosco Busan* incident illustrates that the existing safety management regime remains inadequate when a company treats it as simply a *paper* exercise and does not *verify* real compliance. Systemic failures like this underscore the pressing need for legislative reforms, such as measures pending before the

Congress, to mandate double-hulled fuel tanks, improvements to the Coast Guard's vessel traffic systems, and real medical review for fitness of Coast Guard-licensed pilots to provide additional layers of safety.

### Coast Guard Wades Into the Ballast Water Debate

As if there weren't already enough ballast water regulations in the United States, the U.S. Coast Guard has belatedly reentered the regulatory quagmire. This year, as a result of the regulatory actions of key maritime states (California, New York and Michigan), allowed by the Clean Water Act, the Coast Guard's longstanding ballast water exchange regime fails to provide uniformity.

Faced with its own irrelevancy on such a key issue and the arrival of the environmentally proactive Obama Administration, the Coast Guard has issued a new proposed rule, which would adopt the short-term standards set by the International Maritime Organization (IMO) and employ ambitious technology-forcing standards long advocated by environmentalists to stimulate the development of new ballast water treatment systems.

As recently as December 2008, the EPA emphatically rejected ballast water treatment systems in promulgating its Vessel General Permit (VGP) under the Clean Water Act. Following an exhaustive review of all the public comments, EPA concluded that "treatment technologies that effectively reduce viable living organisms in a manner that is safe, reliable, and demonstrated to work onboard vessels are not yet commercially available." Recounting its review of multiple scientific studies, EPA emphasized that "[b]ased on an evaluation of such studies, requiring a numeric effluent limit for the discharge of living organisms is not practicable, achievable, or available at this time."

The Coast Guard charted a different course. It emphasized that

ballast water treatment technology has been approved by the IMO and other governments that achieves the *de facto* short-term IMO standard, which it believes constitutes a significant improvement over the existing ballast water exchange regime. Thus, the Coast Guard's notice differs from the EPA's conclusion and is surely the result of a change in executive branch leadership, not science. What will prove challenging, even for the Obama Administration, is the Coast Guard's proposal to adopt a "phase-two standard . . . that is potentially 1,000 times more stringent."

The Coast Guard notice acknowledges that its proposed phase-two standard mirrors the U.S.'s position before the IMO and "the more stringent standard established by several states" under the Clean Water Act. Therefore, having adopted the technology-forcing strategy, the outcome will ultimately turn on what is both technologically achievable and practical. Simply put, the proposed rule would set a deadline for vessels built before 2012 to meet the existing IMO standard by 2014-2016 depending on ballast water capacity. The Coast Guard would mandate phase-two compliance by a vessel's first drydocking in 2016 unless a

vessel has complied with phase one, in which case it would have five years to bring its system up to phase-two compliance.

Whether or not the more demanding phase-two standard will apply turns on the Coast Guard's practicality review scheduled for 2013. The importance of this review cannot be overstated, especially considering the industry's sad experience with the flawed and impractical oily water-separator technology imposed by the MARPOL Annex I regime.

The Obama Administration should coordinate this process by formally involving both the Coast Guard and the EPA so that the maritime industry does not face differing answers from each agency. It makes little sense for the Coast Guard to conduct this exercise only to have the EPA use its Clean Water Act authority to promulgate different standards. Moreover, if the Obama Administration could provide a unified position on the implementation of technology-forcing standards by 2013 based on systems that are practical, then key states that have unilaterally pressed for tougher standards might accede to the federal position. The result would be to restore greater uniformity to ballast water regulation in the United States.

## Outlook

Considering the new political reality in Washington, D.C., the maritime industry must redouble its efforts to verify compliance with safety and environmental standards. Otherwise, more embarrassing incidents may follow, thereby further damaging the industry's reputation, even if the criticism is unwarranted. Additionally, the industry should engage proactively to constructively shape new regulatory programs, like ballast water treatment, so that those systems are practical and compliance can be readily achieved. Needless to say, practical solutions remain essential to compliance.

MarEx



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