When a vessel is detained in the U.S. on suspicion of a MARPOL violation, the general practice of the U.S. Coast Guard is to require, as a condition to release of the vessel, the owner to "retain" in the U.S., at its expense, crew members who may be material witnesses pending the conclusion of the investigation and possible prosecution. The obligation is contained in an Agreement for Security.

If the Coast Guard believes that it has a reasonable basis to suspect that a MARPOL violation has occurred, the vessel and its crew can be detained in port pending completion of the investigative and criminal process by the U.S. Justice Department. The vessel owner is under huge commercial pressure to obtain the release of its vessel. The Coast Guard has authority to grant the vessel clearance "upon the filing of a bond or other surety satisfactory." This language has been interpreted by the Coast Guard to allow the imposition of conditions for the release of the vessel in addition to the posting of a surety bond, including the owner's agreement to retain designated crew members ashore at the shipowner's expense.

A form of Agreement on Security has been developed by the Coast Guard. Under the terms of the Agreement, the vessel owner is required to post a bond with a surety satisfactory to the United States, designate an agent for service of process and to make an appearance in any criminal action against the owner and to defend the vessel in rem, cooperate in the collection of documents, facilitate the interview of the vessel's officers and crew and, finally, to retain certain members of the crew in the U.S. by continuing their employment and providing lodging and meals during their retention.

While there is no express statutory or regulatory provision allowing for the "retention" of witnesses pending the completion of a criminal prosecution under an Agreement for Security, the authority to detain the vessel and to detain crew members who may be material witnesses, coupled with the authority to grant clearance upon the posting of satisfactory surety supports the contractual imposition on the ship owner of the obligation to "retain" members of the vessel's crew as a condition for the release of the vessel from detention.

Ironically, the Agreement is a useful device for both the Government and the ship owner. The Coast Guard and the Department of Justice need the cooperation of the vessel owner and to retain the members of crew with knowledge to ensure their availability as witnesses. The vessel owner is under pressure to meet the vessel's cargo commitments and cannot afford to have a vessel detained indefinitely. The Agreement allows for the release of the vessel in exchange for the owner's agreement to "retain" crew witnesses and provide a certain level of cooperation with the Government's investigation.

While the ship owner bears the financial burden of retaining a portion of the crew ashore, it is the retained crew who are placed in virtual house arrest far from home and family. While they remain on the payroll, the crews' passports are taken from them, effectively preventing their departure. It is difficult for the vessel owner to have direct contact with the detained crew members - there is the risk of being accused of witness tampering. For this and other reasons it is necessary for the vessel owner to engage separate counsel for the "retained" crew and engage an agent to see to their care to prevent the crew from believing that they have been abandoned by the owner.

There are virtually no cases dealing with the enforceability of Agreements for Security and given the realities of the situation, it is unlikely that their enforceability can be effectively challenged. A serious challenge to the Government's authority to force the retention of crew members exposes them to the possibility to being held in jail as material witnesses and treated as if they were criminals awaiting trial.

Unfortunately, it is in the Government's interest to prolong the period of detention, sometimes approaching a year, using the time to pressure crew members through aggressive interrogation and offers of immunity from prosecution to obtain testimony against the owner. In anticipation of such delaying tactics, some defense attorneys have made efforts to negotiate a limit to the period of "retention." However, it is not clear whether such a time limit will lead to the repatriation of the retained crew when the period has expired or force the Government to hold the crew for the period as material witnesses (see above) until the investigation and prosecution is completed or to rush to indictment. Cases based on uncorroborated whistleblower testimony are particularly difficult as the Government will delay while it seeks to obtain corroborative testimony. In such cases, there can be little doubt that the Government would detain the crew as material witnesses even after the time limit had expired if it thought it would change the testimony of a stubborn witness. In other words, the retained crew members are pawns in an elaborate chess game between the Government and the owner's defense counsel.

And so what is the vessel owner to do? There is really no acceptable alternative option to an Agreement for Security and the concomitant agreement to "retain" members of the vessel's crew, given the commercial realities. Each situation is different and, depending on the strength of the case against the vessel owner, different approaches will be taken upon the advice of criminal counsel regarding the level of cooperation the owner will provide and the amount of pressure it will assert to obtain the release of its crew.

With thanks to Patrick Cooney of Royston Razor for preparing this article.