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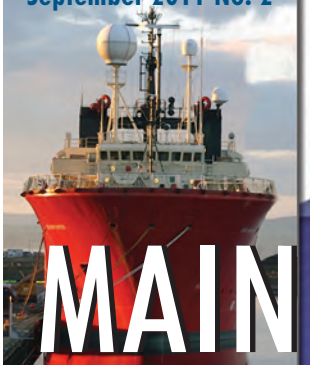

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Changing Tides in Asia—Accessing the Financial Markets

BY CONOR T. WARDE AND KRISTI LYNN SWARTZ

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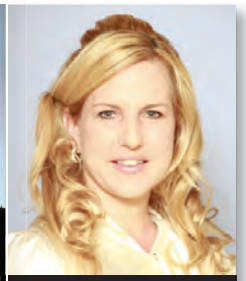

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From a tiny fishing village and colonial trading port of tea, Hong Kong has transformed itself into, and is well established as, a global maritime and financial hub. Hundreds of thousands of vessels make port calls in Hong Kong each year, making it one of the world's largest and busiest ports. Besides being a major shipping hub, Hong Kong also is a vital capital market for companies seeking to raise funds. In the first half of 2011 alone, Hong Kong initial public offerings ("IPOs") accounted for US$23.6 billion in fund raising.

Among the available financing options, some of the largest shipping companies have undertaken or considered public listings on exchanges in Hong Kong, Singapore, New York, and elsewhere for their fleet expansions. A public listing is and will remain an attractive option to some, but private equity, especially for those with investments and operations in Asia, is proving to be an increasingly desirable alternative for shipping companies looking to grow their businesses. With the slowdown in the IPO market and recent market instability, this trend is likely to continue.

"Going Public"

Many factors have contributed to the rise of public offerings in the last number of years, but at the most basic level a company decides to "go public" because of (1) the ability to raise additional funds, (2) the impact it has on the company's internal operations and energy, and (3) increased visibility in the industry.

When choosing to list on an exchange, a company must carefully consider the market in which it wishes to be listed. New York has for a number of years been the marketplace of choice for shipping companies, but an increasing number of bankers and financial advisors have suggested that Hong Kong offers the most suitable market for shipping companies because the city is in the views of many the "nerve center" of the shipping industry, given its central location in Asia, and because of its strong financial, accounting, and legal industries that support the shipping industry.

Hong Kong is now the seventh largest exchange in the world by market capitalization and continues to be a key market for Chinese companies. In the first half of 2011, there were 48 IPOs by Chinese companies alone in Hong Kong.

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In addition to the free trade agreement between Hong Kong and mainland China, Chinese Vice Premier Li Keqiang recently expressed the mutual importance of Hong Kong and mainland China to each other by stating that, among other initiatives, the Chinese government will encourage mainland-based enterprises to list in Hong Kong and will enable Chinese investors to invest in an exchange traded fund constituted by Hong Kong listed stocks. Companies seeking exposure to the rapidly growing Chinese market are well positioned to take advantage of such opportunities by going public in Hong Kong.

Nevertheless, the burdens and challenges of "going public" are not insignificant. The expenses of an IPO can be substantial. Significant reorganizations of a company's corporate and capital structures may be required before the offering. The listing requirements can also be quite stringent and the post-offering duties of a public company can be demanding for even the most well managed companies.

Private Equity on the Map

Despite the advantages of going public, IPOs by shipping companies have been anemic for the past 18 months worldwide. In the absence of IPOs, the shipping industry must look

to alternative sources or return to traditional financing options, such as the banks. However, the global credit crunch has limited the ability and desire of banks to lend as freely as in the past to shipping companies. Private equity may help fill the funding shortfall in the shipping industry, which some analysts have estimated to be as high as $30 billion over the next three years.

One key benefit of private equity is a more streamlined management structure with a better flow of information. A private equity-backed company often finds it easier to align the interests of managers and owners because there are fewer investors overall and the private equity investors usually have a better intimate understanding of the operations of the company. By contrast, a public company often invests significant amounts of time in communicating to a diverse group of shareholders and addressing potential conflicts between these shareholders and the management, as well as ensuring compliance with the various regulatory requirements imposed upon the company. Private equity funded companies are also not subject to the majority of the reporting or corporate governance arrangements of listed companies. The executives can more readily focus on the strategy of the business rather than on reporting requirements. An additional benefit is that when the private equity firm decides either to sell the company or bring it public in the future, investors are more likely to have confidence in the internal financials of the company given that it has likely been subject already to thorough due diligence by the private equity firm.

One of the most commonly noted downsides of private equity funding is that private equity investors generally have short-term investment horizons. The average length of time that private equity investors own companies usually ranges from three to five years. Such an investment approach may lead to short term rather than long term planning and decision making. Management of these companies is often asked to focus on cutting programs and staffing levels that are deemed unnecessary or inefficient.

With all of this in mind, however, there is a growing trend of shipping companies seeking private equity funding and private equity firms continue to seek opportunities in the shipping industry in Asia and elsewhere. In one of the more recent and well publicized examples of this, The Carlyle Group, one of the world's largest private equity firms, formed a joint venture in March 2011 with Tiger Group Investments and others, including Seaspan Corporation, that will focus on bringing together Chinese shipbuilders, lenders, and state-owned companies to support China's desire to increase the amount of cargo it controls. This joint venture deal, on which Blank Rome served as maritime counsel to The Carlyle Group, will deploy $900 million in equity funding over the next five years to acquire $5 billion of containers, tanker vessels, and other shipping assets.

Shipping assets will continue to be attractive to private equity firms as the maritime industry expands to meet the demands, especially in Asia, for natural resources and goods. At the same time, shipping companies are attracted to private equity as the recent market turmoil casts doubt on the availability of public listings as an option for raising significant funds. The valuations offered by private equity firms are at least as strong, if not better than, what is available through a public offering at this time. Private equity funds may, for now, serve as a life preserver for the shipping industry and may also be a driving force in Hong Kong and elsewhere in Asia, at least for the immediate future.

Current Trends in MARPOL Enforcement—Higher Fines, More Jail Time, the Banning of Ships, and Whistleblowers Galore

BY JEANNE M. GRASSO AND GREGORY F. LINSIN

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The United States has been aggressively enforcing violations of the International Convention for the Prevention of Pollution from Ships ("MARPOL") for many years. Since the early 1990s, these prosecutions under the Act to Prevent Pollution From Ships ("APPS") have commonly involved bypasses of the oily water separator or discharges of sludge overboard, but very few of the cases in recent years have involved illegal discharges in U.S. waters. Rather, the cases now are based primarily on false entries in the Oil Record Book ("ORB"), coupled with post-incident conduct such as obstruction of justice and false statements made to the Coast Guard.

The United States does not appear to make any enforcement distinction between cases that involve serious pollution problems and those that represent isolated, comparatively minor deficiencies. Similarly, the United States seems unable or unwilling to differentiate between vessel owners and operators who have made good faith efforts to achieve MARPOL compliance within their fleets, and those companies that ignore their compliance responsibilities. Nearly every allegation of a MARPOL infraction results in a vigorous criminal investigation that extends for many months, during which time the crew members are required to remain in the United States, sometimes for more than a year, at the expense of the owner/operator. And almost every such investigation results in a substantial criminal prosecution. The international maritime community views this enforcement regime as heavy handed and detrimental to the goal of enhanced environmental compliance. The United States disagrees and has stated unequivocally that it will continue these enforcement actions until the illegal discharges stop.

Recent enforcement actions demonstrate an even more aggressive prosecutorial posture.

- In May 2010, rather than prosecuting criminally, the Coast Guard administratively banned a Norwegian-flag ship from U.S. ports for three years under the Ports and Waterways Safety Act ("PWSA"), and revoked its certificate of compliance. If, after one year, the vessel develops and successfully implements an environmental compliance program to the satisfaction of the Coast Guard, it may call on a U.S. port. The shipowner appealed this decision to Coast Guard Headquarters and, depending on the results of the administrative appeal, litigation is possible. This is the first time a ship has been administratively banned for an alleged MARPOL violation.
- Stanships Inc. and three related companies pled guilty (again) in April 2011 (it had pled guilty in a prior case in June 2010) to 32 felony counts for violations of APPS, the PWSA, and obstruction of justice. The companies were fined $1 million and prohibited from trading to the United States for five years. The person owning the companies is also banned from owning ships trading to the United States for five years. In the past, it has been rare to ban ships from trading to the United States and this is the first time an owner has been banned.

Both of these ship-banning cases were initiated by a whistleblower's report to the Coast Guard. In recent years, more than 50% of the new MARPOL cases stem from whistleblowers, likely because of the lucrative rewards the Department of Justice is requesting and courts are awarding under the APPS "bounty" provision, which can amount to as much as 50% of any penalty paid for APPS violations. These awards to whistleblowing crewmembers are commonly in the tens to hundreds of thousands of dollars range.

Unfortunately, because of the reward prospects, in many recent cases whistleblowers who have observed environmental compliance issues have simply ignored company policies that require such problems to be reported shoreside and, instead, secretly gather photographic and/or documentary information regarding the ongoing environmental violations and wait—often for months while the violations continue—to cash in on the information by disclosing it to the Coast Guard after the vessel arrives in a U.S. port. This serves to undermine the international conventions that were designed to deal with potential violations and thwarts a company's internal compliance efforts by depriving it of the ability to react in a timely and responsible manner to correct environmental deficiencies when they are first detected.

This "gaming of the system" undermines the effectiveness of the owner/operator's Safety Management System and represents a perversion of the public policy rationale for the APPS reward system. Crewmembers who engage in this type of intentional deception should not be eligible for monetary rewards under APPS.

It is a daunting management challenge to create and sustain a durable environmental compliance culture aboard commercial ships with rotating crews of many nationalities trading in ports throughout the world. For these reasons, many

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companies have dedicated increased resources to improving management practices designed to foster and enhance environmental compliance aboard their ships. These include: (1) enhanced compliance training, which is necessary in light of frequent crew rotations and the unpredictability of future vessel assignments; (2) establishment of an open reporting system, such as a hotline or anonymous electronic reporting option, so crewmembers can alert shoreside management of environmental deficiencies or violations aboard ship; (3) creation of an audit program, which may include an internal audit team and/or third-party auditors that conduct audits, sometimes on an unannounced basis, and ensure corrective actions; (4) better defining the duties of the superintendent during periodic shipboard visits as the superintendent has a greater ability than port state control inspectors to identify conditions in the engine room that raise environmental compliance issues; and (5) conducting internal investigations, either in-house or with outside counsel, if information is developed from any source that suggests an intentional MARPOL violation has occurred. Seizing the initiative in the development and management of such information can help to control the potential negative consequences of any identified MARPOL deficiency, while strengthening the company's overall environmental compliance program.

The MARPOL enforcement program in the United States over the past several years has significantly distorted the MARPOL compliance and enforcement regime that is embodied in the United Nations Convention on the Law of the Sea ("UNCLOS") and in the MARPOL Convention. Both UNCLOS and MARPOL vest primary responsibility for oversight of environmental compliance in the flag state. This is consistent with

the range of other oversight responsibilities under international conventions that are vested with the flag state, all of which flow logically from an Administration's comprehensive knowledge of and relationship with a vessel's owner/operator. While port and coastal states are authorized under both UNCLOS and MARPOL to perform port state control inspections or to investigate and consider enforcement actions for pollution events occurring in their territorial waters, under both conventions these functions are secondary to the primary environmental compliance assurance role reserved to the flag state.

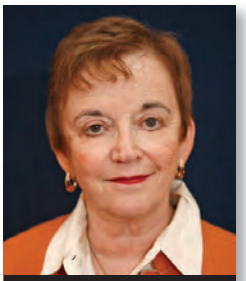
Early on, MARPOL enforcement cases brought by the United States were generally consistent with the international regulatory regime in that the cases brought against foreign-flag ships were based on discharges that occurred in U.S. territorial waters. Over the years, the scope of the United States' MARPOL enforcement program expanded to the point where it is now irrelevant where the illegal discharges occurred. The United States will simply proceed to prosecute the case criminally based on inaccurate ORB entries, and no consideration is given to referring the information concerning non-compliance to the vessel's flag state to permit the Administration to make an independent judgment regarding the appropriate enforcement response.

This distorted MARPOL enforcement pattern can and should be corrected. Vessel operators, working to identify MARPOL compliance issues themselves by utilizing the management techniques outlined above, will be in a better position to determine how and under what terms the compliance issue will be resolved. If information regarding a MARPOL violation is first obtained by the vessel's shoreside management, the owner/operator will be in a position to approach the Administration and develop a resolution based on the flag state's judgment concerning any required corrective action or, if warranted, appropriate enforcement response. This approach has the benefit of being consistent with the intended compliance assurance regime under MARPOL and UNCLOS and, for a number of reasons, would be far more likely to result in a balanced and measured resolution that would be advantageous to the vessel's owner/operator. Additionally, if corrective entries are thereafter made in the vessel's ORB, it would preclude subsequent enforcement action by the United States unless the discharges in question occurred in United States territorial waters.

The challenge of managing environmental compliance issues aboard vessels will only grow more difficult in the coming years. There are concrete steps that operators can take, though, as discussed above, to address these challenges intelligently and place themselves in a stronger position to manage the expanding enforcement risks.

Hope Springs Eternal for the U.S. to Finally Ratify the Law of the Sea Convention

BY JOAN M. BONDAREFF



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It has been widely reported that Senator John Kerry (D-MA), Chair of the Senate Foreign Relations Committee, is considering bringing up the long-dormant Law of the Sea Convention ("Convention") for a vote in this Congress. Of course, the Senator has tried this before and was not able to muster the 2/3 vote required for ratification. Will this year be any different?

As a reminder, the Convention was negotiated in 1982, and after its ratification by the requisite number of countries, went into effect in 1994. The U.S. signed the Convention but never ratified it, an action that requires a 2/3 vote of the U.S. Senate. President Reagan declined to support ratification in 1982 because of the seabed mining provisions in Part XI of the treaty, but instructed his agencies to comply with the rest of the treaty as a matter of customary international law—and that has been the position of the U.S. ever since. Subsequently, Part XI was renegotiated by the parties, and changes were made to satisfy U.S. concerns. Despite these modifications, the U.S. is still not a party to this major international treaty delineating rights and responsibilities to the oceans of the world and the resources that lie within.

Some things are different this year. For one, Senator Lisa Murkowski (R-AK), and Ranking Member on the Senate Energy and Natural Resources Committee, is actively supporting the treaty. This is no doubt due to the fact that Alaska and oil and gas interests may well stand to benefit from ratification and being able to claim larger portions of the outer continental shelf under the Arctic Ocean and adjacent to Alaska. As most readers know, the Arctic ice is melting and several nations, including Russia, are staking sovereignty claims to portions of the Arctic. But, the U.S. does not have a formal seat at the table of the Commission on the Limits of the Continental Shelf, a body established under the Law of the Sea Convention to review and certify claims. (*See* "Who Owns the Arctic?" N. Gronewold, *New York Times*, May 14, 2009.) The Commission is currently reviewing national claims to areas of the Arctic based on surveys conducted in the region. Interest in the resources under the Arctic Circle was greatly expanded when the U.S. Geological Survey, in 2008, released a study of undeveloped Arctic oil and gas resources. The study concluded that approximately 90 billion barrels of oil, 1669 trillion cubic feet of natural gas, and 44 billion barrels of natural gas liquids

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The Law of the Sea Convention (continued from page 5)

could be found there. (*See* "USGS Arctic Oil and Gas Report," July 2008, http://geology.com/usgs/arctic-oil-and-gas-report.shtml.)

Other factors that may promote support for the Convention include the growing incidents of piracy in the Indian Ocean, Sea of Aden, and Red Sea. (*See* "Attacks off the Somali coast drive piracy to record high, reports [the International Maritime Bureau]," www.icc-ccs.org.) The U.S. Navy has to patrol these waters for this and other reasons, and the Navy has been a long-time supporter of the Convention for purposes of securing U.S. transit rights through international waters and straits.

The advance of oil and gas drilling into deeper waters, and the beginnings of a deep seabed mining industry, also could promote the ratification of the Convention. U.S. claims to sovereign rights over the 200-mile Exclusive Economic Zone ("EEZ") and Outer Continental Shelf ("OCS") are currently based on customary international law. Customary international law consists of "rules of law derived from the consistent conduct of nation states acting out of the belief that the law required them to act that way," but nothing in customary international law is immutable and the conduct of nations can change over time. (*See* "Practices and Methods of International Law," S. Rosenne, *New York: Oceana,* 1984.) These claims can only be fully secured with a basis in treaty rights.

Claims over deep seabed minerals can only be resolved in an international forum such as the International Seabed Authority ("ISA"), headquartered in Jamaica. The U.S. and other companies have begun to show interest in recovering these minerals—perhaps the last frontier on earth. But, the U.S., once again, has no official voice at the ISA. Recently, the ISA approved four applications for exploratory contracts. The counties involved are China, Russia, Nauru, and Tonga.

Finally, the current Obama Administration plans to develop coastal and marine spatial plans for the waters and resources of the EEZ can also be enhanced with the adoption of the Convention since any resulting claims to new resources of the EEZ are only based in customary international law as opposed to treaty rights.

While the Bush and Obama Administrations have both supported U.S. ratification of the treaty, and the last vote in the Senate Foreign Relations Committee was 17-4 in support of ratification, there continues to be a strong vocal minority opposed to the Convention. This opposition may well impede Senator Kerry's plans to get 67 votes for the Convention if and when the treaty goes to the Senate Floor.

Opposition to the Law of the Sea treaty is reflected in the views of the Heritage Foundation and other conservative organizations. (*See* "U.N. sea treaty still a bad deal for U.S.", Kim R. Holmes, Ph.D, pub. July 14, 2011, on the website of the Heritage Foundation at www.heritage.org.) Their principal objection is that the U.S. will lose rights, including sovereign claims to OCS resources, if it joins the Treaty. Other conservatives are simply opposed to the U.S. joining any new international organizations.

These fears are largely refuted in a book produced by a coalition of industry and environmental groups, entitled, "Law of the Sea Briefing Book," and published at www.globalsolutions.org. The book takes each "myth" offered by the treaty's opponents and refutes it. For example, the publication explains how the treaty actually *increases* U.S. sovereignty over resources of a 12-mile territorial sea, a 200-mile EEZ, and offshore resources, including minerals, to the outer edge of the continental margin, which extends up to 600 miles off Alaska. The book also refutes the claim that customary international law is an adequate basis for securing navigational rights: "The Convention provides clear legal rules in a written treaty, as opposed to reliance on customary international law, which is too easily challenged by unilateral claims of other countries and changed by the practice of countries over time." (*Briefing Book* at 15.)

At the end of the day, whether the U.S. finally ratifies the Law of the Sea Convention is a matter of political will, the efforts of Senators Kerry and Murkowski to persuade their respective caucuses of its benefits, and, ultimately, the availability of adequate Floor time given other pressing matters on the U.S. Senate calendar.

Preserving Electronic Navigation Evidence

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When a casualty occurs, litigation almost inevitably follows. For this reason, it is critical that, following a casualty, vessel owners and operators act quickly to determine what electronic navigation data exists and how it can be preserved. In the United States, vessel owners have an affirmative duty to preserve electronic evidence that may be relevant to pending or anticipated litigation. Just as important, however, the wealth of electronic data created by modern navigation systems can greatly assist an owner's presentation and proof of its claims or defenses.

Courts in the United States have made it clear that unique electronic data, such as that created by navigation systems, must be preserved if it could be relevant in litigation. This duty to preserve extends not only to evidence relevant to pending litigation, but also to evidence that could be relevant to litigation that is reasonably foreseeable in the future. This duty also may be imposed by flag-state requirements such as the IMO's "Guidelines on Voyage Data Recorder ("VDR") Ownership and Recovery," which requires that "the owner must be responsible, through its on-board standing orders, for ensuring the timely preservation of this evidence." In a marine casualty, assume that litigation is likely; thus, any relevant records must be preserved.

At the same time, U.S. courts take a dim view of the alteration of vessel records. When alterations occur, courts are likely to presume that the original records would have been harmful to the owner's position. Even if alterations are admitted and not relied on, the fact that they were made could be a factor in apportioning liability for the casualty.

There can be no doubt that the duty imposed on a vessel owner to preserve a vessel's electronic records is a serious one. A party can expose itself to civil or criminal sanctions and can severely jeopardize its litigation position where its employees or agents alter ship's records or knowingly fail to preserve electronic evidence. Under some circumstances, even the negligent failure to take adequate steps to preserve electronic evidence can result in sanctions.

Sanctions for what is known as "spoliation" can include outright dismissal or the entry of judgment against the responsible party, a judicial presumption that the lost or destroyed records would have been harmful to the owner's position, the exclusion of other evidence or testimony, or an award of costs or other financial sanctions. If the casualty involves a criminal or other government investigation, such as commonly occurs when a casualty involves an oil spill, evidence spoliation can result in criminal sanctions such as a felony prosecution, even in the absence of any other criminal wrongdoing.

Aside from the legal obligation to preserve electronic evidence, such evidence is very often helpful to an owner's case. It is not uncommon for the officers and crews of vessels, traditionally loyal to their ship, to give irreconcilable statements with respect to their actions, courses, and speeds preceding a collision or grounding. Courts attempting to reconstruct such casualties and resolve such discrepancies traditionally used paper records. Electronic navigation systems, however, can foreclose these typical disputes.

GPS, radar/ARPA, AIS, ECDIS, and VDS usually record highly relevant data. But obtaining and preserving that data is a common problem. Some data is automatically preserved. But some data is retained only until it is overwritten with new data. For example, GPS positional data may be retained in memory for only the last 24 or 48 hours before it is overwritten.

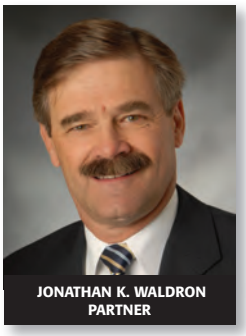
Following a casualty, owners must take immediate affirmative steps to ensure that records from electronic navigation systems are preserved. This may require preserving both the electronic records themselves and the archives in case they contain additional relevant data.

Prior planning for electronic data collection following a casualty can help avoid spoliation questions. Owners should consider making data collection plans part of their casualty response procedures and training their vessel crew in electronic data recovery. Otherwise, quick action may be needed to engage a technician or expert knowledgeable about what information exists and how to retrieve it. It is important to keep in mind that post-casualty data management and recovery procedures will be scrutinized by adversaries and government investigators and that lost data will generate unwelcome questions about spoliation or obstruction.

Data collection plans should also include the possibility of recovering data from third-parties, such as shore stations or other vessels in the area. Although third-parties not involved in the casualty have no obligation to preserve evidence, prior planning and quick action may succeed in retrieving their electronic evidence, which can often be relevant and helpful.

Deepwater Horizon Good Samaritans Stuck in Litigation

BY JONATHAN K. WALDRON



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Immediately following the explosion on the *Deepwater Horizon,* emergency response vessels rushed to the rig to save lives and render assistance to those in peril. In the ensuing months, responder companies worked to clean up the oil that was pouring into the gulf in an effort to mitigate the spill. As a consequence of these efforts to help in the worst environmental disaster in U.S. history, these emergency and cleanup responders now find themselves entwined in complex and protracted specialized multi-district litigation ("MDL"), despite the fact that protections were put in place following lessons learned from the *Exxon Valdez* specifically to prevent such occurrences.

Background on the Good Samaritan Law under the Oil Pollution Act of 1990 ("OPA 90")

Following the *Exxon Valdez* incident in 1989, Congress included a responder immunity provision in OPA 90 to protect from liability those individuals or corporations who provide care, assistance, or advice in mitigating the effects of an oil spill. As detailed in the OPA 90 Conference Report, Congress intended that responses to oil spills be immediate and effective, and noted that, without such a provision, the substantial financial risks and liability exposures associated with spill response could deter a prompt, aggressive response.

This immunity does not prevent any injured party from recovering its full damages resulting from the spill incident, as OPA 90 provides that the responsible party ("RP") is liable for any of the removal costs or damages that a responder is relieved of pursuant to this immunity consistent with the OPA 90 "polluter pays" principle. This immunity does not apply if a responder acts with gross negligence or willful misconduct, or in cases involving personal injury or wrongful death.

Litigation against Good Samaritans as a Result of the *Deepwater Horizon* Incident

Following the *Deepwater Horizon* incident on April 20, 2010—which resulted in 11 deaths, injuries to 17 men working on the platform, the discharge of approximately five million barrels of oil, and required thousands of responders to work several months to contain and clean up under the challenging conditions—numerous claims and lawsuits were filed. Unfortunately, the OPA 90 standard specific to responders has proven inadequate to protect responders from becoming entwined in such suits. In these cases, plaintiffs have thus far been successful in maintaining their actions simply by alleging gross negligence (without providing any supporting facts), and by asserting "exposure" claims resulting from alleged exposure to released oil or from approved dispersants used to treat that oil as personal injury claims falling outside the scope of the specific responder immunity provisions.

Following the filing of hundreds of law suits, it was decided to consolidate all of the complaints under a special MDL procedure designed to speed the process of handling complex cases, such as air disaster litigation or complex product liability suits. MDL cases are civil actions involving one or more common questions of fact pending in different districts. With a goal to efficiently process cases that could involve an extremely large number of plaintiffs in many different federal courts which all share common issues, a Judicial Panel on Multidistrict Litigation decides whether cases should be consolidated under MDL and where to transfer the cases. The *Deepwater Horizon* litigation was consolidated in the Eastern District Court of Louisiana before Judge Barbier.

For the *Deepwater Horizon* MDL, the cases have been catalogued into pleading bundles called Master Complaints under various categories. One of the Master Complaint bundles named as defendants all the parties involved in the post-explosion response actions, which includes the manufacturer of the dispersants used, the companies providing the aircraft spraying dispersants, the contractors leading the incident command for BP, as well as the nation's two leading oil spill response contractors. This complaint alleges various torts causing personal injury as a result of exposure to oil and/or dispersants and damages to personal and real property as a result of dispersants or oil coming into contact with such property. A separate Master Complaint bundle named as defendants all the owners and/or operators of the rescue vessels that answered the *Deepwater Horizon* distress call and responded to the fire emergency after the explosion.

Due to the complexity of the MDL, the litigation is expected to last for years. Substantial time is being spent in discovery and motions, and the priority of the litigation is mainly and naturally focused on the complaints directly against the RPs. Court activity related to the responders is for the most part being deferred in order to deal with the direct actions against the RPs. As a result, the responders will incur millions of dollars in attorneys' fees and other costs in defending these suits—money that could otherwise have been spent on new equipment or in enhancing the nation's ability to respond to oil spills.

These actions against the Good Samaritans are troubling because the OPA 90 immunity regime is intended to protect responders from extensive and costly litigation and potential liability. Although the responders have argued for immunity and preemption against liability as it relates to the *Deepwater Horizon* claims asserted against them in the current litigation,

these defenses are proving to be time consuming and expensive to assert, and there is no consequence to the plaintiffs for bringing claims against the responders, even when they have full recourse against the RP.

Formation of Coalition to Improve Good Samaritan Protections

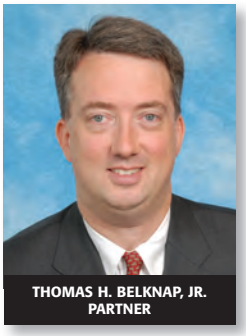
Absent enhanced liability protections, it is unlikely that responders will again take such immediate and bold response actions at the time of spill incidents. Indeed, as a result of this incident, responders are requiring extra layers of indemnification as well as seeking detailed directions and approvals from government officials before taking any response actions. These types of action are not in the overall public interest and are inconsistent with the overall intent of OPA to encourage a prompt and aggressive response to minimize damage to the greatest extent practicable.

Currently, there is a strong initiative underway to represent the overall common interests of the response industry through the formation of a coalition to seek enhanced legislation to fill the immunity gaps identified as a result of the *Deepwater Horizon* incident. This coalition broadly represents interests related to emergency lifesaving and firefighting, salvage, oil well containment, spill response, dispersants, and spill management. A legislative solution is particularly important as these entities constitute the first responders to both the casualty itself and the resulting oil spill, and their response must be immediate and without hesitation for fear of liability.

Proposed legislation is being crafted and will be introduced in Congress in the near future following the return of Congress from the summer recess. Of course, Congress will have a number of priorities to combat when it returns, including war related issues, the economy, and the nation's deficit. As a result, it is unclear when Congress will turn to maritime, including spill related, legislation. When it does, however, it is imperative that the maritime industry rallies around this response industry coalition initiative to ensure enactment of "Good Samaritan" enhancements as quickly as possible. Hopefully, based on lessons learned from *Deepwater Horizon,* we can make sure our nation's response industry has the necessary tools in its tool kit, including a liability regime with a properly enhanced immunity protection necessary to foster the aggressive and immediate response we will need for the next major spill incident.

Should U.S. Courts Exercise Jurisdiction in Treasure Salvage Cases where the Wreck is Located in International Waters?

BY THOMAS H. BELKNAP, JR.



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The term "treasure salvage" has a tendency to conjure romantic images of pirates and adventurers. Not, I might add, of modern day pirates, who are widely acknowledged to be unromantic thugs and scoundrels, but rather those of the old story books, of whom time and fiction writers have been more forgiving. In these stories, "x" marks the spot and the hero follows obscure and cryptic clues in a wild adventure to the long-lost chest of gold in the abandoned sunken shipwreck, keeping it all for himself and living happily ever after.

Just to define our term, by "treasure salvage" we mean the subsea exploration and recovery of artifacts from sunken vessels that are believed (or, more often, hoped) to be of historical or monetary significance. Successful treasure salvage has always required mastery of the combined disciplines of historical research and subsea exploration and recovery, and in real life, of course, it has always involved long hours and a lot of disappointment.

As in many areas, technology has been the driver of change. Subsea exploration that was impossible just twenty years ago is now practically routine. Modern satellite positioning capabilities are precise to a degree that was only recently inconceivable. Data analysis and computer modeling capabilities are exponentially more sophisticated, and are expanding rapidly with each passing year. Historical research and information is more widely available and accessible thanks to the internet. Successful treasure salvage, in other words, has become increasingly a product of investment and hard work rather than a game of chance.

The result of these changes is that sunken shipwrecks that were once assumed to be lost forever are increasingly being found. In addition to the "rogue" salvors who have traditionally engaged in the treasure salvage business, sophisticated publicly traded companies have entered the scene in recent years and have applied considerable funding and efforts towards seeking out newer and more dramatic discoveries. The discovery of the *TITANIC* in 1985 and of the sidewheel steamer *CENTRAL AMERICA* in 1987 are good examples of early high-profile discoveries, and more recently Odyssey Marine, a publicly traded company, discovered a shipwreck it nicknamed the "Black Swan," recovering over 500,000 silver coins weighing some 17 tons and hundreds of gold coins and worked gold. According to news reports, the estimated value of the recovered property in this case was about $500 million.

The United Nations estimates there are some 3 million shipwrecks on the ocean floor. Most, of course, are of no interest to treasure salvors; however, there are many undiscovered wrecks of substantial interest to subsea explorers. Of course, treasure salvors are only one subset of subsea explorers, and a perennial conflict exists between the interests of archaeologists and historians on the one hand, who are principally interested in collecting and preserving historical and culturally significant information, and treasure salvors on the other who, at least according to stereotype, are principally interested in recovering artifacts of value.

As it often occurs, the law has been forced to adapt to these technological developments, and the adjustment has not always been entirely smooth. Early treasure salvage cases tended to rely upon the maritime law of "finds" to hold that a party that recovered artifacts from an abandoned shipwreck was entitled to keep them. More recently, however, the courts have substantially favored applying maritime salvage law. In a nutshell, the difference is that under the law of finds the finder is considered to have title to the property once it obtains possession. Under the salvage law, by contrast, the salvor merely has a lien in the property and is deemed to be holding it in trust for the owner. It does not obtain title, but instead is entitled to a salvage award to reward it for recovering the property for the benefit of the owner. The salvage law presumes, in other words, that a property's owner did not intend to abandon the property merely because it was lost at sea.

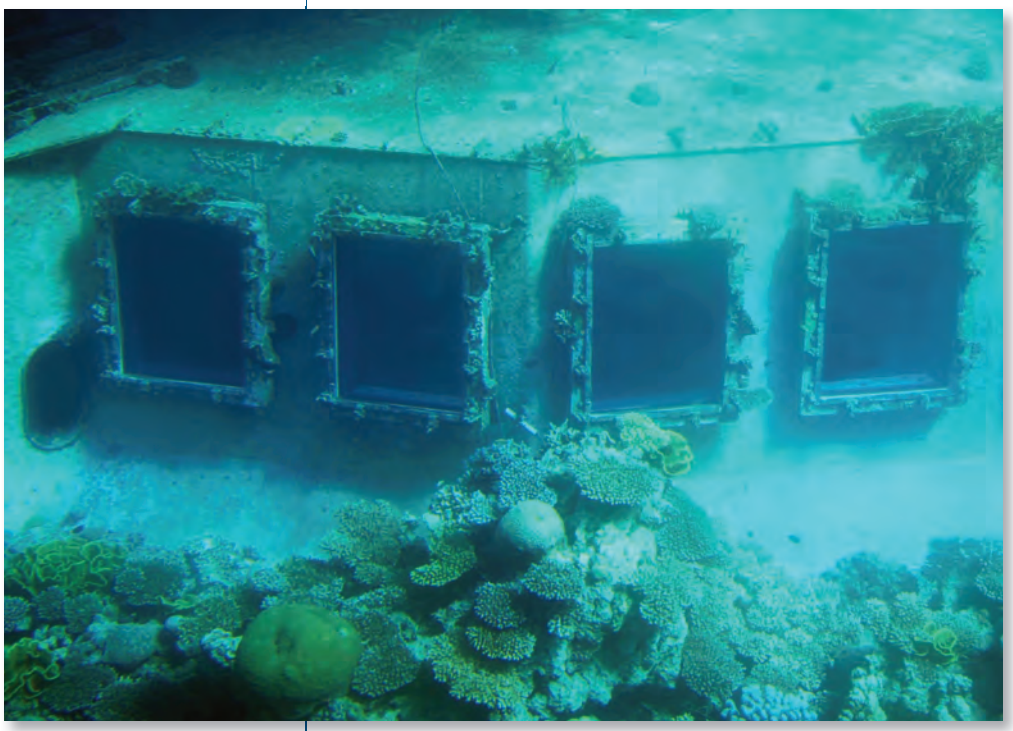
To enforce a salvage lien, the salvaged property must be arrested within the jurisdiction of a competent court or must otherwise be physically brought into the jurisdiction of the court. In the United States, the Federal District courts are vested with exclusive jurisdiction over maritime salvage claims. Once the property is within the jurisdiction of a competent court, that court may adjudicate the ownership and salvage interests in the property as against all potential claimants. This is based on its *in rem* jurisdiction over the property.

But what about a shipwreck sitting on the ocean floor in international waters? What law applies? And what court has jurisdiction? Or, indeed, should any court have jurisdiction?

This issue was at the fore in the litigation concerning the *TITANIC,* which has reached the Fourth Circuit Court of Appeals on three separate occasions. In those decisions, the Fourth Circuit confirmed the view that the law of salvage should ordinarily prevail over the law of finds in this context. It also concluded that the law of salvage was so universal and well accepted that it constituted, in essence, the general maritime law of nations that should—and would—be uniformly recognized in maritime jurisdictions around the world. Thus, a U.S. District Court may exercise "constructive *in rem* jurisdiction" over a shipwreck in international waters, so long as the salvor has managed to bring some small artifact from the wreck in to the jurisdiction.

Constructive *in rem* jurisdiction means, in essence, that a U.S. court may issue orders designating a party as "exclusive" salvor of a wreck and may issue orders to protect the wreck site from interference from others. It may also issue orders to protect archaeological or historical data that might otherwise be damaged or lost in the course of salvage operations. It may not, however, adjudicate ownership of the property, nor may it issue a salvage award in the property, until such time as the property is physically brought within the jurisdiction of the court. The premise for exercising such extra-territorial jurisdiction is that the law of salvage is so widely recognized that a foreign court would enforce an order of the U.S. court as part of the international general maritime law.

This premise may be a bit wishful: while it is unquestionably true that the law of salvage belongs to the ancient and revered maritime law, its application to confer some degree of jurisdiction over shipwrecks located in international waters is certainly a newer—and probably less universally recognized—phenomenon. And perhaps it begs the question: *should* salvage law allow a U.S. court to effectively extend its jurisdictional reach into international waters?



As a practical matter, it is difficult to see an alternative that allows the salvor its reward and yet also protects both the private interests of the original owner of the property and also the public interest of preserving sites of significant cultural or archaeological importance. Under the law of finds, the finder has the incentive to reduce found property to its possession at the earliest possible opportunity, because that is how it establishes its rights in the property. Under a strict salvage regime, on the other hand, the salvor would have a similar incentive to take and deliver possession of salved property into the custody of the court at the earliest possible opportunity so that it could perfect its claim for a salvage award. In either case, the recovering party would have a strong incentive to immediately recover found artifacts even at the expense of the integrity of the wreck site.

Under the constructive *in rem* approach, by contrast, the salvor can take a more methodical approach to salvaging the wreck: once it has done its preliminary investigation and has determined that it has found a site of sufficient importance, it can commence an action by delivering only a token artifact into the jurisdiction of the court. This is largely a symbolic gesture, but also serves to confirm that the salvor has, in fact, located a wreck and that it has the means of recovering artifacts from it. Once the court has constructive *in rem* jurisdiction it can enter orders to protect the salvor's salvage interest, such as naming the party the exclusive salvor in possession, which can help to avoid a "fight" over access to the salvage site or a damaging race to recover artifacts. It can also substantially incentivize the salvor to use best practices in conducting the salvage operation, because the court can make it a condition of maintaining its exclusive status that the salvor demonstrate a continuing commitment to preserving the integrity of the site and any recovered property. The court can also enter orders aimed at protecting the site itself, such as requiring certain specific record-keeping procedures or preservation methods. It can also entertain submissions by third parties who may have a specific interest in ensuring the site is properly handled or salvaged.

It is probably impossible to construct a legal regime that fully recognizes and protects all of the competing interests in a historical shipwreck located in international waters. But devising the best possible balance within the confines of existing, well-recognized legal principles must continue to be the goal, and ultimately it will be up to the courts to continue to wrestle with this issue in the coming years. The one thing that seems certain is that the cases will keep coming as long as there is still treasure to be discovered at the bottom of the sea.

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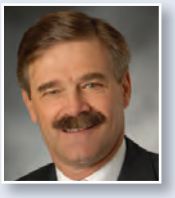
KEY INDIVIDUALS



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The quotes, commentary, and rankings referenced in this document are published in *Chambers 2011*.