Lawsuits, Claims, and Legislative Implications of the Deepwater Horizon Spill

By Jonathan K. Waldron, Duncan C. Smith and Jeanne M. Grasso

On April 20, 2010, a fire and explosion occurred onboard the Deepwater Horizon, a mobile offshore drilling unit owned by Transocean Ltd. and, at the time, operated for BP Exploration & Production, Inc. ("BP"). On April 22, 2010, the Deepwater Horizon sank, resulting in an uncontrolled flow of hydrocarbons from the wellhead into the Gulf of Mexico. As of the date of this article, BP is still trying to stem the flow of the oil and has reportedly spent over $3.1 billion responding to the ruptured oil well, including costs of the spill response, claims paid, and grants to the Gulf states. To date, BP has taken responsibility for responding to—and cleaning up—the spill and has established a process to manage claims from the incident, reportedly spending over $162 million in damage claims. As part of this process, BP is making advance payments based on estimates of business losses and has agreed to establish a $20 billion claims fund.

In addition, there have been numerous ongoing administrative and congressional investigations, various Congressional hearings have been held and legislative proposals introduced, and multiple law suits have been filed.

The Non-U.S. Investor: Unforeseen Implications of the Oil Pollution Act of 1990 ("OPA 90"). In addition, Congress is holding a series of oversight hearings to look into the Deepwater Horizon incident and many Members of Congress have already responded by introducing bills to address perceived problems.

Background

In 1990, Congress enacted OPA 90 to increase pollution prevention, ensure better spill response capability, increase liability for spills, and facilitate prompt compensation for clean-up and pollution damage. OPA 90 created the Oil Spill Liability Trust Fund (the “Fund”) to provide funds for oil spill clean-up, assessment and restoration of natural resources, and compensation to claimants for removal costs and damages. The Fund is managed by the U.S. Coast Guard’s National Pollution Funds Center (the "NPFC"), which is charged with evaluating and determining whether to accept claims made by a responsible person.

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BP established a $20 billion claims fund for the incident. The fund will be available to satisfy legitimate claims, and will be administered by an Independent Claims Facility (“ICF”) set up by the Coast Guard. The ICF will be tasked with making payments as they are adjudicated. The purpose of the fund is to provide a readily available source of funds to claimants to resolve claims in an efficient and cost-effective manner.

This article originally appeared in the June 2010 edition of Maritime Reporter. Reprinted with permission from Maritime Reporter.
As one might expect, each of the above “elements” of salvage award: (1) that the salvage service was voluntarily rendered, (2) that the vessel or other maritime property was lost or destroyed, (3) that the salvors averted a marine peril, and (4) that the salvors were successful in their salvage operations; and (5) the state of readiness and efficiency of the salvor’s equipment and the value thereof.

Alternatively, the parties to the salvage claim may opt to have salvage remuneration assessed by way of a private arbitration. While, in England, the most popular form of contractual salvage assessment is that offered under Lloyd’s Open Form of Salvage Agreement “No Cure—No Pay” (“LOF”).

This form of salvage contract may be entered into by the parties at any time before, during, or after the services have been performed and, as its name implies, requires success for payment to be due to the salvor. One exception to this principle that “success” is required is where the Special Compensation Protection & Indemnity Clause (“SCOPIC”) is incorporated into the LOF2000 form. If SCOPIC is invoked, and should the salvor fail to save the vessel or her cargo, he may still be compensated for his out-of-pocket expenses reasonably incurred in his attempt, plus an uplift of 25% thereof. The rationale behind this is to encourage salvors to continue their efforts to prevent or minimize marine pollution in circumstances where their award under Article 13 of the Convention (which is also applicable to LOF) would not warrant continuing with the services.

The Position in the United States

In the main, U.S. law closely tracks the English law of salvage. Three elements must be proven to be entitled to a salvage award: (1) that the salvage service was voluntarily rendered, (2) that the vessel or other maritime property at issue was in marine peril, and (3) that the salvage was at least partially successful. The law of salvage applies in respect of “navigable” waters that are within the federal court’s admiralty jurisdiction. One might think it perverse that there is no entitlement for an award for the “mere” salvage of human life; however, one who acts to save human life, while others simultaneously act to save the damaged vessel, is entitled to share in the salvage award in respect of the vessel.

As one might expect, each of the above “elements” of salvage has been subject to extensive judicial gloss. Thus, for instance, fire fighting services rendered in a harbor by a town fire department are not “voluntary” because the fire crew was for this purpose. Standards for claim adjudication will be developed and published in the near future. Dissatisfied claimants maintain all current rights under law, including the right to go to court or to the Fund. Processing details for this mechanism are still being worked out.

Claims for Economic Damages

Among the compensable damages specified in OPA 90 are damages arising from economic loss. Specifically, RPs are liable for “[d]amages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources…”

One of the major concerns arising out of this incident is whether parties will be able to seek compensation and reimbursement for such things as vessel delays, diverting from original plans, chartering alternative vessels, and other similar actions resulting in lost profits or earning capacity. Although the Coast Guard will not pay claims for demurrage or contractual charter party disputes per se, once the dispute has been settled between the subject parties, the party suffering an economic loss due to lost profits or earning capacity may have a viable claim under OPA 90.

Congressional Oversight and Legislation

In response to the Deepwater Horizon incident, numerous hearings have been held—and will continue to be held—with a focus on the economic and environmental effects of the spill, as well as the impact of the oil rig explosion on offshore oil and gas development policy. Members of Congress have already introduced over 100 bills to address various aspects of the spill. Various Congressional committees are now starting to take action to consolidate and consider various bills. For example, H.R. 5629, sponsored by Congressman Obenafer and under consideration by three committees, would among other things, repeal limits of liability, increase the minimum level of financial responsibility for an offshore facility to $1.5 billion, authorize recovery for non-pecuniary damages and human health injuries, require all vessels engaged in OCS activities to operate under the U.S. flag and be 75% U.S. owned (and a Mobile Offshore Drilling Unit (“MODU”)), also have to be built in the United States), and substantially revise the oil spill response planning and safety regimes for vessels, facilities, and MODUs.

Notwithstanding the advance of H.R. 5629, conflicts have emerged over the question of who should be in charge of the oversight of the spill. Chairman Obenafer’s committee understands that the Coast Guard is in charge. Chairman Rahall of the House Natural Resources Committee questions whether that is correct and whether an official in the Department of the Interior should have that responsibility consistent with the responsibility for Outer Continental Shelf resources. There is also continuing concern by a number of Members of Congress over broader unintended consequences for liability having nothing to do with the oil spill such as for cruise lines and overflight avigation, approval and use of dispersants, trade secret protections for response technologies, and impacts on small business ability to participate in response and clean up activities, among other concerns. Finally, other committees such as the House Judiciary and Energy and Commerce Committee have yet to make their mark on this legislation.

Conclusion and Recommendations

If you have suffered any of the aforementioned damages as a result of the Deepwater Horizon incident, you may be entitled to compensation. BP has established 25 claims centers and a 24-hour, toll-free claims hotline at (800) 440-0858, and the Deepwater Horizon Unified Command has published a website providing detailed information about the incident at www.deepwaterhorizoncompensate.com and www.restorethegulf.com. Similarly, if you have a technology or assets that you think would be effective in the response and cleanup, BP and the Coast Guard has set up procedures for submittal of those ideas for evaluation and approval.

We recommend you continue to monitor the implementation of the new ICF funded by BP. We also recommend you continue to monitor the implementation of the new ICF funded by BP. We also recommend you continue to monitor the development of the new regime as appropriate. Consequently, we recommend you continue to monitor the development of the new regime as appropriate. Consequently, we recommend you continue to monitor the development of the new regime as appropriate. Consequently, we recommend you continue to monitor the development of the new regime as appropriate. Consequently, we recommend you continue to monitor the development of the new regime as appropriate. Consequently, we recommend you continue to monitor the development of the new regime as appropriate. Consequently, we recommend you continue to monitor the development of the new regime as appropriate.
Walking the Plank
BY JOHN D. KIMBALL

Editor’s Note: This article was originally prepared as a speech given by Mr. Kimball at the Connecticut Maritime Association’s (“CMA”) Shipping 2010 Conference on March 24, 2010.

In the pirate tradition, walking the plank was a preferred method for disposing of unwanted prisoners when a ship was seized. Usually, the prisoner’s descent to death was hastened by tying a heavy weight to his body. Some historians suggest that pirates of old thought eliminating prisoners by this means was not actually murder since no one laid a hand on them to cause their death. More realistically, it most likely was the quickest way of discarding seamen who were not useful to the pirates as hostages.

This small piece of pirate history may serve as a back-drop to the narrow question to be discussed in my short talk today of whether our government and the United Nations should prohibit the payment of ransom to pirates to secure the release of a vessel and her crew. Unlike pirates of old whose goal was to capture a ship and its cargo, the pirates of Somalia have worked on the basis that their greatest reward will come from holding the crew hostage and demanding a large ransom payment. This is a question which has been the subject of much discussion and has gained currency recently from a headline article on the front page of Lloyd’s List.

It is a point that warrants discussion. The scourge of piracy in the Gulf of Aden has claimed many victims in the last two years and, despite a significant and very costly military effort, the problem remains and certainly has not lessened. The pirates show no signs of giving up. While this CMA Shipping 2010 Conference has been proceeding, at least four ships have been captured by Somali pirates. There is historical precedent for banning ransom payments to pirates, and a compelling argument can be made in favor of the idea. My own conclusion, however, is that making ransom payments illegal is not likely to deter Somali pirates. Instead, it could take us back to the age-old problem of pirates forcing their hostages to walk the plank, if necessary, to up the ante and increase the pressure on a ship owner to pay up. Except in the modern era, scenes of this happening would likely fill the internet.

The Pirate Problem

This audience needs no introduction to the pirate problem. I daresay some in the audience may have had direct experience with pirates prowling around the Gulf of Aden.

Piracy and ransom payments are not a new problem. Julius Caesar himself was seized by pirates in 75 B.C., and released after ransom was paid. Piracy on the high seas was a major preoccupation during the early years of the American republic; by 1800, the United States was paying about 20% of total federal revenues to the Barbary States as ransom and tribute. This only ended when the U.S. navy built up a fleet of warships able to take on the pirates.

The International Maritime Bureau’s Piracy Reporting Centre (“IMB PRC”) has reported a total of 406 incidents of piracy and armed robbery in 2009, with attacks by Somali pirates accounting for 217 of the total. In addition, in 2009, 49 vessels were hijacked, of which 47 were captured by Somali pirates. 120 vessels were fired upon, 1,052 crewmembers were taken hostage, and 76 crewmembers were either injured or killed. All of this took place despite the presence of the world’s navies around the Gulf of Aden, which increased significantly beginning in the spring of 2009. According to experts on the subject, “[t]he potential for [a significant] rise of new and refurbished pirate activity in the Gulf of Aden seems likely.”

The largest reported ransom to date was paid in January 2010 to secure the release of the tanker MARAV CENAVRUS, which was laden with two million barrels of oil when it was hijacked by Somali pirates in November 2009 near the Seychelles in the Indian Ocean. The vessel was released after an aircraft delivered a ransom payment believed to be between $55 million and $7 million.

There can be little doubt that the payment of ransom has contributed to the problem. For otherwise unemployed young men in Somalia, the prospect of getting a share of a multi-million dollar ransom payment far outweighs the comparatively low risk of being shot, caught, or otherwise confronted by the world’s navies. Each ransom paid only encourages pirates to demand more, thus, further perpetuating the problem. This is a principal reason behind suggestions that ransom payments should be illegal.

In addition to the increased insurance premiums to cover ransom payments, ship owners are also negatively impacted by rising operational costs due to higher wages paid to crews to transit the higher risk areas, and delays caused by longer transit times or diversions to avoid the area altogether.

According to Lloyd’s List, vessels electing to transit around the Cape of Good Hope to avoid piracy in the Horn of Africa incur hundreds of thousands of dollars in increased fuel costs per trip and an additional seven to ten days of...


1. The Convention exempts from its coverage warships, vessels of less than 500 GT, and vessels operating throughout their life only in internal waters. Article 3, Hong Kong Convention.

2. “Success in deterring the attacks or the subsequent ransom payments, such as Italy and Colombia, have not had much success in deterring the attacks or the subsequent ransom payments. It is legal in the U.S. and England to pay ransom to a pirate. Countries that do have laws prohibiting ransom payments that are known, or reasonably suspected, to be used for “terrorist purposes” are illegal and punishable by fourteen years in prison. "Terrorism," under the United Kingdom's Terrorism Act of 2000, is defined as the use or threat of action designed to intimidate the government or the public for the purpose of advancing a political, religious, or ideological cause. As a matter of international law, however, piracy is not terrorism. Indeed, the two are quite distinct and the difference is important. Under Article 101 of the United Nations Convention on the Law of the Sea, piracy is defined as “illegal acts … committed for private ends ….” The aim of pirates is simply to make money, whereas terrorists have the wholly different goal of destroying governments and the world economy. Therefore, laws aimed at those who make payments to terrorists, as currently defined, do not apply to ransom payments paid to Somali pirates. Governments should be reluctant to change their laws in order to redefine piracy as an act of terrorism unless—and until—evidence is provided that proves that pirate ransom payments are, in fact, funding terrorist organizations. One key problem with making pirate ransom payments illegal is the need for international cooperation to make the measure effective. In the absence of wide international acceptance of a ban, the problem will continue to persist. While it is more realistic to tackle the problem at a national level, governments may find that they do not have the support from shipowners and the insurance industry who are pragmatist and prefer paying ransoms to bloodshed. As the English Commercial Court held in a recent opinion dated February 18, 2010, “[t]he parties have paid the ransom, but the alternative of leaving the vessel, its cargo, and transit time. When this occurs, “both the shipper and the consumer are ultimately impacted due to higher operating costs and the delays in the supply chain.”

As the piracy problem has escalated, so has the development of specialized insurance policies created to respond to this increased risk. It is reported that the cost of kidnap and ransom insurance in 2009 was 10 times more expensive than it was in October 2008 for ships transiting the Gulf of Aden.” These numbers may not be precisely up to the minute, but it has been reported that a ship owner can obtain up to $3 million of cover for the ship and the crew for a maximum of five or six days for a premium of $4,000 to $5,000. “The shipping and insurance industries have adapted very quickly to the reality of having to pay ransoms, regarding ransom payments as a virtually normal cost of doing business. It is accepted that ransom may be treated as a general average expense and the cost will be spread among all parties to the venture. The insurance industry’s readiness to insure against ransom undoubtedly has contributed to the piracy problem and no doubt has led to a spike in ransom demands. In turn, this has led to an increase in attacks, since payments enable the pirates to recruit more pirates and buy more sophisticated weapons and equipment.”

By virtual all accounts, the Somali pirates appear to be motivated by money, not ideology, and the continued payment of ransom fuels this affront to maritime navigation. The question is, will the attacks end if governments make the payment of ransom to pirates illegal?

Ransom Payments

At a Security Council Debate on Piracy and Somalia held on November 18, 2009, Ambassador Rosemary A. DiCarlo, Alternate U.S. Representative for Special Political Affairs, remarked, “The United States is concerned that ransom payments have contributed to the recent increases in piracy and [the United States] encourage[s] all states to adopt a firm ‘no concessions policy’ when dealing with hostage-takers, including pirates.”

While many countries, including the U.S., do not make or facilitate substantive concessions to hijackers—including the payment of ransoms to terrorists and pirates—very few countries, if any, actually have laws making it illegal for private parties, such as ship owners and insurance companies, to pay ransoms. It is illegal in the U.S. and England to pay ransom to a pirate. Countries that do have laws prohibiting ransom payments, such as Italy and Colombia, have not had much success in deterring the attacks or the subsequent ransom payments.
Walking the Plank (continued from page 5) especially its crew in the hands of pirates is significantly worse." Moreover, attempting to restrict ransom payments may be problematic for a number of reasons.

Reasons for Not Making Ransom Illegal

1. Enforcement would be very difficult. It would be extremely difficult to monitor and enforce global ransom payments, given the current global system of shipping and finance.

2. It would criminalize what may be the only action available to shipowners and their insurers to free captured crew members. Criminalizing ransom payments could have unintended consequences, such as exacerbating the problem or deterring legitimate efforts to secure the release of vessels.

3. It would escalate the problem by forcing pirates to take even more drastic action than they have so far. This could lead to increased violence and suffering.

4. It is not likely to solve the problem. There are better solutions. The U.S. government has been working with other countries to address piracy, and there are international efforts to combat the problem.

Our governments also should be making a concerted effort to prosecute pirates who are captured. The Maersk Alabama prosecution in the U.S. is notable. The U.S. government has also been working with Kenya and helping to fund its efforts to prosecute and convict pirates and this is likely to have a greater impact than trying to shut off ransom payments.

There was a positive development recently with the successful prosecution and conviction of 8 Somali pirates in Kenya, all of whom received 20 year prison sentences. According to Lloyd’s List, this was only the first of 12 major piracy cases working their way through the Kenyan judicial system. These prosecutions should be helpful in deterring piracy.

For all of these reasons mentioned above, I urge government leaders to keep the focus on prevention and prosecution, and not on criminalizing the only means that may be available to a ship owner to secure the release of the vessel and crew if captured by pirates.1

1. Partner, Blank Rome LLP. The author wishes to thank Lauren Wilgus and Marija Pecar for their assistance in the preparation of this presentation. The views stated in this paper are solely the opinion of the author and should not be considered the opinion of Blank Rome LLP or our clients.
To address frequent approval requests, MARAD adopted regulations (46 C.F.R. Part 221) that grant general approvals under Section 56101 for certain transfers of U.S.-flag vessels and interests in such vessels to non-U.S. citizens. In general, those regulations permit the sale, lease, charter, delivery, or other transfer of an interest in, or control of, a U.S.-flag vessel to a non-U.S. citizen, provided that the vessel remains documented under the U.S. flag following the transaction and is not operated under authority of a foreign country. Exceptions to this general approval include bareboat or demise charters of U.S.-flag vessels for operation in the coastwise trade and sales for scrapping. In addition, foreign transfers of vessels less than 1,000 gross tons are subject to a general approval subject to certain conditions.

In the case of foreign transfer transactions that are not covered by a general approval, an application must be filed with MARAD, which evaluates them on a case-by-case basis. In evaluating applications, MARAD considers, among other things, the following:

(i) the type, size, speed, general condition, and age of the vessel;
(ii) the acceptability of the owner, proposed transferee, and the country of registry or the country under the authority of which the vessel is to be operated; and
(iii) the need to retain the vessel under U.S. documentation, ownership, or control for purposes of national defense, maintenance of an adequate merchant marine, foreign policy considerations, or the national interest.

46 C.F.R. § 221.156(b)(1). MARAD’s approval of an application is usually subject to certain standard conditions, which are set forth in its regulations, and MARAD may impose other conditions it deems appropriate. For vessels that are 3,000 gross tons or more, these conditions typically include continu-ing restrictions—in the form of a contract secured by a surety bond—on transfer and operation of the vessel for the remainder of its economic life, which is deemed to be 20 years for tank vessels and 25 years for non-tank vessels subject to extension for rebuilt or modified vessels. These restrictions are generally aimed at prohibiting the vessel from being owned or operated by or in countries such as Cuba and North Korea.

During times of war or national emergency declared by the President, 46 U.S.C. § 56102 applies to foreign transfers, and it is more comprehensive and restrictive than Section 56101. For example, these foreign transfer restrictions also apply to the transfer of interests in vessels that are under construction in U.S. shipyards and to the shipyards themselves. The penalties for violations of Sections 56101 and 56102 are somewhat severe. In the case of Section 56101, a person who knowingly commits a violation is subject to criminal fines and imprisonment for not more than five years. Civil penalties may also be assessed regardless of whether the violation was knowingly made. In addition, transfers made in violation of Section 56101 are void, and a U.S.-flag vessel may be seized and forfeited to the U.S. government for these violations. Similar penalties apply to violations of Section 56102.

MARAD Arrangement with EPA on Foreign Transfers—TSCA Restrictions

In recent years, MARAD has agreed, on an informal basis, to refer foreign transfers of U.S.-flag vessels requiring its approval to the Environmental Protection Agency (‘‘EPA’’) for EPA review of compliance with U.S. environmental laws, in particular the Toxic Substances Control Act (‘‘TSCA’’), which is codified at 15 U.S.C. §§ 2601-2629. According to MARAD officials, there is no formal Memorandum of Agreement with EPA on this subject, but one is being currently developed. Therefore, MARAD has undertaken this process as a matter of policy and has not issued any amendments to its foreign transfer regulations formally notifying interested parties that the process will take place. In light of the MARAD regulatory criteria for evaluating foreign transfer applications (quoted above), there does not appear to be a clear basis under the Administrative Procedure Act for the current informal arrangement. Each shipowner seeking to transfer a vessel out of the U.S. flag has been left to their own devices to navigate what has become a cumbersome and unregulated process.

TSCA prohibited the manufacture, processing, or distribution in commerce of polychlorinated biphenyls (‘‘PCBs’’) one year after the law’s enactment in 1977. Under EPA regulations, the distribution in commerce, including for export, of PCBs at concentrations of 50 ppm or greater is prohibited, unless a waiver is granted. 40 C.F.R. §§ 761.20 and 761.97. Vessels manufactured before 1977 did contain PCBs in transformers, capacitors, and cables, among other places. However, presumably vessels built in the United States after 1978 do not include PCBs and, hence, are not affected by this prohibition.

Several federal court decisions have held that the sale of a vessel containing PCBs is the equivalent of distributing PCBs in commerce and is prohibited under TSCA restrictions. For example, in the case of the United States v. M/V Sanctuary, 540 F. 3d 295 (4th Cir. 2008), involving a former U.S. Navy
Foreword

Another area where Rule B drove the development of the law on maritime jurisdiction was in the context of Forward Freight Agreements, or FFAs. FFAs have been described as a contractual commitment to "pay the difference between a price agreed today and the future price of moving a product from one location to another, or for the future price of hiring a ship over a period of time." FFAs are financial instruments that were created to allow maritime parties to hedge market risks in the shipping freight market, though of course there is no requirement that a buyer or seller of FFAs be a maritime party, and the ultimate obligation is to pay or receive money under the agreement, and never to actually operate a ship or carry cargo. Numerous district court decisions have found FFAs to be maritime contracts.

The Second Circuit has not had the opportunity to weigh in on this issue yet, but I think there are some who might legitimately question the correctness of those decisions. While it is true that FFAs are linked to ocean freight values and are certainly used by parties in the shipping industry to hedge their freight positions, FFAs are in their essence financial derivatives, not pegged to any actual carriage of cargo or other actual maritime commerce except insofar as it may impact indexed freight rates. And certainly, there is nothing that limits FFAs to use by the maritime industry. In any event, I think it is an open question whether the appeals courts will ultimately agree with the district courts on this issue.

Commodity Sales Contracts

Another area where the district courts got a bit giddy was with commodity sales contract. There were quite a few cases dealing with these kinds of contracts, and in most cases the dispute involved a contract for the sale of a given commodity in which the buyer had some involvement in nominating a vessel or, for instance, in undertaking to be responsible for demurrage at the discharge port. Plaintiffs argued that when disputes arose over the "maritime" component of the contract—e.g., over the buyer's obligation to pay demurrage—that part of the contract at least was a maritime contract thus giving the court admiralty jurisdiction.

This argument met with mixed results in the district courts. The early trend seemed to be away from seeing these kinds of contracts as maritime, but as matters progressed it seemed that the tide turned and the decisions began to more uniformly agree that claims under the "maritime" terms of a sales agreement do give rise to maritime jurisdiction.

Acrobat. If the computer is on-line, Acrobat will check the security company's list of expired certificates to ensure that the certificate was valid at the time the contract was signed. Assuming that the security companies use adequate procedures to verify an applicant's identity and any representative capacity, the Adobe credentials provide a secure and reliable digital signature system. Signing in this manner will not be commonplace, of course, until enough people obtain Adobe credentials.

Acrobat also contains a signature generating facility that produces what is known as a "self certificated signature." Such a signature is like a traditional holographic or "wet" signature in that it is not accompanied by any independent verification that it is the signature of the person purportedly signing the document. It does establish the integrity of the document. A graphic of one's wet signature can be attached to the digital signatures applied by Acrobat. If you are dealing with a person whose signature is known to you, a self certificated signature could be sufficient. For an important contract, or one for which the identity of the signatory may need to be confirmed when the signatory is no longer available, a self certificated signature would not be appropriate.

Adobe recently started testing a cloud-based service using its LifeCycle software, called Adobe eSignatures. (LifeCycle is enterprise software that manages workflow and digital signatures. eSignatures essentially permits smaller entities to use parts of the LifeCycle program that is running on Adobe's computers on the Internet, hence in the "cloud.") To use this system, a user registers with eSignatures on the web by providing their name, e-mail address, and a password. eSignatures then confirms the e-mail address by sending an e-mail to the user containing a return link. Once registered, the user can have a document signed by logging into eSignatures, uploading a pdf document to be signed, and listing the e-mail addresses of the other persons whose signatures are required. eSignatures then applies the signature of the first signer and notifies the other signatories that there is a document to be signed at the eSignatures site. The signatories will then either register (which will be followed by confirmation of their e-mail address) or login if they have previously registered. Once logged in, they will be presented with the text of the document and a request that they sign it by clicking a "Sign" button.

Presumably eSignatures issues signature keys to each registrant, retains them, then applies them to documents each time eSignatures receives authorization on its website from that user to sign a document. From the user's perspective, the process is quick and easy and results in a digitally signed document whose integrity is certified by Adobe. Adobe does not, however, certify the identity of the signatories, which is entirely dependent upon the initiator's providing the correct e-mail addresses of the signatories.

In situations in which e-mail messages are frequently exchanged, sufficient trust can be established that it would not be unreasonable to assume that the person at an e-mail address is who he says he is, particularly if the address follows the usual named-companyname format. If the identity of the signatory is later disputed, it should be possible to obtain information from the company to establish the signatory's e-mail address, even if the signatory is no longer employed. Then the process used by eSignatures would have to be proved. With eSignatures, we progress from having to know a person's signature (as with the self certificated signatures) to needing to know only his e-mail address.

While the ease and convenience provided by eSignatures is attractive, there are some drawbacks. Many parties will be reluctant to upload their contracts to Adobe unless they are assured that unauthorized access is prevented. Because eSignatures presents signatures with a static image of the document, comparison of the document to be signed does not appear to be possible.

A great deal of time and expense could be saved by using digital signatures that would be beneficial for currency. When delays are reduced, commerce usually increases. Adobe estimates that over $7 billion a year is spent shipping paper documents in order to obtain signatures, most of which could be eliminated by using digital signatures.

Emerging Environmental Requirements for Foreign Transfers of U.S.-Flag Vessels

BY JOAN M. BONDAREFF AND R. ANTHONY SALGADO

Background: MARAD's Foreign Transfer Regulations

In general, the transfer of a U.S.-flag vessel to another registry and/or to a non-U.S. citizen owner requires the prior approval of the Maritime Administration ("MARAD") under 46 U.S.C. § 56101 (which is the current codification of Section 9 of the Shipping Act, 1916, as amended). Specifically, subject to certain exceptions, Section 56101 prohibits the sale, lease, charter, delivery, or other transfer (and any agreement to do so) to a non-U.S. citizen of any interest in, or control of, a U.S.-flag vessel owned by a U.S. citizen.

(continued on page 14)
Digital Signatures (continued from page 9)

If the document being signed is identical to the form of the agreed draft. Often, when the signed paper original is received, the parties will return it to electronic form by scanning it for filing and archiving. The scanned document is subject to inadvertent and deliberate alteration.

In contrast, a document that is signed electronically but is not circulated to, and is not voluntarily examined by, the parties may be tampered with during transmission. The parties are responsible for maintaining a record of the signed document that is identical to the signed original.

Digital signatures are generated by software that uses public key encryption systems. Each user has a public key, which is made available to others, and a private key, which is kept confidential. The keys, which consist of a long series of numbers, are unique. Anything encrypted by the private key can only be decrypted by the related public key.

A digital signature is a way to verify the authenticity of a document. It is created by applying a mathematical formula to the contents of the document and appending the result to the document. The formula is based on a public key, which is made available to others, and a private key, which is kept confidential.

The identity of the holder of the private key must be established separately as described below.

The encryption that is performed in signing a document is essentially a unique digital fingerprint of the document, known as the “hash.” The hash is a mathematical expression of the distribution of the ones and zeros in the digital form of the document. Signature software verifies the integrity of a signed document by calculating the hash value of the current document and then comparing it to the encrypted hash in the digital signature. If the document has not been altered since the time of signing, the digital signature does not prevent future alterations to the signed document.

Instead, document integrity is established by having the software confirm that the file has not been altered since the time it was signed. The software can detect even the most minute changes to a signed document. Removal of one space from a document, for example, will cause the software to report that the document has been modified.

The most challenging aspect of digital signatures is establishing the identity of the signatory, the holder of the private key. The keys themselves do not provide this information. A separate document can be signed and then attached to the original document as a certificate. The certificate can be checked online with the issuer who will verify the period during which the certificate is valid. If the certificate is valid at the time of signing, the identity of the signatory is established.

Adobe has simplified the use and management of digital signatures by integrating some of the steps in signing and verifying signatures into its Acrobat software. In Acrobat, a digital signature can be applied to a PDF document. (Other software companies also provide electronic signature systems. Adobe is used as an example here because it developed the portable document format (“pdf”) and it has had long experience with electronic signatures. In addition, all the courts that have instituted electronic filing require the use of documents in pdf.)

Adobe has collaborated with security companies such as Verisign, Truste, and GeoTrust enabling them to offer an “Adobe certificate.” The certificate contains a public key and a certificate issued by the security company. Prior to issuing the certificate, the security company verifies the identity of the applicant. If the applicant is signing on behalf of an entity, the certificate will reflect such capacity if the entity confirms the applicant’s authority to the security company. A fee is charged for issuing credentials. Verisign, for example, charges $595.

If the document is contained in a USB token and access is protected by a password. To sign a document in Acrobat, the user would plug the USB token into the computer, invoke the signatures section of Acrobat, and enter a password. Acrobat will then affix a digital signature to the document together with a certificate of the security company. The Acrobat software is programmed to recognize the certificate of the security company that issued the digital signature.

Thus, a recipient of the document can obtain confirmation of the document’s integrity and the identity of the signatory by using the digital signature. If they match, the document has not been altered since the time of signing. Digital signatures do not prevent future alterations to the signed document.

Instead, document integrity is established by having the software confirm that the file has not been altered since the time it was signed. The software can detect even the most minute changes to a signed document. Removal of one space from a document, for example, will cause the software to report that the document has been modified.

The Second Circuit did address this issue in Tradhol Int’l, S.A. v. Colony Sugar Mills, Ltd., however, and found that the plaintiff in that case had failed to establish either how the “maritime” elements of the claim were severable or how the non-maritime elements were “incidental.” Only time will tell whether this burden can ever be met.

Multi-Modal Transport Contracts

The latest word on the subject of maritime jurisdiction came as recently as June 21, 2010, when the Supreme Court decided Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp. (“K-Line”). That decision answered the question—closely related to the issue in Kirby—of whether COGSA should govern in respect of a claim relating to a multi-modal carriage involving ocean carriage, where the cargo is damaged on an inland leg that ordinarily would be covered by another federal statute, the Carmack Amendment.

In K Line, cargo was being shipped from China to Chicago through bills of lading issued by the ocean carrier K Line. The cargo involved inland transportation on a train operated by Union Pacific Railroad, arranged by K Line, and the UPR train derailed in Oklahoma in April 2005 causing substantial damage. Suit was filed in California, and the district court found that the entire cargo was covered by COGSA and enforced a Tokyo forum selection clause in the bill of lading. The Ninth Circuit reversed, finding that issuing a through bill of lading and contracting for a railroad to transport the goods from Long Beach to Chicago, K Line had “engaged in railroad transportation” governed by the Carmack Amendment.

The Supreme Court reversed the Ninth Circuit’s ruling, finding its earlier decision in Kirby to be closely analogous and ruling that the Carmack Amendment does not apply to inland segments of a multi-modal shipment from overseas under a through bill of lading. Rather, “Congress considered such international through bills and decided to permit parties to extend COGSA’s terms to the inland domestic segment of the journey.”

Quoting Kirby, the K-Line Court observed that “[t]he international transportation industry clearly has moved into a new era—the age of multi-modalism, door-to-door transport based on efficient use of all available modes of transportation by air, water, and land.” Based on the decisions in Kirby and K-Line, it appears that this new era will largely be governed by maritime law.

As with FFA’s, a number of pending appeals suffered early terminations as a result of Joldah. The Second Circuit did not address this issue in Tradhol Int’l, S.A. v. Colony Sugar Mills, Ltd., however, and found that the plaintiff in that case had failed to establish either how the “maritime” elements of the claim were severable or how the non-maritime elements were “incidental.” Only time will tell whether this burden can ever be met.

Digital Signatures Revisited

It has been ten years since E-Sign—the federal law validating electronic signatures—was adopted, yet there has been little use of them in maritime and other transactions. Lack of familiarity, trust, and comfort in a new process that is fundamentally different from traditional signatures has delayed progress toward electronic contracts. As businesses shift to electronic recordkeeping, however, the need for digital signatures will become increasingly compelling. Deciding how to proceed requires consideration of practical, legal, and technological issues.

E-Sign validated “electronic signatures” are defined as an electronic sound, symbol, or process associated with a contract or other record by a person with the intent to sign the record. 15 U.S.C. § 7006. Digital signatures are a subset of electronic signatures and are more elaborate and secure than a simple symbol or typed name that might be used as an electronic signature. Under such a broad validation, the issue of validity of an electronic signature will rarely arise. The real issue is a question of evidence and proof—whether a particular electronic signature method will provide a party with the means to readily establish the genuine test of the document and the identity of the signatories in the event of a dispute. A simple method could be used for such things as internal documents, and a more elaborate one for important contracts.

The fundamental difference between paper and electronic documentation of a deal is that, in the electronic world, there are no original documents. In the paper world, each party would be given a signed original of the contract that would be stored in paper form. If a discrepancy in contract language later surfaced, each party would rely on its original document to establish the terms of the contract. If necessary, the paper contracts would be examined to detect alterations. In the absence of a signed copy, the parties could still establish the chain of custody and control of an electronic document, but in the absence of a digital signature, it is much more difficult to establish that an unauthorized change was made to the document.

The typical method of documenting a deal today is electronic, the parties exchange electronic drafts and redlined copies until an agreement is reached on the ... (continued on page 12)
The Non-U.S. Investor: Unforeseen Exposure to U.S. Gift and Estate Taxation for Non-Resident Aliens

BY SUSAN PECKETT WITKIN

Editor’s Note: This article continues a series aimed at introducing some of our other practice groups at Blank Rome. In this article, contributed by our Private Client Group, we discuss gift and estate tax issues as they pertain to non-resident clients.

Often, an individual who is neither a resident nor a citizen of the U.S. (referred to here as a “non-resident alien” or “NRA”) is presented with an opportunity to invest in U.S. real estate, tangible property such as art or collectibles that will be located in this country, stock of a U.S. company, or as a partner in a limited partnership or member of a limited liability company (“LLC”). Typically, the savvy NRA investor knows what he must do to avoid being treated as a U.S. resident for income tax purposes. But, he may not be aware that these investments could affect one of the three federal transfer taxes, namely, the federal gift tax, estate tax, and generation-skipping transfer (“GST”) tax.

Any transfer of property is subject to special income tax rules under FIRPTA (Foreign Investment in Real Property Tax Act) and generally trigger capital gain, unlike dispositions of most capital assets held by NRAs. These rules are outside the scope of this article. Note also that dispositions of interests in appreciated U.S. real property are subject to special income tax rules under FIRPTA (Foreign Investment in Real Property Tax Act) and generally trigger capital gain, unlike dispositions of most capital assets held by NRAs. These rules are outside the scope of this article.

It is preferable for the NRA to avoid direct ownership in U.S. real estate because a transfer of the property to a trust or a family member renders the property subject to estate taxation. Therefore, it is generally advisable to consult with counsel before a transfer is made to a non-U.S. entity.

In contrast to this rule for real estate and tangible, shares of stock in a corporation are considered to be intangible personal property and, regardless of situs, are not subject to gift taxation upon lifetime transfer by the NRA (unless the NRA is a covered expatriate, in which case different rules will apply during the 10-year period following expatriation).

The same property that is taxable if given away during the NRA’s life is subject to federal estate tax if owned by the NRA at the time of his death. In addition—and subject to any different rules set forth in a governing estate tax treaty between the U.S. and the NRAs country of domicile—intangible personal property with a U.S. situs (i.e., intangible personal property situated or deemed situated in the U.S. at the NRAs death) is taxable under the federal estate tax laws, with a $13,000 credit against the tax that is due. If the property passes to the NRAs spouse (who presumably is also a NRA), it is subject to current estate taxation under the above rule unless the marital deduction is obtained by transferring the property into a trust that is held for the lifetime benefit of the spouse. Even in this case, the estate tax is merely deferred and the property held in trust will be estate taxable at the surviving spouse’s death.

As noted above, shares of stock issued by a corporation constitute as intangible property. If the corporation is a U.S. corporation, then the stock has a U.S. situs, and if it is owned by the NRA at the time of his death, then it will be subject to federal estate taxation regardless of where the stock certificate or other physical evidence of ownership is located. A partnership interest and a membership interest in a LLC are also intangible personal property under U.S. laws, but the application of the federal estate tax is not as clear as in the case of a corporation. Generally speaking, however, if the partnership or LLC does not terminate upon the NRAs death, and is also a valid and continuing entity, then the situs of its underlying assets at the NRAs death would not be relevant, but the U.S. may seek to assert an estate tax based on either the place where the entity’s business is conducted or the domicile of the NRA partner. Therefore, the NRA should be cognizant of the potential estate tax exposure when investing in partnerships and LLCs.

Other examples of intangible personal property are interests in patents and trademarks, debt instruments, bank accounts, certificates of deposit, and cash on hand in a brokerage account. Accounts held in U.S. banks are deemed non-U.S. situs property so long as these are not effectively connected with the conduct of a U.S. trade or business; but a brokerage firm that is not considered to be a bank, and funds on deposit in the NRAs name at the time of the NRAs death, will be deemed U.S.-situs property and subject to federal estate taxation. Debt instruments issued by U.S. persons—the interest on which qualifies as portfolio interest for federal income tax purposes—will be deemed situated outside the U.S. and will not be subject to federal estate taxation. Patents, trademarks, and certain copyright interests issued or licensed in the U.S. are generally property situated in the U.S., but should be reviewed carefully. Life insurance, whether held in a trust or owned outright by the NRA, is not treated as situated in the U.S. even if the policy is issued by a U.S. insurance company. Often, NRAs will invest indirectly through foreign holding companies or other structures. These should be reviewed by counsel in the U.S. to make sure the structure is sound from the U.S. tax perspective. Care must be taken to review trusts as well. A trust that is established by the NRA, or by a family member and benefitting the NRA, may be subject to U.S. estate taxation at the time of the NRAs death, depending on the interests in, or rights over, the trust property that the NRA held at death; when the transfer occurred; and the type of property that was transferred to the trust.

Perhaps the most common trap for the unwary NRA is investment in U.S. real estate. It is preferable for the NRA to avoid direct ownership in U.S. real estate because a transfer during life will attract a gift tax, and ownership at death will subject the property to estate taxation. Therefore, it is generally advisable to consult with counsel before a transfer in a U.S. residence is acquired. The laws of the NRAs domicile must be reviewed and evaluated, but it is often advisable to have a foreign entity rather than the NRA himself make the purchase. Foreign ownership may not be permissible in all cases, but the most notable being the cooperative apartment; typically a foreign corporation will not be permitted to be the purchaser or co-op. However, foreign entity ownership is generally allowed in the case of a condominium, house, or other interest in real property, including undeveloped land. Once real property is owned by the NRA, it can be transferred to a foreign corporation, for example, and if corporate formalities are observed, this should be effective to block federal estate taxation. Although there are arguments the IRS may assert at the time of the NRAs death to tax the property if it is still owned by the entity, this strategy is generally offers maximum protection against exposure to federal estate tax.

This is intended as a review of general rules. Obviously, each situation’s facts and circumstance must be reviewed for planning opportunities.

Susan Witkin is a partner in the Private Client Group and her practice focuses on estate, trust and tax planning, estate and trust administration, and related litigation. She represents domestic, foreign, and multinational clients in these areas. 1. Since most of the transfers that NRAs contemplate tend to be to a spouse or children and/or to grandchildren, and because the GST is a more limited in its application to NRAs, we will not discuss its application here. But, one should be aware that if a transfer is gift or estate taxable, and is made to a non-U.S. entity (or to a trust that could benefit such an individual), the GST tax may be implicated as well. Also note that various states impose local estate and/or inheritance taxes that apply in addition to the federal estate tax. While these generally follow the federal rules regarding what is taxable, due to the differing approaches of the states, you should discuss your potential estate tax liability with your state tax advisor. 2. Note that that disposals of interests in appreciated U.S. real property are subject to special income tax rules under FIRPTA (Foreign Investment in Real Property Tax Act) and generally trigger capital gain, unlike disposals of most capital assets held by NRAs. These rules are outside the scope of this article.
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Often, an individual who is neither a resident nor a citizen of the U.S. (referred to here as a “non-resident alien” or “NRA”) is presented with an opportunity to invest in U.S. real estate, tangible property such as art or collectibles that will be located in this county, stock of a U.S. company, or as a partner in a limited partnership or member of a limited liability company (“LLC”). Typically, the savvy NRA investor knows what he must do to avoid being treated as a U.S. resident for income tax purposes. But, he may not be aware that these investments could attract one of the three federal transfer taxes, namely, the federal gift tax, estate tax, and generation-skipping transfer (“GST”) tax.

While the federal estate and GST taxes are in a one-year sunset period and do not apply in 2010 to U.S. citizens, U.S. residents, or NRAs, the gift tax remains in effect. The estate and GST taxes will, even without passage of new federal legislation, apply again beginning in 2011, so for simplicity we may assume all three taxes to be in effect.

Gifts by NRAs will trigger current gift taxation if the subject of the gift is real property or tangible personal property that is situated in the U.S. or, as we sometimes say, has a “domicile” in the U.S. (as opposed to the much more amorphous concept of “duration of stay”). We ignore those differences here as we assume that if someone is a non-resident for U.S. income tax purposes, then he or she is domiciled outside the U.S. for estate and gift tax purposes. If the property passes to the NRAs spouse (who presumably is also a NRA), it is subject to current estate taxation under the above rules unless the marital deduction is obtained by transferring the property into a trust that is held for the lifetime benefit of the spouse. Even in this case, the estate tax is merely deferred and the property held in trust will be estate taxable at the surviving spouse’s death. As noted above, shares of stock issued by a corporation constitute as intangible property. If the corporation is a U.S. corporation, then the stock has a U.S. situs, and if it is owned by the NRA at the time of his death, then it will be subject to federal estate taxation regardless of where the stock certificate or other physical evidence of ownership is located. A partnership interest and a membership interest in a LLC are also intangible personal property under U.S. laws, but the application of the federal estate tax is not as clear as in the case of a corporation. Generally speaking, however, if the partnership or LLC does not terminate upon the NRAs death, and is also a valid and continuing entity, then the situs of the underlying assets at the NRAs death would not be relevant, but the U.S. may seek to assert an estate tax based on either the place where the entity’s business is conducted or the domicile of the NRA partner. Therefore, the NRA should be cognizant of the potential estate tax exposure when investing in partnerships and LLCs.

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The same property that is taxable if given away during the NRAs life is subject to federal estate tax if owned by the NRA at the time of his death. In addition— and subject to any different rules set forth in a governing estate tax treaty between the U.S. and the NRAs country of domicile— intangible personal property with a U.S. situs (i.e., intangible personal property situated or deemed situated in the U.S. at the NRAs death) is taxable under the federal estate tax laws, with only a $13,000 credit against the tax that is due. If the property passes to the NRAs spouse (who presumably is also a NRA), it is subject to current estate taxation under the above rule unless the marital deduction is obtained by transferring the property into a trust that is held for the lifetime benefit of the spouse. Even in this case, the estate tax is merely deferred and the property held in trust will be estate taxable at the surviving spouse’s death.

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Digital Signatures (continued from page 9)

If the form being signed is identical to the form of the agreed draft. Often, when the signed paper original is received, the parties will return it to electronic form by scanning it for filing and archiving. The scanned document is subject to inadvertent and deliberate alteration.

In contrast, a document that is to be signed digitally may be circulated for signature by e-mail, it can be readily compared to the previous draft, and its integrity will be maintained when archived. If the signed document is altered (other than by adding signatures), the signature software will indicate that the document is no longer identical to the one that was signed.

Digital signatures are generated by software that uses public key encryption systems. Each user has a public key, which is made available to others, and a private key, which is kept confidential. The keys, which consist of a long series of numbers, are unique. Anything encrypted by the private key can be decrypted only by the related public key. A document is signed by using the private key to do an encryption. If a public key will decrypt that encryption, then you know that it was encrypted using the related private key. The identity of the holder of that private key must be established separately as described below.

The encryption that is performed in signing a document is essentially a unique digital fingerprint of the document, known as the “hash.” The hash is a mathematical expression of the distribution of the ones and zeroes in the digital form of the document. Signature software verifies the integrity of a signed document by calculating the hash value of the current document and then comparing it to the encrypted hash in the digital signature. If they match, the document has not been altered since the time of signing. Digital signatures do not prevent future alterations to the signed document.

Instead, document integrity is established by having the software confirm that the file has not been altered since the time it was signed. The software can detect even the most minute changes to a signed document. Removal of one space from a document, for example, will cause the software to report that the document has been modified.

The most challenging aspect of digital signatures is establishing the identity of the signatory, the holder of the private key. The keys themselves do not provide this information. A separate digitally signed certificate must be obtained that states essentially that “John Smith is the holder of public key 175864236….” This certificate is issued by a recognized certification authority such as Verisign or Truste.

To confirm the identity of the signatory, the certificate can be checked online with the issuer who will also verify the period during which the certificate is valid. If the certificate was valid at the time of signing, the identity of the signee is established.

Adobe has simplified the use and management of digital signatures by integrating some of the steps in signing and verifying signatures into its Acrobat software. In Acrobat, a digital signature can be applied to a pdf document. (Other software companies also provide electronic signature systems. Adobe is used as an example here because it developed the portable document format (“pdf”) and it has had long experience with electronic signatures. In addition, all the courts that have instituted electronic filing require the use of documents in pdf.)

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The Supreme Court reversed the Ninth Circuit’s ruling, finding its earlier decision in Kirby to be closely analogous and ruling that the Carmack Amendment does not apply to inland segments of a multi-modal shipment from overseas under a through bill of lading. Rather, “Congress considered such international through bills and decided to permit parties to extend COGSA terms to the inland domestic segment of the journey.”

Quoting Kirby, the K-Line Court observed that “[t]he international transportation industry clearly has moved into a new era—the age of multi-modalism, door-to-door transport based on efficient use of all available modes of transportation by air, water, and land.” Based on the decisions in Kirby and K-Line, it seems that this new era will largely be governed by maritime laws.
Commodity Sales Contracts

Another area where the district courts got a bit giddy was with commodity sales contracts. There were quite a few cases dealing with these kinds of contracts, and in most cases the dispute involved a contract for the sale of a given commodity in which the buyer had some involvement in nominating a vessel or, for instance, in undertaking to be responsible for demurrage at the discharge port. Plaintiffs argued that when disputes arose under the “maritime” component of the contract—e.g., over the buyer’s obligation to pay demurrage—that part of the contract at least was a maritime contract thus giving the court admiralty jurisdiction.

This argument met with mixed results in the district courts. The early trend seemed to be away from seeing these kinds of contracts as maritime, but as matters progressed it seemed that the tide turned and the decisions began to more uniformly agree that claims under the “maritime” terms of a sales agreement do give rise to maritime jurisdiction.
U.S.-flag vessel to a foreign flag. In addition, the prohibitions of Section 56101 apply to vessels whose last documentation was the U.S. flag.

To address frequent approval requests, MARAD adopted regulations (46 C.F.R. Part 221) that grant general approvals under Section 56101 for certain transfers of U.S.-flag vessels and interests in such vessels to non-U.S. citizens. In general, those regulations permit the sale, lease, charter, delivery, or other transfer of an interest in, or control of, a U.S.-flag vessel to a non-U.S. citizen, provided that the vessel remains documented under the U.S. flag following the transaction and is not operated under authority of a foreign country. Exceptions to this general approval include bareboat or demise charters of U.S.-flag vessels for operation in the coastwise trade and sales for scrapping. In addition, foreign transfers of vessels less than 1,000 gross tons are subject to a general approval subject to certain conditions.

In the case of foreign transfer transactions that are not covered by a general approval, an application must be filed with MARAD, which evaluates them on a case-by-case basis. In evaluating applications, MARAD considers, among other things, the following:

(i) the type, size, speed, general condition, and age of the vessel;
(ii) the acceptability of the owner, proposed transferee, and the country of registry or the country under whose authority the vessel is to be operated; and
(iii) the need to retain the vessel under U.S. documentation, ownership, or control for purposes of national defense, maintenance of an adequate merchant marine, foreign policy considerations, or the national interest.

46 C.F.R. § 221.156(b)(1). MARAD’s approval of an application is usually subject to certain standard conditions, which are set forth in its regulations, and MARAD may impose other conditions it deems appropriate. For vessels that are 3,000 gross tons or more, these conditions typically include continuin restrictions—in the form of a contract secured by a surety bond—transfer and operation of the vessel for the remainder of its economic life, which is deemed to be 20 years for tank vessels and 25 years for non-tank vessels subject to extension for rebuilt or modified vessels. These restrictions are generally aimed at prohibiting the vessel from being owner-operated or by or in countries such as Cuba and North Korea.

During times of war or national emergency declared by the President, 46 U.S.C. § 56102 applies to foreign transfers, and it is more comprehensive and restrictive than Section 56101. For example, these foreign transfer restrictions also apply to the transfer of interests in vessels that are under construction in U.S. shipyards and to the shipyards themselves. The penalties for violations of Sections 56101 and 56102 are somewhat severe. In the case of Section 56101, a person who knowingly commits a violation is subject to criminal fines and imprisonment for not more than five years. Civil penalties may also be assessed regardless of whether the violation was knowingly made. In addition, transfers made in violation of Section 56101 are void, and a U.S.-flag vessel may be seized and forfeited to the U.S. government for these violations. Similar penalties apply to violations of Section 56102.

MARAD Arrangement with EPA on Foreign Transfers—TSCA Restrictions

In recent years, MARAD has agreed, on an informal basis, to refer foreign transfers of U.S.-flag vessels requiring its approval to the Environmental Protection Agency (“EPA”) for EPA review of compliance with U.S. environmental laws, in particular the Toxic Substances Control Act (“TSCA”), which is codified at 15 U.S.C. §§ 2601-2629. According to MARAD officials, there is no formal Memorandum of Agreement with EPA on this subject, but one is being currently developed. Therefore, MARAD has undertaken this process as a matter of policy and has not issued any amendments to its foreign transfer regulations formally notifying interested parties that this process will take place. In light of the MARAD regulatory criteria for evaluating foreign transfer applications (quoted above), there does not appear to be a clear basis under the Administrative Procedure Act for the current informal arrangement. Each shipowner seeking to transfer a vessel out of the U.S. flag has been left to their own devices to navigate what has become a cumbersome and unregulated process.

TSCA prohibited the manufacture, processing, or distribution in commerce of polychlorinated biphenyls (“PCBs”) one year after the law’s enactment in 1977. Under EPA regulations, the distribution in commerce, including for export, of PCBs at concentrations of 50 ppm or greater is prohibited, unless a waiver is granted. 40 C.F.R. §§ 761.20 and 761.97. Vessels manufactured before 1977 did contain PCBs in transformers, capacitors, and cables, among other places. However, presumably vessels built in the United States after 1978 do not include PCBs and, hence, are not affected by this prohibition.

Several federal court decisions have held that the sale of a vessel containing PCBs is the equivalent of distributing PCBs in commerce and is prohibited under TSCA restrictions. For example, in the case of the United States v. M/Y Sanctuary, 540 F. 3d 295 (4th Cir. 2008), involving a former U.S. Navy

Notes From The Editor: The Expansion of Admiralty Jurisdiction

BY THOMAS H. BELKNAP, JR.

In recent years, we have seen a trend of expansion of the federal court’s admiralty jurisdiction in a number of different areas. To a large degree, this has been an offshoot of two fairly recent decisions of the Supreme Court, which may have construed as representing a trend of widening the federal maritime jurisdiction.

In Exxon Corp. v. Central Gulf Lines, the Supreme Court reversed a nearly 150-year-old “bright line” rule that agency contracts were excluded from the admiralty jurisdiction, holding that such contracts should be considered maritime where “the services performed under the contract are maritime in nature.” Exxon involved a claim by a bunker supplier that supplied bunkers domestically and arranged bunkers internationally as an agent through local suppliers. Under the “traditional” rule, claims under the former arrangement were maritime, whereas claims under the latter were not. The Supreme Court reversed this rule, finding that the nature and subject matter of the two arrangements were essentially identical and holding that both were maritime. This ruling has reopened the possibility that many other kinds of agency contracts traditionally outside the maritime context might now be considered maritime.

In Norfolk Southern v. Kirby, the court considered the question of whether bills of lading issued for a multimodal transport involving both an ocean carriage and an over-land segment should be construed under federal maritime law or state law when the cargo is damaged during the over-land portion of the carriage. The Court held that the multimodal carriage was “essentially maritime” even though it also involved an over-land leg, and thus the entire carriage was governed by the federal maritime law.

One fascinating side-effect of the recent and now deceased Rule B EFT-attachment craze was to put the development of maritime law concerning admiralty jurisdiction into “fast forward” mode. Since one of the two key requirements of Rule B is that a claim be “maritime,” Rule B plaintiffs constantly strove to test the outer boundaries of the admiralty jurisdiction. Some of these attempts were, perhaps surprisingly, successful. Others were not but may well foreshadow future expansions by the Supreme Court.

Shipbuilding and Ship Constructions Contracts

People are often surprised to learn that contracts for the construction and for the sale of a vessel are not considered to be within the admiralty jurisdiction. Intuitively, it is difficult to see how either kind of contract is not “essentially maritime in nature” within the meaning of the Exxon and Kirby Supreme Court cases. But long standing precedent, from the Supreme Court in the case of shipbuilding contracts, and from the Circuit Courts of Appeal in the case of ship sale contracts, has held that these kinds of contracts are not maritime.

In Kalmarona Shipping Co. v. Sea Gulf Shipping Co. Ltd, one brave district court judge concluded that Kirby and Exxon—as well as a recent Second Circuit decision that had applied their reasoning to construe a commercial general liability insurance policy as maritime based on the subject matter of what was being insured—gave her sufficient cover to conclude that the rule in these cases and the reasoning behind them could be applied to offshore transactions. She followed her reasoning and, as far as I understand, all of those appeals died an untimely death before this jurisdictional issue could be considered by the Second Circuit.

Numerous other district judges considering the identical question thereafter, however, declined to follow the decision in Kalmarona—not necessarily because they disagreed with its reasoning, but rather, as a matter of precedent, felt constrained by prior precedent of the Second Circuit, which they concluded had not actually been overruled by Kirby and Exxon. This issue was on appeal to the Second Circuit in several cases at the time. For example, the new federal court’s admiralty jurisdiction in the Second Circuit was considered by the Supreme Court.

The Second Circuit did get the chance to consider this issue in Primera Maritime Limited v. Jiangsu Eastern Heavy Industry Co. Ltd. None of the district courts had been courageous enough to conclude that Exxon and Kirby had actually overruled the old Supreme Court precedent holding that a ship sale contract is not maritime, although the point was argued in several cases to the lower courts. On appeal, the Second Circuit observed that the plain- tiff was “correct to point out that the conceptual approach taken in those cases suggests that modern principles disfavor per se admiralty rules based on the site of the contract’s formation or performance.” Ultimately, however, the Second Circuit was not prepared to conclude that the Supreme

(continued on page 6)
Walking the Plank (continued from page 5) especially its crew in the hands of pirates is significantly worse.” Moreover, attempting to restrict ransom payments may be problematic for a number of reasons.

Reasons for Not Making Ransom Illegal

1. Enforcement would be very difficult.
2. It would criminalize what may be the only action available to ship owners and their insurers to free captured crew members.
3. It would escalate the problem by forcing pirates to take even more drastic action than we have seen to force their demands. Seeing even one seaman who is forced to walk the plank because of a refusal to pay ransom would be one too many.
4. It is not likely to solve the problem.
5. There are better solutions. Our governments have done a commendable job on many different fronts to prevent pirate attacks. These efforts should continue to be the main focal point for dealing with the problem.

Our governments also should be making a concerted effort to prosecute pirates who are captured. The Marseik Alabama prosecution in the U.S. is notable. The U.S. government also has been working with Kenya and helping to fund its efforts to prosecute and convict pirates and this is likely to have a greater impact than trying to shut-off ransom payments. There was a positive development recently with the successful prosecution and conviction of 8 Somali pirates in Kenya, all of whom received 20 year prison sentences. According to Lloyd’s List, this was the only one of the first 12 major piracy cases working their way through the Kenyan judicial system. These prosecutions should be helpful in deterring piracy.

For all of these reasons mentioned above, I urge government leaders to keep the focus on prevention and prosecution, and not on criminalizing the only means that may be available to a ship owner to secure the release of the vessel and crew if captured by pirates.1

1. Partner, Blank Rome LLP. The author wishes to thank Lauren Wilkus and Marja Pecar for their assistance in the preparation of this presentation. The views stated in this paper are solely the opinion of the author and should not be considered the opinion of Blank Rome LLP or our clients. 


6. Acting Deputy Administrator James Caponiti’s February 4, 2009 statement before the U.S. Coast Guard Sub-Committee on Transportation and Infrastructure of the U.S. House of Representatives on International Piracy.

7. See “Piracy driving up kidnap and ransom rates: Aon” dated April 9, 2009 at http://www.businessinsurance.com/article/20090409/NEWS/200015933

8. Id.


10. See Miscellaneous v. Ambo Corporate Member Ltd., [2010] EWHC 280 (Comm) (February 18, 2010) (the payment of ransom was formerly illegal in England under the now repealed) Ransom Act of 1782.


12. Subsequent to the presentation of this paper at the CMA Shipping 2010 Conference on March 24, 2010, on April 13, 2010, President Obama issued an executive order imposing economic sanctions against persons contributing to the deterring situation in Somalia, including acts of piracy in the waters off of Somalia. The executive order freezes the assets of certain persons who are identified as “specially designated nationals” and prohibits U.S. persons from doing business with these individuals. Two persons on the list of specially designated nationals are known pirates. The executive order does not contain a general ban on the making of ransom payments to Somali pirates. However, the order could affect ransom payments to the extent that they involve the two identified pirates or their associates. Please see Blank Rome’s April 2010 Maritime Developments Advisory “New U.S. Sanctions Against Somalia Terrorists and Piracy and Terrorism” at www.blankrome.com/index-th?contentID=74&ItemID=2252.


However, this world does not yet exist, so shipowners have to struggle with current conditions.

In brief, the Hong Kong Convention requires each vessel to carry a certificate that accompanies the vessel throughout its life and identifies any hazardous materials that may be contained in the vessel. PCBs and asbestos are prohibited under Annex I to the Convention; installations containing hydrochlorofluorocarbons (“HCFC”) are permitted only until January 1, 2020. The Convention also requires that each member state ensure that ship recycling facilities within its borders conduct ship scrapping in an environmentally sound and safe manner. Removal of hazardous materials must be

force until at least 15 nations have signed it. These 15 signatories must represent a combined merchant fleet of no less than 40% of the world’s gross tonnage of merchant shipping, and the combined annual ship recycling volume of these nations during the preceding 10 years must constitute no less than three percent of the gross tonnage of the combined merchant shipping of these nations. In other words, we can expect a long wait until the Hong Kong Convention enters into force, unless the major shipping nations make a commitment to its earlier implementation.

In brief, the Hong Kong Convention requires each vessel to carry a certificate that accompanies the vessel throughout its life and identifies any hazardous materials that may be contained in the vessel. PCBs and asbestos are prohibited under Annex I to the Convention; installations containing hydrochlorofluorocarbons (“HCFC”) are permitted only until January 1, 2020. The Convention also requires that each member state ensure that ship recycling facilities within its borders conduct ship scrapping in an environmentally sound and safe manner. Removal of hazardous materials must be
Conclusions and Next Steps

If EPA continues to step up its enforcement actions against U.S. shipowners under TSCA, Section 56101 and other statutes, shipowners will have no choice but to clean up their vessels before they are sold for scrap overseas. From a legal perspective, MARAD must amend its foreign transfer regulations to make clear to interested parties that it has adopted this new practice. At a recent maritime forum, a MARAD attorney announced that the agency planned to do so. Until the agency amends its regulations and establishes a new procedure, MARAD will have to document the legal authority under which it is imposing the new requirements. The EPA has also issued an Advance Notice of Proposed Rulemaking requesting comments on its reassessment of use authorizations for PCBs. Specifically for the maritime industry, EPA is seeking comments on nine questions about the use of PCBs on vessels.

Eventually, Congress will have to review the new MARAD and EPA requirements to determine if they make sense for the maritime industry and if new legislation addressing the subject is needed.

1. The Convention exempts from its coverage warships, vessels of less than 300 GT, and vessels operating throughout their life only in internal waters. Article 3, Hong Kong Convention.
Piracy and ransom payments are not a new problem. Julius Caesar himself was seized by pirates in 75 B.C. and released after ransom was paid. Piracy on the high seas was a major preoccupation during the early years of the American republic; by 1800, the United States was paying about 20% of total federal revenues to the Barbary States as ransom and tribute. This only ended when the U.S. navy built up a fleet of warships able to take on the pirates. The International Maritime Bureau’s Piracy Reporting Centre (“IMB PRC”) has reported a total of 406 incidents of piracy and armed robbery in 2009, with attacks by Somali pirates accounting for 217 of the total. In addition, in 2009, 49 vessels were hijacked, of which 47 were captured by Somali pirates. 120 vessels were fired upon, 1,052 crewmembers were taken hostage, and 76 crewmembers were either injured or killed. All of this took place despite the presence of the world’s navies around the Gulf of Aden, which increased significantly beginning in the spring of 2009. According to experts on the subject, “in 2008, ransoms would have averaged between $500,000 to $1 million. In 2009, ransoms were between $1 million and $7 million and…a rough estimate [indicates] that the average is now $2 million.”

The largest reported ransom to date was paid in January 2010 to secure the release of the tanker MARAV CENAVIRUS, which was laden with two million barrels of oil when it was hijacked by Somali pirates in November 2009 near the Seychelles in the Indian Ocean. The vessel was released only after an aircraft delivered a ransom payment believed to be between $5.5 million and $7 million.

There can be little doubt that the payment of ransom has contributed to the problem. For otherwise unemployed young men in Somalia, the prospect of getting a share of a multi-million dollar ransom payment far outweighs the comparatively low risk of being shot, caught, or otherwise confronted by the world’s navies. Each ransom paid only encourages pirates to demand more, thus, further perpetuating the problem. This is a principal reason behind suggestions that ransom payments should be illegal. In addition, the increased insurance premiums to cover ransom payments, ship owners are also negatively impacted by rising operational costs due to higher wages paid to crews to transit the higher risk areas, and delays caused by longer transit times or diversions to avoid the area altogether.

According to Lloyd’s List, vessels electing to transit around the Cape of Good Hope to avoid piracy in the Horn of Africa incur hundreds of thousands of dollars in increased fuel costs per trip and an additional seven to ten days of transit. While the owner may benefit from civil compensation under CLC, it is not protected for its role under criminal law; the operator is not covered by the terms of the CLC and cannot benefit from “channeling”; the classification society has an equally independent role and cannot be brought under the cover of the CLC; and TOTAL, the shipper, was guilty of certain wrongdoings (see below), but can benefit from the “channeling” protection under the CLC.

In an earlier related court case involving Eni, the Court also asked advice from the European Court of Justice (“ECJ”) concerning the definition of “waste” under European waste legislation. The ECJ determined that the leaking and dispersal of persistent oil at sea, be it in small or large quantities, but with the properties to harmfully damage the environment, is illegal in EU territorial waters if it is clear that such an incident could have avoided. (This implies that a substance or product where lost during transport could become “waste.”) The ECJ pointed out that, according to European law, the “owner” of the “waste” is responsible for “discharging” the waste in an acceptable manner. If this is not done correctly, the “polluter pays” principle would be applicable. The Court has not insisted on following ECJ’s route, but it determined that French law is not incompatible with European law.

This is the place to concisely summarize 400-plus pages of the Arrest, but suffice it to state the essence of the judgment below:

• All four parties have been found guilty of “environmen-tal crime,” but for different reasons and with different responsibilities.

The Pirate Problem
This audience needs no introduction to the pirate problem. I daresay some in the audience may have had direct experience with pirates prowling around the Gulf of Aden. Some historians suggest that pirates of old thought eliminating prisoners by this means was not actually murder since no one laid a hand on them to cause their death. More realistically, it most likely was the quickest way of discarding seamen who were not useful to the pirates as hostages. This small piece of pirate history may serve as a back-drop to the narrow question to be discussed in my short talk today of whether our government and the United Nations should prohibit the payment of ransom to pirates to secure the release of a vessel and her crew. Unlike pirates of old whose goal was to capture a ship and its cargo, the pirates of Somalia have worked on the basis that their greatest reward will come from holding the crew hostage and demanding a large ransom payment. This is a question which has been the subject of much discussion and has gained currency recently from a headline article on the front page of Lloyd’s List.

It is a point that warrants discussion. The scourge of piracy in the Gulf of Aden has claimed many victims in the last two years and, despite a significant and very costly military effort, the problem remains and certainly has not lessened. The pirates show no signs of giving up. While this CMA Shipping 2010 Conference has been proceeding, at least four ships have been captured by Somali pirates. There is historical precedent for banning ransom payments to pirates, and a compelling argument can be made in favor of the idea. My own conclusion, however, is that making ransom payments illegal is not likely to deter Somali pirates. Instead, it could take us back to the age-old problem of pirates forcing their hostages to walk the plank, if necessary, to up the ante and increase the pressure on a ship owner to pay up. Except in the modern era, scenes of this happening would likely fill the internet.

Walking the Plank
BY JOHN D. KIMBALL

Editor’s Note: This article was originally prepared as a speech given by Mr. Kimball at the Connecticut Maritime Association’s (“CMA”) Shipping 2010 Conference on March 24, 2010.

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As one might expect, each of the above “elements” of “navigable” waters that are within the federal court’s admiralty jurisdiction. One might think it perverse that there are not others simultaneously act to save the damaged vessel, is entitled to share in the salvage award in respect of the vessel.

Salvage award: (1) that the salvage service was voluntarily rendered, (2) that the vessel or other maritime property (a) the salved value of the vessel and other property; (b) the time used, and expenses and losses incurred, by the salvors; (c) the nature and degree of the danger; (d) the skill and efforts of the salvors in salving the vessel, other property, and life; (e) the skill and efforts of the salvors in salving the vessel, other property, and life; (f) the skill and efforts of the salvors in salving the vessel, other property, and life; (g) the risk of liability and other risks run by the salvors or their equipment; (h) the promptness of the services rendered; (i) the availability and use of vessels or other equipment intended for salvage operations; and (j) the state of readiness and efficiency of the salvor's equipment and the value thereof. Alternatively, the parties to the salvage claim may opt to have salvage remuneration assessed by way of a private arbitration. By far, the most popular form of contractual salvage assessment is that offered under Lloyd's Open Form of Salvage Agreement “No Cure—No Pay” (“LOF”). This form of salvage contract may be entered into by the parties at any time before, during, or after the services have been performed and, as its name implies, requires success for payment to be due to the salvor. One exception to this principle that “success” is required is where the Special Compensation Protection & Indemnity Clause (“SCOPIC”) is incorporated into the LOF2000 form. If SCOPIC is invoked, and should the salvor fail to save the vessel or her cargo, he may still be compensated for his out-of-pocket expenses reasonably incurred in his attempt, plus an uplift of 25% thereof. The rationale behind this is to encourage salvors to continue their efforts to prevent or minimize marine pollution in circumstances where their award under Article 13 of the Convention (which is also applicable to LOF) would not warrant continuing with the services.

The Position in the United States

In the main, U.S. law closely tracks the English law of salvage. Three elements must be proven to be entitled to a salvage award: (1) that the salvage service was voluntarily rendered; (2) that the vessel or other maritime property at issue was in marine peril, and (3) that the salvage was at least partially successful. The law of salvage applies in respect of “navigable” waters that are within the federal court’s admiralty jurisdiction. One might think it perverse that there is no entitlement for an award for the “mere” salvage of human life; however, one who acts to save human life, while others simultaneously act to save the damaged vessel, is entitled to share in the salvage award in respect of the vessel.

As one might expect, each of the above “elements” of salvage has been subject to extensive judicial gloss. Thus, for instance, fire fighting services rendered in a harbor by a town fire department are not “voluntary” because the fire crew was for this purpose. Standards for claim adjudication will be developed and published in the near future. Dissatisfied claimants maintain all current rights under law, including the right to go to court or to the Fund. Processing details for this mechanism is still being worked out.

Claims for Economic Damages

Among the compensable damages specified in OPA 90 are damages arising from economic loss. Specifically, RPs are liable for “[d]amages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources. . . .” One of the major concerns arising out of this incident is whether parties will be able to seek compensation for economic loss due to lost profits or earning capacity may have a viable claim under OPA 90.

Congressional Oversight and Legislation

In response to the Deepwater Horizon incident, numerous hearings have been held—and will continue to be held— with a focus on the economic and environmental effects of the spill, as well as the impact of the oil rig explosion on offshore oil and gas development policy. Members of Congress have already introduced over 100 bills to address various aspects of the spill. Various Congressional committees are now starting to take action to consolidate and consider various bills. For example, H.R. 5629, sponsored by Congressman Oberstar and under consideration by three committees, would among other things, repeal limits of liability, increase the minimum level of financial responsibility for an offshore facility to $1.15 billion, authorize recovery for non-pecuniary damages and human health injuries, require all vessels engaged in OCS activities to operate under the U.S. flag and be 75% U.S. owned (and a Mobile Offshore Drilling Unit (“MODU”) also have to be built in the United States), and substantially revise the oil spill response planning and safety regimes for vessels, facilities, and MODUs.

Notwithstanding the advance of H.R. 5629, conflicts have emerged over the question of who should be in charge of the oversight of the spill. Chairman Oberstar’s committee understandably puts the Coast Guard in charge. Chairman Rahall of the House Natural Resources Committee questions whether that is correct and whether an official in the Department of the Interior should have that responsibility consistent with the responsibility for Outer Continental Shelf resources. There is also continuing concern by a number of Members of Congress over broader unintended consequences for liability having nothing to do with the oil spill such as for cruise lines and overflight aviations, approval and use of dispersants, trade secret protections for response tech- niques, and impacts on small business ability to participate in response and clean up activities, among other concerns. Finally, other committees such as the House Judiciary and Energy and Commerce Committee have yet to make their mark on this legislation.

Conclusion and Recommendations

If you have suffered any of the aforementioned damages as a result of the Deepwater Horizon incident, you may be entitled to compensation. BP has established 25 claims centers and a 24-hour, toll-free claims hotline at (800) 440-0858, and the Deepwater Horizon Unified Command has established a website providing detailed information about the incident at www.deepwaterhorizonresponse.com and www.restorethegulf.com. Similarly, if you have a technology or assets that you think would be effective in the response and cleanup, BP and the Coast Guard has set up procedures for submittal of those ideas for evaluation and approval.

We recommend you continue to monitor the implementa- tion of the new ICF funded by BP. We also recommend you contact your counsel with regard to claims to fully understand your rights.

With regard to legislation, although it is impossible to predict exactly what legislation will ultimately be enacted, it is a virtual certainty that a new pollution regime will emerge. In fact, there are indications that the House leadership will push for House approval of a Deepwater Horizon bill before the August 2010 recess and that the Senate will take up a bill in September 2010. Accordingly, any person or entity involved in the Deepwater Horizon incident should consider possible action to protect your interests. It is highly likely that some legislation will be enacted before the end of the year.
Deepwater Horizon (continued from page 1)

against the Fund. At the start of the spill, there was approxi-
mately $1.6 billion available in the Fund and a $1 billion limit
per incident, of which no more than $500 million may be
paid for natural resource damages.

The Coast Guard has designated BP as the “Responsible
Party” (“RP”) ultimately responsible for payment of both the
removal costs and damages due to the incident. The limits of
liability for an offshore facility are $75 million in addition to all
removal costs; however, the limits of liability can be broken
under various scenarios.

Numerous lawsuits have been filed alleging both OPA
90 claims for removal costs and damages, as well as claims
for removal costs and damages under general maritime law
in a negligence action in a federal or state court. The prob-
lem with negligence claims under general maritime law is
that it is not a strict liability regime, and generally a defend-
ant is not liable under the general maritime law for purely
economic losses in the absence of physical injury to the
claimant’s person or property, even though such losses may
be deemed a foreseeable consequence. Experience has
shown with OPA 90 that the claims process discussed below
provides a viable and fairly efficient means for recovery with-
out the attendant expenses and uncertainties for recovery
associated with litigation.

Claims Procedures

Before filing a claim with the NPFC, the claimant must
have submitted its claim to the RP for resolution—unless oth-
erwise directed by the NPFC to file directly against the Fund—
and must not be involved in a pending law suit. The RP is
authorized to make interim payments, but if the RP denies
the claim or fails to pay it within 90 days, the claim may be
submitted to the NPFC. Claims associated with removal costs
must be submitted within three years of the completion of all
removal actions related to the incident. Claims for all dam-
ages must also be submitted within three years of the date
of injury (from the time the injury was reasonably discover-
able with the exercise of due care). Claims that are settled
with the RP may not be submitted to the Fund for reimburse-
ment of a greater amount. However, if partial settlements are
received from the RP, e.g., only a portion of the claim was
resolved, subsequent claims may be submitted to the Fund
for reimbursement. Such partial claims must be clearly docu-
mented as to what portion of the claim was paid and/or not
paid by the RP.

Upon receipt of a claim, the NPFC reviews it for com-
pleteness and may request additional information from the
claimant. Once the NPFC makes a determination with regard
to the claim, the claimant must accept or reject the deter-
mination within 60 days. More details concerning claims
procedures may be found under the NPFC’s website at:
www.uscg.mil/npfc/claims/.

On June 16, President Obama and BP announced that
BP established a $20 billion claims fund for the incident. The
fund will be available to satisfy legitimate claims, ... Payments from the fund will be made as they areadjudicated by an Independent Claims Facility (“ICF”) set up
under a pre-existing duty to the town to aid in fighting fires.
Additionally, a vessel that is “softly aground” in mud or silt,
with no imminent danger from weather and the ability to
refloat herself on the next tide, is not necessarily in marine
peril. Further, success can mean something less than saving
the vessel from total loss where, for instance, some portion
of her cargo is rescued before she sinks.

The factors to be considered in determining what level
of salvage award should be granted are essentially in keep-
ing with the English system, which follows the basic prin-
ciple that salvages of valuable property in serious peril and at
extreme risk to the salvors should be more handsomely
rewarded than simple and routine acts of assistance.

Importantly, the award is not intended to be a simple
quantum
meruit
reimbursement—
for the salvor’s expenses. Rather, it is intended to be a reward that is large enough to
affirmatively encourage those at sea to attempt to rescue
property in marine peril.

Notably, U.S. courts and arbitrators, recognizing the valu-
able aid that commercial salvors render to the shipping community at large—and acknowledging the large overhead
expenditures those companies need to make in order to
have assets at the ready at all times—frequently award com-
mercial salvors a commercial “uplift” for a successful salvage.

A claim for salvage can be enforced either against the
salved vessel in rem
by commencing a maritime arrest
action, or against the owner by commencing a lawsuit against
him personally, pursuant to the admiralty jurisdiction of the
federal courts. Federal courts have exclusive jurisdiction over
salvage claims, and state courts are not competent to make
marine salvage awards. As is the case under English law, the parties can, and
often do, agree to arbitrate salvage claims. This is often preferred on both sides of the table because of the significant
potential cost savings and the ability to have the dispute
decided by arbitrators who are experienced in this somewhat
esoteric field. The Society of Maritime Arbitrators, Inc. in New
York has published a form salvage agreement (MARSALV
Form) and salvage arbitration rules that are finding more
widespread use recently—particularly in the area of pleasure
boat salvage.

Conclusion

Finally, the best thing a person who has rendered assis-
tance at sea can do next is to contact a lawyer. There are
many pitfalls for the inexperienced, and a lawyer with good
salvage experience can help his client negotiate a path
through them and get the salvor paid for the valuable services
he has rendered.

This article originally appeared in the June 2010
edition of Maritime Reporter. Reprinted with permission
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Lawsuits, Claims, and Legislative Implications of the Deepwater Horizon Spill

BY JONATHAN K. WALDRON, DUNCAN C. SMITH AND JEANNE M. GRASSO

On April 20, 2010, a fire and explosion occurred onboard the Deepwater Horizon, a mobile offshore drilling unit owned by Transocean Ltd. and, at the time, operated for BP Exploration & Production, Inc. ("BP"). On April 22, 2010, the Deepwater Horizon sank, resulting in an uncontrolled flow of hydrocarbons from the wellhead into the Gulf of Mexico. As of the date of this article, BP is still trying to stem the flow of the oil and has reportedly spent over $3.1 billion responding to the ruptured oil well, including costs of the spill response, claims paid, and grants to the Gulf states. To date, BP has taken responsibility for responding to—and cleaning up—the spill and has established a process to manage claims from the incident, reportedly spending over $162 million in damage claims. As part of this process, BP is making advance payments based on estimates of business losses and has agreed to establish a $20 billion claims fund.

In addition, there have been numerous ongoing administrative and congressional investigations, various Congressional hearings have been held and legislative proposals introduced, and multiple law suits have been filed.

Following the Deepwater Horizon incident, many questions and concerns have arisen regarding the liability for damages and claim rights and procedures. If you have incurred losses, including economic losses, as a result of the oil spill, you may be entitled to compensation under the Oil Pollution Act of 1990 ("OPA 90"). In addition, Congress is holding a series of oversight hearings to look into the Deepwater Horizon incident and many Members of Congress have already responded by introducing bills to address perceived problems.

Background

In 1990, Congress enacted OPA 90 to increase pollution prevention, ensure better spill response capability, increase liability for spills, and facilitate prompt compensation for clean-up and pollution damage. OPA 90 created the Oil Spill Liability Trust Fund (the “Fund”) to provide funds for oil pollution cleanup and compensation. OPA 90 established a $2.7 billion trust fund to pay for response costs, cleanup, and damage claims. If oil pollution damages are caused by a responsible party, the Fund may be used to meet response costs for the oil spill, unless the responsible party is able to pay these costs. The Fund is managed by the U.S. Coast Guard’s National Pollution Funds Center (the “NPFC”), which is charged with evaluating and determining whether to accept claims made.

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