LOST IN D.C., concerning passage of the United Nations Law of the Sea Treaty

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Admiralty and Maritime Law Committee

LOST IN D.C.

By: Miller W. Shealy, Jr.,

The Law of the Sea Treaty (“LOST”\(^2\)) has foundered in D.C. More than 160 nations have ratified the Treaty. The United States is the only major naval and maritime nation to withhold ratification. Since the early 1980’s it has seemed close to Senate passage many times, but it has never made it to the floor for a vote. Many thought the time was right this past summer; however, the treaty was successfully scuttled in Washington once again.

What exactly is LOST all about? We have had a law of the sea for centuries. It quite literally goes back to ancient Phoenicia, Greece, and Rome. Maritime powers have always followed common rules of the sea to promote trade and guarantee security for their coasts.\(^3\) Over centuries this developed into the concept known in international law as the “customary law of the sea.”\(^4\) It is a subdivision of “customary international law.”\(^5\) However, custom is limited and cannot provide the specificity and authority needed to avoid and resolve many disputes.

One of the earliest customary principles of the law of the sea concerned the territorial sea. What part of

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\(^2\) “LOST” is the new acronym for the Law of the Sea Treaty, most often used by the Treaty’s critics. It is properly referred to as the United Nations Conference of the Law of the Sea III (UNCLOS III) or simply Law of the Sea III (LOS III).


\(^4\) Id.

\(^5\) Id.
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MESSAGE FROM THE CHAIR

Welcome all Committee Members – We are starting this year off with an interesting and informative newsletter for all to enjoy. I want to thank everyone that worked hard to make our October newsletter possible. I hope to see Committee Members in La Quinta, California on October 10 – 14, 2012, at the TIPS Fall Leadership Meeting. We will spend our time at La Quinta planning for this year’s events. We are holding a business meeting on Friday, October 12 at 8 AM PST. Should you wish to call-in for the meeting, please let me know by email and I will see if the hotel has conference call capability and will arrange. My email address is lsands@riker.com. At our business meeting, we will be discussing our anticipated Insurance program and webinars and our meetings in Dallas, TX, Washington, DC, and San Francisco, CA. If you cannot make La Quinta, please try and make the ABA meeting in Dallas in February 2013. The Committee will be attending a strategic planning session at the Dallas meeting where our Committee’s effectiveness will be assessed to determine additional ways we can have an impact on the maritime community, both domestically and internationally. We will seek information from all Committee Members for our strategic plan. We are also planning an event in Dallas to take advantage of its prime location for marine, oil and gas companies. In the next week all Committee Members will be receiving a short survey about what Members would like to see from the Committee. I ask that you take the time to complete this survey so that we can ensure our Committee is serving your needs and continues to be a success within TIPS. Enjoy the newsletter and don’t forget to dial in for our monthly conference calls held on the third Thursday of each month. Our next call will be on October 19, 2012. The call-in number is 866-646-6488 and the conference code is 1885350536.

Warm Regards,
Laurie Sands
2012-2013 Chair
Admiralty and Maritime Law Committee

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Admiralty and Maritime Law Committee Newsletter Fall 2012

TRADE TALK

For our fourth “Trade Talk” piece, we are pleased to spotlight a valued contributor to our committee’s monthly calls, Buford Boyd Pollett, in-house counsel/director of legal affairs for the Middle East and India at McDermott Middle East, Inc., in Jebel Ali, Dubai, United Arab Emirates. The McDermott imprimatur is one of the finest oil and gas companies with a rich Texas lineage spanning almost 90 years. “Team McDermott” draws strength from a diversity of backgrounds, perspectives, and ideas among approximately 13,500 employees representing more than 50 nations with unique languages and dialects. Below are excerpts from our interview which address his views on the maritime industry, what outside counsel need to do to get McDermott’s business, key legal issues for a global enterprise, and perhaps most importantly his prediction for the rest of the football season in Texas.

Q. Buford, tell us what prompted you to get into the maritime legal industry?

R. At the age of eleven, I knew that I wanted to work to find and develop natural resources. I wanted to help people fully benefit from the world around them in a way that was similar to the benefits that I enjoyed growing up on my parents’ (Buford Jordan and Mary Elizabeth Pollett) family farm near Wrightsville, Georgia.

Along the way, I learned that developing natural resources was not that different from farming, in fact the risks are often very similar (i.e. weather is a risk for farmers just as much as weather can really impact offshore energy developments). As part of this career path, I also worked as a wellsite geologist and mudlogger on various vessels and worksites in the Gulf of Mexico, Alaska, and California.

In addition, after finishing my technical and business degrees, I knew I needed the legal background to fully appreciate the full spectrum of risks and opportunities involved in finding and developing natural resources, so I decided to attend law school to obtain the legal tools that I needed to continue this pursuit.

During law school, I needed an elective to be able to understand some aspects of maritime law, especially since so much of the energy industry takes place in offshore locations. Consequently, I took the marine insurance class as my elective that semester of law school.

Later, my first boss after law school, Mr. Sam Whitt, was the main reason that I joined the Maritime Law Association (MLA). Thus, I am truly grateful that Mr. Whitt insisted that I join the MLA, because over the years, my in-house clients have needed me to continue to further develop my understanding of the maritime legal framework both in the United States and in other countries around the world.

Q. Can you describe your experience in-house?

R. My experience has been that people look to in-house counsel to provide solutions and guidance on a wide range of issues that may not be purely legal in nature.

Even though in-house counsel needs to have certain legal specialties under their belt, my experience has been that I must be able to find the solution for my in-house clients, or help them find the appropriate solution on subjects that might be outside my wheelhouse. Therefore, I have to maintain a good understanding of what my in-house clients’ needs are and provide or assist in obtaining the appropriate resources to meet those needs.
As in-house counsel, I may not know what issue will soon cross my desk, but constantly working to understand my in-house clients by simple acts, such as getting out of my office and having a coffee or tea with my colleagues in various departments is helpful. This allows me to monitor the pulse of the organization and to better understand the current needs and anticipate the future needs of my in-house clients.

Similarly, I must work to better understand the industry as a whole with regard to trends and best practices, if I am really going to be able to provide the needed support to my in-house clients. Therefore, I need to read a variety of industry publications and to the extent possible, participate in industry conferences that often do not have a legal focus.

In addition to understanding my in-house clients’ business needs, I also have to work on the human element and provide the needed leadership within the organization to achieve the organization’s goals. Therefore, as in-house counsel, I am continually improving my leadership, listening, and coaching skills.

Q. What are your views on hiring outside counsel?

R. Often, I have already undertaken a first legal review of the legal issues, so I generally expect outside counsel to know the subtle topography of the current law and where the law is going in a particular area. As a result, I really expect outside counsel to be able to answer promptly and provide accurate recommendations to a set of specific facts. To facilitate outside counsel in providing this needed service, I work closely with outside counsel to generate a scope of work that fits within the needed timeframe and close to the estimated cost.

In addition, for matters that are more complex I work with outside counsel to generate decision trees, so that we can better evaluate these complex matters and inform my in-house stakeholders accordingly.

Thus, finding professional and competent outside counsel and maintaining clear communication with outside counsel are critical elements in generating the appropriate legal advice that I must provide to my in-house clients.

Q. What legal issues are coming across your desk with some frequency these days?

R. Since McDermott is a leading engineering, procurement, construction, and installation (EPCI) company focused on executing complex and offshore EPCI oil and gas projects worldwide, and I am now part of this dynamic and growing company, I am seeing a lot of what I have seen over the years (i.e. transactions, transactions, and transactions, ....did I mention transactions?). Likewise, I have been privileged to work with some great industry groups, such as the Association of International Petroleum Negotiators, to generate model contracts for the industry to minimize transaction times.

In addition, I have the great opportunity to be a member of the Program Committee for the Offshore Technology Conference. In this capacity, I get to work with a variety of people in the offshore industry whose expertise covers a very broad spectrum to generate the program for the largest offshore industry event in the world. In this role, I get to work on some of the larger legal issues facing the offshore industry today with regard to new regulations for vessels or use of local in-country resources.

Q. For our practitioners, which maritime event(s) do you get the most out of?

R. In addition to my work with the Offshore Technology Conference, I am now more involved in the
Southeastern Admiralty Law Institute (SEALI). SEALI brings together a great group of maritime practitioners, puts together a great program on very timely topics, and for that reason, I really recommend SEALI to anyone who wants to stay up-to-date of the maritime issues of the day.

Q. In addition to the AMLC newsletter, of course, which maritime publication do you find most useful?

R. First, I really like the way the Journal of Maritime Law and Commerce combines the business and legal elements to provide a very practical series of articles on timely topics. Since I have worked and lived extensively on the United States Gulf Coast, I find that the Loyola Maritime Law Journal and Tulane Maritime Law Journals provide me with excellent and timely updates on the maritime legal framework.

Q. Thank you for taking time to speak with us today. As a final question, with you now living in Dubai, have you found an appropriate place to watch US football games and if so, can you predict which team will win more games this football season? The Texans of Houston or the Cowboys of Dallas?

R. Yes, the NFL packages are readily available and watching online is great in Dubai, even if I am watching during breakfast.

Since the cliché goes “Defense wins championships”, and since the team with the best defense going into this season is the Houston Texans, the Houston Texans are the clear favorites in my book over the Dallas Cowboys.

In the interest of full disclosure, please note that the fact that my oldest daughter, Izabella Sofia, was born in Houston, Texas and is an avid Texans fan did not influence my assessment any more than the fact that my youngest daughter, Agatta Florentina, was born in France would influence my assessment of the attributes of the Napoleonic Code as compared to the English Common Law.
KEEPING LITIGATION ASHORE: HOW A RECENT DECISION COULD OFFER MARITIME PRACTITIONERS AN ESCAPE FROM LONDON ARBITRATION CLAUSES

By: Daniel J. Cragg1 and Vince C. Reuter2

Just about every Supreme Court term the Court reminds lower courts of the preeminence of the Federal Arbitration Act (“FAA”), its “liberal policy favoring arbitration,” and that the FAA was “enacted in 1925 in response to widespread judicial hostility to arbitration agreements.”3 These “reminders” have even taken the form of rare summary reversals of a state supreme court judgment.4 This emphasis, combined with the prohibition on interlocutory appeals from orders compelling arbitration, places the proverbial thumb on the judicial scales in favor of the party seeking to send a case overseas.

Despite this, and especially in the maritime context, a litigant seeking to avoid its dispute being shipped away to foreign arbitral shores should not yet give up hope. A recent decision from the United States District Court for the District of Massachusetts has shown one way a party can keep maritime litigation at home.5 While it may be premature to call that decision a trend, the court has put itself squarely on one side of a distinct circuit split between the Second and Fifth Circuits, perhaps prodding the Supreme Court to enlist itself again in its quest to draw hard lines in the FAA.

The dividing issue in the circuit split relates to whether Chapter 2 of the FAA,6 which applies when less than all parties are U.S. citizens, requires an “arbitral clause in a contract” to be signed in writing by both parties in order to be enforceable. In Sphere Drake Ins. PLC v. Marine Towing, Inc.,7 the Fifth Circuit held that an “arbitral clause in a contract” is enforceable against a party regardless of whether that party signed the document actually containing the arbitral clause. In Kahn Lucas Lancaster, Inc. v. Lark Intern. Ltd.,8 the Second Circuit came to the opposite conclusion. After explicitly rejecting Sphere Drake, that court went through an exhaustive (and in our opinion persuasive) textual analysis of Chapter 2 of the FAA and rejected a liberal, pro-arbitration reading.

The importance of this split may have seemed largely academic the past dozen-or-so years; however, to maritime practitioners, decisions like the one in this recent District of Massachusetts case could offer an escape, however narrow, from the ubiquitous London arbitration clause. In Maroc Fruit Bd. S.A.,9 the district court tackled the question of whether a London arbitration clause found on a charter party that was not signed by the shipper, but was incorporated into the shipper’s bill of lading, is enforceable under Chapter 2 of the FAA. In other words, the district court answered the question of whether enforcement of an arbitration clause required evidence of an actual agreement. The district court answered emphatically in the affirmative.

The importance of Maroc Fruit Bd S.A. to maritime practitioners lies in part to its rather unremarkable facts. Marco Fruit Board S.A., the owner and shipper of citrus

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3 See AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1745, 179 L. Ed. 2d 742 (2011) (holding California law which prohibited class action arbitration waivers in consumer contracts preempted by FAA).
4 See, e.g., Magness Health Care Ctr. Inc. v. Brown, 132 S. Ct. 1201, 1202, 182 L. Ed. 2d 42 (2012) (GVR) (“Here, the Supreme Court of Appeals of West Virginia, by misreading and disregarding the precedents of this Court interpreting the FAA, did not follow controlling federal law implementing that basic principle . . . .”).
7 16 F.3d 666 (5th Cir. 1994).
8 186 F.3d 210 (2nd Cir. 1999).
ARCTIC NAVIGATION – THE LURE AND THE CHALLENGE

By: Peter G. Pamel¹, Partner, Robert C. Wilkins², Associate, Borden Ladner Gervais LLP, Montreal, Quebec, Canada

Arctic navigation has become an exciting and attractive prospect for the far northern waters of North America in recent years, although it also presents a host of challenges – economic, social, environmental, and technical. Legal issues and structures also need to be addressed if such navigation is to occur without incident and in an orderly fashion.

Global Warming and Melting Ice

The new enthusiasm about shipping in Arctic waters is the result of the melting of the Arctic ice pack. According to the most recent data and satellite images, assembled by NASA and its affiliated National Ice Data Center (NSIDC) in Boulder, Colorado, the Arctic Ocean’s summer ice cover has now reached its lowest level since records were first kept in 1979.³ Arctic ice cover on August 26, 2012 was 1.58 million square miles (4.1 million square kilometers), or 27,000 square miles (70,000 square kilometers) below the then lowest record of Sept. 18, 2007, a daily extent of 1.61 million square miles (4.17 million square kilometers). The minimum extent of summer sea ice has declined by 13 percent in each of the three decades since 1979. The ice is also getting thinner. This year’s record was reached even before the end of the Arctic melt season, which usually occurs in mid- to late-September. It has been alleged that, on average, Arctic ice cover now recedes by some 27,000 square miles (70,000 square kilometers) annually, being an area approximately equivalent to that of Lake Superior.

Melting Ice and the Northwest Passage

There has been speculation that the Northwest Passage could be virtually open water in the summer as early as 2030 or perhaps even sooner,⁴ although no one knows for sure, as many variables have to be taken into account in any such prognostication. The opening of the Passage is being promoted as a new and profitable trade route between Europe and Asia, with major reductions in transit times and costs (fuel, crewing, etc.) for shipowners. The following table gives examples of how transiting the Northwest Passage could reduce distances for merchant vessels on certain key international trade routes:⁵

<table>
<thead>
<tr>
<th>Route</th>
<th>London - Yokohama</th>
<th>New York - Yokohama</th>
<th>Hamburg - Vancouver</th>
</tr>
</thead>
<tbody>
<tr>
<td>Panama</td>
<td>23,300</td>
<td>18,560</td>
<td>17,310</td>
</tr>
<tr>
<td>Suez Canal &amp; Malacca Straits</td>
<td>21,200</td>
<td>25,120</td>
<td>29,880</td>
</tr>
<tr>
<td>Cape Horn</td>
<td>32,289</td>
<td>31,639</td>
<td>27,200</td>
</tr>
<tr>
<td>Northwest Passage</td>
<td>15,930</td>
<td>15,220</td>
<td>14,970</td>
</tr>
</tbody>
</table>

Northern Resources and Shipping

The abundance of natural resources beneath the surface of the Arctic land and water is another factor motivating the growing interest of business people in shipping in the Far North. In addition to iron ore, diamonds, gold, zinc, copper, uranium, and rare earth metals lying undiscovered in the Arctic soil, the U.S.

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⁵ Table translated from article by Frédéric Lasserre, “La souveraineté canadienne dans l’Arctique: la glace est mince”; http://fig-sl-die.education.fr/actes/actes_2006/lasserre/article.htm.

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I. Introduction

Arbitration has been a successful alternative to litigation for the maritime community for hundreds of years. For example, organizations like the Society of Maritime Arbitrators have thrived as resources for alternative dispute resolution by adopting rules based in part on the Federal Arbitration Act (“FAA”) to achieve the goals of cost efficiency, speed and fairness.

On the other hand, establishing fund instruments and creating a corresponding claims procedure has not been as successful an alternative to litigation in the context of oil spill claim resolution. The creation of the Gulf Coast Claims Facility (“GCCF”) to handle claims against and distribute awards from the fund established by British Petroleum (“BP”) in the aftermath of the Deepwater Horizon oil spill is an example of this failed form of alternative dispute resolution. The Oil Pollution Act of 1990 (“OPA 90”) governs litigation and any alternative claims procedures following an oil spill. OPA 90 does not require the creation of a claims facility or a fund for victim compensation; it is “entirely vague concerning how a responsible party must satisfy its duties.”

This Note will: 1) provide an introduction to maritime arbitration, 2) discuss challenging an arbitration award in the maritime context, 3) provide a background on OPA 90 and the National Pollution Funds Center (“NPFC”), 4) discuss the claims procedure and standard of review under OPA 90, 5) discuss the problems with the GCCF, and 6) propose amendments to OPA 90. This Note will argue that in order to avoid the complex litigation that ultimately dissolved the GCCF, with the goals of cost efficiency, speed and fairness in mind, amendments to OPA 90 should outline and mandate an alternative dispute resolution process modeled after the policies and procedures behind maritime arbitration.

II. Maritime Arbitration: Background and Context

When Congress passed the FAA in 1925, it ended a period of judicial reluctance toward enforcing arbitration provisions in admiralty contracts by validating such provisions in every area of commercial law subject to federal jurisdiction. The reluctance had formerly been justified in England on the basis that admiralty courts could not grant equitable relief. However, there was speculation that a declaration of an arbitration provision as void as against public policy reflected the judge’s concern about his own income declining, as the provision essentially “ousted” the jurisdiction of the court.

Although United States courts expressed similar sentiments early in the twentieth century, “courts are no longer ‘jealous of their own power’” and arbitration provisions are relied upon for settling maritime

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Year In Review

The August 2011 ABA annual meeting held in Toronto, Canada, of all places was a great meeting to lay the foundation for a strong year for the AMLC.

Chair Elect Designee Pam Palmer (r) speaking with a prospective member at an ABA TIPS social event in Toronto.

Pam Palmer (r) accepts an achievement award from then ABA TIPS Chair Ginger Busby (c) at the Toronto meeting for all of the committee’s efforts during ABA year 2011 chaired by Anne Kulesa.

Vice Chair Jim Koelzer at a volunteer event held at a food distribution center in Toronto.
Vice Chair David Deehl with ABA TIPS Director Mary Ann Peter (r) during the ABA TIPS Fall Meeting in October, 2011 in Seattle, Washington, where the AMLC co-sponsored an event on port security.

In February, 2012 the ABA mid-year took place in New Orleans, Louisiana. The AMLC held a program at Tulane Law School with Professor Robert Force and students. Here, Vice Chair Jessica Martyn (c) and Tulane law student member Lauren (Tootsie) Burk (r), chat at a reception held after a TIPS event.

Jim shows the lettuce who’s the boss.

Chair Chris Nolan (r) at an ABA TIPS community service event, Pitbull vaccinations and microchip clinic, in New Orleans where disaster preparedness packets the committee helped prepare were distributed.
In April 2012, the AMLC hosted a luncheon during the MLA Spring meetings at the New York Yacht Club, including Vice Chair Blythe Daly (l), Cathy Roberts, Pam Palmer, Kristin Stringer, Chris Nolan, Jason Barlow, Pamela Schultz (r) (not pictured Attilio Costabel, Dick Leslie, Suzanne Judas and George Gabel).

In May 2012, during the ABA TIPS spring meeting in Charleston, South Carolina, the AMLC visited the Charleston School of Law for an event with their maritime society to discuss the practice of law and plans for the law school’s new admiralty LLM program.

Law Student Vice Chair Olivia Palmer (c), with TIPS Chair Randy Aliment and his wife, at the AMLC’s Charleston soiree hosted by Olivia at her family’s mansion.

Committee members Ryan Tennant (l), Olivia Palmer, Jessica Martyn, Chris Nolan, and Chair Elect Laurie Sands
The AMLC leadership attends a dinner hosted by the Charleston School of Law at the Charleston Yacht Club.

Inside the Charleston Yacht Club, AMLC leadership dines with distinguished guests of the Charleston School of Law, including Professors Randall Bridwell and Miller Shealy, and Professor/Practitioner Gordon Schreck.
Vice Chair Harmony Loube and Chris Nolan take a moment at the Chicago annual meeting to reflect on a good year for the committee.

A lovely view from the Chicago Yacht Club.

The AMLC end the ABA year in August 2012 in Chicago, Illinois at the annual meeting by hosting a luncheon at the Chicago Yacht Club that included over 20 guests from overseas and other TIPS committees. AMLC members pictured include AMLC Law Student Writing Competition winner Lucy Martucci (l), Janice Hugenar, National Maritime Service President Alan Swimmer, Chris Nolan, Pam Palmer, Rebecca Bush, Philip Brickman, Tamara Tomomitsu and Harmony Loube.
The Chicago Yacht Club prepared a lovely menu for all of our guests and welcomed the committee with open arms.

Committee member and Italian lawyer extraordinaire Giuseppe Lorenzo Rosa (l) presents the Circolo Nautico Brenzone Yacht Club pennant to the Chicago Yacht Club in exchange for theirs at our luncheon.

Chris Nolan (c) accepts the ABA TIPS Overall Excellence Award from ABA TIPS Chair Randy Aliment (l) during the Chicago annual meeting. The award is the highest honor.

Chris Nolan at a volunteer animal clinic event in Chicago during the ABA annual meeting.
Finally, AMLC recruitment of new members starts early. This year we welcomed Vice Chair Jessica Martyn’s new baby boy Henry to the long-term planning committee.

… And Vice Chair Ray Waid also helped improve our membership numbers with the addition of his new baby boy Silas.
the sea, if any, could a coastal state consider its own? Almost as soon as people began to venture out to sea in boats the issue arose. Disputes over rivers, lakes, bays, passages, and, most importantly, fishing rights became routine. A custom developed that a coastal state had some claim of right to a band of water along its coast. This primary right to a certain part of the sea was justified by two interests, which are still dominant in the law of the sea today: security and economics. By the 17th century, the range of coastal artillery was roughly 3 miles, thus the cannon-shot rule was born. The 3 mile rule was remarkably stable for centuries. Though some nations claimed 4 miles and sometimes more, the outer limit rarely exceeded 7 and not more than 12 until just after the Second World War. The principle was *terrae dominum finitur, ubi finitur armorium vis* (the dominion of the land ends where the range of weapons ends).

The 19th century saw a huge leap in maritime technology. The sail was abandoned for the steam engine. By the 20th century, coal was giving way to diesel engines. The Second World War changed everything. The development of the Aircraft Carrier made any version of the cannon-shot rule totally obsolete. Thus, in 1945 President Truman issued the Truman Proclamation which asserted U.S. rights over the entire continental shelf. The effect of this was to give the United States a 200nm limit. It was the Truman Proclamation that gave birth to the modern law of the sea.

The hue and cry was substantial. However, many nations did not complain, they followed suit. A number of nations in South America asserted similar claims to the continental shelf in the Atlantic and the Pacific. The oceans suddenly got a lot smaller. One need only look to a map of the world, particularly Europe, the Indian subcontinent, the Caribbean, and the South China Sea to appreciate the problem. There is just not enough ocean to go around.

The United States and other nations turned to the United Nations. In 1958 the first United Nations Conference on the Law of the Sea (UNCLOS I) was held. It was followed by UNCLOS II in 1960, and then from 1973-1982 by UNCLOS III. By November 1994 sixty nations had ratified UNCLOS III and it entered into force. UNCLOS III was based on three major principles: freedom of the seas, sovereignty, and the common heritage of mankind. It represents the codified summation of customary law of the sea, as well as a set of solutions to new problems unique to the modern world.

Freedom of the seas is the cardinal virtue and the most ancient in the law of the sea. The idea is that all coastal nations must have ingress and egress - innocent passage, transit - from one part of the sea to another on a worldwide basis. Not only must ships be able to freely traverse the great oceans without being harassed, they must be able to transit the narrow places of the world unmolested: Gibraltar, Hormuz, the Dardanelles, Malacca, and the English Channel to name a few.

Sovereignty refers to the right of coastal nations to safeguard the security and economic interests of their coasts. UNCLOS III proposes a novel and brilliant solution. It divides all the water in the world into five categories: inland waters, territorial sea, contiguous zone, exclusive economic zone (EEZ), and the high seas. Inland waters are those waters landward of the coastline. The coastal state’s right to these is absolute. The next four categories are all seaward of the coastline. The first is the territorial sea which extends 12nm miles from the coast. Then comes the contiguous zone stretching out another 12nm. Extending from this point is the EEZ. The EEZ actually includes the territorial sea and the contiguous zone and extends a full 200nm from the coast. Seaward of the EEZ is the high sea. The high seas are the common heritage of mankind. The coastal state’s rights diminish as one moves from the coast outward to the high seas. UNCLOS III provides for “innocent passage” through the territorial sea. Limited rights to enforce some laws extend to the contiguous zone. Rights to exclusive economic exploitation of the EEZ belong to the coastal state. These rights include fishing and mineral exploitation of the seabed and subsoil. Obviously, most states do not have a full 200nm EEZ. Many have only a few nautical miles of territorial sea, if that. However, UNCLOS III deals with setting boundaries by a process known as delimitation. Thus, the sea is divided and reduced, but common rights to the high seas are protected.
and even limited rights to another state’s territorial sea are guaranteed, e.g., innocent passage. The Treaty also incorporates rules for flagging ships. This is the primary mechanism for regulating shipping on the high seas. Any state may flag a ship but must do so in accordance with certain rules and regulations to guarantee the safety of the crew and vessel, as well as maintain the vessel in a manner which is protective of the environment.

Pursuant to the concept of the common heritage of mankind, the Treaty recognizes that the seas belong to all mankind and must be used to benefit all. Thus, the Treaty contains numerous provisions regarding the marine environment and the protection of marine wildlife. It also creates a court, the International Tribunal on the Law of the Sea (ITLOS), based in Hamburg, Germany, to resolve conflicts between nations under the Treaty. It establishes the International Seabed Authority (ISA) headquartered in Kingston, Jamaica, to regulate economic activities in the high seas, e.g., deep sea mining and the like. The ISA has the authority to collect royalties from member nations for various economic activities in the seas and distribute them to poorer member nations. Thus, all nations may share in the bounty of the oceans.

The Treaty is supported by diverse interests. The Navy and other branches of the military are behind the Treaty. This is significant as a major criticism has been that the Treaty undermines U.S. security interests. The Navy and Coast Guard believe the Treaty will give it clear rights of passage and set more precise ocean boundaries. A key part of the Treaty is that warships are entitled to innocent passage. The business community, the U.S. Chamber of Commerce and many oil companies support the Treaty. The major reason for such strong business support is that unless an internationally agreed upon system is in place to guarantee title and rights to property, the high seas and even the EEZ cannot be profitably exploited and competing claims resolved. One region where this is particularly important is in the arctic. The so-called arctic land grab is particularly disturbing as multiple nations, including the United States, assert claims there. Just a few years ago, Russian submarines planted the Russian flag on the arctic seabed. While this remains largely a symbolic act, its symbolism must not be underestimated. It presages the very kind of disputes that will be extremely difficult to resolve without a legal regime in place.

A substantial number of distinguished diplomats and officials have given their support to and testimony in favor of the Treaty: Secretary of State Hilary Clinton; Secretary of Defense Leon Panetta; Chairman of the Joint Chiefs of Staff, General Martin Dempsey; Henry Kissinger; George Shultz; James Baker, III; Colin Powell; Condoleezza Rice; and even, at least when she was governor of Alaska, Sarah Palin. We must also add to this list every president since Reagan.

So why the opposition? First, it is believed the Treaty is unnecessary. Much of the Treaty is not new, it is an expression of the customary law of the sea. As such, the Treaty is largely superfluous. Second, the Treaty limits U.S. sovereignty in two ways: (1) The establishment of ISA is nothing more than a U.N. attempt to impose taxes on U.S. commercial ventures and ultimately the American public. The United Nations does not at present have taxing power. To turn over such power is a dangerous precedent. Whether one characterizes it as a tax, royalty, permit, or licensing fee, the result is the same. The United Nations will have direct access to U.S. pocketbooks. (2) Unlike many treaties, UNCLOS III can be changed by vote of the member nations. The consent of all is not required. Many fear that given the extensive powers given to the United Nations under this Treaty, once the United States has ratified it the trap will be sprung. Changes will be made that will bind the United States to terms that will cripple U.S. security and economic interests.

Shrill recriminations fly back and forth between proponents and opponents of the Treaty. I do not believe

10 See generally note 2 and UNCLOS III, Section 3.
14 Id.
that the proponents are anti-American internationalists bent on undermining America and turning the country over to a one world government. Nor are the opponents uninformed tea partiers yearning for some by-gone yesteryear of U.S. global dominance. The benefits are very real, as are the risks. If some international legal regime is not in place conflicts over the sea and its use will multiply. We will one day have a full blown international crisis arising out of the economic exploitation of the sea. However, the U.N. membership is hardly a model of efficiency, democracy, reason, or even human rights, much less sound economic management of anything. A conversation has long been going on among elites, but the public is unaware of this Treaty and its significance. For it to succeed or properly fail, they must be brought on-board. This will take time and, most especially, strong leadership. We are running out of both.

KEEPPING LITIGATION AShORE:... Continued from page 7

fruit, brought an action against various defendants when its fruit arrived in Massachusetts in a moldy condition. In its defense, the voyage charterer asserted that the case must be stayed or dismissed without prejudice in order to allow for arbitration. As noted, the basis for arbitration stemmed from the charter party, a document the shipper was not a party to. The shipper was, of course, a party to the bill of lading, and as we also mentioned, that document referenced the existence of an arbitration clause. Thus, while the shipper was on notice – assuming it read the fine print – it could not have known the details of the agreement, including the location or law of the forum.

Like the circuit courts before it, the dispute in Maroc Fruit Bd. S.A. turned on the specific language in Chapter 2 of the FAA. Chapter 2 implements the Convention on the Recognition and Enforcement of Foreign Arbitral Awards9 (“Convention”). In short, whether an arbitration clause is enforceable depends on whether it is supported by an “agreement in writing.”

The Convention requires a contracting state to:

recgnize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.10

In turn, an “agreement in writing” is defined by the Convention as:

an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.11

It may be worthwhile to read that definition a second time. By our eyes, it appears that an “agreement in writing” can be read at least two ways. First, it could mean an:

(1) An arbitral clause in a [larger] contract; or
(2) A [distinct] arbitration agreement,
   a. Signed by the parties, or
   b. Contained in an exchange of letters or telegrams.

Alternatively, it could mean:

(1) An arbitral clause in a [larger] contract, a. Signed by the parties, or b. Contained in an exchange of letters or telegrams; or

(2) A [distinct] arbitration agreement, a. Signed by the parties, or b. Contained in an exchange of letters or telegrams.

The Fifth Circuit came down decisively on the side of the former interpretation. In Sphere Drake, the question was whether an arbitration clause in an insurance agreement, unsigned by the defendant, could be considered an “agreement in writing.” Likely adhering to the school of liberally interpreting arbitration agreements – not altogether unjustified considering

10 Id. at Art II, § 1.
11 Id. at § 2.
precedent – the Fifth Circuit did not even entertain an alternative, and the unsigned arbitration clause in the insurance agreement was found enforceable under Chapter 2 of the FAA.

The Second Circuit, however, did entertain alternatives, and thoroughly so. In Kahn Lucas, the issue was whether a purchase order, not signed by the defendant, but containing an arbitration clause, could compel arbitration under Chapter 2 of the FAA. That court began with applying a rule of punctuation: “when a modifier is set off from a series of antecedents by a comma, the modifier should be read to apply to each of those antecedents.”12 Accordingly, under this rule, the requirement for signatures from the parties would be read to apply to both arbitration clauses and arbitration agreements.

While the court’s grammatical analysis was itself compelling, it did not stop there because it recognized that the Convention was written in the five official language versions (French, Spanish, English, Chinese, and Russian). The court was particularly influenced by the Spanish and French versions which used the plural form for “signed,” indicating the signature requirement was intended to refer to each antecedent. The court further noted that in the Chinese version the modifier “signed” preceded both arbitration clauses and arbitration agreements. The interpretations were not unanimous, however, because the Russian version used a singular “signed.” Nevertheless, the court did not let the exception overtake the rule, and found that the weight of international consensus favored requiring a signed arbitration clause and arbitration agreement.

Lastly, the Kahn Lucas court relied on legislative history from the convention. The convention “working group’s” final text provided that “[t]he expression ‘agreement in writing’ shall mean an arbitration agreement or an arbitration clause in a contract signed by the parties, or an exchange of letters or telegrams between those parties.”13 This final text was sent to the drafting committee where it was to be modified in form but not substance; thus, no meaning should be ascribed to the drafting committee’s choice to arguably separate “arbitration clause” from “arbitration agreement.”

Returning to Maroc Fruit Bd. S.A., like us, the Massachusetts district court found the Second Circuit’s reasoning convincing. But as much as the reasoning, it’s the facts in Maroc Fruit Bd. S.A. that should interest the maritime bar. Under the Kahn Lucas/Maroc Fruit Bd. S.A. rule, as long as one party is foreign, the threat of London arbitration is hollow against shippers whose only legal obligation stems from an ordinary, industry-standard bill of lading.

Given the circuit split, and the Supreme Court’s penchant for taking FAA cases, this issue may seem ripe for a petition for certiorari. Indeed, stay tuned, because Société Marocaine De Navigation Maritime d/b/a Navimar, the movant in Maroc Fruit Bd. S.A, has appealed to the First Circuit. Whichever side of the circuit split the First Circuit comes down on, this case would be an appropriate vehicle for Supreme Court resolution of the issue.

12 Kahn Lucas Lancaster, Inc., 186 F.3d at 215.
13 Id. at 218.

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www.ambar.org/tipsadmiralty
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Geological Survey has estimated that as much as 30% of the world’s undiscovered reserves of natural gas, 13% of its undiscovered oil reserves, and 20% of undiscovered natural gas liquids lie north of the Arctic Circle, approximately 84% of these estimated resources being expected to occur offshore. In addition, more and more cruise ships have already begun to ply the northern seas, taking eco-tourists to exotic locations in Alaska, Nunavut, and Greenland where few outsiders ever travelled in the past.7

Many Challenges

Commercial navigation north of the 60th parallel poses a host of challenges to business and government. Among these are continuing ice hazards, often requiring ice-strengthened ships and icebreaker assistance; the lack of complete and accurate navigational charts of some Arctic waters, with attendant grounding risks; increased marine insurance costs for contemplated voyages; the lack of infrastructure (deepwater ports, terminals, ship repair facilities, etc.); and search and rescue facilities located too far to the south to be of help when casualties occur up North. In addition, of course, are the environmental risks that northern shipping poses to waters and wildlife, and the resulting impact on the Arctic’s indigenous peoples and their centuries-old lifestyle. There are also concerns over the security risks and potential for increased criminality in northern seas, especially trafficking in drugs, arms, or people. There are significant legal challenges as well, some of them outlined here.

The Legal Status of the Northwest Passage

The legal status of the Northwest Passage itself has yet to be determined.9 The United States considers it an international strait, open to the use of all states for transit passage, entailing freedom of navigation and overflight. President George W. Bush reiterated this position forcefully just before leaving office in January 2009.10

Canada, on the other hand, asserts that the Northwest Passage forms part of Canadian inland waters, basing its claim partly on historic title, dating back to the Inuit occupation of the Arctic from “time immemorial”, and partly on the straight baselines which Canada drew around the whole Arctic Archipelago in 1985.11 If the Northwest Passage waters are its internal waters, Canada would be free to apply Canadian laws there to persons, goods, and incidents, and to exclude foreigners and their vessels from those waters, subject only to a possible right of innocent passage. It is hoped that this dispute can be settled by good-faith negotiations. A useful model for such a resolution is afforded by the 1988 “Arctic Cooperation Agreement” between Canada and the United States,12 whereby the United States asks for permission to transit the Passage, which Canada commits itself to give, without either country compromising its legal position as to the status of the Passage in international law. But the present uncertainty will need to be resolved, especially as other countries are now advancing their own contentions about sailing in and through those warming waters.

The Delimitation of the Beaufort Sea

Canada and the United States have also been at loggerheads for some time over the delimitation of the Beaufort Sea.13 The United States contends that its boundary should follow a line at equal distance from the closest land point of each state, thus respecting the “equidistance principle”. Canada, for its part, proposes that the maritime boundary runs along the 141st meridian, as an extension of the territorial boundary between the Yukon and Alaska established by a treaty of 1825 between Russia and the United Kingdom.14 This matter

7 See, for example, the Canadian Arctic Cruise Information and Recommendations website at http://www.polarcruises.com/Arctic/destinations/canadian-arctic_12.htm, listing a wide variety of Arctic cruises planned for 2013.
9 See generally Donat Phararand, Canada’s Arctic Waters in International Law (Cambridge: Cambridge University Press, 1988).
14 Convention between Great Britain and Russia Concerning the Limits of their Respective Possessions on the North-West Coast of America and the Navigation of the Pacific Ocean, February 16, 1825, 75 CTS 95.
will take on added importance if and when oil drilling is undertaken in those waters.

**The Limits of the Continental Shelf**

Under art. 76 of the United Nations Convention on the Law of the Sea (UNCLOS), the Continental Shelf comprises the seabed and subsoil of the submarine areas extending beyond the coastal state’s territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. Under a complex formula in UNCLOS, however, a coastal state may lay a claim to an extended continental shelf, reaching to as far as 350 nautical miles from the baselines of its territorial sea or more than 100 nautical miles beyond the point at which the seabed lies at a depth of 2,500 meters. Such claims, accompanied by scientific data, must be submitted to a body of 21 scientists sitting on the United Nations Commission on the Limits of the Continental Shelf, within ten years of the ratification of UNCLOS by the applicant state. The Commission then makes non-binding recommendations to the coastal state concerned. States whose claims overlap (e.g. Canada and Russia) must negotiate an agreement or litigate before a competent court (e.g. the International Tribunal on the Law of the Sea or the International Court of Justice) or arbitral tribunal specified in the Convention.

Canada is now preparing its scientific data and is due to present its case to the Commission by its deadline of December 2013, although it appears that consideration of the matter may be delayed until 2030 owing to the volume of work now confronting the Commission. The United States has never ratified UNCLOS, although it is generally regarded as incorporating principles of customary international law which the United States generally accepts. The United States has been working closely with Canada, however, in preparing the scientific data required for Canada’s claim.

Because of the potential wealth at stake in the Continental Shelf, however, acrimonious debates and legal conflicts between some states as to its delimitation are possible, if not probable. Time will tell if, when and how those disputes will be settled.

**Search and Rescue**

Recent incidents such as the grounding of the cruise ship CLIPPER ADVENTURER on a shoal in Nunavut in August 2010 and the crash of the 737 aircraft at Resolute Bay, Nunavut in August 2011, have highlighted the vital importance of trained and ready search and rescue services in the Far North. The personnel of such services must be available quickly to respond to such casualties. Existing resources are located in places many hours’ flying time away from most High Arctic locations, and local communities in many cases lack any such resources.

A laudable effort to set up the legal framework for better search and rescue (SAR) service has nevertheless been made by the Arctic Council. The Arctic Council was founded in 1996 and consists of Canada, Denmark, Finland, Iceland, Norway, the Russian Federation, Sweden, and the United States, as well as bodies representing Arctic indigenous peoples as permanent participants. On May 12, 2011, the Arctic Council adopted the Agreement on Cooperation on Aeronautical and Maritime Search and Rescue (SAR) in the Arctic. This Agreement sets up a structure for improved and coordinated SAR in the Arctic countries concerned (comprising a territory of some 13 million square miles) and is now being implemented by the Council’s member states.

**The Polar Code**

The International Maritime Organization (IMO), working with the International Association of Classification Societies and various national maritime administrations, is undertaking to draft an International Code of Safety for Ships in Polar Waters (the “International Polar Code”). This proposed legislation, which is intended to become mandatory under the

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15 Adopted at Montego Bay, Jamaica, December 10, 1982, 1833 UNTS 3, ILM (1982) 1261, to which Canada became party in December 2003. The United States has yet to ratify UNCLOS but generally accepts many of its principles as forming part of customary international law.
16 See UNCLOS, art. 76(4) to (6) and Annex II.
17 UNCLOS, art. 287.
21 See Dr. H. Deggins, IMO Marine Technology Section, powerpoint presentation on “Develop of a Mandatory Polar Code – Update on Progress”, October 2011; http://www.imo.org/MediaCentre/HotTopics/polar/Documents/polarcodePPT2011.pdf. The Polar Code is being developed through the Sub-committee on Ship Design and Equipment of IMO’s Marine Classification Societies and various national maritime administrations, is undertaking to draft an International Code of Safety for Ships in Polar Waters (the “International Polar Code”).
Convention on Safety of Life at Sea (SOLAS),
possibly in 2014, is aimed at increasing marine safety and environmental protection in Arctic waters. Among other things, the Code would harmonize the diverse national regulatory regimes governing the design of ice-capable vessels, so as to set higher and uniform levels of ice strengthening for all Polar Class ships, and to regulate the training and employment of ice navigators serving aboard such vessels.

Environmental Protection

The specter of horrendous marine pollution caused by increased Arctic shipping is haunting legislators, environmentalists and the general public today, particularly with respect to potential oil drilling in the offshore. Cleaning spilled oil from ice-covered waters poses technical problems to which there are at present no proven solutions. In an effort to manage the risk, both Canada and the United States have extended their national laws on environmental protection to their respective Arctic waters. The United States, for example, applies some 30 statutes to its Outer Continental Shelf off Alaska, including the Outer Continental Shelf Lands Act, the National Environmental Policy Act, the Endangered Species Act, the Coastal Zone Management Act, the Federal Water Pollution Control Act, the Ports and Water Safety Act, the Marine Mammal Protection Act, the Clean Air Act, and the National Historic Preservation Act. The leasing of drill sites off Alaska is managed by the Bureau of Ocean Energy Management (BOEM). But anxiety over oil spills under the ice have been intensified since the DEEPWATER HORIZON fiasco in the Gulf of Mexico. And Shell has recently received permission to begin preparations for exploratory drilling in the Chukchi Sea.

Canada applies its Arctic Waters Pollution Prevention Act (AWPPA), to control the deposit of waste in Arctic waters (north of the 60th parallel), up to 200 nautical miles out to sea, and imposing rigorous sanctions on offenders. Through its Canada Shipping Act and its Marine Liability Act, Canada also extends to its northern waters a number of international conventions on marine pollution, notably as the CLC 1992 on Civil Liability for Oil Pollution Damage, the Fund Convention 1992, the OPC Convention 1990, and the Bunker Pollution Convention 2001. Canada has also taken steps to control marine traffic in Arctic waters, through the Northern Canada Vessel Traffic Services Zone Regulations, establishing the so-called NORDREG Zone with reporting requirements for


26 43 USC 1331 et seq.
27 42 USC 4321-4347.
28 7 USC 136, 16 USC 1531 et seq.
29 16 USC 1451-1456.
30 33 USC 1251-1376.
31 33 USC 1221-1236.
32 16 USC 1361-1389 and 1401-1423b.
33 42 USC 7401 et seq.
34 16 USC 470 et seq.
35 See generally the BOEM website at http://www.boem.gov/.
36 R.S.C. 1985, c. A-17, as amended by S.C. 2009, c. 11, in force August 1, 2009, together with its Arctic Waters Pollution Prevention Regulations C.R.C. 354 and its Arctic Shipping Pollution Prevention Regulations, C.R.C. 353, the latter dealing with ship construction and matters such as ice navigators.
vessels in or transiting any of Canada’s sixteen Shipping Safety Control Zones, all of which complies with art. 234 of UNCLOS.

The National Energy Board of Canada in 2011 published its “Review of Offshore Drilling in the Canadian Arctic” and the related “Filing Requirements”. These publications provide a basic road-map for exercising effective control over offshore petroleum operations in Canada’s Arctic waters. But the effectiveness of these guidelines has yet to be tested.

The IMO Guidelines for Ships Operating in Arctic Ice-Covered Waters are another important set of desirable international norms for protecting pristine Arctic waters from the risk of marine pollution.

As with any legislation or regulatory scheme, however, it will be very important to monitor and demand strict enforcement of these various laws, regulations and guidelines as drilling operations are undertaken in the fragile environment concerned.

Marine Insurance

Marine insurance is key to the development of navigation of both commercial ships and cruise ships in the Far North. For non-traditional players in the North, such insurance is often not available or offered only at a cost that shipowners and operators find prohibitive. Arctic waters are often situated outside the trading limits of hull and machinery policies on merchant vessels, and the physical risks, even with a reduced ice cover in summer, are nonetheless real, especially if the vessel in question is not ice-classed. Underwriters evaluate many factors in deciding whether to underwrite Arctic shipping risks, including:

- the vessel’s suitability for the trade concerned;
- the conditions of the charterparty (e.g. ice clauses);
- the vessel’s draught;
- the reliability of the draught data;
- the planned route of the voyage;
- whether the ship has been in similar conditions previously;
- what experience its owners and managers have with Arctic navigation;
- how experienced and well-trained are the crew, their systems and routines;
- whether ice pilots are available;
- what kind of weather can be expected on the voyage;
- whether updated weather and ice information is available for the voyage contemplated and from whom;
- what preparation of the vessel has been made to confront these conditions;
- how remote are the shipyards and deep water quays;
- the accessibility (or inaccessibility) of icebreakers or other vessels and of salvage assistance, etc.

Despite the insurance challenge, however, insurance tends to follow trade, and the economics of the marketplace will probably make coverage more available and affordable in the foreseeable future.

Conclusion

Arctic navigation is an alluring prospect, either in relation to destination shipping, or to expedite shipments of goods and people between continents. Yet such navigation continues to be fraught with daunting challenges, many of them entailing substantial risks and requiring considerable outlays of money by the public and/or the private sector. The legal challenges summarized here (and others) are no less daunting than the political, economic, and environmental ones. Nevertheless, the call of the North – North America’s final frontier – cannot be denied or ignored for long, and is now attracting the avid interest of other peoples, notably in China and India. One hopes that proper and effective legal structures can be developed, especially through the IMO and the Arctic Council, while time permits. Only in that way can the development and exploitation of Arctic resources, and increased navigation within and across the top of the world made possible by melting ice, become safer, peaceful, and truly beneficial activities in our time and for the generations to come.

USING PRINCIPLES… Continued from page 9

disputes.11 When passing the FAA, Congress intended to enforce arbitration clauses to which parties contractually agreed.12 To recognize the preference of maritime parties to arbitrate and to ease court dockets,13 admiralty law continues to encourage the use of arbitration.14

The goal of using arbitration in lieu of litigation, regardless of whether parties are in the maritime context or some other field, is to remain fair while expediting a resolution in the most cost efficient way.15 Specifically, “the advantages of arbitration, in contrast to litigation in the courts, are that the parties may choose the arbitral forum and applicable procedure; the dispute is decided by experts in maritime law; and resolution of the dispute is generally faster . . . [and] less burdensome.”16

To understand the maritime industry’s particular inclination toward arbitration rather than litigation, it is useful to note the historical context out of which this tradition emerged. “Shipping and interport trade were centered not around ships per se, but around the transportation and delivery of commodities. Disputes had to be resolved as fairly and quickly as possible ‘in the course of business’ in order for this overall purpose not to suffer.”17 Uniformity in ancient international maritime law developed in response to inevitable disputes that arose in trade, in order to minimize surprises and support, rather than restrict, commerce.18 Parties needed to know their rights and obligations in whatever port they might enter; “a port which had an understandable, urbane, and civilized method of resolving such disputes . . . would be attractive to international trade and to merchants from other ports.”19 The quoted author focuses on uniformity in international maritime law, but the same aspects of the industry contributed to its inclination toward arbitration.20

The nature of the industry in New York specifically gave rise to a system favoring arbitration:

In the 1960’s and earlier, the vast majority of the dry cargo chartering business was conducted within a mile of 17 Battery Place. . . . Most shipping men met for lunch and drinks at a few select clubs and restaurants. There was a great amount of personal contact on a regular informal basis among shipping people. . . . [sic]In such an atmosphere it was possible to amicably resolve disputes, to nip potential problems in the bud before they got in the hands of the “dreaded lawyers” and to generally promote commerce and shipping on a more or less commonly understood and orderly basis. If disputes could not be resolved in that manner then they could, for the most part, be resolved quickly through arbitration by men with particular expertise and generally with a minimum of paper work and according to a sense of “rough justice.” There were no fundamental principles of law involved or needed.21

11 Sommer, supra note 10, at 1038.
12 Id. at 1038, citing 65 CONG. REC. 1931 (1924).
16 SCHONBAUM, supra note 14, at n.3. The same goals are at the heart of creating funds to settle mass tort claims. See Conk, supra note 3, at 180-81.
18 Id.
19 Id.
20 There is not only an international element involved with shipping overseas, which creates a need for consistency as previously mentioned, but there is also an element of unpredictability and danger which creates a willingness to forego all the protections of due process that come with a litigated dispute in favor of a faster and cheaper dispute resolution process. This can be compared to the political philosopher John Rawls “‘original position’ in which parties decide the principles of justice from ‘behind a veil of ignorance,’ that is, without knowing what will happen to them or where they will end up in their societies. From this position, Rawls argues that parties will be inclined to develop a system of justice which would maximize the prospects for the least well-off, for fear that they themselves may end up in that position. See JOHN RAWLS, A THEORY OF JUSTICE (Belknap Press of Harvard Univ. Press, 1999).
21 Force & Mavronicolas, supra note 13, at 1465-66.
A. Society of Maritime Arbitrators’ Rules

Despite the fact that present day disputes involve much larger sums of money and much more complex legal issues, maritime parties continue to incorporate arbitration clauses in their contracts. Nearly all of the maritime arbitration in the United States occurs in New York under the rules of the Society of Maritime Arbitrators (“SMA”). Since its establishment in 1963, the SMA has offered an “efficient, practical system for fair disposition of maritime disputes.” Since maritime arbitration is a “creature of contract,” parties may negotiate the terms of their agreement “to shape the form and nature of their arbitration.” As noted in the SMA Rules of Arbitration (“Rules”), wherever parties have agreed to arbitrate with the SMA, they may mutually alter or modify the Rules, except those that empower the Arbitrators to administer the arbitration proceedings. Members of the SMA are “commercial men,” meaning they “are or have been actively engaged in the shipping business.” There are disclosure requirements for circumstances that may prevent a panelist from rendering an unbiased award based solely upon an objective consideration of the evidence. Panelists are disqualified if they have a financial or personal interest in the outcome of the arbitration or have acquired, from an interested source, detailed prior knowledge of the matter in dispute.

Parties appoint arbitrators according to Parts II and IV of the Rules. The Rules allow each party to the arbitration to select a panelist from the “Roster” of qualified maritime arbitrators provided and maintained by SMA. Those two panelists then select a third panelist. During the hearing, parties are entitled to have counsel represent them, and to make an opening statement of their claim. Formal rules of evidence do not apply, and the Rules only call for “an orderly manner appropriate to judicial proceedings.” Discovery rules are similarly relaxed, but were revised in 1994 to “encourage parties to have a clear picture of each other’s claims and counterclaims” and to foster efficiency.

Many features ensure transparency in the process. The Panel is required to decide by majority vote (unless parties have contracted such that a unanimous vote is required) and to submit a written decision to the parties within one hundred and twenty days. The Panel is granted broad power and may reward specific performance, attorney’s fees, and/or “any remedy or relief that fairly accomplishes the purpose of the award.”

27 See id. at 1466, 1472. See also Maritime Arbitration in New York, supra note 1 (“SMA MODEL ARBITRATION CLAUSE: Should any dispute arise out of this Charter, the Matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. This Charter shall be governed by the Federal Maritime Law of the United States. The proceedings shall be conducted in accordance with the Rules of the Society of Maritime Arbitrators, Inc. The arbitrators shall be members of the Society of Maritime Arbitrators, Inc.”).
28 See Force & Mavronicolas, supra note 13, at 1464, 1467.
29 See Maritime Arbitration Rules, supra note 25, at §I §1.
30 See Maritime Arbitration Rules, supra note 25, at §IV §10.
31 Parties are free to agree to a one- or two-person panel, and they may also modify the appointment procedure. See Maritime Arbitration Rules, §§I-1, II§3, IV§10 (2010), available at http://www.smany.org/sma/about4.html.
32 During the hearing, parties are entitled to have counsel represent them, and to make an opening statement of their claim. Formal rules of evidence do not apply, and the Rules only call for “an orderly manner appropriate to judicial proceedings.” Discovery rules are similarly relaxed, but were revised in 1994 to “encourage parties to have a clear picture of each other’s claims and counterclaims” and to foster efficiency.
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34 See supra note 25, at §V §21.
[c]opies of any documents, exhibits and accounts intended to be introduced at a particular hearing should be supplied to the other party or opposing counsel and to Panel members at least one week prior to the date of that hearing. Any fact or expert witness intended to testify before the Panel should likewise be identified at least one week in advance of the scheduled hearing date.
36 “All evidence shall be taken in the presence of the Arbitrator(s) and of all the parties, except in the case of depositions or where any of the parties is absent without reasonable cause, in default, or has waived its right to be present or where submission of evidence by mail or in other form has been agreed by both parties.” Maritime Arbitration Rules, supra note 25, at §V §23. “Persons having a direct interest in the arbitration are entitled to attend hearings.”
37 See supra note 25, at §V §23.  “Persons having a direct interest in the arbitration are entitled to attend hearings.”
which it deems just and equitable.”

To “give users an efficient system which can lead to quick, cheap and fair resolution of their disputes,” the SMA has also created a Shortened Arbitration Procedure that requires parties to appoint Panelists within fifteen days of notice of demand for arbitration. The Shortened Arbitration Procedure also requires Panelists to render a decision within thirty days of receiving the parties’ final statements.

B. Challenging a Society of Maritime Arbitrators’ Award

The Rules represent the “commercial efficiency model” of justice, where the formalities and protection inherent in litigation (causing slower speed and higher cost) are traded for efficiency. The lack of an opportunity to appeal an arbitration panel’s decision is an example of favoring efficiency over fairness or due process. Once the Panel has issued its award, it is final, although section 30 of the Rules allows for modification of an award to correct an obvious clerical or mathematical error. “The right to correct substantial errors may be entirely lacking,” as once the Panel issues the award it is “ functus officio, and does not have the power to hear re-argument.” An unsatisfied party has the option to vacate the award pursuant to section 10 of FAA, but a “mistake in law or fact is not a ground for vacatur . . . [and] [t]here is, effectively, no appeal to the courts on the merits. Federal policy strongly favors arbitration, and for this reason, the U.S. Congress has severely limited the opportunities for successful attacks upon arbitration awards.” As one scholar phrased it, “ de maximus non curat lex – ‘you can’t complain after a stupid award.’

This extreme deference to the decision of the Panel supports and encourages alternative dispute resolution in the maritime context. The FAA establishes a federal policy that favors arbitration, requires courts rigorously enforce arbitration agreements, works toward the goal of relieving congestion in courts, and allows parties a faster and cheaper alternative method of dispute resolution. Although there are several procedural points at which parties to arbitration have an opportunity to call upon the courts to interfere, this Note will focus on the court’s involvement after the arbitration panel has issued its award and the unsatisfied party moves to vacate.

Section 10 of the FAA provides four instances where a court, upon application of any party to the arbitration, may vacate the award: 1) instances of fraud, corruption, or undue means in obtaining the award; 2) evidence of partiality or corruption amongst the panel; 3) evidence of misconduct amongst the panel in refusing to postpone the hearing, hear evidence or other misbehavior indicating prejudice; or 4) where the panel exceeded its powers or so imperfectly executed its powers as to render the award neither mutual, final nor definite. Review is governed by an extraordinary level of deference to the underlying award; the award will be upheld if the arbitrator’s interpretation can be derived from the agreement in any rational way. This standard is necessary in order to preserve the benefits of reduced delay and expense and
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to prevent arbitration from becoming a preliminary step to judicial resolution.52 It has been argued that “in big cases there ought to be a right of appeal to the courts on questions of law” and it has been suggested that the FAA be amended so that a court may modify or change the award when there is a certain amount in controversy and a “serious error of law.”53 However, in order to serve the goals of efficiency and speed, extreme deference to the Panel’s decisions is required, even if it means some unfair decisions stand. The fact that the parties have negotiated and agreed to an arbitration clause and its terms in their contract must be given great weight. The fact that the parties have appointed the Panel and granted them the authority to resolve their dispute must be given great weight. The existence of rules that ensure procedural fairness and transparency in the procedure must be relied upon in order for the process to remain a successful alternative to litigation, rather than a preliminary step towards it.

III. Background on Claims Funds

The same goals of speed, efficiency and fairness that are behind maritime arbitration are also behind the creation and administration of public,54 quasi-public,55 and private funds56 in the resolution of mass tort claims. A claims fund is money designated to pay injured persons, according to a set of rules as to who gets paid and how much.57 “The claims fund may supplant other potential avenues of recovery, such as court lawsuits. The rules for claimant eligibility may be determined at the outset of the fund, or left to the claim administrator to craft.”58 Congress has set up funds in the wake of national disasters or tragedies. An example is the September 11th Victims Compensation Fund, administered by Kenneth Feinberg and funded by the Treasury.59 Prior to that, the Black Lung Program compensated miners diagnosed with black lung disease.60 Private companies have also used the funds model of claims resolution to preempt mass tort litigation or class action; for example, Merck set up a fund after Vioxx was linked to heart disease.61

A. Oil Pollution Act of 1990, Oil Spill Liability Fund, and National Pollution Funds Center

After the Exxon Valdez oil spill off the coast of Alaska in 1989, Congress passed OPA 90 and expanded the Oil Spill Liability Trust Fund (“Trust Fund”).62 The NPFC was created at this time under the United States Coast Guard to administer the Trust Fund and implement OPA 90.63 OPA 90 sets forth elements of liability for responsible parties for a vessel or facility from which oil is discharged, as well as an alternative claims procedure for both natural resource damage claims by the United States, state and local governments, Native American tribes, and foreign governments.64 OPA 90 also allows for private damages claims, including damages to real or personal property, loss of subsistence from natural resources, loss of revenues, loss of profits and earnings, and increased or additional public service costs up to a legislative cap of $75 million (except where the spill occurred due to gross negligence or willful misconduct, or by a violation of federal law).65 OPA 90 is distinguishable from other environmental statutes in that

53 Force & Manvencicolas, supra note 13, at 1599.
56 See Conk, supra note 55, at 268 (“Unlike the public fund, which seeks to offer just compensation, the private fund might be seen as essentially a settlement offer that may discount full compensation, but provide claimants quick and certain recovery.”).
57 Id. at 266.
58 Id.
59 Id.
60 Id.
61 Id. at 267. See Conk, supra note 3, at 141, for a discussion of the history of mass tort claim resolution. Professor Conk argues that the Vioxx and September 11th Victim Compensation Funds “yield awards that are products of open and adversarial processes with transparent measures of damages.” Conk, supra note 3, at 141. He goes on to argue that by contrast, “the GCCF is entirely private, its liability principles obscure, and its damages measures stated with such generality as to leave the Administrator with wide discretion.” Conk, supra note 3, at 141.
62 John M. Woods, Going on Twenty Years – The Oil Pollution Act of 1990 and Claims Against The Oil Spill Liability Trust Fund, 83 Tul. L. Rev. 1323, 1324 (2009). See also S. Rep. No. 101-94 (1989) (There were actually four major oil spills in a three-month period preceding the passing of OPA. In a 24-hour period in the summer of 1989, there were oil spills in the coastal waters of Rhode Island, the Delaware River, and the Houston Ship Channel, although none as damaging as the 11-million gallon disaster in the Prince William Sound.).
63 Woods, supra note 62, at 1324.
65 33 U.S.C. § 2703; Millan, supra note 64, at 51.
it goes beyond natural resource restoration and allows for private damages claims, which would otherwise be a “private law game” under maritime law, which does not traditionally provide for pure economic loss damages absent physical damage.\(^{66}\)

Although the legislative history of OPA 90 is long and dense, the aforementioned goals of speed, efficiency and fairness behind the legislation and expansion of the Trust Fund are clear in the reports of the enacting Congress (101st):

One of the purposes of the Fund is to provide a source of money for immediate cleanup activities or damage compensation in the event a spiller does not act promptly. In such a case, the Fund would be used for removal costs and would be available for prompt damage compensation. . . . Another purpose of the Fund is to provide a source of compensation for claims which are not settled by the spiller by virtue of a limit or a defense. . . . The Fund assures that the costs associated with a spill are compensated, not just those within the spiller’s limit of liability, through a mechanism which spreads these excess costs to all users of oil. . . . As reported, S. 686 would establish a simplified claims procedure for the disbursement of compensation available from the Fund. . . . [The] principle concept of this bill is to provide ready and complete compensation for any party suffering damages from discharges of oil . . . to assure prompt access to sufficient sums[.]\(^{67}\)

A report of the introductory Congress (94th) also lays out these goals.\(^{68}\) In this report, the House discusses the “patchwork” of conflicting legislation that regulated liability for oil spills at the State and Federal level, which led to a Department of Justice study on methods and procedures that would support a uniform law of oil spill liability and compensation.\(^{69}\) The report states that Congress intended the study to “address the means of insuring fair and expeditious compensation to victims of pollution, without imposing unreasonable financial burdens on the persons involved in the necessary activities associated with the production and movement of oil.”\(^{70}\) The Department of Justice submitted the study to Congress and it became the basis for the first version of OPA 90.\(^{71}\)

**B. Procedure and Standard of Review for OPA 90 Claims**

OPA 90 preempts general maritime tort law, for which federal courts are granted original jurisdiction.\(^{72}\) Claims must first be presented to the responsible party as a condition precedent to federal court action or presentation to the Trust Fund.\(^{73}\) It is interesting to note that an issue the House Report of the 1976 introductory Congress cited as “less controversial” was the mechanism of victim compensation and this decision, in the name of efficiency, to require that a claim first be submitted to the spiller prior to being submitted to the Trust Fund or to a federal court.\(^{74}\) Ironically, the report predicts that in most cases this would result in quick, uncomplicated settlements, and avoid the need to maintain government personnel to handle fund settlements.\(^{75}\) The mechanism of victim compensation employed by the spiller was not seen as controversial, in 1976 nor in 1990, but later became the center of complicated and expensive multi-district litigation.

OPA 90 does not guide the responsible party in satisfying its duties, but it does speak to the way the Trust Fund, under the NPFC, should handle claims.\(^{76}\) The statute says that a claimant may commence the action in federal court or present the claim to the Trust Fund,\(^{77}\) if the spiller denies all liability or does not settle

\(^{66}\) Millan, supra note 64, at 47-48.

\(^{67}\) S. Rep. No. 101-94.

\(^{68}\) H.R. Rep. No. 94-1489.

\(^{69}\) Id.; see also S. COMM. ON COMMERCE, 94TH CONG., METHODS AND PROCEDURES FOR IMPLEMENTING A UNIFORM LAW - PROVIDING LIABILITY FOR CLEANUP COSTS AND DAMAGES CAUSED BY OIL SPILLS FROM OCEAN RELATED SOURCES (Comm. Print 1975).

\(^{70}\) H.R. Rep. No. 94-1489.

\(^{71}\) Id.


\(^{73}\) See 33 U.S.C. §2713(a); see also Millan, supra note 64, at 49.


\(^{75}\) H.R. Rep. No. 94-1489 at 20.

\(^{76}\) See 33 U.S.C. §2704; Mullenix, supra note 7.

\(^{77}\) See 33 C.F.R. §136.103(d) (2009).
the claim in a timely manner. Claims submitted to the Trust Fund must be presented to the responsible party at least ninety days prior, but there are no statutory standards for the Trust Fund or NPFC to employ when reviewing claims denied by the responsible party. The Trust Fund claims decisions, however, are reviewable under the Administrative Procedure Act (“APA”).

In the name of efficiency, much like the FAA’s standard of review, the APA’s standard of review is highly deferential, particularly when a court is asked to rule on an agency decision that evaluated scientific data within its technical expertise. A court must set aside an NPFC decision if it is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law. NPFC can satisfy this benchmark by showing it examined the relevant data and explained a rational basis in the facts for its decision. The unsatisfied claimant bears the burden of proving the NPFC acted arbitrarily, and the court may not substitute its judgment or try to supply a rational basis if the NPFC has failed to do so in the administrative record before the court. This deference is comparable to that laid out in the FAA, serving the similar goals of speed, efficiency and fairness.

C. Gulf Coast Claims Facility

The explosion of the Deepwater Horizon oil rig in April 2010 dumped nearly five million barrels of oil in the Gulf of Mexico. Given the catastrophic degree of destruction, it became obvious that damages would exceed the $75 million cap on liability provided in OPA 90. It also became obvious that the standard claims procedure, mandating a ninety-day window for the responsible party to render a decision before allowing submission to the Trust Fund, would be an unrealistic remedy to those fishermen, shrimpers, and Gulf-dependent businesses that lost their livelihood due to the spill. In response to these circumstances, BP, after the Coast Guard designated them as the “responsible party,” waived the $75 million liability cap and set up claims offices throughout the Gulf Coast states that paid out for losses on a walk-in basis for two months. OPA 90 does not require the creation of a claims facility or a fund for victim compensation; it is “entirely vague concerning how a responsible party must satisfy its duties,” so these actions were not in violation of the statute and were a way to appease public outcry. Although this initial program dispensed hundreds of millions of dollars, many frustrated applicants, who were denied compensation due to documentation problems or who were becoming impatient with “administrative slowness,” criticized it as chaotic and unregulated. In response to these criticisms, and to ensure fair, timely and transparent claims procedures, President Obama and BP executives negotiated the creation of a $20 billion fund. The GCCF, under Kenneth Feinberg, administered the fund. The precise legal authority for these executive

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78 Millan, supra note 64, at 51.
79 Light, supra note 64, at 90. See infra note 158 for a discussion of NPFC review of claims denied by responsible party.
80 Light, supra note 64, at 90; see also Woods, supra note 62, at 1324, 1331.
82 Id. (citing 5 U.S.C. § 706). To survive this standard of review, the NPFC is required to: examine the relevant data and articulate a satisfactory explanation for its action including a “rational connection between the facts and the choice made”. . . . If an agency’s interpretation of a statute . . . is contrary to Congress’s intent, as evidenced by the language and legislative history of the statute, the reviewing court must reject the agency’s interpretation.
84 Id., supra note 64, at 90.
85 Id.
86 Light, supra note 55, at 259.
87 Id.
88 See Mullenix, supra note 7, at 833; see also Steir, supra note 55, at 260-61.
89 Mullenix, supra note 7, at 833.
90 Id.; Steir, supra note 55, at 261.
91 Steir, supra note 55, at 261; see also Mullenix, supra note 7, at 834-45 (“BP did not actually place this entire amount in escrow. Instead, only $3 billion was transferred into an account . . . BP’s remaining obligations pursuant to this $20 billion commitment are to be funded, in the future, by BP’s ongoing oil drilling revenues, largely derived from its offshore drilling efforts in the Gulf.”).
92 Steir, supra note 55, at 261.
actions is unclear. After this initial agreement, there was little to no government oversight of the creation and implementation of standards and regulations governing claimant eligibility and compensation. "Although Feinberg made well-publicized tours of Gulf Coast towns in the weeks after the oil spill and held several ‘town hall’ meetings, he nonetheless did not provide for a formal public notice and comment on proposed standards” such as is provided in the federal rulemaking process. The lack of oversight and governance at this and subsequent stages made a large, complicated and expensive mess out of claim resolution. One scholar deemed GCCF as representative of an “unnounced incremental trend toward the lawless, private resolution of mass claims. This resolution . . . was created by a culpable defendant, unbounded by legal norms, and administered by a heroic ‘special master’ with limitless, unreviewable discretion, who [was] also the employ of the malefactor.” A competing view is that GCCF may one day serve as a model for handling future industrial accidents, and was “a remarkably effective alternative to the cumbersome way damages are usually meted out after a corporate accident: through the tort system.”

One scholar wrote that GCCF, as a “quasi-public claims fund,” should be welcomed into the mass tort toolbox as an effective way to respond to rapidly developing crises. Despite this support, GCCF was dissolved in a settlement between BP and the Plaintiffs Steering Committee (attorneys representing individuals and businesses denied claims by the GCCF or who otherwise opted into the class action multi-district litigation against it) in May of 2012. Even those that supported the GCCF must admit it failed as an alternative dispute resolution procedure. To avoid this outcome in the future, and achieve the goals of speed, cost-efficiency and fairness, OPA 90 should require some transparency and guide the spiller’s means of determining eligibility and claim value.

Transparency was a problem from the outset of GCCF. Early in the process, Feinberg refused to disclose how much BP was compensating his law firm for administering the Fund. There was also no

93 Mullenix, supra note 7, at 835 (“[N]o Executive Order . . . Congress held no hearings to lay the groundwork for creation of the fund, nor was congress involved at all in the creation of GCCF . . . or appointing a special master . . . Feinberg explained to a congressional subcommittee that he was operating pursuant to a ‘compact’ . . . In subsequent colloquies, Feinberg abandoned his ‘compact’ conceit and instead vaguely suggested that he was operating under the authority of OPA.”).
94 Id., at 842-43. See also Conk, supra note 3, at 141 (describing the “regulatory gap” apparent in OPA 90).
95 Mullenix, supra note 7, at 842-43.
96 Gulf Coast Recovery: President Obama’s BP Compensation Fund, How Is It Working? Before the Committee on Natural Resources, 101ST CONG. (Oct. 27, 2011), http://naturalresources.house.gov/Calendar/EventSingle.aspx/EventID=265099 (Chairman Hastings repeatedly commented that the lack of “any semblance of oversight” by administration was problematic, and “maybe this is an experience, something in progress, and we’ll have to see how it works.”).
97 Mullenix, supra note 7, at 823 (“Since the Claims Facility was set up, there have been constant complaints from claimants of lost paperwork, slow processing time and low-ball payments.”); see also Eric Heisig, New Lawsuit Filed in Gulf Oil Spill, THE DAILY COMET (Dec. 8, 2011, 10:55 AM), http://www.dailycomet.com/article/20111208/ARTICLES/111209613.
100 See infra note 122.
101 In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010, MDL No. 2179 (E.D.La. May 2, 2012); see also Andrew Longstreth & Jonathan Stempel, BP Spill Claims Process ‘In Need of Improvement,’ REuters, (Mar. 8, 2012) http://uk.reuters.com/assets/print?aid=UKBRE8271602120308 (“Lawyers on the Plaintiffs’ Steering Committee . . . have said the new program will be fair and transparent, although some lawyers outside that process have questioned whether it will be an improvement.”). Patrick Judge, the Louisiana lawyer appointed by Judge Barbier to replace Feinberg as claims administrator, has stated that he believes the court supervised process would be smoother than the GCCF’s due to claimant eligibility terms set out in the settlement agreement. See Brendan Kirby, BP Lawsuit Settlement Administrator Promises ‘Claimant-Friendly’ Assistance Program, PRESS REGISTER (June 5, 2012), http://blog.al.com/live/2012/06/bp_lawsuit_settlement_administr.html.
102 It is easier to argue about who is to blame for this failure than it is to argue about whether expensive litigation was avoided or not. Joe Nocera of The New York Times argues greedy plaintiffs’ lawyers are to blame; more commonly the finger was pointed at “pay czar” Ken Feinberg. Either way, the litigation is daunting and continuous. One plaintiffs’ lawyers website boasted,

The BP Claims Lawsuit is going to be one of the biggest legal battles in US history . . . More than 120,000 claimants have stepped forward to join in the federal lawsuit against BP and other energy companies, claiming personal and financial losses after last year’s disastrous BP oil spill in the Gulf Coast. It’s not too late for you to do the same and say to hell with the GCCF, I want to get my compensation. The legal proceedings are expected to reach all the way to the Supreme Court . . . Many legal experts are comparing the BP claims lawsuit to the lawsuit filed against Exxon-Valdez after the oil spill off the coast of Alaska in 1989. That legal battle lasted almost a decade.

103 See Moira Herbst, Pressure on Kenneth Feinberg to Disclose BP Pay Deal, REPORTERS LEGAL (Nov. 23, 2010), http://in.reuters.com/article/2010/11/22/idINIndia-53083520101122, see also Steir, supra note 55, at 257.
information made public as to how claims administrators were trained. This caused distrust in the public, after having been promised by President Obama that the Fund would be independent and not controlled by BP. This also raised an obvious conflict of interest, despite Feinberg’s repeated assertions that he functioned as an impartial administrator. Even a New York University Professor who opined that Feinberg was not in violation of professional responsibility standards was paid by BP (at a rate of $950.00 per hour). To deal with this problem, Judge Barbier, presiding over the consolidated multidistrict litigation in the Eastern District of Louisiana, enjoined Feinberg and his firm in February of 2011 from referring to themselves as neutral or independent.

In late 2011, the Justice Department named an independent auditor to review the GCCF process of evaluating and paying claims. Senator Roger Wicker (R-MS.) commented: “[f]rom the beginning, we asked for transparency and fairness from the GCCF as it worked to help people impacted by the oil spill. Many questions about the claims process have arisen without sufficient answers, so this audit should bring needed explanations.” In June 2012, results of the audit showed approximately $64 million in erroneously underpaid claims. The litigation and auditing due to a lack of transparency undermined the goal of the Fund as an alternative means to resolve claims quickly and cheaply.

A second problem that arose with the GCCF’s processing of claims was the rule making, claims eligibility and claims valuation procedure it employed. As compared to the rulemaking and claims eligibility determination process employed in creating the September 11 Victims Compensation Fund, “the creation of criteria governing the GCCF claim process was subject neither to formal nor informal rulemaking. Simply, the GCCF is a largely privatized enterprise not subject to public legitimacy constraints.” Furthermore, once rules had been implemented, Feinberg resorted to an ad hoc decision making model that responded not only to objections and requests from the public and claimants, but also from BP. Representative Jo Bonner (R-Ala.) remarked that the claims process was marked with great inconsistency, and Feinberg was accused of “increasing claimant appeasement by further extending eligibility, including increasingly remote proximity claims.”

Let us first examine the issue of claim valuation. In the hearing that preceded the audit order, Feinberg addressed the outcry over inadequate compensation to the regions’ shrimpers, telling Congress the GCCF would “find a

104. Mullenix, supra note 7, at 833.
105. President Barack Obama, Remarks by the President to the Nation on the BP Oil Spill (June 15, 2010) (transcript available at http://www.whitehouse.gov/the-press-office/remarks-president-nation-bp-oil-spill) (“[T]his fund will not be controlled by BP. In order to ensure that all legitimate claims are paid out in a fair and timely manner, the account must and will be administered by an independent third party.”).
106. Mullenix, supra note 7, at 873.
107. Id. at 874.
108. In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010, MDL No. 2179, 2011 WL 323866 (E.D.La. Feb. 2, 2011) (order in response to Plaintiffs’ Motion to Supervise Ex Parte Communications with Putative Class (Rec.Doc. 912)).
109. While BP may have delegated to Mr. Feinberg and the GCCF independence in the evaluation and payment of individual claims, many other facts support a finding that the GCCF and Mr. Feinberg are not completely ‘neutral’ or independent from BP. For example, Mr. Feinberg was appointed by BP, without input from opposing claimants or the Plaintiffs’ Steering Committee, and without an order from the Court. Mr. Feinberg is not a true third-party neutral such as a mediator, arbitrator, or court-appointed special master . . . The clear record in this case demonstrates that any claim of the GCCF’s neutrality and independence is misleading to putative class members and is a direct threat to this ongoing litigation.
110. Wicker-Backed Amendment to Audit Gulf Coast Claims Facility Advances, Y’ALL POLITICS (Nov. 2, 2011, 8:23 AM), http://yallpolitics.com/index.php/yp/post/30581. Even after this audit was ordered, Mississippi Attorney General Jim Hood vowed to continue his own investigation of and litigation with GCCF and Feinberg. See also Kaija Wilkinson, AG Hood Vows to Continue Pursuit of Transparency, HUNTSVILLE TIMES, Dec. 23, 2011 (“Hood praised the department’s selection of [the auditors] . . . But Hood suggested the audit might be too little, too late.”).
112. Mullenix, supra note 7, at 841-42.
113. Id. at 843-44.
115. Mullenix, supra note 7, at 850.
way to be more generous.”

The following month, shrimpers’ and crabbers’ compensation doubled to four times each claimant’s 2010 documented losses. Although this was seen as a victory and a fair result for those claimants, the pressure to please the public and the lack of restraints on the process led to inconsistency and payment of fraudulent claims. One Louisiana attorney commented,

“I’ve heard outrageous stories of waitresses or waiters, or even exotic dancers getting $10,000, $20,000 or $30,000 in the first month. . . . It really upset a lot of victims of the oil spill that had earned a living in and on the water of the Gulf of Mexico and they weren’t seeing the same compensation as a waiter, waitress or someone in a related field.”

A Florida attorney said he had heard of waitresses receiving $80,000, yet others with legitimate and documented losses getting rejected. These may be exaggerations, but the public’s perception of a claims resolution process is a determining factor in its success as an alternative to litigation.

This leads to the issue of claims eligibility and the question of how the GCCF should have responded to claims as far removed as Sweden and Minnesota. Although for a period, GCCF used eligibility charts and maps, they succumbed to public outcry and eventually abandoned them. In response to a question from Rob Wittman (R-VA) about the reasonableness of a claim from oyster processors in Virginia, Feinberg testified:

“If there is a direct link, in your hypothetical, between a Virginia oyster processing company, that depends for its livelihood on Gulf Coast shrimp, by all means, and I can go back and see, but I’m sure we’ve paid some of those claims. I know we have in Maryland. In Maryland we paid, I think there are a couple of oyster restaurants that we’ve paid that were dependent on Gulf Coast shrimp for their livelihood.”

Again, this was seen as a victory and a fair outcome for seafood industry claimants “once-removed,” but there were examples of less popular eligibility determinations and mid-game rule changes. One occurred in August 2011, when Feinberg announced that in order for businesses and workers to continue to be eligible for interim damage payments from GCCF, they had to show a 5% increase in income. Where eligibility is broad and vague, there is again the issue of fraud. There is also the issue of fairness and efficiency. Some have challenged the validity of claims by real estate developers, for example, who lost money in deals after the spill, questioning, “whether the selling price was more affected by the economy than the spill.” It is arguably unfair to make BP pay for money lost in real estate deals not along the coastline. It is also arguably an inefficient use of the fund money


119 David Ferrara, In Gulf Shores: 2 Claims, 2 Stories, HUNTSVILLE TIMES, Aug. 23, 2011 (landscaping business owner satisfied with GCCF settlement, commercial landlord resorts to suing BP after GCCF rejects his claim application).

120 Berry, supra note 116; see also Brendan Kirby, Mobile Man Convicted of False Oil Spill Claim, MOBILE REGISTER, Nov. 4, 2011; Brendan Kirby, Long Record Results in Prison, HUNTSVILLE TIMES, Oct. 31, 2011; Delray Couple Charged in BP Oil Spill Scheme, WPBF NEWS, (Oct. 7, 2011), http://www.wpbf.com/Delray-Beach-Couple-Charged-In-BP-Oil-Spill-Scam/8789358/5057672/-/7yo3wz/-/index.html; Associated Press, Florida Man Charged With Claims Fraud, HUNTSVILLE TIMES, Aug. 31, 2011.


122 Id.; see also Matt Barrentine, Feinberg Breaks Promises to Seville Quarter, FOX 10 TV (Jan. 18, 2012, 12:47 PM), http://www.fox10tv.com/dpp/news/gulf_oil_spill/feinberg-promise-broken-to-seville-quarter (discussing restaurant owner whose claim got denied, but restaurant employees, using same lost business figures, received thousands of dollars).


124 Mullenix, supra note 7, at 849.

125 Gulf Coast Recovery: President Obama’s BP Compensation Fund, How Is It Working? Before the Committee on Natural Resources, supra note 96.

126 Dan Murtaugh, Businesses Must Shoe Growth to Continue Claims, HUNTSVILLE TIMES, Aug. 24, 2011.

127 Kirby, supra note 141; Kirby, supra note 141; Staff Report, supra note 141; Associated Press, supra note 142.

128 See Layden, supra note 143.
to compensate real estate developer “victims” when long-term damage to fisheries, for example, is yet to be determined.129

Lastly, the GCCF was criticized as slow and plagued with delays.130 In one particularly heart wrenching story, a charter fishing boat captain died of cancer the night before his final claim paperwork came, after a year of trying to get payment.131 A family friend who tried to help him through the process said, “Once it goes to the Feinberg level in Ohio, it goes into a magic black hole and nobody has any influence whatsoever, when it sits at that level.”132 At the October Congressional hearing, Feinberg denied Rep. Landry’s claims that the GCCF conveniently “lost” paperwork in order to delay payments;133 the PSC successfully claimed that this was a strategy to pressure cash-strapped business owners and individuals into accepting a Quick Payment Final Claim.134

Although claims had been paid to the tune of over $6.1 billion by the time the GCCF was dissolved,135 a better and quicker result than the victims of the Exxon Valdez oil spill experienced,136 this can hardly be described as an efficient process. It is important to note that this cannot be described as an easy process either. Feinberg had no real model and, although there was a lot of criticism of him as the “master of disaster” and the “pay czar” of the fund, it is clear that statutorily mandated oversight from the federal government could have helped ensure efficient, timely and fair claims resolution.137 It is yet to be seen how efficient the procedure will become under Judge Barbier’s supervision.138

IV. Proposals to Amend OPA 90

Given the catastrophic degree of damage done by the Deepwater Horizon Oil Spill, and the continuing aftermath of attempted alternative dispute resolution and litigation, there have been a number of OPA 90 amendments proposed. Some of these proposals include amendments that would increase presidential oversight of claims processing, remove the liability cap, limit the removal of OPA 90 claims from state to federal court, and expand causes of action for oil spill victims.139 To serve the goals of fairness, efficiency, and speed, OPA 90 amendments should be modeled after the rules governing maritime arbitration, and should guide the creation and administration of claims facilities by responsible parties in the future.

To address GCCF’s aforementioned transparency problem and satisfy a need for fundamental fairness, OPA 90 should borrow from the SMA Rules governing the appointing of arbitrators and subsequent disclosure requirements. If you recall, Part IV of the SMA Rules would disqualify any person who had a personal or financial interest in the outcome of the arbitration, or who has acquired detailed prior knowledge on the matter from an interested source from serving

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129 Id.
130 Gulf Coast Recovery: President Obama’s BP Compensation Fund, How Is It Working? Before the Committee on Natural Resources, supra note 96; see also Heisig, supra note 119.
132 Id.
133 Gulf Coast Recovery: President Obama’s BP Compensation Fund, How Is It Working? Before the Committee on Natural Resources, supra note 96, statements of Jeff Landry (R-LA).
134 See, e.g., Laurel Brubaker Calkins, Jef Feely & Edward Peterson, BP Reaches Estimated $7.8 Billion Deal with Gulf Spill Victims, BLOOMBERG (Mar. 3, 2012), http://www.bloomberg.com/news/print/2012-03-03/bp-reaches-settlement-agreement (attorneys argued that the GCCF used coercive tactics to force claimants to accept inadequate payments for their claims and give up their right to sue); Ferrara, supra note 141 (“What they’re trying to do is wear you down, so you give up”); see also Gulf Coast Claims Facility - Summary of Options for Submission of Final and Interim Payment Claims, available at http://www.gulfcoastclaimsfacility.com/summary_options.pdf (This option requires no loss documentation, compensates individuals at $5,000 and businesses at $25,000, and requires claimants to sign a full release of liability, thereafter_foreclosing their appeal and litigation options.).
135 Brubaker Calkins, et al., supra note 156.
136 Gulf Coast Recovery: President Obama’s BP Compensation Fund, How Is It Working? Before the Committee on Natural Resources, supra note 96, statements of Ed Markay (D-MA) (Rep. Markay commented at the start of the hearing the tragedy that some victims of the 1989 oil spill in the Prince William Sound did not receive any compensation until 2008, nearly two decades later. Some of those victims had already passed.).
137 It was noted in the October 2011 Congressional Hearing that the GCCF was not completely without oversight, although Feinberg commented that he was willing to take full blame or full credit for the failure or success of the project due to how minimal oversight had been. It seems oversight was limited to periodic review and suggestions from the Department of Justice in the form of letters, and appeal to the NPFC under OPA 90. As of the date of the hearing, all 1,359 GCCF claim determinations reviewed by NPFC had been upheld. Id.; see also Jim Snyder, BP’s Spill Fund Paid $5.5 Billion in Claims, Feinberg Says, BLOOMBERG BUSINESS WEEk (Oct. 27, 2011, 12:20 PM), http://www.businessweek.com/news/2011-10-27/bp-s-spill-fund-paid-5-5-billion-in-claims-feinberg-says.html.
138 See Longstreth, supra note 122, discussing Feinberg’s replacements. See also Richard Blackden, BP in the Dock: the Case Explained, THE TELEGRAPH (Feb. 26, 2011, 2:00 PM) http://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/9104915, discussing Judge Barbier’s thirty year experience as a maritime lawyer in New Orleans before being appointed to the bench.
and independent from BP. If the statute mandated representatives to stop portraying that they were neutral need for Judge Barbier to order Feinberg and GCCF as maritime arbitrators. The NPFC and the spiller could SMA keeps a roster of persons with qualifications to act with the resolution of claims with the responsible party, should require the Coast Guard and NPFC to be involved taking a page from the SMA Rules. For example, the SMA for business claims, or either business or individual claims on a certain amount. Regardless of delay, it seems in this instance statutorily mandated disclosure, transparency, and federal oversight would improve the alternative dispute resolution process employed by a party responsible for an oil spill in the future.

In keeping with the idea of increasing government oversight by utilizing Coast Guard and NPFC personnel, OPA 90 should outline ways for the government to work with the responsible party in the initial phase of claims administration to determine a “sphere of damage” within which eligible claimants would lie. If unforeseen damages are discovered later in the process, OPA 90 should govern the amending of eligibility rules and compensation charts. Lastly, standards of review, similar to those laid out by the FAA, the SMA, and the APA, should govern any appeal procedure.

This Note does not mean to suggest that government involvement would increase the speed of claims resolution; I only argue that this oversight would create a feeling of justice and fairness in the public eye. The public’s perception of an alternative dispute resolution process’ level of fairness is important in determining whether it will be effective in keeping claims out of court.

Another issue surrounding GCCF, as previously discussed, was the lack of government oversight. OPA 90 should require the Coast Guard and NPFC to be involved with the resolution of claims with the responsible party, taking a page from the SMA Rules. For example, the SMA keeps a roster of persons with qualifications to act as maritime arbitrators. The NPFC and the spiller could also create such rosters, summarizing and organizing claims administrators’ professional history and qualifications by location. A three-person panel could decide claims; the claimant appointing one administrator, the NPFC appointed a second, and the responsible party appointing a third. It must be kept in mind that adding these procedural protections would slow down the process significantly, but perhaps delays could be mitigated by mandating something similar to the GCCF’s Emergency Advance Payments program, or only allowing the panel to be assembled for business claims, or either business or individual claims over a certain amount. Regardless of delay, it seems in this instance.

Although some of these suggestions may slow down the claims administration process, it has been noted that the GCCF received criticism for operating with delays. OPA 90 can outline, much like the SMA Rules for Shortened Arbitration Procedure, strict turnaround times for document submission and response. If either party violated these deadlines, there could be penalties to encourage speed. For example, if a claimant missed a deadline, s/he would not be required to forfeit his claim, but perhaps suffer a penalty in the form of a fee when the claim is ultimately paid. If the responsible party missed its deadline, it could be required to pay an interim amount to the claimant while the issue is resolved.

The last issue OPA 90 should attempt to address in the claims administration process by the responsible party is fraud. The SMA Rules allow for “Arbitration on Documents Alone” where the parties agree in writing

140  MARITIME ARBITRATION RULES, supra note 25, at IV§ 8.
141  Steir, supra note 55 (discussing the need for transparency in claims-administrator pay and a structure that preserves independence and neutrality in administration). Up until the October 2011 Congressional hearing, members of the house were still unclear as to how much say BP had in claims decisions and valuations. Gulf Coast Recovery: President Obama’s BP Compensation Fund, How Is It Working? Before the Committee on Natural Resources, supra note 96 (Feinberg clarified at this hearing the BP has the right to appeal claims settled for over $500,000, but added that they have not exercised that right often.).
143  MARITIME ARBITRATION RULES, supra note 25, at II §4.
145  RULES FOR SHORTENED ARBITRATION PROCEDURE OF THE SOCIETY OF MARITIME ARBITRATORS, supra note 39.
to forego the hearing process and submit documents and briefs to the panel for decision.\textsuperscript{146} The default is an oral hearing, conducted in an orderly manner appropriate to judicial proceedings, but traditional rules of evidence are not applied. OPA 90 should call for a default for decision on documents alone, perhaps borrowing from the GCCF documentation requirements,\textsuperscript{147} but allow either party to request an oral hearing. To try to stay as efficient as possible, the statute could limit the claimant’s right to request a hearing until they have exhausted document submission options. On the other hand, OPA 90 could allow the responsible party to request a hearing at any time, which would discourage fraudulent claimants from pursuing compensation.

\textbf{V. Conclusion}

Whether the new court supervised claims process will fare better than the GCCF, and whether Feinberg will one day be hailed as a hero and pioneer of mass tort claim resolution, remains to be seen. What is already clear is that the huge responsibility of restoring individuals, businesses, and the environment of an entire region of the country should not be left in the hands of one “pay czar” to “see how it plays out.”\textsuperscript{148} OPA 90 should not be “entirely vague” as to how a responsible party must satisfy its duties.\textsuperscript{149} SMA and the tradition of marine arbitration is a historically efficient and successful alternative dispute resolution model. The federal government should borrow a page from these rules to provide guidance and oversight to the future spiller. This would create a fairer, more efficient restitution process for victims and prevent the alternative claims resolution procedure from becoming a mere pathway to complex litigation. \textsuperscript{573}

\begin{itemize}
\item \textsuperscript{146} \textit{Maritime Arbitration Rules}, supra note 25, at VI §27.
\item \textsuperscript{147} \textit{Gulf Coast Claims Facility, Document Requirements}, http://www.gulfcoastclaimsfacility.com/requirements.pdf (last visited Jan. 22, 2012).
\item \textsuperscript{148} \textit{Gulf Coast Recovery: President Obama’s BP Compensation Fund, How Is It Working? Before the Committee on Natural Resources}, supra note 96, statements of Chairman Hastings.
\item \textsuperscript{149} Mullenix, supra note 7, at 834.
\end{itemize}
2012-2013 TIPS CALENDAR

October 2012
11-15  TIPS Fall Leadership Meeting   La Quinta Resort and Club
       Contact: Felisha A. Stewart – 312/988-5672   La Quinta, CA
18-19  Aviation Litigation National Program   The Ritz-Carlton
       Contact: Donald Quarles – 312/988-5708   Washington, DC

November 2012
7-9    Fidelity & Surety Committee Fall Meeting   Marriott Hartford
       Contact: Donald Quarles – 312/988-5708   Downtown Hartford, CT

January 2013
23-25  Fidelity & Surety Committee Midwinter Meeting   Waldorf-Astoria Hotel
       New York, NY

February 2013
6-12   ABA Midyear Meeting   Hilton Anatole
       Contact: Felisha A. Stewart – 312/988-5672   Dallas, TX
       Speaker Contact: Donald Quarles – 312/988-5708
14-16  Insurance Coverage Litigation Spring CLE Meeting   Arizona Biltmore Resort & Spa
       Contact: Ninah Moore – 312/988-5498   Phoenix, AZ

April 2013
23-28  TIPS Section Spring Leadership Meeting   JW Marriott
       Washington, DC   Washington, DC

August 2013
8-13    ABA Annual Meeting   San Francisco Marriott
        Contact: Felisha A. Stewart – 312/988-5672   San Francisco, CA
        Speaker Contact: Donald Quarles – 312/988-5708

October 2013
8-13  TIPS Fall Leadership Meeting   Minneapolis Marriott Hotel
       Contact: Felisha A. Stewart – 312/988-5672   Minneapolis, MN