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2006 CENTENNIAL YEAR

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INTERNATIONAL COMMERCIAL ARBITRATION

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In today's global economy the options for resolving disputes are of singular importance in the negotiation and performance of international contracts. Foreign courts can be a morass of unpredictability. A United States-based party forced to litigate in the courts of another country might face frightening obstacles - not necessarily knowing where litigation may be filed; politically biased judges operating in a court system that is not equipped to resolve complicated commercial problems; judges with a bias towards local customs or local parties; the hearings conducted in an unfamiliar language at an inconvenient location subject to local laws that do not provide appropriate remedies. Business enterprises want predictability. The growing trend is towards more flexible methods of dispute resolution – binding arbitration, mediation, or a combination of the two – mediation first and, if that is not successful, referral of the matter to binding arbitration.

Arbitration of international commercial disputes is conceptually similar to arbitration of domestic commercial disputes. Because of the greater obstacles encountered in navigating the global commercial world, arbitration offers a number of advantages and allows the parties to tailor a dispute resolution model that mitigates against uncertainty. Among the advantages are choice of language, choice of law and situs, impartial arbitrators experienced in the field of dispute, confidentiality, and the ability to enforce awards in other countries and against sovereign bodies. Arbitration may also be quicker from start to finish. Awards are final. There are limited grounds to appeal or vacate. Discovery is also limited, saving the parties time and money. There are also disadvantages. Summary procedures that are frequently used in court to avoid a full trial are more limited in arbitration. Injunctions might require court action. The case might become bogged down with jurisdictional issues. Arbitration cases may not be heard on consecutive days, and the gaps could delay a final resolution. If binding arbitration is not elected and if the losing party does not voluntarily abide by the award, the winner will have to go to court anyway.

In the absence of an agreement to arbitrate, disputes arising from a commercial relationship will be resolved in court. The agreement, or arbitration clause, is generally contained in the contractual documents. The drafter must be familiar with the factors to be addressed. The first is whether arbitration will be administered by an organization established for that purpose or ad hoc – that is, self-administered. There are a number of organizations that administer arbitrations and mediations. Most people are familiar with the American Arbitration Association. Its international division is the International Centre for Dispute Resolution, located in New York City. The ICDR has an experienced

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staff of case managers who can administer a case from start to finish, much like the clerks of a court. The ICDR has cooperative agreements with over sixty other arbitral institutions in forty-three countries and a roster of four hundred experienced arbitrators. ICDR case managers are fluent in over a dozen languages. It also provides comprehensive rules of procedure and a roster of qualified arbitrators with experience in many areas of law and commerce. Information about the ICDR can be found on the website of the American Arbitration Association, *http://www. adr.org.*

Most administering organizations have sample arbitration clauses, but they contain the bare minimum. Additions should be considered to lock in areas that are important to the context of the types of disputes that can be anticipated. The drafter should consider provisions for choice of law, the number of arbitrators, their fields of expertise, their nationality, the method of selection, the language in which the case will be heard, the situs of the hearing, limitations on issues subject to arbitration, limitations on damages or other remedies, discovery, rules of procedure and evidence, the type of award, and attorneys fees. Not all of these are important in every situation, and the sophisticated rules of the more commonly used administrative institutions may be sufficient. Therefore, it is important to know how the adopted rules deal with these subjects before modifying or supplementing them.

Most parties are concerned with predictability and so the clause should specify the choice of law. In the absence of a stated choice, the Tribunal has flexibility. It could use the law of the situs, the law of the place of performance or its own version of the law of international trade yet not linked to a particular situs – lex mercatoria. The latter may be preferred if the parties are interested in applying concepts of good faith and fair dealing, custom and usage, common sense and equity.

The sample arbitration clause published by ICDR reads: "Any controversy or claim arising out of or relating to this contract, or a breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules." The ICDR suggests that the parties add (1) "The number of arbitrators shall be (one or three); (2) the place of arbitration shall be (city, state, country), and (3) the language(s) of the arbitration shall be (state the language(s)." See the ICDR cite at *www.info@adr.org.*

Domestic arbitration proceedings tend to follow the same procedures as domestic courts, although with less formality. Because international disputes involve non-US parties and may be held overseas, the non-US party may be trained in the civil law system of trying cases. Most English speaking countries adopt the common law system. The civil law system is more common and is used in Continental Europe, most of Africa, Central and South America, and many other countries. There are some notable differences in how a case is presented. Civil law is more code based; common law is case and code based. Presentation of evidence is also handled differently. In civil law countries, the evidence should be laid out in the pleadings as opposed to being introduced at the hearing. The case should be fully developed at the time that the pleadings are filed. There is very little discovery. In fact, the word "discovery" might provoke fits of rage. Limited requests for exchange of documents are permitted. Unlike U.S. courts where the parties are given great latitude over the breadth scope to documents and questions that are relevant to the disputed issues, depositions are rare. In the U.S., the arbitrator or judge acts as a referee and gate keeper. The attorneys control the presentation of their respective cases. In civil law forums, the Tribunal or judge controls the case; not the attorneys. Counsel will present the Tribunal with a package of documents and point out the ones that make its client's case. Witnesses are not used for authentication of documents, and pre-filed witness statements are common. If expert testimony is appropriate, the Tribunal may appoint its own expert who will investigate and prepare a report. A party's expert will have a limited role. Brutal cross-examination is the exception. The judge or Tribunal may conduct the examination of witnesses. Counsel suggests the questions to the Tribunal. Long-winded legal briefs are discouraged. A simple outline with a list of important code citations and treatise is more common. Punitive or exemplary damages are usually not allowed unless the parties agree otherwise.

The International Bar Association has promulgated rules for the taking of evidence in international proceedings. The IBA Rules For The Taking Of Evidence In International Commercial Arbitration are designed to bridge the gaps between the practices of different countries. They cover such topics as exchange of documents, identification and testimony by fact witnesses, party appointed and tribunal appointed expert reports and testimony, admissibility of evidence, and conduct of the hearing.

Arbitration of disputes is becoming increasingly favored across the international commercial spectrum, whether the commerce is in developed or developing economies. Statistics show that the number of cases filed with the more established arbitration organizations is on the rise. Mandatory arbitration assures that all parties are playing on the same field. Although the outcome of the case is never a certainty, the rules of the game are established in advance and enforced. This should be of great comfort to business entities operating in the international community. WCS

ESTATE PLANNING ALERT

By Mary Alice Smolarek

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This Estate Planning Alert provides information about changes in the law resulting from passage of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (the Tax Relief Act).

THE NEW LAW

Rates and exemptions 2010 – 2013

The estate, gift, and generation-skipping transfer (GST) tax exemption amounts have been reunified and are now $5 million (indexed for inflation beginning in 2012), with a maximum tax rate of 35 percent. In 2013, unless the changes made by the Tax Relief Act are extended, made permanent, or replaced by a different tax scheme, the exemption amount will drop to $1 million, and the top rate will return to 55 percent.

Gift Transfers in 2010

The gift tax in 2010 was an exemption amount of $1 million and a tax rate of 35 percent for gifts in excess of $1 million. Donors must report gifts in excess of $13,000 to any one individual on a federal gift tax return (Form 709), due April 15, 2011. The GST tax applied for transfers made in 2010, but at a rate of 0 percent. A taxpayer can allocate GST tax exemption (now $5 million) to 2010 transfers. Certain rules related to the GST tax continue for 2010, such as the automatic allocation of the GST exemption. Outright transfers to skip persons (individuals more than one generation below the donor) in 2010 were subject to the 0 percent GST tax but taxpayers should consult their advisors as to (1) opting out of the automatic allocation of GST exemption, (2) the impact of the new law on 2010 transfers to trusts, and (3) how to report such transfers.

PLANNING OPPORTUNITIES

Estate planning should incorporate as much flexibility as possible to respond to changing legislation.

Two Years Only

The Tax Relief Act provides opportunities to transfer wealth available only in 2011 and 2012. As currently written, the law ends in 2013, so taxpayers who want to take advantage of these opportunities must act before then.

Leveraged giving in 2011 and 2012

The Tax Relief Act reunifies the lifetime gift tax exemption with the estate tax exemption. Any gift tax exemption used prior to 2011 reduces the new $5 million exemption. So individuals who had given away $1 million (or more) prior to 2011 now have the ability to transfer $4 million without triggering the gift tax. By using the new exemption before 2013, individuals may be able to lock in the benefits of the current law. The enhanced exemption increases the benefits of lifetime gifts, removing the assets' future appreciation from the donor's estate. Examples of techniques to leverage the exemption include sales to "intentionally defective" grantor trusts, transfers to grantor retained annuity trusts or charitable lead annuity trusts, and transfers of partial interests in real estate or business entities.

The sunset provisions present a possible fly in the ointment of gift planning. The new laws are scheduled to revert back to 2001 tax law in 2013 if Congress fails to act. The rules in effect now may not be in effect at the donor's death. Gifts that are sheltered by the exemption amount are brought back into the taxable estate of the donor at the value on the date of the gift. If the $5 million exemption reverts back to $1 million at the time of the donor's death, a gift during life of $5 million would leave $4 million subject to estate tax at death.

Commentators are divided on what course Congress will take regarding the future estate tax. It is certainly plausible that, even if the exemption amount decreases, Congress would grandfather prior gifts made under the higher exemption levels. Expert advice is essential to select the right technique for each situation, including consideration of anticipated death taxes and the source of payment of those taxes.

Portability of the exemptions

Each individual has a $5 million exemption in 2011 and 2012. The Tax Relief Act includes provisions that will allow a married couple to transfer the unused exemption of the first spouse to the surviving spouse. This is called portability, and it potentially doubles the survivor's own $5 million exemption amount to $10 million. The surviving spouse may also use the deceased spouse's unused exemption amount to make lifetime gifts. Under the current law, portability would only be available if both spouses die before 2013.

Portability is complicated. At the first spouse's death, the Personal Representative must prepare and file an estate tax return electing portability. A surviving spouse may lose some of the exemption amount if he or she remarries and outlives the second spouse. In some situations, portability may offer an alternative to the creation of trusts at the death of the first spouse, although the non-tax benefits of trusts remain important: asset management, creditor protection, and the assurance that the first deceased spouse's estate will ultimately pass as he or she intended.

A Personal Representative must consider portability as a factor in administering the estates for a decedent whose death occurs in 2011 or 2012. The best use of portability

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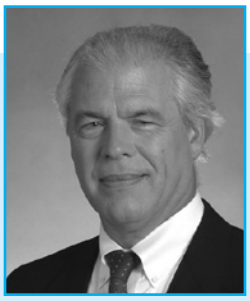
PWC INJURIES – DEFECTIVE DESIGN OR OPERATOR ERROR?

By David W. Skeen



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U.S. Coast Guard accident statistics show that 80% of boating casualties involve boats of less than 26 feet in length. Of those casualties, 36% involve personal watercrafts ("PWC") such as Jet Skis and Waverunners. A review of selected PWC injury cases shows that these high casualty rates may be a result of a deadly mix of two factors: Design defect and operator error. Design defects include the counter-intuitive off-throttle "steering" on some PWCs, whereby the operator who seeks to avoid a collision by slowing down, actually loses control and continues in the direction of his momentum because there is no rudder or steering mechanism. Operator error refers to inexperienced, poorly trained, or poorly supervised users, who operate PWCs at 40, 50 and 60 miles per hour in congested waterways, far too close to other recreational boats and swimmers.

Liability of Manufacturers for Defective Design and Failure to Warn

In Folsom v. Kawasaki Motors Corp., 509 F. Supp 2d 1364; (M.D. Ga. 2007), the plaintiff was floating on a raft on a lake in Georgia when the operator of a "Jet Ski" (a PWC manufactured by Kawasaki Motors Corp.) lost control and struck the plaintiff in the back of the head. The plaintiff alleged defective product design, asserting that Kawasaki failed to provide off-throttle steering capabilities (e.g., a rudder) and failed to provide adequate warnings of the complications with off-throttle steering loss in the absence of a rudder. The court explained that to steer or turn a Jet Ski, the driver must engage its throttle to push water through the jet pump. In most models, turning the handle bars changes the angle of the water exiting the jet pump, which allows the operator to maneuver the Jet Ski. However, when the throttle is off, there is little or no steering or turning capability and no braking mechanism. One merely coasts to a stop in the direction of one's momentum.

The plaintiff argued that the loss of steering at high speed rendered the Jet Ski "unreasonably dangerous." The plaintiff offered two expert witnesses who testified as to the effectiveness of a rudder which would allow steering capability to exist after the throttle was released. Defendant, Kawasaki, argued that the Federal Boat Safety Act of 1971, 46 U.S.C. §4301-4311 (U.S.C.A.), which does not require rudders, pre-empted any state law defective product claim. The court rejected Kawasaki's pre-emption argument based on the Supreme Court decision in Sprietsma v. Mercury Marine, 537 U.S. 51 (2002), a case in which the Court held that the Coast Guard's failure to address propeller guards under federal law did not pre-empt state law claims of defective product design relating to the absence of propeller guards. However, the defective design claim was nonetheless dismissed on summary judgment because plaintiff's experts on rudder design did not meet the very strict federal test for expert qualification in design defect cases.

The case against Kawasaki continued forward, however, on the failure to warn count. The court concluded that although there were eleven different on-board warning labels affixed to the body of the Jet Ski, the one relating to the characteristics of off-throttle steering were not conspicuous enough and not in a position where the operator could see it while seated on the Jet Ski. The court concluded that a jury could find that the label did not adequately communicate the off-throttle steering warning to the Jet Ski operator.

Liability of Rental Companies for Failure to Educate

Another class of cases has involved the liability of companies that rent PWCs for failure to warn or educate their customers as to the proper and safe operation of a PWC. The State of Florida, in fact, has gone further than most states in requiring PWC rental companies to certify their employees as having taken an approved safety course and requiring them to give safety instructions to the renters. In Tassinari v. Key West Water Tours, L.C., 2007 WL 1879172 (S.D. Fla. June 27, 2007), the rental company was held liable for the personal injury of a PWC user due to a violation of Florida Statutes §327.39 and §327.54, because its employee had not taken the approved safety course. Although not involving a PWC, in KDME, Inc. v. Bucci, 2007 WL 2345026 (S.D. Cal. August 14, 2007), the rental company was held liable to an injured plaintiff who rented a 16' Bayliner Capri, because its employee failed to explain the configuration of the bridle attached to the inner tube and the function of the lanyard "kill switch".)

Other courts have rejected the liability of rental companies for failure to warn under some circumstances. For example, in Hodges v. Summer Fun Rentals, Inc., 203 Fed. Appx. 89, 2007 AMC 599 (9th Cir. 2006), where the plaintiff lost a leg while "wake jumping" with his rented PWC, the Court of Appeals for the Ninth Circuit affirmed the district court's dismissal of plaintiff's case against the rental company, holding that it had no duty to warn the user of the obvious hazard of falling off a PWC while wake jumping. In Alarcon v. Rasanow, 2006 Ohio 5804 (Ohio App. 2006), the court held that the rental company owed no duty to the passenger of the renter of a PWC, and even if it did, it was only a duty to see that that the PWC was in working order and that the renter had no visible impediments to the operation of the PWC.

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may arise where a couple's estate planning documents failed to include tax planning.

IRA charitable rollover

In prior years, an individual who was at least 70 ½ could transfer up to $100,000 per year from an IRA to a qualified public charity without including the amount transferred in taxable income. The transfer could also be counted toward the individual's required minimum distribution. That law expired at the end of 2009, but the Tax Relief Act extends it through 2010 and 2011. Because the law was enacted so late in the year, donors were allowed to elect to allocate up to $100,000 of charitable contributions made in January 2011 to 2010.

To use this technique, (a) the donor must be 70 ½ at the date of the transfer; (b) the transfers must be from an IRA, not from 401(k)s or certain other plans; (c) the donee must be a public charity (and not a donor-advised fund or a supporting organization); and (d) the transfer must be made directly from the IRA to the charity. The amount of the transfer is excluded from income, which is likely to be more advantageous than a taxable withdrawal followed by a deductible contribution of the same amount.

ESTATE PLANNING GOING FORWARD

The provisions of the Tax Relief Act are more generous than anticipated, but they also make basic estate planning more complex. Review your plan to make sure that it works in today's $5 million exemption environment. Couples who planned to create trusts at the first death based on tax-driven formulas will want to revisit those plans to be sure they continue to meet the family's objectives.

When the exemption was $3.5 million, a spouse with a $5 million estate who died funding an estate exempt trust for the benefit of the surviving spouse and/or children would have left $3.5 million in trust and $1.5 million going to the surviving spouse outright or in trust. Under the new exemption limits, the entire $5 million would be placed into the trust.

Some plans may call for changes to the formulas creating those trusts. In other cases, modification of the terms of the trusts themselves may be more appropriate. For single individuals as well as married couples, plans incorporating generation-skipping trusts and other formula-based gifts may require revisions. In addition to the Federal estate taxes, planning has to include consideration of any state level estate taxes that would apply.

If you would like to review your current estate plan in light of the estate tax law changes, or if you would like to further explore possible gifting strategies, please contact Mary Alice Smolarek. WCS

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The State of Maryland has certain regulations under the State Boating Act requiring rental companies ("personal watercraft livery operators") to display personal watercraft safety regulations and to include them in their rental agreements with the user. *See* Code of Maryland Regulations (COMAR) 08.04.08.02.

Liability of PWC Operator for Violations of Rules of the Road

Finally, there are cases where courts have found the operator liable for personal injuries as a result of a violation of navigational rules. In the Maryland case of Moore v. Matthews, 445 F. Supp.2d 516 (D. Md. 2006), the senior class of Kent County High School was having its senior class picnic along Still Pond Creek, just off the Chester River on Maryland's Eastern Shore. After lunch, two students returning to the picnic area from a nearby cove were operating PWCs at between 45 to 65 mph. The plaintiff's PWC was in the lead, but its operator, the plaintiff Moore, was inexperienced. When she turned her head to look back, the PWC slowed down and veered 180 degrees, and the defendant's PWC coming along behind struck Ms. Moore, causing multiple injuries.

The court, on defendant's motion for summary judgment, noted first the applicability of the Inland Navigational Rules to the collision of PWC, stating that "anyone who undertakes operation of vessels on navigable waters is charged with knowledge of the Inland Navigational Rules and a mandatory duty to obey them" – including operators of PWCs. The court then analyzed the applicability of Rules 5, 6, 7, 8, 13 and 16 of the Inland Rules, which are codified at 33 U.S.C. § 2001 through 2073. The court concluded that because there was sufficient evidence that the defendant may have violated Rules 6 and 8 (relating to avoiding the risk of collision), that the burden was on the defendant to prove that such violation was not the cause of the collision. Since the defendant was proceeding at 45 to 65 miles per hour within 120 feet of the plaintiff, the court was skeptical that defendant could have stopped in time, but, in any event, the court concluded that there was not sufficient evidence in the record to grant defendant's motion for summary judgment.

The State of Maryland has enacted regulations which require that PWC operators carry a Certificate of Boater Safety Education, and place age limits on the rental of PWCs. The regulations also limit the speed of PWCs to 7 miles per hour (6 knots) when within 100 feet of another vessel, wharf, pier or jetty; require a lanyard-type engine cut-off switch; and prohibit certain activities, including wake jumping within 100 feet of another vessel, weaving through congested vessel traffic, and speeding in restricted areas, among others. *See* COMAR 08.18.02.05.

CONCLUSION

Manufacturers have made some strides in adopting voluntary standards for design to address the absence of off-throttle steering, as well as efforts to provide better, more effective warning labels. State legislators also continue efforts to require rental companies and users to educate themselves on the steering characteristics of PWC's safe operation. However, the defective design and operator errors continue to contribute to frequent PWC injuries. WCS

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