Case of First Impression – Is an Agreement on Security a Maritime Contract?

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Currently pending before the U.S. Court of Appeals for the Third Circuit is a case involving the applicable reach of the federal court's admiralty jurisdiction to resolve disputes arising out of specialized "Agreements on Security." *Nederland Shipping Corporation v. United States of America*, No. 20-2269. The Agreement on Security[1] is a Coast Guard standardized form agreement that is imposed by the Coast Guard when an Owner, Operator, and/or Vessel are accused of alleged violations of the Act to Prevent Pollution from Ships, 33 U.S.C. §1901, *et seq*., and the accompanying regulations. Consistent with the Coast Guard's stated statutory authority under APPS, a vessel's departure clearance is withheld by Customs and Border Protection (CBP) at the request of the Coast Guard, until 'surety satisfactory to the Secretary' is posted.[2] The "Agreement on Security" is the required 'surety' and generally consists of a large financial bond and various other financial and non-financial obligations required of the Owner and Operator.

In the *Nederland Shipping* case, the Owner and Operator of the M/V NEDERLAND REEFER brought, *inter alia*, a breach of contract claim against the United States seeking damages of no less than $277,000, as a result of the government's breach of the Agreement and failure to reinstate the departure clearance promptly once the agreement was signed and surety was posted. Instead, the vessel was delayed for a period of approximately thirty-six (36) days at Big Stone Anchorage in Delaware Bay. District Judge Andrews dismissed the action, ruling that there was no subject matter jurisdiction over the dispute because the Agreement on Security was not a maritime contract. The district court further held that the government had not agreed to waive its sovereign immunity and any cause of action (whether brought as a breach of contract pursuant to the Agreement on Security or the separate right of action claim for compensation under APPS),[3] must be brought in the Federal Court of Claims pursuant to the Tucker Act.[4] *Nederland Shipping Corp. v. United States*, 456 F. Supp. 3d 584, 2020 U.S. Dist. LEXIS 76072, 2020 WL 1989166 (D. Del. April 27, 2020).

All of the court's rulings were challenged on appeal, however this paper will focus on the district court's holding that the Agreement on Security is ***not*** a maritime contract and the apparent

[1] *Watervale Marine Co. v. United States Dep't of Homeland Sec*., 807 F.3d 325, 328, 420 U.S. App. D.C. 220, 223, 2015 U.S. App. LEXIS 21642, *4-5, 2016 AMC 243, 81 ERC (BNA) 2187 (D.C. Cir. 2015) ("These agreements [are] required by the Coast Guard as a condition of release of the vessels. . . . these agreements include several terms above and beyond the posting of a typical financial bond. They called for the vessel owners and operators to pay wages, housing, and transportation costs to crew members who remain in the jurisdiction, as well as facilitate their travel to court appearances, to encourage crew members to cooperate with the government's investigation, to help the government serve subpoenas on foreign crew members located outside of the United States, to waive objections to both *in personam* and *in rem* jurisdiction, and to enter an appearance in federal district court.").
[2] 33 U.S.C. § 1908(e).
[3] 33 U.S.C. § 1904(h).
[4] 28 U.S.C. §§ 1346, 1491.

incongruity in the decision compared to other federal cases where district courts have exercised admiralty jurisdiction. The disparity is even more glaring when viewed in the context of the historic purposes of MARPOL/APPS and the "genuine salty flavor" of the Agreement on Security.

A. Admiralty Jurisdiction

District courts have exclusive jurisdiction to resolve admiralty claims for breach of a maritime contract. *Norfolk S. Ry. Co. v. James N. Kirby, Pty. Ltd*., 543 U.S. 14, 23-24, 125 S. Ct. 385, 160 L. Ed. 2d 283 (2004); 28 U.S.C. § 1333; *see also*, Judiciary Act of 1789, § 9, Ch. 20, 1 Stat. 73, 76-77; *United States v. M/V Santa Clara I*, 859 F. Supp. 980, 991 (4th Cir. 1994) (it is axiomatic that the admiralty and maritime jurisdiction of the federal district courts includes any dispute involving a maritime contract, including those contracts with the government) (citing *Rex Oil, Ltd. v. M/V Jacinth*, 873 F.2d 82 (5th Cir. 1989), *cert. denied*, 493 U.S. 1043 (1990)).

In determining whether a contract is a maritime contract, courts have routinely held that the focus of the inquiry is "the nature of the services" and "the character of work" to be performed. *Ingersoll Milling Machine Co. v. M/V Bodena*, 829 F.2d 293, 302 (2d Cir. 1987). The U.S. Supreme Court has instructed that "[t]he principle by reference to which the cases are supposed to fall on one side of the line or the other is an exceedingly broad one. The only question is whether the transaction relates to ships and vessels, masters and mariners, as the agents of commerce." *Kossick v. United Fruit Co*., 365 U.S. 731, 736, (1961). In *Norfolk S. Ry. Co. v. James N. Kirby, Pty. Ltd*., the Supreme Court expanded on this authority, holding: "the boundaries of admiralty jurisdiction over contracts . . . [are] conceptual, rather than spatial," and instructed that "[t]o ascertain whether a contract is a maritime one. . . . The answer depends upon the nature and character of the contract, and the true criterion is whether it has reference to maritime service or maritime transactions." *Norfolk S. Ry. Co. v. James N. Kirby, Pty. Ltd*., 543 U.S. 14, 23-24, 125 S. Ct. 385, 160 L. Ed. 2d 283 (2004).

B. The Nature of MARPOL and APPS

APPS is the domestic implementation of the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 (collectively MARPOL 73/78 or MARPOL). *See* Pub. L. No. 96-478, 94 Stat. 2297 (1980) (codified as amended at 33 U.S.C. §§ 1901-1915). MARPOL sets forth international standards and prescribes regulations aimed at preventing and minimizing pollution from ships. The Third Circuit Court of Appeals explained the historic purpose of MARPOL and APPS in *United States v Abrogar*,

> Failure of a ship to comply with MARPOL requirements can form the basis for U.S. action to refuse to allow that ship to enter port, to prohibit the ship from leaving port without remedial action, to refer the matter to the flag state of the vessel, or where appropriate, to prosecute the violation in the United States.

Abrogar, 459 F.3d 430, 432 (3d Cir. 2006) (*citing* 33 U.S.C. § 1908). Said another way, all of the delineated options available to the government for handling suspected violation(s) of APPS (and MARPOL) are 'salty' in nature and specifically touch on maritime commerce involving foreign-flagged commercial vessels which call the ports and waterways of the United States. The Ninth Circuit Court of Appeals explained that MARPOL "attempts to strike a balance between the need

to protect and preserve the marine environment ***and the desire not to impose laws which make shipping prohibitively expensive.***" *See United States v. Apex Oil Company Inc., et al.*, 132 F.3d 1287, 1291 (9th Cir. 1997) (emphasis added).

The Coast Guard's Marine Safety Manual contains binding agency policy which governs the activities of the Coast Guard in detaining foreign vessels for civil or criminal enforcement purposes pursuant to APPS. *See* Coast Guard Marine Safety Manual, Vol IV., at C1-12 – C1-13. Specifically, Coast Guard agents are instructed to secure the United States' position through the taking of a Letter of Undertaking or Surety Bond pursuant to 33 U.S.C. §1908(e). Both options are traditional substitute security devices for vessels that are routinely posted in admiralty actions as substitutes for the *res*. The legislative history of APPS confirms that Congress intended the Coast Guard's authorization to request CBP to withhold a vessel's departure clearance was granted for the express purpose to obtain security to ensure the payment of a fine or civil penalty ***that might be imposed against a vessel in rem***. *See* House Report No. 96-1224 reprinted in 1980 U.S.C.C.A.N. 4849, 4864. (emphasis added).

C. The Agreement on Security

Courts have ruled that the historic purpose of an Agreement on Security is to assure payment of a fine or penalty and avoid the necessity to detain the vessel further and/or to arrest the vessel in the future. *See Watervale Marine Co. v. United States Dep't of Homeland Sec.*, 55 F. Supp. 3d 124, 145 (D.D.C. July 18, 2014) ("the language of the security agreements at issue here, as well as the legislative history of section 1908(e) and the practices that are actually used in the prosecution of criminal cases related to the vessels, establish that the purpose of the bond is to assure an eventual judgment if the government wins its case against suspected violators, not to "ensure" a suspect's participation in the prosecution of the case against him."). The Agreement itself contains the following clauses which relate to various maritime services and transactions:

- Clause 1 – To post a Surety Bond as security for, *inter alia*, any claims *in rem* against the Vessel.

- Clause 3 – Owner and Operator agree to continue to employ and to pay total wages in a timely manner . . . "Total wages" . . .includes the total wage the crewmember contracted for and anticipated, including guaranteed overtime. Owner and Operator were also required to provide the crewmembers with "reasonable lodging, a meal allowance and health care coverage . . ." and to "repatriate" the crewmember at the conclusion of the matter (or the government no longer requires the crewmember's presence).

- Clause 9 - Owner, Operator and the United States agree that the criminal and civil penalty claims of the United States against the Vessel in rem shall attach to the Vessel release's security as provided pursuant to the Federal Rules of Civil Procedure, Admiralty, Maritime Claims, Supplemental Rule E(5). In consideration of the Surety Bond, the United States agrees not to cause the arrest of the Vessel, nor the arrest, seizure, or attachment of any other vessel owned, operated, managed, or chartered by the Owner or Operator for the Alleged Violations, and not to withhold CBP departure clearance of the Vessel,

or any other vessel under the same management and control of the Owner and Operator . . .

- Clause 10 – This Agreement is to be binding whether the Vessel be in port or not in port, lost or not lost, and regardless of its condition . . .

In addition, the Agreement on Security contains a specific district court jurisdiction clause for any claim which may be brought.

- Clause 4 – Any dispute between the United States and Owner or Operator regarding payment under this paragraph shall be submitted to the United States District Court for the District of Delaware. In any such dispute wherein one party claims a breach of the terms and conditions herein, the party asserting that there has been a breach of the Agreement shall bear the burden of proof.

D. The District Court Ruling

Despite the seemingly 'salty' flavor of the Agreement on Security, the maritime obligations contained therein, and contract's stated purpose to serve as a substitute for a maritime *res*;[5] District Judge Andrews found the Agreement on Security was not a maritime contract and as such, there was no admiralty jurisdiction. Judge Andrews held:

> It does not relate to a ship in its use as such, or to commerce or navigation on navigable waters, or to transportation by sea or to maritime employment. *Retif Oil & Fuel, LLC v. Offshore Specialty Fabricators, LLC*, 2018 U.S. Dist. LEXIS 167697, 2018 WL 4680125, at *5 (E.D. La. Sept. 28, 2018). The principal objective of the Agreement is to permit the ship's departure clearance while preserving the Government's ability to investigate. *See Angelex Ltd. v. United States,* 723 F.3d 500, 509 (4th Cir. 2013) (withholding departure clearance did not create admiralty jurisdiction); *Retif Oil & Fuel*, 2018 U.S. Dist. LEXIS 167697, 2018 WL 4680125, at *5 (a "surety agreement is not held to be an admiralty contract, since the obligation of the surety is only to pay damages in the event of liability on the underlying contract. . . .").

Nederland Shipping, 465 F. at 591

E. Incongruity with other Cases interpreting Maritime Contracts

Judge Andrews opinion adopted the government's argument that the purpose of the Agreement on Security was to ensure the government's ability to investigate and pursue criminal fines and/or civil penalties. However, the decision completely side-stepped and avoided numerous decisions which are in direct conflict with the finding that the contract is not maritime.

[5] Going so far as to specifically cite and quote the Supplemental Admiralty Rules.

1. Substitute Security for the *Res*

Courts have routinely held that disputes involving an undertaking must be cognizable within the court's admiralty and maritime jurisdiction when it is given as a substitute for a maritime *res*:

> Where a bond for contribution is given to release the *res*, or to prevent its arrest, ***admiralty must have jurisdiction over the substitute***, or it cannot proceed by its usual course, but must resort to the cumbersome and expensive expedient of keeping the *res* in its custody and selling it under the decree.

Compagnie Francaise de Navigation a Vapeur v. Bonnasse, 19 F.2d 777, 778 (2d Cir.), *cert. denied* 275 U.S. 551 (1927); *see e.g., Continental Grain Co. v. Barge FBL585 et. al*., 364 U.S. 19, 35, 80 S.Ct. 1470, 4 L. Ed. 2d 1540 (U.S. 1960) (The U.S. Supreme Court stated that "this Court has from an early day consistently held that a bond, given to prevent the arrest or to produce the release of a vessel, is substituted for and stands as the vessel in the custody of the court."); *J.K. Welding Co. v. Gotham Marine*, 47 F.2d 332 (S.D.N.Y. 1931) (holding that the agreement not to assert a claim against a maritime *res* is sufficient consideration for a letter of undertaking (or substitutes security) to form the basis for maritime jurisdiction).

2. Maritime Services, Transactions, and Commerce

The purpose of the Agreement on Security included, *inter alia*, obtaining the release of the Vessel so that it could continue its journey and trade; to provide monetary and non-monetary obligations by the Owner and Operator in exchange for "the United States agree[ment] not to cause the arrest of the Vessel, nor the arrest, seizure, or attachment of any other vessel owned, operated, managed, or chartered by the Owner or Operator for the Alleged Violations . . ."; and the continued employment, care for, and ultimate repatriation of the seafarers.[6]

District Courts have found that a guarantee to pay issued as a substitute for releasing seized vessels or cargo from arrest was a maritime contract, as it "ultimately hastened the delivery of the cargo by sea," and was "not merely a contract to contribute to the settlement of a maritime claim." *Deval Denizcilik Ve Tigaret A.S. v. Agenzia Tripcovich S.R.L.*, 513 F. Supp. 2d 6, 9, 2007 U.S. Dist. LEXIS 72697, *8-9, 2007 AMC 2685 (S.D.N.Y. 2007); *see also Great Eastern Shipping Co. v. Binani Cement Ltd.*, 655 F. Supp. 2d 395, 399 (S.D.N.Y. 2009) (holding that a letter of indemnity constituted a maritime contract based on the exchange of maritime rights, *i.e*. the release of cargo in exchange for an agreement to pay. "The fact that the indemnity contract is actually a promise to pay money cannot be divorced from the overall purpose of the transaction, which was maritime, nor the fact that a maritime right was given up as consideration."); *Williamson v. Recovery Ltd. P'ship*, 542 F.3d 43, 49 (2d Cir. 2008) (holding that "standard" non-compete, nondisclosure, and lease contracts were still maritime contracts because of their "nature and character" and connection to "maritime commercial venture").

[6] "A seaman's contract to work aboard a vessel is a maritime contract." *Aqua-Marine Constructors, Inc. v. Banks*, 110 F.3d 663, 670-71 (9th Cir. 1997), *cert. denied*, 522 U.S. 933, 139 L. Ed. 2d 263, 118 S. Ct. 339 (1997); *see also Madeja v. Olympic Packer, LLC*, 155 F. Supp. 2d 1183, 1209 (D. Haw. 2001).

The Agreement on Security is more "salty" than "sandy" as it touches on important international maritime services and transactions which facilitates a foreign-flagged vessel's operation and trading to ports around the world. *See Kalafrana Shipping, Ltd. v. Sea Gull Shipping Co.*, 591 F. Supp. 2d 505 (S.D.N.Y. Oct. 2, 2008). In *Kalafrana*, District Judge Scheindlin wrote that a contract for the purchase of a launched ship that had been plying the seas for some time "has a distinctly 'salty flavor,' for the sole purpose of a ship is to sail." *Id*. at 509. The M/V NEDERLAND REEFER was actively engaged in the seasonal fruit trade and was a highly specialized refrigerated reefer ship which transported fruit cargos. As such, a contract with the government for the return of the Vessel's departure clearance to continue her journey and trade and which calls for specific obligations related to the employment of thirteen (13) seafarers who man the Vessel, certainly appears to meets the standards to invoke admiralty jurisdiction adopted by other courts. *Kirby, Pty. Ltd.*, 543 U.S. at 23-24; *see also Ocean Science & Engineering, Inc. v. International Geomarine Corp.*, 312 F. Supp. 825, 828, 1970 U.S. Dist. LEXIS 11746, *6 (D. Del. 1970) (finding that a contract to perform geological surveys and take samples invoked a "genuinely salty flavor" because the transaction related to a ship and master and mariners)(quoting Justice Harlan in *Kossick v. United Fruit Co*., 365 U.S. 731, 81 S. Ct. 886, 6 L. Ed. 2d 56 (1961)).

Finally, despite the district court's holding that the Agreement on Security did not relate to a particular vessel, transaction, or transportation by sea or maritime employment; none of those elements are required in order for a court to exercise admiralty jurisdiction. The U.S. Supreme Court has held that a maritime contract need not even refer to any particular vessel. *See Kirby*, 543 U.S. at 23. Nor do maritime contracts need to refer to any particular shipment. *See generally Folksamerica Reinsurance Co. v. Clean Water of N.Y., Inc.*, 413 F.3d 307 (2d Cir. 2005) (holding that an insurance contract providing coverage for losses sustained to vessels while undergoing repairs is a maritime contract). Numerous courts have found contracts such as Forward Freight Agreements are maritime contracts notwithstanding the fact that they do not refer to any particular vessels or shipments, because their purpose was to facilitate maritime commerce. *Flame S.A. v. M/V Lynx*, No. 10-00278, 2010 U.S. Dist. LEXIS 145880, at *9 (E.D. Tex. June 22, 2010); *Flame S.A. v. Freight Bulk Pte. Ltd.*, 762 F.3d 352, 362 (4th Cir. 2014). The purpose of the Agreement on Security, at least in significant part,[7] was to return the Vessel's timely departure clearance, provide substitute res, and to continue to house, feed, employ, and insure foreign crewmembers, all of which composed traditional maritime activities and/or facilitated maritime commerce.

F. Does the Tucker Act Apply?

The Tucker Act is a jurisdictional statute which provides parties with the right to pursue a claim against the United States for any claim founded in the U.S. Constitution, Act of Congress, or upon an express or implied contract with the United States. *United States v. Mitchell*, 463 U.S. 206, 216, 77 L. Ed. 2d 580, 103 S. Ct. 2961 (1983); 28 U.S.C. § 1491(a)(1). Claims which are

[7] Even if the Agreement on Security is a 'mixed contract', the district court would still have the ability to exercise admiralty jurisdiction. *Tradhol Internacional, S.A. v. Colony Sugar Mills Ltd*., 354 Fed. Appx. 463, 464 (2d Cir. 2009) (confirming "a federal court can exercise admiralty jurisdiction over a mixed contract if . . . the claim arises from a breach of maritime obligations that are severable from the non-maritime obligations of the contract." (quoting *Folksamerica Reinsurance Co. v. Clean Water of New York, Inc.*, 413 F.3d 307 (2d Cir. 2005)) (other citations omitted).

covered by the Tucker Act are required to be heard by the Federal Court of Claims. *Id*. However, the applicability of the Tucker Act is limited to claims and causes of action which do not provide for their own exclusive basis for the exercise of jurisdiction by the district court.

When an action involves a maritime contract and invokes admiralty jurisdiction, the exclusive jurisdiction to hear the matter rests with the district court and not the Federal Court of Claims. *See, e.g., Asta Eng'g v. United States*, 46 Fed. Cl. 674, 675-76 (Fed. Cl. 2000) (Indeed, "there is a long history of exclusive jurisdiction over maritime contract matters in the district courts." Congress waived sovereign immunity with respect to maritime matters, so that the United States could be sued in the district courts. *See* Suits in Admiralty Act, 46 U.S.C. app. § 742; 46 U.S.C. app. § 782 (1994); *see also Henderson v. United States*, 517 U.S. 654, 665, 134 L. Ed. 2d 880, 116 S. Ct. 1638 (1996). The jurisdiction of the district courts over actions involving maritime contracts (including those with the U.S. government) exists exclusively with the district courts and at the expense of the jurisdictional grants of the Tucker Act. *See United States v. M/V Santa Clara I*, 859 F. Supp. 980, 991 (4th Cir. 1994); *United States v. United Continental Tuna Corp*., 425 U.S. 164, 172-79 (1976); *Glover v. Johns-Manville Corp.*, 662 F.2d 225, 232 (4th Cir. 1981). At no time has Congress expressly conferred admiralty jurisdiction on the United States Court of Federal Claims or its predecessors which exercise Tucker Act jurisdiction. *Asta Eng'g v. United States*, 46 Fed. Cl. 674, 676-77 (Fed. Cl. 2000).

As such, if the Third Circuit vacates and reverses the decision below holding that the Agreement on Security is not a maritime contract; then original jurisdiction would be proper before the district court, and there would be no basis to force the action to be brought in the Federal Court of Claims.

Conclusion

The case is one of first impression, as no prior Circuit Court has been asked to rule specifically on whether the Agreement on Security constitutes a maritime contract giving rise to admiralty jurisdiction or not. Oral argument before the Third Circuit Court of Appeals was held on April 14, 2021 and can be accessed from the Third Circuit Court of Appeals here: https://www2.ca3.uscourts.gov/oralargument/audio/20-2269_NederlandShippingv.USA.mp3.