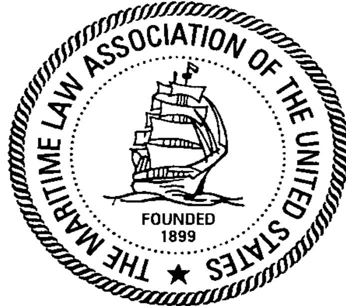
MARITIME LAW ASSOCIATION OF THE UNITED STATES
Committee on Carriage of Goods



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Editors: Sara B. Kuebel
and Dennis A. Cammarano

Contributors: Lucas D. Bradley
and Brody D. Karn

THAT'S NO RED HERRING SWIMMING ON LAND

Here, the District Court of New Jersey considered an NVOCC's motion to transfer the case based on a forum selection clause in its through bill of lading. The dispute centered on a crated shipment of household goods that was moved from Sydney to upstate New York. While at defendant's warehouse in New Jersey pending delivery, the crate was allegedly damaged.

Defendant sought to transfer the case the 66 miles to the Southern District of New York per its bill of lading's mandatory forum selection clause. Plaintiff opposed the motion on three grounds: 1) lack of admiralty jurisdiction because the damage occurred on land, 2) unenforceable forum clause within a contract of adhesion, and 3) the on-land loss was beyond the scope of prescribed carriage undertaking.

The district court echoed the Supreme Court's ruling in *Norfolk S. Ry. Co. v. Kirby* in finding that as long as the carriage requires substantial carriage by sea, the purpose of the bill of lading agreement was to effectuate maritime commerce. Hence, federal maritime law applied. On the adhesive nature of a bill of lading, the court pronounced that a forum selection clause is presumptively valid even when it is part of an adhesion contract.

As to the on-land loss being beyond the reach of the parties' agreement and COGSA, the court referenced the fact that agreed "through" carriage to an inland destination necessarily requires land transport. Further, the court emphasized that the bill of lading included an express provision that allowed the carrier to utilize any mode of transport or storage to perform the contract. Accordingly, the terms of the bill of lading applied and the case was transferred to the S.D.N.Y.

The decision closes with the reminder that the strong presumption of enforcing forum selection clauses can only be overcome by strong contrary public interest factors or exceptional circumstances.

***Beaumont v. Vanguard Logistics (USA), Inc.*, No 2:22-cv-02715 (D. N.J. July 19, 2022) (William J. Martini, Judge)**

STIPULATED STAY APPROVED AFTER CLEARING FRCP 1's COMMAND

Plaintiff, an importer of an ocean shipment of yams, sued Mediterranean Shipping Company (USA) Inc. ("MSC USA") for damage to the yams while in transit. Following removal of the case to the Federal Court, MSC USA stated its intention to bring a motion to dismiss. MSC USA then brought a stipulated motion to stay discovery pending resolution of the anticipated motion to dismiss based on suit against the wrong party and time-bar under COGSA.

The Magistrate Judge initially observed that a stay of discovery is not warranted by the mere pendency of a dispositive motion. Then the court determined that a stay is at odds with FRCP Rule 1's mandate that the Rules "be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."

The court then considered the following four factors in ultimately granting the stay:

1. Whether the defendant made a strong showing that Plaintiff's claim was unmeritorious;

2. The breadth of propounded discovery and burden of responding to it;

3. The risk of unfair prejudice to any party opposing the stay;

4. The nature and complexity of the case; and

5. The posture or stage of the litigation.

Based on the documents provided, the court determined, without prejudice, that it appeared that MSC USA was acting as an agent for a disclosed principal, MSC SA. As a disclosed agent, MSC USA may not be liable for breach of contract and, therefore, had a meritorious defense. Next, the court determined the Carriage of Goods by Sea Act's one year statute of limitation would apply to the exclusion of the state law's six-year statute. This too pointed to a meritorious defense. As to the burden of discovery, the court acknowledged that the pending discovery was not significant but that given the apparent strength of the defenses, discovery at that juncture pointed to a waste of resources.

The court found no prejudice would befall Plaintiff which had stipulated to the stay, and footnoted its position that it was not prejudging defendant's anticipated motion to dismiss. The court granted the stipulated motion to stay.

***Serwaahafua v. Mediterranean Shipping Company (USA) Inc.*, No. 2:22-cv-2111-MKB-JMW (E.D. NY June 16, 2022) (James M. Wicks, Magistrate Judge)**

BACK FROM THE DEAD: SIXTH CIRCUIT VACATES JUDGMENT FOR LACK OF SUBJECT MATTER JURISDICTION

Plaintiff, Akno 1010 Market Street, St. Louis, LLC (Akno 1010), sued Nahid Pourtaghi in the U.S. District Court for the Eastern District of Michigan, asserting that the Defendant misappropriated Plaintiff's funds. Akno 1010 alleged diversity of citizenship (28 U.S.C. § 1332(a)(2)) as the basis for federal subject matter jurisdiction. In its complaint, Plaintiff averred that it was a domestic entity since it was organized under the laws of Michigan. Defendant was admittedly a Canadian resident. The parties litigated the underlying dispute for three years, including two dispositive motions, full discovery, and briefed an appeal of the grant of Defendant's motion for summary judgment.

Following briefing on the merits of the district court's summary judgment decision, the U.S. Court of Appeals for the Sixth Circuit raised, *sua sponte*, a concern over the existence of subject-matter jurisdiction. Specifically, the Sixth Circuit harbored serious doubts as to whether Akno 1010 had properly and sufficiently pled the existence of complete diversity amongst the parties. The court's concern was that Akno 1010 was a sole member limited liability company (LLC) who's sole member was a Swiss holding company, which was in turn wholly owned by an Italian citizen. Since the lawsuit was between two foreign nationals, diversity jurisdiction was lacking. In light of the foregoing, the Sixth Circuit vacated the district court's judgment and remanded for further consideration.

In its opinion, the appellate court emphasized three well-established principles of diversity jurisdiction:

1. The party asserting diversity jurisdiction bears the burden of establishing the parties' citizenship.

2. Unlike corporations whose citizenship is determined by the state of its incorporation and principal place of business, LLCs have the citizenship of its members. Therefore, the citizenship of each member of an LLC must be alleged.
3. The obligation to ensure subject matter jurisdiction exists rests with the parties and the courts, and it can never be waived, even post-judgment.

This case presents a good reminder to litigants that entry into federal court is not assured, and that counsel is well advised to assert a fully documented basis for establishing the limited jurisdiction of federal courts.

***Akno 1010 Market Street St. Louis Missouri LLC v. Nahid Pourtaghi*, No. 21-2959 (6th Cir. 2022) (Opinion dated August 8, 2022) (Gilman, Griffin and Thapar, Circuit Judges)**

NVOCC OFF THE HOOK FOR SALVAGE EXPENSES

Subrogated cargo underwriters and their insured (Ingram Micro) sought reimbursement of salvage expenses from Shipco Transport Inc (Shipco) and JAS Forwarding Services (Ireland) Ltd (JAS) which were non-vessel operating common carriers (NVOCCs) that issued the bills of lading to Ingram Micro.

On 13 September 2018, the AS Fortuna grounded near Ecuador. The cargo was not physically damaged in the incident. Nevertheless, Plaintiffs were compelled by the vessel owner to pay salvage expenses to obtain release of the cargo. Recovery efforts were based on the vessel's unseaworthiness, common law principles of indemnity, negligence, and the NVOCCs' status as common carriers. The NVOCCs brought motions under F.R.C.P. 12(c) for judgment on the pleadings, Rule 56 for summary judgment, and Rule 12(b)(7) based on Plaintiffs' failure to join vessel owners as indispensable parties. The court granted the NVOCCs' motions.

The court determined COGSA is inapplicable where salvage damages, rather than any physical damage or loss, are at issue (citing *Hellenic Lines Ltd v. Embassy of Pakistan*, 467 F.2d 1150, 1156 (2d Cir 1972) ("The provision 'loss or damage' in [COGSA] refers to physical loss or damage to the goods"); and *Bubble Up Int'l Ltd v. Transpacific Carriers Corp.,* 458 F. Supp. 1100, 1104 n. 4 (S.D.N.Y. 1978). The court then noted that even if COGSA applied in this situation, the NVOCC defendants would not be liable for unseaworthiness.

The court defined seaworthiness as "the ability of a vessel adequately to perform the particular services required of her on the voyage she undertakes." The court also observed that the NVOCC defendants did not control the vessel and thus did not have the right or practical ability to inspect ships for seaworthiness or order repairs. As such, the court held that the NVOCC defendants did not owe a situationally impossible duty to ensure the vessel was seaworthy.

The court cited *Thyssen Steel Caribbean Inc. v Palma Armadora SA*, No. 81-cv-6066 (RWS), 1983 WL 674 *6 (S.D.N.Y. May 19, 1983) for the proposition that a carrier who did not own the vessel was entitled to rely on the vessel owner's warranty of seaworthiness contained in a charter party. Further, since the NVOCCs were not the ones actually at fault for the grounding, they could not be liable under common law maritime indemnity.

Finally, the court dismissed the vessel owner for Plaintiffs' failure to effect service of process within 90 days as required under F.R.C.P. 4, coupled with Plaintiff's acknowledgement that owners were not subject to process in the forum.

***Chubb Seguros Peru S.A. v. AS Fortuna, Opco B.V.,* No. 1:20-cv-3392 (ALC) (S.D. N.Y. March 31, 2022) (Andrew L. Carter, Jr., Judge)**

YOU'VE GOT MAIL, *BUT*: NINTH CIRCUIT HOLDS THAT LIMITATION ACT'S SIX-MONTH DEADLINE IS NOT JURISDICTIONAL AND CLARIFIES REQUIREMENTS OF "WRITTEN NOTICE"

In consolidated limitation actions on appeal, the Ninth Circuit considered two issues of first impression in that circuit: (1) whether the six-month deadline for initiating a limitation action in federal court is a jurisdictional rule; and (2) what constitutes "written notice" to trigger that deadline.

The two lower cases involved a collision and death occurring in Alaska and a drowning death in Hawaii. In each case, the district court judge dismissed the vessel owner's limitation action via summary judgment, finding that the action was untimely as not filed within six months of written notice of a claim. Appeals followed and were consolidated.

The Ninth Circuit first considered whether the six-month provision contained in the Shipowner's Limitation of Liability Act, 46 U.S.C. § 30511(a), limited the court's jurisdiction or whether it acts merely as a claim-processing rule. If the provision is jurisdictional, then an untimely limitation action can be dismissed with a properly filed Rule 12(b)(1) motion. On the other hand, if simply a claims processing rule, the untimeliness of a limitation action is considered a merits issue appropriately raised in a motion for summary judgment.

Noting a split in the Circuits between the Fifth and Eleventh on one hand, and the Second and Sixth on the other, the Ninth Circuit agreed with the Fifth and Eleventh and held that section 30511(a) is not jurisdictional because the plain language of the statute dose not "clearly state as much." Having determined that the timeliness of a limitation action is not jurisdictional, the Ninth Circuit turned to what constitutes "written notice" so as to start the six-month deadline for owners to initiate an action to limit liability.

Relying on the statutory text, the Ninth Circuit held that the phrase "written notice of claim" imposes three requirements: (1) the notice must be in writing; (2) the notice must clearly state that the victim intends to bring a claim or claims against the owner; and (3) the notice must include at least one claim that is reasonably likely to be covered by the Limitation of Liability Act. With respect to the second requirement, the Ninth Circuit further explained that "reasonable possibility" of a claim or a "potential claim" does not trigger the six-month period. Rather, "the writing must convey to the vessel owner the claimant's actual intent to initiate a claim." Applying this standard and reviewing the alleged "written notices" in the lower cases, the Ninth Circuit reversed the lower court decisions and held that neither claimant's "written notice" satisfied the second requirement. As such, both limitation actions were indeed timely.

***Martz v. Horazdovsky*, 33 F.4th 1157, 1160 (9th Cir. 2022) (Wardlow, Miller and Bade, Circuit Judges)**

VOLUNTARY DISMISSAL DENIED: SDNY REMINDS NVOCC OF THE COST OF PLAYING GAMES

During the tumultuous year of cargo shipping that was 2021, the M/V MAERSK ESSEN lost roughly 750 containers overboard in the Pacific Ocean. On January 4, 2022, Liberty Mutual Insurance commenced a subrogation action against Expeditors International of Washington, Inc. ("Expeditors") in the U.S. District Court for the Western District of Washington. The suit was a result of its assured's overboard cargoes, while Expeditors had acted as a non-vessel operating common carrier ("NVOCC").

Two months after suit was filed in Washington, counsel for Expeditors sought indemnification from Mediterranean Shipping Company ("MSC")[1] for losses it might incur from the Washington suit. MSC warned Expeditors that the terms of their sea waybill governed their relationship, and that any suit arising out of the waybill must be brought in the Southern District of New York. Accordingly, Expeditors filed an indemnification action in New York.

Due to an administrative error, MSC defaulted in the New York suit. The Clerk entered default, and Expeditors sought default judgment. Simultaneously, Expeditors apparently became aware of an amended service contract that trumped the forum selection clause in the MSC sea waybill. This gave Expeditors the green light to implead MSC in the Washington suit, and thus, Expeditors withdrew its motion for default judgment in New York.

The Western District of Washington granted Expeditors leave to file a third-party complaint. Shortly thereafter, MSC answered Expeditors' SDNY complaint, and the case was consolidated with the dozens of other claims related to the ESSEN casualty. Expeditors then filed a motion for voluntary dismissal in favor of pursuing the matter in the Western District of Washington. The motion was denied.

The court focused its reasoning on several issues: (1) Expeditors did not seek to implead MSC for indemnification in the Washington case originally, but instead voluntarily chose the Southern District of New York; (2) Expeditors had several opportunities to voluntarily dismiss the S.D.N.Y. action before MSC filed its answer; and (3) Expeditors only sought to dismiss the case after it was consolidated with all other claims related to the same voyage. Judge McMahon derided Expeditors' claim that the basis of its motion was convenience. In her Order, she reminded Expeditors that the whole purpose of consolidating all claims relating to the voyage of the ESSEN was, in fact, convenience. The consolidated claims in New York would undoubtedly

[1] MSC was engaged in a Vessel Sharing Agreement with Maersk to provide direct liner service.

involve the same witnesses, discovery, and the same questions of fact and law. Consolidation, the court noted, would allow MSC to reach a global resolution of all claims against it in one forum. Judge McMahon vacated MSC's default and indicated her belief that the motion was less about convenience than gamesmanship.

***Expeditors International of Washington, Inc. v. Mediterranean Shipping Co., S.A.*, No. 22 Civ. 1805 (CM) 2022 U.S. Dist. LEXIS 189355 (S.D.N.Y. Oct. 17, 2022) (Colleen J. McMahon, Judge)**

READ THE (ONLINE) FINE PRINT: COURT TRANSFERS CASE TO JOIN RELATED LITIGATION BASED ON FORUM-SELECTION CLAUSE

A subrogated cargo insurer brought suit against Expeditors International of Washington, Inc., a non-vessel operating common carrier, in connection with the non-delivery of cargo carried aboard the ONE AQUILA during her transpacific voyage to the U.S. Suit was brought in in the U.S. District Court for the Western District of Washington. Separately, Defendant Expeditors filed several indemnity claims against the vessel's operator in the Southern District of New York.

Eventually, Expeditors moved to transfer Traveler's case to the Southern District of New York based on a forum-selection clause. That clause appeared in Expeditors' online terms and conditions for the carriage. The forum-selection term provided that the sea waybill would be construed according to the laws of the State of Washington and federal law. It also required the merchant to consent to non-exclusive jurisdiction and venue in the Western District of Washington. Then, however, it also provided that "Merchant irrevocably consents to the commencement and to the transfer of venue in any or all such actions to any other venue in which Carrier is party to a legal action brought by itself or a third party that arises from or is

connected with the Goods, their carriage, loading, unloading, handling, or storage, or loss, damage, or delay related to any of the Goods."

The judge ruled that the provision for suit in Washington State was a permissive venue provision and that the last clause of the provision (related to already pending suits) constituted a mandatory forum clause justifying transfer to the S.D.N.Y. under the circumstances. First, the court determined that there was no waiver of the forum-selection clause, even though Expeditors waited almost one year to file its motion. Unlike cases where a summary judgment motion was filed prior to the request to transfer, Expeditors had not used significant judicial resources prior to filing its motion, and it had telegraphed the potential for consolidation in an early status report. Next, the Court did not balk at the online nature of the terms and conditions, noting that they were incorporated into the waybill, coupled with the fact that Plaintiff sued on the sea waybill. Further, the court said that even if the contract of carriage was one of adhesion, its terms were not ambiguous. The initial non-exclusive jurisdiction clause deferred to the clause at issue in the case, which required transfer for consolidation with other pending actions regarding the same carriage of goods. Accordingly, even if the contract were construed against Expeditors, it still was enforceable. Lastly, public interest factors and judicial efficiency favored litigating all cases

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arising from the same cargo casualty in the same forum. There were not any strong countervailing interests, since the underlying shipment was an international one between two international companies who had negotiated much of the transaction electronically.

***Travelers Property Casualty Company of America v. Expeditors International of Washington, Inc.*, No. 2:21-cv-01184-JHC (W.D. Wash. September 8, 2022) (John H. Chun, Judge)**

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