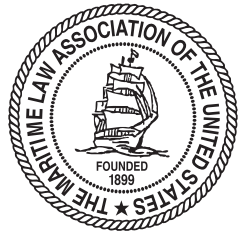

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THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES

THE MLA REPORT

Editors:

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TABLE OF CONTENTS

EDITORIAL COMMENT

This edition of MLA Report contains the newsletters of the Association's Committees that were issued in connection with the Spring Meeting in New York in May 2015. Of particular interest are the U.S. Coast Guard's initiative to develop American National Standards for recreational boating and a related initiative by organizations involved in recreational boating education to explore the creation of a specialized Operator Uninspected Passenger Vessel ("OUPV") license for boating instructors as part of a National System of Standards for Recreational Boat Operation. These initiatives are reported in the lead article of *Boating Briefs*, the newsletter of the Committee on Recreational Boating.

In our Fall 2014 edition we honored William R. Dorsey of Baltimore, a past president of the Association, in an In Memoriam article which included remembrances by other past presidents. Unfortunately, we inadvertently omitted the remembrance written by Patrick J. Bonner of New York, our 47th president. With apologies to Pat we include his remembrance of Bill Dorsey in this edition.

We thank the following members of the Committee on Young Lawyers for their proof-reading and cite checking assistance in the preparation of this edition: Corey R. Greenwald of Clyde & Co. US LLP in New York, Patrick J.R. Ward of Hand Arendall LLC in Mobile, Jonathan B. Segarra of Maynard, Cooper & Gale PC in Mobile, Stephanie Propsom of Fincantieri Bay Shipbuilding in Sturgeon Bay and Christine M. Walker of Fowler White Burnett PA in Miami. We appreciate their help. However, we remain responsible for any errors or ambiguities that may have escaped their and our view.

As in the past, we remind readers that the articles, case notes and comments published in the MLA Report are for information purposes only, are not intended to be legal advice and are not necessarily the view of The Maritime Law Association of the United States.

Chester D. Hooper
David A. Nourse
Editors

IN MEMORIAM

William R. Dorsey, III

Remembrance

Due to the Centennial, there was very little money in the treasury when Bill took over as President. He remained upbeat but we had to watch our spending very closely. At that time, one of our major expense items was the cost of the COGSA revision that later became the Rotterdam Rules. The United States was taking the lead in revising the law and there were travel expenses that strained the treasury. Bill did not waver in his support for the effort but in his humorous way, he dubbed the group involved in the work the "Gang of Four." That nickname stuck and it is close to being a badge of honor now.

When we would discuss getting publicity for the MLA activities, Bill would talk about his days as the sports editor of his college newspaper, the UVA Cavalier Daily. A few years later, my daughter was on the paper and I was able to go into their records and I found an article he wrote. The headline read something like "Courageous Cavs Crush Clemson Cagers." I sent it to him (I said I was working on his unauthorized biography) and complimented him on the alliteration. When I next saw him he was very quick to tell me that he did not write the headline but someone else did. Then without missing a beat, he smiled and said "the article was well written, wasn't it?" I laughed and had to agree.

Bill had a great sense of humor and we will miss him. I just wish I was with Anne and Bill on one of those nights when the Orioles won the series.

Pat Bonner

[Editors' note: This is a continuation of the In Memoriam to Bill Dorsey in the Fall 2014 issue of the MLA Report, Doc. No. 816.]

COMMITTEE ON ARBITRATION AND ADR

Editor: Leo G. Kailas

NEWSLETTER

May 2015

Editor's Comment

I first wanted to report on several important developments relating to arbitration and ADR. This Committee, our Subcommittee, the Liaison Committee of the MLA and the Society of Maritime Arbitrators of New York ("SMA", chaired by Donald Murnane), and the New York Maritime Consortium have been working on several initiatives to promote maritime arbitration in the United States. Last November, we had a highly successful program at the Harvard Club, comparing New York and London arbitration and the myths and realities associated with both processes. Judge Loretta Preska, Chief Judge of the United States District Court for the Southern District of New York, was the moderator for the event, which included comparative presentations on finance, litigation, and arbitration by leading arbitrators, lawyers, and bankers from both sides of the Atlantic.

During the Spring MLA meeting, many Committee members (including Manfred Arnold, Klaus Mordhorst, Liz Burrell, Keith Heard, Donald Murnane, and the Committee Chair) worked with the MLA, NYMAR, SMA, ASBA, and the New York Consortium to sponsor a mock arbitration relating to a casualty in New York harbor that involved a cargo of highly refined paraffin wax. The title of the program, "Seven Days in May: Resolving Your Arbitration Insecurities," was a play on the request of the parties for security after an explosion on the vessel caused several crew deaths and injuries and resulted in damage to the paraffin wax cargo and an adjacent cargo of ethanol. The program also provided CLE credit to all attendees.

In addition, a large contingent of Committee members will participate in the ICMA XIX Meeting in Hong Kong that will take place between May 11 and May 15. Among those presenting papers will be Committee members Manfred Arnold and Don Murnane ("The Case for Apportioned Fault in Safe Berth/Port Cases Under US Law"), David Martowski ("Consolidation of Disputes under Section 2 of the SMA Rules"), Anthony Pruzinsky ("The Application of Mandatory Law to Determination of Rights in Maritime Arbitration"), and John Kimball ("An Overview of Recent New York Arbitration Awards of Significance").

I feel honored to be working with the large group of talented maritime professionals on this Committee who are devoted to the promotion of the maritime practice through programs and scholarship. Those efforts are reflected in the case notes below, which were overseen by our Committee Secretary, Chris Nolan, and the Young Lawyers Committee of the MLA.

Thank you to Committee Vice-Chair Peter Skoufalos and Committee Secretary Chris Nolan for taking the laboring oar on the project, and our YLC drafters including: YLC Committee liaison Lindsay Sakal, Scott Gunst, Kristi Hunter, Justin Mitchell, John Scarborough, Imran Shaukat, Carlos Tamez, Christie Walker, and Matthew Waters.

I. SECOND CIRCUIT

a. **Carmack Redux**:

In *Sompo Japan Insurance Company of America v. Norfolk Southern Railway Company and Nipponkoa Insurance Company v. Norfolk Southern Railway Company*, 762 F.3d 165 (2d Cir. 2014),[1] in what is hoped to be the final iteration of the underlying litigation, the Second Circuit affirmed the district court's ruling that a rail carrier can enforce an exoneration clause in an ocean carrier's through bill of lading.

[1] This is the only decision in the newsletter which does not address arbitral issues. But as it is the final chapter in a lengthy and noteworthy litigation, we include a summary here.

This action arose from a train derailment in 2006 which damaged cargo being transported from Asia to various locations in the United States pursuant to through bills of lading issued by Yang Ming and Nippon Express. Plaintiffs Sompo Japan Insurance Company of America ("Sompo") and Nipponkoa Insurance Company ("Nipponkoa") were the subrogees of the destroyed cargo.

In the original litigation of this action, the plaintiffs asserted claims under Carmack, applying it to the rail leg of a continuous international shipment originating in a foreign country. As such, the defendant railroads did not raise any affirmative defense such as the exoneration clauses in the Yang Ming and Nippon Express through bills of lading. Several state law causes of action that had also been pled were dismissed as preempted by Carmack. These decisions were appealed by the defendants. Pending appeal, the U.S. Supreme Court decided *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp*. 561 U.S. 89 (2010), which holds that Carmack does not apply to shipments originating overseas under a single through bill of lading. Following the ruling in *Kawasaki*, the cases were remanded to the district court to determine the reinstated state law claims, as the Carmack claims could no longer be sustained.

Upon return to the district court, the defendants argued for the first time that the exoneration clauses in the Yang Ming and Nippon Express through bills of lading applied, and that therefore, the issuing ocean carrier was solely responsible, with respect to the cargo interest, for any loss or damage.

Plaintiffs argued that the exoneration clauses could not be relied upon because the defense was untimely raised. The district court entered motions for summary judgment finding Yang Ming's exoneration clause was enforceable; Nippon Express's was not, however, because it was too ambiguous.

All parties filed motions to reconsider. Upon reconsideration, the district court found that the exoneration clauses were enforceable, except with respect to one shipment

where an indemnification provision, not the exoneration clause, was at issue. Both sides appealed.

On appeal, the Second Circuit affirmed the district court's ruling in both cases and found the defendants were entitled to enforce the exoneration clauses in the ocean carriers' bills of lading. The court found that the defendants did not waive the exoneration-clause defense during the first round of summary judgment motions, as it was entirely irrelevant at that time because the plaintiffs' claims were premised entirely on Carmack liability. Rather, for all practical purposes, the remand was the first opportunity for the defendants to assert this defense. Similarly, the court ruled that there was no prejudice to the plaintiffs, as any time and money wasted in pursuing the Carmack claims was the result of the plaintiffs' own decision to pursue litigation under the Carmack framework.

The judgment in Nipponkoa's favor finding contractual indemnification arising out of the destruction of its insured's cargo was also disputed. The defendants argued that at the time Yang Ming assigned its claims to Nipponkoa, Yang Ming had not incurred damages for which it was entitled to indemnification. Nipponkoa responded that the defendants waived or were estopped from making these arguments.

The Second Circuit agreed with Nipponkoa, finding that the defendants' argument was waived as not raised until the second motion for reconsideration. Despite the defendants' efforts, the difference in arguments they made in the two motions for reconsideration could not be minimized. Therefore, a viable argument no longer existed.

Additionally, the court ruled that while the defendants may have been entitled to strict compliance with payment requirements before a contractual indemnification claim could be filed, they failed to timely raise this argument. The defendants' earlier actions also contradicted this argument, as the defendants did not originally object to Nipponkoa proceeding with the assignment

from Yang Ming, but rather indicated they would look into resolving the claim directly with Nipponkoa.

Thus, the court sustained its holding that the argument to reverse Nipponkoa's judgment against the defendants was waived. The court also permitted the affirmative defense of the exoneration clauses found in the ocean carrier's bills of lading.

b. Forum Selection Clause Prevails:

In *Atlantic Container Line AB v. Volvo Car Corporation*, 2015 A.M.C. 72 (S.D.N.Y. 2014), the Southern District of New York denied Volvo Car Corporation's ("VCC") and Volvo Cars of North America, LLC's ("VCNA") motions to dismiss based on lack of personal jurisdiction against Atlantic Container Line ("ACL"), the owner of the M/V ATLANTIC CARTIER, and its lead hull insurer, Norwegian Hull Club ("NHC"). The district court found the forum selection clause in favor of New York courts contained in the relevant sea waybill applicable, even though VCC was also subject to an arbitration clause in favor of Sweden contained in the transportation agreement between VCC and the non-vessel operating common carrier that issued the sea waybill. VCC also moved to dismiss claims premised on *forum non conveniens* and failure to state a claim.

By way of background, Walleniun Wilhelmsen Lines AS ("WWL"), a non-vessel operating common carrier, was party to an Implementing Agreement to charter space on ACL's vessels. Subsequently, WWL entered into a Transportation Agreement with VCC which contained a compulsory arbitration clause directing all disputes to the Stockholm Chamber of Commerce. VCC transported its cargo under two WWL sea waybills from Sweden to New York and Baltimore. While ACL was not named on the sea waybills, the sea waybills contained a Himalaya clause stating that "[t]he parties to this bill of lading intend to extend its terms and conditions, including all defenses and limitations, to all parties who participate in its performance…" and also contained a definition of "Carrier" that included "vessels used in the carriage, their owners, and operators." The sea waybills additionally

contained a forum selection clause in favor of the U.S. District Court for the Southern District of New York.

While in transit to the United States, a fire started on board the vessel, believed to have originated from VCC's Cargo. As such, the action was initiated by the plaintiffs against the defendants, as shipper and consignee under the relevant sea waybills, in the Southern District of New York, seeking relief under COGSA, among other claims, for repair to the vessel, damage to third parties' cargo, costs for inspections and surveys of the cargo, and loss of revenue. Defendants moved to dismiss the complaint for failure to state a claim, lack of personal jurisdiction due to the forum selection clause in the Transportation Agreement in favor of arbitration in Sweden, and *forum non conveniens* seeking to transfer the matter to Sweden. After finding that, as the consignee, VCNA could not have known the dangerous nature of the cargo, the district court dismissed certain claims thereagainst.

With respect to jurisdiction, however, the defendants argued that the plaintiffs were not subject to the forum selection clause, as they were not parties to the sea waybills. The district court disagreed, noting ACL met the definition of "Carrier" per the sea waybill terms and conditions and that the Himalaya clause effectively extended the terms and conditions to ACL as a party who participated in the performance of the sea waybill. To find otherwise, the court noted, would frustrate the intent of the parties as ACL was an intended beneficiary of the sea waybill's broad Himalaya clause.

The defendants next argued that the forum selection clause was unenforceable, as it was not reasonably communicated to the shipper or consignee and, therefore, unjust and unreasonable. The district court referred to the four-part test in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) to determine the enforceability of a forum selection clause, and found that a party to a contract is presumed to know its terms. The court was unconvinced by the defendants' argument that the forum selection clause was "buried in the boilerplate terms of the non-negotiated waybill," partly because the Transportation Agreement between WWL and VCC

incorporated all contractual documents, including WWL's waybill containing the forum selection clause. Additionally, although the Transportation Agreement between WWL and VCC contained an arbitration clause, the Transportation Agreement only applied as to WWL and VCC, but not ACL, who was not a party to it. Therefore, the court reasoned, with respect to the claims of the plaintiffs against the defendants, the forum selection clause in the sea waybill, not the arbitration clause in the Transportation Agreement, should apply.

The court then considered defendants' argument that New York is not a proper or convenient forum. The district court found it is not enough to rebut the presumption of enforceability of the forum selection clause by arguing difficulty, expense or burden. Rather, the defendants must demonstrate that "it would be 'impossible' to litigate in the chosen forum." While a typical analysis determines the level to defer to plaintiff's choice of forum, the court stated, this analysis is altered by a valid and enforceable forum selection clause. *See Atlantic Marine Construction Co., Inc. v. U.S. Dist. Court for the Western District of Texas*, 134 S.Ct. 568 (2013); *Phillips v. Audio Active Ltd*., 494 F.3d 378, 383-84 (2d Cir. 2007). The district court applied the *Phillips* test and found that New York had an interest in deciding the case, despite the defendants' argument for arbitration in Sweden.

As noted above, the district court found there was personal jurisdiction over the defendants in New York. It dismissed three counts of the complaint only as to VCNA. All other claims persisted as against VCC and the matter proceeded in New York subject to New York law.

c. Security for London Arbitration Counterclaims Recognized:

In *Aracruz Trading, Ltd. v. Kolmar Group AG*, 2015 WL 269141 (D. Conn. Jan. 21, 2015), the District of Connecticut awarded defendant Kolmar Group AG ("Kolmar") security against its counterclaims which would be decided in a London arbitration.

Kolmar, the owner of a cargo of butadiene, a compressed and liquefied form of natural gas, entered into charter parties with the plaintiffs, owners of two vessels used to transport Kolmar's cargo from India to China and South Korea. The cargo arrived at its respective discharge ports with excessive amounts of an unwanted element in the butadiene. The cargo was rejected by the buyer, pending a process of blending the transported (tainted) butadiene with sound batches of the butadiene, which either arrived from another vessel or were already present at the port. The blending was successful for one shipment and not for the other; however, the buyers accepted the entirety of the cargo at a reduced price.

The charter party provided that all claims must proceed by arbitration in London, subject to English Law. The plaintiffs claimed demurrage for the delays in discharge and blending at the port. Kolmar asserted counterclaims for the contamination of the butadiene during the ocean voyage. These claims were to be determined by the London arbitration. In the interim, plaintiffs commenced litigation against Kolmar in the United States to obtain security for their claims for demurrage.

The district court entered an order authorizing the issuance of process of attachment in favor of plaintiffs, and plaintiffs were furnished a bank guarantee in the amount of their demands. In response to plaintiffs' claims for demurrage, Kolmar asserted counterclaims for damages and expenses arising out of plaintiffs' alleged deficient performance under the charter party. Kolmar sought countersecurity pursuant to Admiralty Rule E(7)(a) for its counterclaims. Plaintiffs resisted these efforts, and moved to dismiss Kolmar's counterclaim against them. The court was confronted with four motions: two by plaintiffs to dismiss Kolmar's counterclaims, and two by Kolmar to compel security.

Rule E(7)(a) states that a plaintiff "must give security for damages demanded in the counterclaim unless the court for cause shown, directs otherwise." The rule does not define "cause shown," however, an omission that has resulted in judicial interpretation of the Rule. One example of such judicial

interpretation of the phrase by the Second Circuit can be found in *Result Shipping Co., Ltd. v. Ferruzzi Trading USA Inc.*, 56 F.3d 394 (2d Cir. 1995). In *Result Shipping*, the Second Circuit found that only a frivolous counterclaim is not entitled to countersecurity. Citing this authority, the district court held that "Rule E(7) entitles an admiralty or maritime counterclaimant to reciprocal countersecurity unless its claim can fairly be characterized as manifestly and blatantly frivolous," which could not be said of Kolmar's counterclaims. The district court found Kolmar's claims were "straightforward, lucid, complete, and well-pleaded," and that Kolmar need not present the merits of the counterclaims at this stage.

Regarding amounts, the district court found that it was of no consequence that Kolmar demanded counterclaim security in a total amount greater than plaintiffs obtained in their earlier Rule B attachment. Countersecurity must be provided for damages demanded by the defendant, and is not limited to the amount of security provided by the defendant to secure plaintiff's claims. Thus, the district court granted Kolmar's motion directing plaintiffs to post security for Kolmar's counterclaims.

Citing to *Voyager Shipholding Corp. v. Hanjin Shipping Co.*, 539 F. Supp. 2d 688 (S.D.N.Y. 2008), the district court declined to exercise its discretion to stay the London arbitration pending plaintiffs' posting of security. The court noted, however, its willingness to consider vacating the attachments in the event that plaintiffs failed to post security, in order to "place the parties on an equality as regarding security." The district court thus denied plaintiffs' motion to dismiss and granted Kolmar's motion to post countersecurity for the claims which were subject to London arbitration.

d. Proper Interest Rate with ICSID Arbitration:

In *Mobil Cerro Negro, Ltd., v. Bolivarian Republic of Venezuela*, No. 14-CV-8163, 2015 WL 631409 (S.D.N.Y. Feb. 13, 2015), the district court denied a motion to vacate a judgment enforcing a $1.6 billion award, with a 3.25% interest rate, issued

by the International Centre for Settlement of Investment Disputes (ICSID) against Venezuela. Venezuela sought to modify the 3.25% interest rate set by the ICSID Convention, which was adopted by Congress, replacing it with the lesser rate provided in 28 U.S.C. § 1961.

The court found it lacked authority to undertake such a review, as the award was unambiguous. Courts are required to recognize all aspects of ICSID awards and, pursuant to the convention, "have no clear charter to undertake any substantive review of such awards," unlike other regimes which provide for limited substantive review by the courts. The court also found that applying a U.S. interest rate would result in different rates applying in different countries. The uniform imposition by all countries of the ICSID rate avoids this potentially discordant outcome. Second, § 1961 is a general statute which is trumped by the more specific § 1650a, the enabling statute for ICSID. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2068 (2012). Third, § 1650a is a later-enacted statute which interprets an earlier-enacted statute. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 143 (2000). Fourth, where possible, a U.S. statute is to be construed to *not* conflict with international agreements.

The court additionally ruled that Venezuela's reliance on cases arising under the FAA, where § 1961 was considered, was misplaced. The ICSID provides that the FAA shall not apply to enforce awards rendered under the ICSID, and unlike the FAA, the ICSID does not permit substantive review. Because Venezuela elected to arbitrate before the ICSID, the court found, it cannot now selectively apply rules from other arbitral regimes.

e. Arbitrability Scope:

In *McKenna Long & Aldrige LLP v. Ironshore Specialty Insurance Co.*, No. 14-CV-6633, 2015 WL 144190 (S.D.N.Y. Jan. 12, 2015), the United States District Court for the Southern District of New York dismissed a declaratory judgment action initiated by Vincent W. Sedmak and McKenna Long & Aldridge LLP

("McKenna") seeking to enjoin a pending arbitration brought before the International Center of Dispute Resolution ("ICDR") by the defendant, Ironshore Specialty Insurance Company ("Ironshore")

Ironshore issued a policy, at the request of Sedmak for Eidos, to protect the principal on a $20 million loan to fund patent enforcement litigation. The policy contained an arbitration agreement. The loan was used to pay McKenna over $11 million in legal fees and Sedmak a salary of over $3.7 million. Another $2 million was transferred to a company owned by Sedmak. Ironshore argued that Sedmak lacked authority to do so, and that this maneuver was a misuse of the loaned funds. Eidos and the Lender requested that Ironshore pay the remaining principal.

Ironshore initiated arbitration, seeking a decision that it owed nothing, or to reduce the amounts owed. It then moved to compel arbitration, which was granted and affirmed on appeal. McKenna and Sedmak initiated a declaratory judgment action and filed summary judgment, in turn seeking (1) a determination that Ironshore's claims were not arbitrable and could not be compelled to arbitration, and (2) a declaration that any award Ironshore may obtain from ICDR was not enforceable against it.

The court first assessed the arbitrability of the action, finding there was no clear agreement to arbitrate arbitrability, as the agreement in the policy was not signed by McKenna or Sedmak, nor were they named as insureds or loss payees. The court then considered four of five theories for enforcing an arbitration agreement against a non-signatory. The court considered: incorporation by reference, agency, veil-piercing/alter-ego and direct-benefit estoppel. Each theory was explored in detail, with substantive analyses of the basis for each test. The court concluded there was no triable issue that McKenna and Sedmak were directly benefited by the policy, and as third-party beneficiaries of the policy, knowingly accepted benefits stemming therefrom. The court, therefore, denied plaintiffs' motion for summary judgment seeking a declaration that Ironshore's claims

were non-arbitrable and also dismissed Counts I and II of both McKenna and Sedmak's actions as against Ironshore.

II. FOURTH CIRCUIT

Court Vacates Arbitration Decision that Limited an Injured Seaman's Relief for Maintenance and Cure

In *Aggarao v. MOL Ship Mgmt. Co.*, No. 09-3106, 2014 WL 3894079 (D. Md. Aug. 7, 2014), the United States District Court for the District of Maryland refused to recognize or enforce a Philippine arbitration decision that limited a seaman's maintenance and cure remedy on the grounds that the decision violated U.S. public policy.

Potenci Aggarao was assigned to raise floor panels on the M/V ASIAN SPIRIT in preparation for loading motor vehicles at the Port of Baltimore when he was crushed between a pillar and a mobile deck lifting machine, sustaining serious injuries. Aggarao had previously entered into a Philippine Overseas Employment Contract ("POEA Contract"), whereby his exclusive remedy against the vessel interests was via arbitration in the Philippines. The POEA Contract provided that the employer would be liable for the full cost of medical treatment, as well as board and lodging, "until the seafarer was declared fit to work or to be repatriated." If the seafarer refused repatriation, he would have no right to maintenance and cure.

Aggarao commenced arbitration against his employer in the Philippines. As a threshold matter, the arbitrator determined that Philippine law, rather than U.S. maritime law, applied to Aggarao's claims. With regard to Aggarao's claim for maintenance and cure, the arbitrator explained that because Aggarao refused to be repatriated after the company-designated physician determined that Aggarao was fit to be repatriated, the vessel interests could not "be required to bear the burden of [his] maintenance and cure in the United States."

The district court refused to confirm the Philippine arbitration decision. The district court first applied the Supreme Court's *Lauritzen-Rhoditis* seven-factor test and determined that U.S. maritime law, and not the law of the Philippines, applied to Aggarao's claim. After establishing that U.S. maritime law applied, the court reasoned that the arbitration decision "transgressed this country's strong and longstanding policy of protecting injured seafarers and providing them special solicitude." Relying on *Asignacion v. Schiffahrts*, 2014 A.M.C. 713 (E.D. La. 2014), the district court concluded that the arbitration decision violated the U.S. policy of protecting and providing for injured seamen, and therefore would not be recognized or enforced.

III. FIFTH CIRCUIT

a. Imputing Waiver of Right To Arbitrate:

In *Al Rushaid v. Nat'l Oilwell Varco, Inc.*, 757 F.3d 416 (5th Cir. 2014), in a matter of first impression, the Fifth Circuit held that actions of a party's co-defendants could not be attributed to that party for purposes of imputing waiver of the right to arbitrate where the co-defendant had not substantially invoked judicial process, causing "detriment or prejudice" to the other co-defendants.

Al Rushaid Parker Drilling, Ltd. and related entities filed suit in state court against several National Oilwell Varco co-defendants, including NOV Norway, under various contracts that took the form of purchase orders in response to price quotations. The matter was removed to federal district court. While other NOV co-defendants answered the lawsuit, NOV Norway demanded arbitration and filed a motion to compel arbitration of all claims against all defendants and to stay proceedings in favor of arbitration.

NOV Norway's motion cites an arbitration provision incorporated in a specific price quotation issued by NOV Norway to the plaintiff. The quotation refers to terms and conditions which provide that, "[a]ll disputes arising out of or in connection with the

contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce." The district court denied NOV Norway's motion to compel, reasoning that NOV Norway's co-defendants had substantially invoked the judicial process to plaintiffs' detriment through substantial discovery and motion practice. While NOV Norway did not participate in discovery or motion practice, the district court reasoned that (1) the co-defendants were jointly owned and controlled and were represented by the same counsel, (2) NOV Norway benefitted from discovery, and (3) NOV Norway benefited from the judicial process by refusing informal service. NOV Norway sought interlocutory review by the Fifth Circuit pursuant to Title 9 U.S.C. section 16(a)(1)(C).

The Fifth Circuit cited its own precedent, holding that a party may waive a contractual right to arbitrate where it substantially invokes the judicial process, thereby causing "detriment or prejudice" to the other party, but also noted that "[t]here is a strong presumption against finding a waiver of arbitration."

However, the Fifth Circuit held that the co-defendants' actions could not be imputed to NOV Norway, and that NOV Norway had not substantially invoked judicial process. The court found that NOV Norway promptly took steps to arbitrate by sending an arbitration demand, filing an answer arguing litigation was impermissible because of the arbitration clause, and moving to compel arbitration. Although NOV Norway's co-defendants answered the lawsuit, NOV Norway did not invoke the judicial process and, accordingly, did not waive its right to arbitrate, unless the co-defendants' actions could be attributable to it.

The court also found that the district court, in holding that the actions of NOV Norway's proponents could be attributed to it, did not apply agency and contract law to determine whether an affiliate's agreement to arbitrate can bind a non-signatory or analyze whether the alter-ego or successor-corporation doctrine would impute the affiliate's actions to the corporation. Attributing the actions of NOV Norway's co-defendants to NOV Norway

simply because it benefitted from those actions, the court found, would cast an unduly wide net and it would be unreasonable to deny NOV Norway's right to arbitrate merely because it benefited from the litigation.

The court also held that imputing actions of a party's co-defendants on the grounds that the entities are jointly owned or controlled or share legal counsel contravenes the fundamental principle of corporate separateness.

Finally, the court found that there was no evidence that NOV Norway or its affiliates had sought to cause delay and expense or had abused corporate form.

Accordingly, the Fifth Circuit vacated the district court's denial of NOV Norway's motion to compel arbitration and ruled that claims against NOV Norway were subject to the arbitration clause of the price quotation. The Fifth Circuit declined to compel any of the other parties to arbitrate their disputes or to stay proceedings. The issue was instead remanded to the district court for its reconsideration.

b. Broadly-Written Arbitration Provision Contained Within Seaman's Expatriate Employment Agreement Applied to Claims Arising from Personal Injury:

In *FD Frontier Drilling (Cyprus), Ltd. v. Didmon,* 438 S.W. 3d 688 (Tex. Ct. App. 2014), the Texas Court of Appeals reversed and remanded for further proceedings the trial court's decision to refuse to compel arbitration pursuant to an arbitration clause contained in a seaman's expatriate employment agreement.

The appellee and original plaintiff, Steve Didmon, was employed as a subsea engineer on a vessel in foreign waters. Didmon signed an Expatriate Employment Agreement ("EEA") with Frontier Cyprus. According to the EEA, Didmon agreed to arbitrate "any dispute arising out of, or in connection," with the EEA. One day later, Didmon signed an Alternative Dispute

Resolution (ADR) Agreement which included tort claims arising out of his employment.

Nevertheless, Didmon brought suit against his employer in state court in Texas, alleging Jones Act and general maritime law claims for his personal injuries. The defendants removed the case to federal court to enforce the arbitration provisions of the Convention on Recognition and Enforcement of Foreign Arbitral Awards, pursuant to 9 U.S.C. § 201.

The defendants then filed a motion to dismiss or stay pending arbitration based on the ADR Agreement. The U.S. district court found that the ADR Agreement was unenforceable against Didmon because it was not signed by the defendants. The defendants argued that their logo on the document equaled subscription to its terms. However, the court looked at the plain meaning of "subscribe" and found that it required a signature, not a logo, and remanded the case back to state court.

On remand, the defendants argued that the arbitration clause in the EEA Agreement, not the ADR Agreement, required arbitration. The trial court denied defendants' motion to dismiss or stay pending arbitration and interlocutory appeal ensued.

On appeal, the court looked to both Supreme Court and Fifth Circuit opinions which have held that similar arbitration clauses have expansive reach. The parties agreed that the EEA contained a valid arbitration agreement. The issue on appeal was whether the EEA was broad enough to encompass Didmon's personal injury claims.

The court reasoned that broadly-written arbitration clauses are not limited only to claims which arise under the agreement, but rather apply to all disputes between the parties which have a significant relationship to the agreement. The court went further and reasoned that where the facts alleged within a plaintiff's complaint are intertwined with the agreement which contains the arbitration clause, the plaintiff's claims are arbitrable.

The court found that Didmon's personal injury claims had a significant relationship to the EEA, and his claims could not stand alone without reference to the EEA. Specifically, the Jones Act provides a cause of action for a seaman injured in the course of his employment by the negligence of his employer. Therefore, the court of appeals held that the arbitration clause of the EEA was applicable to Didmon's claim.

IV. FIFTH CIRCUIT

Scope of Arbitral Authority

In *Seagate Technology LLC v. Western Digital Corp.,* 854 N.W. 2d 750 (Minn. 2014), the Supreme Court of Minnesota was asked to consider if the Court of Appeals had properly reinstated an arbitration award, finding the arbitrator did not exceed his authority or refuse to hear material evidence.

The arbitration involved an employment contract which contained a confidentiality clause. When the employee left Seagate to work for Western Digital, Seagate alleged trade secrets were misappropriated by both the employee and Western Digital. Western Digital invoked the arbitration clause, and Seagate sought sanctions during arbitration against Western Digital for fabricating evidence suggesting that certain trade secrets had been made public. The arbitrator awarded sanctions against Western Digital, a total award of $630 million, and precluded evidence disputing the validity of the trade secrets.

A motion was brought in state court to vacate this award. The trial court found the failure to hear all evidence was improper, a decision Seagate appealed. On appeal, the award was reinstated. The supreme court affirmed the trial court's decision. It found that pursuant to the language of the arbitration agreement, which permitted the arbitrator to "grant injunctions or other relief," punitive sanctions were authorized. They were also permitted by the AAA Employment Rules which incorporated the arbitration agreement. Moreover, the arbitrator had the discretion to fashion this remedy and did not exceed his authority provided by statute.

The court also addressed whether the arbitrator's imposition of sanctions precluding any evidence or defense on a claim warranted *vacatur*. The court found that the arbitrator heard all the evidence, but failed to use it when constructing the award. A Minnesota statute addressed situations involving limitations to presenting evidence, the court found, not the use of or weight given to evidence when constructing the award. It concluded that the complaints of the employee and Western Digital were outside the scope of the statute, and therefore the arbitrator's conduct was proper.

V. NINTH CIRCUIT

The FAA Does Not Preempt State Law

In *Elite Logistics Corp. v. Hanjin Shipping Co.,* 589 F. App'x 817 (9th Cir. 2014), the majority of a three-judge panel of the United States Court of Appeals for the Ninth Circuit affirmed the district court's order denying defendant Hanjin's motion to compel arbitration. The court found no error in the district court's determination that the arbitration provision in a contract between Hanjin and motor carrier Elite Logistics was unconscionable according to California law. The court also agreed that the Federal Arbitration Act ("FAA") did not act to preempt state law in this case.

The underlying dispute concerned fees charged by Hanjin to trucking company Elite Logistics for late pick-up and drop-off of containers on weekends and holidays, as described in *Elite Logistics Corp. v. Hanjin Shipping Co., Ltd.*, No. 11-02961, 2012 WL 2366403 (C.D. Cal June 21, 2012). The fees were charged in accordance with the Uniform Intermodal Interchange and Facilities Access Agreement (the "Agreement"), which is a standard contract drafted by the Intermodal Association of North America that Hanjin required its trucking-carrier counterparties to sign. The Agreement contained an arbitration provision that required, among other things, notification of disputed charges within thirty days of receipt, thus operating as a statute of limitations shorter than the

four-year claim period available under California law and working solely to Hanjin's benefit.

The Ninth Circuit affirmed the district court's conclusion that the Agreement was unconscionable under California law, which requires showings of both procedural and substantive unconscionability. On the procedural side, the court found sufficient record evidence to support the conclusion that the Agreement was a contract of adhesion under California law. The trucking company had no meaningful opportunity to negotiate the arbitration provision and could not have conducted business as an intermodal carrier without signing the Agreement. With regard to substantive unconscionability, the court cited several one-sided features of the Agreement that inured solely to Hanjin's benefit, including the thirty- day notice-of-claim provision, lopsided evidentiary burdens in arbitration, and insufficient authority in the would-be arbitration panel to enjoin wrongful conduct by Hanjin. As for the application of the FAA, the panel found that the FAA does not preempt California's procedural unconscionability rules, citing recent decisions of the Ninth Circuit, the California Supreme Court, and the United States Supreme Court in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1748 (2011). The court also found no state substantive unconscionability rules that offended the FAA by discriminating unfairly against arbitration.

In opposition, one dissenting judge took the view that the majority misapplied *AT&T Mobility LLC v. Concepcion* and that it did not follow the correct standard for unconscionability jurisprudence set forth subsequently by the California Supreme Court in *Sonic-Calabasas A. Inc. v. Moreno*, 311 P.3d 184 (Cal. 2013). The dissenting opinion contended that the district court should have engaged in a more fact-intensive inquiry before making determinations about the substantive and procedural unconscionability of the parties' agreement to arbitrate.

VI. ELEVENTH CIRCUIT

a. Crew Member and Cruise Ship CBA Venue Battle:

In *Vera v. Cruise Ships Catering and Serv. Int'l, N.V.*, 594 F. App'x 963 (11th Cir. 2014), Ralph Vera ("Vera") sued his employer for Jones Act negligence, unseaworthiness, maintenance and cure, and failure to treat. The district court entered an order compelling arbitration based on a provision in Vera's collective bargaining agreement. On appeal, Vera challenged the district court's order, alleging that the arbitration agreement failed to meet the jurisdictional prerequisites for enforcement and was void for public policy reasons. The United States Court of Appeals for the Eleventh Circuit reviewed Vera's allegations under the standard set out in *Bautista v. Star Cruises*, 396 F.3d 1289 (11th Cir. 2005) for claims arising under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"). Under *Bautista*, an arbitration agreement requires enforcement under the Convention if the following prerequisites are met: (1) the agreement is "in writing within the meaning of the Convention"; (2) "the agreement provides for arbitration in the territory of a signatory of the Convention"; (3) "the agreement arises out of a legal relationship, whether contractual or not, which is considered commercial"; and (4) one of the parties to the agreement is not an American citizen.

First, regarding the jurisdiction prerequisite argument, Vera challenged the written agreement under *Bautista* because his employment contract did not contain an arbitration clause and he did not sign the collective bargaining agreement. In its analysis, the court noted that Vera signed his employment contract, which incorporated by reference the collective bargaining agreement, and which contained an arbitration clause that encompassed any questions concerning the terms and conditions of the collective bargaining agreement. Vera's complaint included allegations found in the terms and conditions of the collective bargaining agreement. As such, the court found the jurisdictional prerequisite of a written agreement was satisfied.

Second, regarding the public policy argument, the court found that Vera alleged the subject argument at the wrong stage of litigation. Specifically, based on the principles found in *Bautista*, at the arbitration enforcement stage, the court can only review allegations such as the agreement being null and void, inoperative, or incapable of performance under the Convention. Therefore, because Vera's argument on jurisdictional prerequisites and public policy failed, the Eleventh Circuit found that the arbitration agreement required enforcement.

b. Crew Member Employment Contract Arbitral Scope:

In a similar case, *Trifonov v. MSC Mediterranean Shipping Co. SA*, 590 F. App'x 842 (11th Cir. 2014), Nikolay Trifonov ("Trifonov") appealed a district court's order compelling him to arbitrate claims of Jones Act negligence, unseaworthiness, maintenance and cure, and failure to treat. Trifonov's employment contract incorporated by reference his collective bargaining agreement, which had an arbitration clause. The Eleventh Circuit again proceeded to analyze whether the agreement was enforceable under the Convention based on *Bautista*.

However, in this case, Trifonov argued that under the Federal Arbitration Act ("FAA"), the arbitration agreement was not enforceable because the FAA expressly excludes seaman employment contracts from the definition of "commerce." Therefore, Trifonov argued, if his employment contract was not commercial, it was not enforceable under the Convention. The Court quickly found that Trifonov's argument failed because *Bautista* previously concluded that seaman contracts are commercial in nature, regardless of the FAA's seaman exemption. Next, Trifonov argued that the arbitration agreement was not enforceable based on public policy considerations. The court likewise rejected the public policy argument, finding it was prematurely brought at the then-present stage of the proceeding. Last, Trifonov argued that Jones Act claims are generally not subject to removal. In response, the court conceded that Jones Act claims are typically not subject to removal. The court then found,

however, that Jones Act claims are subject to arbitration under the Convention, and the Convention authorizes removal of claims relating to enforcement of an arbitration agreement. Accordingly, the Eleventh Circuit upheld the district court's order compelling arbitration.

c. Can an Arbitration Clause be Unconscionable?

In *Pysarenko v. Carnival Corp.*, No. 14-20010 (S.D. Fla. April 30, 2014), the United States District Court for the Southern District of Florida ruled that the arbitration clause in a cruise line's seaman contract is not "unconscionable," does not deprive the seaman of the statutory remedies to which he is entitled, and falls under the Convention of the Recognition and Enforcement of Foreign Arbitral Awards, not the Federal Arbitration Act ("FAA").

The plaintiff, Mr. Pysarenko, was a seaman working for Carnival Cruise Lines who suffered an injury and subsequently sued his employer for damages, even though his contract contained an arbitration clause. Pysarenko did not challenge the validity of the contract or of the arbitration clause, but instead raised three affirmative defenses: (1) the seaman's contract was unconscionable; (2) the seaman's contract deprived him of remedies to which he was entitled under U.S. law; and (3) the FAA explicitly excludes seaman's contracts.

The district court noted the binding precedent of the Eleventh Circuit, which it interpreted as subsuming seaman's employment contracts under the Convention of the Recognition and Enforcement of Foreign Arbitral Awards, notwithstanding the FAA. The court compelled arbitration and ruled in favor of the defendant on each of Pysarenko's three affirmative defenses. The court thus reaffirmed the Eleventh Circuit's rule that a seaman's contract is not subject to attack solely on the basis of an arbitration clause.

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CARGO NEWSLETTER NO. 65

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FORUM CLAUSE SWEEPS SANDY CARGO TO TOKYO…

Allianz Global Corporate & Specialty v. Chiswick Bridge, 2015 AMC 751, 2014 WL 6469027 (S.D.N.Y. Nov. 17, 2014).

A subrogated underwriter sued with respect to two shipments carried from China to New Jersey. The shipments were discharged two days before Hurricane Sandy struck New Jersey. (The two cases were two of fifteen consolidated for all purposes).

The subrogated underwriter claimed the shipments were damaged by "wetness" and that the ocean carrier discharged the cargo two days before the hurricane. The subrogated underwriter claimed the ocean carrier knew of or should have known of the "well predicted and highly publicized impact" of the hurricane, including expected storm surges, rising water level, heavy wind, and rain. The subrogated underwriter also alleged breach of contract and obligations as a carrier for hire and/or bailee.

The ocean carrier had issued waybills for the shipments, both of which incorporated the terms and conditions of its standard combined transport bill of lading. This contained a governing law and jurisdiction clause calling for jurisdiction in the Tokyo district court in Japan and Japanese law "except as may be otherwise provided for herein."

The ocean carrier moved to dismiss both complaints arguing that the forum selection clause mandated that any claims against it be brought in Tokyo.

The court referred to the Supreme Court decision in *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 2014 AMC 1 (2013), as setting forth the manner to enforce a forum selection clause should be way of motion to dismiss for forum non conveniens. It noted the Supreme Court left open the question of whether such a motion may alternatively be brought under Rule 12(b)(6), however, the court went on to construe the motion under *forum non conveniens* principles set forth in *Atlantic Marine*.

It stated the court may rely on the pleadings and affidavits submitted in connection with the motion, but cannot resolve any disputed material facts in the movant's favor unless an evidentiary hearing is held (Citing cases).

The court found the enforceability of the forum selection clause is governed by federal law and:

> Under the doctrine of *forum non conveniens*, a valid forum selection clause must be given "controlling weight in all but the most exceptional cases." *Atlantic Marine*, 134 S. Ct. at 851, 2014 AMC at 12. In the admiralty context, forum selection clauses "are prima facie valid and should be enforced" unless the resisting party meets the "heavy burden" of showing that enforcement would be unreasonable under the circumstances. *M/S Breman v. Zapata Off-Shore Co.*, 407 U.S. 1, 10, 17, 1972 AMC 1407, 1414,1419 (1972).

The court went on to note that courts in the Second Circuit employed a four-part analysis to determine the validity of such clauses. The court must determine: (1) whether the clause was

"reasonably communicated" to the party resisting enforcement, (2) whether the clause is mandatory or permissive, and (3) whether the claims and parties involved in the suit are subject to the clause. If the three requirements are met, the forum selection clause is presumptively enforceable. The final step of the analysis is for the court to ascertain whether the resisting party has rebutted the presumption of enforceability by showing that enforcement would be unreasonable or unjust, or that the clause would otherwise be invalid for reasons such as fraud or overreaching.

The subrogated underwriter did not dispute that the forum selection clause was reasonably communicated, mandatory and applied to its claims against the ocean carrier. Thus it was presumptively enforceable. Looking to whether the party challenging enforcement overcame the presumption of enforceability, the court noted the clause would be enforced unless the resisting party showed: (1) its incorporation was the result of fraud or overreaching; or (2) the law to be applied in the selected forum is fundamentally unfair; or (3) enforcement contravenes a s strong public policy of the forum state; or (4) trial in the selected forum would be so difficult and inconvenient that it effectively would be denied its day in court.

The subrogated underwriter argued that enforcement would be unreasonable and unfair as splitting its litigation efforts between New York and Tokyo would be "unduly costly and prejudicial" to its interests.

The court noted that the subrogated underwriter's argument was of the sort expressly rejected by the Supreme Court in *Atlantic Marine*: "When parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation."

The court found the subrogated underwriter had made no showing that it would be unable adequately to assert its claims in the Tokyo forum, or that it would not receive a fair hearing there.

The court distinguished *In re Rationis Enterprises*, 1999 AMC 889, 1999 WL 6364 (S.D.N.Y. 1999). (cited by the subrogated underwriter), as involving a matter of "unusual size and complexity" and involving a proceeding under the Limitation of Liability Act, and that court had found the defendant had waived the forum selection defense in that matter. By contrast, the instant case did not involve a limitation proceeding, nor was it asserted that the ocean carrier waived its forum selection defense. The court also noted that *Rationis* was decided before *Atlantic Marine*.

The court granted the motions to dismiss, holding the claims against the ocean carrier must be adjudicated in the Tokyo District Court.

MANIFEST DISREGARD: STILL A TOUGH ROW TO HOE…

Hess Corp. v. Dorado Tanker Pool, Inc., 2015 AMC 1432, 2015 WL 915294 (S.D.N.Y. Mar. 4, 2015).

Charterer moved to confirm an award essentially in its favor (see Cargo Newsletter No. 64, MLA Report, Doc. No. 816, Fall 2014 at 18373); owner interposed a motion to vacate the award.

The court noted that owner's sole challenge was that the award reflected "manifest disregard of the law of damages."

The court first found it had jurisdiction because the agreement to arbitrate was part of the charter party which it deemed a "quintessentially maritime contract" and, alternatively, because the petition to confirm and the motion to vacate came within the scope of the New York Convention, whose implementing legislation provides for federal subject-matter jurisdiction.

The court further noted the fact that one of the parties being a foreign corporation suffices to bring the award within the scope of the New York Convention.

It next addressed the standard for consideration of "manifest disregard", noting the party challenging an arbitration award on this basis "bears a heavy burden" and requires "more than a simple error in law or a failure by the arbitrators to understand or apply it."

Essentially, the party resisting the award must establish that the governing law alleged to have been ignored was well defined, explicit, and clearly applicable and that the arbitrator(s) appreciated the existence of such clearly governing legal principle, but decided to ignore or pay no attention to it.

> "[e]ven where explanation for an award is deficient or non-existent, we will confirm it if a justifiable ground for the decision can be inferred from the facts of the case." *Duferco*, 2003 AMC at 1528, 333 F.3d at 390. And "where an arbitral award contains more than one plausible reading, manifest disregard cannot be found if at least one of the readings yields a legally correct justification for the outcome." *Id*.

The court stated the general principle applicable to the calculation of damages in maritime cargo damage cases as the same as in ordinary contract cases. The primary object, in keeping with the common law, is to award damages which would indemnify the plaintiff for the loss sustained by reason of the carrier's fault.

The court noted the ordinary rule of damages, "known as the market value rule," was to measure damages as the difference between the fair market value of the goods at their destination in the condition in which they should have arrived with the fair market value in the condition in which they actually did arrive. (Citation omitted).

The court went on to note an alternative measure may be used "where circumstances suggest a more appropriate alternative"

than the fair market value test. Under this rule, where "reconditioning of the merchandise is feasible…at a modest cost so that the shipper realizes the market value of the product, the courts sometimes limit damages to [the] reconditioning costs." *Santiago v. Sea-Land Serv., Inc.*, 366 F. Supp. 1309, 1315, 1974 AMC 673, 680 (D.P.R. 1973).

The appropriateness of abandoning the market value for the cost of reconditioning depends on the facts, and available evidence, of each case. The court went on to note that, in addition to the value assigned to the direct damage to the cargo itself, recovery may be had for reasonable incidental damages (such as costs of surveys, inspections, salvage handling, necessary transportation and the like) resulting from the cargo damage (Citing cases).

The court then addressed owner's challenge to the award on the ground that the panel manifestly disregarded the law of damages by awarding charterer expenses incurred in "mitigating" the loss, while disregarding the revenue and benefits received by the charterer from its "mitigation" efforts. The court stated this argument was "narrowly circumscribed." Owner did not challenge the panel's factual findings and, although in the arbitration owner vigorously argued that the panel should apply the alternative remediation cost rule, "[it] now 'does not contest the Panel's decision to apply the market value rule of damages.'" Thus, owner had to accept "the starting point for calculation of damages is the diminution in market value of the Contaminated Fuel. . . ."

The court took owner's argument to mean that the panel should have subtracted from charterer's damages the net proceeds of what the panel described as charterer's attempt to mitigate its damages by moving the product about to other of its tanks through a myriad of barge transfers, product blends and sales.

In this context, the court considered this challenge to have at least two flaws; First: owner did not present this argument (its view of the operation of the market value rule) to the panel, and the court's review of the post-hearing briefs revealed that it did not. As

the supposed rule on which owner now relied was never brought to the arbitrators' attention, it could not be used as a basis to refuse to confirm the award.

Second: the court stated, "[this] argument mischaracterizes the relationship between the market value rule and the duty to mitigate. An implicit premise of the market value rule is that the injured party's duty to mitigate would have been satisfied by selling the distressed goods upon receipt for fair market value. Thus, where the market value rule is applicable, the shipper's efforts, if any, to recondition the distressed goods rather than reselling them immediately are irrelevant to the computation of direct damages. As the Panel correctly explained, '[b]ecause the market value rule considers the diminished value of the cargo *on the date of discharge*, later price fluctuations or changes in value beyond the date of discharge are *irrelevant* to [the] damages calculation.'"

As to owner's argument that the panel's decision was inconsistent in that it awarded part of the cost of reconditioning, and thus, should have credited at least part of the benefits charterer derived from its mitigation effort, the court considered this argument flawed in that, even assuming that it rested on a plausible characterization of the award, there was a more plausible characterization, not inconsistent and legally sound.

Referring to the panel's awarding a portion of the barging costs; the court noted the panel awarded a part of these costs as well as a portion of charterer's claims for inspection costs and spill taxes. As to these inspection fees, spill taxes and extra barge costs, the panel described them collectively as "ancillary losses" which the court said may be characterized fairly as "incidental damages":

> [Owner's] attempt to characterize the ancillary losses awarded as mitigation costs might be more persuasive if the Panel had awarded all of the barging costs that [charterer] sought. But, . . . The panel only awarded the costs of a single barge

> movement from ship to shore. . . . the panel expressly declined to award the cost of a different barge "movement. . . ." "Thus, contrary to [Owner's] interpretation of the Award, the Panel appears to have denied, rather than granted, mitigation costs. (Brackets supplied)

The court considered it was obliged to give an arbitral judgment the most liberal reading possible (Citation omitted). It found:

> A plausible - - indeed, a persuasive - - reading of the Award is that the Panel declined to award mitigation costs, and instead awarded market value damages plus incidental expenses. Because that interpretation of Panel's decision is both plausible and legally sound, any ambiguity in the wording of the Panel's decision does not constitute a sufficient basis to refuse to honor the Award.

In sum, the court found owner had failed to show the award resulted from any manifest disregard and confirmed the award.

(The court went on to consider and award prejudgment and postjudgment interest, as well as attorneys' fees.)

COURSE OF DEALING SEALS THE DEAL…

Affiliated FM Ins. Co. v. Bridge Terminal Transp. Servs., Inc., No. 14 CIV. 6938, 2015 WL 685244 (S.D.N.Y. Feb. 18, 2015).

Defendant agreed to transport certain containers of children's clothing from Huntsville, Alabama to Fort Payne, Alabama by motor carrier. When the containers arrived at their destination, the seals on the containers had been broken and their contents mostly pilfered. The subrogated underwriter brought an

action for breach of contractual obligations, negligence and bailment. The defendant motor carrier moved seeking an order compelling arbitration, appointing an arbitrator and staying the action pending arbitration.

The court noted that prior to the shipments involved, the plaintiff's insured had contracted for at least ten other shipments with the defendant. Upon delivery of such shipments, the insured received receipts, each of which contained a provision that the service was subject to the "terms, conditions and limitations of liability stated in BTT's Rules Tariff that are available upon requests from BTT, or at http://bttinc.com."

Copies of the receipts were submitted to the court and a copy of the Rules Tariff was also submitted. Defendant avowed the Rules Tariff was available on its website. The Rules Tariff contained the provision calling for arbitration; location to be agreed upon; each party bearing its own costs, and costs of the arbitration board to be equally split.

The court noted the Federal Arbitration Act provided that, if an agreement to arbitration applies to a dispute, on application of one of the parties, the court "shall" stay the trial of the action until an arbitration has been had in accordance with the terms of the agreement. The FAA further provides that if the arbitration agreement does not provide a method of selecting an arbitrator, the court is to appoint one. It further noted the FAA strongly encourages arbitration and that agreements to arbitrate must be interpreted liberally.

Plaintiff contended that the arbitration provision in the Rules Tariff was not part of the contract between the parties because the Rules Tariff was only given to its insured on receipt of the shipments, not before the shipments. Additionally, if the receipts were part of a contract, they did not properly incorporate the Rules Tariff into the contract by reference. Defendant replied that the receipt comprised part of the contract because they were issued as part of a course of dealing and that the receipts properly incorporated the Rules Tariff.

The court noted, as a matter of state contract law, terms repeatedly included in written confirmation between two parties can become part of subsequent contacts between the same parties:

> ….[where] a manufacturer has a well-established custom of sending purchase order confirmations containing an arbitration clause, a buyer who has made numerous purchases over a period of time, receiving in each instance a standard confirmation form which it either signed and returned or retained without objection, is bound by the arbitration provision. [*Pervel Indus., Inc. v. T M Wallcovering, Inc.*, 871 F.2d 7, 7-8 (2d Cir. 1989).]

The insured had received ten delivery receipts prior to the shipment involved. The court felt the insured was surely aware that the receipt contained such term, and the language in those receipts became part of the contract pursuant to a course of dealing.

The court then addressed whether the language successfully incorporated the Rules Tariff and the arbitration provision. It noted two conditions must be satisfied for incorporation. First, the document must be specifically referred to and identified beyond reasonable doubt, and second, it must be clear that the parties had knowledge of and assented to the incorporation terms (citation).

The court held the receipts could hardly have been clearer that receipt of each shipment constituted assent to a separate, specifically identified document i.e., the Rules Tariff. The court found the document was identified beyond doubt, and the parties knowingly assented.

The court noted it was well established in the Second Circuit that arbitration agreements may be incorporated into contracts by reference; and further, any stricter state law doctrine

specifically impeding incorporation of arbitration agreements would be preempted by the Federal Arbitration Act.

> In any case, the parties are sophisticated merchants who knew the prevalence of arbitration agreements in the shipping industry.

The court granted the motion to compel arbitration and stayed the action pending arbitration. The court declined to appoint an arbitrator because the parties had not yet attempted to select one in accordance with the terms of the agreement. The cross motion to strike the affirmative defense was denied.

PROVE IT!!

Kawasaki Kisen Kaisha, Ltd. v. Plano Molding Co., 782 F.3d 353, 2015 AMC 1030 (7th Cir. 2015).

Appellants are three companies that were involved in the shipment of molds involved in a derailment in Oklahoma. The train was carrying two injection molds being delivered to defendant/appellee. The derailment occurred after the molds broke through the floor of their shipping container causing the railcar and many behind it to derail, resulting in approximately $4 million in total damage.

At issue in the case was the reason the molds broke through the floor of the container. The ocean carrier and the railroad sued the consignee of the molds, claiming that it was at fault because the company it hired packed the molds into the shipping container improperly. Secondly, the consignee would be liable for breach of a warranty found in the NVOCC's bill of lading which provided the contractual terms for the shipment of the molds. The consignee argued that the molds were properly packed and they fell through the floor of the container because the container was defective.

The district court had previously held the consignee was bound by the "World Bill of Lading" issued by the NVOCC and

could be held liable to appellants if it violated the terms of that agreement. This ruling was not appealed.

In a three-day trial, consisting largely of expert testimony, Appellants sought to prove the consignee breached a warranty providing that the "Merchant" warrants the stowage of containers was safe and proper and suitable for handling and carriage and for indemnity against the carrier caused by any breach. There was no direct testimony of how the molds were packed into the container, and neither party presented witnesses who were involved in the loading of the container. (The container was loaded in China.)

The district court found there was not enough evidence to support the claim that the crates had not been properly lashed and found for the consignee. It also found that the shipping container was defective and that defective welds caused the molds to fall through the bottom of it.

Initially, appellants argued that the district court erred in not following the guidance of *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), when it assessed the testimony of their expert. The court held the district court performed its gate-keeping analysis for each expert, both before the trial and in its final opinion: "Once an expert's testimony is admitted, it is treated no differently than lay testimony . . . . In a bench trial, once the court has fulfilled its gate-keeping function, it becomes the trier of fact that needs to assess the evidence itself—not just the methodology underlying that evidence." *Plano Molding Co.*, 782 F.3d at 360, 2015 AMC at 1038-39.

The court found the consignee's experts were more credible than appellant's.

Turning to the heart of the appeal, the court considered the burden of proof and whether such had been met:

> Normally, the party claiming breach of a warranty under a maritime contract --here,

> appellants--bears the burden of proof. (Citation omitted)

However, appellants asserted that the burden should fall on the consignee to prove the molds were packed properly because it had readier access to knowledge about such facts. Appellants pointed to the consignee's contractual relationships with the NVOCC and the shipper, either of which could have inquired as to how the container was loaded in China. They also argued the consignee's engineering vice-president had a home in China and that he should have investigated how the container was loaded.

This argument was based upon the rule that "the burden of proving a fact is said to be put on the party who presumably has peculiar means of knowledge enabling him to prove its falsity if it is false," (9 Wigmore, Evidence §2486, at 275 (3d ed. 1940), This rule has also been endorsed by the Supreme Court (Citation omitted).

While the court referred to several cases in which the rule was employed, it declined to employ this type of burden shifting in this case. First, it considered the information at issue was not "peculiarly within the knowledge of the consignee." Not only did the consignee lack "peculiar" (i.e., "exclusive") knowledge of the information at issue, it lacked any knowledge whatsoever. It simply had no information about how the container was actually loaded. Even if the consignee had a close relationship with the foreign companies involved, these companies were separate entities, and the mere fact that the consignee may have a close relationship with them did not bring the information peculiarly within the consignee's knowledge.

Additionally, no information was brought forward to demonstrate that the consignee would actually be able to acquire the information at issue. The fact that the consignee's vice-president had a personal home in the country (China) was irrelevant. The court noted the vastness of China, its having the largest population on earth, along with appellants' failure to

explain how the vice-president would have easy access to the information at issue.

"In sum, fairness does not dictate that the burden of proof on this issue be shifted to a party with no actual knowledge of the relevant information and, it seems, no ready way to acquire it." *Plano Molding Co.*, 782 F.3d at 363, 2015 AMC at 1043.

The court found the district court properly held appellants to the burden of proving the breach of warranty and that burden required them to prove it was more likely than not that the consignee breached the warranty. Thus, the district court did not clearly err by finding the appellants failed to meet this burden.

As to an argument that the consignee presented no evidence to suggest the molds were properly packed, the court noted consignee "did not have to prove anything," finding appellants did not produce sufficient evidence to prove a breach of warranty on the part of the consignee.

As to an argument that the appellants should not have to affirmatively prove breach, but that a breach should be presumed based on the circumstances of the case, the court found appellants wrong about the purpose of the warranty, stating "It exists to create a contractual duty, not to shift the burden of proof."

It expressed sympathy to an argument that it would be exceedingly difficult for a carrier to affirmatively prove that a shipping container was improperly packed when a derailment had led to the destruction of the most probative evidence.

At the same time, the court noted the problem "was known to the parties when they agreed to be bound by the World Bill of Lading." At that time, appellants could have insisted on a bill of lading provision stating that, in a case such as the instant, when a derailment is caused by a merchant's goods breaking through the floor of the container, there would be a presumption that the container was mis-packed. No such presumption was written in

the bill of lading as used, and the court declined to essentially rewrite the terms of the bill of lading by presuming breach.

The circuit court agreed with the district court's conclusion that appellants did not meet their burden of proving the consignee had breached the warranty and, thus, did not have to review the district court' findings that the container was defective and that those defects caused the molds to fall through its floor.

The judgment of the district court was affirmed.

YES WE HAVE NO BANANAS…BUT WHY?

Del Monte Fresh Produce N.A., Inc. v. M/V LOMBOK STRAIT, 2015 AMC 1047, 2015 WL 1190113 (S.D.N.Y. Mar. 16, 2015).

A shipments of bananas consigned to plaintiff were carried aboard defendant's vessel from Guatemala to New Jersey. Plaintiff alleged the bananas started prematurely to ripen while onboard the vessel, while defendant asserted that the bananas ripened because they were defective when they were loaded on the vessel.

The district court, in a detailed opinion consisting of 29 pages, noted the vessel was a refrigerated ocean-going cargo vessel that was being directed by the transportation arm of the consignee to perform bi-weekly round- trip liner service from Central America to the United States. The vessel moved under a charter party between the owner/defendants and consignee's transportation arm ("Network").

The court noted that, at the time of the voyage in question, fresh air supply inlet ducts and dampers in each mast house and cargo hold were in poor condition due to corrosion and defendants were aware of this. The result of the corrosion was that fresh air vents could not be shut off; thus, fresh air was always drawn into the ventilation system during the voyage involved. The court further noted testimony by the vessel's chief engineer that he had performed maintenance work on a CO2 analyzer and that he had

attempted to replace the O2 sensor because the vessel's computer program indicated it needed to be replaced. He had read the instructional manual but did not have training on how to maintain the instrument. He initially testified that he changed the CO2 sensor on the machine but later conceded he had, in fact, changed the O2 sensor. He did not recall whether he had later done additional work on the CO2 analyzer or whether anyone told him to calibrate or otherwise alter the CO2 analyzer during the voyage following the voyage in question.

The charter party (which also covered a sister vessel) provided that the master was under the orders of the charterer as regards employment, agency, or other arrangements, and the charterer was to arrange and pay for "loading, trimming, stowing…, unloading, weighing, tallying and delivery of cargoes." It was also "authorized to sign bills of lading on behalf of the master" in accordance with loading tallies and/or Mate's receipts." The charter party provided for arbitration in New York with U.S. law to apply.

The court rendered a detailed description of the activities of the consignee, who had been growing bananas in Guatemala since 1972, harvesting them five days a week. It owned eight farms in the northern district of Guatemala and purchased fruit from other farms in the southern region.

When bananas are harvested, they are inspected, with those satisfying consignee's specifications sent for packing, and the deficient bananas rejected and sold in local markets. After the bananas are harvested, they are transferred by rail to a packing shed in the middle of the farm which is staffed by several of the consignee's personnel tasked with monitoring the inspection, cleaning, packing, and transport of the bananas. They are again inspected for consistency with the consignee's specifications with any unsatisfactory fruit being rejected. After being separated, washed, weighed, etc., they are boxed and then loaded into a truck for transport to a warehouse. Before the bananas are loaded on the vessel, some boxes are randomly selected for the consignee's "Green Life Program." The object of that Program is to determine

how long after harvest bananas will start to ripen. The Program is implemented weekly through a selection of random boxes of bananas and exposing them to conditions similar to those on a voyage from the tropics to North America.

Bananas from the northern farms in Guatemala are generally trucked from the farms to the cold storage warehouses because of the short transit time. Bananas from farms in the south are transported in refrigerated containers. The consignee insures the containers cool the fruit during transport by verifying the amount of diesel utilized by the trucks after the trip, as well as by checking the temperature of the fruit on discharge at the warehouse.

At the warehouse, the consignee either unloads the bananas into the cold storage warehouse or keeps the fruit in the containers and sends it to the port area where it is stowed in reefer banks until the vessel arrives. If a container is sent to the port and plugged into the electric reefer bank, the consignee's personnel monitor and log temperatures every four hours. If a container is to be stored in the warehouse, the consignee assigns the fruit to a cool room and its employees discharge the pallets after obtaining temperature, data, and pulp temperatures of the fruit. Every six hours, consignee's quality inspectors measure ethylene in the cool rooms and also check ambient air and pulp temperatures of the bananas. Random inspections of the bananas are also conducted while in the cool rooms.

The consignee starts loading bananas into containers at the warehouse for transport to the port or pier once the vessel has arrived at the berth. On arrival, consignee's personnel and the First Officer check pulp temperatures and conduct a walk-over inspection of the pallets before loading.

The consignee provides instructions to the Chief Engineer on proper care and cooling of the cargo during the ocean voyage so as to avoid ripening. The court noted certain specific instructions were given concerning maintenance of pulp temperatures and ventilation procedures.

Before loading commenced, consignee's quality control inspector inspected the vessel for the presence of ethylene and measured the temperatures in the holds, among other things, without identifying any problems. During the loading, pulp temperatures were taken by the vessel's crew and noted in a log. There were no exceptions taken as to the temperatures of any of the fruit; however, because the bananas were packed into cardboard boxes which only had small finger holes, the vessel's crew was unable otherwise to evaluate the condition of the cargo.

After the cargoes were loaded aboard the vessel in both Costa Rica and Guatemala, the charterer issued non-negotiable bills of lading to the consignee. They described the various Guatemalan and Costa Rican farmers as the "shippers" of the cargo. The bills of lading were signed by the charterer "for the master."

The voyage took approximately three-and-a-half days. After arrival, discharging commenced to the terminal which the consignee had hired to discharge the fruit and store it before distribution. During the first day of discharge, neither the crew nor consignee's personnel smelled or saw any ripe or turning bananas and pulp temperatures were within acceptable measures. Inspections by consignee's personnel in the terminal warehouse did not detect any ripe or turning bananas.

On the second day of discharge, consignee's personnel discovered ripe and turning bananas in the warehouse from the bananas that had been discharged the day before. Surveys were conducted which found ripe and turning bananas present in the holds aboard the ship. Pallets were dismantled and individual boxes observed, and it was noted that yellow ripe bananas were co-mingled with green bananas in the same boxes and pallets, and that bananas at the bottom of the pallets were significantly greener than bananas at the top of the pallets. Some pulp temperatures of randomly tested fruit were abnormally high. Bananas loaded in Costa Rica were out-turned in good conditions, as were the pineapples and melons.

In its decision, the court noted the Carriage of Goods by Sea Act set forth the responsibilities, liabilities and rights of carriers involved in the carriage of goods into the United States from ports outside the United States and stated, "A "carrier" is defined in the statute as the "owner, manager, charterer, agent, or master of a vessel," referring to 46 U.S.C. §30701.

[Editor's note: The definition quoted by the court refers to a modification made to the Harter Act in the recodification of Title 46 in 2006. This definition is not in the United States Carriage of Goods by Sea Act which is set forth as a note to 46 U.S.C. §30701. *See* Cargo Newsletter No 60, p. 4., MLA Report, Doc. No. 808, Fall 2012 at 17198]

The court listed the burden-shifting framework to adjudicate liability under COGSA: Initially, "a plaintiff-shipper must establish a *prima facie* claim by showing that the cargo was 'damaged while in the carrier's custody.'." (citation omitted). Once the plaintiff has presented a *prima facie* case, there is a presumption of liability and the burden of proof shifts to the defendant to establish that the damage was not caused by its negligence or that the damage falls under one of COGSA's exempted causes (citations omitted). If the carrier discharges this burden, the presumption vanishes, and the burden returns to the shipper to show that carrier negligence was at least a concurrent cause of the loss or damage to the cargo. (Citation omitted) If the plaintiff makes such a showing, the final burden rests with the carrier to establish an appropriate apportionment of fault, or bear the entire loss. (Citation omitted)

The court then considered two principle issues. The first: whether the consignee had a viable claim under COGSA; defendant arguing the bills of lading merely served as receipts and not contracts of carriage.

The court referred to the decision of the Second Circuit in *Man Ferrostaal, Inc. v. M/V Akili,* 763 F. Supp. 2d 599, 2011 AMC 786 (S.D.N.Y. 2011) *aff'd on other grounds*, 704 F.3d 77 (2d Cir. 2012) as observing that courts have historically interpreted

COGSA as roughly distinguishing between "public" or "common" carriages and "private" carriage: the first being subject to COGSA, while the latter not.

It also noted the Fifth Circuit had endorsed what is referred to as "a governing instrument" standard under which COGSA applicability is determined based upon which document, a charter party or a bill of lading, is found as governing the relations between the litigants.

The court found COGSA applied for two principle reasons. First, the court found the voyage involved was a "common carriage":

> This is true because, although Network chartered the full reach of the Vessel from Defendants, the fruit that was shipped was owned by the various farms it was sourced from in Guatemala and Costa Rica. Citing *Man Ferrostaal Inc. v. M/V Akili* (*supra*).

As to the "governing instrument" standard, the court distinguished defendant's point that "bill[s] of lading under a charter party [are] only…receipts [as] when [they] remains in the hands of the shipper charterer" (*Nichimen Co. v. M. V. Farland*, 462 F.2d 319, 1972 AMC 1573 (2d Cir. 1972)), as that case involved "different circumstances" from the case at issue because the charterer here issued bills of lading on behalf of the master "to the shipper (Del Monte)."

[Apparently, the farmer "shippers" never saw the bills of lading, such having been given to the consignee directly by the charterer.]

As to the consignee demonstrating a *prima facie* case, the court accepted that bills of lading for packaged goods merely refer to the external appearance of the cargo. They would not have probative force with respect to goods shipped in packages which

would prevent the carrier from observing any conditions which might exist when the goods were loaded.

However, the court found that Guatemalan bananas were delivered in good condition and based its conclusion largely on the deposition testimony of employees of the consignee as to how Guatemalan bananas are grown, harvested, handled, and inspected by the consignee in Guatemala in accordance with procedures "which were observed on each shipment before and after the one at issue, with good outturns."

The court considered the testimony on behalf of defendants as merely raising a "possibility" of inherent vice which did not disturb its conclusion of good order upon delivery to the vessel. The court referred to the consignee's "extensive practices and procedures both before and immediately after the harvest of bananas in Guatemala which are crafted to identify and weed out over grade and/or mature bananas."

It found, "the determinations of the grade of the bananas by [consignee's] employees who do so on a regular basis, with trained eyes and precise instruments, to be more persuasive than Dott's stray comment, particularly in light of his lack of formal training in banana horticulture and the imprecision with which he commented on the issue."

In a footnote, the court recognized a difference of opinion among courts in the Second Circuit as to whether the shipper or carrier bears the burden of proving or disproving inherent vice when a defendant has presented some evidence on the issue; however, the court did not reach this question because of its finding that evidence established (by a preponderance of evidence) that the bananas were not suffering from an inherent vice when loaded on the vessel in Santo Tomás.

The court went on to hold defendants did not establish the damage was not caused by their negligence or that it was caused by a COGSA exception.

Finally, defendants argued that any amount of judgment against them should be reduced by any amount attributable to the charterer's actions. The charterer was not a party to the action, and the issues raised were outside the scope of the litigation.

> …this court, in finding for Plaintiff, need not and has not determined whether or how Defendants -- let alone Network -- were negligent. Rather the court merely finds that Defendants have failed to carry their burden to prove that they were not negligent or that the loss resulted from an exempted cause under COGSA.

Damages were stipulated and the court awarded pre-judgment interest at the average interest rate paid on 6 month United States Treasury Bills.

PANEL MAJORITY PUTS BALL IN SHIPPER'S COURT…

In the Matter of the Arbitration between Invista S.a.r.l., as Charterer and Stolt Tankers B.V., as Owner of the M/V STOLT PERSEVERANCE; SMA 4244 (Arb. at N.Y. 2015)(Berg, Ziccardi, Martowski)

A shipment of Hexamethylenediamine (hereafter HMD) was carried from Houston, Texas to Ulsan, Korea. The charterer/shipper employed a liquid chemical cargo surveyor and consultant to prepare extensive HMD pre-loading vessel procedures and perform surveying supervision and vessel readiness auditing prior to and during loading of the HMD. It also provided training, written standardized procedures and detailed handling work instructions for its surveyors. The contract of affreightment also incorporated a Clause Paramount providing that the charterer's claim was to be decided in accordance with COGSA, and "its well-established burdens of proof."

Prior to loading, the vessel's tanks were cleaned under the supervision of the Chief Officer in accordance with charterer's

annexes and inspected and fully approved by its appointed surveyors. The loading operation was delayed due to the fact that HMD had frozen solid in the shore loading hose connecting the jetty head to the vessel's manifold. The shore hoses used to transfer the product from the jetty to the ship's manifold were to be fitted with a terminal-supplied sleeve into which steam could be supplied to gradually warm and unfreeze plugged product in hose. At the time of loading, about fifteen feet of sleeve on the vessel side of the cargo hose was missing.

Terminal personnel applied handheld live steam wands along the length of the shore cargo hose, at the ship's manifold and ashore on the dock, and after a seven hour delay that included several hours of live steaming, the frozen cargo was thawed and flowed through the line and the ship's manifold. After the completion of loading, the tanks were sampled and tested by the surveyor and found to be on-specification.

Upon arrival at destination, the two tanks involved were tested and found on-specification with respect to "all contractually agreed specifications." However, with respect to the product's UVT value, one of the tank showed a value which was considered to be too low by the receiver. It refused to accept the product solely on the basis of UVT reading.

The rejected cargo was then taken to Singapore and ultimately to Rotterdam. Samples were taken at Singapore and additional samples taken at Rotterdam for testing. The rejected product was ultimately returned to the United States on the vessel and distilled by the charterer.

Arbitration proceedings were held were pursuant to the charter form. Charterer contended it had established good order and conditions on loading and off-specification at Ulsan, relying on testing of pre-loading, post loading and discharge cargo samples and "well-established precedent that arguably supports its position."

The owner contended that that product was off-specification at loading due to a pre-shipment impurity. It was loaded on a particularly cold day and owner argued that the alleged contamination was activated by thermal degradation caused by the terminal personnel's aggressive application of excessive steam thawing to the frozen blockage in the terminal's loading line. It contended that this triggered a Vogel Reaction (hydrolysis of nitriles), which over time, reduced the UVT value after the vessel sailed from Houston. Owner asserted that, since the reaction was not complete when the post-loading samples were drawn, these samples were not representative of the condition of the cargo and that charterer had not established the cargo's internal good order and condition at loading.

Opposing arguments were also presented as to the impact of damages, identification of the unknown impurity in the product, the issue of due diligence involving DI water in the cargo pump cofferdam for the HMD cargoes and the relevance of other shipments.

The panel majority considered the matter required a determination of whether the cargo contamination claim prevailed over owner's asserted defenses in the context of well-established COGSA burdens of proof. The panel majority then considered the testimony of experts presented on behalf of owner and on behalf of charterer.

> Stolt cites *The NIEL MAERSK,* 91 F.2d 832, 933 (2d Cir. 1937), for the proposition that once Stolt has shown that cargo damage may have resulted from a pre-shipment condition, Invista has the burden of rebutting such evidence and establishing by a preponderance – "more likely than not" – on the specific facts of this case, that the HMD was delivered to Stolt "in a condition fit for transportation". To similar effect, *Perugina Chocolates & Confections, Inc. v. S/S RO RO GENOVA*, 649 F. Supp. 1235,

> 1241 (S.D.N.Y. 1987) holds that the burden remains with the shipper, not the carrier, to establish that it was more likely than not that the cargo was in such an internally fit condition as to survive the voyage for which it was intended."

The panel majority considered the issue to be decided a close one; however, it went on to state that the testimony of owner's expert witness was highly persuasive and credible and her testimony lead to a conclusion that – more likely than not – the unknown pre-shipment impurity "Aminodecancenitrile", when heated prior to shipment, triggered a Vogel reaction and this reaction was the cause of the drop in UVT manifested several days after sailing from Houston. In the panel majority's view, charterer "failed to rebut the evidence of the Vogel reaction, and, in so finding, we accept [Owner']s legal position on the burden of proof standard."

The dissent agreed that COGSA applied and the matter should be determined by the application of COGSA's burden of proof; however, the dissenter could not accept the panel majority's conclusion that the condition of the product was the result of a Vogel reaction:

> [T]he many sample tests and history of [charterer's] many shipments over the years without incident say otherwise.

COMMITTEE ON CRUISE LINES AND PASSENGER SHIPS

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NEWSLETTER

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THE IMPACT OF THE CVSSA ON PROSECUTING AND DEFENDING SEXUAL ASSAULT CLAIMS

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In 2010, Congress passed the Cruise Vessel Security and Safety Act ("CVSSA"), mandating, *inter alia*, video surveillance systems on passenger cruise vessels embarking and departing passengers in the U.S. Since then, closed-circuit television ("CCTV") monitoring systems have become standard throughout the industry. The statute, however, does not detail how many cameras are required or the areas of coverage, nor does it dictate the method of surveillance. The number of cameras and their placement vary widely among cruise operators. The CVSSA states only that the ship must "maintain a video surveillance system to assist in documenting crimes on the vessel and providing evidence for the prosecution of such crimes." 46 U.S.C. §3507(b)(1).

Though Congress empowered the Coast Guard to "issue such regulations as are necessary to implement [the CVSSA]," 46 U.S.C. §3507(j), it has been slow in doing so. Proposed on January 16, 2015[1], regulations under consideration would require,

[1] The text of the proposed regulations (Federal Register Vol. 80, No. 11 – Cruise Vessel Security and Safety Act of 2010) can be found at the following link: http://www.uscg.mil/hq/cg5/cg521/docs/80FR2350.pdf.

among other things, cruise line video surveillance systems "in areas to which passengers and crew members have common access," excluding passenger staterooms or crew cabins. 80 FED. REG. 11 (to be codified at 46 C.F.R. 70). The proposed regulation states that the Coast Guard "would expect the vessel owner or operator to make whatever arrangements are necessary to ensure effective system placement," but "does not require real time monitoring." *Id*.[2]

Even if these proposed regulations become law, the CVSSA still lacks specificity regarding the *number* of cameras required or specific *locations* which must be covered by those cameras.

Moreover, the ambiguity inherent in "areas to which passengers and crew members have common access" is likely to become a source of disagreement, debate and, potentially, litigation.

Both before enactment of the CVSSA and after, there have been personal injury claims alleging that the use, or lack thereof, of security video cameras and CCTV monitoring on cruise vessels caused or contributed to the injury/incident. These claims have generally taken two forms: (1) alleging failure to monitor CCTV systems; and/or (2) alleging noncompliance with the CVSSA. Both types of claims have been rejected to date.

The leading case on failure to monitor is *Mizener v. Carnival Corp.,* No. 05-22965, 2006 U.S. Dist. LEXIS 44332 (S.D. Fla. July 16, 2006). There, a passenger disappeared while traveling on the CARNIVAL PRIDE and was presumed to have gone overboard. The personal representative argued that by placing video cameras aboard its vessel, Carnival voluntarily assumed a duty (i.e., the so-called "undertaker doctrine") to

[2] The proposed regulations would also require CCTV footage to be "kept for at least 14 days after a voyage, and for 120 days when a serious incident is reported." 80 FED. REG. 11. The proposed regulations describe "serious incidents" to include "sexual assault and the disappearance of passengers at sea." *Id*.

monitor the cameras at all times and to protect the safety of its passengers. *Mizener*, No. 05-CV-22965 [ECF No. 1]. The court disagreed, finding that no duty to monitor the cameras aboard its vessel existed. *Id*. [ECF No. 24]. District Judge Marcia Cooke concluded that to hold otherwise would, in effect, require cruise lines who installed CCTV to "insure the safety of their passengers or patrons." *Id*.

While *Mizener* predated enactment of the CVSSA, in *Doe v. Royal Caribbean Cruises, Ltd.*, No. 11-23323, 2011 WL 6727959 (S.D. Fla. Dec. 21, 2011) a post-CVSSA enactment case, a passenger alleged she was sexually assaulted by another passenger who pulled her into a women's bathroom. The events leading up to the assault were captured on the vessel's CCTV and included her rebuffing two prior attempts to pull her into the bathroom. *Id*. at *1. This went unnoticed by the vessel's security personnel. The passenger argued that the cruise line breached its duty to assign sufficient personnel continuously to monitor the cameras, in essence, arguing, *inter alia*, that the CVSSA's requirement to maintain video surveillance necessarily implied a requirement to monitor same. Magistrate Judge Jonathan Goodman rejected this argument, adopting *Mizener*'s reasoning that "the mere installation of video cameras does not create a duty to monitor them." *Id*. at *3.

In *Fiorillo v. Carnival Corp*., No. 12-21599, 2013 WL 632264 (S.D. Fla. Feb. 20, 2014), a passenger alleged that a crewmember sexually assaulted her as she slept in her stateroom. In a separate count of her complaint, she alleged that the CVSSA created a duty to "maintain an adequate video monitoring system to regulate access by crewmembers to passenger cabins." *Fiorillo*, No. 12-CV-21599. District Judge James Cohn dismissed the claim, holding that breach of the CVSSA did not create a private right of action. *Fiorillo*, 2013 WL 632264 at *4, *see also Perciavalle v. Carnival Corp*., No. 12-CV-20996, 2012 WL 2412179 at *2 n.2 (S.D. Fla. June 26, 2012) ("Although Plaintiff has pled [a violation of CVSSA] as a basis for his spoliation claim, *the statute does not appear to create a private cause of action* for a failure to report an incident to the FBI.") (emphasis added).

The decisions to date, however, do not appear completely to settle the issue of CVSSA CCTV-based claims. Plaintiffs may still seek to bring negligence claims alleging insufficient and/or inadequate video recording systems. They may attempt to demonstrate that systems are inadequate by establishing non-conformity with the CVSSA. Such claims may seek to circumvent the *Mizener*, *Doe*, and *Fiorillo* decisions by alleging a ship's CCTV system is not reasonable under the circumstances – especially given prior onboard incident history (i.e., akin to land based negligent security claims). Success on such claims seems less likely given *Mizener* and its progeny, but not altogether impossible, if framed as negligence claims which – rather than relying on the CVSSA to create the duty or cause of action – use it as a statute which creates a benchmark for reasonableness under the circumstances (i.e., violation of a statute as evidence of negligence).

It remains unclear moving forward how courts will treat these types of claims, but it seems likely passengers will continue to assert claims based on failure to follow the CVSSA and its video surveillance requirement.

[Author's note: I would like to thank Mase Lara, P.A. associate Andrew Beaulieu for his contributions to this article .]

THE APPLICATION OF U.S. LAW IN SEAMAN'S ARBITRATIONS

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Although those circuit courts that have weighed in on the subject have made it clear that they will enforce arbitration provisions contained in collective bargaining agreements applicable to seamen, only one has expressly addressed the issue of whether arbiters must apply U.S. maritime law in such proceedings. While the Fifth Circuit has recently upheld an award following the application of Philippine law, it is nevertheless clear under existing Supreme Court precedent that U.S. maritime law

must be applied or the resulting arbitration award will be unenforceable.

The starting point for a better understanding of this issue begins with a discussion of the longstanding policy inherent in maritime law protecting seamen.

I. The Strong Policy of U.S. Maritime Protecting Seamen's Remedies

Because of the nature and unique hazards of their work at sea, seamen have always been provided with special protections by maritime law, dating back to the days of the ancient Phoenicians. These special protections have been deemed necessary in large part to prevent unscrupulous shipowners from taking advantage of their seamen, who are generally powerless to protect themselves.[1]

Accordingly, U.S. maritime law has historically treated seamen as "wards of the court."[2] The special solicitude given to seamen pre-dates even our Constitution, and although times have changed, even today's seaman faces a much more difficult and challenging environment than land based workers as recognized by the court in *Pope & Talbot v. Hawn, Inc.*[3]

> From ancient times admiralty has given to seamen rights which the common law did not give to landsmen, because the conditions of sea service were different from conditions of any other service, even harbor service. . . . While his lot has been ameliorated, even under modern conditions the seagoing laborer suffers an entirely different discipline and risk than does the harbor worker. His fate is still tied to that of the ship. His freedom is

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[1] *See e.g. Collie v. Fergusson*, 281 U.S. 52, 55, 1930 AMC 408 (1930) (the "evident purpose" of the Seamen's Wage Act is "to secure prompt payment of seamen's wages . . . and thus to protect them from the harsh consequences of arbitrary and unscrupulous action of their employers, to which, as a class, they are peculiarly exposed.").

[2] *Cortes v. Baltimore Insular Line, Inc*., 287 U.S. 367, 376, 1933 AMC 9 (1932).

[3] 346 U.S. 406, 423-24, 1954 AMC 1 (1953).

> restricted. He is under an unusual discipline and is dependent for his food, medicine, care and welfare upon the supplies of the ship. Contrast the lot of this plaintiff who lived at home, was free to leave his employment, took no risks of the sea and had no different condition or hazard attached to his employment than would have attached to a carpentry job in a building ashore.[4]

Because of this special solicitude, the federal courts have expressly held on numerous occasions over the years that a seaman cannot be deprived of his or her remedies under the Jones Act,[5] doctrine of unseaworthiness[6] or maintenance and cure[7] by contract.

II. The Convention on the Enforcement of Foreign Arbitral Awards

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[8] the Supreme Court created a two-step approach for the consideration of defenses to arbitration agreements under the Convention on the Enforcement of Foreign Arbitral Awards.[9] Under this two-step approach, only those limited defenses contained in Article II of the Convention may be raised in the initial arbitration enforcement stage. Additional defenses, including those based upon violation of public policy and unconscionability, which are recognized in Article V of the Convention, may only be asserted at the post arbitration award enforcement stage.

Although involving claims under U.S. securities laws, *Mitsubishi's* two step approach has been the rock upon which all of

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[4] *Id.* at 423.
[5] *See e.g. Corsair v. Stapp Towing Co., Inc*., 228 F. Supp. 2d 795, 2003 AMC 1050 (S.D. Tex. 2002); *see also Stevens v. Seacoast Co., Inc.* 414 F.2d 1032, 1969 AMC 1911 (5th Cir. 1969).
[6] *Reed v. Steamship Yaka*, 373 U.S. 410, 1963 AMC 1373 (1963).
[7] *Cortes*, 287 U.S. 367.
[8] 473 U.S. 614 (1985).
[9] 9 U.S.C. §201 *et seq.*

the subsequent Eleventh Circuit cases construing seamen's contracts have been based.

Since the defendant seeking to compel arbitration in *Mitsubishi* agreed to the application of U.S. securities laws, the court was not called upon to decide whether the use of foreign law would have invalidated the arbitration result. The court went on, however, to warn:

> We merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a *prospective waiver* of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.[10]

The Supreme Court has reiterated its adherence to the prospective waiver doctrine in a number of subsequent cases.[11]

In *Mitsubishi* and its progeny, the court has treated arbitral provisions as "a specialized kind of forum-selection clause."[12] While recognizing the validity of arbitration as the forum, it nevertheless has gone on to explain:

"By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[13]

Although *Mitsubishi* did not expressly address the issue of whether arbiters could apply U.S. law in the face of contrary contractual provisions, the court left little doubt, however, that it believed that arbiters had such a power:

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[10] *Id*. at n.19 (emphasis added).
[11] *See e.g. Vimar Seguros y Reaseguros v. M/V Sky Reefer,* 515 U.S. 528, 1995 AMC 1817 (1995); *Rodriguez de Quijas v. Shearson/American Express, Inc*., 490 U.S. 477 (1989).
[12] *See e.g. Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974).
[13] *Mitsubishi*, 473 U.S. at 628.

> To be sure, the international arbitral tribunal owes no prior allegiance to the legal norms of particular states; hence, it has no direct obligation to vindicate their statutory dictates. The tribunal, however, is bound to effectuate the intentions of the parties. Where the parties have agreed that the arbitral body is to decide a defined set of claims which includes, as in these cases, those arising from the application of American antitrust law, *the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim. And so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.*[14]

In *Bautista v. Star Cruises*,[15] the Eleventh Circuit adopted this two-step approach and held that the seamen's argument that the arbitration agreement was unconscionable, because they were coerced into signing it could only be raised *following the arbitration* in subsequent enforcement proceedings. In reliance upon *Mitsubishi*, the court concluded that the only defenses which could be asserted to challenge the requirement for arbitration where the requisites for recognition were met, were those based upon "fraud, mistake, duress, and waiver."

Subsequently, in *Thomas v. Carnival Corp*.,[16] another panel of the Eleventh Circuit concluded that an arbitration provision which required the application of foreign (Panama) law violated U.S. maritime law's strong public policy protecting seamen's remedies and therefore constituted a prospective waiver invalidating the arbitration provision altogether.

Thereafter, another panel of the Eleventh Circuit decided in *Lindo v. NCL (Bahamas), Ltd.*,[17] that the *Thomas* Court had

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[14] 473 U.S. at 636-37 (emphasis added).
[15] 396 F.3d 1289, 2005 AMC 372 (11th Cir. 2005).
[16] 573 F.3d 1113, 2009 AMC 2830 (11th Cir. 2009).
[17] 652 F.3d 1257, 2012 AMC 409 (11th Cir. 2011).

violated the Eleventh Circuit's precedent rules by failing to follow the two-step approach adopted in *Bautista* in considering the public policy defense *at the initial arbitration enforcement stage*, rather than waiting until after the arbitration to determine what law was in fact applied.

In eleven subsequent decisions over the following three years, a variety of different panels of the Eleventh Circuit affirmed the two-step approach articulated in *Mitsubishi* and *Bautista*, holding only that public policy and unconscionability defenses cannot be raised at the arbitration enforcement stage, but solely at the later award enforcement proceedings.[18] None of these cases even suggested that an arbitration award which applied foreign law so as to deprive a seaman of his U.S. maritime remedies would ultimately be enforceable. In fact, these opinions typically construed the court's prior opinion in *Lindo* as merely standing for the proposition:

> As we held in *Lindo*, only after arbitration may a court refuse to enforce an arbitral award if the award is contrary to the public policy of the country.[19]

In fact, the legal validity of the entire line of post *Thomas* cases is based upon the presumption that such authority exists. Since these cases all stand for the proposition that it is *premature* at the arbitration enforcement stage to conclude that U.S. maritime law will not be applied during the arbitration, they necessarily recognize that arbiters have the authority to apply U.S. law despite foreign choice of law provisions. Otherwise, the courts would be

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[18] *Henriquez v. NCL (Bahamas), Ltd*., 440 F. App'x 714 (11th Cir. 2011); *Maxwell v. NCL (Bahamas), Ltd*., 454 F. App'x 709 (11th Cir. 2011); *Doe v. Princess Cruises, Ltd*., 657 F.3d 1204, 1221 n.14 (11th Cir. 2011); *Arauz v. Carnival Corp.*, 466 F. App'x 815, 816 n.2 (11th Cir. 2012*); Fernandes v. Carnival Corp.*, 484 F. App'x 362 (11th Cir. 2012); *Quiroz v. MSC Mediterranean Shipping Co*., 522 F. App'x 655 (11th Cir. 2013); *Brown v. Royal Caribbean Cruises Ltd.*, 549 F. App'x 861, 864 (11th Cir. 2013); *Singh v. Carnival Corp.*, 550 F. App'x 683 (11th Cir. 2013); *Paucar v. MSC Crociere, S.A.*, 552 F. App'x 872 (11th Cir. 2014); *Trifonov v. MSC Mediterranean Shipping Co*., 590 F. App'x 842 (11th Cir. 2014); *Vera v. Cruise Ships Catering and Services Int'l, N.V.*, 594 F. App'x 963 (11th Cir. 2014).

[19] *Henriquez*, 440 F. App'x at 716.

required to reject these arbitration agreements at the preliminary enforcement state as running afoul of the constraints established in *Mitsubishi* and *Vimar*. Thus the entire house of arbitration cards is built upon the presumption of such authority and if it is removed, the house will necessary collapse from a lack of underlying support.

III. Post Arbitration Opinions

To date there have been only two cases with reported opinions dealing with the consequences of the failure of arbiters to apply U.S. maritime remedies in a seaman's arbitration. In *Aggarao v. MOL Ship Management Co., Ltd.*[20] the federal district court for Maryland concluded that the failure to provide a seaman with his full panoply of remedies guaranteed under U.S. maritime law "transgressed this country's strong and longstanding policy of protecting injured seafarers and providing them special solicitude," rendering the resulting arbitration award unenforceable.

In *Asignacion v. Rickmers Genoa Schiffahrts,*[21] the federal court for the Eastern District of Louisiana reached a similar conclusion, refusing to enforce an arbitration award from the Philippines in the amount of $1,870 for a seaman who sustained severe burns over 35% of his body while on a ship located on the Mississippi River. Shockingly, a panel of the Fifth Circuit recently reversed the district court's finding and reinstated the arbitration award.[22]

Although paying lip service to the Supreme Court's recognition of the principle of prospective waiver and the existence of the United States' "'explicit public policy that is well defined and dominant' with respect to seamen. . . [who] have long been treated as 'wards of admiralty,'" the Fifth Circuit then proceeded completely to ignore these principles, acknowledging that "the causes of action and remedies available to seamen reflect this special status," the Fifth Circuit nevertheless concluded that U.S.

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[20] 2015 AMC 444, 2014 WL 3894079 (D. Md. Aug. 7, 2014).
[21] 2014 AMC 713, 2014 WL 632177 (E.D. La. Feb. 10, 2014).
[22] 783 F.3d 1010, 2015 AMC 913 (5th Cir. 2015).

courts were powerless to require their recognition where arbitrators refused to give them effect under the rationale "that a court cannot refuse to enforce an award solely on the ground that the arbitrator may have made a mistake of law or fact." (emphasis added).[23]

The Fifth Circuit's rationale was even more mystifying, since it did not challenge the validity of the contrary decision in *Aggarao.* Instead of criticizing the district court's application of the prospective waiver doctrine, the Fifth Circuit sought to distinguish the completely contrary result in that case solely based upon the difference in severity between the seamen's respective injuries, relying upon the fact that the arbiters had concluded that *Aggarao* had sustained a Grade 1 disability, which was the highest level set forth in the contract, while *Asignacion* was found to only have a level 14 disability.

The disingenuous nature of this attempted distinction is completely unsupportable by law or logic. One of the fundamental flaws in the Philippine Overseas Employment Contract ("POEA") is that it does not allow the arbiters to consider the actual medical evidence and testimony of the seaman's treating doctors, but instead requires that the panel accept the opinion of the doctor hired by the employer to assess the plaintiff's disability.[24]

The utter unconscionability of the POEA system is clearly seen in this case in which the company doctor concluded that *Asignacio*n was entitled to the lowest disability rating possible, even though the district court expressly found that the "Plaintiff sustained ***severe*** burns to 35% of his body, including his abdomen, upper and lower extremities; and genitalia, [which] . . . resulted in an insufficiency of skin in various areas of his body, affecting his body heat control mechanism. . . [and creating] multiple skin ulcerations and sexual dysfunction." Following emergency treatment, the plaintiff was transferred to the burn unit of Baton Rouge General Medical Center for a month, after which he continued to receive medical treatment back in the Philippines,

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[23] *Id.* at 1016-17.

[24] *Aggarao*, 2015 AMC 444, 2014 WL 3894079 at *6 (D. Md. Aug. 7, 2014).

including plastic surgery in which "a significant amount of scar tissue was removed from [his] lower abdomen."[25]

Despite the extremely substantial magnitude of the plaintiff's injuries and obvious resulting permanent damages, the Fifth Circuit concluded that it found "no evidence" that the arbiter's award of $1,870.00 "was inadequate" or that it "violate[d] this nation's 'most basic notions of morality and justice." The Fifth Circuit's shocking lack of judicial conscience was even more astonishing in light of the district court's finding that:

> in this case, the Philippine law applied by the arbitral panel did not simply apply less favorable remedies than United States general maritime law would have. Instead, the Philippine law provided ***no such*** remedies. Accordingly, the remedies available under Philippine law were not less favorable, but rather were nonexistent. (emphasis in the original).[26]

IV. Conclusion

Under the two-step approach established by the Convention, defenses based upon public policy and unconscionability may only be raised at the post arbitration stage and not at the initial arbitration enforcement phase. The Supreme Court has justified this procedure of putting the legal cart before the horse, by separating out the consideration of the forum selection and choice of laws provisions in the arbitration contracts in order to give arbiters the opportunity to apply U.S. legal remedies.

The Supreme Court has permitted the enforcement of arbitration provisions by treating arbitration as a "specialized kind of forum," which will still allow litigants the opportunity to enforce U.S. legal remedies. The court has made it clear, however, that where such a forum selection clause operates in conjunction

[25] 2014 AMC 713, 2014 WL 632177 at *1 (E.D. La. Feb. 10, 2014).
[26] *Id.* at *9.

with a choice of law provision to deprive litigants of their guaranteed U.S. law remedies, it will constitute a prospective waiver invalidating the results of the arbitration.

Where the arbiters refuse to apply U.S. law, the arbitration award should therefore be rendered unenforceable as in *Aggarao*, notwithstanding the Fifth Circuit's recent opinion in *Asignacion*. In addition to the problems with the legal analysis underlying its opinion discussed above, the Fifth Circuit's refusal to give effect to the prospective waiver doctrine was also based in significant part upon a disingenuous construction of the record before it, which should result in significantly reducing its precedental value.

Although the district court's opinion recognized that the plaintiff had filed suit under both the Jones Act and general maritime law and subsequently sought to vacate the arbitration award on the grounds that it deprived him of his rights under both,[27] it at times utilized the shorthanded expression "general maritime law" to describe the source of the substantive rights sought to be vindicated without each time including reference to the Jones Act. Ignoring the actual record, the Fifth Circuit jumped on the use of this short-handed expression to reject the application of the prospective waiver doctrine in the case, asserting that it "is limited to statutory rights and remedies."[28]

While a strong argument can be made that the prospective waiver doctrine would also include the deprivation of non-statutory general maritime remedies created by the Supreme Court itself, the Fifth Circuit's rejection of the *application* of the doctrine in the case before it on these grounds as opposed to its *repudiation* of the doctrine all together in seamen's cases, should render its opinion inapplicable to cases where the district courts more carefully spell out the nature of the effected substantive rights as including those arising from federal statute, such as the Jones Act and Seaman's Wage Act.

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[27] *Id.* at *2.
[28] *Asignacion*, 783 F.3d at 1021.

UPDATE ON THE LAW

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PASSENGER CLAIMS

ADA

Seco v. NCL (Bahama), Ltd., 588 F. App'x 863 (11th Cir. 2014)

Plaintiff brought suit for injunctive relief under the ADA alleging the cruise ship lacked handicapped-accessible exterior cabins with balconies or window views and that the doors were not ADA compliant because they required excessive force to open them. Case was dismissed because the plaintiff failed to allege an injury-in-fact because he did not plead that he suffers from a disability or a condition that would cause the lack of windows or balconies in his stateroom to affect his enjoyment of the cruise. In addition, the court found that the ticket contract required the plaintiff to submit to binding arbitration as to his ADA claims are not "personal injury" claims.

Attorney Fees

Schmieder v. NCL Am., Inc., 151 So. 3d 1280 (Fla. Dist. Ct. App. 2014)

The plaintiff appealed the trial court's dismissal of her negligence claim for fraud on the court and a final judgment awarding the cruise line attorney's fees and costs. The appellate court affirmed the trial court's dismissal, but concluded that attorney's fees and costs pursuant to Florida Statutes Section 768.79 are inapplicable in admiralty cases. *See Royal Caribbean Cruises, Ltd. v. Cox,* 137 So. 3d 1157 (Fla. Dist. Ct. App. 2014), *rev. dismissed,* 145 So. 3d 822 (Fla. 2014).

Consortium Claim

Shore v. Magical Cruise Co., Ltd., No. 6:14-cv-358-Orl-31GJK, 2014 WL 3687100 (M.D. Fla. 2014)

The court denied cruise lines' motion to dismiss consortium claim. In light of *McBride v. Estis Well Serv., L.L.C.*, 731 F.3d 505, 514 (5th Cir. 2013), the court found that the law is no longer definitive on this issue.

Friedhofer v. NCL (Bahama), Ltd., No. 14-23294-CIV, 2015 U.S. Dist. LEXIS 726, 2015 WL 588642 (S.D. Fla. January 22, 2015)

The court granted the cruise line's motion to dismiss the plaintiff's loss of consortium claim. The plaintiff failed to respond to the motion to dismiss on this issue and therefore the court saw no reason to depart from this long established precedent that general maritime law does not permit loss of consortium claims, referencing *Gandhi v. Carnival Corp*., No. 13-24509-CIV, 2014 WL 1028940 at *4 (S.D. Fla. Mar. 14, 2014).

Experts

Farley v. Oceania Cruises, Inc., No. 13-20244-CIV, 2015 U.S. Dist. LEXIS 30576, 2015 WL 1131015 (S.D. Fla. March 12, 2015)

The plaintiff brought suit against Oceania for injuries he sustained from tripping over the leg of a lounge chair that was protruding into the walkway creating a dangerous and hazardous condition. The court granted the defendant's motion to strike plaintiff's liability expert. Although the witness had the sufficient background, education and experience to qualify as an expert, the court ruled the expert's opinions lacked reliability. The court noted that the expert used very little supporting materials or sources, failed to indicate how his analysis was conducted or how his experience formed that analysis, and what steps he took to verify his results.

Torres v. Carnival Corp., No. 12-cv-23370-JLK, 2014 U.S. Dist. LEXIS 97217, 2014 WL 3548456 (S.D. Fla. July 17, 2014)

The plaintiff alleged she tripped and fell over a raised ledge that was covered by a mat or similar material which obscured, disguised or hid the raised threshold. The court struck the plaintiff's liability expert finding that the attempt to introduce expert testimony as to the floor features, lighting and warnings unnecessarily complicated the case. The court commented that the jury is capable of understanding the mechanics of walking and the various reasons one may fall, including tripping over a carpet, as well as changes in brightness encountered on a daily basis.

Lancaster v. Carnival Corp., No. 14-cv-20332-KMM (S.D. Fla. February 22, 2015)

The court denied the cruise line's motion to strike plaintiff's expert finding that the expert's experience working aboard cruise ships as a security officer qualified him to testify as to crowd control and management. The court rejected the defendant's argument that his experience as a security officer alone did not provide him with the requisite expertise because the disembarkation protocols fell under the umbrella of the cruise director and safety director. The court did preclude the expert from testifying as to various SOLAS regulations and IMO circulars which were deemed inadmissible.

Forum and Venue

Klein v. Silversea Cruises, Ltd., No. 3:14-CV-2699-G, 2014 U.S. Dist. LEXIS 4424, 2015 WL 181777 (N.D. Tex. January 14, 2015)

Plaintiff challenged the sufficiency of the notice in the Passage Contract. The court found the Passage Contract provided sufficient notice as to the proper forum and the case was transferred to the Southern District of Florida.

Santos v. Costa Cruise Lines, Inc., No. 14-CV-2698 (DLI) (CLP), 2014 U.S. Dist. LEXIS 29524, 2015 WL 1034441 (E.D.N.Y. March 10, 2015)

The court granted the cruise line's motion to dismiss for *forum non conveniens* where the Passage Contract had a clause that all claims arising out of a voyage that does not depart from, return to, or visit a U.S. port shall be brought in Genoa, Italy. The court applied the four-part test articulated in *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 383 (2d Cir. 2007), and determined that the forum-selection clause was valid and enforceable because: (1) it was communicated; (2) had mandatory force; (3) covered the claims and parties involved in the dispute; and (4) the resisting party did not demonstrate that enforcement would be unreasonable or unjust, or that the clause was invalid for reasons such as overreaching or fraud.

McQuillan v. Norwegian Cruise Line, No. 14-1195, 2014 U.S. Dist. LEXIS 146970, 2014 WL 5305792 (E.D. La. October 14, 2014)

In enforcing the forum selection clause and transferring the case to the Southern District of Florida, the court ruled that the plaintiff's failure to read the ticket does not preclude her from being bound by it. The court further concluded that a plaintiff's monetary or physical restrictions are insufficient to preclude enforcement in today's age of video conferencing and electronic filing because a plaintiff does not even need to set foot in a courtroom to bring a lawsuit.

Feinstein v. Carnival PLC, No. CV-14-01981 (DDP) (EX.), 2014 U.S. Dist. LEXIS 132103, 2014 WL 4678999 (C.D. Cal. September 19, 2014)

In a medical malpractice suit, the plaintiff brought suit in state court against Carnival PCL (trading as Cunard) as the owner and operator of the vessel, its sister company Princess Cruise and Fleet Maritime Services, the entity which employs and pays the medical staff. The defendants removed the action to federal court

under diversity jurisdiction. Applying the "Forum Defendant Rule" the case was remanded to state court. The court determined that Princess was not a sham defendant. Because of the complex corporate relationships between the corporations, the court could not definitively conclude that Princess did not have a role in the litigation. The court noted that there was some record evidence that Princess and Carnival had an ongoing contractual relationship, that the Fleet Maritime Services was created while Princess and Carnival were one entity, and the defendant doctor oversaw medical centers on ships operated by both Carnival and Princess.

Portnov v. Carnival Corp., No. 5:14-cv-02887-PSG, 2014 U.S. Dist. LEXIS 171708, 2014 WL 6998083 (N.D. Cal. December 11, 2014)

The plaintiff filed suit alleging discrimination against the cruise line and argued that the forum selection and arbitration provisions in his ticket contract did not apply because he never actually boarded the boat, and therefore he was not a "guest." The court noted that the contract itself defines "guest" as "all persons or entities booking or purchasing passage and/or traveling under [the] [c]ontract." Therefore, the plaintiff was bound by the contract from the moment of purchase, not from the moment of boarding the boat.

Gonzalez-Martinez v. Royal Caribbean Cruises, No. 14-01255 (ADC), 2014 U.S. Dist. LEXIS 38764, 2015 WL 1349961 (D.P.R. Mar. 26, 2015)

The court rejected that the plaintiff's forum selection clause in her Passage Contract was not reasonably communicated because it was not translated into their native language of Spanish. The court noted that the plaintiff failed to state that she cannot read English, and therefore could not understand the contract as written. The case was transferred to the Southern District of Florida.

International Safety Management Code

Alvarez v. Carnival Corp., No. 14-20479-CIV, 2014 U.S. Dist. LEXIS 15229, 2014 WL 5473568 (S.D. Fla. October 27, 2014)

The plaintiffs brought a negligence claim against the cruise line when the vessel they were traveling on was stranded at sea without power following a shipboard fire. The defendant argued that the claims for negligence based upon breach of the International Safety Management Code impermissibly attempted to expand the duty of care. Relying on *Rinker v. Carnival Corp.,* 753 F. Supp. 2d 1237 (S.D. Fla 2011), which held that violations of the International Safety Management Code were insufficient in isolation to allege negligence absent a showing of causation, the claim was dismissed. As the parties stipulated to the *res ipsa loquitur* in the case as it relates to the fire, the remaining claims were upheld.

Jurisdiction

Summers v. Carnival Corp., No. 13-23932-CV-McAlily (S.D. Fla. April 6, 2015)

The court granted the ship's doctor's motion to dismiss for lack of personal jurisdiction. The plaintiff alleged, and the doctor admitted, that he entered into written contracts with the cruise line, served on vessels that embarked from ports in the state of Florida, treated patients (crew and passengers) while the vessels were in Florida ports or territorial water, and attended annual seminars conducted in Florida. Nonetheless, the court ruled that these contacts were insufficient to show continuous and systematic contacts between the doctor and Florida necessary to establish general jurisdiction pursuant to F.S.§48.193(2).

Medical Malpractice

Summers v. Carnival Corp., et al., No. 13-23932-CV-McAlily (S.D. Fla. April 6, 2015)

The court denied the cruise line's motion to dismiss in light of the *Franza v. Royal Caribbean, Ltd.*, 772 F.3d 1225 (11th Cir. 2014) and found the plaintiff could proceed under the theories of vicarious liability, respondeat superior and apparent agency. The court found the defendant's reliance on the provisions in the guest ticket contract that the ship's doctor was an independent contractor, and the argument that plaintiff's belief that the medical staff were employees or agents *per se* unreasonable, was meritless. The court did dismiss the count for negligent hiring, retention and training with leave to amend as the plaintiff failed to allege sufficient facts to state a cause of action.

Ure v. Oceania Cruises, Inc., No. 14-21340-CIV, 2014 U.S. Dist. LEXIS 165649, 2014 WL 6611586 (S.D. Fla. November 20, 2014)

In another post-*Franza* decision the court granted a motion of reconsideration reinstating the plaintiff's claims against the cruise line under the theories of respondeat superior and negligence. Claims for apparent agency and negligent hiring and retention were dismissed without prejudice. The plaintiff was granted leave to amend to plead additional facts. The court struck the plaintiff's claim for third-party beneficiary finding that plaintiff needed to show the cruise line, and not the medical provider breached the agreement citing to *Rinker v. Carnival*, 836 F. Supp. 2d 1309 (S.D. Fla. 2011); *Huang v. Carnival*, 909 F. Supp. 2d 1356 (S.D. Fla. 2012)

Pleading Requirements

Harding v. NCL (Bahamas), Ltd., No. 14-24290-Civ-Scola, 2014 U.S. Dist. LEXIS 31684, 2015 WL 1028602 (S.D. Fla. February 25, 2015)

In a slip and fall accident, the court dismissed the plaintiff's complaint for failure to allege sufficient factual allegations. The court ruled absent factual allegations detailing how the cruise line failed to keep its deck dry, how it failed to close off the wet deck, and how it failed to give notice of the slippery conditions, the plaintiff did not satisfy the notice pleading requirements set forth in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Young v. Carnival Corp., No. 14-22924-CIV, 2014 U.S. Dist. LEXIS 153789 (S.D. Fla. October 30, 2014)

The court denied the cruise line's motion to dismiss in a slip and fall claim. The court rejected the defendant's position that the plaintiff was required to identify the slippery substance on the floor and precisely how the slippery substance caused her to fall. The court stated that the plaintiff was not required to plead a "play-by-play" within the complaint.

Shore v. Magical Cruise Co., Ltd., No. 6:14-cv-358-Orl-31GJK 2014 WL 3687100 (M.D. Fla. July 24, 2014)

The court rejected the cruise line's argument that the plaintiff failed to state a claim for negligence because she failed to plead facts to show that the cruise line owed her a duty to warn of the allegedly defective hair product, or that the company breached such a duty. The plaintiff alleged, *inter alia*, that the cruise line employee applied an expired and contaminated product to plaintiff's scalp, and that the contamination and the expiration date were both visible upon inspection of the bottle containing the product.

Moseley v. Carnival Corp., 593 F. App'x 890 (11th Cir. 2014)

The plaintiff was injured when the bathroom sink dislodged and fell on her while using the port bathroom facilities in Freeport Harbour when the vessel called in the Bahamas. The court rejected the failure to warn claim finding that the plaintiff did not plead any facts to show the cruise line knew or should have known of the risk of injury associated with using the bathroom facility in the port. The claim for vicarious liability was also dismissed as the court noted that even assuming the plaintiff's adequately pled the elements of an agency relationship, the complaint failed to include any facts that Freeport knew or should have known of the risk by the use of reasonable care.

Sanctions

Villeta v. Carnival Corp., No. 13-cv-24369-CMA (S.D. Fla. November 5, 2014)

As a sanction for gross discovery violations the court struck the cruise line's affirmative defenses regarding lack of notice and absence of a dangerous condition. The court found that the defendant took an overly narrow view in responding to interrogatories when it stated there were no changes to the subject flooring after the accident when in fact a slip-resistant treatment had been applied to the tile flooring. The court rejected the defendant's argument that it had viewed the request to mean there were no physical changes. Additional discovery violations were committed when the corporate representative testified that he was unaware of any inspections or testing to the subject area prior to the floor being treated and the defendant denied the existence of any inspection reports in response to production requests. Plaintiff later discovered that the corporate representative provided access to the ship so that a third party entity could conduct testing which the representative participated in. The sanction was found to be appropriate because it was specifically related to the particular claim at issue, which avoids any due process concerns. *Serra Chevrolet, Inc. v. Gen. Motors Corp.,* 446 F.3d 1137, 1151 (11th Cir. 2006).

Shore Excursions

Ash v. Royal Caribbean Cruises Ltd., No. 13-20619-CIV, 2014 U.S. Dist. LEXIS 164691, 2014 WL 6682514 (S.D. Fla. November 25, 2014)

Plaintiff was injured when the bus he was riding in crashed on its way to a cruise line sponsored shore excursion. The cruise line entered into a contract with the shore excursion company who in turn contracted with a third party to provide bus transportation to the excursion site. The plaintiff brought a claim for third party beneficiary alleging that the cruise line and the excursion company entered into a contract that primarily and directly benefitted the plaintiff by requiring that the excursion company purchase and maintain insurance as well as exercise reasonable care while operating their excursions. Citing to *Aronson v. Celebrity Cruises, Inc.*, No. 12-CV-20129, 2014 WL 3408582 at *14 (S.D. Fla. May 9, 2014), the court ruled that the plaintiff failed clearly and specifically to demonstrate an intent primarily and directly to benefit the plaintiff in his complaint. The claim was dismissed with leave to amend.

Statute of Limitations

Veverka v. Royal Caribbean Cruises, Ltd., No. 12-3070 (ES) (MAH), 2014 U.S. Dist. LEXIS 33163, 2015 WL 1270139 (D.N.J. March 18, 2015)

The court granted summary judgment where the plaintiff brought suit two years after the initial injury despite a limitation clause within the Passage Contract. The court rejected the plaintiff's argument that he did not receive the Passage Contract because her daughter booked the cruise, the defendant's failure to produce the original ticket renders the limitation causes unenforceable, and that it was a contract of adhesion and procedurally and substantively unconscionable. The court stated that it is immaterial who booked the cruise and whether the plaintiff received it prior to boarding. The Passage Contract is

valid so long as the terms are reasonably communicated and the plaintiff could have read the ticket after his injury.

Summary Judgment

Lancaster v. Carnival Corp., No. 14-cv-20332-KMM (S.D. Fla. Feb. 9, 2015)

Plaintiff brought a negligence claim against the cruise line alleging failure to warn of the dangers of crowding during the disembarkation process and failure to take adequate precautions and follow proper procedures to prevent a crowd from forming in the corridor. Summary judgment was granted as to the failure to warn claim as the court found that both the luggage the plaintiff tripped over and the crowd itself were open and obvious conditions. Although there was no duty to warn, the court ruled that the cruise line still owed the plaintiff a reasonable duty not to create or cause (through selecting and dictating the manner of disembarkation) a hazardous condition that in turn injures a passenger. Summary judgment denied as a reasonable juror could find that the defendant failed to exercise due care by failing to maintain sufficient crowd-management personnel, the result of which was the crowding that caused the plaintiff to fall.

Holderbaum v. Carnival Corp., No. 13-24216-CIV, 2015 U.S. Dist. LEXIS 22289, 2015 WL 728362 (S.D. Fla. Feb. 19, 2015)

The plaintiff alleges she was injured when her shoe caught on a gap between the metal "wear strip" on the nose of the top of a staircase and the carpet lining. The court denied the cruise line's summary judgment motion finding that there was sufficient evidence to establish that the condition existed at the time of the incident. The court relied on expert testimony, photographs and the plaintiff's shipboard statement. The court noted that the law does not require a slip-and-fall victim to gather evidence of a risk creating condition immediately before the accident in order to survive a summary judgment motion. With regards to establishing the existence of a hazardous condition, the plaintiff showed that the carpet, stairs, and stair railings violated various industry safety

standards, naming the National Fire Protection Association and the American Society for Testing and Materials as two relied-upon standards. The court restated the long-standing Fifth and Eleventh Circuit norms that "advisory guidelines are recommendations, while not conclusive, are admissible as bearing on the standard of care in determining negligence[,]" citing to *Cook v. Royal Caribbean Cruises, Ltd.*, No. 11-20723-CIV, 2012 U.S. Dist. LEXIS 67977, 2012 WL 1792628 (S.D. Fla. 2012). Finally, actual or constructive notice was shown by the defendant placing "Watch Your Step" warnings signs in comparable locations on other Fantasy-class ships, the occurrence of nearly-identical falls and subsequent injuries sustained by other passengers aboard the same ship as well as aboard other Fantasy-class ships and the remedial measures taken aboard those ships to prevent the nearly-identical injuries.

Torres v. Carnival Corp., No. 12-cv-23370-JLK, 2014 U.S. Dist. LEXIS 100220, 2014 WL 3667763 (S.D. Fla. July 22, 2014) (Appeal has been filed)

The plaintiff tripped and fell over a raised threshold that was covered by a carpet. Summary judgment was granted where the plaintiff testified that there were no objects or obstructions in her path, nothing impeded her view and she was not really paying attention as she walked to the ramp. Absent a defect (rip, tear, water or foreign substance), there was no evidence to show that there was an unreasonably dangerous condition, nor was there any duty to warn.

Lancaster v. Carnival Corp., No. 14-cv-20332-KMM, 2015 WL 545499 (S.D. Fla. February 9, 2015)

Plaintiff showed that the carpet, stairs, and stair railings violated various industry safety standards, naming the National Fire Protection Association and the American Society for Testing and Materials as two relied-upon standards. The court restated the long-standing Fifth and Eleventh Circuit norms that "advisory guidelines are recommendations, while not conclusive, are admissible as bearing on the standard of care in determining

negligence[,]"citing to *Cook v. Royal Caribbean Cruises, Ltd.*, No. 11-20723-CIV, 2012 U.S. Dist. LEXIS 67977, 2012 WL 1792628. Finally, actual or constructive notice were taken by the defendant in placing "Watch Your Step" warnings signs in comparable locations on other *Fantasy*-class ships, nearly-identical falls and subsequent injuries sustained by other passengers aboard the same ship as well as on other *Fantasy*-class ships and the remedial measures taken by those boats to prevent the nearly-identical injuries.

Poole v. Carnival Corp., No. 14-20237-CIV, 2015 U.S. Dist. LEXIS 45927, 2015 WL 1566415 (S.D. Fla. April 8, 2015)

Summary judgment was granted where the court found the plaintiff failed to establish evidence that the cruise line breached its duty. The plaintiff was injured when she walked into a glass door. The defendant submitted testimony from experts and the investigating security officer which indicated the door had a waist-high sign saying "push" along with a handle and a metal door frame. Although the plaintiff alleged lack of sufficient warning, she did not cite to any record evidence to support her statements. The court also struck the plaintiff's experts as being untimely.

SEAMAN'S CLAIMS

Arbitration

Rutledge v. NCL (Bahamas) Ltd., No. 14-23682-CIV, 2015 U.S. Dist. LEXIS 12554, 2015 WL 458133 (S.D. Fla. February 3, 2015)

A ship photographer brought suit for a slip and fall accident and a claim for sexual harassment and sexual assault by her supervisor. The court granted the cruise line's motion to dismiss and to enforce arbitration as to the claims arising from the slip and fall accident. The court denied the motion as to the claims relating to the sexual assault and harassment, determining they did not arise directly from the plaintiff's employment and obligations while working aboard the vessel. The court relied on *Doe v.*

Princess Cruise Lines, Ltd., 657 F.3d 1204 (11th Cir. 2011) in reaching its opinion.

Trifonov v. MSC Mediterranean Shipping Co., 590 F. App'x 842 (11th Cir. 2014)

The Eleventh Circuit Court of Appeals upheld the district court's motion to dismiss pursuant to the mandatory arbitration agreement. The court confirmed that plaintiff's conclusion that the arbitration agreement violated public policy was premature, as the Convention only permitted this affirmative defense on the "award-enforcement" stage, not at the "arbitration-enforcement" stage. The court further ruled that the "effective vindication" doctrine recognized by the Supreme Court in *American Express Co. v. Italian Colors Rest.*, 133 S.Ct. 2304, 186 L. Ed. 2d 417 (2013), did not apply to invalidate the arbitration agreement.

Pysarenko v. Carnival Corp., 581 F. App'x 844 (11th Cir. 2014)

The plaintiff worked as a karaoke host aboard one of Carnival's ships, and claims he was injured while moving karaoke equipment on the boat. The plaintiff alleges negligence, failure to provide him with reasonable medical care and that Carnival denied him the benefit of maintenance and cure. The case was removed to the Southern District of Florida from state court, and the defendants moved to dismiss the action and compel arbitration pursuant to the plaintiff's employment contract. The district court granted the motion and the plaintiff appealed. The plaintiff raises five reasons why the district court erred in granting the defendant's motion to compel arbitration. The 11th Circuit adopted the "well-reasoned opinion" from the district court, and affirmed on all counts.

Vera v. Cruise Ship Catering & Servs. Int'l, N.V., 594 F. App'x 963 (11th Cir. 2014)

The plaintiff appealed the ruling to arbitrate arguing that the defendant failed to demonstrate that the plaintiff actually signed the arbitration agreement by providing any documentation

thereof; and the arbitration clause should be declared void for public policy reason in that it requires him to waive his right to pursue remedies under United States statutes prospectively. In rejecting both arguments, the court found that the plaintiff's employment contract which incorporated by reference the collective bargaining agreement was sufficient since both countries were signatory to the convention. The plaintiff's public policy argument also failed because it was made premature as it must be raised at the arbitration-enforcement phase.

Wong v. Carnival Corp., 599 F. App'x 355 (11th Cir. 2015)

The plaintiff appealed the district court's order that compelled him to arbitrate arguing that Panamanian law would bar his claims for negligence under the Jones Act and for maintenance and cure and unseaworthiness under general maritime law. Plaintiff argued *Lindo* is no longer good law because federal courts can invalidate an arbitration agreement as against public policy if it prevents the effective vindication of a federal statutory right and because the court is bound by the contrary ruling in *Thomas v. Carnival Corp.*, 573 F. 3d 1113 (11th Cir. 2009). In upholding the order to arbitrate, the court stated that *Thomas* was inconsistent with prior law *Bautista v. Star Cruises*, 396 F.3d 1289 (11th Cir. 2005), and that *Bautista* and *Lindo* still control. The court also rejected the plaintiff's summary of *American Express Co. v. Italian Colors Rest.,* 133 S. Ct. 2304, 186 L. Ed. 2d 417*,* that it gives a court power to invalidate an arbitral agreement if the enforcement of that agreement prevents rights granted under federal statutes.

D'Cruz v. NCL (Bahama) Ltd., No. 1:15-cv-20240, 2015 U.S. Dist. LEXIS 40326, 2015 WL 1468327 (S.D. Fla. Mar. 30, 2015)

The plaintiff was an employee on the defendant's ship, working as a systems manager in its IT department. He challenged the order to arbitrate on the grounds that he performed all his duties aboard the vessel and not in a foreign state. The court rejected this argument finding that "abroad" to mean outside of the United States adding that if the legislature intended to limit the applicability of the Convention, it could have done so.

Attorneys' Fees & Punitive Damages

Hicks v. Vane Line Bunkering, Inc., No. 13-1976-cv (2d. Cir. April 17, 2015)

The Second Circuit upheld an award of attorney's fees and punitive damages where a jury found that the defendant willfully breached its maintenance and cure obligations. The Second Circuit noted that there was a discrepancy amongst the district courts as to whether punitive damages may be limited only to attorney's fees or whether both punitive damages and attorney's fees could be awarded to a prevailing plaintiff. The Second Circuit stated that it held in *Kraljic v. Berman Enter., Inc.,* 575 F. 2d 412, 415-16 (2d. Cir. 1978) that the amount of punitive damages was limited to the amount of reasonable attorneys' fees. However, the Second Circuit concluded that more recent holdings by the Supreme Court, namely *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009), undermined the holding in *Kraljic*. *Atlantic Sounding* changed the landscape of binding case law, which clearly stated that punitive damages are in no way limited to only attorneys' fees.

Maintenance and Cure

Ramirez v. Carolina Dream, Inc., No. 13-2109, 2014 WL 3703746 (1st Cir. 2014)

Summary judgment in favor of the ship owner reversed. The court found that there was a genuine issue of material fact which existed as to whether seaman's aplastic anemia arose or became aggravated during his service to the vessel.

Pain and Suffering

Hicks v. Vane Line Bunkering, Inc., No. 13-1976-cv (2d. Cir. April 17, 2015)

The Second Circuit affirmed a denial to set aside a jury verdict. At trial, the jury found that the defendant willfully breached its maintenance and cure obligations, awarding the

plaintiff compensatory and punitive damages. The defendant argued that the plaintiff's pain and suffering found by the jury was insufficient as a matter of law. The defendant relies on statements made by the plaintiff that his condition did not significantly improve after the initial injury; therefore the pain and suffering experienced by the plaintiff were a result of the initial injury, not the failure to fulfill its maintenance and cure obligations. The court concluded that this statement is misguided under Second Circuit jurisprudence, stating that "the prolonging or worsening of a condition as a result of the employer's breach will sustain a pain and suffering damages award[,]" citing to *Messier v. Bouchard Transp.*, 688 F.3d 78, 84-85 (2d Cir. 2012). The court noted that the jury reasonably concluded that the actions taken by the defendant cut off maintenance and cure prematurely, which forced the plaintiff back to work before he was declared fit because the plaintiff's financial situation was dire (his house ended up being foreclosed on). Therefore, the district court did not abuse its discretion in holding that the jury acted reasonably when deciding to award pain and suffering.

Seaman's Status

Bendlis v. NCL (Bahamas), Ltd., No. 14-24731-CIV, 2015 WL 1124690 (S.D. Fla. March 11, 2015).

The cruise line made arrangements for a crewmember to travel from his home country of Nicaragua to Copenhagen to join the vessel for his new contract. Before the crewmember could join the vessel, he became mentally disoriented and was admitted to a psychiatric hospital in Copenhagen. He was ultimately diagnosed with a brain cyst. The cruise line argued that because the crewmember had not yet begun working under his new contract, his old employment contract governed, which had a provision that stated he was not an employee unless and until he signs a new employment contract. Since he was not an employee, no maintenance and cure was owed. Relying on *Archer v. Trans/Am. Serv, Ltd.*, 834 F.2d 1570 (11th Cir. 1988), the court found that the plaintiff was "in the service of the vessel" when the incident

occurred because the cruise line required him to arrive in Copenhagen two days prior to the boarding.

ARTICLES OF INTEREST

Seaworthy: To Protect Seafarers, Congress and The Federal Courts Have Created a Strong Set of Common Law Rights and Privileges; *Los Angeles Lawyer*, Vol. 37, page 34 (December 2014), by Carlos Felipe Llinas Negret, Esq.,

New Destinations for Shipboard Malpractice, AAJ Trial Magazine, Vol. 51, page 38 (February 2015) by Robert Peltz, Esq. and Gretchen Nelson, Esq.

RECENT TRIAL RESULTS

Lancaster v. Carnival Corp., No. 14-cv-20332-KMM, 2015 Jury Verdicts LEXIS 1102 (S.D. Fla. February 26, 2015)

Plaintiff alleged he tripped and fell during the disembarkation process due to narrow corridors that were congested and obstructed by passengers and luggage. Plaintiff alleged that the cruise line failed to have and/or follow reasonable disembarkation procedures. The defendant argued that the luggage and groups of people were open and obvious conditions and that the plaintiff failed to exercise reasonable care for his own safety when traversing the corridor. Defendant further argued that the plaintiff's damages were a result of his pre-existing conditions and not the fall. Defense verdict granted in favor of the cruise line.

Terry et. al. v. Carnival Corp., No. 13-cv-20571-DLG, 2015 Jury Verdicts LEXIS 1104 (S.D. Fla. February 27, 2015)

The plaintiffs were stranded at sea without power and proper sanitation following a fire in the engine room. The plaintiffs proceeded to trial on their claim on negligence by applying a *res ipsa* presumption to their theory of causation. A bench trial was held as to the plaintiffs claimed physical and

emotional injuries. The court made individual awards to the plaintiffs ranging between $16,000 and $1,000.

Caraffa v. Carnival Corp., case no.: 2006-000964-CA-01, 11th Judicial Circuit in and for Miami-Dade County, FL (February 11, 2015)

The plaintiff claimed that her husband was exposed to asbestos while working on Carnival's ships between 1985 and 2000 and that the exposure to asbestos caused him to develop squamous cell carcinoma, a cancer of the lung. The cruise line argued at trial that there was no evidence that the decedent was ever exposed to any solid or respirable asbestos on a Carnival ship and that he did not have asbestosis, a necessary link between asbestos exposure and lung cancer. During trial, the defendant moved for a directed verdict which the court denied, permitting the matter to go to the jury. The jury returned a verdict in favor of the plaintiff for approximately $5.6 million, but found decedent to be 65% comparatively negligent. The court subsequently granted the defendant's post-trial motion to set aside the verdict and entered judgment in favor of the cruise line.

COMMITTEE ON FISHERIES

Chair: Keven J. Thornton
Editor: Terence G. Kenneally

FISHERIES CASE BRIEFS

April 2015

Yates v. United States, 135 S. Ct. 1074 (2015)

Parties and Issue:

Petitioner John Yates ("Yates") was a captain aboard a commercial fishing vessel fishing for red grouper in the Gulf of Mexico. During an offshore inspection of Yates' vessel, a federal agent found that the vessel's catch contained undersized red grouper, in violation of federal conservation regulations. The officer instructed Yates to keep the undersized fish segregated from the rest of the catch until the ship returned to port. After the officer departed, Yates instead told a crew member to throw the undersized fish overboard. For this offense, Yates was charged with destroying, concealing, and covering up undersized fish to impede a federal investigation in violation of 18 U.S.C. § 1519, a provision of the Sarbanes–Oxley Act ("SOX") of 2002.

At trial, Yates moved for a judgment of acquittal on the § 1519 charge. Yates argued that SOX was designed to protect investors and restore trust in financial markets following the collapse of Enron Corporation, and therefore § 1519's reference to "tangible object" includes objects used to store information, such as computer hard drives, not fish. The district court denied Yates's motion, and a jury found him guilty of violating § 1519. The Eleventh Circuit affirmed the conviction, concluding that § 1519 applies to the destruction or concealment of fish because, as objects having physical form, fish fall within the dictionary definition of "tangible object."

Certiorari was granted.

Holding:

The Supreme Court reversed the Eleventh Circuit's ruling and found that the disposal of undersized fish did not involve a "tangible object" for the purpose of SOX. The court noted that SOX was prompted by the exposure of Enron's massive accounting fraud and revelations that the company's outside auditor had destroyed potentially-incriminating documents. § 1519 was intended to prohibit, in particular, corporate document-shredding to hide evidence of financial wrongdoing. The court agreed with Yates, and in reliance on its statutory construction of SOX, held that its definition of "tangible object" includes objects that one can use "to record or preserve information," not every object in the physical world.

Bland v. Omega Protein, Inc., No. CIV.A. 14-0127, 2014 WL 7179379 (W.D. La. Dec. 15, 2014).

Parties and Issue:

Plaintiff Author Bland was employed by Omega Protein (Omega) as a member of the crew of the F/V RACCOON POINT. Bland was allegedly injured aboard the vessel on May 3, 2013. Bland and his wife, individually and on behalf of their minor child, (hereinafter referred to as "plaintiffs") filed a lawsuit against Omega for Jones Act negligence, unseaworthiness, and failure to pay maintenance and cure. Plaintiffs sought punitive damages as well as damages for loss of society, consortium, and services.

Holding:

The district court relied on *McBride v. Estis Well Service, Inc*., 768 F.3d 382, 384 (5th Cir. 2014) and dismissed the plaintiffs' claims for punitive damages on the basis that neither an injured seaman nor the personal representative of a deceased seaman can recover punitive damages under either the Jones Act or general maritime law for unseaworthiness. The court reiterated the *McBride* court's rationale that seaman's recovery is limited to pecuniary losses where liability is predicated on Jones Act

negligence or unseaworthiness. However, the court permitted the plaintiffs' prayer for punitive damages with respect to the claims for Omega's failure to pay maintenance and cure.

Finally, the court granted Omega's motion to dismiss with respect to Bland's wife and minor child's independent claims for loss of society, holding that they were not entitled to an independent claim of loss of society under the general maritime law or Jones Act.

Frontier Fishing Corp. v. Pritzker, 770 F.3d 58 (1st Cir. 2014).

[Editors' note: This is an update of the Fall 2013 Case Summary Report, District Court opinion, *Frontier Fishing Corp. v. Locke*, CIV.A. 10-10162-DPW, 2013 WL 2090551 (D. Mass. May 13, 2013).]

Parties and Issue:

Plaintiff Frontier Fishing Corp. ("Frontier") brought suit against the Secretary of the Department of Commerce and the Under Secretary of Commerce for Oceans and Atmosphere, challenging the imposition of penalties by the National Oceanic and Atmospheric Administration ("NOAA") for allegedly fishing in a restricted-gear area in violation of the Magnuson–Stevens Fishery Conservation Management Act ("MSA"). The district court affirmed NOAA's finding of a violation, and Frontier appealed.

Holding:

The First Circuit affirmed the district court's ruling and held that the ALJ did not abuse his discretion by denying Frontier's request to supplement the record. The court held that additional discovery was not warranted, because Frontier was given ample opportunity to conduct reasonable discovery through various administrative proceedings, was able to move for summary judgment without information it sought in the appeal, and received all of the information NOAA used in making its determination.

Finally, the court affirmed the district court's finding that there was substantial evidence presented to support NOAA's determination that Frontier's vessel was trawling in a restricted-gear area.

Glacier Fish Co. LLC v. Pritzker, No. C14-40 MJP, 2015 WL 71084 (W.D. Wash. Jan. 6, 2015).

Parties and Issue:

The total amount of Pacific whiting available to be caught by non-tribal commercial harvesters has been divided among three sectors: the catcher-processor sector ("CP Sector") which consists of vessels that harvest and process Pacific whiting at sea, the mothership sector, and the shoreside sector. Glacier Fish Company ("plaintiff") and two other Seattle-based companies formed the Pacific Whiting Conservation Cooperative ("PWCC"). The PWCC intended to avoid an unrestrained "race for fish" among sector participants by having each member limit its Pacific whiting harvest to a certain percentage of the CP Sector's total allocation as part of a "CP Co-op Program."

In January 2011, National Marine Fisheries Services ("NMFS") implemented Amendment 20, which created an individual fishing quota ("IFQ") program for the trawl fleet and cooperative programs for the CP Sector and mothership sector. Amendment 20 implemented several changes for PWCC, notably including the requirement to apply annually for a CP Co-op permit, the issuance of IFQs to individual CP-endorsed limited-entry trawl permit owners in the event the co-op dissolved, and the allocation of key bycatch species (along with Pacific whiting) to the CP Co-op Program. In December 2013, NMFS published its final rules implementing a cost recovery program for the Trawl Rationalization Program.

On January 9, 2014, plaintiff filed suit against the Secretary of the United States Department of Commerce Penny Pritzker, National Oceanic and Atmospheric Administration ("NOAA"), and NMFS (collectively referred to as "defendants") alleging that

the cost recovery regulations violate the Magnuson-Stevens Act ("MSA"). Plaintiff alleged that the regulations violated the MSA because: 1) the CP Co-op Permit is not a Limited Access Privilege Program ("LAPP") (2) plaintiff is not the holder of the LAPP and should not be charged the fee; (3) NMFS, and not Pacific Council, developed the methodology to calculate the cost recovery fee; and (4) the cost recovery fee should be set aside because NMFS included unrecoverable costs within its fee calculation. Defendants moved for summary judgment.

Holding:

The court found that the CP Co-op Permit is a LAPP as determined by NMFS and that the CP Co-op Permit should formally register the CP Co-op and its associated members to harvest and process through a formal rulemaking procedure. The CP Co-op Permit identified plaintiff as a holder. The court gave deference to NMFS's position that it complied with MSA by adopting the Pacific Council's definition of direct program costs or incremental costs. The court concluded that NMFS's actions in calculating the general cost figure, including the incremental costs, met the standard in considering the relevant factors and articulating a rational connection between the facts found and the choice made.

Oceana, Inc. v. Pritzker, 75 F. Supp. 3d 469 (D.D.C. 2014).

Parties and Issue:

Plaintiff Oceana, Inc. ("Oceana") brought suit alleging that the National Marine Fisheries Service's ("NMFS") determination in its 2012 Biological Opinion that the Atlantic Sea Scallop Fishery would not jeopardize the existence of the Northwest Atlantic population of loggerhead sea turtles. That particular population segment is listed as threatened under the Endangered Species Act ("ESA"). Oceana argued that NMFS reached its no-jeopardy determination by employing an interpretation of a key regulation that contravenes both the regulatory text as well as the language and spirit of the underlying ESA.

This matter was before the U.S. District Court for the District of Columbia on cross-motions for summary judgment filed by Oceana and NMFS, as well as by defendant-intervenor Fisheries Survival Fund.

Holding:

NMFS first asserted that Oceana lacked standing to challenge the 2012 Biological Opinion because the "action area" does not extend to the specific North Carolinian island on which the Oceana declarants observe sea turtles. Oceana offered declarations of two members who stated that they enjoy the study and observation of loggerheads and would be injured by harm to the species. To have standing, a plaintiff must have suffered an "injury in fact." The court found that Oceana's declarants were sufficient to ground Oceana's standing and that Oceana was able to show, as required for standing, that the interest it sought to protect by the lawsuit was germane to its organizational purpose.

Oceana's principal argument was that NMFS, in determining whether the Scallop Fishery would "jeopardize the continued existence of" loggerheads within the Northwest Atlantic, applied an unlawful construction of the regulation that defines this pivotal statutory phrase. The regulation at issue provides that the statutory phrase "jeopardize the continued existence of" means "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. §402.02. In a 2008 Biological Opinion, moreover, NMFS defined the term "reduce appreciably" to mean that there be a "considerable or material reduction in the likelihood of survival and records" of the species.

Oceana argued that NMFS unlawfully imported a heightened requirement that any reduction in the likelihood of loggerheads survival and recovery be "considerable" or "material," rather than simply being perceptible. Rejecting this argument, the court afforded deference to NMFS's interpretation of its own

regulation and found that NMFS's interpretation of the phrase "reduce appreciably" does not contravene the text of 50 C.F.R. §402.02.

Oceana next argued that NMFS impermissibly construed the ESA, because NMFS' interpretation of "reduce appreciably"— which reaches only "considerable" or "material" reductions— is out of step with the plain language of the ESA. The ESA requires that federal agencies ensure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of a listed species. Oceana maintained that for an agency action to "jeopardize the continued existence of" a listed species, that action must only cause some deterioration in the species pre-action condition. Disposing of this reading, the court reasoned that just because Oceana's approach may be more protective than that of the agency does not mean that NMFS' interpretation of 50 C.F.R. § 402.02 is in conflict with the ESA, and therefore NMFS may reasonably conclude that a given agency action would not be likely to jeopardize the continued existence of the species, even if said action may reduce the likelihood of a species' survival and recovery to some degree. The court found that NMFS' reading of "jeopardize the continued existence of" was inconsistent with the ESA. The statute does not define how the concept is to be measured, and the agency, therefore, has discretion to make this determination on the basis of its own expertise.

Finally, Oceana challenged the Incidental Take Statement ("ITS") issued as a part of the 2012 Biological Opinion. NMFS concluded that the agency action will not jeopardize a species' continued existence, yet will cause some takes incidental to that action. Oceana challenged the adequacy of the ITS with respect to both dredge and trawl fishing, and specifically maintained that, due to inadequate monitoring of fishing activities in the Scallop Fishery, the take limits established in the ITS did not serve as meaningful triggers for the reinitiation of consultation. To determine whether the incidental take limit of 161 turtles annually has been exceeded, NMFS intended to employ methods aimed at addressing the inadequacy of "observer coverage" as a means of monitoring loggerhead takes.

The two major modifications to dredge gear were (1) Turtle Deflector Dredges ("TDDs") and (2) chain mats. A TDD deflects sea turtles over the dredge, rather than underneath it and helps keep sea turtles out of the dredge bag, actions that are expected to reduce the severity of some interactions that occur. Chain mats provide a similar benefit by acting as a barrier to prevent the capture of sea turtles in the ring of the bag. These protective modifications, however, make the observation of loggerhead takes more difficult. As a consequence, NMFS planned to rely primarily on a monitoring "surrogate" to measure when the numerical take limit of 161 turtles has been reached. The surrogate chosen by NMFS was the "dredge hour," which is the number of hours spent dredge fishing. NMFS will consider the ITS "exceeded," thus retriggering consultation, if the two-year running average of dredge hours in Mid–Atlantic waters during the period of May through November of any scallop fishing year is greater than the average of the total number of dredge hours from Mid–Atlantic waters during the same period of 2007 and 2008.

Oceana challenged two aspects of the ITS with respect to dredge fishing, arguing that (1) NMFS' use of a surrogate for monitoring incidental takes is arbitrary and capricious because there are viable options for direct monitoring of these takes; and that (2) even if employing a surrogate is not unlawful, NMFS' choice of the dredge-hour surrogate in particular is arbitrary and capricious, because the method fails to serve as a meaningful trigger for reconsultation.

The court found that NMFS' decision to use a surrogate rather than directly to monitor loggerhead takes was not arbitrary and capricious after recognizing NMFS' determination that while the gear modifications obscure observers' ability to count actual takes, making coverage less effective, video monitoring as another method was infeasible.

The court next turned to Oceana's challenge to the particular monitoring surrogate chosen by NMFS, i.e., the number of hours spent dredge fishing in Mid-Atlantic waters from May through November. Oceana argued that the dredge hour surrogate

failed to function in a manner that will give effect to the ITS' dredge take limit of 161 loggerheads. NMFS' theory behind the dredge hour monitoring surrogate was that the more hours spent dredge fishing, the more turtles will interact with the dredge gear. NMFS contended that by counting dredge hours and comparing them, on an annual basis, against the average number of dredge hours fished in 2007 and 2008, the agency implemented a monitoring system capable of functioning as a trigger to determine when the dredge take limit of 161 turtles has been exceeded. If the allowable level of incidental take is exceeded, NMFS is required to reinitiate ESA consultation immediately.

The court concluded that NMFS' proposed ITS failed to explain how 252,323 hours equaled 161 takes and remanded the ITS to NMSF so that it could either more clearly explain the connection or chose a number of hours that aligns with the numerical take limit. The court also ordered NMFS to either revise its to provide a more thorough explanation of its choice to re-estimate trawl takes on a five [5] year schedule (rather than more frequently) or to reach a different conclusion. The court rejected, however, Oceana's argument that the Biological Opinion should be vacated and held that NMFS must continue to use its existing monitoring tools while it revises the ITS.

United States v. Reeves, No. CRIM. 11-520 JBS, 2015 WL 461860 (D.N.J. Feb. 4, 2015).

[Editors' note: This is an update of the Fall 2012 Case Summary Report, District Court opinion, *U.S. v. Reeves,* 2012 WL 2576394 (D. N.J. July 3, 2012) *See* MLA Report, Doc. No. 808, Fall 2012 at 17258]

Parties and Issue:

Defendants included six [6] individuals and two [2] corporations involved in the oyster harvesting and distribution industry along the Delaware Bay in New Jersey and Delaware named in a fifteen-count indictment. Individual defendants Thomas Reeves, Todd Reeves, and Renee Reeves were affiliated with

defendant Shellrock, LLC, d/b/a Reeves Brothers, in Port Norris, New Jersey. Thomas and Todd Reeves are brothers who owned and operated Reeves Brothers, an oyster dealer authorized to buy and sell oysters under New Jersey law. Renee Reeves, wife to Todd Reeves, worked in the Reeves Brothers office and performed functions such as preparing invoices for oyster purchases and sales. Thomas and Todd Reeves also harvested oysters from the Delaware Bay under annual licenses with a Seaford, Delaware company, defendant Harbor House, of which defendant Mark Bryan was an owner and operator. Defendant Pamela Meloney was an office employee of Harbor House.

Various defendants were charged with aiding and abetting the commission of the crime of keeping false records under the Lacey Act, 16 U.S.C. §§ 3372-3373, by making or causing another to make records and logs that falsely included the amount of oysters that had been harvested, landed, sold, or purchased by the defendants. Defendants were also charged with trafficking, or aiding and abetting trafficking, in oysters processed or transported in violation of New Jersey law. Various defendants were also charged with falsifying records with the Food and Drug Administration ("FDA").

The jury found most defendants guilty of Lacey Act violations, trafficking, and falsifying records. Ms. Meloney was acquitted of all counts against her. Defendants filed post-trial motions for judgment notwithstanding the verdict or for a new trial.

Holding:

The court denied all of defendants' post-trial motions, with the exception of granting the motion of Kenneth W. Bailey for judgment of acquittal on a count of falsifying records submitted to the FDA based on insufficient evidence to sustain a conviction for obstruction of justice. The court denied all other post-trial motions, finding that the defendants were not prejudiced by the variance between the indictments and evidence allowed at trial. The evidence was sufficient to sustain convictions for conspiracy to

falsify federal oyster transaction records. Finally, Renee Reeves' conviction for conspiracy and her acquittal on two [2] substantive counts under the Lacey Act were found not inconsistent.

United States v. Bengis, 783 F.3d 407 (2d Cir. 2015).

Parties and Issue:

From 1987 to 2001, defendants Arnold Bengis and Jeffrey Noll, through their company Hout Bay Fishing Industries Ltd., harvested rock lobsters from South African waters in amounts that exceeded the authorized quotas for export to the United States, a violation of both South African and U.S. law. The defendants were individually indicted in the United States District Court for the Southern District of New York.

Defendants, pled guilty of conspiring to violate the Lacey Act, which prohibits trade in illegally- taken fish and wildlife, and to commit smuggling, related to an elaborate scheme to illegally harvest lobsters in South African waters for export to United States. David Bengis pled guilty to conspiracy to violate the Lacey Act.

The defendants were sentenced to terms of imprisonment and to a forfeiture order. The United States thereafter sought restitution on behalf of South Africa. The district court eventually issued a restitution order of $22,446,720.00. The defendants appealed the restitution order and the related demand to deposit funds up to the restitution amount with the clerk of court.

Holding:

The Second Circuit upheld the trial court's amount of restitution and concluded that judicial factfinding in order to determine the appropriate amount of restitution under a statute that does not prescribe a maximum does not implicate a defendant's Sixth Amendment rights.

The court next considered defendant David Bengis' separate argument that he should be excluded from paying restitution beyond his involvement in the conspiracy, which was only from 1999 through August 1, 2001. The court remanded David Bengis' case for the trial court to determine whether David Bengis, when he joined the conspiracy in 1999, understood the scope of conspiracy, such that he knew or should have known the extent of its adverse economic impact.

COMMITTEE ON RECREATIONAL BOATING

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BOATING BRIEFS

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USCG Policy Shift in Recreational Sphere: On-Water Instruction for Recreational Licenses

In 2011, the United States Coast Guard ("USCG") initiated a national consensus-driven process to develop entry-level, on-water performance skill-based standards, to complement current classroom standards, for all recreational boat operation. That on-water project served as the catalyst for the USCG's current drive to organize and integrate boating education standards under one National System of Standards for Recreational Boat Operation. Implementing this national system will provide a home for all recreational boating entities to synergistically serve the boating public; ultimately increasing their ability to enhance the safety and enjoyment of our nation's boaters. Further, this system will foster awareness of and cooperation among recreational marine education entities (organizations, states, industry educators) and more importantly, serve as a springboard to grow the entire recreational marine industry.

As the on-water boating skills being developed, in alignment with classroom knowledge standards, are rolled out as American National Standards (ANS), course designers will have free access to these national standards for voluntary incorporation in boating education curriculum. Educational experts believe this will raise the quality of entry-level boating education across the country and at the same time, grow public awareness of the availability and benefits of on-water boating education. As public awareness and demand for on-water education increases, the need to expand the pool of qualified instructors with the proper

credentialing to meet that demand will rise accordingly. As plans for a USCG National System of Standards take shape, leaders in recreational boating education have identified a key barrier to the expansion of on-water recreational boating instruction. Current regulations require recreational boating instructors to earn a commercial Merchant Mariner license ("OUPV") to deliver powerboating, canoeing/paddling, sailing, etc. courses, even though the scope and responsibilities of these boating safety instructors differ substantially from professional mariners. Recreational boating safety instructors do not require the same level of expertise or advanced security protocols. Rather, they have a recreation focus, are typically seasonally employed, younger in age and modestly compensated. The requirements for Merchant Mariner licensing go beyond what recreational boating instructors need to deliver safe, high quality education, and are cost prohibitive and impractical in the recreational boating safety education environment. Entities providing recreational boating safety courses need a tailored solution that keeps the boating public safe within a business model that make economic sense for all.

To address this need, on-water recreational boating community leaders have a proposed solution to the OUPV license issue that works within the emerging USCG National System of Standards for Recreational Boat Operation. This solution involves implementing a USCG National Recognition System ("Recognition System") for boating education entities that comply with high quality training standards, follow best practices and instruct using ANS standards. Entities providing boating safety education would apply to be a USCG "Recognized Entity". USCG Recognized Entities would earn specialized OUPV license umbrella status—qualifying its instructors to deliver Recognized Entity designed on-water courses under the body's umbrella status. To ensure on-going quality and safety, each Recognized Entity would self-certify that its instructors properly maintain the established proficiency requirements to teach the curriculum.

Moreover, the USCG National System of Standards for Recreational Boat Operation is designed to be inclusive (open to all), non-dominant (equal standing for all) and USCG branded to

foster national credibility and uniformity. Creating a USCG recognition system offers an opportunity to cement a positive inclusive, non-dominant, credible pathway to benefit all boating safety entities/educators and the expanding boating public. On-Water recreational boating safety education leaders are exploring potential legal pathways to implementing a Recognition System, including a specialized OUPV license umbrella component, that will help expand instructor pools, attract recreational boaters, increase boater safety and enjoyment (returning boaters), reduce fatalities/injuries, and ultimately foster the growth of the entire recreational marine industry.

Joanne M. Dowal, Project Administrator, U.S. Coast Guard On-Water Standards Grant

FEDERAL LEGISLATION AND REGULATION

U.S. Virgin Islands Uninspected Vessels May Now Carry 12 Passengers

As part of the implementation of the Howard Coble Coast Guard and Maritime Transportation Act of 2014, uninspected passenger vessels may now carry up to twelve (12) passengers in the United States Virgin Islands provided the vessels are certified under the United Kingdom Yellow Code (for motor vessels) or Blue Code (for sailing vessels). The act brings United States uninspected passengers vessels in the Virgin Islands into parity with British Virgin Islands and United Kingdom. vessels, which can carry up to twelve passengers rather than six. The Coast Guard issued Maritime Safety and Security Bulletin 03-15 of March 2, 2015 to clarify the requirements for vessels wishing to carry up to twelve passengers.

Coast Guard Issues Marine Safety Information Bulletin on Parasailing After Collisions with Aircraft

The USCG published MSIB 03-15 of March 16, 2015, to address flight safety rules regarding parasailing vessels after two incidents last summer where aircraft towing banners collided with

parasailing rigs towed by vessels. The bulletin reminds operators that the Federal Aviation Authority regulates parasailing activities and that they must therefore follow Federal Aviation Authority rules prescribing flight limitations, notice, and marking requirements. The bulletin also encourages parasail operators to be proactive and vigilant in avoiding low-flying aircraft, and to coordinate regular safety meetings with low-flying aircraft operators in their geographic region.

Coast Guard Authorization Act Passed by House; Awaits Senate Vote

In May the United States House of Representatives passed HR-1987, the Coast Guard Authorization Act. The bill makes several changes to federal law relevant to recreational maritime interests, including:

- Section 312 would allow Certificates of Documentation to be effective for 5 years; currently Certificates are only valid for one year and must be renewed annually.

- Section 510 would amend the Jones Act, 46 U.S.C. § 30104, to bar claims by nonresident aliens employed on foreign passenger vessels if the injury or death arose outside United States territorial waters. This provision is similar but broader in scope to that found in § 30105, which bars claims by nonresident aliens working on oil rigs if the injury or death occurred within the continental shelf of a foreign country.

- Section 503 would require the Comptroller General to submit a report to Congress describing actions that could be taken to improve the efficiency of the National Vessel Documentation Center ("NVDC"), including by transferring the NVDC's operations to Coast Guard Headquarters in Washington, D.C.

- Section 309 would update the data the USCG provides manufacturers to determine weight of engines when conducting flotation tests; engines have grown considerably heavier since this data was last updated over twenty (20) years ago.

- Section 304 would amend 46 U.S.C. § 4302 to change the definition of model year for recreational vessels and equipment. Currently model years span from August 1st to July 31st; under the new legislation a model year would begin June 1st and span to the following July 31st. Presumably the drafters intended for the year to span from June 1st to the following May 31st.

STATE LEGISLATION AND REGULATION

New York, New Jersey Lower Boat Taxes

New York has capped its vessel sales and use tax at the first two hundred and thirty thousand dollars ($230,000.00) of a vessel's value; tax rates vary in New York by jurisdiction but range around eight percent (8%), equating to a tax cap of eighteen thousand to nineteen thousand dollars ($18,000.00 - $19,000.00) depending on locale.

New Jersey capped its seven percent (7%) statewide vessel sales and use tax at twenty thousand ($20,000.00), bringing it roughly in line with New York's new cap. The bill was passed by the legislature and awaits the Governor's signature.

Florida Caps Tax on Yacht Repairs

Florida has capped its vessel repair tax at sixty thousand ($60,000.00). Florida charges a six percent (6%) sales tax on yacht repairs, so yacht owners paying for over one million dollars ($1,000,000) in repairs will benefit from the repair tax cap.

Washington State Passes Marine Tourism Bill, Allows Large Yachts 180 Days Tax-Free

Washington's new law allows yachts greater than seventy-eight feet (78') owned by limited liability companies to cruise Washington waters up to one hundred and eighty (180) days before being subject to Washington's ten percent (10%) vessel tax. Prior to the law, yachts greater than seventy-eight feet (78') and owned by an limited liability company were subject to that tax after sixty (60) days, while other yachts could remain up to one hundred and eighty (180) days.

Hawaii Mandatory Boating Safety Training Goes Into Effect

Since November, Hawaii has begun enforcing its mandatory boater education rule, requiring all motor vessel operators to have undergone a boating safety course and to show proof of certification on demand.

Michigan Lowers Blood Alcohol Limit

Michigan has joined the growing trend of states equating the legal limit for operating vessels to the limit for operating automobiles. The legal limit in Michigan is now point zero eight percent (.08%) blood alcohol content, the same limit for driving a car.

Uniform Certificate of Title for Vessels Act ("UCOTVA") Gains Momentum

This year Connecticut and Washington, D.C. joined Virginia in adopting the Uniform Certificate of Title for Vessels Act. The Alabama and Mississippi legislatures have both introduced but not yet passed the ("Act"). The Act provides for a uniform titling system throughout the United States that dovetails with the Uniform Commercial Code, and requires state titles for vessels to be "branded" if they have suffered significant damage. If the USCG approves the procedures under the Act, preferred ship mortgage status would be granted to mortgages and security agreements on state-titled vessels pursuant to 46 U.S.C. § 31322(d).

SALVAGE

Low-Level Salvage, Even by Professional Salvor, Yields Low-Level Award

Girard v. M/Y Quality Time, 596 F. App'x 846, 2015 AMC 425 (11th Cir. 2015)

A thirty-nine (39) foot Meridian yacht, THE QUALITY TIME, struck a submerged object one night near Key West and began taking on water. The operator anchored the vessel and called the Coast Guard, who evacuated the passengers and deployed a pump to dewater the vessel. Meanwhile, a professional salvor heard the distress call and came to the scene. The Coast Guard pump was not working effectively, so the salvor deployed his own pump, donned diving gear and entered the water, applied a temporary patch from outside the hull, and completed the dewatering. The salvor then towed the vessel to a boatyard. Winds were twenty (20) knots or less, seas were two feet or less, and the entire operation took about three hours.

The salvor filed a salvage action *in rem*. The district court found that the salvor acted promptly and efficiently but that the operation involved little danger or specialized skill. The court awarded the salvor seventeen thousand dollars ($17,000) — equivalent to ten percent (10%) of the vessel's post-casualty value plus a two percent (2%) uplift due to his status as a professional salvor. Dissatisfied with the award, the salvor took an appeal.

While conceding that the district court's factual findings were accurate, the salvor argued that the award did not account for the risk and skill involved in the operation and that the circumstances mandated an award of no less than thirty-three percent (33%) of the vessel's post-casualty value.

The circuit court noted that a salvage award is to be based on the factors announced in *The Blackwall*, 77 U.S. 1, 2002 AMC 1808 (1869). Those factors are:

(1) The labor expended by the salvor;

(2) The promptitude, skill, and energy displayed by the salvor;

(3) The value of the equipment used by the salvor and the danger to which that equipment was exposed;

(4) The risk incurred by the salvor;

(5) The value of the property saved; and

(6) The degree of danger from which the property was rescued.

The salvor asserted that the fourth *Blackwall* factor—the risk incurred by the salvor—should be evaluated in comparison with hazards ordinarily encountered by those "who go to sea" and not in comparison with (the presumably greater) hazards encountered by professional salvors. The appellate court disagreed and held that the risks encountered by a professional salvor in undertaking a salvage operation are to be measured in relation to the hazards normally encountered in the salvage business, not to the hazards encountered by seafarers in general. Because the risks encountered here were of the type ordinarily encountered by a professional salvor, the district court was not required to render a more liberal reward. (And recall that the district court had already given the salvor a two percent (2%) uplift due to his status as a professional salvor.)

The salvor also argued that an award of thirty-three percent (33%) of the vessel's post-salvage value was more consistent with the public policy of encouraging salvors and was mandated based on comparisons to previous awards. The appellate court held that fixed percentages and comparisons to previous awards were not an absolute guide in determining a salvage award, which is to be based on the facts and circumstances unique to each case. Again the court upheld the district court's determination.

Lastly, the salvor argued that the district court erred in not awarding prejudgment interest. As the district court's order made no mention of prejudgment interest, the circuit court remanded the

case to allow the lower court to consider an award of prejudgment interest.

[Editors' note: Thanks to Carroll Robertson of BoatU.S. for bringing this case to our attention.]

Challenges to an Arbitration Provision in a Salvage Contract Must Specifically Challenge the Arbitration Clause in the Complaint, and Not Merely Challenge the Contract as a Whole

Farnsworth v. Towboat Nantucket Sound, Inc., 790 F.3d 90, 2015 AMC 1586 (1st Cir. 2015)

Yacht owner Farnsworth executed a "no cure, no pay" salvage contract containing a binding arbitration provision with Towboat Nantucket Sound ("TNS"), and TNS salvaged the yacht. After the parties submitted to arbitration, Farnsworth filed a complaint with the United States district court seeking a preliminary injunction against the arbitration and a declaration that the salvage contract was unenforceable, arguing that he had signed the contract under duress. The district court denied the injunction, the arbitration ended in favor of TNS, and the court granted TNS's motion to confirm the arbitration award despite Farnsworth's objection that the contract, including the arbitration provision, was signed under duress.

The First Circuit, following the Supreme Court in *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010), held that questions as to the validity of a contract as a whole are properly decided by the arbitrator, whereas validity challenges lodged specifically at the arbitration clause are properly decided by the courts. As the validity of the arbitration provision was thus severable from the validity of the contract as a whole, Farnsworth was required to specifically challenge the arbitration clause in his federal complaint, even though the basis of his challenge to the contract as a whole (duress) logically applied to every clause of the salvage contract. As Farnsworth failed to challenge the arbitration clause specifically in his complaint and failed to later amend the

complaint to do so, the First Circuit affirmed the district court's confirmation of the arbitration award.

MARITIME LIENS

Sailor Has No Maritime Lien for Breach of Contract Unconnected With a Specific Vessel

Spooner v. Multi Hull Foiling AC45 Vessel 4 Oracle Team USA, Case No. 15-cv-00692, 2015 U.S. Dist. LEXIS 33716 (N.D. Cal. March 18, 2015)

Spooner, a member of the Oracle Racing Team, filed suit in rem against an Oracle catamaran and *in personam* against Oracle Racing, Inc., the defending America's Cup champion, for wrongful termination of a "maritime service contract."

At Spooner's request, the United States Marshal in San Francisco arrested components of an AC45 catamaran, packed in three shipping containers destined to Bermuda. Oracle moved to vacate the arrest, arguing that Spooner had no maritime lien because his contract did not specify any particular vessel on which Spooner was to serve. After a post-arrest hearing, the magistrate judge agreed with Oracle and vacated the arrest.

Having served for eleven (11) years previously as a sailor for Oracle, Spooner signed on behalf of Allegro Yachting Ltd. (evidently a company formed by Spooner) a new agreement titled "Heads of Terms for AC35-Sailing Team-Joseph Spooner." The contract characterized Spooner as a "Sailing Team Member" and stated that Allegro "shall procure that [Spooner] shall provide, perform, and deliver such duties and services required of him as a member of the Sailing Team of [Oracle]." But the contract did not identify any particular vessel on which Spooner was to work. Indeed, the contract stated that "nothing in this Heads of Terms or otherwise guarantees that [Spooner] will be part of the crew for any particular race or regatta…."

Anticipating that the thirty-fifth (35th) Cup would take place in the United States, Spooner (a citizen of New Zealand)

applied for and obtained an athlete visa using the Oracle contract to support his application. Spooner then conducted repair work on an Oracle AC45 vessel in San Francisco. Later, Bermuda was selected as the site of the thirty-fifth (35th) America's Cup. Oracle issued a "relocation plan" to move its operations to Bermuda. Spooner thought that his relocation compensation would not cover the cost of relocating his family to Bermuda, and he requested a salary increase from twenty-five thousand dollars ($25,000.00) per month to thirty-eight thousand dollars ($38,000.00) per month. When Oracle told him that the compensation was not negotiable, Spooner requested mediation. Oracle then terminated the contract.

After the post-arrest hearing, the court concluded that Spooner's claim for wrongful termination did not support a maritime lien. While his contract obliged Spooner to serve "as a member of the Sailing Team," it did not specify what vessel or vessels Spooner would work on. (The contract also included non-maritime components, namely that Spooner would participate in publicity and fundraising events.) Therefore, the arrest was vacated, but without prejudice to Spooner's *in personam* claims.

[Editors' note: Thanks to Alberto J. Castañer-Padró, of CASTAÑER LAW OFFICES P.S.C. for this summary.]

COMMITTEE ON SALVAGE

Chair: Jason R. Harris[1]

NEWSLETTER

Spring 2015

RECENT DEVELOPMENTS IN SALVAGE LAW

Girard v. M/Y Quality Time, 596 F. App'x 846, 2015 AMC 425 (11th Cir. 2015). *Eleventh Circuit applies Blackwall factors and affirms low-order salvage award to professional salvor.*

The Eleventh Circuit Court of Appeals affirmed the U.S. District Court for the Southern District of Florida's award of $16,896.05 (12% of the vessel's post-casualty value) to Arnaud Girard, a professional salvor, in connection with the salvage of the M/Y QUALITY TIME following its grounding off the coast of Key West in 2012. Mr. Girard, appearing *pro se*, appealed.

Rejecting Mr. Girard's argument that the district court's conclusions of law were inconsistent with its factual findings, the Eleventh Circuit, applying *The Blackwall,* 77 U.S. 1, 2002 AMC 1808 (1869) factors, found that a low-order salvage award was appropriate because Mr. Girard's efforts were limited to routine salvage services typical of a professional salvor such as pumping or dewatering the vessel, patching the hull, and towing the vessel to the boatyard. The court of appeals noted that the seas were "moderate" and the weather was relatively calm at the time of the operation. The court further noted that in making the award, the district court had considered the risks Girard took during the nighttime dive to repair the vessel's hull and Girard's promptness and effectiveness in completing the salvage. In light of the district

[1] Please direct communications/questions to the Salvage Committee Chair at jrharris@welchharris.com. Mr. Harris is a partner with Welch and Harris, LLP, 636 Court Street, Jacksonville, NC 28540, telephone (910) 347-0161. Ellen G. Shults, an associate with Welch and Harris, LL, assisted in the preparation of these notes.

court's application of the *Blackwall* factors to the factual findings, the court of appeals found no inconsistencies between the district court's findings and conclusions.

Turning to Mr. Girard's contention that the district court erroneously applied the fourth *Blackwall* factor when it found that he was not entitled to a liberal award because he did not face risks out of the ordinary for a professional salvor, the court of appeals noted that the appropriate standard to apply when evaluating whether liberally to reward the salvor is whether the salvor took risks out of the ordinary "for men of that calling," the typical professional salvor – as opposed to the risks that an ordinary person would take, adopting a standard earlier espoused by the Second Circuit Court of Appeals in *B.V. Bureau Wijsmuller v. United States*, 702 F.2d 333, 1983 AMC 1471 (2d Cir. 1983). Therefore, the court of appeals held that the district court did not err in its application of the fourth *Blackwall* factor and had appropriately made a low-order salvage award.

The court of appeals similarly dismissed Mr. Girard's argument that the lower court should have awarded him 33% of the QUALITY TIME's post-casualty value as a means to incentivize salvors. In support of his contentions, Mr. Girard cited cases in which he claimed the salvage award was not less than 33% of the ship's value. The court of appeals disputed Girard's characterization of the cited cases, but found "in any event" that "fixed percentages of value and comparisons to percentage from previous awards should play no role in the salvage award" and concluded by affirming the district court's salvage award.

Lloyd's Syndicate 1861 v. Crosby Tugs, L.L.C., 2014 AMC 2337, 2014 WL 3587375 (E.D. La. July 21, 2014) *aff'd*, 598 F. App'x 337 (5th Cir. 2015). *Tow versus salvage analysis; court denies vessel owner's negligent salvage claim.*

This dispute arose from the sinking of the M/V RICKY B, an offshore supply vessel, in the Gulf of Mexico while being towed by the defendant/salvor, Crosby Tugs, LLC ("Crosby"). The owner of the M/V RICKY B and its insurer sued Crosby alleging that the

sinking of the RICKY B was the result of negligent towing by Crosby. Crosby counterclaimed alleging that it provided salvage towing services and seeking compensation for the same. plaintiffs argued that Crosby was negligent by: (1) failing to pump the engine room before commencing the tow and (2) towing the RICKY B at an excessive rate of speed. Crosby responded that plaintiffs' claims were barred by the *Pennsylvania* Rule and that the RICKY B was in "dire straits" long before Crosby reached it and was "doomed to sink notwithstanding Crosby's best efforts."

Following a bench trial, the court rendered judgment in favor of Crosby. First, the court determined that the services provided by Crosby were in the form of salvage vice towage. In conducting the analysis, the court noted that the "[t]he major element distinguishing salvage [from towage] is an unanticipated marine peril that gives rise to or occurs during towage," and that, in light of the crew of the RICKY B sending a "we are sinking" message to shore and having abandoned ship, the ship was clearly in a position of peril, and that therefore the services provided by Crosby were in the nature of a salvage. Noting the existence of a contract salvage agreement, the court found that Crosby was entitled to no additional compensation (other than the contracted amount) for its salvage efforts.

Next, the court turned to the owner's negligent towing claims and found that the Pennsylvania Rule applied due to three statutory violations committed by the RICKY B (namely, (1) an inadequate number of crew members, (2) a violation of the Stability Letter issued by the Coast Guard, and (3) substance abuse by one of the crew members). The court found that because the owner failed to show that the statutory violations "could not have caused the sinking of the vessel," the owner was prohibited from disclaiming all liability for the sinking of the vessel and that liability for the sinking of the vessel must instead be apportioned according to fault of the respective parties.

As to the apportioned fault of Crosby, the court noted the rule that a salvor will be held liable for affirmative damages if the salvor is guilty of "gross negligence or willful misconduct," or if

the salvor's negligence causes a "distinguishable" or "independent" injury to the salved vessel, meaning an injury other than the one that salvage efforts were undertaken to prevent. The court found that Crosby's actions failed to reach the level of "gross negligence" and that the resultant sinking of the vessel was indistinguishable from the one that Crosby was originally called on to prevent and subsequently rendered judgment in favor of defendant Crosby.

Tug Blarney, LLC v. Ridge Contracting, Inc., 14 F. Supp. 3d 1255, 2014 AMC 1729 (D. Alaska 2014). *Pure salvage claim permitted under parties' charter agreement; existence of marine peril for purposes of pure salvage claim.*

In a complicated and lengthy decision, the U.S. District Court for the District of Alaska held that a charter agreement between a cargo owner and a sunken tug owner did not preclude the sunken tug owner from asserting a pure salvage claim against the cargo owner. In its analysis, the district court noted that the parties' charter agreement stated that the tug owner would be eligible for salvage even if one of its ships performed salvage for the venture.

Turning to the merits of the salvage claim, the district court held that the vessel was in marine peril, for purposes of the pure salvage claim, where the barge carrying cargo was without power, unmanned, and stranded in the Bering Sea 100 miles from shore, and unable to respond to the changing conditions. The district court also held that the salvage was "successful" for purposes of the pure salvage claim, even though the cargo owner asserted that the salvors took the cargo to an unsuitable destination and the cargo was not accessible for several weeks, noting that the cargo owner conceded that the cargo was delivered in essentially the same condition as it was in when loaded onto the barge.

St. Clair Marine Salvage, Inc. v. S/Y WITCH OF ENDOR MC, No. 6137 TZ, No. 14-11942, 2014 WL 4386725 (E.D. Mich. Sept. 5, 2014). *Salvor waived right to compel arbitration where it moved to amend its complaint to add a new substantive claim after arrest of sailboat.*

Plaintiff/salvor filed the complaint in this action in May 2014 following an incident involving the hard grounding of defendant/owner's 1986 39 foot sailboat in the St. Clair River. Salvor alleged that following the defendant's distress call requesting assistance, the salvor dispatched a salvage vessel that arrived to find the sailboat hard aground and offered to salvage her; defendant then signed a salvage agreement containing an arbitration provision. The salvor freed the sailboat and the sailboat was able to maneuver on her own into deeper water. Salvor alleged that the defendant was responsible for approximately $10,000 for salvage and that the salvor was entitled to enforcement of its maritime lien by way of arrest of the vessel along with her engines, tackle, apparel, equipment, and other necessaries, as well as condemnation and sale to satisfy the lien.

The court authorized arrest of the sailboat, and the salvor next moved to amend its complaint and compel arbitration. In opposition, the defendant argued that the salvor had waived its right to demand arbitration by filing the federal court action and filing an amended complaint going to the merits of its claim. The salvor responded that it had not waived its contractual right to arbitrate by proceeding in federal court to obtain an *in rem warrant* of arrest to protect its maritime lien.

The court acknowledged that the salvor was entitled to proceed in federal court to secure arrest of the sailboat without waiving its contractual right to arbitrate the merits; however, by amending its complaint to add a new substantive claim directed to the merits of the matter and causing the defendant "to expend significant resources in this court," the salvor engaged in the judicial process "well beyond what was necessary to secure the Vessel."

Notably, the court found compelling that the plaintiff/salvor presented "no evidence that Plaintiff ever referenced the contractual arbitration provision, or suggested or demanded arbitration in the 13 months it spent negotiating the claim prior to filing the federal court action." Therefore, according to the court, the salvor's actions were "utterly inconsistent with reliance on the contractual right to arbitrate."

Farnsworth v. Towboat Nantucket Sound, Inc., 36 F. Supp. 3d 247, 2014 AMC 2052 (D. Mass. 2014) *aff'd*, 790 F.3d 90 (1st Cir. 2015). *Court approves arbitration panel's rejection of owner's claim of duress.*

This case arose out of a marine salvage contract containing a mandatory arbitration clause signed by the plaintiff/vessel owner after the defendant/salvor pulled the plaintiff's vessel off of a rocky shoal. Plaintiff filed the action requesting a preliminary injunction to prevent the salvor from enforcing the arbitration clause of the marine salvage contract. The district court denied the plaintiff's motion and stayed the case pending the outcome of arbitration. In arbitration, the salvor was awarded $50,000 (7% of the vessel's undisputed value of $689,972.00)[2] and requested the district court to confirm the arbitration award.

The district court held that whether the vessel owner could void the arbitration clause was a question of arbitrability for the court to decide. The court further held that the owner's defensive claim that the purported contract was signed under duress was arbitrable as it fell within the scope of the salvage contract's arbitration clause.

Turning to the merits of the duress claim, the district court held that the arbitration panel acted within its authority when it decided that the vessel owner did not sign the contract under duress. The court stated that although it was sympathetic to the

[2] The arbitration award was reported in the "2014 Recent Developments in Salvage Law," available at www.welchharris.com/attorney-profiles/. See MLA Report, Doc. No. 813, Spring 2014 at 18201.

vessel owner's allegations regarding the presence of defendant's employees on the vessel, the circumstances surrounding their presence, and the vessel owner's contention that the salvor's refusal to leave until the plaintiff signed the salvage contract constituted an improper threat, the vessel owner did not allege that the salvor "actually physically compelled him to sign the salvage contract—for example, by putting a gun to his head or manually forcing him to sign the contract [.]" as is necessary to void a contract under a claim of duress. Accordingly, the district court affirmed the arbitration panel's award to the salvor. The vessel owner subsequently filed an appeal of the District court's order to the United States Court of Appeals for the First Circuit; the parties have filed opening briefs and the appeal is pending.

St. Clair Marine Salvage, Inc. v. M/Y BLUE MARLIN, No. 13-14714, 2014 WL 2480587 (E.D. Mich. June 3, 2014). *Vessel owner's tort claims dismissed; court distinguishes between intentional and unintentional torts when applying maritime economic loss rule.*

This dispute between plaintiff/salvor St. Clair and defendant/third-party plaintiff Lebowski arose following the grounding of Lebowski's vessel in Lake St. Clair, Michigan. After his own unsuccessful attempt to unground the vessel, Lebowski contacted third-party defendant BoatU.S., with whom he had a membership agreement to provide certain towing and ungrounding services; BoatU.S. contacted St. Clair to respond to Lebowski's call.

St. Clair claimed that it found the vessel hard aground, that Lebowski's agreement with BoatU.S. covered only soft groundings, and that therefore, St. Clair and Lebowski entered into a separate salvage agreement for St. Clair's services to unground the vessel. According to Lebowski, the vessel "ran aground on a sand bar" -- a "soft grounding" -- and Lebowski's BoatU.S. contract should therefore have covered the cost of St. Clair's services. Lebowski counterclaimed that St. Clair misrepresented the nature of the grounding to Lebowski and indicated to Lebowski

that he would have to agree to a separate salvage contract in order to have the boat removed from the sandbar.

Lebowski also filed a third-party complaint against BoatU.S. for breach of contract and a number of tort claims, including a Michigan statutory claim for deceptive trade practices, citing BoatU.S.'s purported misrepresentations of material facts regarding coverage for ungroundings and towings and based upon the contention that BoatU.S. knew or should have known that St. Clair (allegedly the agent of BoatU.S.) made misrepresentations as to the nature of the grounding. BoatU.S. moved to dismiss all of the Lebowski's tort-based claims on the grounds that the dispute between BoatU.S. and Lebowski was "a breach of contract case in which tort claims have no place." BoatU.S. further contended that maritime law governed the case in its entirety and that the maritime economic loss doctrine barred Lebowski's tort claims for economic damages.

The court granted dismissal in favor of BoatU.S. on Lebowski's tort claims. In its analysis, the court distinguished between intentional and unintentional torts, finding that the unintentional torts (e.g., negligence) were clearly barred by the maritime economic loss rule pursuant to the Second Circuit's holding in *Am. Petroleum & Transp., Inc. v. City of New York,* 737 F.3d 185, 2014 AMC 17 (2d Cir. 2013) *cert. denied sub nom. Am. Petroleum & Transp., Inc. v. City of New York*, N.Y., 134 S. Ct. 2828, 189 L. Ed. 2d 787 (2014)

As to the intentional tort claims, the court cited the Third Circuit's decision in *Werwinksi v. Ford Motor Co.*, 286 F.3d 661, 676 (3d Cir. 2002), wherein the Third Circuit described "an emerging trend ... 'recogniz[ing] a limited exception to the economic loss doctrine for fraud claims, but only where the claims at issue arise independent[ly] of the underlying contract.'" The court found, however, that because Lebowski's fraud and breach of contract claims were "virtually indistinguishable" the appropriate relief for the "purported misrepresentations—whether couched as intentional or innocent misrepresentations—rests in contract law, not that of tort," and dismissed the tort claims against BoatU.S.

Even if the maritime economic loss rule did not bar the plaintiff's tort claims, the court was "confounded" by the allegations lodged against BoatU.S., noting that "[t]he Towing Service Agreement [between BoatU.S. and plaintiff/salvor] contains rather clear language delineating the scope of its coverage and there is no indication in the [owner's claims against BoatU.S. that plaintiff/salvor] is properly characterized as BoatU.S.'s agent such that holding BoatU.S. accountable for St. Clair's alleged misconduct is proper." The court went on to add that nothing in the owner's pleadings supported its claims that BoatU.S. falsely represented the nature of the grounding, thus rejecting the claim that BoatU.S. violated the Michigan Consumer Protection Act.

S. Recycling, LLC v. McAllister Towing of Virginia, Inc., No. CIV.A. 12-2197, 2014 WL 2440571 (E.D. La. May 29, 2014). *No salvage lien against vessel other than that salved.*

This matter arose out of a contract for towing services between McAllister and Southern Recycling for McAllister to tow Southern Recycling's drydock, the SCOTIA DOCK II from Nova Scotia to Texas. Following receipt of the SCOTIA DOCK II in Texas, Southern Recycling refused to pay McAllister on the grounds of negligence, breach of warranty, and breach of contract by McAllister.

Before the court was McAllister's motion for partial summary judgment seeking dismissal of (1) Southern Recycling's claim for a salvage lien against the MICHAEL J. MCALLISTER, the vessel used by McAllister to perform the tow services, (2) Southern Recycling's claim for breach of contract against McAllister for failing to name it as an additional insured, as required under the towing contract, and (3) Southern Recycling's claim for lost revenue and/or profits for McAllister's subsequent arrest of the SCOTIA DOCK II following Southern Recycling's refusal to pay the $820,039.06 allegedly due under the towing contract.

As to the claim for a salvage lien against the MICHAEL J. MCALLISTER, McAllister argued that a salvage lien cannot be

asserted against a vessel other than the one saved and further argued that under maritime law "[t]here is no legal basis for claiming salvage based upon agreeing to pay others ... to search for a lost asset when those parties fail to save the asset from a marine peril."

Southern Recycling did not contest McAllister's summary judgment motion on the salvage lien or the claim for breach of contract for failing to name it as an additional insured. Noting the same, the court granted McAllister's motion for summary judgment on both counts, finding the record "devoid of any evidence that the MICHAEL J. McALLISTER was salvaged by Southern Recycling or that McAllister did not list Southern Recycling as an additional [insured]." The court ordered further briefing on Southern Recycling's claim for lost revenue and profits and denied McAllister's motion for summary judgment on the claim against Southern Recycling for refusing to pay the amount allegedly due under the contract, finding that material facts remained in dispute.

Recovery Ltd. P'ship v. Wrecked & Abandoned Vessel S.S. Cent. Am., 2015 AMC 322, 2014 WL 3925495, (E.D. Va. Aug. 8, 2014) *aff'd sub nom*. *Davidson v. Columbus-Am. Discovery Grp.,* 594 F. App'x 148 (4th Cir. 2015) and *aff'd sub nom. Recovery Ltd. P'ship v. Wrecked & Abandoned Vessel S.S. Cent. Am*, 790 F.3d 522 (4th Cir. 2015). *Information provided by attorney to salvor during course of legal representation of salvor cannot be the basis for a claim by the attorney to the salvaged vessel.*

This matter involved a salvage claim made by the salvor's former attorney to salvage rights to the wreck of the S.S. CENTRAL AMERICA. The attorney argued that he was entitled to a salvage award because, during the course of his representation of the salvor, he provided information to the salvor that was "utilized in, and useful to, the salvage of the S.S. CENTRAL AMERICA." The attorney claimed that under Ohio law, he had an "attorney's retaining lien" on the information provided because he had not been paid attorney's fees by the salvor and that the information provided to the salvor constituted "service voluntarily

rendered when not required as an existing duty or from special contract," making him entitled to a salvage award.

The court rejected the attorney's salvage claim and granted dismissal in favor of the salvor. The court stated that even if the attorney had an attorney's retainer lien under Ohio law, he "could not have used the information to salvage the vessel himself." Therefore, according to the court, the information provided by the attorney to the salvor could not be used as the basis for a claim to the salvaged vessel. The court noted that "at best" the attorney may have an "*in personam* claim for attorney's fees or document storage fees" against the salvor, but "not an *in rem* action against the Defendant vessel."

R/V BEACON, LLC v. Underwater Archeology & Exploration Corp., No. 14-CIV-22131, 2014 WL 4930645, (S.D. Fla. Oct. 1, 2014). *No piercing of the corporate veil where alleged fraudulent conduct was "unrelated" to breach of agreement to charter vessel for use in treasure hunting enterprise.*

This dispute arose out of a contractual relationship between plaintiff R/V Beacon, LLC, owner of the R/V BEACON, and defendant Underwater Archeology & Exploration Corp. ("Underwater), whereby Underwater agreed to charter the vessel for use in a treasure hunting enterprise for a period of three years commencing in March 2011. Pursuant to the parties' agreement, Underwater would pay Beacon 20% of the value of all "nongovernmental treasure recovered." Although the agreement required Underwater to "actively utilize the vessel on as many days as possible," at the time of the court's decision, the vessel had not left port since December 2011, purportedly due to mechanical problems.

Beacon sent money to Underwater on several occasions for repair of the vessel as part of an effort to minimize delay of the treasure hunting enterprise. Beacon alleged that, contrary to the assertions made by Underwater's principals ("Chatterton"), Underwater failed to use the money for repair of the vessel and it became clear to Beacon that Underwater had no intentions of

resuming operations and had effectively abandoned the vessel in the Dominican Republic. Beacon therefore instituted claims for breach of contract against Underwater and Chatterton and fraud claims against Chatterton.

Before the court was Chatterton's motion to dismiss Beacon's breach of contract and fraud claims. Chatterton argued that the breach of contract claim should be dismissed because he was not a party to the agreement between Beacon and Underwater. The court agreed noting that it is well-established that a non-party cannot be bound to an agreement and found that the alleged fraudulent conduct by Chatterton was "unrelated" to Beacon's allegations of specific provisions of the agreement and that therefore the allegations were insufficient to support finding Chatterton liable for Underwater's breach of contract via a "piercing of the veil" theory.

The court similarly dismissed Beacon's fraud claim against Chatterton, holding that the claim was barred by the maritime economic loss rule and was not pled with particularity as required by Federal Rule of Civil Procedure 9(b).

Minford v. Berks Cnty. (Inc.)/Cnty. of Berks (Inc.), No. 14-MC-224, 2014 WL 4858112 (E.D. Pa. Sept. 29, 2014). *No federal subject matter jurisdiction under* 28 U.S.C. § 1333 *or the Public Vessels Act for pro se plaintiff's petition for declaratory judgment regarding ownership of plaintiff's name.*

Pro se plaintiff filed a petition for declaratory judgment seeking that the court declare that ownership to the proprietary rights in his name belonged to him and for the court to order the county government to cease debt collection efforts. Plaintiff asserted a number of bases for federal subject matter jurisdiction including federal jurisdiction under the admiralty statute, 28 U.S.C. § 1333 and the Public Vessels Act, 46 U.S.C. §§ 31101–31113.

Rejecting plaintiff's alleged bases for the federal subject matter jurisdiction under 28 U.S.C. § 1333, the court found that the plaintiff did not include any allegations that would implicate the

section by failing to "identify any incident with a legitimate, potential impact on maritime commerce and bearing a substantial relationship to traditional maritime activity." The court further found that the plaintiff failed to "allege that any incident occurred on navigable waters and it would appear that he cannot do so considering he is apparently attempting to stop Berks County and its agents from collecting money from him."

Turning to plaintiff's basis for federal subject matter jurisdiction pursuant to the Public Vessels Act, the court similarly found that the plaintiff failed to include any allegation that invoked admiralty jurisdiction and that therefore the Public Vessels Act was inapplicable.

COMMITTEE ON YOUNG LAWYERS

Chair: Norman Stockman
Vice Chair: Blythe Daly
Secretary: Jennifer Porter

NEWSLETTER

Vol. 2015 - 1 April 2015

Message from the Chair

It's once again time for the Spring MLA meeting in New York City. This year's meeting will be held April 28-May 1. I hope everyone who can has made plans to attend. In addition to the substantive committee meetings, the annual meeting, and the Friday night dinner, we will have our usual committee meeting Thursday afternoon and our highly-anticipated social event Thursday night. I look forward to seeing you there.

I would like to extend a special thanks to all of you who have volunteered for committee work since our last meeting. You truly are the lifeblood of this committee.

This will be my last meeting as chair of the Young Lawyers Committee, and it will also be my last as a member of the committee. It has been an honor to serve you, and I have enjoyed getting to know so many of you personally and professionally.

The incoming officers of the Young Lawyers Committee are Blythe Daly (chair), Jennifer Porter (vice chair), and Imran Shaukat (secretary). The Young Lawyers Committee is in very capable hands, and I look forward to seeing the committee thrive and grow under their leadership.

See you in New York!

Norman Stockman

YLC SPRING MEETING IN NYC

The Young Lawyers Committee will meet at our usual time in Midtown.

Thursday, April 30, 2014
2:00-4:00 p.m.
Holland & Knight
31 West 52nd Street
New York, NY 10019
Tel: 212-513-3200

In addition to our usual business meeting, this year's spring meeting will feature a panel presentation discussing the investigation of marine casualties. The panel will be moderated by Leanne O'Loughlin (Claims Executive at Charles Taylor P&I Management (Americas), Inc.). The panel members are CDR Jason Krajewski (Chief, Prevention Law Division, Office of Maritime and International Law, United States Coast Guard), Brian McCarthy (Law Office of Brian Thomas McCarthy, PLLC, Melville, NY), and Ryan Gilsenan (Womble Carlyle Sandridge & Rice, LLP, Charleston). This is a top-notch panel, and we can expect an engaging and informative presentation.

If you plan to attend the meeting please e-mail YLC Vice Chair Blythe Daly at Blythe.Daly@hklaw.com by Tuesday, April 28, 2014, so she can provide your name to security at Holland & Knight, who will require that all attendees present photo identification at the desk in the lobby.

YLC SOCIAL EVENT

As we do every year, the YLC will have its annual "Dutch-treat" social event during MLA week in New York. After dinner, we plan to meet at a nearby bar.

Many thanks to Pamela Schultz, Lindsay Sakal and Blythe Daly for planning and coordinating what promises to be a great event.

COMMITTEE LIAISON PROGRAM

The Committee Liaison Program assigns one YLC member to each of the MLA's standing committees to serve as a liaison. The goal of this program is to increase the communication between the standing committees and the YLC, which we hope will lead to opportunities for our members in those committees as well as an increase in the utilization of the YLC for committee projects. Additionally, liaisons provide a brief status report at each YLC Spring meeting pertaining to the work of each standing committee.

A chart identifying the appointed liaisons is posted on the YLC page of the MLA website for everyone's reference. Let this serve as a reminder to our liaisons that the YLC is ready to work. Spread the word to your respective committees and please call on us when we can be of service.

If you are interested in volunteering to serve as a YLC liaison, please email the Secretary of the YLC, Jennifer Porter, at Jennifer.Porter@kyl.com. If you are currently a YLC liaison and have a project that needs help, please e-mail me at nstockman@handarendall.com.

RECENT PROJECTS

The YLC recently completed its work on the MLA Amicus Brief Project. The YLC assisted in compiling for the MLA website all of the *amicus curiae* briefs filed by the MLA over the years. Ben Segarra headed up this effort on behalf of the YLC, with the assistance of Marissa Henderson, Imran Shaukat, and Eric Thiel. I want to thank each of these YLC members for their hard work and dedication to this important project of the MLA.

At the request of Katharine Newman, Chair of the Marine Ecology and Maritime Criminal Law Committee, the YLC was

asked to assist in preparing summaries to include in their spring newsletter *Bilge & Barratry*. Many thanks to the following individuals who assisted in preparing the latest edition of the newsletter: Jude Smith, Michael Hedayt, Danielle Gauer, Christine Walker, Leanne O'Loughlin, Becky Hamra, Patricia O'Neill, Stefanos Roulakis, and Claire Garza.

The following YLC members recently assisted in the preparation of the MLA Committee on Arbitration and ADR's newsletter: Lindsay Sakal, Imran Shaukat, Justin Mitchell, Kristi Hunter, Matthew Waters, Christie Walker, and Scott Gunst.

CALL FOR PROJECTS

To the Standing Committees: Please let us know how we can help with your projects. If you have projects in need of research or have writing opportunities that are well-suited for younger lawyers, please keep our committee in mind. Additionally, we can usually find a YLC member to assist with staffing your meeting (handling CLE paperwork, sign-in sheets, handouts, and assisting with presentation set up, etc.), if and when the need arises.

PUBLICATION OPPORTUNITIES

Do you have any war stories from your practice that you wish to share with others? Do you think you have a sense of humor? Consider submitting your written piece for consideration to Benedict's Quarterly Maritime Bulletin. You may write to Managing Editor Joshua S. Force at jforce@shergarner.com.

PROCTOR STATUS

Any Associate member of the MLA who has been a member of the MLA for four years or more is eligible to apply for Proctor status with the MLA. The advantages of Proctor status are numerous, not the least of which is that a member cannot serve as a committee chair, vice-chair or director unless s/he is a Proctor or Non-Lawyer member. Proctor applications may be obtained from

the MLA Membership Secretary or may be downloaded from the MLA website (www.mlaus.org).

YLC MEMBERSHIP LIST ON WEBSITE

If you are not already signed up as a member of the YLC on the MLA website, please make sure you do so. We use the membership list on the website as a vehicle for communicating with our members. In this regard, we have reason to believe that some of our young lawyers are not registered as YLC members and thus do not receive our communications. If you know anyone who might fall into this category, please pass this along and encourage him/her formally to join via the website so he/she can stay in the loop. Conversely, if you are no longer a YLC member and are tired of our shenanigans, feel free to unsubscribe.

TABLE OF CASES

Page(s)