DOCUMENT NO. 833
Spring 2018

THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES

THE MLA REPORT

Editors:

CHESTER D. HOOPER
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EDITORIAL COMMENT

This edition of the MLA Report contains newsletters of the Association's Committees that were issued in connection with the cancelled Fall Meeting in California in October 2017 and the Spring Meeting in New York in May 2018.

In accordance with our practice of honoring members who have materially advanced the work of the Association and the development of maritime law, we have included a remembrance of Paul Edelman of New York.

We thank the following members of the Committee on Young Lawyers for their proof-reading and cite checking assistance in the preparation of this issue: Corey R. Greenwald of Clyde & Co. US LLP in New York, J. Ben Segarra of Maynard, Cooper & Gale PC in Mobile, Patrick J.R. Ward of Hand Arendall Harrison Sale LLC in Mobile 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 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 views of The Maritime Law Association of the United States.

Chester D. Hooper
David A. Nourse
Editors

IN MEMORIAM

Paul S. Edelman

Paul Edelman, leading maritime and aviation disaster lawyer who worked for over sixty years with the firm of Kreindler & Kreindler in New York, died on June 26, 2018 at the age of 92. He was survived by his two sons, Jeff and Paul. His wife Roe predeceased him.

Paul, a World War II veteran, was a wonderful example of America's "Greatest Generation." In 1943, the Army sent Paul to Harvard College but within a year he was assigned overseas. On his nineteen birthday, January 2, 1945, Paul fought in the Battle of the Bulge, installing communication cables as part of the Signal Corps. He later recounted that he was "happy I didn't have to kill anybody - and that no one killed me."

Paul returned to Harvard after the war. A little known fact is that Paul earned a spot on Harvard's fencing team, where he undoubtedly honed tactical skills that he would later utilize as a litigator. Paul graduated from Harvard in 1947 (at Paul's commencement, George Marshall announced his Marshall Plan). Paul then attended Harvard Law School, where he was a classmate and close friend of Lee Kreindler. Lee set Paul up on his first date with the remarkable woman he eventually married, Rosemary "Roe" Jacobs, and Lee and Paul were best man at each other's weddings. That was a wonderful prelude to Paul's decision in 1953 to become one of the first lawyers to join the firm that Lee had just founded with his father Harry, Kreindler & Kreindler.

Paul enjoyed a long, happy career with the Kreindler firm and became a trailblazer in the field of maritime law. He was a remarkably skilled advocate for the rights of crewmembers, passengers and their families. His trademark litigation style was to charm clients, juries and judges, disarm his adversaries with kindness, and impress everyone with his mastery of his cases and the law.

Paul had the good fortune to begin his maritime law career when the shipping industry was in its heyday. Paul's first big case involved the 1956 sinking of the ANDREA DOREA off Nantucket. Over the next five decades, he worked on a long series

of notable maritime and aviation disasters. He successfully navigated and won countless trials and appeals for his clients.

Paul was renowned for his encyclopedic knowledge of cases and the law, which he gladly shared with his fellow counsel on both sides of the bar. Paul was an avid reader. His office was piled high with stacks of legal books and articles. He scoured every new volume of the Federal Supplement and Reporter for the latest important cases. And Paul was a beloved mentor to several generations of lawyers at the Kreindler firm, other plaintiffs' firms and defense firms around the country.

Paul authored the 2 volume book MARITIME INJURY AND DEATH and was co-author of the treatise MARINE LAWS: NAVIGATION AND SAFETY, which had four editions. He wrote the admiralty column in the NEW YORK LAW JOURNAL every month for over 20 years, was an Editor for the MARITIME LAW REPORTER and authored many articles. He chaired and served on numerous New York and national bar committees.

Paul joined the Maritime Law Association in 1955 and served on various MLA committees. Paul was also a long time member of the American Association for Justice and in 2015 was the first recipient of an award named in his honor: the Paul S. Edelman Maritime Law Lifetime Service Award.

Paul was cherished in his local community of Hastings-on-Hudson, NY, serving on the local Planning Board and leading efforts to preserve open space in the town. Most of all Paul was loved for the humor, kindness and civility that he shared with everyone around him. He was a true gentleman and leader by his wonderful example. He will be sorely missed.

By: Steven R. Pounian

COMMITTEE ON ARBITRATION AND ADR

NEWSLETTER

Spring 2018

EDITOR'S COMMENT:

We are pleased to offer with this newsletter a review of notable arbitration cases that we hope will be of value to Committee members in particular and to the Association's membership in general. In addition to recognizing the efforts of the Committee's leadership, including Vice-Chair Chris Nolan and Secretary Lindsay Sakal, the Committee would like to thank Daniela Oliveira and Imran Shaukat, the Committee's Young Lawyers Liaisons, for their invaluable contribution to this newsletter.

Peter Skoufalos

SOCIETY OF MARITIME ARBITRATORS AWARD OF NOTE

In the matter of the Arbitration between Commodities & Minerals Enterprise Ltd., v. CVG Ferrominera Orinoco, C.A., SMA 4296, 2017 WL 385948 (Arb. at N.Y., Jan. 5, 2017):

In *Commodities & Minerals Enterprise Ltd.*, a tribunal of the Society of Maritime Arbitrators Inc. ("SMA") ordered a partial award of pre-judgment security in the amount of $62,730,279.98 for claims arising from a series of iron ore contracts between Commodities & Minerals Enterprise Ltd ("CME") and CVG Ferrominera Orinoco CA ("FMO"). The award is nearly $50 million more than the previous largest award pre-judgment security issued by an SMA tribunal.

The underlying dispute concerns CME's claim against FMO for damages in the amount of approximately $212,262,096.46, plus interest and attorney's fees, pursuant to a Transfer System

Management Contract ("TSMC"). The TSMC contained an arbitration clause, invoking SMA arbitration, which authorized the panel to "order any and all preventative measures as it deems fit. . . ." Moreover, SMA Section 30 states that, "[t]he Panel, in its award, shall grant any remedy or relief which it deems just and equitable."

Relying on the authority implicit in SMA Section 30 and numerous court and SMA decisions applying the general maritime law of the United States, the tribunal reasoned that it had authority to grant an award of security, "when there has been a strong showing that a claim is likely to succeed on the merits and enforcement of an eventual judgment will be difficult." *Commodities & Minerals Enterprise Ltd.*, SMA 4296 at ¶44, 2017 WL 385948, at *1 (Arb. at N.Y., Jan. 5. 2017). As a governmental entity in a challenging home venue, the potential enforcement issue loomed large. And previous conduct of not meeting the establishment of escrow funds raised concerns for the panel. In addition, the panel noted that the Foreign Sovereign Immunities Act ("FSIA") "does not apply to arbitration and does not bar an arbitration panel from ordering an agency of a foreign sovereign to post pre-judgment security." *Id.* at ¶54, 2017 WL 385948, at *1. The latter concerned a defense raised by FMO.

FIRST CIRCUIT

a. Looking Through the Complaint for Jurisdictional Purposes

Ortiz-Espinosa v. BBVA Securities of Puerto Rico, Inc., 852 F.3d 36 (1st Cir. 2017):

In *Ortiz-Espinosa v. BBVA Securities of Puerto Rico*, the district court held that the "look-through" approach to federal question jurisdiction applies to FAA §§ 9-11 petitions to confirm, vacate, modify, or correct arbitration awards.

The action arose from disputes between a group of investors and their investment brokers, after the investors' accounts suffered large losses. The brokerage agreement provided for arbitration of disputes before the Federal Industry Regulatory Authority

("FINRA"). The investors asserted several claims under state and federal law including violations of the Securities Act and the Securities Exchange Commission. Those claims were ultimately denied and the investors sought relief from the Puerto Rico Court of First Instance requesting that the court vacate or modify the arbitration award. In that petition, rather than invoke the Federal Arbitration Act (FAA), claimants sought relief under the Puerto Rico Arbitration Act ("PRAA"). The defendants removed the case to federal court in the United States District Court for the District of Puerto Rico. "Defendants based their claims of federal jurisdiction on a look-through approach, asserting that the underlying claims were based on federal securities laws, and that the district court would have had jurisdiction if the claims had been filed in district court." *BBVA Securities of Puerto Rico* at 41.

Recognizing the Supreme Court's decision in *Vaden v. Discovery Bank*, 556 U.S. 49, 62 (2009), holding that a "court may 'look through' a §4 [compel] petition to determine whether it is predicated on an action that 'arises under' federal law," the First Circuit reasoned that "Congress cannot have intended jurisdiction over §§ 9-11 petitions only to exist in diversity or perhaps in admiralty." *Id.* at 46. This practical approach to jurisdiction provides a unitary jurisdictional approach, allowing for federal court jurisdiction when a petitioner could have filed in federal court under the FAA but doesn't. In support of its holding, the court further noted that,

> [a]llowing a federal court to compel arbitration in a federal question case but then later denying a federal forum for confirming, modifying, or vacating the award would lead to strange consequences [and] . . . create potential inconsistency between the federal pre-award decision and the later state court decision involving the question of whether the arbitrators exceeded their powers by deciding issues that are not properly subject to arbitration.

Id. at 46-47.

Editor's comment:

While the FAA automatically applies to maritime contracts, non-maritime or mixed contracts arising under federal law may also be removed to federal court for relief under FAA §§ 9-11. There is a circuit split on the interpretation of this issue so it may well be resolved by the Supreme Court.

b. Court, Not Arbitrator, Decides FAA §1 Exemptions

Oliveira v. New Prime, Inc., 857 F.3d 7 (1st Cir. 2017), *cert. granted*, 138 S. Ct. 1164, 200 L. Ed. 2d 313 (2018)

In our Fall 2017 issue (MLA Report, MLA Doc. 827, at 19609), we addressed the First Circuit decision in *Oliveira v. New Prime, Inc*., holding that the applicability of FAA §1 exemptions (seamen, railroad employees, other classes of workers engaged in foreign or interstate commerce) was a question of arbitrability for district courts to decide (rather than arbitrators) and that transportation-worker agreements that establish or purport to establish independent-contractor relationships are contracts of employment within the meaning of the §1 exemption. There is a circuit split on this issue. *Certiorari* was granted on Feb. 26, 2018.

D.C. CIRCUIT

a. "Complete Arbitration Rule" Applied to Deny Vacatur of Interim Award

Berkowitz v. Republic of Costa Rica, 288 F. Supp. 3d 166 (D.D.C. 2018), *dismissed*, No. 18-7026, 2018 WL 2331988 (D.C. Cir. Apr. 24, 2018)

In *Berkowitz*, a father and his two sons ("Petitioners") sought *vacatur* or annulment of an interim award issued by the International Centre for Settlement of Investment Disputes (the "Tribunal") in favor of the Republic of Costa Rica ("Costa Rica"). In the arbitration, Petitioners alleged that they were deprived of their residential real estate property investments, in violation of the

Dominican Republic–Central America Free Trade Agreement ("CAFTA"), when Costa Rica allegedly expropriated their beachside properties. Pursuant to Section 10 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10, Petitioners filed a petition to vacate the interim award in the United States District Court for the District of Columbia, on the ground that the Tribunal exceeded its authority in issuing the interim award. In denying the petition, the court held that because substantive tasks remained unresolved after the Tribunal's issuance of the interim award, the "complete arbitration rule" precluded the petitioners from appealing the interim award in the district court.

By way of factual background, in 1991, the Costa Rica Ministry of Natural Resources, Energy and Mines issued an executive decree (the "Decree") in which it declared the Costa Rican government's attempt to establish a national park to protect leatherback turtles that were being affected by development near the country's beaches. The Decree established a marine park that extended 125 meters inland from the high tide mark. *Berkowitz*, 288 F. Supp. 3d at 168. In 1995, the Costa Rican Congress passed Law No. 7524 (the "Park Law"), which "authorized the state to acquire, either through direct purchase or expropriation, any private properties or portions thereof that are located within the boundaries of the Park." *Id.* However, the Park Law "established the eastern boundary of the Park at 125 meters *west* of the mean high tide mark, rather than 125 meters *east* of the mean high tide mark. . . ." *Id.* (emphasis in original). Consequently, the Park Law essentially created an offshore marine park, thereby conflicting with the intention of the Decree that contemplated an inland park. *Id.*

In 2003, Brett Berkowitz began the process of acquiring land along the west coast of Costa Rica. Prior to purchasing the lands, Berkowitz met with the Minister of the Environment and Energy, and allegedly received assurances that the Costa Rican government "did not intend to expropriate the land in question, they did not have the funds for it, and the Government and Ministry did not intend to prevent development of the private property bordering the public zone. . . ." *Id.* In 2005, however, the Costa Rican government adopted Resolution 2238-2005-SETENA, which set the Park's

eastern boundary 125 meters inland of the mean high tide mark. *Id.* at 169. Subsequently, Costa Rica began initiating judicial proceedings to expropriate lots within the Park, including lots owned by Petitioners.

At the conclusion of a five-day hearing, the Tribunal issued its interim award on "jurisdiction, finding that it: (1) lacked jurisdiction to hear claims with regard to one of petitioners' properties; (2) had jurisdiction to hear claims with respect to two of petitioners' properties; (3) and needed more briefing on whether it had jurisdiction to hear claims regarding petitioners' two remaining properties." *Id.* at 167. After issuing the interim award, the Tribunal "invited the parties to propose corrections within 30 days, as provided for in Article 38 of the United Nations Commission on International Trade Law Arbitration Rules ("the UNCITRAL Arbitration Rules"), G.A. Res. 68/109, art. 38, U.N. Doc. A/RES/68/109 (Dec. 16, 2013)." *Id.* at 170. Rather than proposing corrections, Petitioners filed their petition in the United States District Court for the District of Columbia, seeking to vacate or set aside the interim award.

Subsequent to the petition, the Tribunal notified the parties that although it issued an interim decision on the grounds of jurisdiction, the Tribunal remained "seised of the dispute between the Parties," that the decision of the Tribunal "was expressly designated to be an 'interim' award, not a 'final' award," and that the interim award "contemplated further proceedings involving all Claimants, including both the [Petitioners] and Respondent." *Id.* at 175. Accordingly, the Tribunal notified the parties that they "remained subject to the arbitral jurisdiction of the Tribunal even after the Interim Award issued." *Id.*

The court concluded that the interim award expressly contemplated "consultation with the Parties" regarding "further proceedings" to allow the Tribunal to decide remaining issues. *Id.* at 176. Applying the "complete arbitration rule,"[1] the court

[1] "Under the 'complete arbitration rule,' for an arbitration to be final, 'the arbitrators must have decided not only the issue of liability of a party on the claim,

concluded that the Tribunal had substantive tasks remaining regarding the dispute between the parties, and therefore the award was not an appealable final judgment. *Id.* Accordingly, the court denied the petition to vacate the interim arbitration award.

SECOND CIRCUIT

a. Materiality Key to Challenge of Award on Ground of Fraud

Odeon Capital Grp. LLC v. Ackerman, 864 F.3d 191 (2d Cir. 2017):

Section 10(a)(1) of the Federal Arbitration Act permits *vacatur* of an arbitration award "where the award was procured by corruption, fraud, or undue means." In affirming the district court's confirmation of an award and denial of a petition to vacate, the Second Circuit discussed the standard for *vacatur* when based on the ground of fraud. Noting that a challenge based on fraud must plead that "the fraud materially related to an issue in the arbitration," the court devoted the balance of its decision to the appropriate standard for evaluating materiality. *Ackerman,* 864 F.3d at 196.

Here, Ackerman, a bond trader, prevailed on various claims arising out of his employment with Odeon. After the tribunal, in a non-reasoned award, granted Ackerman's claim for unpaid wages, Odeon moved to vacate the award on various grounds and Ackerman cross-moved to confirm. Odeon then moved to amend its petition to add a challenge based on fraud, arguing that Ackerman

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but also the issue of damages.' *See United Transp. Union v. Trailways, Inc.*, No. CIV. A. 86-1502, 1987 WL 8730, at *1 (D.D.C. Mar. 12, 1987). The subjective belief held by arbitrators about the finality of an award is a key factor in determining whether the award is final. *See Am. Postal Workers Union v. U.S. Postal Serv.*, 422 F. Supp. 2d 240, 246 (D.D.C. 2006) (noting that an award will be considered final when it is "'intended by the arbitrator to be his complete determination of every issue submitted to him'" (quoting *McKinney Restoration, Co. v. Illinois Dist. Council No. 1 of Int'l Union of Bricklayers & Allied Craftworkers*, 392 F.3d 867 (7th Cir. 2004))." *Berkowitz*, 288 F. Supp. 3d at 174.

perjured himself before the tribunal. The district court denied the motion to amend, holding that Odeon could not demonstrate that the alleged perjury was material to the award. The Second Circuit agreed that, without a reasoned award, "there is simply no basis in the record to find that Ackerman's testimony … played any role in the arbitrators' award on his unpaid wages claim." *Id.* The mere fact that Ackerman was the sole witness on the wage claim was not a sufficient basis to find that any "untruth" could serve as a basis for *vacatur*, noting that Section 10(a)(1) requires that the award must have been "procured by … fraud."

The court, however, disagreed with the district court's denial of Ackerman's request for attorney's fees. While noting the "prevailing American rule," the Second Circuit held that Ackerman's request for attorney's fees nevertheless had a statutory basis in the New York Labor Law (Section 1981 (1-a)). Thus, the district court abused its discretion in relying solely on its equitable power to deny an award of attorney's fees.

b. Subject Matter Jurisdiction under the New York Convention

Albaniabeg Ambient Sh.p.k. v. Enel S.p.A., 169 F. Supp. 3d 523 (S.D.N.Y. 2016):

This case examines whether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201 *et seq.* (the "Convention"), confers subject matter jurisdiction on a federal court to enforce a foreign judgment pursuant to Article 53 of the New York CP.L.R.

Procedurally, the judgment enforcement action was commenced in N.Y. state court pursuant to a motion for summary judgment in lieu of a complaint. The defendant then removed the state court action to federal court, citing Section 205 as a basis for federal subject matter jurisdiction. Whereas Section 205 expressly recognizes a party's right to remove an action from a state court to a federal court where the underlying agreement or award falls under the Convention, it does not by itself confer subject matter

jurisdiction. Instead, a party seeking recognition or enforcement of an award or agreement falling within the Convention must look to Section 203.

However, Section 203 has been interpreted by the Second Circuit narrowly, "limiting it to actions to compel, confirm, or vacate and arbitral award" and "several other measures … in aid of an arbitration." *Enel S.p.A.*, 169 F. Supp. 3d at 528-29. Here, the plaintiff's action did not seek to confirm or vacate an arbitration but, instead, sought enforcement of an Albanian court judgment. The court concluded that "[n]either the Second Circuit nor any court in this District has found Section 203 subject matter jurisdiction in such circumstances." *Id.* at 529. Moreover, the fact that the defendant raised certain defenses related to arbitration—*e.g.* that the judgment was obtained in violation of a binding arbitration agreement—was not sufficient to invoke federal subject matter jurisdiction under Section 203 and the Convention. Thus, an action to enforce a foreign judgment is not converted to an action or proceeding under the Convention simply because the party resisting enforcement raises a prior arbitration or agreement to arbitrate as a defense in the enforcement action. Accordingly, the action was remanded to state court. The court also denied plaintiff's request for attorneys' fees and costs, finding that defendant's removal of the action was not "objectively unreasonable" in light of the paucity of published decisions concerning Section 205 removal and subject matter jurisdiction.

c. Court's Role in Unopposed Petition to Confirm

Maersk Line Ltd. v. Nat'l Air Cargo Grp., Inc., 2017 AMC 2420, 2017 WL 4444941 (S.D.N.Y. 2017):

Where one party fails to oppose a petition to confirm, the court will review the petition to confirm as one for summary judgment based on the petitioner's submission. This does not amount to a "rubber-stamp" of the award, as demonstrated in this case where the court modified the panel's award of 9% post-judgment interest, finding that 28 U.S.C. § 1961, which links post-judgment interest to the rate of Treasury bills, controlled.

Underlying the dispute was a contract to transport goods from the U.S. to foreign destinations. At the conclusion of the contract, Maersk remained unpaid for amounts that were largely undisputed. After arbitration was commenced, Maersk filed a dispositive motion at the request of the panel and was awarded the principal amount of its claim, plus pre-award interest, arbitrator compensation and expenses and post-judgment award. Maersk then moved the court for summary judgment and confirmation of the award. Noting that it must grant the motion where there is no genuine dispute as to material facts, the court largely confirmed the award, but concluded that the selection of state law did not supplant the statutorily defined post-judgment interest rate applicable to federal judgments through 28 U.S.C. § 1961. While parties may depart from § 1961's interest rate, the New York State choice of law did not amount to the "clear and unambiguous language" that is required to replace the federal statute.

d. No Stay of Action to Appeal a Finding of Waiver of Arbitration

LifeTree Trading Pte., Ltd. v. Washakie Renewable Energy, LLC, No. 14-CV-9075 (JPO), 2017 WL 4862792 (S.D.N.Y. Oct. 27, 2017):

Plaintiff commenced an action against the defendant in 2014 alleging breach of a $90 million biofuel contract. A year later the parties moved for partial summary judgment, which the court granted with respect to dismissal of certain claims against the defendant and denied the plaintiff's motion on liability. As the court's decision notes, two years of discovery followed. Thereafter, the defendant's entire defense was revealed to be a "pure fabrication" resulting in a finding of liability against the defendant, along with the imposition of sanctions. However, the court concluded that there was a genuine dispute of material fact concerning damages, denied summary judgment on damages and set a trial date. On the day prior to the final status conference before trial, defendant moved to compel arbitration. The court denied the motion on grounds of waiver and then considered whether a stay of

the action was warranted pending an interlocutory appeal of the court's refusal to stay the action in favor of arbitration.

In refusing to stay the action pending the appeal, the court analyzed the four factors guiding the court's determination, focusing on whether defendant has made a strong showing that it is likely to succeed on the merits. Here, defendant was unlikely to overcome the finding of waiver where (i) it had participated in the litigation for three years; (ii) the litigation was substantially advanced, with trial of the action imminent; and (iii) defendant had engaged in prejudicial (and sanctionable) conduct. Further, defendant had twice submitted to the court's jurisdiction by admitting in its answer that the parties' contract was subject to the court's jurisdiction and by demanding a jury trial. Under these circumstances, a stay of the court action pending an appeal was inappropriate and the defendant's motion was denied.

e. Right of Intervenors to Oppose Award Confirmation

Eddystone Rail Co., LLC v. Jamex Transfer Servs., LLC, 289 F. Supp. 3d 582 (S.D.N.Y. 2018):

To what extent do non-parties to an underlying arbitration have standing to intervene in a federal action to challenge the award? Finding that the non-parties had failed to demonstrate a substantial interest in the arbitration, the court concluded that the proposed intervenors could not overcome the "general rule" embodied in the FAA that a court may vacate an arbitration award only "upon the application of any party to the arbitration." (U.S.C. § 10(a)). In doing so, the court distinguished this case from its earlier holding in *Ass'n of Contracting Plumbers of City of New York, Inc. v. Local Union No. 2 United Ass'n of Journeymen & Apprentices of Plumbing & Pipefitting Indus. of U.S. & Canada,* 841 F.2d 461 (2d Cir. 1988)), where the court found that the proposed intervenors had a "substantial interest" in the underlying arbitrations and could, therefore, intervene as of right under Fed. R. Civ. P. 24(a). The court noted that its holding in *Contracting Plumbers* was an "exception" that had "limited application" where, for example, foreclosing the

non-party from challenging an award would have jeopardized the non-party's "very existence."

In contrast, the proposed intervenors in *Eddystone* could not show such a substantial interest because their principal goal in challenging the award was to avoid potential alter ego liability in a subsequent enforcement action. The court found that such a "defensive strategy" was "somewhat removed from the type of interest" recognized in *Contracting Plumbers*. Separately, the court also found that the proposed intervenors in *Eddystone* lacked standing as non-parties to the arbitration pursuant to Article III of the U.S. Constitution in that the relief they sought was different than that sought by a party with standing. Here, the proposed intervenors could not demonstrate an injury in fact without an alter ego finding first being made in the enforcement action. Further, the court examined whether Rule 24(a)(2)—providing intervention as of right—could assist the proposed intervenors. However, the court concluded that the proposed intervenors could not show an interest in the property or transaction relating to the subject matter of the award confirmation proceedings. This was because the proposed intervenors' claim was dependent upon a court ruling in an ancillary proceeding (i.e. the separate enforcement action) and was thus too attenuated to allow intervention. Finally, the court concluded that allowing permissive intervention pursuant to Rule 24(b) would thwart the "straightforward" nature of award confirmation proceedings by allowing non-parties to introduce collateral issues into what is intended to be a summary proceeding.

f. Non-Signatories Can Rely on Equitable Estoppel to Stay Action

Bankers Conseco Life Ins. Co. v. Feuer, No. 16 CIV. 7646 (ER), 2018 WL 1353279 (S.D.N.Y. Mar. 15, 2018):

Plaintiff and defendants' corporate vehicle entered into two separate reinsurance agreements containing nearly identical arbitration clauses. Alleging that the defendants had misappropriated funds from an investment trust created by plaintiff for purposes of implementing the reinsurance agreements, plaintiff,

on the same day, commenced arbitration against the corporate signatory and the present action against the corporation's principals. The individual defendants sought a stay of the court action pending a resolution of the arbitral proceedings.

The court first determined whether a contract was formed between the parties, concluding that federal law and not state-law principles controlled that determination. Under federal law, the doctrine of equitable estoppel can be invoked by non-signatories to compel arbitration where "the issues the non-signatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed." *Feuer*, 2018 WL 1353279, at *4 *citing JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 177 (2d Cir. 2004) *(*quoting *Choctaw Generation Ltd. P'ship v. American Home Assurance Company*, 271 F.3d 403, 406 (2d Cir. 2001)). The "intertwined-ness" test is subject to a two-part analysis: (i) whether the signatory's claims arise under the same subject matter of the agreement and (ii) whether the non-signatory has a 'close relationship' to a signatory of the agreement.

Here, the court concluded that the plaintiff's court claims arose from the same subject matter as the reinsurance agreements. Moreover, the agency relationship between the individual defendants and their corporate vehicle created the necessary "close relationship" to satisfy the second prong of the intertwined-ness analysis. Finally, the court was unable to find defendants' hands to be unclean such as to preclude their reliance on the equitable doctrine of estoppel. Accordingly, a stay of the action was appropriate pending arbitration of the dispute falling under the reinsurance agreements.

g. Who Decides Waiver of Arbitration—Court or Tribunal?

Syngenta Crop Prot., LLC v. Ins. Co. of N. Am., Inc., No. 18CV715(DLC), 2018 WL 1587601 (S.D.N.Y. Mar. 29, 2018):

Eighteen years earlier, after protracted litigation, an insured and its insurer ("INA") entered into a settlement agreement that

released the insurer from liability under the policy for any "environmental claims" that might be made against the insured. The settlement agreement was subject to New York arbitration pursuant to the rules of the American Arbitration Association ("AAA"). Two months after the settlement agreement was concluded, the insured notified INA that the insured had been named as a defendant in various lawsuits brought by non-employee contractors claiming harm from exposure to asbestos ("Asbestos Claims"). Although INA issued a reservation of rights letter, it only denied coverage 18 years after it was notified of the Asbestos Claims and 9 years after the insured made a formal demand for payment under its policy. INA cited the parties' earlier settlement agreement as a basis for declining coverage. INA then commenced arbitration under the settlement agreement seeking a declaration of non-liability and the insured commenced an action seeking to stay the arbitration pursuant to 9 U.S.C. § 3 of the FAA. Had INA waived its right to assert the settlement agreement as a defense under the policy? Judge Cote concluded that the issue was one for the arbitrators to decide and thus stayed the action in favor of arbitration.

In reaching its decision, the court distinguished "questions of arbitrability" from "gateway procedural issues," with waiver falling into the latter category. Whereas, arbitrability is presumptively an issue for the court, gateway procedural disputes go to the issue of whether an arbitration clause in an otherwise undisputed arbitration agreement "applies to a particular type of controversy." Nevertheless, the Second Circuit in its 2017 decision in *Meyer v. Uber Techns., Inc.*, 868 F.3d 66 (2d Cir. 2017), had reaffirmed that waiver of arbitration through participation in litigation could be decided by the district court. Here, however, the insured's waiver argument was not premised on INA's "litigation conduct." Therefore, absent a contrary intent to shift determination of gateway issues to the court, the presumption remained that the issue of waiver based on INA's conduct, should be decided by the arbitrators.

Finally, the court considered whether N.Y. Insurance Law § 3420 provided the insured a defense outside the scope of the parties' arbitration agreement. The court framed this argument as a

"question of arbitrability" because it was directed to the merits of the parties' dispute, as opposed to a procedural defense. Reviewing New York state and federal court decisions, the court noted that parties to an arbitration may through "clear and unmistakable" language authorize arbitrators to decide arbitrability issues. In addition, parties can reflect their intent to delegate arbitrability by incorporating the rules of an arbitration association that empowers arbitrators to decide such questions. In applying these principles, the court concluded that the broad language of the arbitration clause, as well as the incorporation of AAA rules, required the arbitrators to decide arbitrability issues as well as gateway procedural disputes.

h. Preliminary Injunction to Stay Arbitration against Putative *Alter Egos* Denied

Royal Wine Corp. v Cognac Ferrand SAS, No. 650249/2018, 2018 WL 1087812 (N.Y. Sup. Ct. Feb. 28, 2018):

The defendants in this action had entered into a 5-year contract to import non-Kosher products into the North American market. The agreement also required the importer to enter into an endorsement agreement with the rap artist Snoop Dogg. The agreement was subsequently terminated by the exporter due to the importer's insolvency and the importer commenced arbitration to collect a termination fee. The exporter denied liability and also asserted various counterclaims. The exporter prevailed on its counterclaims in the liability phase of the arbitration, but a second arbitration to determine damages was stayed after the importer filed for bankruptcy.

After the bankruptcy action was concluded, the exporter again commenced a second arbitration asserting the same counterclaims made in the first arbitration. However, the exporter also asserted *alter ego* claims against the plaintiff, Royal, as well as the importer's principals. Royal was a minority shareholder of the importer, holding less than 2.5% of its shares.

Royal then commenced the present action seeking to stay the second arbitration on various grounds and seeking a determination

of its *alter ego* status. Finding that Royal was not a signatory to the arbitration agreement between the importer and exporter, the court held that Royal lacked standing to stay the second arbitration simply. Effectively, Royal was seeking to assert the importer's defenses while at the same time denying that it was the importer's alter ego. The court found that Royal "may not have it both ways: if Royal is an alter ego of [the importer], it may not avoid the arbitration clause; if it is not an alter ego of [the importer], it has no right to interfere with the arbitration." *Royal Wine Corp.*, 2018 WL 1087812, at *2. Royal, therefore, could not establish the necessary elements for a preliminary injunction.

FIFTH CIRCUIT

a. Consent Award Sufficient to Confer Subject Matter Jurisdiction

Transocean Offshore Gulf of Guinea VII Ltd. v. Erin Energy Corp., No. CV H-17-2623, 2018 WL 1251924 (S.D. Tex. Mar. 12, 2018):

Transocean Offshore Gulf of Guinea VII Ltd. ("Petitioners") moved the United States District Court for the Southern District of Texas to enforce arbitral awards and for entry of final judgment under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"). Petitioners' motion stemmed from a consent award entered by the London Court of International Arbitration. *Erin Energy Corp.*, 2018 WL 1251924 at *1. Erin Energy Corporation ("Respondent") moved to dismiss Petitioners' motion for lack of subject-matter jurisdiction.

The dispute between the parties arose "over a contract for drilling equipment, personnel, and services in the waters off the coast of Nigeria." *Id.* at *1. Petitioners filed suit to enforce Respondent's payment of the amounts it owed under the arbitral consent award. Respondent argued that the consent award was not subject to the Convention and that the Southern District of Texas lacked subject-matter jurisdiction. *Id.* at *2. Specifically, Respondent argued that because the Convention was silent on its

applicability to decisions that record the terms of a settlement between parties, such silence meant that the Convention was not intended to apply to consent awards. *Id.* Respondent further cited to the London Court of International Arbitration's rules "as evidence that consent awards are treated differently from other arbitral awards." *Id.*

Chief Judge Rosenthal, writing for the court, first recognized that the Convention grants district courts subject-matter jurisdiction over actions to confirm arbitral awards to which the Convention applies. *See* 9 U.S.C. § 203. The court next recognized that "if a party applies for an order confirming an arbitral award, the court—assuming jurisdiction—must confirm the award unless there are grounds for vacating, modifying, or correcting it. 9 U.S.C. § 207." *Erin Energy Corp.*, 2018 WL 1251924 at *3.

Citing to *Albtelecom SH.A v. UNIFI Commc'ns, Inc.*, No. 16 CIV. 9001 (PAE), 2017 WL 2364365 (S.D.N.Y. May 30, 2017), "a case with analogous facts and legal issues," and finding that the Southern District of New York's analysis was "thorough and persuasive," the court noted that the Southern District of New York "held that an award 'entered into by consent of the parties, as opposed to being based on an arbitrator's resolution of the factual and legal disputes,' [is] covered by and subject to the Convention." *Id.* at *4 (citing *Albtelecom*, 2017 WL 2364356 at *5). The court concluded that Petitioners and Respondent "did not dismiss the arbitration. Rather, they opted to continue the arbitration proceedings even after they came to their own agreement. While the tribunal did not make findings or reach legal conclusions, it made an award that bound the parties, within its power." *Id.* Because the consent award was subject to the Convention, the court concluded that it had subject-matter jurisdiction under 9 U.S.C. § 203 to confirm the arbitral awards. Concluding that there was no basis to vacate or modify the award, the court granted Petitioners' motion to enforce the arbitral awards and denied Respondent's motion to dismiss for lack of subject-matter jurisdiction. *Id.* at *6.

b. No Grounds for Vacatur of Houston Maritime Arbitrators Association Award

Ranger Offshore Mexico, S. de R.L. de C.V. v. Grupo Tradeco, S.A. de C.V., 2018 A.M.C. 710, 2018 WL 780707 (S.D. Tex. 2018):

In *Ranger Offshore Mexico,* a federal judge in the Southern District of Texas affirmed a Houston Maritime Arbitrators Association award in a dispute over unpaid chartering fees, finding that the arbitrators made no errors on attorneys' fees or procedural delays in their decision.

The dispute arose between plaintiff Ranger Offshore Mexico ("Ranger") and defendant Tradeco over an agreement to charter the offshore vessel MV LEWEK TOUCAN (the "Vessel") for Tradeco's use in a pipeline project. Due to project delays, the Vessel was never used on the intended project. Thereafter, the parties agreed to amend the charter and suspend payment of charter hire for a period of time, after which Tradeco would resume payment. During this time, Grupo Tradeco also signed a guarantee agreeing unconditionally to pay any amount due to Ranger in connection with the charter. Under the amendment, Tradeco agreed to issue six unconditional "Pagares," which are similar to promissory notes. After the suspension period ended and the Vessel was returned to Tradeco, Tradeco challenged the Vessel's seaworthiness and refused to accept its redelivery.

After several months of discovery and a nine-day hearing, the three-member arbitration panel issued a partial final award in favor of Ranger and later a final award awarding Ranger $17,598,980.76 in damages and $1,963,222.10 in attorneys' fees.

In attempting to vacate the arbitration award, defendants contended that the panel exceeded its authority in its calculation of attorneys' fees because it awarded fees paid by Ranger Offshore, Inc. (ROI), Ranger's parent company. The court found that the panel did not exceed its authority because even though ROI paid for the attorneys' services, Ranger was the entity that incurred the costs of

those services by retaining the attorneys to represent it throughout the arbitration.

Defendants also argued that the arbitration award was not final because the award was allegedly conditional on the enforceability of the Pagares which the panel did not address. The panel found that four of the six Pagares were never delivered to Ranger, and therefore unenforceable. As to the remaining Pagares, the panel held that it did not have jurisdiction over the two Pagares that were delivered and did not include the amount they represented as part of the award. As a result, the outcome of the arbitration award was not conditional on the enforceability of the Pagares.

Lastly, defendants argued that the award should be vacated because the panel refused to postpone the arbitration hearing on the basis that two separate "Mexican Agreements" between the parties mandated that the arbitration take place in Mexico under Mexican law. In denying defendants' motion to postpone, the panel noted that the defendants had participated in over a year's worth of pre-arbitration proceedings and discovery without ever questioning the validity of the charter's arbitration clause. The Southern District of Texas found that there were several reasonable bases upon which the panel denied defendants' request, including the amount of delay, the untimeliness of the request less than two months before the hearing, and that the parties had initially agreed that there were "no pending or anticipated parallel or duplicate proceedings." Moreover, the court found that the "Mexican Agreements" were irrelevant to the issues before the panel because the basis for the arbitration was defendants' refusal to pay overdue amounts under the charter, and the subsequent guarantee and amendment of same.

c. Manifest Disregard Standard Not Ground for Refusing Enforcement Under New York Convention

OJSC Ukrnafta v. Carpatsky Petroleum Corp., No. CV H-09-891, 2017 WL 4351758 (S.D. Tex. Oct. 2, 2017):

The *OJSC Ukrnafta* case stems from a joint venture agreement ("JV") between the plaintiff OJSC Ukrnafta ("Ukrnafta")

and Carpatsky Petroleum Corporation ("CPC"), Texas, along with a joint activity agreement ("JAA") and amendments thereto.

The agreement required that disputes be submitted to arbitration. The branch of CPC that entered into the agreements was a Texas corporation referred to as CPC-Texas. CPC then merged into a new Delaware entity referred to as CPC-Delaware. The agreement was amended in 1998 to require that arbitration take place in Stockholm, Sweden, by the Arbitration Institute of the Stockholm Chamber of Commerce and that the case would be conducted pursuant to the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules and the "material law of Ukraine."

CPC-Delaware referred a dispute to the Arbitration Institute of the Stockholm Chamber of Commerce pursuant to this provision on September 28, 2007. On Feb. 3, 2008, Ukrnafta filed a petition in the 190th Judicial District Court of Harris County Texas against CPC-Delaware, *et al*. asserting that it signed the JV and JAA with CPC-Texas, which was a company incorporated in Texas. However, CPC-Texas merged with CPC-Delaware (which was the surviving entity), and Ukrnafta contended that CPC-Texas did not inform it that it was going out of business and wished to substitute a new company to take its place in the JAA. Ukrnafta contended that this failure to inform it of the change was inconsistent with the agreements between the parties and contrary to the requirements of Ukrainian law, which governs the agreements. Ukrnafta also contended that subsequent to the merger, CPC-Delaware signed amendments to the agreements, including the Amended JAA, using the CPC-Texas corporate seal. Ukrnafta asserted causes of action for negligence, fraud, misappropriation of trade secrets, tortious interference with existing contract and unjust enrichment and sought a declaratory judgment, permanent injunction and fees. CPC removed the case to the U.S. District Court for the Southern District of Texas pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitration Awards.

On April 4, 2009, CPC filed a motion to stay pending a decision by the Swedish arbitration tribunal, which was granted by

the court. The case effectively remained stayed until Feb. 1, 2017 due to ongoing appeals of the arbitration in Sweden, at which time, CPC sought to confirm the arbitration award under the New York Convention and dismiss Ukrnafta's claims.

CPC argued that the district court had secondary jurisdiction over the case and could determine only whether the award should be enforced within its jurisdictional boundaries and that the tribunal's findings were entitled to deference because Sweden was the primary jurisdiction.

Ukrnafta first made a procedural argument which the court found to have no real impact on the matter. Ukrnafta also argued that the award should not be enforced under Article II of the Convention, which requires that the agreement to arbitrate is in writing, because Ukrainian courts had found that the agreement was signed by an entity that no longer exists and was thus void. Ukrnafta further argued that the court should refuse to enforce the award under Article V of the New York Convention for the following reasons: (1) the arbitration agreement is invalid; (2) Ukrnafta did not have an opportunity to present its case; (3) the award was beyond the scope of the purported agreement to arbitrate; (4) the arbitration was not in accordance with the agreement of the parties; and (5) enforcement of the award would be contrary to public policy. Ukrnafta additionally asserted that the court should set aside the award because the tribunal manifestly disregarded the parties' agreement or the law. Ukrnafta's final argument was that dismissal of Ukrnafta's claims was not appropriate because Ukrnafta's claims were not the same as the issues addressed in the arbitration.

In reply, CPC argued that the Ukrainian courts' rejection of the award is not subject to deference as Ukraine constitutes a secondary jurisdiction. CPC argued that the court could consider the defenses only under Article V of the Convention and that Ukrnafta failed to prove any of its defenses. Lastly, CPC argued that all of Ukrnafta's claims should be dismissed as barred by *res judicata* and collateral estoppel.

A district court "shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition of enforcement ... specified in the [New York] Convention." Only courts in countries with "primary jurisdiction" can annul the award. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 287 (5th Cir. 2004). Courts in the countries in which or under the laws of which the arbitration took place have primary jurisdiction. *Id.* "Other countries with jurisdiction to enforce an award have what is referred to as "secondary jurisdiction." *Id.* "[A] court with secondary jurisdiction is limited to deciding whether the award may be enforced in that country." *Id.* Courts with primary jurisdiction may evaluate "a request to annul or set aside the award," but courts with secondary jurisdiction "may only refuse enforcement under the specific grounds enumerated in Article V of the Convention." *Id.* at 288. A court of secondary jurisdiction "may not refuse to enforce an arbitral award solely on the ground that the arbitrator may have made a mistake of law or fact." *Id.*

On the issue of whether the agreement was in "writing" under Article II of the Convention, the court found that it had secondary jurisdiction and thus could only refuse to enforce under one of the grounds outlined in Article V (not Article II).

The court then rejected all of Ukrnafta's Article V arguments against enforcement of the award. First, the court found that there was a strong presumption that the procedural law of the place of arbitration applies and buttressing that presumption was the fact that at least one of the Swedish court opinions indicated that the parties agreed that Swedish procedural law applied. Thus, the court found that the procedural law of Sweden applied and that Sweden was therefore the only primary jurisdiction. Because the award had not been set aside by Sweden, the court could not refuse to enforce the award under Article V(1)(e). The court also found that Ukrnafta had sufficient notice of the issues in the case and had ample opportunity to present evidence to the panel. In addition, the court held that it was up to the arbitral tribunal to determine if the agreement was valid, which it did, and thus the court could not refuse to confirm the award under Article V(1)(d) of the convention. Ukrnafta's final

Article V argument was that the award was contrary to public policy because it would require illegality in the performance of a contact that the Ukraine courts had ruled was null and void. However, the court rejected this argument finding that the relevant inquiry was the public policy of the *enforcing country*, in this case the U.S., which strongly favors the enforcement of awards.

The court also found that the manifest disregard standard did not apply because it "is not among the exclusive bases for non-enforcement listed in Article V of the Convention" and that Ukrnafta failed to show that the tribunal deliberately disregarded what it knew to be the law to reach a particular result.

On the last issue of the *res judicata* and collateral estoppel effects of the arbitral finding on Ukrnafta's claims against CPC, the court found that the issue was not sufficiently briefed by the parties for the court to make a case-by-case determination and thus denied the request without prejudice to refiling.

NINTH CIRCUIT

a. Employment Contract Requires Arbitration

Jean Luc Van Wyk v. Princess Cruise Lines, Ltd.; Carnival PLC; and Carnival Corp., 2:17-cv-9113 (C.D. CA, Mar. 13, 2018):

Plaintiff, Jean Luc Van Wyk, was hired as the assistant photo manger on the EMERALD PRINCESS. His employment contract ("Contract") stated "all disputes of any kind or nature whatsoever … shall be resolved by binding arbitration in Bermuda." On July 25, 2017, while underway, he was directed by the Vessel's security team to photograph the scene of a murder that took place in a cabin. This resulted in nearly 100 graphic photos of a bloody scene. He immediately began suffering from severe emotional distress, anxiety and panic. He reported these symptoms and was given one day off, during which time he was required to print color copies of the photos which further aggravated his condition. It was not until November 2017 that he was provided proper maintenance and health care.

Plaintiff filed suit in December 2017 pursuant to maintenance and cure, among other causes of action.

In response, the defendants filed this motion to compel arbitration. In deciding the motion, the court looked to 1) whether it was a valid agreement to arbitrate and 2) whether the agreement encompassed the dispute at issue. *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.2d 1126, 1130 (9th Cir. 2000). Plaintiff did not argue the arbitration clause was invalid but instead that it deprived him of the right to recover for maintenance and cure because Bermuda does not have a comparable remedy. The court disagreed, finding Bermuda adopted a law providing for the functional equivalent of maintenance and cure and that the Contract provided for a substantially similar remedy through medical care, daily stipend during treatment and continued wages. Finally, the court looked to *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 637, n. 19), which allows courts to "invalidate on 'public policy' grounds, arbitration agreements that 'operat[e] . . . as a prospective waiver of a party's *right to pursue* statutory remedies." However, because maintenance and cure is a common law, not statutory, remedy, they found this doctrine of "effective vindication" does not apply.

Moving on to the second element, plaintiff argued that when the parties agreed to arbitration, neither party could possibly have imagined he would photograph a murder scene. The court, however, found the arbitration clause was sufficiently broad, covering "any and all disputes", that it covered his activities. As such, the motion was granted and entire action dismissed

b. Non-Signatory Could Not Compel Arbitration Under New York Convention

Yang v. Majestic Blue Fisheries, LLC, 876 F.3d 996 (9th Cir. 2017):

Relying on statutory construction that non-signatories cannot compel arbitration, the Ninth Circuit affirmed the district

court's order denying the vessel owner's motion to compel arbitration against the wife of a seaman who died in a sinking fishing vessel.

Dongwon Industries Co. Ltd ("Dongwon") supplied crew and supervised maintenance and repairs on F/V MAJESTIC BLUE, owned by Majestic Blue Fisheries, LLC. F/V MAJESTIC BLUE set sail with a known rudder leak and three weeks later flooded and sank. Chang Cheol Yang died after re-boarding the vessel to look for the Captain. The widows of both Mr. Yang and the Captain filed wrongful death actions premised on inadequate repairs and incompetent crew. The Captain's widow successfully litigated her case, but Mrs. Yang's case was delayed by the defendants seeking to enforce an arbitration clause signed by "Dongwon 'on behalf of MAJESTIC BLUE FISHERIES, LLC.'" The district court compelled arbitration against Majestic but denied Dongwon's motion.

To compel arbitration under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention Act"), 9 U.S.C. §201 *et seq.*, you must prove "an agreement in writing" *Balen v. Holland Am. Line Inc.,* 583 F.3d 647, 2009 AMC 2561, 2568 (9th Cir. 2009). The Convention Act implements a Treaty, by the same name, which defines "agreement in writing" to "include an arbitral clause in a contract or an arbitration agreement, signed by the parties…" Convention Treaty, art. II(2). Dongwon argued "signed by the parties" modified only "arbitration agreement" and not "arbitral clause." The court disagreed, looking to canons of construction relating to punctuation and comma placement; how foreign versions of the Treaty were crafted; legislative history; and other Circuits' interpretations, to conclude that "signed" applied to both the agreement and the clause. In making this finding, the court relied on *Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd.,* 186 F.3d 210, 215-18 (2d Cir. 1999) but also dismissively concluded that only a party to the agreement may litigate its enforcement, and Dongwon was not. Convention Treaty, art. IV(a), V(1)(a), VI.

Dongwon also looked to federal arbitration law to compel arbitration. However, seaman employment contracts are expressly exempted under the Federal Arbitration Act, 9 U.S.C. §1 *et seq*. *See also, Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148, 1152-53, 2008 AMC 2752, 2755-56 9th Cir. 2008). Despite this, Dongwon asked the court to permit a non-party to invoke arbitration under the FAA if state contract law allows enforcement of the agreement. *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1128 (9th Cir 2013). This approach was rejected by the court holding that, to the extent the FAA provides for arbitration of disputes between non-signatories or non-parties, it conflicts with the Convention Treaty and does not apply. Furthermore, no state law provided Dongwon a basis to arbitrate based on its claims of equitable estoppel, agency or alter ego. First, equitable estoppel did not apply to claims that are independent of the employment agreement containing the arbitration provision. *Kramer*, 705 F.3d at 1131. Alter-ego and agency theories also fail as Dongwon failed to raise these arguments in the district court and furthermore affirmatively represented that the two companies were "separate and distinct." Moreover, public policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement. *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1287 (9th Cir. 2009)

c. Marine Insurance Policy Arbitration Clause Delegates Arbitrability Issues to Arbitrators

Galilea, LLC v. AGCS Marine Ins. Co., 879 F.3d 1052, 2018 AMC 46 (9th Cir. 2018*)*:

The Ninth Circuit affirmed in part and reversed in part the district court orders finding an arbitration provision in the maritime insurance policy enforceable despite law in the forum state precluding its application.

Taunia and Chris Kittler ("Kittlers") were the sole members of Galilea, LLC ("Galilea") which purchased a yacht. They sought insurance coverage through Pantaenius America Ltd ("Pantaenius") who acted as agent for various underwriters. Galilea submitted a hand-signed application to Pantaenius in which three underwriters

were listed and included an arbitration clause. One day after submitting the application, Pantaenius issued an insurance binder and the next day it issued the formal policy, effective in a specific "cruising area." The final contract differed from the application in that it identified federal maritime law and applied New York law to any gaps, and changed the scope of arbitrable disputes from "any disputes arising out of or relating to the relationship" to "any and all disputes arising under this policy." A month later, the Yacht ran ashore in Colón, Panama which, according to Pantaenius, was south of the cruising area. Galilea disputed their denial of coverage saying the application and policy did not reflect their actual agreement and Pantaenius and the underwriters misrepresented the scope. In response the underwriters initiated arbitration in New York. Galilea responded, filing suit in Montana; underwriters filed a separate action in S.D.N.Y to enforce the arbitration clause. The decision dealt with "gateway" questions of arbitrability.

The first question was whether a document constitutes a contract. While questions as to the validity of a contract can be decided by an arbitrator, challenges to the existence of the contract go before a court. *Kum Tat Ltd. V. Linden Ox Pasture, LLC*, 845 F.3d 979, 983 (9th Cir. 2017). The court concluded the application did not evidence mutual assent and was not a contract. The application contained a choice of law and forum selection clause for New York. Therefore evaluating it under New York law, in order for the language to be incorporated into the insurance policy, it must be physically attached to the policy or directly incorporated therein. *Smith v. Pruco Life Ins. Co. of New Jersey*, 710 F.3d 476, 479-80 (2d Cir. 2013) (internal citations omitted). Neither of these steps was taken.

The court then evaluated if Montana law would apply to the dispute. Galilea argued Montana public policy overrides arbitration provisions and is not preempted by the Federal Arbitration Act ("FAA"), 9 U.S.C. §1-16. See, McCarran-Ferguson Act, 15 U.S.C. §1012 (shielding state insurance laws from federal preemption). Looking to *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 313, 1955 AMC 467, 470 (1955), the first determination is whether there is an established federal maritime law principle and

where there is an absence, or a need for uniformity, state law will control. In this case, there was a clear federal law, the FAA, which expressly provided for enforcement of arbitration provisions in maritime contracts. Galilea next sought to apply Montana's Uniform Arbitration Act which nullified arbitration clauses in insurance policies unless the contracts were between insurance companies. The court took a step back reiterating that, based on choice-of-law, New York law, if any, would apply. The only connection to land-locked Montana was that the owners of Galilea were Montana residents. It then circled back noting first, this is a maritime insurance policy; second, there is federal maritime law which applies here – the FAA; third, since there is federal law, state law is not necessary. Last, the court dismissed Galilea's argument to apply *M/S Bremen v. Zapata Off-Shore Co.*., 407 U.S. 1, 1972 AMC 1407 (1972), stating it did not discuss federal maritime rules about choice of law but rather forum selection clauses. Additionally, its argument to apply state law in the interest of public policy was not relevant. The court assessed:

> [i]t does not make sense to apply the federal maritime choice-of-forum rule of *The Bremen* to invalidate *another* established federal maritime rule specifically addressing the appropriate forum – here, arbitration – because of a conflict with a forum *state's* public policy. Within federal admiralty jurisdiction, conflicting state policy cannot override squarely applicable federal maritime law.

Galilea, LLC, 879 F.3d at 1060, 2018 AMC at 58.

Last, but not least, the court found the parties delegated arbitrability issues to the arbitrator. Although the FAA has a presumption against arbitration of arbitrability, see *Cape Flattery Ltd. v. Titan Mar., LLC*, 647 F.3d 914, 920, 2011 AMC 2327, 2334 (9th Cir. 2011), where sophisticated parties incorporate the AAA rules, which permit an arbitrator to rule on his/her own jurisdiction, it is clear evidence the parties intended to arbitrate arbitrability. *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015). The court concluded that the fact the Kittlers formed an LLC under

Nevada law, owned a yacht valued at over a million dollars and Mr. Kittler owned a financial services company, evidenced their sophistication.

In sum, the court concluded the insurance application did not have an enforceable arbitration agreement; the policy's arbitration clause fell under the FAA to which federal maritime choice-of-law principles, not Montana, applied; and finally that the parties agreed to resolve questions of arbitrability in arbitration. Thus, the underwriter's motion to compel arbitration was granted in its entirety.

ELEVENTH CIRCUIT

a. Proper Venue for Arbitration is for Arbitrators to Decide

Bamberger Rosenheim, Ltd., (Israel) v. OA Dev., Inc., (United States), 862 F.3d 1284 (11th Cir. 2017), *cert. denied sub nom. Bamberger Rosenheim, Ltd. v. OA Dev., Inc.*, 138 S. Ct. 654, (2018):

Bamberger Rosenheim, Ltd., (Israel) involves an international arbitration dispute between Bamberger (also referred to as Profimex), an Israeli company, and OAD, an American real estate developer, arising from purported breach of the parties' Solicitation Agreement. The Solicitation Agreement included the following agreement to arbitrate:

> Any disputes with respect to this Agreement or the performance of the parties hereunder shall be submitted to binding arbitration proceedings conducted in accordance with the rules of the International Chamber of Commerce. Any such proceedings shall take place in Tel Aviv, Israel, in the event the dispute is submitted by OAD, and in Atlanta, Georgia, in the event the dispute is submitted by Profimex.

OA Dev., Inc., (United States), 862 F.3d at 1286.

After relations between the parties deteriorated, Profimex commenced arbitration in Atlanta against OAD for breach of contract. In the same Atlanta arbitration, OAD submitted a counterclaim alleging that Profimex had defamed OAD in statements to Israeli investors. Profimex objected to the counterclaim's arbitration in Atlanta, arguing "that a 'dispute submitted by OAD' [must] be arbitrated in Tel Aviv, Israel." The arbitrator, however, determined that venue for the defamation counterclaim was proper in Atlanta, in part, because the "dispute" was submitted by Profimex. The arbitrator ultimately found Profimex liable on OAD's defamation counterclaim.

Profimex filed a petition to vacate the arbitrator's defamation award in federal district court, and OAD filed a petition to confirm the award. Profimex raised several grounds for *vacatur* and defenses against confirmation. However, the district court confirmed the arbitral award and Profimex appealed.

The dispositive issue on appeal was whether a question about the venue of an arbitration is itself arbitrable. The court held "that disputes over the interpretation of forum selection clauses in arbitration agreements raise presumptively arbitrable procedural questions;" however such clauses determine *where* an arbitration is conducted, "not *whether* there is a contractual duty to arbitrate at all." As a result, the court deferred to the arbitrator's interpretation of the venue provision and the determination that the "dispute" was submitted by Profimex. The court also rejected Profimex's argument that the international character of the dispute made venue more like a question of arbitrability than it would be in a domestic dispute.

b. Rule B Attachment and Georgia State Court Attachment Remedy Denied to Secure Potentially Favorable London Award

SCL Basilisk AG v. Agribusiness United Savannah Logistics LLC, 875 F.3d 609, 2017 AMC 2926 (11th Cir. 2017):

In *SCL Basilisk AG*, the United States Court of Appeals for the Eleventh Circuit affirmed the United States District Court for the Southern District of Georgia's denial of a request for posting of security that was not authorized by Rule B of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Action, Georgia law, or principles of maritime law.

The case arose out of a charter dispute between the plaintiffs-vessel owners and the charterer arising from the carriage of grain from New Orleans to Portugal and Morocco. On a claim unrelated to the dispute between the parties, the M/V SCL BASILISK was detained pursuant to a writ of attachment issued in the Eastern District of Louisiana at the request of a non-party. The plaintiffs incurred damages as a result of the delay caused by the attachment, and thereafter instituted arbitration proceedings against the charterer, as required by the charter agreement, in London. The plaintiffs then filed a "Petition and Application for an Order for Security in Aid of Foreign Arbitration Pursuant to O.C.G.A. § 9-9-30"[2] in the Southern District of Georgia, seeking $667,528.86 to secure a possible judgment in the pending arbitration in London.

In the petition, the plaintiffs identified each of the defendants as having registered agents in Georgia. *SCL Basilisk AG*, 875 F.3d at 612, 2017 AMC at 2928-29. In denying the petition, the district court explained that while Supplemental Rule B allows entities to sue in personam and attach property as security for a claim, Supplemental Rule B requires that the plaintiff or the plaintiff's attorney sign and file an affidavit stating that the defendant cannot be found within the district. Because all defendants were "present in some fashion in this district," the plaintiffs could not meet the requirements of Rule B. *Id.* at 613, 2017 AMC at 2930. In denying

[2] O.C.G.A. § 9-9-30 states that "[b]efore or during arbitral proceedings, a party may request from a court an interim measure of protection, and a court may grant such measure, and such request shall not be deemed to be incompatible with an arbitration agreement."

the plaintiffs' claim under O.C.G.A. § 9-9-30, the district court noted that it could apply state law to supplement maritime law if the result did not "frustrate national interests in having uniformity in admiralty law." *Id.* at 613. The district court concluded that "section 9-9-30 did not have the expansive scope that the plaintiffs attributed to it. Instead, it simply permitted the court to grant remedies otherwise available under federal and Georgia law. It did not create new remedies." *Id.* at 614, 2017 AMC at 2930-31.

The Court of Appeals for the Eleventh Circuit affirmed the district court. The court of appeals concluded that Rule B "cannot be used purely for the purpose of obtaining security: . . . security cannot be obtained except as an adjunct to obtaining jurisdiction." *Id.* at 622, 2017 AMC at 2933 (citing *Nehring v. Steamship M/V Point Vail*, 901 F.2d 1044, 1051, 1993 AMC 244, 255 (11th Cir. 1990). The Eleventh Circuit further concluded that O.C.G.A. § 9-9-30 does not grant courts authority "to create new substantive remedies; rather it confirms that a court's grant of interim relief, utilizing existing state remedies, is not inconsistent with submitting a merits determination to an arbitrator." *SCL Basilisk AG*, 875 F.3d at 620, 2017 AMC at 2941.

COMMITTEE ON CARRIAGE OF GOODS

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CARGO NEWSLETTER NO. 70

Fall 2017 (Wildfire Edition)

CARTONS OF COMPUTER PARTS FALL TO "PIECES"…

Mapfre Atlas Compania de Seguras S.A. v. M/V LOA, 2017 AMC 2379, 2017 WL 3332234 (S.D.N.Y. 2017).

A shipment of computer parts was carried from Miami, Florida to Guayaquil, Ecuador, pursuant to a bill of lading which, under the column captioned "NO OF PKGS", had the number "1"; and under the column "DESCRIPTION OF PACKAGES AND GOODS" stated: "1X40' HC CONTAINER S.T.C. 989 PIECES COMPUTERS PARTS."

The goods arrived in Ecuador around October 6, 2014. Around October 17, 2014, the goods were inspected and 491 cartons of goods were said to be missing. Plaintiff underwriter responded to a claim for damages in the amount of $126,863.28 and brought an action against the carrier. The carrier moved for judgment on the pleadings and plaintiff moved for partial summary judgment.

The court considered the question presented to be: "How to define the term 'package' under COGSA." 2017 AMC at 2383. The plaintiff asserted that each of the "989 PIECES COMPUTERS PARTS" listed on the bill of lading constituted a "package"; however, defendant asserted that the single container into which all 989 "pieces" were loaded constituted a single package: "Whether a 'piece' is or is not a 'package' under COGSA has liability consequences amounting to thousands of dollars." *Id.* at 2384.

The court, referring to decisional law in the Second Circuit, noted: "The question of what constitutes a COGSA package…is largely and in the first instance a matter of contract interpretation." *Id.* at 2385.

> …where the bill of lading expressly states the number of containers as the number of packages, the container will be deemed the COGSA package even if the bill of lading also notes the number of units within the container, so long as the units are not referred to as "packages."

Norwich Union Fire Ins. v. Lykes Bros. S.S. Co., 741 F. Supp. 1051, 1057 (S.D.N.Y. 1990).

The court noted the number "1" was clearly stated under the column "NO OF PKGS." The court then referred to the description of packages and goods which described the shipment as "989 PIECES COMPUTERS PARTS."

The court rejected the assertion that the pieces were packaged, noting the only evidence offered as to shipping preparation was a photograph plaintiff alleged showed the goods were boxed before being placed within the container: "Even taking the picture as true, it does not establish that 989 separate boxes, representing 989 separate computer part pieces, were put into the shipping container as Plaintiff claims." 2017 AMC at 2386.

The court noted the bill of lading's description did not indicate how the computer parts "pieces" were packaged; however, what it did indicate was that the computer parts pieces were said to be contained within a single high-cube container.

A clause in the bill of lading entitled "Package Limitation" provided:

> If the Goods are consolidated in any container or similar article of transport, the number of packages or units shall, for the purposes of clause 19.2, be

> those enumerated on the face of this bill of lading as having been packed in such article of transport. Otherwise, such article of transport shall be considered the package or unit. If the goods are not shipped in packages or are shipped in bulk, the package or unit shall mean the customary freight unit for such Goods.

The court stated clause 19.2 of the bill of lading "specifically deals with instances where the Hague Visby Rules applied." *Id.* at 2388. However, referring to clause 21 "which details which laws apply in which in cases [sic], the Bill of Lading clearly states that when shipments are to or from the United States, as is the case here, COGSA applies. As such, the parameters defining a 'package' under clause 19.3 are irrelevant here." *Id.* (Internal citations omitted). **See Editors' note below.**

Lastly, the court stated that even if the container was not viewed as a COGSA package and the computer parts viewed as "goods not shipped in packages"… "[a]bsent any agreement in the bill of lading, goods placed in containers and not described as separately packaged are considered 'goods not shipped in packages' to which the $500 applied per 'customary freight unit.'" *Id.*

The court noted that "customary freight unit" is defined in the Second Circuit not as the "standard unit of measure used in the industry, but the actual freight unit used by the parties to calculate freight for the shipment at issue." *Id.* (citing *FMC Corp. v. S.S. Marjorie Lykes*, 851 F.2d 78, 80 (2d Cir. 1988)). The bill of lading indicated a lump-sum freight rate was for the single container. Thus, the "customary freight unit" would result in liability being limited to $500.

Editors' note:

The court fixed on the issue of whether a "piece" could constitute a "package" under U.S. COGSA. The bill of lading contained a provision (clause 19) which essentially adopted the

language of clause IV (5) of the Hague-Visby Rules (slightly modified) and was entitled "Package Limitation."

It is submitted that the decision's comment that reference to clause 19 or a portion thereof in the bill of lading was "irrelevant" overlooks the provisions of clause IV (5) of COGSA itself.

Section IV (5) of COGSA (quoted in full in footnote 2 at page 8 of the Decision) allows the parties to contract for a different limitation amount, but such limitation amount must be higher than the $500 limitation referred to in COGSA. Clause IV (5) of the Hague-Visby Rules provides for a limitation which is usually higher than the $500 of COGSA; providing for a limitation amount of 666.67 SDR per package or unit, or for limitation based upon the weight of the cargo lost, **whichever is the higher**. (Emphasis supplied.)

The decision makes no comment as to any application of the second paragraph of Section IV (5) of COGSA, other than quoting the Section.

ENUMERATION OF FROZEN FISH SINKS CONTAINER LIMITATION…

Kyokuyo Co Ltd v. A.P. Moller – Maersk A/S; High Court of Justice, Queen's Bench Division, Commercial Court, Case No.: CL-2014-0F00360; [2017] EW HC 654 (Comm); Decision of Mr. Justice Andrew Baker, dated March 29, 2017.

A shipment consisting of twelve containers of frozen tuna loins was shipped from Spain to Japan. A draft bill of lading was prepared by the carrier covering all twelve containers; however, delivery of three containers was delayed. In order to avoid further delay, the parties agreed to the issuance of three sea waybills, one for each of the three containers. The sea waybills described the containers as containing "[no.] PCS FROZEN BLUEFIN TUNA LOINS". The tuna loins were "unpackaged." One container also contained (in addition to 206 "pcs" of tuna loins) 460 bags of tuna. Reference to these 460 bags had appeared in the draft bill of lading

but was mistakenly omitted from the cargo description in the Sea Waybill.

Upon delivery, cargo in all three containers was found to have suffered damage. The defendant carrier did not admit liability for the damage alleged, however, the parties agreed that, if a number of issues relating to any limitation applicable would be answered, settlement might well result thereafter.

Initially, the court considered whether the Hague-Visby Rules were compulsorily applicable. Claimant argued that they did apply by force of law pursuant to the British Carriage of Goods by Sea Act of 1971 because the shipment was from Spain which was a contracting state adhering to such Rules, although no bill of lading, as such, was ever actually issued.

The court found where the terms of carriage required a bill of lading to be issued, it was immaterial that no bill of lading was insisted upon, or in fact issued. Liability would still be limited by Article IV rule 5 of the Hague-Visby Rules which would apply with the force of law.

[However, if the carrier proved that the damage with respect to one container arose out of the final stage of transit after completion of discharge at Yokohama, liability would be limited to 2 SDRs per kg gross weight of the tuna thus damaged (according to Clause 7.2 (c) of the Maersk Terms, as opposed to the Hague-Visby Rules)].

Under Hague-Visby, the court found each frozen loin was a separate unit and liability limited to 666.67 units of account for each loin. With respect to the bagged tuna, liability should be limited to the greater of 666.67 units of account or two units of account times the gross weight in kilograms (however, the bags of tuna were not mentioned in the relevant Sea Waybill).

[If the Hague Rules had applied, the court found each frozen loin to be a separate unit which would have attracted a separate limitation of liability (100 English Pounds) and each bag of tuna

would be a separate package and would also attract a similar separate limit of liability.]

The court considered the emphasis to be on how the cargo was made up for stuffing into the container, not on how it might have been prepared for shipment without containerization.

It was agreed that the waybills were to be considered, as opposed to what was contained in the draft bill of lading.

Thus, under the Hague-Visby Rules, each frozen tuna loin was a separate "package or unit." As these had been identified and enumerated in the waybills as being the cargo, and the language of the enumeration was consistent with what was loaded into that container, each frozen tuna loin counted. As regards the bagged tuna, as the waybill made no mention of them, there was only one "package or unit", which was the container.

Editors' note: The reader is encouraged to review the entire decision of Mr. Justice Andrew Baker for his comments and reasoning. The decision contains some 121 paragraphs and comprises 33 pages plus an appendix of 4 pages.

"REEFER BREAKDOWN" NOT ENOUGH…

Lamex Agrifoods, Inc. v. MSC Mediterranean Shipping Company S.A., 2017 AMC 2780, 2017 WL 4803923 (S.D.N.Y. 2017).

A reefer container of frozen peaches was shipped from Thessaloniki, Greece, to La Porte, Texas. After the container arrived at Houston, Texas, it was loaded onto a truck for inland shipping. The trucker was contracted for by the plaintiff; however, the peaches were still in the carrier's container.

On the way from the discharge port to final destination, the freezer malfunctioned and the peaches thawed. This resulted in a loss of $48,000.

The plaintiff filed an action asserting claims for breach of contract and negligence, and the carrier answered, then moved for judgment on the pleadings.

The carrier argued that the bill of lading provided that liability on its part for damage occurring while the container was not in its control should not be fastened on it. The plaintiff responded by asserting that the peaches actually thawed on board the ship, and that even if the peaches thawed on the truck, the carrier provided a faulty container. The court rejected both plaintiff's claims.

As to the first claim (it happened aboard the ship), the court noted this claim was not asserted in the complaint. "The complaint tells an unambiguous story….Nowhere does the Complaint allege that the peaches thawed on the ship. To the contrary, the Complaint affirmatively alleges just the opposite." 2017 AMC at 2782 (citing *Bellefonte Re. Ins. Co. v. Argonaut Ins. Co.*, 757 F. 2d 523, 528 (2nd Cir. 1985) ("A party's assertion of fact in a pleading is a judicial admission by which it normally is bound throughout the course of the proceeding.")).

As to the second claim, the court noted "the bill of lading explicitly disclaims liability for any damage sustained while the container was not in the (carrier's) control." 2017 AMC at 2782. It also provided that the carrier would not be liable for any loss "arising from latent defects, breakdown, defrosting," etc., and that the carrier did not warrant refrigerating but merely would exercise care in its operation and maintenance while in its actual possession. The court noted the plaintiff's opposition brief made no attempt to explain why these provisions did not preclude its "container-based claims." *Id.* at 2783.

The plaintiff argued there might have been a separate contract that was not affected by the clear language of the bill of lading; however, no facts were alleged showing that such a contract existed. The bill of lading contract noted it was a final contract and "may not be changed orally."

"Given the clear language of the bill of lading, [the plaintiff] fails to state a claim for damages arising out of the failure of the refrigerator while in the possession of [its trucker]." *Id.*

The court granted the carrier's motion for judgment on the pleadings.

"IN ANY EVENT"…

De Wolf Maritime Safety BV v Traffic-Tech International Inc. (The "Zagora"): Federal Court, Ontario: Decision of Honorable Madam Justice St-Louis; 2017 FC 23: January 11, 2017.

A shipment described as "One piece zodiac and spare parts" was shipped from Vancouver, Canada, to Rotterdam. The container was carried under a bill of lading which made no mention of on-deck carriage.

The container was carried on deck and washed overboard during the voyage. The cargo owner (plaintiff) was unaware that the cargo was being carried on deck, being notified of the loss only after it happened.

Plaintiff (as owner and consignee) sued the ocean carrier who asserted the defense of limitation provided for in the Hague-Visby Rules.

The court referred to Article I(c) of the Hague-Visby Rules (the same language as Article I(c) of the Hague Rules) and noted it defines "goods" as including "goods, wares, merchandise and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried."

To not be considered as "goods," the shipment must not only be carried on deck but also must be stated in the bill of lading as being so carried. The bill of lading made no mention of on-deck carriage. As one of the two conditions of Article I (c) was not met,

the court found the cargo could not be excluded from the definition of "goods," and thus was subject to the Hague-Visby Rules.

It also found the carriage of the container on deck did not amount to a fundamental breach or deviation, but merely involved a matter of construction of the contract.

The court further referred to Article IV (5) (a) which provides for a limitation of liability for the carrier and the ship "in any event." No evidence was provided to support any claim that the damage resulted from an act or omission by the carrier done with intention to cause damage or recklessly and with knowledge that damage would probably result. The court looked at the words "in any event" as meaning "in every case." The court allowed the carrier limitation in accordance with the Hague-Visby Rules.

INDEMNITY IS DIFFERENT…

AGCS Marine Insurance Company v. Geodis Calberson Hungaria Logisztikai KFT, 16-CV-9710 (JMF), 2017 WL 5891818 (S.D.N.Y. Nov. 28, 2017).

Defendant contracted to ship computer equipment from Hungary to Pennsylvania by air. Defendant enlisted third-party defendant (El Al) to fly the shipment from Hungary to the United States; third-party defendant (Alliance) acted as ground handling agent at JFK Airport in New York and third-party defendant (PAI Trucking) transported the cargo from JFK Airport and warehoused it in a bonded container freight station. The cargo left the freight station on December 15, 2014, and, just over two years later, the owner of the cargo filed suit against defendant as the "contracting carrier," alleging the computer equipment arrived in damaged condition. Approximately five months later, defendant filed third-party complaints against the third- party defendants as "actual carriers," seeking damages, contribution and indemnification.

Third-party defendants moved to dismiss the third-party complaints as untimely pursuant to Rule 12(b) (6) (where a court "must confine itself to the four corners of the complaint"). However,

if matters outside the pleading are submitted, the court may consider those documents and treat the motion "as one for summary judgment under Rule 56." Both sides relied on extrinsic evidence and the court treated the motion as one for summary judgment.

It was agreed that the Montreal Convention generally applied to the case because it related to the "international carriage" of "cargo." Additionally, there was no dispute that, if Article 35 of the Montreal Convention applied to defendant's claims against the "actual carriers," those claims would be time-barred as they were filed more than two years after the completion of delivery.

The court found there was little question that Article 35 would apply to a claim for damages based on negligence. This left the sole issue in dispute as to whether Article 35 also applied to claims for contribution and indemnification.

The court referred to a decision in the Ninth Circuit as appearing to be the only American court to have addressed that issue in any depth (*Chubb Ins. Co. of Europe S.A. v. Menlo Worldwide Forwarding, Inc.*, 634 F.3d 1023 (9th Cir. 2011)). It also noted the Convention itself (in Article 37) provided for rights of recourse against third parties and that: "Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person." 2017 WL 5891818 at *3.

Following the U.S. Ninth Circuit, the court held Article 35 applied to claims for "damages" but not to claims for indemnification or contribution. It granted the motion to the extent the third-party complaints sought damages, but denied the motion to the extent they sought indemnification and contribution. It further denied the request for attorneys' fees, costs and expenses as time barred under the Montreal Convention.

INTERCLUB AGREEMENT DEALS WITH RESPONSIBILITY EVEN THOUGH NO "FAULT"…

Transgrain Shipping (Singapore) PTE Ltd. v. Yangtze Navigation (Hong Kong) Co. Ltd. (the M/V YANGTZE XING HUA); Court of Appeal (Civil Division); [2017 EWCA Civ. 2107]; Decision of the Right Honorable Lord Justices Longmore, Hamblen and Henderson, dated December 13, 2017.

A shipment of soya bean meal was transported from South America to Iran where the vessel arrived in December of 2012. The vessel was under time charter (NYPE form), and when it arrived off the discharge port, charterers (who had not been paid as yet by the receiver) ordered the vessel to wait. This took over four months. During that time, the cargo, or part of it, started to overheat.

When the vessel was brought alongside and discharged in May 2013, damage was found and a claim was made by the receiver against the owner for some £5 million. This was settled after negotiations for £2,654,238. The owner then claimed that amount (plus the sum of US $1,012,740. for hire) from the charterers and took the matter to arbitration.

The charter party included a provision whereby the Interclub Agreement of 1996 was incorporated. Considering the Interclub Agreement, particularly Clause 8, the arbitration panel found against the charterers, rejecting all the allegations made by it against the owner and the crew. The panel also held that charterers were not in breach or at fault or neglect in loading the cargo although what they loaded, together with the instructions to wait outside the discharge port, was in all probability the cause of the damage:

> Either Owners or Charterers must bear the risk of something going wrong caused, on our analysis by Charterers' decision to not only protect their position but we sense actually profit from it. We can but conclude that this is a case where the ICA must regard Charterers' decisions as an "act" falling

within clause 8(d) and bear 100% of the consequences.

Charterers appealed the arbitration decision and the lower court affirmed the decision of the arbitration panel, considering clause 8 of the Interclub Agreement was "…not concerned with fault but was rather a mechanism for assigning liability for cargo-claims by reference to the cause of the damage to the cargo regardless of fault." The judge gave permission to appeal.

On appeal to the Court of Appeal, Lord Justice Longmore dealt with the background of the Interclub Agreement and agreed with the decisions of the judge below and the arbitration panel that "...the word 'act' in the context of the ICA be given its natural meaning, there is no need to confine it to 'culpable act.'"

Lord Justice Hamblen agreed that the matter should be dismissed for the reasons given by Longmore LJ., noting the natural meaning of the word "act" is something which is done. It does not connote culpability. The central question is does the claim "in fact" arise out of the act, operation or state of affairs described? It does not depend upon legal or moral culpability, nor is there any stated or obvious criterion against which such culpability is to be judged.

Lord Justice Henderson agreed.

The appeal was dismissed with costs awarded to owner.

COMMITTEE ON CARRIAGE OF GOODS

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CARGO NEWSLETTER NO. 71

Spring 2018 (BIMCO Edition)

MERE CONCLUSIONS ARE INSUFFICIENT…

DS-Rendite Fonds NR. 108 VLCC Ashna GMBH & CO Tankschiff KG v. Essar Capital Americas Inc., 882 F. 3d 44, 2018 AMC 307 (2d. Cir. 2018).

Plaintiffs moved for attachment and garnishment under Fed. R. Civ. P. Rule B. The vessel involved was chartered pursuant to a timecharter. One of the defendants entered into a novation agreement assuming the obligations of the charterer. Subsequently, other guarantees were made including a subsequent settlement agreement.

The owners' complaint asserted a claim for breach of a maritime contract and simultaneously sought attachment and garnishment for some $10,586,346.63. The district court denied the motion for attachment and a motion for reconsideration. An appeal followed.

The court considered the matter as a "classic *quasi in rem* proceeding. The Plaintiff is seeking to assert a claim against a defendant, over whom the court does not (otherwise) have personal jurisdiction, by seizing property of the defendant (alleged here to be in the hands of a third party)." 882 F. 3d at 47.

The court noted Supplementary Rule B(1) refers to an *in personam* action; the court also commented that the nature of the jurisdiction the court acquires by a Rule B attachment is properly denominated "*quasi in rem*" because any judgment rendered is

limited to the value of the attached property. The court addressed the concept of *quasi in rem* and noted it proved particularly useful in admiralty: "in a Rule B proceeding, 'the *res* is the only means by which a court can obtain jurisdiction over the defendant' … If a Plaintiff is not able to successfully attach the defendant's property under Rule B, the district court lacks jurisdiction over the defendant." *Id.* at 48.

To secure an *ex parte* order of attachment under Rule B, a plaintiff "bears the burden of establishing a right to attachment" (citation omitted). First, plaintiff must file a verified complaint praying for attachment and an affidavit asserting that the defendant cannot be found within the district. The complaint "may contain a prayer for process to attach the defendant's tangible property or other intangible personal property…up to the amount sued for…in the hands of garnishees named in the process." "Finally, the court must review the complaint and affidavit(s) in support, and if the conditions of Rule B appear to exist, enter an order authorizing process of attachment and garnishment." *Id.*

"If an attachment is ordered, any person claiming an interest in [the attached property] shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be vacated or other relief granted." *Id.* at 49.

"The issue in the present matter is whether appellant's complaint and affidavit make legally sufficient allegations that identifiable property of the defendants, tangible or intangible, is 'in the hands of garnishees.'" *Id.*

Initially, the court noted the pleading requirements under Rule B are said to be easily met. However, there are limits: an existing attachment order is not valid where the attachment and garnishment is "served before the garnishee comes into possession of the property," or where the garnishees do not "owe [] a debt to the defendant at the time the order is served." *Id.*

Courts have recognized the need for limits to prevent abuse. As a result, district courts often initially grant attachment orders;

however, they then use Rule E hearings to determine whether the requirements of Rule B have, in fact, been met.

Referring to the case of *Marco Polo Shipping Co. Pte. v. Supakit Prod. Co.*, 2009 AMC 639 (S.D.N.Y. 2009), and other cases cited, the court noted district courts have required a minimal specificity of factual allegations identifying the defendant's property to be attached before issuing a Rule B Order. To meet that standard, some identification of the "property" is needed.

The court found the complaint did not meet the standard, alleging only entirely conclusory allegations that the garnishees do business with the defendants and that the garnishees, on information and belief, hold property and funds which are due and owing to defendants.

The district court denied the motion for attachment finding the conclusory allegations did not provide a sufficient basis to conclude there were attachable assets within the district. On a motion for reconsideration, other assertions were made, including "it is highly likely that the Garnishees owe money to defendants, and thus have attachable assets within this District." 882 F. 3d at 51. The district court found these assertions failed to sufficiently allege that defendants are entitled to a debt owed by the garnishees.

The court found the complaint stated only in conclusory terms that the garnishees held property and did not allege facts explaining why any one of the garnishees (six companies) would hold property of "Essar," which is actually three separate companies.

Even assuming an affiliation, it did not follow that there was a specific entitlement "to a debt owed by a garnishee, much less a debt that would be in the possession of the garnishee 'at the time the order is served.'" *Id*. (Internal citations omitted).

The court found it was within the district court's discretion to deny the motion and affirmed. It allowed appellant, should it wish

to renew its application, to file a complaint and motion according to the standards set forth in the opinion.

45 DAYS NOT ENOUGH; $20,000 LIMIT OK; PLAINTIFF GIVEN "DO-OVER" AS TO INTENTIONAL TORT…

Ergon Oil Purchasing, Inc. v. Canal Barge Company, Inc., 2018 AMC 326, 2018 WL 705870 (E.D. La. 2018).

Plaintiff hired two barges to transport 48,000 barrels of crude oil from Texas City, Texas, to Vicksburg, Mississippi. When the voyage was completed, it was determined that cargo in one of the vessels had been contaminated in transit. Plaintiff filed suit seeking in excess of $2 million in damages against the barge owner, the surveying company, and the company that stripped and cleaned the barge prior to its loading.

On motion, the court dismissed plaintiff's claims against the stripping company for lack of personal jurisdiction.

The surveying company then moved to dismiss the claims against it on the basis that it was not notified by the plaintiff within 45 days after delivery of its report and, alternatively, that any maximum amount of damage would be limited to $20,000 pursuant to the general terms and conditions of its preferred rate agreement which was entered into by the parties.

The court denied plaintiff's motion in part; however, it also granted it in part. As to the time limitation, "based on the authorities cited by Plaintiff," the court agreed that the provision calling for claims to be brought within 45 days was contrary to Texas law, which governed the dispute by agreement of the parties. 2018 AMC at 328. "The Agreement shall be governed by and interpreted in accordance with the laws of the State of Texas," under which any contract stipulation requiring notice of a claim for damages within less than 90 days is void. *Id.* at n. 7.

As to the limitation provision, the court found there was no disparity between the parties as to bargaining power and noted that

damage limitations "may be enforced without regard to whether the limitation is a reasonable estimate of the probable damages resulting from a breach of contract." *Id.* at 329. Accordingly, the court found no basis for disregarding the $20,000 damages limit.

The court went on to note that, in its opposition memorandum, plaintiff contended that the surveying company knew of the impending harm and deliberately and intentionally did not timely alert it. At the same time, this "alleged" unidentified intentional tort had not been set forth in plaintiff's complaint.

The court stated, "[S]hould Plaintiff timely determine that appropriate grounds exist for alleging such a claim, consistent with the requirements of Rule 11 of the Federal Rules of Civil Procedure, it must promptly seek leave to amend its complaint to do so." *Id.* at 329.

RETURN WITH US NOW TO THOSE THRILLING DAYS OF YESTERYEAR! FROM OUT OF THE PAST…(WITH APOLOGIES TO "THE LONE RANGER")

Sea Tank Shipping AS v. Vinnlustodin HF et ano.; Court of Appeals (Civil Division), [2018] EWCA Civ 276; Decision of Lady Justice Gloster, Lord Justice David Richards, and Lord Justice Flaux, dated February 22, 2018.

A shipment of fish oil was carried from Iceland to Norway on board a tanker vessel, the AQASIA, pursuant to a charter party. On arrival at the discharge port, about 547 metric tons were found to be damaged. The disponent-owner/defendant claimed it was entitled to limit liability pursuant to Article IV, Rule 5 of the Hague Rules (some £54,730.9). Cargo claimants took the position that no limitation applied and the value of the goods lost was $367,836.

Judge Sir Jeremy Cooke (sitting as a Judge of the High Court) held that the term "unit," as contained in the Hague Rules of 1924, did not include bulk cargo. Thus, the disponent-owner/defendant was not entitled to limit liability as per Article VI, Rule 5.

On appeal, Lord Justice Flaux essentially followed the path chosen by the court of first instance, referring to the Travaux Preparatoiers for the Hague Rules, authorities, both English and Commonwealth, as well as others, and textbooks and academic commentators.

The decision of Lord Justice Flaux (consisting of 101 paragraphs), dismissed the appeal with Lord Justice Richards and Lady Justice Gloster (also on the panel) agreeing.

[Editors' note: It is strongly suggested the reader review the full decision of Lord Justice Flaux. Essentially, it tracks the decision of Sir Jeremy Cooke below; however, it is respectfully submitted that there appears to be a basis for the proposition that the Hague Rules were intended to include bulk shipments.

For example, review of the Travaux Preparatoiers would indicate that the bulk carriers (referred to then as "tramp" carriers) constituted a major portion of shipping tonnage and also were considered as being significant (perhaps necessary?) participants in the formation of the Hague Rules. [The delegates included representatives from ship owners, cargo interests, insurance companies, bankers, who met to fashion a regime which would be uniform and essentially acceptable to all.]

It would seem somewhat illogical that bulk carriers would be considered important contributors to the formation of the Rules, yet then deny them access to a protective clause which ultimately was an agreed consensus of the various interests attending and participating in forming such compromise regime.

Further, paragraphs 50/51 of the decision refers to the issue of limitation being discussed in Brussels in October of 1922 and a year later in Brussels.

Paragraph 50 notes a comment by Mr. Bagge, the Swedish delegate, recalling that Sir Norman Hill had stated Article IV, Rule 5 should not apply to bulk cargoes.

Neither paragraph 50 nor 51 contain the comments of Mr. Bagge made a year subsequent in 1923. His recollection of Sir Norman Hill's remarks was to the opposite.

Paragraph 50 makes no reference to the further comments of Judge Hough (acting as chairman) in opposition to Mr. Bagge's comment as to bulk cargo.

Such occurred over 90 years ago and it seems highly unlikely that the issue involved would be made the subject of further litigation at this point in time.

In 1968, the Visby Amendments to the Hague Rules came into effect which, admittedly, include limitation for bulk shipments by virtue of the alternative coverage based on weight. At the same time, it remains possible that charter parties/bills of lading may well make reference to the Hague Rules of 1924 and face the issue with which the AQASIA was concerned.

Perhaps any remedial efforts might consider the possibility mentioned by Lord Justice Flaux in his paragraph 97: "the appellant could have protected itself by seeking to incorporate in the charter party some form of deeming provision giving Article IV, Rule 5 and 'unit' a different meaning.…"]

TEXAS COURT SENDS PLAINTIFF TO BIG APPLE…

Caddell Construction Co. (DE), LLC v. Danmar Lines, Ltd., Civil Action No. H-17-3130, 2018 WL 1536744 (S.D. Tex. Mar. 29, 2018).

Defendant agreed to deliver 28 of plaintiff's air handling units from Norfolk, Virginia to the United States Embassy in Kabul, Afghanistan. Plaintiff alleged the cargo was damaged in transit between Karachi Port, Pakistan, and Kabul and that defendant breached its contract with plaintiff, was negligent, and breached its bailment obligations.

Defendant moved to transfer to the Southern District of New York because the bills of lading included a forum-selection clause:

> 14.2. U.S. Carriage – The contract evidenced by or contained in this bill of lading or otherwise arising from the Carriage or in relation to the Goods shall be governed by and construed in accordance with the laws of the United States of America and particularly 28 USC Section 1300 et seq. of US COGSA. Any claim against the Carrier under this bill of lading or otherwise arising from or in relation to the Services or the Goods shall be determined exclusively by the United States District Court for the Southern District of New York to whose jurisdiction the merchant irrevocably submits. The Merchant agrees that it shall not institute legal proceedings in any other court and shall indemnify the Carrier for all legal costs and expenses incurred by the Carrier to transfer or to remove a suit filed in another forum.

Plaintiff alleged a separate agreement (the purchase order)—not the bills of lading—controlled and that such purchase order did not have a forum-selection clause. Plaintiff also conceded that neither party formally executed the purchase order. Plaintiff also argued that it had no notice of the terms and conditions because it received only a scan of the front side of the bills of lading and that the consignee received the originals of the bills of lading, not plaintiff.

Defendant responded that plaintiff had notice because defendant was a licensed NVOCC and was required to file its bill of lading form with the United States Maritime Commission for approval. It argued that this filing made the bill of lading public and put plaintiff on constructive notice of its terms and conditions.

The court considered plaintiff's arguments and found the purchase order did not govern the parties' relationships. It was not executed and the argument that the parties operated under its terms was not supported by the record.

> [Plaintiff's] claim that it did not see the terms and conditions of the bill of lading does not preclude enforcing the forum-selection clause. First, [defendant] provides evidence that its bill of lading form was "publicly filed with and approved for use as a contract of carriage by the U.S. Federal Maritime Commission." [Plaintiff] does not dispute that the bill of lading form, including terms and conditions, was available publicly. Rather, it argues that it "never agreed to the default application" of the bills of lading.

2018 WL 1536744 at *3 (internal citations omitted).

The court noted the Fifth Circuit did not require that a shipper receive bill of lading terms and conditions in order to be held to them. "A shipper may be held to a clause in a bill of lading 'even though the bill of lading [has] not been issued.'" *Id.* The court found plaintiff had constructive notice of the bills of lading terms and conditions, including the forum-selection clause.

The court found plaintiff had the burden of establishing that the transfer to the forum for which the parties bargained was unwarranted and that plaintiff had not met its burden. As to plaintiff's argument that private interest factors weighed against transfer, the court noted the Supreme Court has held a motion to transfer based on a forum-selection clause should not consider arguments about the parties' private interests. The court further found that plaintiff did not overcome its burden of showing public interest factors weighed against a transfer. The court found the parties' relationship to be governed by the bills of lading containing the forum-selection clause and granted the motion to transfer to the United States District Court for the Southern District of New York.

MARITIME LIEN GETS SHORE LEAVE...

Dampskibsselskabet Norden A/S v. 25,001.078 Metric Tons of Fly Ash, 308 F. Supp. 3d 693, 2018 AMC 1067 (N.D.N.Y. 2018).

The owner of the vessel commenced an *in rem* action against 25,001.078 metric tons of fly ash seeking to enforce a maritime lien against the charterer. The court issued an order directing the issuance of a warrant of arrest *in rem* against the cargo, and appointed the master of the vessel and a recycling center as substitute custodians.

The charterer moved to partially vacate the arrest of a portion of the cargo which had been discharged prior to the issuance of the warrant of arrest in rem (approximately 17,000 metric tons).

The charterer argued that the owner could not assert a lien over the portion of the cargo which had been discharged from the vessel prior to the issuance of the warrant of arrest because it was *unconditionally* delivered as part of a settlement agreement between the parties. The court noted "a defendant may 'attack the complaint, the arrest, the security demanded or any other alleged deficiency in the proceedings.'" 308 F. Supp. 3d at 695.

"At a hearing, it is the Plaintiff that bears the burden of showing that the arrest or attachment should not be vacated." *Id.* The court noted the various arguments asserted and stated, "[u]nder United States law, it has been settled for over a century that we presume a maritime lien exists in favor of a ship owner on cargo for charges incurred during the course of its carriage. … This kind of lien is ordinarily lost upon the cargo's 'unconditional delivery to the consignee.'" *Id.* at 696-97 (internal citations omitted).

"However, 'because it would frustrate commerce to require ship owners to retain their liens only by actual possession of the implicated cargo, a ship owner enjoys a strong presumption that, absent a clear indication to the contrary, he has not waived his cargo lien upon the delivery of that cargo.'" *Id.* at 697.

The court found the owner had carried its burden of demonstrating that the arrest should not be vacated: the complaint and attached exhibits showed the charter party permitted the owner to place a lien on the cargo for unpaid demurrage and other expenses. A notice of lien was transmitted to the charterer. While

some cargo was discharged, the owner further notified the charterer (as well as the stevedore and the recycling entity storage) that the owner intended the lien to remain in place once the cargo was discharged ashore:

> [I]t would be a serious sacrifice of his interests, if the ship was compelled, in order to preserve the lien, to remain day after day with her cargo on board, waiting until the consignee found it convenient to pay the freight, or until the lien could be enforced in a court of admiralty…if the cargo cannot be unladen and placed in the warehouse of the consignee, without waiving the lien, it would seriously embarrass the ordinary operations and convenience of commerce, both as to the ship-owner and the merchant.

Id. at 698 (citing *In re 4,885 Bags of Linseed*, 66 U.S. 108, 114 (U.S. 1861)).

The court denied the motion to vacate the seizure of the cargo which had been discharged ashore.

CARMACK NEEDS MORE THAN "TBD"…

New York Marine and General Insurance Company v. Estes Express Lines, Inc., 719 F. App'x 691 (9th Cir. 2018).

Suit was brought to recover $84,511.23 that the underwriter had paid to its assured with respect to batteries which suffered damage while carried by a trucker. On summary judgment, the district court held that neither the trucker nor the broker was liable because the loss claims did not indicate "a specified or determinable amount of money" as required by the Carmack Amendment. 719 F. App'x at 692.

The court noted, "[t]o obtain relief against a carrier under the Carmack Amendment, claimants must comply with '[m]inimum filing requirements.' A claim must, at a minimum, '(1) contain facts sufficient to identify the…shipment (or shipments) of property;

(2) assert[ ] liability for alleged loss, damage, injury, or delay; and (3) mak[e] a claim for the payment of a specified or determinable amount of money.'" *Id.* (Internal citations omitted).

The court found that the claim forms at issue lacked such a specified or determinable amount, but merely noted the cargo's total value of $148,055.30 and stated the extent of damage was "unknown until cargo is inspected." *Id.*

A few weeks after the claim was submitted, the assured was warned that the amount of the referenced claim was still missing and the claim form needed to be updated. No update followed. "Merely identifying the upper bound of possible damages with exact damages 'TBD' does not suffice." *Id.* at 693.

Even under a standard of "substantial performance," the claim failed as the damage to the batteries was not obvious, but out-of-sight without any apparent means for inspecting them.

The district court's judgment was affirmed.

[Editors' note: The decision of the Ninth Circuit is marked "NOT FOR PUBLICATION" and "This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3."]

NEWSLETTER NO. 70 REVISITED…

AP Moller-Maersk A/S & Kuokuyo Limited; Court of Appeal (Civil Division); Neutral Citation No. [2018] EWCA Civ 778; Decision of Lady Justice Gloster and Lord Justice Flaux, dated April 17, 2018.

The Court of Appeal essentially follows the decision of Mr. Justice Andrew Baker dealt with in Newsletter No. 70 (see *supra* at 20024) [in a somewhat shorter decision consisting of 101 paragraphs; some 31 pages, as opposed to 121 paragraphs and 33 pages, plus an appendix of 4 pages].

The court found the Hague-Visby Rules applied, including Article IV, Rule 5, even though Sea-Waybills were involved.

A draft bill of lading had been prepared by the carrier, but three Sea Waybills were issued. The court found the terms of carriage required a bill of lading to be issued, and it was then immaterial that no bill of lading was insisted upon or in fact issued.

The Hague-Visby Rules applied with the force of law, the shipment being from Spain, a contracting party to such Rules.

As to limitation, the court found that each frozen loin was a separate unit and as each loin was enumerated in the sea-waybills, plaintiff was entitled to the liability limitation under Hague-Visby for each.

As to bagged tuna, while such would qualify as "packages," the Sea Waybill involved made no mention of them. Thus, the container was to be considered the package.

The court also took the opportunity to comment on the *El Greco (Australia) Pty Ltd. v. Mediterranean Shipping Co. S.A.* [2004], 2 Lloyd's Rep. 537 decision, noting that enumeration was sufficient and the tuna need not be described as "as packed."

The court also rejected an invitation to consider the aspect of whether the frozen tuna loins could have been loaded differently, i.e., further packaging or consolidation other than in containers.

[As in Cargo Newsletter No. 70, the reader is encouraged to review the entire decision.]

COMMITTEE ON MARINE INSURANCE AND GENERAL AVERAGE

Chair: Andrew C. Wilson
Editor: Julia M. Moore

NEWSLETTER - Spring 2018

In This Issue:

1. **Case Summaries related to the following issues**:
    a. Subrogation
    b. Policy Contract – Cover for Salvage Costs Denied
    c. Arbitration Clause Enforceable
    d. Warranty
    e. Named Insured Provision
    f. Insurer Protected by Limitation Act Injunction
    g. Admiralty Jurisdiction
    h. *Uberrimae Fidei Strictissimi*/Utmost Good Faith

SUBROGATION - Barred Against Additional Assured But Separate Tort Claims to Proceed

Lloyd's Syndicate 457 v. Floatec, LLC, No.16-03050, 2017 WL 3189020 (S.D. Tex. July 27, 2017)

Subrogated underwriters on an "Offshore Construction Risk Policy" sued an engineering firm and a warranty surveyor to recoup losses paid when the mooring "tendons" for the enormous deep water drilling rig, BIG FOOT, fell to the ocean floor in 5000 ft. of water during installation and were lost. The defendants filed motions to dismiss claiming that they were "Other Insureds" as defined under

the policy, or, the claims were barred under the Louisiana anti-subrogation rule barring subrogated underwriters' claims against additional or "other" insureds. Alternatively, they sought to compel arbitration under the terms of their contract with the rig owner.

Underwriters presented numerous arguments surrounding the interpretation of the term "Other Insured" in their policy, all of which were rejected by the court. Underwriters then argued that the allocation of risk and indemnity provisions in the defendants' contract with the rig owner related to the rig owner's property losses, all of which were in favor of the rig owner, were inconsistent with the defendants' interpretation of their status under the policy. The court rejected this argument as well as underwriters' contention that the defendants' liability policies were required to be primary per their contract with the rig owner, stating that this language was taken out of context and that the defendants were not required to obtain builder's risk insurance under their contract with the rig owner, which rendered the "primary" theory inapposite. On these and other bases, the court dismissed the Underwriters' claims with prejudice.

In contrast, on the claims against the warranty surveyor, the court concluded that these were not based upon subrogation, but instead upon separate tort theories of negligence and breach of the warranty of workmanlike performance under Louisiana law. Because of the separate and independent theory of recovery, the court held that the warranty surveyor's defenses of "Other Insured" status and the Louisiana anti-subrogation rule were simply inapplicable, and the claims could proceed. The court also concluded that there was no right to arbitration available based upon the terms of the rig owner's contract since underwriters were not a party to that contract and their rights arose independently of it. The case is now on appeal before the U.S. Fifth Circuit.

POLICY CONTRACT – Cover For Salvage Costs Denied

Starr Indemnity & Liability Co. v. Water Quality Insurance Syndicate, 320 F. Supp. 3d 549, 2018 AMC 1401 (S.D.N.Y. 2018)

This case arose out of the April 6, 2014, grounding of two tank barges, GM-5001 and GM-5002, carrying approximately 300,000 barrels of decant oil on the upper Mississippi, while they were being pushed by the M/V KAREN PAPE. Genesis Marine was, at all relevant times, the owner of the barges and the M/V KAREN PAPE. As a result of the grounding, which occurred at a time when the river level was falling rapidly, Genesis Marine incurred substantial costs for the lightering and refloating of the barges, which was done by T&T Salvage. No oil was discharged from the barges as a result of the grounding, or during the lightering and refloating operations. Genesis Marine thereafter filed claims with its hull/protection & indemnity insurer, Starr Indemnity & Liability Co., and its primary pollution liability insurer, Water Quality Insurance Syndicate ("WQIS"). Specifically, Genesis Marine presented a claim to Starr as the hull insurer for the entire invoiced amount of the salvage costs incurred by Genesis Marine to refloat the barges, in the amount of $2,892,670.37. Starr ultimately paid $2,864,756.26 of the costs charged by the salvor. WQIS paid pollution control costs incurred and claimed by Genesis Marine in excess of $280,000.

Starr, as assignee of Genesis Marine, filed suit against WQIS seeking reimbursement of the salvage costs paid by Starr. Starr claimed that WQIS was responsible for covering these costs under several provisions of the WQIS Policy on the basis that the measures taken by Genesis Marine in response to the grounding were, in whole or in part, to respond to a substantial threat of a discharge of oil from the stranded barges. It was undisputed that the WQIS policy does not provide coverage for the costs of salvage unless such costs are incurred to mitigate or prevent a "substantial threat of discharge" under the Oil Pollution Act of 1990 ("OPA '90"). WQIS denied that the grounded barges posed a substantial threat of discharge under OPA '90, and declined to reimburse Starr for the subject payments made to Genesis Marine.

Following a three day bench trial, during which the parties presented fact and expert testimony and documentary evidence, the Hon. Paul A. Engelmayer issued a 46 page decision finding, *inter alia*, that the barges did not pose a substantial threat of discharge,

and holding that none of the provisions of the WQIS policy were triggered and therefore WQIS was not liable to Starr for any of the salvage costs incurred by Genesis Marine. In so holding, the court expressly credited the contemporaneous documentary evidence and testimony over the testimony of plaintiffs' witnesses, including the Coast Guard, stating that "[t]he evidence does not reflect – and the participants in real time did not conclude – that there was a substantial risk of discharge. Rather, the evidence overwhelmingly showed that the barges – by their nature and in the circumstances at hand – were never at risk (or anywhere close) of the type of failure that might have resulted in an oil discharge."

Editor's note: Thanks to John Woods and Corey Greenwald of Clyde & Co. US LLP for submitting this case note.

ARBITRATION CLAUSE ENFORCEABLE

Galilea v. AGSC Marine Ins. Co., 879 F.3d 1052, 2018 AMC 46 (9th Cir. 2018).

After introducing its decision with a literary flourish from Plato and Shakespeare, the Ninth Circuit Court of Appeals turned to the quotidian question of arbitration clauses and marine insurance policies. The circuit court then affirmed in part, and reversed in part, the decision of the district court and found that the arbitration clause in the policy contract was enforceable. In doing so, the court examined the intersection of the McCarran-Ferguson Act, 15 USC §1012, and the Federal Arbitration Act ("FAA"), 9 USC §1-16, which provides for enforcement of arbitration provisions in maritime contracts. Noting that plaintiff policy-holder Galilea was attempting to "navigate around" the arbitration clause by invoking McCarran-Ferguson, the court concluded that because no state's law was applicable to the insurance contract in the first instance, McCarran-Ferguson had no applicability. Finally, the court ruled that the question of arbitrability was delegated to the arbitrator as a matter of contract and was not for the court to decide. The court of appeals disagreed with the lower court on the issue of whether the arbitration clause in the policy application bound the parties to arbitration and reversed that decision. However, because the court

of appeals affirmed the decision on the arbitrability of the insurance contract itself, the court remanded the matter back to the district court with instructions to grant the underwriters' motion to compel arbitration in its entirety.

Editor's note: This decision was originally reported in the Spring 2016 edition of this newsletter. (MLA Report, MLA Doc. 823 at 19162.)

WARRANTY

Starnet Ins. Co. v. La Marine Service LLC, 298 F. Supp. 3d 869 (E.D. La. 2017).

This action arose out of the sinking of the vessel M/V CAPT. L.J. owned by defendant La Marine Service and covered by a time-hull insurance policy issued by plaintiff Starnet. Starnet denied coverage for the loss and contended that the vessel sank because of negligent maintenance. Evidence indicated that the stuffing boxes were poorly maintained and leaking and the vessel relied on an automatic bilge pump to keep water pumped out of the vessel. On the night of the sinking, the generator engine stopped running and, without power, the bilge pumps no longer worked to keep water out of the engine room. The central issue before the court was whether the defendants' negligent maintenance precluded coverage under the implied warranty of seaworthiness and/or the Liner Negligence Clause. Before reaching these questions, the court first determined that federal maritime law applied since the Liner Negligence Clause at issue was closely related to the Inchmaree Clause which was governed by Fifth Circuit admiralty precedent.

Noting the settled "American Rule" that federal maritime law implies two warranties of seaworthiness in a time hull insurance policy: (1) an absolute warranty of seaworthiness at the inception of the policy and (2) a modified negative warranty under which an insured promises not to knowingly send a vessel to sea in an unseaworthy condition, the court determined that the Liner Negligence Clause waived or displaced the American Rule's implied warranties of seaworthiness. Therefore, the salient question

was whether the vessel owner exercised due diligence to keep the vessel in a seaworthy condition. After weighing the evidence, the court found that it was essentially uncontested that the vessel's stuffing boxes and propulsion shafts were not properly maintained, and that the lack of proper maintenance caused the leaking which caused the loss. Relying on the evidence of negligent maintenance, the court held that La Marine failed to exercise due diligence to maintain the vessel in a seaworthy condition and that, as a result, the loss was excluded under the Liner Negligence Clause.

NAMED INSURED PROVISIONS

Maclean v. Travelers Ins. Co., 299 F. Supp. 3d 231, 2017 AMC 2462 (D. Mass. 2017)

The plaintiffs, Kevin and Donna Maclean, ("Macleans") were passengers in a speedboat travelling at high speed as part of a "lightning speedboat adventure" when the speedboat crossed another boat's wake, tossing the Macleans into the air and injuring them. The owner of the speedboat they were in was insured by the Travelers Insurance Co. ("Travelers") under a policy with a Named Operators Endorsement. Unfortunately, the person operating the boat at the time of the accident was not listed in the Named Operators Endorsement. Travelers contended that this vitiated cover and, as a result, Travelers had no duty to defend or indemnify the speedboat's owners in connection with the Maclean's claims. The speedboat's owner then assigned its coverage rights against Travelers to the Macleans who prosecuted the captioned suit.

Travelers moved to dismiss the suit for lack of subject matter jurisdiction and for failure to state a claim on which relief can be granted. The court then determined that while it had subject matter jurisdiction to hear the dispute, it would dismiss the claim as the clear language of the policy contract unambiguously placed the loss outside the protection of the policy. Rejecting the plaintiff's claim that Massachusetts state law applied, the court found that the Named Operators Endorsement was a promissory warranty and that "under maritime law 'breach of a promissory warranty in a maritime insurance contract excuses the insurer from coverage.'" *Lloyds of*

London v. Pagan-Sanchez, 539 F.3d 19 (1st Cir. 2008) (citations omitted). The district court also rejected the Macleans' argument that the post-accident addition of the speedboat operator to the Endorsement was a "retroactive approval," which barred the enforcement of the warranty. The court noted that the argument was "clever," but that it did not square with the text of the policy which was rendered void when the vessel was operated by a non-listed operator.

Editor's note: Thanks to Brad Gandrup of Fisher Broyles, LLP and Keith Heard of Burke & Parsons for submitting this case note.

Mt. Hawley Ins. Co. v. Miami River Port Terminal, LLC, .713 F. App'x 951 (11th Cir. 2017)

In this unpublished opinion, the Eleventh Circuit affirmed a district court's decision that the plaintiff insurer did not owe a defense or indemnity to an entity that was not named in the policy. The error first occurred in 2010 when the defendant sought to add the Miami River Port Terminal to its policy as an insured location and to add the company that owned the terminal property as a named insured. Unfortunately, only the Terminal was added as an insured location. The error was not noticed during renewals in 2010, 2011 and 2012. Not until 2013, when a longshoreman fell from the dock and sustained severe personal injuries, did the error come to light. The insurer agreed to add the property-owning company to the policy prospectively, not retroactively, and withdrew its defense of the property-owning company. The insurer then sought a declaration from the court that it was not obligated to defend or indemnify the unnamed property owner. After reviewing the policy, the district court determined that the property-owning company was not a named insured. Citing policy language that stated "No person or organization is an insured…that is not shown as a Named Insured in the Declarations," the court held that the failure to list the property-owing company in the declarations was fatal to coverage despite the naming of the Terminal property as an insured location. Finally, the court commented that the defendant's request for reformation of the

policy served as an acknowledgment that the property-owning company was not a named insured.

INSURER PROTECTED BY LIMITATION ACT INJUNCTION

In re American Boat Co. LLC, No. 16-506, 2018 WL 1635654 (M.D. La. April 5, 2018)

This litigation arose out of the death of a Jones Act seaman employed aboard the M/V DANNY ETHERIDGE. Petitioners filed a limitation action and then sought to enjoin two subsequently filed state court actions. As part of the limitation actions, the insurers of Western Rivers sought to intervene and extend the Limitation Action's injunction against suits to any suit against the insurers of Western Rivers. The court ruled that Western Rivers' insurers were allowed to intervene and it further extended the injunction barring direct actions in order to prevent the insurance of the ship owner from being exhausted through direct action proceedings.

ADMIRALTY JURISDICTION – State Court's Concurrent Jurisdiction Requires Remand

Stark v. Markel American Ins. Co., No. 17-1498, 2017 WL 5151300 (W.D. Wash. Nov. 7, 2017)

Plaintiff Stark filed an action against Markel American Insurance Co. ("Markel") in a Washington state court seeking coverage for the loss of his vessel as the result of an accidental fire. Markel denied coverage on the basis of an exclusion for losses if the vessel was afloat. Since the loss occurred while the vessel was afloat at the time of the fire, Markel argued that the policy excluded cover for loss. Stark argued that he was not informed about this exclusion and his broker, DMA & Associates, Inc. was also named in the suit. Markel removed the action to federal court stating that: (1) the court had admiralty and maritime jurisdiction over the suit since the policy was a marine insurance contract; and (2) the court would have diversity once Markel filed a motion to sever Stark's claims against DMA, a non-diverse party. Stark argued that the state court had

concurrent jurisdiction and that the severance of DMA was not warranted as the suit concerned a dispute over whether the broker communicated Markel's policy exclusion.

Citing a "strong presumption against removal jurisdiction," the court granted the motion to remand after stating that Markel had failed to meet its burden that removal was appropriate given the state court's concurrent jurisdiction. The court also found that the inclusion of broker DMA in the action was not fraudulent and diversity jurisdiction was not available. The court then awarded Stark attorney's fees based on Markel's "unreasonable" position in arguing against remand.

***UBERRIMAE FIDEI STRICTISSIMI*/UTMOST GOOD FAITH**

QBE Seguros v. Carlos A. Morales-Vazquez, No. 15-2091, 2017 WL 5479458 (D.P.R. Nov. 14, 2017).

Plaintiff QBE Seguros ("QBE") filed this action in admiralty against defendant policy holder Carlos Morales-Vazquez ("Morales") seeking a judgment that the policy was void *ab initio* as a result of Morales' misrepresentation of his prior boating history and his prior loss record. Both parties moved for summary judgment: Morales sought to dismiss the entire complaint; QBE sought a declaration that it was under no duty to indemnify Morales. In analyzing the cross-motions, the court relied on well-settled precedent, noting that the marine insurance contract was governed by the principle of utmost good faith and that full disclosure of all material facts was required of the applicant for marine insurance. Morales argued that the non-disclosures were not material because QBE did not rely on that information in choosing to issue the policy. Morales also argued that QBE waived its right to deny cover based on the non-disclosures since QBE's agents knew the information that Morales did not disclose before QBE issued the policy. Finding that there was a genuine issue of fact with respect to whether an agent of QBE had knowledge of the non-disclosed information, the court denied Morales' motion. The court then denied QBE's motion on the same basis.

COMMITTEE ON RECREATIONAL BOATING

Chair: Mark Buhler
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BOATING BRIEFS

Volume 27, No. 1, Spring 2018

FIRST CIRCUIT UPHOLDS AWARD FOR LOSS OF USE, DESPITE NO PENDING CHARTERS

Sharp v. Hylas Yachts, LLC, 872 F.3d 31 (1st Cir. 2017)

Aggrieved by a series of problems with his new sailing yacht, an owner sued the seller and was awarded loss-of-use damages for the time the yacht had spent undergoing repairs. The First Circuit Court of Appeals affirmed the award, even though the owner had not exposed the yacht for charter before the repair period.

The owner, a semiretired engineer, bought the $2 million custom-built yacht from a seller in Massachusetts. The seller warranted that the yacht would be "of excellent quality, of good workmanship and materials, seaworthy and suitable for its intended use of extended ocean cruising."

Shortly after closing, the yacht experienced a series of problems with its hydraulic system, the boom and related equipment, and the battery-charging system. The seller made numerous repairs (either directly or through subcontractors), but many of the problems persisted. Eventually, the owner arranged for his own repairs. In all, the yacht was out of service for about eight months.

The owner sued the seller in Massachusetts federal court, and a jury awarded him over $650,000 for lost charter hire, depreciation, out-of-pocket repair costs, and other expenses incurred during the eight months when the yacht was not in use.

The seller appealed, arguing among other things that loss of use was not compensable because the buyer had not taken any steps to charter the yacht before or during the repair period. The buyer cross-appealed, contending that the trial court erred in not awarding him exemplary damages and attorneys' fees under the Massachusetts Consumer Protection Statute.

In general, the owner of a purely recreational vessel cannot recover for loss of use. *The Conqueror*, 166 U.S. 110 (1897). But if a vessel is used for both business and pleasure, then recovery may be allowed to the extent the owner proves a loss of business use. Direct evidence of vessel employment is not required, but the owner must at least show an opportunity and willingness to charter the vessel.

Before and during the eight months at issue in this case, the owner had not taken any steps to advertise the yacht for charter, his insurance policy covered only private use, and he had not taken a business deduction on his taxes. On the other hand, the owner had set up a holding company to hold title and to charter out the yacht for those portions of the year when the owner himself would not be using the yacht. Furthermore, after the repairs were completed, the yacht was in fact regularly chartered at the rate of twenty thousand dollars ($20,000.00) per week. In light of this evidence, the First Circuit Court of Appeals held that the trial court correctly allowed the claim for lost charter hire and related detention damages to go to the jury.

As for the buyer's cross-appeal, the court decided that a mere breach of warranty does not constitute a violation of the Massachusetts Consumer Protection Statute. Given the conflicting evidence, the trial court was entitled to conclude that the seller—though unsuccessful in its efforts to repair the yacht—had not engaged in deception. Moreover, had the owner not been so eager to close early, the seller would have had time to conduct more sea trials, which might have revealed the problems in time to fix them before delivery.

The trial court's judgment was therefore affirmed in all respects.

INSURANCE

Ninth Circuit: Federal Arbitration Act Preempts State Public Policy Against Arbitration Clauses in Insurance Contracts

Galilea, LLC v. AGCS Marine Ins. Co., 879 F.3d 1052 (9th Cir. 2018)

Montana residents Taunia and Chris Kittler, sole members of Galilea, LLC, purchased a yacht through Galilea in 2014. About a year later, the Kittlers submitted to Pantanius America Ltd. an online request for an insurance quote for the yacht and exchanged several documents with Pantanius, who acted as the agent for the insurance underwriters. Pantanius received a signed application while the Kittlers docked in Puerto Rico, en route to San Diego through the Panama Canal. The application included arbitration and choice-of-law provisions stating that any dispute arising out of the relationship between the underwriters and the insureds would be settled by American Arbitration Association ("AAA") arbitration in New York and governed by the laws of New York. Pantanius issued a binder a day later specifying a cruising area extending south to thirty and a half (30.5) degrees north latitude which, keep in mind, barely gets one into Florida. The formal insurance policy—issued within a day of the binder—provided that the policy was effective only when the insured vessel was within the specified cruising area. Both the policy and the application called for arbitration in New York pursuant to AAA rules, but the policy's choice-of-law provision stipulated that it would be governed by federal maritime law, and where there were gaps, the laws of the State of New York. The policy also provided that disputes arising under the policy would be resolved by binding arbitration within New York County.

Almost one month after the insurance policy was issued, the yacht ran aground near Colon, Panama, outside the specified cruising area. Underwriters denied coverage and initiated arbitration in New York. Galilea participated in the arbitration proceedings, but

also filed a separate action against underwriters in federal court in Montana, along with a motion to stay the arbitration proceedings. The Montana district court ruled that: (1) the arbitration provision in Galilea's original insurance application was not relevant, because it was not included in the underwriters' demand for arbitration; (2) claims arising under the insurance policy came within admiralty jurisdiction, and under relevant choice-of-law principles, federal maritime law governed the contract; (3) the Federal Arbitration Act (FAA) mandated enforcement of the policy's arbitration provision; (4) questions relating to the enforceability and scope of the arbitration provision were properly determined by the court, not an arbitrator; and (5) the scope of the policy's arbitration clause did not extend to ten of Galilea's twelve claims.

Notably, the policy differed from the application in that the policy (i) identified federal maritime law and, to fill its gaps, New York law, as the applicable law, and (ii) included different language concerning the scope of arbitrable disputes—"any and all disputes arising under this policy," not "any dispute arising out of or relating to the relationship."

The Ninth Circuit Court of Appeals first decided that the insurance application was not a contract because, under New York law, language from an application may be incorporated into an insurance policy only if the application was attached to the policy at the time of delivery. Some of the information provided in the application was reprinted in the policy, but the forum-selection and choice-of-law provisions were not incorporated into the policy, and the application was not identified in the policy as an incorporated document.

The panel then turned to the insurance policy and decided that it was a contract subject to the FAA. Galilea asserted that the FAA did not apply because Montana public policy bars enforcement of arbitration provisions in insurance contracts, and Montana law, preserved from federal preemption by the federal McCarran-Ferguson Act, precludes the FAA's application. The McCarran-Ferguson Act in general leaves it to the states to regulate the business of insurance.

Here, the panel held that since the FAA expressly applies to "maritime transactions," the policy's arbitration provision was enforceable and that landlocked Montana simply did not have a materially greater policy interest that would override federal maritime law as expressed in the FAA. Although federal maritime law leaves room for state insurance regulation if there is no established federal maritime law rule or need for federal uniformity, the FAA specifically applied to the parties' insurance policy and the parties' coverage dispute fell within federal admiralty jurisdiction.

The panel also found that the district court erred by declining to send all of the questions to arbitration, holding that the agreement to arbitrate according to AAA rules was sufficient to show clear and unmistakable intent to resolve arbitrability questions in arbitration, rather than federal court.

Court Will Not Decide Arbitrability if Contract Incorporates Arbitration Rules Giving That Authority to Arbitrator

Raven Offshore Yacht Shipping, LLP v. F.T. Holdings, LLC, 199 Wash. App. 534 (2017)

F.T. Holdings, LLC entered into a contract with Raven Offshore Yacht Shipping, LLP to transport the vessel NANEA from Florida to British Columbia. The contract, primarily negotiated by Raven's managing partner, included an arbitration clause in which the parties agreed to resolve disputes arising from the contract through arbitration subject to the Rules of the Maritime Arbitration Association of the United States ("MAA"). While in transit, the NANEA suffered damage amounting to about three hundred thousand dollars ($300,000.00).

Citing policy exclusions, Raven's insurer declined the claim, and FT filed suit against Raven and Raven's managing partner in Washington state court alleging violations of the state consumer protection act, among other things. Raven moved to compel arbitration, and the trial court denied the motion. Raven appealed to the Court of Appeals of Washington, arguing that the MAA granted the arbitrator the power to decide any jurisdictional question of the

tribunal, as well as the existence, scope, or validity of the underlying arbitration agreement.

On appeal by Raven, FT argued that no Washington or Ninth Circuit Court of Appeals authority has held the incorporation of the MAA constitutes the intent to delegate arbitrability of jurisdictional questions to an arbitrator. FT also argued that even if FT and Raven agreed to arbitrate questions of jurisdiction, Raven's managing partner was not a party to the agreement and therefore jurisdictional questions were reserved for a trial court. Although Washington courts had not addressed the effect of incorporating the rule of an arbitration body in an arbitration clause, Raven relied on holdings from various Federal Circuit Courts of Appeal, including the Ninth Circuit Court of Appeals, which enforced the rules of arbitrating bodies when those were incorporated into the arbitration agreement.

The court agreed with Raven, finding the MMA entrusted jurisdictional questions to the arbitrator. This was so even though rules of arbitration should be strictly construed when incorporated into arbitration agreements by reference. Lastly, the court held that Raven's managing partner was bound by the arbitration agreement via principles of agency.

Insurer Did Not Commit Bad Faith by Construing "Jet Ski" to Include a Honda Personal Watercraft

Fire Ins. Exch. v. Oltmanns, 416 P.3d 1148(Utah 2018)

Robert Oltmanns was piloting a Honda F-12 AquaTrax personal watercraft with brother in-law Brady Blackner in tow. Blackner sustained injuries and brought a lawsuit against Oltmanns, who sought coverage from his homeowner's insurer, Fire Insurance Exchange, who in turn filed a declaratory action seeking a determination of its responsibility to Oltmanns under the policy. The policy excluded liability for bodily injury resulting from "the ownership, maintenance, use, loading or unloading of … jet skis and jet sleds." The district court ruled in favor of Fire Insurance, finding that the "jet skis and jet sleds" exclusion precluded coverage.

The court of appeals reversed, holding that the term "jet ski" as used in the exclusion was ambiguous because it could reasonably be read as referring not to personal watercraft in general but rather specifically to personal watercraft manufactured by Kawasaki, which held the trademark on the name "Jet Ski." The court of appeals therefore construed the contract against the insurer and in favor of Oltmanns. (We reported on this decision in *Boating Briefs* Vol. 21:2.) (MLA Report, MLA Doc. 808 at 17331.)

Fire Insurance then settled with Blackner for the policy limit of three hundred thousand dollars ($300,000.00) and paid Oltmanns' defense costs. Dissatisfied, Oltmanns filed a counterclaim to recover the legal fees incurred in challenging the coverage denial, on the basis that the denial was in bad faith. Fire Insurance moved for summary judgment and the district court granted the motion, finding that Fire Insurance's actions in litigating whether the "jet ski" exclusion applied were reasonable. The court of appeals affirmed the trial court's ruling.

The issue before the Utah Supreme Court was whether Fire Insurance's coverage position was "fairly debatable," thus negating Oltmanns' allegation of bad faith. Oltmanns argued that the term "jet ski" could not reasonably be read to encompass a Honda F-12 Aquatrax, since the "Jet Ski" name was a Kawasaki trademark. But Fire Insurance put forward substantial usage evidence suggesting that the term "jet ski" was, in Fire Insurance's words, a "genericized term for any type of personal watercraft." The Utah Supreme Court recognized that "jet ski" is frequently treated as a generic term in cases, ordinances, and dictionaries. Thus, the scope of the term was fairly debatable, and Fire Insurance had acted in good faith by relying on the exclusion.

Pollution Exclusion Applies to Injury and Death by Carbon Monoxide

Travelers Prop. Cas. Co. of Am. v. Klick, 867 F.3d 989 (8th Cir. 2017)

Three (3) people were exposed to carbon monoxide while on board a recently purchased fishing boat. When the owner, Christopher Klick, noticed the engine was not operating properly, a passenger opened the engine compartment and carbon monoxide flowed up to the wheelhouse, causing Klick to lose consciousness and fall into the engine compartment. Unbeknownst to Klick and his passengers, the exhaust pipe had broken off, and the engine had been releasing carbon monoxide into the engine compartment. Two passengers died from the exposure, and Klick suffered severe burns as well as permanent brain damage. Klick filed suit against the dealer that sold the boat.

At the time of the sale, Travelers insured the dealer against damages resulting from bodily injury arising out of its operations, including the sale of vessels. But the policy excluded coverage for "any liability…arising out of the actual…seepage, discharge, dispersal, disposal or dumping, release, migration, emission, spillage, escape, or leakage of 'pollutants' into … atmosphere." Travelers sought a declaration that under Minnesota law the pollution exclusion precluded coverage for injuries arising out of the carbon monoxide leak. In granting summary judgment for Travelers, the district court held that the injuries arose exclusively out of the release of a pollutant into the atmosphere.

Klick appealed, arguing that (1) the engine compartment did not contain an "atmosphere" and thus the proximate cause of the injuries was not the dispersal of pollutants to the wheelhouse, but rather the engine's release of the carbon monoxide into the engine compartment; (2) the boat dealer's liability did not arise out of the release of carbon monoxide into the wheelhouse, because the injuries arose out of the release of carbon monoxide into the engine compartment; and (3) even if the liability did arise out of the release

of carbon monoxide into the wheelhouse, that compartment did not contain "atmosphere."

The court rejected Klick's first argument, noting that once the carbon monoxide leaked from the engine and into the engine compartment, the movement to the wheelhouse was also a release, dispersal or migration of the pollutant. The court rejected the second argument by applying the Minnesota Supreme Court's definition of "arising out of" as "causally connected with," and holding that the release of carbon monoxide to the engine compartment causally led to Klick's injuries. Lastly, relying on Minnesota precedent that defined atmosphere as "ambient air," the court observed that the wheelhouse was not a sealed environment but rather was open to the surrounding air.

Accordingly, the pollutant exclusion applied because Klick's injuries arose exclusively out of the release, dispersal, or migration of pollutants from the engine to the atmosphere.

PRODUCTS LIABILITY

Punitive Damages Reduced in Failure-to-Warn Action

Warren v. Shelter Mut. Ins. Co., 233 So.3d 568 (La. 2017)

A 1998 Champion was underway, traveling on plane on the Calcasieu River, when the hydraulic steering system failed. The failure put the vessel into a violent turn (known as a "J-hook"), which ejected several passengers from the vessel, tragically killing one of them. The parents, individually and on behalf of the decedent, brought an action against the steering system's manufacturer, Teleflex, and various other defendants. After motion practice and settlement, the remaining parties were the father, the decedent's estate, and Teleflex.

The jury returned a defense verdict. However, the trial judge ordered a new trial after learning that he had given mistaken information to the jury in response to a juror's question about an item of evidence. The case was tried again, and the second jury

awarded one hundred and twenty-five thousand dollars ($125,000.00) in compensatory damages and twenty-three million ($23,000,000.00) in punitive damages.

The hydraulic steering system had three main components: (a) the helm pump which was attached to the helm and contained hydraulic fluid; (b) two hoses that ran from the helm pump to the outboard engine; and (c) a horizontal cylinder with a piston inside, mounted on the outboard engine. When the helm is turned to port or starboard, the helm pump moves hydraulic fluid to the corresponding hose, causing the piston to slide inside the cylinder and thereby turn the engine.

The design of the system was such that any loss of hydraulic fluid could allow air into the system. The air would then be compressed, causing a spongy feeling in the helm. If even a few ounces of hydraulic fluid leaked, the vessel could lose steerage, resulting in serious injury or even death. Testimony showed that Teleflex knew about the danger of a leak and also knew that the defect could not be designed out of the system. The evidence established that a sticker containing a proper warning would have cost thirty cents and could have been placed on the helm, rear cylinder, and wherever fluid is added to the system.

On appeal, the Louisiana Supreme Court held that an award of punitive damages was warranted because Teleflex's conduct did amount to more than simple negligence. Teleflex knew of the defect for almost a decade before this particular vessel was sold, and the cost of a sticker to properly warn an operator about the danger of an oil leak was quite low.

The size of the award, however, did not pass constitutional muster. Under general maritime law, a ratio of 1:1 is accepted, unless there are extenuating circumstances, such as an egregious act with a low compensatory damages award. The court decided that such circumstances existed here: a death had resulted from Teleflex's inaction, yet the jury's compensatory award was relatively low. Noting that the intermediate appellate court had fairly recently affirmed a two million dollar ($2,000,000.00) award of

general damages to the mother of a deceased child in a different failure-to-warn case, the court decided that the compensatory damages in this case could reasonably be two million one hundred and twenty-five thousand dollars ($2,125,000.00) (i.e., the $125,000 the jury actually awarded, plus the hypothetical $2 million for general damages). Applying a 2:1 multiplier, the court decided that the punitive damages award should be reduced to four million two hundred and fifty thousand dollars ($4,250,000.00).

Fourth Circuit: A Watercraft is Not Unreasonably Dangerous When Accompanied by Warnings That, if Followed, Make the Product Safe

Hickerson v. Yamaha Motor Corp., 882 F.3d 476 (4th Cir. 2018)

The Fourth Circuit, applying South Carolina law and the Restatement (Second) of Torts, has ruled that a claim for defective design of a personal watercraft must fail where the injured passenger failed to observe warnings that were designed to prevent that very harm she sustained.

The passenger was riding on a 2011 Yamaha VXS WaveRunner on Lake Hartwell in South Carolina. She sustained serious orifice injuries when she fell backwards off the watercraft and into the jet thrust. At the time of the accident, she was wearing a bikini with no wet suit. She had also been drinking and was the fourth passenger on the watercraft, which was being operated by a ten-year-old. Before boarding the watercraft she did not read any warnings printed in the manual or on the craft itself.

The craft was equipped with warning labels on both the front and the back. The warnings read, in relevant part, as follows:

> WEAR PROTECTIVE CLOTHING. Severe internal injuries can occur if water is forced into body cavities as a result of falling into water or being near jet thrust nozzle. Normal swimwear does not adequately protect against forceful water entry into rectum or vagina. All riders must wear a wet suit bottom or

> clothing that provides equivalent protection (See Owner's Manual).

The passenger filed suit against Yamaha in federal court in South Carolina, alleging product-liability claims under South Carolina law for design defect and inadequate warnings.

The case revolved around the expert testimony of Dr. Anand Kasbekar, a mechanical engineer who was familiar with personal watercraft and who had been retained as an expert in dozens of product-liability cases. The gist of Dr. Kasbekar's opinion was that the watercraft's warnings were inadequate, that a set of alternative warnings was better, and that design alterations like a contoured seat and hand straps would have made the craft safer. He also concluded that the warnings were "congested" and confusing.

The trial court found Dr. Kasbekar qualified to testify as an expert on personal watercraft. However, the trial court subsequently found Dr. Kasbekar's opinions to be unreliable, in that his theory was not supported by "research, data, or scientific theories." Rather, Dr. Kasbekar offered summary conclusions that existing warnings on the craft were inadequate because passengers could more easily see a warning located directly on the seat instead of warnings appearing on the glove box and at the rear of the craft. Yet he offered no demonstrative testing or research or data to support the conclusions. The Fourth Circuit took particular issue with Dr. Kabekar's opinion that the wetsuit depicted in the on-craft warnings should be black rather than white "based solely on his personal recollection that he had never seen a white wet suit." Ultimately, the Fourth Circuit upheld the lower court's decision to exclude Dr. Kasbekar's opinions, noting that "Dr. Kasbekar's own testimony established that his opinions lacked the markers of reliability Rule 702 and *Daubert* require to prevent an expert from misleading a jury with unproven conjecture."

Because the plaintiff had relied solely upon Dr. Kasbekar's expert opinion to support her claim that the warnings placed on the craft were inadequate, once his opinions were stricken there was no

remaining evidence from which a jury could deduce that the warnings were inadequate.

The final question to be answered on appeal by the Fourth Circuit was whether the craft was unreasonably dangerous, notwithstanding the adequacy of the warnings. This issue turned upon application of Comment j to the Restatement (Second) of Torts, § 402A, which provides:

> Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.

The plaintiff argued that, even if the warnings were adequate, the craft was still defective in the sense that it was unreasonably dangerous. She put forth the argument that design claims should be independent of warning claims, because to hold otherwise would allow "good warnings to trump bad design," and thus "subordinate design safety to warnings."

The court disagreed. Relying upon the plain language of Comment j, as well as South Carolina and Fourth Circuit Court of Appeals case law applying Comment j, the court found that a product bearing a warning which, if heeded, would make the product safe for use, is neither defective nor unreasonably dangerous. Therefore, the seller is not liable for any injuries caused by the use of the product if the user ignores the warning.

Thus, in light of the plaintiff's failure to read the warnings placed upon the craft, the fact that the plaintiff's injuries were the kind of injuries the warnings were designed to prevent, and the absence of any evidence indicating that the warnings were inadequate, the Fourth Circuit Court of Appeals upheld the lower court's grant of summary judgment in favor of Yamaha.

First Circuit: Failure to Include Adequate Warning With Instruction Manual not Actionable Where Vessel Owner Does Not Read the Manual

Santos-Rodríguez v. Seastar Solutions, 858 F.3d 695 (1st Cir. 2017)

Citing a vessel owner's failure to read his steering system's instruction manual and other safety warnings, the First Circuit Court of Appeals has found that a company's alleged failure to provide adequate warnings or instructions cannot be the proximate cause of a plaintiff's injuries where the warnings, even if given, would not have been read.

Plaintiff was a passenger in a boat near Guayama, Puerto Rico. The vessel was equipped with a hydraulic steering system manufactured by Seastar Solutions. A ball-joint on the rod connecting the steering system to the right motor broke while the boat was in motion, ejecting plaintiff from the boat. As a result, he sustained serious permanent injuries, including paraplegia. Subsequent examination revealed that the rod end failed because of corrosion.

Plaintiff sued Seastar in admiralty, alleging that the ball joint's susceptibility to corrosion was a design defect, and that Seastar was liable for failing to place a warning against corrosion in the steering system's instruction manual. While the manual did inform owners that "[b]i-annual inspection [of the steering system] by a qualified marine mechanic is required" and instructed them to "[c]heck fittings and seal locations for leaks or damage and service as necessary," the manual did not include a specific warning about corrosion of the rod end.

The boat's owner had acquired the vessel second-hand, and it was undisputed that he had not read the manual or any of the warnings affixed to the steering system. The owner had hired third-party mechanics to maintain the boat, but none of those mechanics ever brought the corroded rod end to his attention.

In affirming the lower court's ruling in favor of the manufacturer, the First Circuit Court of Appeals ruled that, even assuming that the manual did not contain adequate warnings or instructions, the lack of warnings could not be the proximate cause of the plaintiff's injuries, as a matter of law, where the vessel owner had not actually read the manual. The First Circuit Court of Appeals similarly upheld the lower court's finding that the plaintiffs had failed to introduce any evidence to support their expert's conclusion that the rod end was defectively designed. Plaintiff was simply arguing that the failure of the rod end itself was sufficient evidence of a design defect. But the mere fact that something went wrong with the rod end was not sufficient to show that Seastar's design of the rod end was defective.

LIENS

Owner's Bankruptcy Filing Does Not Oust Admiralty Court of Jurisdiction to Enforce Seaman's Lien for Maintenance and Cure

Barnes v. Sea Haw. Rafting, LLC, 889 F.3d 517 (9th Cir. 2018)

A seaman, Chad Barnes, was injured when the M/V TEHANI, a twenty-five (25) foot rigid hull inflatable boat he was working on, exploded. Barnes was seriously injured in the accident. For a period of time after the accident, he received monetary assistance from the vessel's owner. When this monetary assistance stopped, Barnes filed an admiralty suit against the vessel, the LLC that owned the vessel, and the LLC's owner and manager. Barnes sought maintenance and cure in addition to other relief, including the enforcement of his seaman's lien against the vessel. (The vessel owner was not insured for liabilities to Barnes.)

The district court declined to award Barnes any maintenance before trial, despite multiple motions for summary judgment on the issue and Barnes' undisputed entitlement to maintenance. Then, after fifteen months of litigation, the vessel owner and manager declared bankruptcy. The district court ruled that the automatic stay barred enforcement of Barnes' maritime lien against the vessel. The

district court then dismissed the claims against the vessel because Barnes failed to verify an amended complaint, though the original complaint had been verified. During the pendency of the appeal, the bankruptcy court approved the trustee's sale of the vessel free and clear of Barnes' maritime lien.

Upon review, the court of appeals concluded that the district court erred in dismissing the claims against the vessel, because the vessel and the other defendants waived any objection to *in rem* jurisdiction by answering the original verified complaint and litigating the case for over fifteen (15) months. Further, the failure to file a verified amended complaint did not divest the district court of *in rem* jurisdiction. The court of appeals reasoned that an amended complaint only supersedes the original complaint as to substance, not procedural effect. Once *in rem* jurisdiction has vested, requiring the verification of subsequent amended pleadings for the district court to retain jurisdiction serves no procedural purpose.

The court of appeals also determined that the automatic bankruptcy stay did not apply to maritime liens for maintenance and cure, and therefore the bankruptcy stay did not prevent Barnes from enforcing his maritime lien. Since the district court sitting in admiralty had already obtained jurisdiction over the vessel, the filing of the bankruptcy petition did not divest the district court of jurisdiction. Even if the bankruptcy court had *in rem* jurisdiction over the vessel, it is an open question whether a bankruptcy court has legal authority to sell a vessel free and clear of maritime liens, at least where the lienor did not consent to the bankruptcy court's jurisdiction. Since Barnes did not submit voluntarily to the bankruptcy court's jurisdiction, that court did not have jurisdiction to dispose of his maritime lien.

Finally, the court of appeals acknowledged that it lacked appellate jurisdiction to review the district court's summary judgment decision not to award maintenance until after trial. However, the appellate court had the authority to treat the notice of appeal as a petition for a writ of *mandamus*. In evaluating the underlying record, the court of appeals determined that Barnes had

established his entitlement to maintenance and cure. The court of appeals issued a writ of *madamus* directing the district court to award maintenance subject to a potential upward modification after trial. In doing so, the Court of Appeals for the Ninth Circuit, as a matter of first impression, adopted the burden-shifting framework of *Hall v. Noble Drillings (U.S.) Inc.*, 242 F.3d 582 (5th Cir. 2001), and *Incandela v Am. Dredging Co.*, 659 F.2d 11 (2d Cir. 1981), for determining the maintenance amount.

STATE LEGISLATION

The following is a sampling of certain new or proposed state legislation relating to recreational boating. The summary was provided by Todd Lochner of Annapolis and prepared with assistance from Colin Fitzpatrick, a 2019 J.D. candidate at Tulane Law School.

Alabama

- *Act 2018-179*
  This act provides a procedure by which an Alabama law enforcement officer may remove a derelict vessel from the waters of the state of Alabama.

California

- *AB-2175*
  Proposed legislation. Section 1 empowers a peace officer to remove a vessel from public property in certain circumstances when the vessel is related to a crime. Section 2 imposes a criminal penalty of 6 months imprisonment for the negligent or reckless use of a vessel, water skis, or aquaplane that causes great bodily injury.

- *SB-1247*

Proposed legislation. Amends the boating-under-the-influence statute to change “mechanically propelled vessels” to “vessels.”

- *SB-644*
  Proposed legislation allowing vessels to be impounded for 30 days when a violation of the reckless-boating statute results in a person’s death.

Connecticut

- *SB-476*
  Proposed legislation to exempt vessels, vessel motors, and vessel trailers from sales and use taxes and for a fuel tax exemption for dyed diesel fuels.

Florida

- *HB-915, SB-1132*
  Gives the Fish and Wildlife Commission authority to designate by rule the expiration timeframe and design of vessel safety inspection decals.

- *SB-1612*
  Proposed legislation to be called “Ellie’s Law” regulating airboats carrying passengers for hire on waters of the state.

Georgia

- *HB 357*
  Establishes titling provisions for vessels in Georgia. Passed in both houses, awaiting the governor’s signature.
- *HB 665*
  Proposed legislation slightly modifying the abandoned-vessel statute.

Illinois

- *Public Act 100-0469*
  Updates Boat Registration and Safety Act. Slightly changes the PFD requirements to remove the USCG classification. Slightly increases registration fees.

Kentucky

- *HB-183*
  Removes exemption for federal vessels from registration requirements.

Louisiana

- *HB-706*
  Bill that would allow possession of certain fishes aboard a vessel traversing between the vessel owner's fish camp and a boat ramp.

- *HB-435*
  Bill that would authorize certain water conservation boards to regulate or prohibit vessel traffic during flood events.

- *HB-549*
  Registration of non-motorized house boats.

- *HB-784*
  Would increase boat registration fees.

Maryland

- *SB-46*
  Bill that would remove the requirement of carbon monoxide detectors and provide for the publication of a safety pamphlet on the danger of carbon monoxide.

Massachusetts

- *H3913, S1634*
  Bill that would reform vessel taxes.

- *H2745*
  Bill that would require motorboat safety program.

- *H1801*
  Proposed legislation to regulate parasailing.

- *H2909*
  Bill that would modify the law about abandoned vessels on Commonwealth property to allow for vessels abandoned in the tidewaters or shore to be moved.

- *H1312*
  Bill that would regulate kayak instructors.

- *S463*
  Bill to allow out-of-state vessels to moor for up to 60 days.

New Jersey

- *A 712*
  Bill that would provide for the removal of abandoned vessels during a natural disaster.

- *A 1544*
  Bill that would allow persons under the age of 16 to operate motorboats under direct parental supervision.

New York

- *A 00246*

Bill that would prohibit jet ski passengers from riding in front of the driver and raise the minimum age to rent a jet ski to 18.

- *A 01520*
  Bill that would revoke privilege to operate a pleasure vessel upon revocation of driver's license.

- *A 01852*
  Would require a boating safety course to rent a boat.

- *A 02640*
  Authorizes towing a water skier without an observer under certain circumstances.

- *A 06708*
  Requires closed bow boats to have carbon monoxide detectors.

- *A 07405*
  Adds US Sailing Association to list of organizations authorized to give boating safety courses.

- *A 08194*
  Prohibits party boats in Sheepshead Bay

- *S 03524*
  Requires all passengers in rowboats, canoes, and kayaks to wear PFDs.

Oklahoma

- *HB 3074*
  Exempts canoes, kayaks, and paddleboards from vessel registration requirements.

- *HB 2840*

Requires PFDs for canoe passengers.

South Carolina

- *S 367, H 3577*
  Prohibits operating a watercraft above idle speed within 100 feet of a moored or an anchored vessel, wharf, dock, bulkhead, pier, or a person in the water.

Tennessee

- *HB 1114, S 1062*
  Regulates motorboats that carry passengers for hire.

Virginia

- *HB 1229*
  Bill that would prohibit water skiing within 150 feet of a dock, pier, boathouse, boat ramp, or person in the water.

Washington

- *HB 2634*
  Phases out copper-based anti-fouling paints.

West Virginia

- *SB 347*
  Defines the term “state of principal operation”; establishes a fee schedule for motorboat registration; establishes motorboat numbering, lighting, fire extinguishers, engine bilges, and flotation device requirements; increases the financial amount of property damage before certain accidents need to be reported; clarifies the requirements for the operation of personal watercrafts; limits the hours during the day water skiing and surfboarding

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