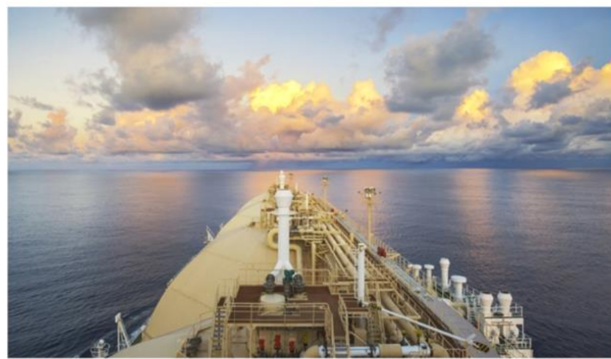
MARITIME AND TRANSPORTATION ALERT: FALL 2017



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The Maritime and Transportation Alert is a quarterly publication providing information on important news and developments within the industry as well as within Montgomery McCracken.

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Jurisdiction Clauses are Enforced

BY VINCENT M. DEORCHIS

A recent case from the federal court in New York confirms that jurisdiction clauses are difficult to overcome. In ThyssenKrupp Materials NA, Inc. v. M/V Kacey, et al, 236 F. Supp. 3d 835 (SDNY 2017), the shipowner field a motion to dismiss for foreign *non conveniens* because the applicable bills of lading contained a clause that "any dispute …shall be decided in the country where the owner has a principle place of business. While the owner of the ship was apparently a Marshall Island registered company, the defendant Owner argued that its principle place of business was still in Greece. The court accepted that statement for purposes of the motion, and then turned to the Plaintiff as to why the motion should not be granted because when there is a valid selection clause the court is obligated to give the clause controlling weight. The only exception is if enforcement of the clause would be unreasonable or unjust, or the clause was unreasonable for such reasons as fraud or overreaching.

Plaintiff argued that the clause was unreasonable because if the case were transferred to Greece, the plaintiff would be unable to maintain an in *rem claim* against the vessel as Greece does not recognize *in rem* rights. The district court stated that the loss of the *in rem* right was not enough to defeat the jurisdiction clause given that the *in rem* claim "does not confer any other benefit than providing an additional mechanism for enforcement". The court went on to say that it was not persuaded in any event that Greece does not recognize *in rem* action as Greece had adopted the Hague Visby rules as a Convention, and the Hague Visby rules specifically recognizes *in rem* actions. See Art. 3(8). [The author of this summary notes that this may be an oversimplification, since the mere adoption of a convention does not necessarily create *in rem* rights, and more importantly the Convention does not provide the mechanism to exercise the *in rem* claim.] The court then determined that other decisions in the Second Circuit have held that the inability to enforce *in rem* actions does not establish that substantive rights will be reduced if the case is transferred abroad.

Plaintiff then argued that transfer to Greece would prejudice the plaintiff because one of the named defendants was the technical manager of the ship, and under the "identity of carrier" clause, the manager would not be subject to suit in Greece, although he would be subject to suit in the US as the identify of carrier clause is not enforceable. The federal judge responded that clauses which channel all responsibility to one party are still enforceable, as the Second Circuit has characterized these clauses as "simply an ordering mechanism that regulates who will be responsible for whom rather than lessening any substantive rights".

That left plaintiff with only one last argument: that the identity of carrier clause is valid under the Harter Act, and plaintiff's rights under the Harter act would be violated if the case were transferred to Greece. The court agreed that the Harter act definition of carrier is more expansive than the bills of lading, and includes the manager of the vessel. However, the court disagreed that Harter Act prohibited transfer of the case, as that act prohibits clauses that "absolve" the carrier of liability -but does not prohibit limiting a carrier's liability. Since the identity of carrier clause only limits who you can sue and does not provide for a general absolution of the carrier, the Plaintiff failed to meet its burden to establish the enforcement of the forum section clause would be unreasonable or unjust, or against any public interest factors.

As a final parting, the federal judge refused to maintain jurisdiction over the case while it was decided in Greece. This is contrary to what the Supreme Court permitted in the famous *Sky Reefer* case. The district court noted that unlike *Sky Reefer*, where there were several possible applicable laws, in the subject case the parties agreed that the Hague Visby rules would be applied, and "thus, Plaintiff's substantive rights will not be impaired or diminished". Indeed, given that the cargo consisted of steel pipe, and assuming it was bundled, Plaintiff might have been facing a $500 package limit in the US. On the other hand, under Hague Visby it is doubtful there would be any limitation as the "per kilo" limitation would have exceeded the package limit.

The lesson learned is that federal judges are not going to ignore jurisdiction clauses. From the court's perspective, in a commercial world, if the parties want to have another court resolve the dispute, then such agreements are enforced.

Court Finds that P&I Club Member Must Play by the Rules

BY PETER TONGE

In TransAtlantic Lines LLC v. American Steamship Owners Mutual Protection and Indemnity Association, Inc., _____F.Supp. 3d___ (2017), 2017 A.M.C. 1293 (SDNY, May 30, 2017), the dispute involved the American Club's partial denial of insurance coverage to one of its members (TransAtlantic) for certain losses deriving from a maritime incident. The American Club Rules stipulate that a Member can appeal a denial of coverage before the association's Board of Directors, which is primarily composed of officers and representatives of the American Club's members. The Rules also provide that

the decision is intended to be "final and binding" and can only be reviewed in a federal court under the deferential "arbitrary and capricious" standard of review.

The Board of Directors denied TransAtlantic's appeal, issuing a 22-page decision. TransAtlantic proceeded to file suit in the Southern District of New York, seeking *de novo* review of the decision to deny coverage, and bringing various claims against the defendants in contract and in tort, as opposed to a single challenge of the Board's decision. They alleged that the appeal procedure was "fundamentally unfair" for four reasons:

1. The Board had a financial interest in the decision, making it an impermissibly biased decision-maker.
2. The ADR procedure violated the American Club by-law which prohibits directors from acting upon a claim in which they have an interest.
3. It was "unlikely" that the Board meaningfully considered the appeal, since the claim was adjudicated at a regular Board meeting without oral argument.
4. The Board members may not have taken an oath of impartiality and failed to disclose their financial and personal interests.

TransAtlantic also argued that the ADR procedure violated public policy under New York state law.

The court declined TransAtlantic's request for *de novo* review of the denial of coverage and rejected all of TransAtlantic's above arguments. Significantly, the court referred to at least two previous court decisions in the Southern District that held American Club board hearings to be voluntary ADR proceedings that are subject to a deferential standard of review.[1] While the court referred to the P&I Club's appeal process as a "somewhat unusual" ADR process, the court agreed that the American Club's hearings "bear all the hallmarks of a voluntary ADR proceeding". It was also noted that the Club Rules stipulated that decisions should be "final and binding", subject to review in federal court under a deferential "arbitrary and capricious" standard of review. The court determined that no part of the Board's justification for its decision was either arbitrary or capricious.

Further, the court held that TransAtlantic's "fundamental fairness" arguments ignored the fact that any supposed bias was inherent to the ADR procedure to which members voluntarily

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[1] See Progress Bulk Carriers v. Am. S.S. Owners Mutual Prot. & Indem. Ass'n, Inc., 2013 AMC 1628, 1634-37, 939 F. Supp.2d 422, 427-29 (S.D.N.Y. 2013), aff'd, 2 F. Supp.3d 499 (S.D.N.Y. 2014)

agree when they join the association. By participating in the appeal proceedings without raising any complaint to the Board, TransAtlantic effectively waived its right to object to the decision. The court also found the allegation that the Board did not meaningfully consider the appeal to be completely unfounded, given the fact that the Board took a month to consider the appeal before issuing its 22-page decision. Finally, TransAtlantic entered into an agreement that made no provision for Board members to have to take an oath of impartiality or disclose their financial or personal interests. The court reasoned that these are "the kind of niceties" that ADR procedures need not provide.

Regarding TransAtlantic's argument that the Board decision violated public policy, the court held that neither part of the two-part test under New York law were satisfied, as is necessary for the public policy exception to prevail. Namely, the law did not prohibit, in an absolute sense, the matter decided by the arbitrator, nor did the decision violate a "well-defined constitutional, statutory or common law of the state."

The court also denied TransAtlantic's request to defer ruling on the American Club's motion for summary judgment and allow discovery into the Board hearing. It was held that post-arbitration discovery was available only in limited circumstances and, in order to take discovery from the ADR panel itself, the litigant would have to provide "clear evidence of impropriety," for example, bias or corruption. The court found that TransAtlantic had failed to do this.

Therefore, the court granted the American Club's motion for summary judgment dismissing the appeal, thus, upholding the ADR decision, denying discovery and dismissing the complaint. The court's decision makes it clear that a party to an ADR procedure cannot attack the very same procedure to which they knowingly and voluntarily agreed. It also reaffirms the unwillingness of courts to set aside decisions made in voluntary ADR proceedings.

Jurisdiction 101 in a Maritime Casualty Case Brought in the U.S.

BY JOHN J. LEVY

This is a good case to tuck away in your files under U.S. "jurisdiction" law. Following a fire aboard a Roll-On Roll-Off vessel damaging millions of dollars' worth of expensive cars, the owners and insurers of the cars brought suit in federal court in New York against the shipper, the charterer, owner and other related entities. The shipper, a Belgian corporation with headquarters in Antwerp, moved to dismiss claiming, among other things, lack of personal jurisdiction and *forum non conveniens.*

The Court denied the motion. Regarding the lack-of-personal-jurisdiction argument, the court found the Bill of Lading's forum selection clause, which provided for exclusive jurisdiction over all claims in New York federal court, to be valid and enforceable against the shipper. In addition, the Court reasoned that Rule 4(k)(d) -- the federal long-arm statute allowing nationwide jurisdiction in certain circumstances -- permitted jurisdiction over the Belgian shipper here.

In light of the forum selection clause, and lacking any unusual circumstances or public interest, the shipper's improper venue and *forum non conveniens* arguments likewise failed.

Nothing particularly new or surprising in the case, but it provides a very helpful outline and summary of U.S. law on jurisdiction, venue, and *forum non conveniens. BMW of North America, LLC v. M/C Courage*, *in rem et al*, ____F.Supp. 3d___ (2017), 2017 A.M.C. 1751 (SDNY, May 19, 2017).

Moldy Corn and Wrongful Arrest: The Potential Costs of Sloppy Paperwork

BY KASPAR KIELLAND

In Casillo Commodities Italia S.p.a. v. M/V Long Cheer et al., Civ. No. 16-16612 (June 28, 2017), the charterer of the M/V LONG CHEER, Casillo Commodities ("Casillo"), attempted to obtain security from the owner of the vessel, Long Cheer Shipping ("Long Cheer"), for a claim for alleged mold damages to a shipment of Mexican white corn during a voyage from Mexico to Venezuela.

In doing so, Casillo sought the arrest and attachment of the M/V LONG CHEER under Rules B and C of the Supplemental Rules for Admiralty and Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure. Casillo's application to the Court included a copy of an unsigned voyage charter party that named Long Cheer as a party to the contract. The Court found that Casillo met its Rule B and C burden because the charterparty, even if unsigned, had named Long Cheer and gave Casillo reasonable grounds to arrest the vessel and probable cause to attach the vessel as owner's property.

Faced with the prospect of having the vessel arrested, Long Cheer posted security in the form of a Club Letter before the vessel entered the port in the United States. Once it avoided disruption to its business operations, Long Cheer filed a motion to vacate the arrest and attachment orders. Long Cheer presented uncontested evidence that they were never intended to be party to the voyage charter and that correspondence regarding the negotiation of the instrument showed that the voyage charter in question was in fact between Casillo and another company, Clipper Bulk, which had previously hired the vessel on time charter from Long Cheer. Long Cheer's name was inadvertently included on the voyage charter between Casillo and Clipper Bulk as an oversight.

On the basis of the new evidence, Casillo no longer satisfied the reasonable grounds and probable cause burdens under Rules B and C. As such, the Court vacated the orders of arrest and attachment, and ordered Casillo to return the Club Letter.

Long Cheer also requested that the Court award wrongful arrest damages in their favor against Casillo. However, the Court denied the request because Casillo, by relying on the unsigned charter party that undeniably had Long Cheer name on it, did not act with sufficient bad faith, malice, or gross negligence. Although, Casillo should have known that its voyage charter was actually with another party.

Owners and operators should monitor the accuracy of their shipping contracts. Even a small mistake may result in a potential business disruption, and unnecessary and costly litigation.

Punitive Damages Ahoy!

BY ALFRED J. KUFFLER

In Tabingo v. American Triumph LLC, No. 92913-1 (Wash., March 9, 2017), the Supreme Court of the State of Washington recently upheld an award of punitive damages to a seaman claiming injuries from the unseaworthy condition of his vessel. Building on the U. S. Supreme Court's 2009 decision in Atlantic Sounding Co. v. Townsend, 557. U. S. 404 (1995) (allowing punitive damages on a claim for wrongful denial of maintenance and cure), the Washington State court reasoned that since maintenance and cure is a claim arising out of the general maritime law, and unseaworthiness finds its genesis from the same source, then allowance of punitives in the latter circumstance is justified. In so doing, the Washington State court declined to follow decisions from federal courts in other states that rejected claims for punitive damages relating to injuries caused by the unseaworthiness of the vessels on which seamen were serving.

While the U. S. Supreme court has not addressed the precise issue of awarding punitive damages for unseaworthiness, certain federal circuits have. See, e.g., McBride v. Estis Well Service, LLC, 768 F.3d 382 (5th Cir. 2014) (punitive damages not allowed for a claim of unseaworthiness. The Washington State Supreme Court in Tabingo recognized that federal maritime law controlled, relied on the U.S. Supreme Court's Townsend decision, and distinguished the U.S. Supreme Court's decision in Miles v. Apex Marine Corp., 498 U.S. 19 (1990) (as non-pecunary damages, punitive damages were not recoverable in a general maritime wrongful death action).

At the moment, whether a seaman's claim for unseaworthiness can result in an award of punitive damages remains unsettled. The issue is ultimately one of federal law and will be resolved in the federal courts. But because federal courts may look to state courts pronouncements for guidance, Tabingo may well wield some influence in the ultimate resolution of this question. Likewise, whether Townsend may ultimately be limited to maintenance and cure claims, or if construed more broadly as was the case in Tabingo, and thus be considered as conflicting with Miles remains to be seen. In the meantime, we can expect that seamen's unseaworthiness claims will now routinely include claims for punitive damages.

Not only will such claims increase the stakes in these cases, the claim for punitives may also affect the defendant employers' insurance coverage at least for that aspect of any judgment. However, under U. S. law, the elements of proof required to establish the right to punitive damages, including willful misconduct or even malice, may simultaneously give insurers grounds for challenging all coverage. For instance, such proof may form the basis for a challenge to coverage on the grounds that the basic concept underlying all insurance is that the cover is for fortuities - that is, unintentional conduct. If the conduct is intentional, then there should be no cover at all. Thus, there may be a possible defense for insurers and food for thought for plaintiffs' counsel before they allege a right to punitive damages.

The Shipping Act Bars Clayton Antitrust Act Relief

BY ERIC CHANG

In re Vehicle Carrier Services Antitrust Litigation, 846 F.3d 71 (3d Cir. 2017), involved claims by plaintiff purchasers of vehicles that defendant ocean carriers had entered into "secret agreements" to fix transportation prices and reduce service capacity; all in violation of federal antitrust laws and various state law causes of action. The alleged "secret agreements" entered into by the ocean carriers included: (1) price coordination agreements; (2) agreements not to compete, including coordinated responses to price reduction requests from customers; and (3) agreements to restrict capacity by reducing available fleet. Plaintiffs claimed economic injuries and sought relief under the federal Clayton Antitrust Act of 1914 and state antitrust, consumer fraud, and unjust enrichment laws. Defendants moved to dismiss on the basis of immunity from federal antitrust liability and preemption of state law claims pursuant to the Shipping Act of 1984, 46 U.S.C. § 40101, *et seq*. (the "Shipping Act"). The District Court of New Jersey agreed that such immunity existed and dismissed the complaints with prejudice. The plaintiffs appealed.

On appeal, the Third Circuit Court of Appeals examined the purpose and legislative history of the Shipping Act. One of the relevant purposes of the Shipping Act was "to establish a non-discriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of government intervention and regulatory costs." 46 U.S.C. 40101(1). A second purpose was to ensure that U.S. flag ships were on a level economic playing field vis-à-vis their foreign counterparts, who were not subject to the threat of U.S. antitrust prosecution. 46 U.S.C. 40101(2). To achieve these twin goals, the Shipping Act expressly immunized agreements that were filed, or which should

have been filed, with the Federal Maritime Commission from federal antitrust laws to combat the "perception . . . that the threat of U.S. antitrust prosecution weighs more heavily on U.S. operators than their foreign-flag competition" and which would otherwise place the U.S. operators at a "competitive disadvantage vis-à-vis their foreign-flag competitors." *In re Vehicle Carrier Services Antitrust Litigation*, 2017 A.M.C. 1, 6, 846 F.3d 71 (3d Cir. 2017), quoting the Report of the House Committee on Merchant Marine and Fisheries, H.R. Rep. No. 98-53(I). In light of the comprehensive and predictable federal framework set forth by the Shipping act to ensure efficient and nondiscriminatory international shipping practices, the Third Circuit affirmed the District Court determination that the Shipping Act prohibited carriers from operating under un-filed agreements and the so-called "secret agreements" at issue, which were not filed with the Federal Maritime Commission, constituted conduct prohibited by and governed by the Shipping Act. Any violation of the Shipping Act would be actionable by or before the Federal Maritime Commission, but would be immunized from the federal antitrust laws.

With regard to the state law claims, the Third Circuit turned to the preemption doctrine of the Supremacy Clause, which provides that: "The laws of the United States . . . shall be the Supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the contrary notwithstanding." U.S. Const. Art. VI, cl. 2. The Supremacy clause empowers Congress to preempt state law. Arizona v. U.S., 567 U.S. , 132 S.Ct. 2492, 2500 (2012)(citation omitted). As noted in the discussion concerning federal antitrust, one purpose of the Shipping Act was the establishment of a non-discriminatory regulatory process for the common carriage of goods by water . . . with a minimum of government intervention and regulatory costs." 46 U.S.C. 40101(1). Through the provisions of the Shipping Act, Congress sought to limit the application of the antitrust laws to enable U.S. carriers to compete with their foreign counterparts. The Third Circuit thus held that "to allow state antitrust claims to proceed would interfere with this goal" and "essentially undo Congress' work in expanding antitrust immunity and undermine its efforts to assist" U.S. carriers. In re Vehicle Carrier Services Antitrust Litigation, 846 F.3d 71, (3d Cir. 2017). In addition, the regulation of maritime commerce has historically been the purview of Congress. Accordingly, the Third Circuit held that the Shipping Act also preempted state law antitrust, consumer protection and unjust enrichment claims. Thus, plaintiffs state law causes of action were likewise properly dismissed.

In the end, plaintiffs seeking relief under antitrust-like causes of action against ocean carriers must seek redress before the Federal Maritime Commission. A number of the plaintiffs have since filed complaints before the FMC to seek an agency determination. It will be interesting to see how this tale ends.

Sole Third-Party Fault and Limitation of Liability Defenses Under the Oil Pollution Act of 1990 Clarified

BY EUGENE J. O'CONNOR

In The case of US v. American Commercial Lines, LLC, No. 16-31150 (5th Cir. Nov. 7, 2017)**,** is the latest chapter in the litigation stemming from the collision between a barge and a tanker on July 28, 2008 which resulted in the barge spilling approximately 300,000 gallons of oil into the Mississippi River near New Orleans. The barge was under tow by the tug MEL OLIVER, which was owned by American Commercial Lines ("ACL") who had hired another company, DRD Towing Company ("DRD"), to operate it. The tug's captain was the only member of the crew with a valid Coast Guard license but he was ashore at the time of collision. The conn had been left to an unlicensed apprentice mate or "steersman" who was not authorized to operate the vessel without continuous supervision. At the time of the collision he was found slumped over the steering gear and non- responsive, having worked almost continuously for 36 hours in violation of Coast Guard regulations.

The government prosecuted DRD, the captain and the steersman for criminal violations of federal environmental law. All three pled guilty to certain counts of violating the Ports and Waterways Safety Act and/or the Clean Water Act.

The government also sued ACL and DRD to recover the almost $20 million it had spent responding to the spill. DRD declared bankruptcy. The government moved for summary judgment against ACL as the Responsible Party ("RP") under OPA, and the district court granted summary judgment and ordered ACL to pay the government in full. ACL then filed this appeal.

ACL contended that it was entitled to a complete defense to liability under Oil Pollution Act of 1990 ("OPA") because a third party, the tugs' operator DRD, caused the spill. The US responded that this third-party defense was not available because DRD's conduct occurred "in connection with a contractual relationship" with ACL. The issue for the Fifth Circuit Court of Appeals was whether DRD's acts or omissions occurred "in connection with any contractual relationship" between these parties.

The Court of Appeals first noted that the meaning of the "in connection with" terminology was a case of first impression. It concluded that under commonly accepted definition and usage "connection" was a "capacious" term that encompassed not only things that are "logically or casually" related but also those that are simply "bound up" with one another. It held that a

third-party's acts or omissions occur in connection with a contractual relationship with the RP, if said acts or omissions "would not have occurred but for that contractual relationship." In this respect, the Court of Appeals recognized that the design and intention of Congress in enacting OPA was to promote prompt response to oil spills and also to prevent future spills by imposing heavy financial consequences to encourage RPs to take all available precautionary measures. One way to achieve this goal was to limit the third-party defense when the third party was in a contractual relationship with RP. The Court of Appeals held that DRD's acts or omissions were incurred in connection with its contractual relationship with ACL and therefore ACL was not entitled to a complete defense under OPA.

In the alternative, ACL argued that it was entitled to invoke OPA's limited liability provision. The US countered that DRD's conduct fell within OPA's exception to limited liability because the spill was caused by the gross negligence, willful misconduct or violation of federal regulations by DRD while acting pursuant to its contractual relationship with ACL.

The Court of Appeals again agreed with the US. The appellate court noted that the term "pursuant to" was another matter of first impression and concluded that this language applied if the person does so in the course of carrying out the terms of the contractual relationship with the responsible party. The appellate court found that the fact that DRD's conduct here gave rise to criminal violations did not take it outside OPA's exception to limited liability. The appellate court also determined that there is "considerable overlap" between gross negligence, willful misconduct or violations of federal regulations on one hand, and criminal violations on the other, and saw no logical basis to distinguish between negligent acts that would constitute exceptions to limited liability and criminal acts which would not.

Lastly, the Court of Appeals rejected ACL's reliance on the doctrine of "*respondeat superior*". ACL contended that under common law, employers are not responsible for intentional torts or criminal acts of their employees if committed outside the scope of their employment. However, the appellate court noted that the liability of an RP for spills caused by the negligence ort misconduct of a contractually related third party under OPA was a creature of statute taking priority over common law. Further, even under common law, employees are liable for the intentional torts of their employees if they were acting within the scope of their employment, i.e. performing work assigned by the employer. The appellate court ultimately held that, ACL was not entitled to limit its liability because the spill was caused by the gross negligence, willful misconduct or federal regulatory violation of DRD while acting pursuant to its contractual relationship with ACL.

The Fifth Circuit Court of Appeals therefore affirmed the district court's grant of summary judgment against ACL in all respects. RPs are not entitled to avoid OPA liability by claiming that the incident was caused by assisting tugs, or also by a wide range of contractual partners or service providers such as charterers, stevedores, repairmen or cargo shippers,

depending on the facts of a given case. However, even though this holding precludes asserting sole party fault when the act or omission in question arises from a contractual relationship between the parties, OPA expressly reserves the RP's right to seek contribution from a third party who is potentially liable under "this Act or any other law" which would include, e.g., theories of liability under general maritime law.

Recovery of Purely Economic Damages From Third Parties for an Oil Spill

BY ROBERT E. O'CONNOR

In re Settoon Towing, L.L.C., 859 F.3d 340 (5th Cir. 2017), two flotillas of barges were sailing southbound on the Mississippi River. One flotilla was carrying crude oil; the other flotilla was carrying grain. They collided as the crude oil flotilla was overtaking the grain flotilla. A crude oil barge ruptured and spilled its cargo into the river.

Settoon, the owner and operator of the flotilla carrying crude oil, was designated as the "Responsible Party" pursuant to the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701 et seq. ("OPA 90"). As such, Settoon spent millions of dollars removing (i.e., cleaning up) the crude oil spill and paying other damages. Settoon also filed a petition for limitation of liability pursuant to 46 U.S.C. §§ 30501, et seq.

Marquette, the owner and operator of the flotilla carrying grain, filed a claim against Settoon. In turn, Settoon filed a counterclaim against Marquette seeking contribution under OPA 90, the general maritime law, or both. The district court found that Settoon was 35% at fault for the collision and Marquette was 65% at fault for the collision. Accordingly, Settoon sought contribution from Marquette – including contribution for purely economic damages – consistent with Marquette's apportioned fault.

Under the general maritime law, purely economic damages are not recoverable. See Robin Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 307-09 (1927). However, under OPA 90, purely economic damages are recoverable from a third party if the third party was solely at fault. See 33 U.S.C. § 2702(d)(1)(B). The issue before the court of appeals was whether purely economic damages are recoverable from a third party when the third party is partially at fault.

Marquette argued that OPA 90 permits a responsible party to recover purely economic damages from a third party only when the third party is solely at fault. The theory is that in those limited circumstances a responsible party is entitled by subrogation to all rights of the United States and other claimants to recover removal costs and damages – including purely economic damages – from a third party. See 33 U.S.C. § 2702(d)(1)(B). However, Settoon's counterclaim was not based on subrogation; rather, it was based on contribution.

OPA 90 addresses contribution at 33 U.S.C. § 2709. It says "[a] person may bring a civil action for contribution against any other person who is liable or potentially liable under this Act or another law." Marquette argued that this section of OPA 90 merely acknowledged that the general maritime law, including the prohibition of recovery of purely economic damages, still applied. The district court and the court of appeals disagreed.

The court of appeals analyzed the statute's plain language and compared it to the Clean Water Act, 33 U.S.C §§ 1251 et seq. ("CWA"), and the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601 et seq. ("CERCLA"). Whereas CWA did not create a cause of action for contribution, both CERCLA and OPA 90 did create a create a cause of action for contribution – including against a third party for purely economic damages – when the third party was partially at fault.

The court of appeals noted that its interpretation of OPA 90 was consistent with legislative history. Congress intended that OPA 90, and not the general maritime law, controlled liability with respect to oil spills. In other words, OPA 90 nullified the Robins Dry Dock prohibition of the recovery of purely economic damages. Therefore, the court of appeals held that a responsible party may seek contribution for purely economic damages from third parties who were partially at fault for an oil spill.

The Definition of 'Merchant' in the Era of Blockchain Technology

BY WOOK CHUNG

When ocean freight remains unpaid or detention/demurrage charges are due and owing, ocean carriers typically claim against every party identified in the Bill of Lading based on two main terms in the Bill of Lading – 1) 'joint and several liability' clause, and 2) a broadly construed definition of 'Merchant.' Many container carriers have a similarly broad definition for 'Merchant: includes the Shipper, Consignee, holder of this Bill of Lading, the receiver of the Goods and any Person owning, entitled to or claiming the possession of the Goods or of this Bill of Lading or anyone acting on behalf of this Person.' (**www.msc.com/lbr/contract-of-carriage**). And, yes, this definition does include categories of parties that might not necessarily be identified by company name within the four corners of the Bill of Lading.

From personal experience, I know carriers rely on this broad definition of Merchant to recover damages against anyone who can reasonably be identified as a 'Merchant' regardless of their cargo ownership interest or the degree of their respective physical contribution to the shipping transaction. Some responded with objections such as lack of consent, lack of notice, or lack of privity. However, in the end, the failure of a booking person to expressly name the cargo interest or other involved entities in the relevant shipping document was no limitation to carrier's recovery claim. And often, the on-going business dynamics between shippers, NVOCCs, and forwarding agents (the latter two parties having their own transportation documents with the similar Bill of Lading terms) required that they adhere to the ocean carrier's bill of ladings terms and/or relevant tariff terms, which are also readily available to them and the public. And, depending on the circumstances, one could argue unjust enrichment, among other equitable principles, against the owner of the cargo even if that entity is not the named consignee in the Bill of Lading.

In the recent case Mediterranean Shipping Co., S.A. v. Best Tire Recycling, Inc., 848 F. 3d 50 (1st Cir. 2017), a company named Armstrong hired Best Tire as a sourcing agent for shipping scrap tires to a consignee in Vietnam. Armstrong is the entity that directly communicated with the ocean carrier for booking and other shipping instructions, and is also the one that prepaid some of the ocean freight. While Best Tire argued that it never agreed to be the shipper of record, it admitted to having received the carrier's booking confirmation and the relevant Bills of Lading. The lower court held, and appellate court affirmed that Best Tire was liable for the charges accrued in the Bills of Lading since "even if [Best Tire] never signed any document with the carrier, it made no objection to being designated as shipper

until it received invoices for the charges." It is notable that the Court suggested that "Armstrong could also be held liable" when it did not appear in anywhere in the relevant Bill of Lading. So, one of the takeaways from this case is that the industry (and the Courts) should continue to apply the definition of Merchant so long as the merchant knew or should have known (or had access to) the shipping transaction and the related terms, and directly enjoyed the benefits at the same time.

So, what is the implication of the continued application of the definition of 'Merchant' in the modern day shipping industry?

A few ocean carriers have already launched, or will soon implement, "blockchain technology" to provide a more efficient, secure, automated, and the real-time management of any given shipping transaction. Initially, blockchain technology was created to facilitate a safe bitcoin trade market based on the concept of open source software - the management of a given transactions is done collectively and securely by the responsible parties. In the shipping context, the "blockchain" would hold together the details of the several smaller 'blocks' of information and transactional input made by certain participants who are given a limited access from booking stage to actual the carriage stage as well as to the delivery stage. Meaning, various parties facilitating the transportation of cargo will need the access to the various blocks of information chain to provide basic shipping data (eg. shipper/consignee/cargo description). Other parties will need to access to add the necessary information to address regulatory requirements (eg. Verified Gross Mass, OFAC, or Hazmat clearance), say as agent for the ultimate shipper. Of course, there may be other parties with access that are just monitoring and verifying the shipping transactions to track the shipment (eg. for Customs clearance, or door delivery preparation). So, with the possibility of increased accessibility to the Bill of Lading and/or other critical shipping information (eg. cargo description, booking status, shipment tracking, and rates information), it is entirely possible that more entities can fit within the definition of Merchant.

Many experts already recognize that blockchain technology will bring billions of dollars-worth of benefits to the shipping industry, and that this new supply chain solution will transform the shipping industry for the better. And as the definition of "Merchant" continues to be imposed by ocean carriers and still gets challenged by others, carriers would be well served by clearly understanding their blockchain processes, and by reviewing their respective definitions of "Merchant", so that potentially liable parties are clearly defined not just from the documentation point of view, but also from the technology and network point of view as well. Of course, the possibility of various cyber-risks and legal and insurance issues associated with the blockchain technology remain as concerns… for me to discuss another day.

Charter Party "No Lien" Clause Enforced

BY TIMOTHY SEMENORO

In Cal Dive Offshore Contractors, Inc. v. M/V SAMPSON, the U.S. District Court for the Southern District of New York considered a claim by vessel manager Cal Dive Offshore Contractors, Inc. ("Cal Dive") for unpaid services against the vessel in rem, the owner CVI Global Lux Oil and Gas 4 S.a.r.l ("CVI"), and CarVal investors, LLC ("CarVal") as owner's agent. Following a trial, the district court held that Cal Dive's maritime lien and in personam claims failed. Cal Dive has since filed an appeal, which remains to be decided.

The relationship between the parties began in order to secure pipelaying contracts in the Gulf of Mexico. For that purpose, Cal Dive and Oceanografia, S.A. de C.V. ("OSA") entered into a Bid Cooperation Agreement. In connection with the work, OSA chartered the M/V SAMPSON from CVI with CarVal acting as owner's agent. Under the terms of the charterparty, CVI would provide the crew for the vessel and OSA would supply additional personnel to handle the pipelaying work. However, due to obligations under the pipelaying contract, Cal Dive was responsible for the overall management of both the operation and pipelaying responsibilities of the vessel.

Accordingly, CVI entered into a Ship Management Agreement with Cal Dive for the crew members to operate the vessel. Concurrently, OSA contracted with Cal Dive for the additional personnel to handle the pipelaying work. OSA and Cal Dive ultimately agreed on the exact crew members Cal Dive would supply for this work. The vessel was deployed and subsequently Cal Dive invoiced CVI for the work of the marine crew and OSA for the pipelaying personnel. While CVI paid, OSA did not make full payment and then filed for bankruptcy. Cal Dive filed claims against the vessel, CVI, and CarVal to recover the unpaid amounts.

At trial, two CarVal witnesses gave credible testimony that Cal Dive was aware of "no lien" provision in the charter party between CVI and OSA. In fact, Cal Dive, as ship manager, had to know the terms of the charterparty in order to address the day-to-day operational needs of the vessel. This included communicating the "no lien" clause to third-party vendors supplying the vessel. Between the testimony and evidence that Cal Dive had received a copy of the charter party, both before and after the execution, the district court found that Cal Dive had actual knowledge of the "no lien" clause in the charter party. Accordingly, the district court dismissed Cal Dive's maritime lien claim against the vessel because, in contracting with OSI for the pipelaying personnel, Cal Dive was fully aware of the "no lien" clause.

In deciding a previously filed motion for summary judgment, the district court had already dismissed Cal Dive's in personam claim against CVI. Since CarVal was clearly CVI's agent, acted within the scope of its authority, and was not personally negligent, the in personam claim against CarVal must likewise fail.

Clearly, the effectiveness of a "no lien" clause can hinge on whether the parties involved had prior knowledge of the restriction. As Cal Dive had actual knowledge of the clause, it was precluded from recovering on the basis of a maritime lien.

Poorly Written Choice of Law Clause Causes a Dilemma

BY VINCENT M. DEORCHIS

A good example of how cases can be treated differently by a court or an arbitration panel can be glimpsed from the decision by the U.S. District Court for the Western District of Washington in Teras Chartering, LLC v. Hyupjin Shipping Co., Ltd., No. 2:16-cv-0188, 2017 WL 2363632 (W.D. Wash. May 31, 2017). In Teras Chartering, the Federal Judge was confronted with a claim for demurrage arising out of delays at two load ports and one discharge port. The vessel was operating under a "Booking Note" rather than a formal charter agreement.

The Defendant, an international freight forwarder who charted in the vessel, filed a summary judgment motion in respect to the demurrage claims arguing that it was entitled to a "reasonable time under the circumstance" to discharge cargo, and that it was also entitled to a "grace period" to offset any delay under the terms of the Booking Note. In wading through the various submissions, the Judge acknowledged that "the parties have made it difficult to trace the basic facts of this case." This was only further complicated by arguments from Plaintiff that the charterparty cases cited by the Defendant were inapplicable to a Booking Note.

Ultimately, the Judge agreed that the defendant freight forwarder was entitled to a "reasonable period of time" to discharge, but did not have sufficient facts presented to determine whether the cargo was actually discharged within a reasonable amount of time. As such, "issues of fact" existed that must be brought to trial.

In contrast, an arbitration panel might have better understood the situation based on their commercial maritime experience, and perhaps have confronted the Defendant's arguments without delaying the matter for a trial on the facts.

Regarding the allowable "grace period," interpretation is required by the court. As a further complication, the Booking Note choice of law clause provided for the non-existent "general maritime law of Washington State." While there is a recognized body of federal US general maritime law, it does not always agree with the laws of Washington State. In this particular instance, federal maritime law requires a two-step process – determine whether ambiguity exists; if so, then rely on extrinsic evidence to determine the meaning of the clause. Washington State law allows the use of extrinsic evidence to determine whether the clause is ambiguous. Recognizing that a choice of law issue should be determined first, the court directed the parties to address this issue in later briefing.

It is submitted by the author that a maritime arbitration panel would probably have used their own understanding of the terms "missed the laycan" and "grace period" without the subtle legal distinction made by the Judge.

The other arguments to strike certain evidence, for continuation of discovery, and for security aside, the outcome of the motion might have been different, if a maritime arbitration panel had been involved instead of a district court judge.

Arbitration Clause Narrowly Construed

BY EUGENE J. O'CONNOR

The case of Iota Shipholding Ltd. v. Starr Indemnity and Liability Company, 16 cv 4881, 2017 WL 2374359, 2017 A.M.C. 1461 (S.D.N.Y. May 31, 2017), involved alleged damage to a cargo of tubing shipped from Mexico to Costa Rica on the *M/V LITA.* The ship was on a time charter between her registered owner Iota and a disponent owner A&B Limited, who in turn voyage chartered the ship to Ternium Mexico. For the subject shipment, bills of lading were issued and executed by the ship's port agent on behalf of the Master and incorporating by reference the voyage charter. The bills of lading named the voyage charterer Ternium Mexico as the shipper, Ternium Costa Rica as the consignee and "the owners of the *M/V Lita*" as the carrier. The bills were on the COGENBILL form, which specified that all terms and conditions of the voyage charter identified on its face were incorporated.

Pursuant to the terms of the Voyage Charter, the cargo underwriter Starr Indemnity, as subrogor of the Ternium entities, demanded arbitration in New York against Iota. In response, Iota petitioned the U.S. District Court to enjoin the arbitration and declare that there was no valid agreement to arbitrate between these parties, invoking the Declaratory Judgment Act, 28 U.S.C. § 2201 and the Federal Arbitration Act, 9 U.S.C §§1-16.

The Voyage Charter's arbitration clause stated in pertinent part that "should any dispute arise between *Owner and Charterer"* (emphasis added) the matter should be referred to arbitration. The issue before the court was whether this language was sufficient to bind Iota, who was not a named party to the Voyage Charter.

At the outset, the court determined that ordinary principles of general maritime law governed the interpretation of this maritime contract. The court further held that the question of the validity and scope of the arbitration clause in the Voyage Charter was ultimately for the court to decide.

The parties agreed that Iota was not a signatory to the Voyage Charter. However, Starr Indemnity argued that Iota was still bound by the terms of the Voyage Charter because Iota was identified by the bills of lading, which incorporated the Voyage Charter terms.

In general, whether a dispute is arbitrated is a matter of contact and a party cannot be required to submit to arbitrate a dispute which it has not yet agreed to arbitrate. However, there are exceptions under which a non-signatory to an arbitration agreement can still be required to arbitrate. For instance, when a charty party's arbitration clause is expressly incorporated into a bill of lading, which the non-signatory has executed; or an alter-ego has executed the charter party with the arbitration agreement.

Here, Starr Indemnity argued that the Voyage Charter was incorporated by the bills of lading. In order for Starr Indemnity to succeed, Starr Indemnity had to prove express incorporation and that the scope of the incorporated arbitration clause was broad enough to include the underlying claim.

In deciding the motion, the court focused on the second prong, i.e. whether the arbitration clause in question was narrow or broad in scope. It observed that precedent in the Southern District was to construe the clause referring specifically to disputes "between owners and charterers" as in the clause at issue, as a typical "narrow" arbitration clause, as opposed to the "quintessential" broad arbitration clause that applies "to all disputes under the charter party."

The court therefore held that the arbitration clause at issue was restrictive in scope and applied only to the owner and charterer identified as such at the beginning of the Voyage

Charter. The Owner was named as the disponent owner A&B Limited. As such, the court ultimately held that even though Iota might be the true owner of the vessel, it declined to "stretch" the scope of the arbitration clause to include non-signatories such as Iota. The "plain text" of the arbitration clause limited the scope of its terms to A&B.

The lesson here is clear. If the parties wish to bind third parties who are not signatories to the charter to its arbitration clause, they should draft the clause accordingly with wording such as "any and all disputes arising under the charter party" to reflect their intention of a broad scope.

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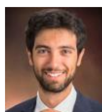

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