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Prepared by Montgomery McCracken's Maritime and Transportation Group

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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. Timothy Semenoro, a partner and member of the firm's Maritime and Transportation practice group, serves as the editor of this publication.

When multiple parties seek the attachment of the same cargo via both federal and state courts, the first to serve proper papers wins

BY ALFRED J. KUFFLER

In ***Stemcor USA Inc. v America Metals Trading LLP***, the District Court for the Eastern District of Louisiana recently considered the attachment of 9,000 tons of pig iron by five competing interests. This case is significant because it illustrates the nuances when multiple parties attempt to attach the same property in two different courts. Understandably, a brief summary of the parties and their respective procedural histories is necessary to appreciate the result.

THE PARTIES AND PERTINENT PROCEDURAL HISTORY

Both Stemcor USA, Inc. ("Stemcor") and Daewoo International Corporation ("Daewoo") filed separate legal actions in the US District Court for the Eastern District of Louisiana on December 14, 2012. Both alleged breaches of their respective maritime contracts with American Metals Trading, LLP ("AMT") for failure to deliver certain cargoes of pig iron. Orders for corresponding writs of maritime attachment were signed on December 14.th

On December 21st, Clipper, on behalf of vessel interested, intervened in the Daewoo action, alleged claims for unpaid freight, deadfreight, and demurrage, and also obtained a writ of attachment against AMT.

Before any writs of attachment had been served, Daewoo amended its complaint to add a claim under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and had an additional writ of attachment issue under Louisiana's non-resident attachment statute. The Stemcor and Daewoo attachments were served on the pig iron cargo aboard the M/V CLIPPER KASASHIO on December 22, 2012.

These two legal actions in US District Court were eventually consolidated on December 27th. The next day, ABN AMRO intervened in the actions and alleged claims that AMT had defaulted under the terms of a loan agreement that was secured by a pledge of pig iron inventory. ABN AMRO obtained a writ of attachment under Louisiana state law.

Following a dispute over the ownership of the subject pig iron cargo, Clipper's arrest papers were modified, reissued, and served on the cargo on December 29th at 8 am. ABN AMRO's attachment was served on January 3, 2013.

Concurrently, ThyssenKrupp/Mannix ("TKM") filed suit in Louisiana state court. TKM also sought to attach the pig iron cargo aboard the M/V CLIPPER KASASHIO and its seizure papers were served on the cargo on December 29th at 7:52 am, a few minutes before Clipper's papers. Ultimately, the pig iron cargo was sold, and the proceeds were paid into the registry of the District Court pending resolution of the competing claims.

THE RESOLUTION OF THE COMPETING CLAIMS

In resolving the competing claims and corresponding attachments, the District Court considered three basic legal theories:

(1) Rule B attachments must be based on "maritime" claims – Rule B itself states that the remedy is available only for "maritime" claims. The District Court reaffirmed that, in order for a breach to give rise to a "maritime claim" within a court's admiralty jurisdiction, the underlying contract must relate to a ship in its use as such, or to commerce or navigation on navigable waters. Simply referring to a ship or the transportation of goods by a ship is not enough. Since the allegedly breached Stemcor and Daewoo contracts were essentially sales contracts requiring ocean transport of the purchased cargo, the District court determined that mere references to ocean transportation was not sufficient, and these contracts were not "maritime" because their primary objective was the sale of the pig iron.

Under these circumstances, the reasoning in the US Supreme Court case *Norfolk Suffolk Railroad Co. v. Kirby* – so long as the purpose of the contract is to effectuate maritime commerce, the contract is maritime – did not apply. Nor was admiralty jurisdiction found to arise under the "mixed contracts" doctrine – contracts that contain both maritime and non-maritime obligations can be separated and tried independently. Instead, the Stemcor and Daewoo contracts were for the sale of goods and not "maritime." Therefore, they could not be the basis for Rule B attachments.

(2) Attachment under the Convention – Daewoo sought to justify its presence in federal court by arguing that the Convention provided the District Court with a basis for jurisdiction and corresponding attachment under state law. The District Court first recognized that the Federal Arbitration Act, which implements the Convention in the United States, explicitly confers jurisdiction on the federal courts to hear disputes arising under the Convention. Then, after considering the split in the federal authority as to whether the Convention allows attachment for purposes of obtaining security and to compel arbitration, the District Court opted to follow those cases allowing an attachment as a provisional remedy under the Convention.

But, upon further analysis, Daewoo still lost. With respect to seizure of property, the Rules of Procedure in the Federal Courts allow use of state court procedures. Here, Daewoo had invoked Louisiana law as one basis for the attachment. However, the District Court held that under the applicable state law, attachment of property could not be used to compel arbitration or obtain security for such a proceeding. Thus, Daewoo's attachment had to be vacated.

(3) Prior Exclusive Jurisdiction – Since Stemcor and Daewoo's December 22nd maritime attachments were dismissed for lack of maritime claims and Daewoo's December 22nd state law attachment was dismissed as being an unavailable remedy, the District Court turned its attention to TKM's December 29th attachment under state law. In doing so, the District Court considered the doctrine of "prior exclusive jurisdiction." Based on longstanding precedent, "when one court exercises *in rem*jurisdiction over a *res*, a second court will not assume *in rem* jurisdiction over the same*res*. Accordingly, the District Court held that TKM's seizure of the property triggered the doctrine and control, i.e., the moment of attachment / seizure, of the property marked the onset of the initial court's jurisdiction. Moreover, as a consequence, all federal attachments and arrests that post-dated TKM's December 29th state law attachment must be vacated.

Finding that TKM's attachment via the state court was the first valid seizure, the District Court then ordered that the funds be transferred, as per the parties' prior agreement, to the state court for further proceedings there. Having been served a few minutes late, Clipper's attachment was legally invalid, and all subsequently served federal attachments suffered the same fate.

CONCLUSION

While this decision does not make any new law, it thoroughly analyzes each point, capturing much significant law in one opinion, and in the process provides much in the way of guidance to the parties and lawyers wrestling with these issues. Put simply, attachments under Federal Rule B must be based on valid "maritime" claims, and a sales contract merely calling for ocean transportation does not give rise to the requisite "maritime" claims. The Convention on Recognition and Enforcement of Foreign Arbitral Awards can be the basis for establishing federal court jurisdiction and does allow provisional remedies under state law in connection with arbitral disputes subject to the limits of state law. And, most importantly, the first valid seizure of property invokes the doctrine of "prior exclusive jurisdiction," reserving the property seized to the court out of which the first valid seizure came and to the exclusion of other courts.

In the end, the moral of the tale is – BE THE FIRST TO SEIZE – because possession is indeed the whole of the law.

The M/V MSC FLAMINIA – Foreign officer estate claims against the vessel interests dismissed

BY TIMOTHY SEMENORO

On July 14, 2012, the container ship MSC FLAMINIA suffered a catastrophic explosion and fire, while in the middle of the Atlantic, during a voyage from Charleston, S.C. to Antwerp, Belgium. Three crew members were killed, the vessel suffered massive structural damage, and a substantial number of the container cargos on board were lost or severely damaged.

On December 7, 2012, the Plaintiffs Conti 11 Container Schiffahrts-GMBH & Co. KG MSC "FLAMINIA" ("Conti"), as owner, and NSB Niederelbe Schiffahrtsgesellschaft MBH & Co. KG ("NSB"), as technical manager and operator, of the MSC FLAMINIA, filed a Complaint for Exoneration From or Limitation of Liability pursuant to 46 U.S.C. § 183, *et seq.* (the U.S. Limitation Act). The resulting limitation proceeding consolidated the existing actions filed by certain cargo interests. Subsequently, the various cargo claimants, NVOCCs, and the estate of the Chief Officer, who died as a result of injuries sustained during the explosion, filed claims in the limitation action.

Following discovery on the jurisdictional presence of Conti and NSB in the United States, Conti and NSB filed a motion to dismiss the claims of the Chief Officer's Estate on the basis that neither the Jones Act, Death On the High Seas Act ("DOHSA"), nor the General Maritime Law of the United States apply to this case. Instead, Conti and NSB argued that German law applies exclusively to the Estate's claim.

The US Jones Act (a/k/a Merchant Marine Act of 1920) is a federal law designed to promote and maintain the American merchant marine industry. 46 U.S.C. § 688, *et seq*. In the context of merchant mariners, the Jones Act allows any seaman, who was injured during his employment, to maintain a cause of action for damages with a right to a trial by jury. Although the language of the statute is broad, not all seamen under all circumstances get the benefit of this law and its associated remedies. In order for the Jones Act to apply, there needs to be a substantial connection with the United States. For an American seaman or an American-flagged vessel, there can be a substantial connection no matter where the injury occurred.

To determine whether the Jones Act applies in a particular case, courts apply a choice of law analysis as set forth in two US Supreme Court cases – *Lauritzen v. Larsen* and *Hellenic Lines*

Ltd. v. Rhoditis. This same analysis is applied for DOHSA and US General Maritime law claims.

Based on *Lauritzen*, a court must consider: (1) the place of the wrongful act; (2) the law of the ship's flag; (3) the allegiance or domicile of the injured seaman; (4) the allegiance of the shipowner; (5) the place where the shipping articles were signed; (6) the accessibility of the foreign forum; (7) the law of the forum. The US Supreme Court in *Rhoditis* considered an additional factor: (8) the shipowner's base of operations and the location of the managing and chartering agents for the vessel. A court may consider additional factors since whether US law applies depends on the substantial contacts between the underlying transaction and the United States.

In opposing the motion to dismiss, the Chief Officer's Estate conceded that none of the *Lauritzen* factors existed. In fact, the Chief Officer was injured in the middle of the Atlantic Ocean (i.e., international waters), the vessel German-flagged, the Chief Officer was a Polish national, Conti was a German company, the employment contract was signed in Germany and subject to German law and forum, and Germany was an accessible forum with laws that allowed for a specified recovery, which the Estate has received. Instead, the Estate argued the application of the *Rhoditis* factor. Specifically, the Estate argued that *Rhoditis* was satisfied by the presence of a NSB office in the United States, the frequency of NSB vessels calling on US ports, and NSB's efforts to sell passenger cruises that include US ports.

Having agreed that none of the *Lauritzen* factors were satisfied, the District Court noted that the Estate did not even attempt to argue that the owner or charterer had bases of operation in the United States, and instead focused on NSB alone. As to the those arguments, the District Court found that the US port calls, the presence of NSB's agent in the United States, and the revenue derived from the cruise operations were simply not substantial enough contacts with the US, even when taken together.

Ultimately, the District Court held that: "Under the circumstances of this case, the interests of the United States have not been sufficiently implicated to warrant the application of United States law." ***In re M/V MSC Flaminia***, 12-cv-8892 (SAS), 2016 WL 1718252, *9 (S.D.N.Y. Apr. 27, 2016)

Post-*Daimler*, Courts are split on when foreign and domestic corporate defendants are subject to general *in personam* jurisdiction

BY ALBERT L. PICCERILLI AND CORA A. DAYON

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The United States Supreme Court's decision in ***Daimler AG v. Bauman*** has altered the legal landscape as to where a corporate defendant, foreign or domestic, may be sued. In *Daimler*, a case in which relevant events took place entirely outside the United States, the Court considered whether a defendant that was incorporated under the laws of Delaware and had its principal place of business in New Jersey was subject to the general (or all-purpose) *in personam* jurisdiction of the courts in California. The Court held that general *in personam* jurisdiction over the defendant could not attach consistent with due process of law, despite the fact that the defendant operated multiple California-based facilities (including a regional office and two other centers) and that the defendant's sales of new luxury vehicles to the California market accounted for 10% of all sales of new luxury vehicles in the United States and 2.4% of the defendant's parent's worldwide sales. Id. at 752. Pre-*Daimler*, the California court's exercise of general *in personam* jurisdiction over this defendant seemed to have been entirely supportable. However, the *Daimler* Court concluded otherwise, warning that if the defendant's "California activities sufficed to allow adjudication of this Argentina-rooted case in California, the same global reach would presumably be available in every other State in which [the defendant's] sales are sizable." Id. at 750.

According to the *Daimler* Court, for general *in personam* jurisdiction to attach, the corporate defendant's "affiliations with the State [must be] so 'continuous and systematic' as to render [the defendant] essentially *at home* in the forum State." Id. at 754 (emphasis added). The Court determined that for a corporation, the corporation's "place of incorporation and principal place of business are "paradig[m] . . . bases for general jurisdiction." Id. at 760. Nevertheless, the Court was unwilling to "foreclose the possibility that in an exceptional case . . . , a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation *at home* in that State." Id. at 761 n. 19 (emphasis added). That said, in view of the insufficiency of the Daimler defendant's extensive presence and sales in California to render the defendant "at home" there, it is difficult to envision a situation in which a defendant that is not incorporated in the forum and does not have its principal place of business in the forum would be subject to the general *in personam* jurisdiction of the forum State.

Now, post-*Daimler*, the lower courts are grappling with the issue of whether or not a corporate defendant that is not incorporated under the laws of the forum state, and does not have its principal place of business there, may nevertheless be subject to the forum's general *in personam* jurisdiction if it is registered to do business in the forum state. On this issue there is a split of authority across multiple jurisdictions in the United States. A few examples are discussed below.

NEW JERSEY AND DELAWARE REMAIN SPLIT ON THE PROPER STANDARD

The U.S. District Court for the District of New Jersey is split on whether a corporation that has registered to do business in the forum has subjected itself to the general *in personam* jurisdiction of that forum. In ***Otsuka Pharm. Co. v. Mylan Inc.***, 106 F. Supp. 3d 456 (D.N.J. 2015), the court found that while "*Daimler* fundamentally altered the general jurisdiction analysis, [it] need not reach the ultimate issue of whether the . . . [d]efendants' jurisdictional contacts render them 'at home' in this forum," because the defendants "consented to the Court's jurisdiction by registering to do business in New Jersey, by appointing an in-state agent for service of process in New Jersey, and by actually engaging in a substantial amount of business in this State." On the other hand, in ***Display Works, LLC v. Bartley***, No. CV 16-583, 2016 WL 1644451 (D.N.J. Apr. 25, 2016), the court found that to "permit the Court to exercise general jurisdiction over any corporation that completes the required registration and appointment procedures, regardless of whether the statute expressly discusses general jurisdiction" would replace "*Daimler's* limitation on the exercise of general jurisdiction to those situations where the 'corporation is essentially at home'" with a "single sweeping rule: registration equals general jurisdiction" and "that cannot be the law." As such, the court in *Display Works* found that a corporation does not subject itself to general jurisdiction in a forum by registering to do business in that forum.

Similar to New Jersey, the U.S. District Court for the District of Delaware is split on whether a corporation subjects itself to general *in personam* jurisdiction in a forum by registering to do business in that forum. Compare ***Acorda Therapeutics, Inc. v. Mylan Pharm. Inc.***, 78 F. Supp. 3d 572, 588 (D. Del. 2015), aff'd, 817 F.3d 755 (Fed. Cir. 2016) (holding that "*Daimler* does not eliminate consent as a basis for a state to establish general jurisdiction over a corporation which has appointed an agent for service of process in that state, as is required as part of registering to do business in that state"), *with* ***AstraZeneca AB v. Mylan Pharm., Inc.***, 72 F. Supp. 3d 549 (D. Del. 2014*), motion to certify appeal granted sub nom. AstraZeneca AB v. Aurobindo Pharma Ltd.*, No. CV 14-664-GMS, 2014 WL 7533913 (D. Del. Dec. 17, 2014), and *aff'd sub nom. Acorda Therapeutics Inc. v. Mylan Pharm. Inc.*, 817 F.3d

755 (Fed. Cir. 2016) (holding that based on the holding in *Daimler*, the defendant's compliance with Delaware's registration statutes, which are mandatory for doing business within the state, cannot establish consent to jurisdiction).

SOME DECISIONS IN PENNSYLVANIA AND NEW YORK HAVE EMBRACED THE NEW STANDARD

The Eastern District of Pennsylvania and the Southern District of New York appear to be on the same page in that decisions of both courts have held that registering to do business in the forum is not enough to confer general *in personam* jurisdiction. The Southern District of New York has held that, "after *Daimler*,… being registered to do business is insufficient to confer general jurisdiction in a state that is neither its state of incorporation or its principal place of business." ***Chatwal Hotels & Resorts LLC v. Dollywood Co.***, 90 F. Supp. 3d 97, 105 (S.D.N.Y. 2015). Likewise, where plaintiff alleged that defendants were registered to do business in the forum state and therefore should be subject to general jurisdiction, the Eastern District of Pennsylvania found that "applying the considerations of *Daimler* and *Goodyear*, the mere allegation that defendants operate in the State does not render defendants "at home" in Pennsylvania and subject it to general jurisdiction here." ***Spear v. Marriott Hotel Servs., Inc.***, No. CV 15-6447, 2016 WL 194071, at *3 (E.D. Pa. Jan. 15, 2016). But, in the post-*Daimler* decision in ***Bradley v. Powell***, No. 15-04025, 2015 WL 5544507, at *5 n.2 (E.D. Pa. Sept. 18, 2015), the court suggested that a foreign corporation's registration to do business in Pennsylvania likely equated with its consent to general *in personam* jurisdiction in that forum.

Essentially, *Daimler* reduces the number of states in which a corporate defendant may be sued under general *in personam* jurisdiction, and shifts the emphasis to a consent analysis and a specific *in personam* jurisdiction analysis in those states where there are sufficient contacts under the law.

No Sympathy for Spoiled Melons – Service Contract Terms Upheld

BY VINCENT M. DEORCHIS

Sometimes you just can't win. In ***Sol Group Marketing Co. v. American President Lines, Ltd.*** before the Southern District of New York, a shipper named Sol brought suit for fraud and misrepresentation against APL on the grounds that the Service Contract between the parties was accompanied by a weekly schedule of sailings for the coming year and which APL failed to maintain. The shipper argued in its complaint that, in entering into the Service Contract, it relied upon the shipping schedule providing weekly service from Central America. When APL failed to provide cargo space every week, Sol was confronted with containers of melons that could not be loaded and subsequently suffered deterioration. Sol also had to use other carriers at much higher freight rates to meet its commitment with suppliers in the United States.

However, the federal judge showed little sympathy for Sol's situation and held that they could have protected themselves by being more careful with the provisions in the Service Contract.

Although a prior E-mail exchange between the parties indicated that APL had the ability and capacity to ship Sol' melons on a weekly basis, the resulting Service Contract did not contain such terms. Moreover, the District Court noted that there was a merger clause in the Service Contract which prohibited any party from referring to a document outside of the Service Contract, i.e., parol evidence. Hence, Sol could not rely upon the weekly schedule that was previously given by APL, and was specifically on that the carrier did not guarantee weekly service under the terms of the actual Service Contract.

Sol sought to get around the parol evidence rule by arguing that APL had "peculiar" knowledge of the relevant facts and the shipper would not had been able to discover the truth about the sailing schedules through the exercise of due diligence. The Court disagreed that the peculiar knowledge exception applied under New York law, pointing out that where the plaintiff has a low cost alternative to the problem, such as "insisting that the written contract terms reflect any oral undertaking on a deal-breaking issue," the parol evidence rule should continue to apply. Succinctly stated, "a party will not be heard to complain that he has been defrauded when it is his own evident lack of due care which is responsible for his predicament."

The District Court also dismissed plaintiff's declaratory judgment claim that the liquidated damage clause in the Service Contract was unenforceable because it was a contract of adhesion and therefore unconscionable. Typically, contracts of adhesion are "standard-form contracts, offered by large, economically powerful corporations to unrepresented, uneducated, and needy individuals on a take-it-or-leave-it basis, with no opportunity to change the contract's term." Since Sol had negotiated and modified parts of the Service Contract, and was a sophisticated company familiar with shipping, it could hardly complain that the Service Contract was a contract of adhesion.

Lastly, Sol complained that the $350 per container "liquidated damages" penalty, under the Service Contract against either party for either failing to provide the minimum volume, or failing to provide service to handle the minimal volume, was unconscionable because it did not come anywhere near the $1 million in damages that was suffered by the shipper. Defendant pointed out that the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998, sanctions the use of liquidated damages clauses in shipping service agreements in order to put the parties on notice of the risks involved from the outset of their relationship. Moreover, since the $350 penalty was applicable to either party for breach of the service agreement, it could hardly be perceived as doing more injustice to the shipper than the carrier.

As such, the District Court granted APL's motion to dismiss Sol's fraud in the inducement claim and partially dismiss Sol's declaratory judgment claim.

U.S. Bankruptcy Court Finds Performance Under Maritime Service Contract Excused Where Carrier Discontinues Voyages

BY DAVIS LEE WRIGHT

The United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") recently recommended that the United States District Court for the Southern District of New York (the "District Court") grant summary judgment in favor of shippers where the carrier discontinued the services for which the shippers had agreed to minimum quantity commitments ("MQC") in exchange for reduced freight rates in a shipping service contract.

In ***In re: The Containership (TCC) A/S***, 2016 WL 2341363 (Bankr. S.D.N.Y. Apr. 29, 2016), plaintiff TCC sued several shippers for breach of contract claiming the shippers were required to pay liquidated damages for failing to satisfy their MQCs. Between 2010 and 2011, TCC entered into approximately 110 shipping service contracts (the "Contracts") pursuant to which the shippers agreed to certain MQCs on TCC's trans-Pacific route between Taicang, China and Los Angeles, California in exchange for lower freight rates. After making 91 voyages, TCC voluntarily discontinued its Taicang-Los Angeles route on April 8, 2011 and canceled the last four scheduled sailings. Most of the Contracts would have expired by their terms on April 30, 2011.

Coincident with the route cancelation, TCC also filed a petition for reconstruction in the Bankruptcy Division of the Commercial and Maritime Court in Copenhagen, Denmark on April 8, 2011 (the "Danish Insolvency Proceeding"). By April 12, 2011, TCC's corporate parent had withdrawn TCC's five chartered vessels, leaving TCC without any operations or ability to operate. On May 31, 2011, TCC's court appointed reconstructor sought recognition of the Danish Insolvency Proceeding as a foreign main proceeding under Chapter 15 of the U.S. Bankruptcy Code. The Bankruptcy Court granted recognition of the Danish Insolvency Proceeding on July 1, 2011. Recognition allowed TCC to bring seventy-six adversary proceedings against various shippers seeking payment of liquidated damages as a result of the shipper's failure to satisfy its respective MQC. Additionally, TCC asserted that, even though the Taicang-Los Angeles route was "discontinued", not terminated, the shipper-defendants (many of whom had not satisfied their MQC) remained liable for any MQC remaining on the "suspended" Contracts. TCC asserted that the shippers remained liable because: (1) each of the Contracts required that the shipper would use best efforts to ship cargo "evenly throughout the duration" of the Contracts, and (2) TCC already accounted for its cancellation of the four remaining voyages by providing each shipper with an offset to the MQC equal to a *pro rata* reduction of the MQC based on TCC's calculation of the amount of cargo each shipper could have shipped on the last four canceled voyages had those voyages occurred. TCC subjected any remaining unfulfilled MQCs to the contractually agreed to liquidated damages rate.

The shipper-defendants sought summary judgment arguing they were: (1) fraudulently induced into the Contracts because TCC had superior knowledge that Shanghai International Port Group ("SIPG") had threatened repercussions on any shipper using TCC; (2) excused from performing under the Contracts because of lack of consideration, TCC's prior breaches, termination of the Taicang-Los Angeles route, and force majeure due to SIPG's actions; and (3) not liable because TCC's filing of the adversary proceeding violated the implied covenants of good faith and fair dealing.

In issuing its recommendation, the Bankruptcy Court construed that the Contracts as maritime contracts "because the primary objectives of the Contracts was the transportation of goods by sea" and concluded that federal law generally governs maritime contracts. Additionally, the Bankruptcy Court applied New York State law in its recommendations as needed because of the principle that state law should supplement any aspect of contract law for which Federal law is silent and because the Contracts contained a New York choice of law provision.

After analyzing a form of Contract and the parties fact statements, the Bankruptcy Court ultimately recommended that the District Court find the Contracts valid and enforceable because the Contracts contained the hallmarks of a contract and the specific terms required by 46 U.S.C. § 40502(c). The consideration for the Contracts was TCC's agreement to ship at rates lower than published tariffs in exchange for the shipper's agreement to MQCs. Contrary to the shippers' argument, TCC's ability to move, at its discretion, a shipper's cargo to a later voyage, did not invalidate the Contracts or render them illusory. Further, force majeure did not excuse the shipper's failure to satisfy the MQCs for two reasons. First, the shipper-defendants failed to provide the contract-required notice of a force majeure event. Second, New York does not recognize financial hardship – i.e., SIPG's threat to do economic harm to shippers using TCC's Taicang-Los Angeles service – as a valid ground for avoiding contracted-for performance.

The Bankruptcy Court also concluded that TCC did not breach the covenant of good faith and fair dealing by filing the adversary proceedings. Again turning to New York law, the Bankruptcy Court noted that the implied covenant "can only impose an obligation consistent with other mutually agreed upon terms in the contract." Here, because the Contracts expressly provided TCC with the right to damages for a shipper's failure to meet its MQC, the Bankruptcy Court could not imply the opposite – that TCC would not seek to recover the MQC shortfall from a shipper. Material facts also existed with respect to the shippers' assertion that there was fraudulent inducement and that TCC breached the Contracts. The Bankruptcy Court recommended denial of summary judgment on these two defenses.

Nevertheless, in its other findings, the Bankruptcy Court did recommend granting summary judgment in favor of the shippers after concluding that TCC's termination of the Taicang-Los Angeles route excused the shippers' MQC requirement. The Bankruptcy Court wrote that TCC's distinction between "suspended," "discontinued," and "terminated" was not meaningful and was, in fact, belied by fact that TCC had no operations following the withdrawal of chartered vessels by TCC's parent. TCC's inability to transport any goods or satisfy its obligations under the Contracts excused the shippers' non-performance. In responding to TCC's assertion that the Contracts were suspended, the Court noted that the Contracts' terms provided that the MQCs would be reduced *pro rata* to the volumes already shipped if TCC chose to "restructure" its services. Therefore, the Contracts essentially provided that any remaining MQC under a "suspended" contract was effectively zero where TCC chose to restructure by completely eliminating service. Further, the Court did not find TCC's *pro* rata crediting based on remaining as voyages, if they had occurred, to be a reasonable outcome. Unlike TCC's other form contract which required even shipments, the Contracts here only required the shippers to use their best efforts to ship evenly throughout the term of the

Contract. Under these terms, the shippers could have waited until the last voyage to satisfy their individual MQCs. In fact, as the Bankruptcy Court noted, the shippers' MQCs would have been fulfilled even if TCC did not have space available for the entire MQC on the last voyage. According to the Contracts, as long as the shipper provided the proper notice to TCC, TCC was required to reduce the shipper's MQC based on the amount of cargo tendered, not the amount of cargo TCC could accommodate on that particular voyage. Because TCC completely terminated the Taicang-Los Angeles route, and the shippers had no obligation to ship evenly throughout the term of the Contract, the Bankruptcy Court concluded that both TCC's service termination and the Contracts' very terms excused the shippers' from satisfying any remaining MQCs.

The Bankruptcy Court's recommendation is pending before District Judge Andrew L. Carter, Jr. under the caption *The Containership Company (TCC) A/S et al. v. Apex Maritime Co., Inc. et al.,* Case No. 16-04913 (S.D.N.Y.).

OCSLA Choice of Law is Not Waivable, and Maritime Law Not Applicable to Oil and Gas Exploration/Production Activities on the Outer Continental Shelf

BY MELANIE A. LENEY

In ***Petrobras America, Inc. v. Vicinay Cadenas***, the United States Court of Appeals for the Fifth Circuit handed down two significant rulings for those who do business on the Outer Continental Shelf: 1) that the choice of law provision under the Outer Continental Shelf Lands Act (OCSLA) cannot be waived, and 2) that general maritime law did not apply to a claim that arose in the context of oil and gas exploration and/or production.

This matter arose from the failure of an allegedly defective underwater tether chain, which was used to secure a piping system for oil production in the Gulf of Mexico. The chain ruptured shortly after installation and severed the pipeline connection between the wellheads on the seabed and a Floating Production Storage and Offloading (FPSO) facility on the surface. The damage to the system included loss of the associated free-standing hybrid riser system, loss of use of the FPSO facility, and lost oil and gas production.

Petrobras America and its Underwriters sued Vicinay Cadenas, S.A., the manufacturer of the alleged defective underwater tether chain in federal district court asserting various tort claims. They alleged subject matter jurisdiction based on maritime law or, alternatively, under OCSLA. Vicinay moved for summary judgment, arguing that it was entitled to prevail under maritime law's economic loss doctrine, which disallows tort recovery when the only physical damage resulting from the incident is to the product itself.

The district court assumed maritime law applied and granted summary judgment to Vicinay. Two months later, Underwriters filed a motion for leave to amend and asserted for the first time that state law, specifically Louisiana, applied and not maritime law. The motion was denied as untimely.

Both issues were appealed. As to choice of law, Vicinay maintained that Underwriters had waived their choice of law argument. The Fifth Circuit rejected this argument reasoning that the choice of law prescribed by OCSLA is statutorily mandated by Congress and not waivable by the parties, whether voluntarily or inadvertently.

Under OCSLA, either maritime law or adjacent state law could apply. Rejecting the district court's ruling on this issue, the Fifth Circuit found that state law applied. For maritime law to apply, the incident has to meet the twin tests of location and connection with maritime activity. The Court did not address the location test because it found the connection test was not satisfied. The connection test requires that the activity giving rise to the plaintiff's injury has to be substantially related to traditional maritime activity. The Court determined that here a component failed on an underwater structure in an offshore production installation and caused the structure to fall to the sea floor. This disrupted oil and gas production and development rather than navigation or traditional maritime commerce. Even the involvement of the FPSO, although legally a vessel, was unrelated because the FPSO's only purpose was to store and process oil in a fixed location for later transport. Finally, the fact that a buoyancy can eventually floated to the surface and had to be recovered had, under the circumstances, only a *de minimus* potential to disrupt maritime commerce or navigation. Therefore, state law applied.

The Fifth Circuit's decision reinforces previous case law finding that maritime law will not apply to oil and gas exploration and production activities that do not involve traditional maritime activity. While every case is fact-sensitive, stakeholders should be aware of the interplay between maritime law and state law in this context.

Southern District Finds “Separate Entity Rule” No Obstacle to Foreign Arbitration Awards Against Bank Guarantor

BY ETHAN HOUGAH

In ***Crescendo Maritime Co. v. Bank of Communications Co. Ltd.***, the District Court for the Southern District of New York considered, among other things, whether the New York State “Separate Entity Rule” barred the enforcement of arbitration awards against bank assets located in New York. Specifically, Crescendo Maritime Co. brought an action against the New York branch of the Bank of Communications Co. Ltd. (“BOCOM”), a Chinese bank with head offices in Shanghai and over two hundred branches throughout mainland China, for the enforcement of London arbitration awards issued in Crescendo’s favor.

THE UNDERLYING CONSTRUCTION CONTRACT AND REFUND GUARANTEES

The events leading up to the arbitrations involved contracts for the construction of a large bulk carrier vessel. In August 2007, Crescendo, acting as a buyer, entered into a shipbuilding contract with Nanton Mingde Heavy Industry Stock Co. Ltd. and New Future International Trade Co. Ltd. (collectively, the “Sellers”) for the construction of a large bulk carrier vessel. The shipbuilding contract entailed, among other things, a purchase price of $18.6 million to be paid in five installments. Crescendo paid three installments of $6.2 million each from September 2007 to January 2010. Under the shipbuilding contract, disputes “arising out of relating to” the contract were referred to arbitration in London, and governed by English Law.

On behalf of the Sellers, BOCOM issued three refund guarantees to Crescendo – one for each of the $6.2 million installment payments that Crescendo had made toward the shipbuilding contract – through a branch office in Qingdao, China. BOCOM’s refund guarantees provided for reimbursement of the installment payments in the event that (1) the installments became repayable to Crescendo under the terms of the shipbuilding contract and (2) the Sellers failed to pay any refunds owed. The refund guarantees also contained choice of law and arbitration provisions, designating London, England as the place where any disputes would be arbitrated in accordance with the rules of the London Maritime Arbitration Association.

THE TERMINATIONS AND DEMANDS FOR REIMBURSEMENT

After several delays in the construction of the vessel and modifications to the shipbuilding contract, the agreement between Crescendo and the Sellers broke down completely. The Sellers subsequently terminated the shipbuilding contract the day before the contract was eligible to be cancelled by Crescendo for failure to meet the modified delivery deadline, and commenced arbitration proceedings against Crescendo in London the following day. In response, Crescendo wrote to the Sellers cancelling the shipbuilding contract and demanded repayment of its installment payments. Crescendo then demanded reimbursement from BOCOM under the refund guarantees. After BOCOM refused to pay, Crescendo commenced arbitration against BOCOM.

THE ARBITRATIONS AND WORLDWIDE LEGAL PROCEEDINGS

The shipbuilding contract and the refund guarantee arbitrations were heard concurrently by the same tribunal. The Sellers and BOCOM appointed one arbitrator, Crescendo appointed the other, and the appointed arbitrators selected a final arbitrator to complete the panel. Subsequently, Alpha Bank, Crescendo's financier for the installment payments, intervened. It is worth noting that, at arbitration, BOCOM described itself as "Bank of Communications Qingdao Branch," but did not present any evidence that it was a separate legal entity from Bank of Communications Co. Ltd.

As the parties were embroiled in the London arbitrations, BOCOM filed a separate action in the Qingdao Maritime Court in China. In the Chinese action, BOCOM alleged maritime fraud against Crescendo, Crescendo's financier, Alpha Bank, and the Sellers. The Chinese court issued a ruling freezing the principal sum and interest under the refund guarantees and "refraining [sic] [BOCOM] from making any payment" to Crescendo or Alpha.

Following the Chinese court's ruling, Crescendo and Alpha obtained a preliminary anti-suit injunction in England. The English injunction ordered BOCOM not to pursue the proceedings in China because its claims were subject to the ongoing arbitration in London. Thereafter, BOCOM unsuccessfully requested that the London arbitration be suspended, and notified the arbitrators that BOCOM would not attend final hearings or further participate in the arbitration proceedings.

The London arbitration hearing took place in November of 2014, without the appearance of BOCOM or the Sellers. Around this same time, BOCOM notified the tribunal that the Sellers had entered bankruptcy. On December 31, 2014, the tribunal ruled in favor of Crescendo in both the shipbuilding arbitration and the refund arbitration. Per the tribunal's awards, the Sellers were ordered to make immediate repayment of the $18.6 million paid under the shipbuilding contract, plus costs and interest. In the event that the Sellers could not make repayment, BOCOM was required to satisfy the arbitration awards.

Crescendo then demanded payment from the Sellers, as well as payment from BOCOM, pursuant to the shipbuilding and refund arbitration awards. Neither the Sellers nor BOCOM paid. As a result, Crescendo filed a petition to enforce the arbitration awards in the Southern District for the District of New York.

PETITION IN NEW YORK TO ENFORCE AND COLLECT ON THE AWARDS

BOCOM opposed Crescendo's petition on three grounds. First, BOCOM argued that the District Court lacked jurisdiction over BOCOM's person or property. Second, BOCOM argued that, even if jurisdiction existed, the District Court should decline to exercise jurisdiction pursuant to the doctrine of forum *non conveniens*. Third, BOCOM argued that the foreign arbitration awards are unenforceable under the New York convention because the arbitration panel exceeded its authority.

The District Court in *Crescendo* found that *quasi in rem* jurisdiction was available because BOCOM, as a debtor of Crescendo, maintains sufficient assets in New York to satisfy the awards. The District Court also rejected BOCOM's argument that, because the awards were issued against BOCOM's branch in Qingdao, China, and not its New York branch, BOCOM's New York assets could not be used to satisfy the awards. In rejecting BOCOM's argument, the District Court noted that Crescendo had established BOCOM's New York and Qingdao branches were the same legal identity, and that BOCOM had not produced any evidence to the contrary.

The District Court also found that New York's common-law "Separate Entity Rule" did not apply to bar enforcement of the arbitration awards against BOCOM's New York assets. Under the "Separate Entity Rule," even when a bank garnishee with a New York branch is subject to personal jurisdiction, its other branches are to be treated as separate entities for certain purposes, including pre-judgment attachments and post-judgment restraining notices and turnover orders. However, the "separate entity rule" only applies when the bank is acting as a garnishee; in other words, the "separate entity rule" is only applicable when the bank holds assets on behalf of a customer, and a creditor of the customer seeks to attach those assets. Because BOCOM itself was liable for the arbitration awards and Crescendo sought to recover against BOCOM's own corporate assets, the District Court in *Crescendo* found that the "separate entity rule" was inapplicable.

The District Court also found that forum *non conveniens* did not prevent it from exercising jurisdiction. This was because, given the summary nature of the action, Crescendo had little tactical advantage in seeking enforcement in New York. Similarly, the inconvenience and expense associated with BOCOM litigating the matter in New York would be minimal since the arbitrations had already taken place and all that remained was a relatively narrow issue of confirmation. Additionally, since BOCOM had chosen to proceed with an action in China in an apparent collateral attack on the London arbitration, the District Court found that there were legitimate concerns related to forum shopping. Thus, while China was technically an adequate alternative forum, the District Court found that it was not "unreasonable to infer that BOCOM's preference for China as an alternative forum is motivated by tactical reason rather than genuine concerns of convenience."

Finally, the District Court rejected BOCOM's New York Convention defenses. Specifically, the District Court found that BOCOM failed to demonstrate that the tribunal erred in permitting Alpha Bank to join in the arbitrations, or that Alpha's joinder in any way caused the arbitration awards to contain decisions on matters beyond the scope of arbitration. The District Court rejected BOCOM's argument that the arbitrators lacked authority to address BOCOM's fraud allegations against Crescendo, finding that, pursuant to the arbitration clause governed by English law, there was a presumption that all disputes arising out of the contractual relationship between the parties was encompassed by the agreement to arbitrate absent explicit language to the contrary. Since the refund guarantees contained clauses referring "any dispute under this Guarantee" to arbitration, the District Court concluded that the London tribunal acted within its authority in considering and rejecting BOCOM's arguments that the refund guarantees were void and unenforceable on account of fraud or misrepresentation.

In summary, New York State's "Separate Entity Rule" may bar enforcement of an award against a local branch of a bank for assets held in another branch when the bank is a garnishee. However, this Rule does not apply when the bank itself is the liable party.

Foreign Filmmaker Subpoenaed at Film Festival "directed" by the Court to Comply

BY KASPAR KIELLAND

In ***Probulk Carriers Limited v. Marvel International Management and Transportation***, Judge Lewis A. Kaplan of the United States District Court Southern District of New York recently reminded us of the flexibility of subpoenas to both compel a party to produce documents and to appear for a deposition - a powerful tool routinely used by litigators in the United States.   In *Probulk Carriers*, the District Court ordered a foreign filmmaker to comply with two subpoenas that he had been served with while he was visiting the United States to attend a film festival.

This tale began with a London arbitration panel finding that Marvel, a Turkish company, breached its charter party with Probulk, a Liberian-based vessel operator. The panel awarded Probulk $12,800,000 in principal plus interest and costs. Probulk moved before the Southern District of New York to confirm and enforce the award. The Southern District of New York defaulted Marvel for failure to appear in the confirmation proceeding and confirmed the award as enforceable.

However, Probulk was unable to locate any assets of Marvel within the Southern District. With no assets against which to enforce the award, Probulk's success in the arbitration was merely hollow victory.

Subsequently, Probulk learned that the son of Marvel's owner was a filmmaker and would be in the United States to attend the premiere of one of his movies at a film festival in Boston. The son was known to have participated in his father's business, Marvel, and appeared to have relevant knowledge. Probulk also suspected that the father was diverting Marvel's funds into his son's movie project in order to shield Marvel from the judgment. Accordingly, Probulk served the filmmaker with two subpoenas while he was on the "red carpet" in the United States. One subpoena compelled him to appear for a deposition. The other subpoena required the production of documents related to Marvel's financials. The filmmaker moved to quash the two subpoenas on the basis that: (1) the Federal Rules of Civil Procedure do not allow for the service of subpoenas on foreign non-party witnesses, (2) the subpoenas are "a transparent attempt to circumvent The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters", and (3) enforcement of the subpoenas would be unduly burdensome because he is a non-party "living halfway across the world" and is being called upon to provide evidence for "litigation arising out of transactions that have no connection to the United States."

Judge Kaplan disagreed. The Federal Rules, the Judge said, do not distinguish between witnesses who are citizens or residents of the United States and witnesses who are not. The Rules provide only that a subpoena may be served at any place within the United States. The Hague Convention, Judge Kaplan continued, is not exclusive and does not prevent Probulk from obtaining evidence by other means. The District Court further noted that: "[the filmmaker's] claims of undue burden are entirely conclusory. Certainly the obligation for sitting for a deposition is not, in and of itself, burdensome. And [the filmmaker] has given no reason to think that the search for responsive documents would take an inordinate amount of time or require the expenditure of substantial sums."

Ultimately, the Judge found that Plaintiff presented sufficient evidence to support its argument that the filmmaker had firsthand knowledge of the information and documents relevant to the enforcement of the arbitration award, and ordered the filmmaker to comply with the subpoenas – both for documents and the deposition.

As to the deposition request, in particular, Judge Kaplan noted that the filmmaker should not be subjected to "unreasonable travel burdens." That being said, the District Court also noted that the Rules permit a court to modify a subpoena that requires a person to comply beyond the geographical limits of the court. Accordingly, the District Court modified the subpoena to allow the deposition to be conducted at a time and place amenable to the parties or, if no such agreement could be made, then in Turkey – the filmmaker's home country.

In the end, a subpoena can be a powerful tool to seek information from a non-party, who has relevant knowledge and is properly served, even when that non-party normally resides outside the jurisdiction of a US court. This can lead to horror story or fairy tale endings, depending on which side of isle you sit.

Inventive Allegations of Racketeering on the Rise in Maritime Context

BY ERIC CHANG

Recently, shippers have been filing suit for cargo damage or loss under the umbrella of the federal Racketeering Influenced and Corrupt Organizations Act (RICO) statute. 18 U.S.C. § 1961, *et seq.* RICO was enacted in 1970 by the US Congress to eradicate organized crime. To ensure that all possible racketeering activity was captured under the RICO statute, the "acts of racketeering activity" are described in the statute in very broad terms and include wire fraud, theft from an interstate shipment, and interference with commerce by threats or violence; plus the usual criminal mainstays of murder, kidnapping, robbery, and arson. More importantly, from the perspective of a shipper who suffered a loss of or damage to cargo, RICO allows a successful claimant the right to collect attorneys' fees and treble (i.e. triple) damages. This has motivated enterprising plaintiff's lawyers into taking advantage of the broad statutory definitions of racketeering activity to fashion RICO claims from maritime commercial disputes that have nothing to do with organized crime.

In order to succeed on a RICO claim, a claimant must do more than merely allege some racketeering activity by the carrier. Rather, a prima facie RICO claim must allege a pattern of "at least two acts of racketeering activity" within ten years of one another. But, the RICO statute does not specify what else, if anything, a claimant is required to allege in addition to "at least" two acts. In ***H.J. Inc. v. Northwestern Bell Telephone Co.***, 492 U.S. 229 (1989), the US Supreme Court clarified that a RICO claimant must also prove a pattern of racketeering activity by demonstrating a "specific threat of [racketeering] extending indefinitely into the future," i.e., an open-ended pattern of criminal activity, or that the offenses "are a part of an ongoing entity's way of doing business," i.e., a close-ended pattern of criminal activity.

Both tests were recently examined in a cargo claim by a New York District Court in ***MAVL Capital, Inc. v. Marine Transport Logistics, Inc.*** In *MAVL Capital*, the plaintiff shippers disputed a NVOCC's exercise of a lien on cargo for unpaid freight by alleging a myriad of tort and contract theories, including a claim under the RICO statute. After discovery, the NVOCC defendants filed a motion for judgment on the pleadings to dismiss plaintiffs' RICO claims. The District Court granted defendants' motion because, even assuming plaintiff's allegations of an unlawful seizure of the cargo to be true, plaintiffs failed to allege either an open-ended or closed-ended pattern of racketeering activity.

The *MAVL Capital* court's analysis is instructive, in particular, because the case involved facts typical of many cargo claims. First, the District Court found that, at most, any alleged RICO activity began and ended within a two month period from the date the carrier first exercised the lien – which the plaintiffs characterized as an act of "extortion" – to the date where defendants allegedly procured a fraudulent title for one of the vehicles involved in the shipment. The District Court held that a period of two months was insufficient to show a closed-ended pattern of criminal activity or show that such criminal activity is a part of the carrier's regular way of doing business. In other words, the alleged racketeering activity that began and ended within a mere two month period was not the type of organized crime that the RICO statute was intended to thwart.

It should be noted that although there is no bright-line rule for determining a closed-ended duration, the Second Circuit has not found a closed-ended pattern of racketeering unless activities exceeded 24 months. ***DeFalco v. Bernas***, 244 F.3d 286 (2d Cir. 2001). This requirement that any alleged racketeering extended activity extend for at least 24 months protects carriers, even in suits involving multiple shipments, so as long as the shipments began and ended within 24 months.

Second, the District Court found that the defendant did not possess any more of the shipper's cargo. This is a key fact in cargo claims where only a single shipment is involved. If there is no further cargo to be seized or acted upon by the carrier, then there is no risk of a racketeering activity "extending indefinitely into the future" because the relationship has come to an end. Without proof of a continuing threat or ongoing racketeering, the plaintiff in *MAVL Capital* was unable to prove an open-ended pattern of criminal activity. Because the plaintiff shipper failed to allege either a closed-ended or open-ended pattern of racketeering, the RICO claims were dismissed.

Additionally, the recent US Supreme Court decision in ***RJR Nabisco, Inc. v. European Community*** provides another significant defense against questionable RICO claims. In *RJR Nabisco*, the Supreme Court held that the extraterritorial reach of RICO was limited to predicate offenses that Congress clearly intended to reach abroad (e.g. trafficking in counterfeit goods). The Supreme Court imposed an additional condition for civil RICO lawsuits: the existence of a domestic injury to business or property. For a plaintiff in a typical cargo claim, *RJR Nabisco* would require the plaintiff to show that any alleged RICO activity and resulting injury occurred domestically and would limit a plaintiff's attempts to tie in foreign activity. These additional conditions significantly limit a claimant's ability to claim a violation of RICO when international shipments are involved.

In short, the allure of treble damages will likely continue to entice plaintiffs' lawyers into bringing RICO claims against carriers, but forewarned is forearmed and carriers defending against these claims need to be aware of the challenges and defenses involved in defending against RICO allegations.

U.S. Bankruptcy Court Relies on International Comity to Invalidate Rule B Attachments

BY DAVIS LEE WRIGHT

Relying on the principle of international comity embodied in Chapter 15 of the United States Bankruptcy Code, the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") recently vacated Rule B attachments previously granted by the United States District Court for the Eastern District of Louisiana (the "Louisiana District Court") on the vessel M/V DAEBO TRADER (the "Vessel") in ***In re DAEBO International Shipping Co.***, *LTD.*, 543 B.R. 47 (Bankr. S.D.N.Y. 2015).

In February, 2015, Daebo International Shipping Co. LTD. ("Daebo") applied for rehabilitation under the Republic of Korea's Debtor Rehabilitation and Bankruptcy Act ("DRBA"). Daebo listed the Vessel as a "tangible asset" of itself and Shinhan Capital Co. ("Shinhan") as a secured creditor. As provided by DRBA, the South Korean court issued a stay order which prevented creditors from "enforcing a judgment, attaching assets or taking other actions to collect a claim" against Daebo. In March, 2015, following the formal commencement of Daebo's rehabilitation proceeding, the foreign representative filed a Chapter 15 petition in the Bankruptcy Court seeking recognition of the Korean rehabilitation as a foreign main proceeding.

Between February 14, 2015, and March 13, 2015 (and after the Korean court issued its stay order), five of Daebo's creditors (the "Claimants") began maritime attachment proceedings against the Vessel in the Louisiana District Court. The Claimants asserted that Daebo's sale of the Vessel to Shinhan, and its subsequent leaseback to Daebo, was fraudulent because (1) Daebo retained all indicia of ownership, (2) Shinhan was actually the alter ego of Daebo, and (3) Shinhan and Daebo operated as a single business entity. Based on these allegations, the Claimants sought to attach the Vessel – for which the Claimants had not provided services or necessaries – in order to provide a source of payment to the Claimants for Daebo's failure to perform under other maritime charter contracts. The Louisiana District Court found that the Claimants had made sufficient allegations to demonstrate that the Vessel was Daebo's property and issued the Rule B attachments.

THE MOTION TO VACATE THE ATTACHMENTS

Following recognition of Daebo's Korean proceedings, Daebo sought relief from the Bankruptcy Court to vacate the Rule B attachments. The Bankruptcy Court held an evidentiary hearing on Daebo's motion to vacate the attachments on October 27, 2015 and thereafter considered post-hearing submissions.

In reaching its ultimate decision to vacate the Rule B attachments, the Bankruptcy Court first considered the DRBA's extraterritorial effect and the Korean court's jurisdiction to issue a stay that would be recognized worldwide (including by the Bankruptcy Court in the United States). Relying on declarations summarizing Korean law, the Bankruptcy Court determined, pursuant to Rule 44.1 of the Federal Rules of Civil Procedure, that as a matter of law the Korean stay order was intended to have worldwide effect and that the Bankruptcy Court would enforce the Korean stay order pursuant to 11 U.S.C. § 1521 (stating court had discretion to grant additional post-recognition relief to protect a debtor's assets as long as creditor's rights are sufficiently protected). The Bankruptcy Court concluded that the Claimants were equally protected by the Korean stay order because the Claimants had filed claims against Daebo in the Korean proceedings. Therefore, to the extent the Bankruptcy Court determined the previously issued Rule B attachments were actually issued against Daebo (and not Shinhan), then the Rule B attachments had to be vacated.

The Bankruptcy Court next turned to the Claimants' argument that Daebo's sale and leaseback of the Vessel was a fraudulent transaction and the Vessel was Daebo's property under a secured financing with Shinhan. The Bankruptcy Court determined, and the Claimants' conceded at trial, that the "lease recharacterization" argument did not support maintaining the Rule B attachments. As the Bankruptcy Court noted, accepting this argument required the acknowledgment that the Vessel would be considered Daebo's property and would be protected by the Korean court's worldwide stay order. The Bankruptcy Court also concluded that the Claimants' alternate theories – which sought to hold Shinhan directly liable for Daebo's debts on the basis that Shinhan participated in an allegedly fraudulent transaction – were nothing more than recharacterizations of the failed "lease recharacterization" argument. Specifically, the Bankruptcy Court found that Claimants failed to satisfy (or even plead) the necessary requirements for a fraudulent transfer or alter ego claim. Finally, the Bankruptcy Court concluded that Daebo's custodian had the exclusive right to pursue the lease recharacterization claim for the benefit of all creditors and that the Korean court had exclusive jurisdiction over that process.

Based on the above analysis, the Bankruptcy Court entered an order vacating the Rule B attachments and directing the Claimants to dismiss the related proceedings pending in the Louisiana District Court.

THE SUBSEQUENT MOTION FOR A STAY PENDING AN APPEAL

On February 4, 2016, the Bankruptcy Court entered an order staying its earlier decision pending appeal by one of the original Claimants, SPV1, LLC ("SPV"). ***In re DAEBO International Shipping Co., Ltd.***, Case No. 15-10616 (MEW), 2016 WL 447655 (Bankr. S.D.N.Y. Feb. 4, 2016). The Bankruptcy Court analyzed SPV's request under the Second Circuit standard: (1) whether the movant will suffer irreparable injury absent a stay, (2) whether a party will suffer substantial injury if a stay is issued, (3) whether the movant has shown "a substantial possibility, although less than a likelihood, of success" on appeal, and (4) how public interests may be affected." The Bankruptcy Court concluded that SPV had not met its burden with respect demonstrating a likelihood of success on appeal; none of SPV arguments in its motion to stay challenged the Bankruptcy Court's prior rulings. The Bankruptcy Court reiterated that a ruling by the Louisiana District Court on the status of SPV's otherwise unsecured claim would violate principles of international comity and deprive the Korean court of its exclusive jurisdiction over the claims already filed by SPV against Daebo in the Korean rehabilitation proceeding. Nevertheless, the Bankruptcy Court issued a stay of its December, 2015, decision on the ground that Daebo/Shinhan had not alleged any prejudice from a stay and that SPV's appellate rights could be mooted absent a stay during the pendency of SPV's appeal.

SPV's appeal, captioned *In re Daebo International Shipping Co. LTD.*, Case No. 16-00389 (S.D.N.Y.), was dismissed with prejudice on July 28, 2016, following the parties' entry into a settlement agreement. The settlement, which received approval from both the Korean court and Judge Sweet of the United States District Court for the Southern District of New York, provided that SPV would receive $84,534.69 and permission to assert claims in the Korean proceeding (subject to Daebo's right to dispute any claims) in exchange for mutual releases arising out of the Vessel's attachment and dismissal with prejudice of SPV's Rule B attachment. No other party appealed the Bankruptcy Court's order vacating the Vessel's attachment.

A Carrier's Lien on Cargo Already Delivered is Extended to Cargo Subsequently in Carrier's Possession

BY ALFRED J. KUFFLER

In ***World Imports Ltd. v. OEC Group***, the United States Court of Appeals for the Third Circuit upheld a carrier's lien on a current cargo for freight monies that were owed by the shipper, World Imports, on other cargo that had already been delivered. This is significant because the appellate court recognized that a carrier's possessory lien can extended by contract, even in circumstances where the carrier has surrendered possession of the original goods.

World Import had a long term contract with OEC, a NVO, for the transportation of World's goods. The contract gave OEC a "general lien" for goods in its possession, but specifically stated that the lien survived delivery of the property. This concept was repeated on each invoice OEC sent to World. Finally, OEC's tariff on file with the Federal Maritime Commission contained a form bill of lading with a provision that OEC had a lien for freight, deadfreight, and other charges. Most importantly, the bill repeated the proviso that the lien survived delivery of the goods and was for any monies due OEC under any bill of lading. The underlying dispute in *World Imports* concerned OEC's claim for about $1,000,000 in unpaid charges accruing on shipments other than the one in its possession. Initially, the district court denied the OEC's claim on the grounds that the delivery of the cargo by OEC to the receiver had been unconditional, and therefore OEC had waived its lien. On appeal, the Third Circuit considered and dismissed all of World Imports legal and policy-based arguments.

In particular, the appellate court addressed the question of whether the clauses in the contract, invoices and tariff extending the lien were enforceable. World Imports argued that because maritime liens cannot be created by contract, this particular lien as a creature of the contract could not be enforced. The appeals court rejected the argument, and instead started from the proposition that the carrier's maritime lien arises not from contract, but by operation of law. Based on this premise, the appellate court held that liens created by law could be modified, extended, or curtailed by contract. Having made this statement of the law, the appellate court then went on to hold that the language in the carrier's contracts which 'extended the lien to any of World's goods which came into OEC custody was valid and enforceable. That said, the appellate court carefully limited this decision to goods in the hands of the carrier, noting that very different considerations prevailed when the attempt is to enforce a lien on goods in the hands of third parties.

In short, the appeals court reversed the lower court decision, holding instead that references to the extension of the lien in the contract, invoices, and the tariff filing established that the lien had not been waived. This decision builds on existing law and clarifies the rights of carriers as to the permissible scope of their liens. Carriers may want to review their bills of ladings, invoices, and tariffs so as to consider how best to take advantage of this ruling. Conversely, Shippers should similarly assess their exposures when they allow carriers' charges go unpaid.

Typical on deck stowage case poses some interesting questions

BY VINCENT M. DEORCHIS

In ***Atwood Oceanics, Inc. v. M/V PAC Altair***, the Southern District of Alabama considered what happens when a carrier wants its cake, and to eat it too. In *Atwood Oceanics*, , the shipper of a cargo of marine drilling riser joints sued the carrier for damage and loss overboard as a consequence of a rogue wave hitting the vessel during its transit from Malaysia to Mobile, Alabama. The bill of lading stated on its face that the cargo consisted of "85 pieces joint risers and 1 crate accessories." The bill of lading also stated that the cargo is "shipped on deck at shippers risk & expense."

Plaintiff made a motion for partial summary judgment to strike the $500 package limitation defense provided under the United States Carriage of Goods by Sea Act (COGSA), Section 4(5) on the grounds that COGSA is not applicable to cargo carried on deck.

The Court agreed that COGSA, by its very terms, states that it does not cover "cargo which by the Contract of Carriage is stated as being carried on deck and is so carried." Since the bill of lading expressly stated that the cargo was carried on deck and the shipper agreed to that carriage, COGSA by its own terms, as a matter of law, cannot apply to the subject cargo.

The District Court also noted that in order to apply COGSA to on-deck cargo, the language in the bill of lading (such as a Clause Paramount) must "expressly" state that COGSA shall be applicable to on-deck cargo. In reviewing the Clause Paramount in the subject bill of lading and the other bill of lading terms, the District Court found that the clause was "wholly silent as to COGSA's applicability to on-deck cargo." Consequently, the Court had no alternative but to grant the plaintiff's application to strike the defense of a $500 package limitation and the application of COGSA to the carriage of the cargo.

Although this decision is consistent with well-established law and does not present any unique issues of first impression, it serves as a very important reminder that on deck stowage is not automatically subject to the application of COGSA, including the carrier's defenses, and that COGSA could apply as a "matter of contract" to the cargo if the parties had agreed to extend COGSA to cargo carried on deck. This is frequently done in many ocean bills of lading in order to take advantage of the 17 defenses provided under COGSA and The Hague Rules, as well as the $500 package imitation.

This decision did not decide the issue of whether the cargo being hit by a rogue wave fell within the defense of "carried on deck at shipper's risk." However, whether the "shipper's risk" should, at a very minimum, include damage attributable to an Act of God or Peril of the Sea defense is worth considering. On the one hand a Peril of the Sea defense might not be applicable in this case because there was no damage to the ship's structure itself. Damage to the ship's structure has been a requisite in many decisions in both the Second and Fifth Circuits as a requirement for invoking Peril of the Sea under the logic that the storm needs to be serious enough to damage both the cargo and the ship's structure as well.

Of course, this naturally raises a very interesting question when it comes to on-deck cargo. If COGSA does not apply as a matter of law to the carriage of goods on deck, then why should the stringent requirements for Act of God or Peril of the Sea, as provided by COGSA? Frankly, we are of the view that as long as the damage to the cargo is due to a risk which is foreseeable from carriage on deck, such as the cargo getting wet or falling overboard, that is all that is needed as a matter of contract to satisfy the provision for "carried on deck at shipper's risk." The reverse is certainly true, as there have been decisions which have held that the term "carried on deck at shipper's risk" does not cover damage which is attributable to activities other than deck carriage. For instance, damage during loading or discharging of cargo from the vessel, or movement of the cargo around the terminal, or delay of the vessel, would not invoke the "shipper's risk" defense.

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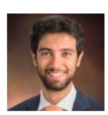

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