



CLIENT ALERT!

U.S. LAW NOTES FOR BUSY MANAGERS

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SPRING

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2010

CAN 16-HOUR WORKDAYS RENDER A VESSEL UNSEAWORTHY OR PROVE THE OWNER NEGLIGENT?

Can 16-hour workdays for a crew for months on end render a vessel unseaworthy and also provide a basis for a claim of negligence against the shipowner under the Jones Act? This question came up before a trial judge out West who dismissed the seaman's claims as a matter of law by summary judgment, but the Ninth Circuit Court of Appeals reversed and ruled that the seaman was entitled to have his case tried on the facts by a jury.

The seaman was required to work 16-hour shifts on a fishing boat and to lift 70-pound trays of fish and dump them into the hold. He complained to his employer to no avail, and at the end of one 16-hour shift, he claimed he had sustained injuries. He filed suit both under the Jones Act for negligence and under general maritime law for unseaworthiness.

There was testimony by another crewmember that other owners limited work to 12 or 14-hour shifts. That was enough to raise a question under the Jones Act of whether a jury might find such a long working day for months on end created an unsafe environment. An issue of fact as to unseaworthiness also was raised because 16-hour workdays might prove that the owner has not provided an adequate crew. The Appeals Court ruled the seaman was entitled to a jury trial, and his claims could not be dismissed by summary judgment. *Ili v. American Seafoods Co.* (9th Cir., Nov. 25, 2009).

N.Y. FEDERAL COURT ORDERS LOCAL BANK TO TURN OVER PROPERTY HELD OVERSEAS BY PARENT BANK

RULING THAT EFTs CANNOT BE ATTACHED UNDER RULE B IS APPEALED TO HIGH COURT

In our last issue of the Client Alert, we reported on the decision in *Shipping Corporation of India v. Jaldhi Overseas*, in which the federal Circuit Court of Appeals in New York ruled that electronic funds (EFTs) transferred through New York banks could not be attached under New York State law and therefore were not attachable under general maritime law. The ruling put an end, at least for now, to the hundreds of suits for attachment under Rule B of the Maritime Rules that were flooding the federal district courts in New York City.

The EFTs are used to convert foreign transactions into U.S. dollars. Claimants had been using Rule B to trap EFTs believing they were the property of the alleged foreign parties.

The Shipping Corporation of India has filed a petition for certiorari with the U.S. Supreme Court, seeking a review of the decision of the federal appeals court in New York on the grounds that the ruling adversely affects the national uniformity of U.S. maritime law by applying a state law to maritime attachments.

It remains to be seen whether the U.S. Supreme Court will grant "certiorari", *i.e.*, agree to hear the case.

Appeals Court Relies Upon Advice of N.Y. State Court

When an issue of state law comes up in a federal suit and the federal court is not sure of the answer, it can "certify" the question to the highest state court, and the state court will usually provide the answer. This avoids federal judges being embarrassed by possibly misinterpreting the law of a state in which they are sitting.

This occurred recently when the Second Circuit Court of Appeals in New York asked the New York Court of Appeals (New York's highest state court) whether a court in New York could order a local bank, over which it has personal jurisdiction, to deliver stock certificates (or the cash equivalent) owned by a judgment debtor, to the judgment creditor, even when the property was in fact located overseas in the custody of the parent company of the local New York branch.

The answer of the New York Court of Appeals was in the affirmative.

Imagine the surprise of the judgment debtor, not a resident of New York, who thought his property was safely stashed away in Bermuda. Imagine the delight of the judgment creditor who had originally obtained his judgment in another state by default under the "full faith and credit" clause

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PROPERTY HELD OVERSEAS

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of the U.S. Constitution, each state is bound to honor the court judgments of another state.

Thus, when the judgment creditor could not collect in the state where he obtained the judgment, it registered the judgment in New York and tried to collect from the local Bank of Bermuda. However, the property belonging to the judgment debtor was overseas, in the Bank of Bermuda's main office.

No problem, said a majority of New York's Court of Appeals. New York law allows a Court in New York to order those foreign assets of the judgment debtor transferred to New York and turned over to the out-of-state judgment creditor.

A dissenting judge had serious doubts about the majority decision because of the absence of any New York contracts upon which to base jurisdiction.

The judgment creditor had filed a writ of execution seeking an order, pursuant to New York law (Article 52, N.Y. C.P.L.R.) that the local New York branch of the Bank of Bermuda turn over the stock certificates or pay any balance owed to the judgment creditor, up to \$2,096,343.

The New York court's turn over order could reach the assets overseas because the overseas bank had a branch in New York, which was the agent that could be served with a turnover order of a New York court. The decision stretches the arm of a court to reach property held overseas.

But as the dissenting judge noted, this was "a non-New York judgment by a non-New York creditor against a non-New York debtor, to recover an asset that is located in Bermuda.

The judgment debtor has little choice but to appeal. Failing to arrange for the turnover of the foreign property or funds could lead to the judgment debtor, or even the local bank, being held in contempt of court. *Koehler v. Bank of Bermuda* (2d Cir., Aug. 2, 2009).

U.S. ADOPTS STIFF RULES FOR VESSEL EMISSIONS AND FUEL

In an effort to reduce air pollution off the U.S. coast, the Environmental Protection Agency has finalized new emission and fuel standards for large (Category 3) marine diesel engines on U.S. vessels, including Category 3 engines.

The U.S. has applied to the International Maritime Organization for approval to have the new standards also apply to non-U.S. vessels operating within 200 nautical miles of most of the U.S. coast. This will affect all large vessels, such as tankers, container ships, cruise ships and cargo freighters that have Category 3 engines.

The new rules will be applied in steps between 2011 and 2016, and they will kick in for category 3 engines by 2015.

Furthermore, the rules also set standards that limit the sulfur content of fuel used by controlled vessels. For engines built beginning 2011, a 20% reduction in NOx levels will be required, and the percentage will grow gradually until an 80% reduction will be enforced for vessels built beginning 2016. Similar phased reductions will apply to hydrocarbon and carbon monoxide.

The new fuel limit for Category 3 engines will be 1,000 PPM sulfur content, with some exceptions, such as vessels that use scrubbers.

U.S. RESPONSE TO PIRACY: ARMED COMMERCIAL VESSELS

In response to concerns about protecting American seamen from pirates, Congress included in the National Defense Authorization Act for fiscal year 2009 requirements that the Secretary of Defense and the Secretary of State eliminate or reduce restrictions on the "carriage of arms and use of armed security teams" on United States flag commercial vessels for "the purpose of self-defense." The Act also requires establishing common standards for the training of armed security teams.

NEW PRODUCT LIABILITY BILL WOULD SIMPLIFY CONSUMER SUITS AGAINST FOREIGN EXPORTERS OF FAULTY GOODS

There are often reports about persons in the U.S. being injured or made ill allegedly by imported products of all kinds. However, bringing product liability suits against foreign manufacturers has often been frustrated by trying to prove that the foreign manufacturer is "present in the United States because it has sufficient "minimum contacts to satisfy constitutional requirements of personal jurisdiction by a state or federal court.

Moreover, even if the foreign manufacturer is shown to be "present and subject to personal jurisdiction, the plaintiff must also prove that the named defendant is located in a country that is a signatory of the Hague Convention on the Service Abroad. There is more red tape that requires the complaint to be translated and sent to the government of the country in which the manufacturer is located, and if the country is not a signatory, then the claimant has to resort to "letters rogatory", a procedure which is even more complicated.

Congress is considering simplifying the mess by a proposed new law called the "Foreign Manufacturers Legal Accountability Bill. The law would require all foreign manufacturers that do business with U.S. importers to appoint registered agents in this country who would be authorized to accept service of process for civil and regulatory actions. Failure to register an agent within 180 days would ban the foreign manufacturer from shipping its products to the U.S. By registering an agent here, the foreign manufacturer will be deemed to have consented to U.S. civil jurisdiction in federal or state courts.

If the bill is passed and signed, obtaining jurisdiction over foreign manufacturers will become relatively simple, and it will remove many of the hurdles that now discourage plaintiffs from trying to obtain jurisdiction over foreign manufacturers.

RIGHT TO ARBITRATE CAN BE WAIVED IF PARTY GOES TOO FAR IN COURT

Sometimes a party to an arbitration contract files a parallel suit in court hoping to obtain some preliminary discovery that it might not be allowed by an arbitrator. Filing a suit to obtain some preliminary discovery may not be a bad idea, but court procedures must not be pushed too far because that could result in “waiver of the arbitration agreement. A claimant is not allowed two bites at the apple.

In a case decided last December by the 8th Circuit, a party to an arbitration agreement filed suit in a federal court alleging that the arbitration agreement was unconscionable and alleging various statutory claims. The defendant moved to dismiss the complaint for failure to state a cause of action, and the defendant also alleged it was preserving its arbitration rights.

The court denied the motion to dismiss. Later, the court also dismissed a motion by defendants to compel arbitration, which motion was not made until four and a half months after the lawsuit was filed. Moreover, the parties had exchanged preliminary disclosures required by the court rules and had agreed with the judge to a Scheduling Order.

The problem was that in moving to dismiss for failure to state a cause of action, the defendant challenged the claim on its merits and presented substantial issues for the court to resolve on the merits in deciding the motion. Waiting four and a half months “to see how the case was going before deciding whether to move to compel arbitration was too much of a delay, and the court denied both the motion to dismiss and the later motion to compel on the grounds that the defendant had waived arbitration by pushing the court’s machinery too far.

A party to an arbitration agreement who is sued in court should promptly assert its arbitration rights since it might risk waiving those rights if it

APPEALS COURT CONFIRMS LEGAL FEES ARE NOT RECOVERABLE UNDER UNITED STATES MARITIME LAW

The general rule barring recovery of attorneys' fees in U.S. federal litigation, except in very limited circumstances, is well embedded and applies to maritime cases.

In a recent federal litigation involving a suit by a marine construction company against a dredging company, the defendant put up a stiff fight and the plaintiff eventually dismissed the suit it had brought. The dredging company asked the federal court to grant attorneys' fees and relied on a state law specifically allowing such recovery.

The Eleventh Circuit Court of Appeals held that the rule barring recovery of legal fees is a “characteristic feature” of U.S. maritime law. The court ruled that the state statute “would directly contravene this established rule of maritime law.”

The Eleventh Circuit pointed out that attorneys' fees will be awarded to the prevailing party in maritime cases only if: “(1) they are provided by the statute governing the claim, (2) the non-prevailing party acted in bad faith in the course of litigation, or (3) there is a contract providing for the recovery of attorneys' fees.”

*The court noted that the dredging contract contained no provision for “indemnification of attorneys' fees,” and that the plaintiff was a “sophisticated party” who was, or should have been, well aware of the law concerning attorneys' fees. Furthermore, the plaintiff had drafted the contract. *Misener Marine Constr. v. Norfolk Dredging Co.* (11th Cir., Jan. 21, 2010).*

plays along too far with court litigation.

There is no specific line drawn by the courts: a judge considers “the totality of circumstances in deciding whether arbitration has been waived. *Hooper v. Advance America* (8th Cir., Dec. 16, 2009).

TO OBTAIN A MARITIME LIEN, VESSEL REPAIR CHARGES MUST BE “REASONABLE”

To establish a maritime lien on a vessel, a shipyard or repairman must prove that the amounts charged were “reasonable. One who furnishes “necessaries to a vessel is automatically entitled to a lien, and repairs have always been considered necessaries under maritime law.

But how does one determine that the price charged for repairs is “reasonable ?

To support a maritime lien, a reasonable price is one that is “customary and “in accord with prevailing charges for the work done and the material furnished.

To avoid litigation and the arrest of the repaired vessels, contracts for repairs should be carefully drafted so that the work to be done and the amount to be charged are both clearly specified in writing. Oral agreements for ship repairs often lead to litigation. See *H&R Yacht Service v. 133' Broward Motor Vessel* (11th Cir., Dec. 9, 2009).

WHISTLEBLOWING TO THE MEDIA UNPROTECTED UNDER SARBANES-OXLEY LAW

As we reported in the past, seamen who were fired for “blowing the whistle on ship operators for discharging oil waste secretly by tipping off the Coast Guard not only could not be fired but were rewarded by sharing part of the fine.

Whistleblowing to the media, however, is not protected under the Sarbanes-Oxley federal law. A U.S. district court in the State of Washington recently upheld dismissal of shore-side workers who tipped off a newspaper about their employers’ violations. Whistleblowers are protected if they report to “a Federal regulatory or law enforcement agency . *Nicholas P. Tides v. The Boeing Company* (W.D.Wa., Feb. 9, 2010).

USE OF MAGIC HOSE TO DISCHARGE OILY WASTE LEADS TO \$4.9 MILLION FINE

Falsifying Oil Record Book

Vessels entering U.S. Ports must ensure not only the keeping of an Oil Record Book (“ORB”) but must maintain it accurately pursuant to the Act to Prevent Pollution from Ships (“APPS”). The Second Circuit Court of Appeals in New York affirmed the conviction of a ship operator whose crew routinely discharged oily waste overboard through the use of a “magic hose” designed to bypass the vessel’s oily water separator. The crew falsified the Oil Record Book, and lied to the U.S. Coast Guard.

The operator argued that the APPS only required it to “maintain an Oil Record Book, which it did, but the court ruled that if all the operator had to show was that it possessed a book, the entire purpose of the Act of diminishing pollution at sea would be frustrated. The court interpreted “maintain,” in light of U.S. law and international regulations, to mean to keep an “ORB” with “complete and accurate information. The crew testified that they had acted under orders of their supervisors in falsifying the “ORB.”

The operator was found guilty of those counts of falsifying records and one count of obstruction of justice. A fine of \$4.9 million was affirmed on the appeal. *U.S. v. Ionia Mgmt. S.A.* (2d Cir., June 20,



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STATE COURT RULES EMPLOYER CAN DEMAND A JURY TRIAL IN SEAMAN’S INJURY CASE

The Jones Act allows a seaman to sue in federal court and demand a jury trial for injuries caused by the negligence by his employer. If the seaman chooses to sue in state court, state procedural law determines whether the parties may demand a jury trial. Most state constitutions allow the right to a jury trial in negligence cases - but for *both* litigants. Because the Jones Act is based upon negligence, the Supreme Court of Washington State has ruled that a ship owner may also demand a jury trial in a Jones Act case. *Endicott v. Icycle Seafoods* (WA Supreme Ct., 7 Jan 2010).

SOLE ARBITRATOR CAN RELY UPON HIS OWN EXPERTISE IN WEIGHING EVIDENCE OF WATER CONTAMINATION

According to the U.S. Third Circuit Court of Appeals, an experienced arbitrator may rely on “his own expertise in making a judgment between conflicting or alternative evidence.

For example, in seeking to ascertain the water content of fuel oil at the time it was loaded, the arbitrator in reaching his decision, relied on the evidence he found credible and declined to draw adverse inferences from the evidence he did not. No expert witnesses had testified at the hearing.

On appeal to a district judge, the party objecting to the Award accused the arbitrator of “evident partiality and of refusing to hear evidence that was “pertinent and material to the controversy. The judge affirmed the Award. The issue was appealed to the Third Circuit Court of Appeals.

The appeals court pointed out that there is a “strong presumption...in favor of enforcing awards. When parties agree to arbitrate, they agree to do so “through to completion, knowing that a “district court may vacate... only in exceedingly narrow circumstances.

Any evidence of prejudice must be “powerfully suggestive of bias, or show “fundamental unfairness. In other words, the objecting party must show clearly that it was “deprived of a fair hearing.

Even the charge of “manifest disregard of the law has lost its punch with appeals courts. The parties who choose to arbitrate are expected to abide by the arbitrator’s decision.

Arbitrators are chosen not because of their knowledge of the law, but because of their knowledge of the technical area of dispute and because of their reputation for fairness.

The policy favoring arbitration would mean little, of course, if arbitration were merely “a prologue to prolonged litigation. *Andorra Services, Inc. et al. v. Venfleet, Ltd.* (3d Cir. 12 Dec. 10, 2009).

PLAN FOR SCANNING 100% OF INCOMING CONTAINERS UNDER REVIEW BY U.S. SENATE

The Senate Committee on Commerce, Science and Transportation is having second thoughts about scanning all containers bound for the U.S.A. The cost of setting up and maintaining scanning equipment at more than 700 foreign load ports would cost \$8 million or more. The current program focuses on scanning suspect and high risk containers.

FAIR MARKET VALUE RULE NOT ALWAYS APPLICABLE TO DETERMINE COGSA DAMAGE TO GOODS

May Be Discarded For More Accurate Alternative Means

While the difference in market value between the sound market value at the place of discharge of cargo and the value of the damaged goods is usually the measure of loss in U.S. Carriage of Goods by Sea Act claims. COGSA does not mandate only this method of calculating damages. Instead, the statute provides a general principle:

“In no event shall the carrier be liable for more than the amount of damages actually sustained. COGSA Section 4(5), 46 U.S.C. § 30701 note.

The Supreme Court has recognized, there are occasions when the use of sound market value “may be discarded for other more accurate means. Moreover, the “inability to prove exact damages is not fatal to a shipper’s case. In such cases, the trial court has some discretion. It can use the best indication it can obtain from the available evidence rather than denying any recovery.

For example, steel coils that are wrapped cannot be unwrapped individually at the discharge terminal to examine for rust or other damage. Normally, they are carried to final destination by road or rail and the contents inspected there. Surveyors can usually determine by inspection at destination, where the loss took place. If saltwater damage is found, the damage is usually attributed to the ocean carrier. That may not be the case if the coils were stored on an open pier.

Tide marks on the coils, signs of overhead drippage, any sweating in the holds must all be investigated. Often such coils are loaded from open piers at the load ports, and the loading of snow-covered coils is not unusual.

The Mate must be especially

vigilant when loading steel coils to take proper exceptions. The shippers sometimes arrange for pre-loading surveys, and those must be carefully studied. When the coils are wrapped, the surveyors at the load port usually cannot see signs of rust inside. Surveyors at destination can sometimes distinguish between very old rust and recent rust.

“Fair Opportunity”

Because steel coils far exceed the COGSA \$500 limitation, claims are usually settled. However, if the ocean carrier does not give the shipper a “fair opportunity to declare a higher value, the \$500 per package limitation provided by COGSA may not be applied to coils.

The Fifth Circuit Court of Appeals disregarded the incorporation of COGSA in a Service Contract and bills of lading where it found a “fair opportunity was not provided by the carrier. Apparently, the bills of lading did not have a box in which the shipper could declare a higher value. *Tradearbed et al. v. Western Bulk Carriers* (5th Cir., January 26, 2010).

SAFE TESTING AND MARKING OF LITHIUM BATTERIES AND CELLS IS PROPOSED FOR AIR CARRIAGE BY D.O.T.

The Department of Transportation has proposed much stricter rules for air shipment of lithium batteries and cells, such as those used in laptops and cell phones. Specific packaging requirements are also included.

The purpose is to insure that packaging and stowage will reduce the risk of short-circuiting that might cause fires during flights. The proposed requirements would also apply to any shipment of goods containing those products.

Documentation of testing must be retained and the products must be marked to indicate they were properly tested. Lithium batteries and cells are regulated as Class 9 Hazardous materials.

VESSEL OWNER WHO ALSO ACTS AS STEVEDORE OWES SEPARATE DUTIES TO LONGSHOREMEN EMPLOYEES

A barge owner who also acted as stevedore is not liable as a vessel owner under the Longshore and Harbor Workers’ Compensation Act where any injury is caused by the negligence of longshoremen who are its employees.

The plaintiff was injured when a load of cargo struck him while he was working in the hold unhooking cargo being transferred from another vessel. He sued the defendant for negligence as a barge owner. The court held that the plaintiff’s injuries were not caused by vessel negligence, but rather by persons providing stevedoring services for defendant in its capacity as the stevedore. The alleged barge owner’s liability did not relate to an unseaworthy condition but solely to the stevedoring operations.

A vessel owner may be liable to an injured longshoreman only 1) if it failed to warn; 2) if the injuries were caused by hazards under the owner’s control; and 3) if it failed to intervene where the stevedore, in the exercise of obviously improvident judgement, means to work on in the face of a hazard known to the owner.

This Client Alert is not to be considered a legal opinion.

It is an advertisement and contains information of general interest to clients and friends of the Firm.

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