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INDEX TO THIS ISSUE

President’s Message	1
Why is the Revision of GENCON Due?	2
Bunker Quality Claims in 2020 – Issues to Consider	3
Obtaining Evidence in the U.S. for Use in a Foreign Proceeding.....	5
Exercising Maritime Liens Against Cargo and Sub-Freights	6
The United States Court of Appeals for the Fifth Circuit expands the application of the <i>In re Larry Doiron</i> test to Mixed-Services Contracts.....	8
In Memoriam: Sally Sielski.....	9
Loose Ends	11

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PRESIDENT’S MESSAGE

By: Nigel Hawkins, President

Since the last issue in September, we have held three lunches at which the speakers made presentations in their areas of expertise. The lunch in October featured Chip Birthisel of Hamilton, Miller & Birthisel in Miami, Florida. He enlightened us about the various kinds of yacht claims. In November, John Miklus, President of the American Institute of Marine Underwriters, answered the question: “Who Says Marine Insurance is Boring?!” In January, Rob Milana moderated a distinguished roundtable of practitioners on the ins and outs of mediation. These lunches with interesting speakers in the maritime field continue on a monthly basis through April, and we encourage all to attend. Thanks to Molly McCafferty for her work in finding speakers.

Michael Fackler of our Yacht Committee attended the Fort Lauderdale International Boat Show recently where he alerted the participants to the advantages of arbitration and mediation under SMA rules. With some fifty or more awards concerning yacht salvage already, the SMA looks to expand its activities in this area. The members of the Yacht Committee are listed on the SMA website and welcome your input.

Some marine insurance companies now encourage arbitration and mediation by the SMA in their policies by including the following clause authored by the Insurance Committee, chaired by Michael Northmore:

The parties to this insurance contract may agree to seek an amicable settlement of any dispute arising under this contract by mediation under the Mediation Rules of the Society of Maritime Arbitrators, Inc. (“SMA”) of New York (www.smany.org) then in force. If the parties do not agree to mediate or if a mediation does not result in a settlement, then the parties may agree to refer the dispute to arbitration before three commercial arbitrators under the

Arbitration Rules of the SMA then in force (“SMA Arbitration Rules”), one to be appointed by each of the parties and the third by the two so chosen, and their decision or that of any two of them shall be final and binding. Alternatively, the parties may refer the dispute to one commercial arbitrator under the SMA Rules for Shortened Arbitration Procedure then in force (“SMA Shortened Rules”) whose decision shall be final and binding. The United States District Court for the Southern District of New York may enter a judgment upon any such award made pursuant to the SMA Arbitration Rules or the SMA Shortened Rules. The governing law provision in the Policy shall apply irrespective of the dispute resolution alternative applicable/chosen above.

For further details on the SMAs activities in the marine insurance world please contact a member of the Insurance Committee to be found on the SMA website.

Finally, we are gratified to note that users are increasingly accessing the 4,000 plus published SMA awards through the online services provided by Lexis (<http://www.smany.org/lexis-nexis-main.html>) and Westlaw (<http://www.westlawinternational.com/wp-content/uploads/2013/06/1230109A-WLI-Society-Maritime-fact-sheet.pdf>).

I trust everyone had a festive holiday season and look forward to working with you in 2020 to promote SMA dispute resolution procedures.

WHY IS THE REVISION OF GENCON DUE?

By: John Weale, Director, Fednav Limited, and Chairman, BIMCO GENCON Sub-Committee, Montreal

Faced with the impending changes from IMO and elsewhere, it is easy to forget how much shipping has already changed in the 25 years or so since the publication of GENCON 1994. And many of these changes lie close to the line which divides the parties to a conventional voyage charter.

The ISPS Code reflects the heightened security environment, as do state requirements for advance cargo manifest declarations. Disposal of cargo residues is now strictly regulated by MARPOL Annex V. Dunnage has to be treated and certified. And while the requirements of the IMSBC Code for new or misidentified commodities are often ignored, they do set clear standards which directly affect the rights and obligations of owners and charterers.

At the same time, other commercially significant issues have surfaced. Today, many, perhaps most, dry fixtures include a clause requiring the owners to deliver cargo without presentation of an original bill of lading, and to do so against the charterers’ signature. Dust generated by loading or discharging of bulk cargoes provokes the intervention of local authorities. Owners may discover that, by agreeing to go to a particular berth or terminal, they have forfeited their right to limit liability. Port state control can be manipulated by unscrupulous shippers, as can pre-loading hold inspections. Owners may face fines where the “official” out-turn quantity does not exactly match the bill of lading figure, and may be prohibited from discharging any apparent excess. And the proliferation of sanctions has skewed the concept of business as usual.

When GENCON was first devised, the voyage charter typically involved two parties. But today, as likely as not, the vessel will be time chartered from a third party, and it is that head owner who enters into the contract of carriage. At the same time, the time charterers discover that their obligations under their voyage sub-charter are by no means on all fours with their rights under the head charter – most notably with regard to implied terms, and especially the implied indemnity. Over the last 20 or 30 years, it has become increasingly clear that the courts will adopt a narrow test of necessity to the implication of terms in a voyage charter. Is the unspoken assumption one which

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is essential for the contract to work? Or is it to be treated as a gratuitous attempt to shift the unanticipated loss or expense from one side of the line to the other?

The statistics demonstrate that GENCON is, by far, the most commonly used of BIMCO's charter forms. But what they do not show is the extent to which the form is usually amended by the addition of printed clauses – most notably, by the incorporation of the Clause Paramount. But the effect of that incorporation, subject to extensive verbal manipulation, is to make the whole charter subject to a regime which will vary according to the statutory framework applicable to contracts of carriage in the states where the cargo is to be loaded and/or discharged: the Clause Paramount is so-called precisely because it rides rough-shod over any term of the charter which conflicts with the Hague or Hague-Visby Rules.

The last revision of the GENCON form was published more than 25 years ago. As BIMCO stated in 1994, this was no more than a comparatively modest review, an up-dating of the 1976 version; and the 1976 revision had in its turn stayed close to the original of 1922. It is against this venerable background that BIMCO decided to undertake a fairly radical re-examination of the GENCON form.

Industry consultation is taking place during the coming months. The goal is to present a final draft to BIMCO's Documentary Committee in November for formal approval.

BUNKER QUALITY CLAIMS IN 2020 – ISSUES TO CONSIDER

By: Paul Collier, Senior Associate, Clyde & Co., London

In recent years the shipping industry has faced a significant number of bunker quality claims, most notably arising out of the so-called “Houston problem,” where there were numerous complaints that contaminated fuel had caused engine problems, including sludge blocking fuel filters and the sticking and seizure of fuel injection components. In the most serious cases, there were reports of vessel blackouts and groundings. The global impact of shipping problems was also evident; whilst complaints regarding the “Houston problem” were originally concentrated around the US Gulf region, complaints regarding off-specification fuel quickly spread across the globe, including to Panama and Singapore.

With the IMO 2020 sulphur cap now in force as of 1 January 2020, the shipping industry faces a new set of potential issues regarding bunker quality. Given that a significant number of vessels have not been fitted with exhaust gas cleaning systems or “scrubbers” (enabling the vessels to consume high sulphur fuels in compliance with the new limits in MARPOL Annex VI), there is increased demand for low sulphur fuel, and prices have risen accordingly.

However, concerns have been raised about the quality of some blends of low sulphur fuels, and in particular, the potential impact on vessels which may not have implemented comprehensive fuel management procedures to store and consume low sulphur fuel.

Owing to different fuel blends, the compositions and properties of low sulphur fuel on the market can vary widely. Experts have raised concerns about the level of catalytic fines (catfines) which can often be at relatively high levels in non-distillate low sulphur fuels, owing to the refining processes and blends with cutter stock to reduce sulphur content. If catfines levels are high and/or vessels do not have adequate purifiers in operation, then these small, hard particles can embed in soft metal surfaces in fuel pumps, injectors and cylinder liners in engines, and act as an abrasive, dramatically increasing the rate of wear of engine components, with the risk of wear beyond maximum limits occurring in weeks.

Concerns have also been raised about the stability levels of blended low sulphur fuel, and the risk that asphaltene content may precipitate out of solution, causing the formation of sludge which can block engine filters and pipes, leading to the potential loss of power and propulsion.

There are also numerous potential issues which could arise with the enforcement of the lower sulphur limits in MARPOL Annex VI, which could result in legal claims. Potential claims could arise where the MARPOL bunker sample tests on specification, but other samples when tested, generate results which narrowly exceed the prescribed 0.50% m/m limit. From 1 March 2020, vessels without scrubbers will not be permitted to carry fuel over the 0.50% m/m limit, leading to potential enforcement action against such vessels and disputes between Owners and Charterers regarding any losses arising out of such enforcement action. Disputes may also arise where Port State Control obtain their own bunker samples from bunker tanks but these test off-specification due to high sulphur content. In such cases, a vessel may be detained and/or forced to debunker by the authorities.

Where there are complaints about bunker quality, a number of potential legal claims could arise between different parties concerned with the bunker supply. Disputes between Owners and Time Charterers concerning bunker quality regularly occur, and we expect that the impact of IMO 2020 will lead to an overall increase in the number of these disputes. There may also be an increase in the number of claims by bunker purchasers against bunker traders and suppliers, as well as claims by vessel Owners under H&M policies, if there is an increase in the number of reports of engine damage.

This article focuses on key legal issues that can arise under charterparties in relation to bunker quality claims.

Charterparty Claims between Owners and Time Charterers Concerning Bunker Quality

A. Charterers' obligations in respect of bunker quality

It is widely accepted that, in the absence of any special conditions, Time Charterers will be under an "absolute" obligation to provide bunkers that are of reasonable general quality and suitable for the type of engines on the vessel. In practice, most charterparties also include express requirements stipulating the grade and type of fuel to be supplied, referable to one of the recent ISO 8217 standards. Given the "absolute" obligation, Charterers will not be able to avoid liability for the supply of bad quality fuel to a vessel by contending they have used reputable suppliers; Charterers are under an obligation to ensure that all fuel bunkered is suitable for consumption by a reasonably well maintained vessel.

In any event, in the absence of express provisions, a vessel Owner could argue that Charterers are under an implied obligation to source bunkers which are "*fit for the purpose intended*". This is likely to have a degree of overlap with the requirement under clause 5.3 of ISO 8217 that fuel should be "*free of any material that renders a fuel unacceptable for use in marine applications*".

However, Charterers will not be obliged to meet any unusual requirements of the vessel's engines, unless those requirements have been brought to Charterers' attention (generally through specifying in the charterparty any requirements that need to be met in terms of fuel).

One of the key issues that may arise with bunker fuel in 2020 is whether any engine damage suffered is primarily caused by poor quality fuel supplied by Charterers in breach of charterparty requirements, or primarily caused by factors that are Owners' responsibility; such as maintenance of the engines, or fuel management practices.

B. Bunker quality claims by Owners against Charterers' Claims for engine damage

In order to successfully advance a claim against Charterers for engine damage, Owners will need to overcome two key hurdles. Firstly, Owners will need to prove that Charterers supplied bunkers to the vessel which were in breach of their obligations in respect of bunker quality. Secondly, Owners will need to prove that the fuel supplied by Charterers caused the engine damage alleged.

Owners often experience difficulties discharging the burden of proof in relation to this second hurdle. Following notification of engine damage, Charterers may allege that the fuel supplied did not cause the engine problems alleged, or alternatively, Owners' management of the vessel (at least in part) contributed to the engine damage. Charterers, may for example, assert that bunkers supplied under a previous charterparty may have caused the damage alleged, Owners had not maintained the engine properly, incompatible fuels had been mixed (causing the bunkers to become unstable) or that Owners otherwise had improper fuel management procedures which caused, or contributed to, the engine damage.

When such disputes arise, the outcome will largely depend on the quality of the evidence, and in particular, whether a party is able to rely on evidence which supports their account of the damage. For this reason, it is important that if engine damage is alleged to have been the result of bad quality bunkers, that the evidence is gathered at an early stage – with surveyors inspecting the engine, samples of the fuel being taken, any damaged components being preserved for analysis, and all relevant documentary records (including but not limited to log books, alarm records, oil record books and maintenance records) concerning the vessel being retained. This evidence will need to be considered, together with the results of sample analysis.

If, following tests on samples, Owners are unable to identify a contaminant in the fuel supplied by Charterers, it will likely be difficult for Owners to discharge the burden of (i) showing that the fuel supplied was off-specification and (ii) that the fuel was the cause of the alleged engine damage.

A further defence that Charterers may seek to rely on in cases where it is determined that off-specification bunkers were supplied to a vessel is to assert that Owners are under a duty to mitigate their losses, and not to exacerbate any damage by continuing to burn bunkers. If the vessel continues to consume bunkers which Owners suspect to be contaminated, notwithstanding concerns about engine

damage, then Charterers may be able to argue that any further damage suffered as a result of fuel consumption after initial concerns of damage became apparent are Owners' responsibility.

Claims where the fuel has not yet been consumed

If Owners have received test results indicating that the fuel supplied by Charterers is off-specification, and there are risks to the vessel in consuming such fuel, then Owners will be placed in a difficult position. As mentioned above, the burden will be on Owners to mitigate their losses. Whilst Owners can demand Charterers debunker off-specification fuel supplied to the vessel, and supply replacement bunkers, there is no guarantee that Charterers will comply with such a demand, particularly if the bunker supplier refuses to re-supply the vessel. Given the burden on Owners to mitigate their losses, it would also be worthwhile Owners establishing whether any options are available that would enable the fuel to be consumed safely (such as blending or incorporating additives to fuel). However, depending on the circumstances, if it is not possible for the vessel to safely consume the fuel, and Charterers have refused to debunker, it may be prudent for Owners to carry out debunkering at first instance, and subsequently advance a claim against Charterers for any losses they incur.

Sampling and testing issues

The samples taken at the time of the bunker supply are of critical importance, given that testing of these samples can indicate whether the fuel supplied is off-specification or not (although some contaminants are only identifiable with advanced GC/MS testing). Moreover, the samples taken are key to the outcome of any subsequent bunker quality dispute. It is therefore important that Owners ensure that the samples taken are representative of the product supplied, with it being desirable for Owners to ensure that samples are taken at the vessel's manifold by drip sample, rather than on the bunker barge.

Results of different samples tested can vary, and this can give rise to the scope for dispute. In particular, in addition to the natural variation in test results, regrettably, the shipping industry has faced problems where unscrupulous bunker suppliers knowingly supply off-specification fuel to vessels, and attempt to mask this through providing false samples of the fuel supplied. The best way for Owners and operators to avoid the risk of this is to insist on fully witnessed sampling at the vessel manifold. This will greatly assist Owners in identifying and dealing with any

bunker quality issues that could arise, and protect their position against Time Charterers (if Charterers supplied the fuel) or against bunker traders or suppliers (if Owners contracted with the bunker traders or suppliers directly).

IMO 2020 raises further issues regarding the fuel carried on vessels. With the 1 January 2020 implementation deadline having passed, the consumption of high sulphur fuel without a scrubber is prohibited. On 1 March 2020, vessels without scrubbers will no longer be able to carry non-compliant fuel. If a vessel does not have a scrubber, Owners will wish to ensure that any fuel supplied does not risk the vessel facing potential enforcement action, and that any residual high sulphur fuel in the vessel's tanks does not push any fuel supplied above the 0.50% m/m limit.

Conclusions - considering possible future impacts

Whilst the key deadline of 1 January 2020 has passed, the full ramifications of the IMO 2020 sulphur cap have yet to be fully felt. In the coming weeks and months, the enforcement steps taken by States against non-compliant vessels will be witnessed. In addition, the shipping industry will be able to see whether the concerns regarding an increase in the consumption of low sulphur fuel will lead to an increase in reports of engine problems.

The key steps that vessel Owners and operators can take to protect their position regarding the supply of bunkers are to ensure that full and proper sampling takes place at the time of supply, and if any issues are later found to arise, to gather all evidence regarding the supply so as to assist in defending any enforcement action from States and to preserve any rights of recourse that may exist against the Time Charterers or bunker suppliers.

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OBTAINING EVIDENCE IN THE U.S. FOR USE IN A FOREIGN PROCEEDING

**By: Kirk M. Lyons, Partner, and Martin West,
Associate, Lyons & Flood LLP, New York**

The U.S. Court of Appeals for the Second Circuit ("Second Circuit"), in *In re del Valle Ruiz*, 939 F.3d 520 (2d Cir. 2019), recently issued a decision that addresses a number of questions of first impression in the context of

foreign litigants obtaining evidence in the U.S. for use in a foreign proceeding. The decision has the potential for opening the doors of discovery not only from individuals or entities located within the U.S., but also from sources located outside of the U.S.

The decision stems from Banco Santander S.A. (“Santander”) acquiring Banco Popular Espanol, S.A. after a government-forced sale. A group of Mexican nationals and two investment and asset-management firms (the “petitioners”) sought to intervene in foreign proceedings to contest the legality of the acquisition. In connection with the foreign proceedings, the petitioners sought discovery from Santander and its New York-based affiliate, Santander Investment Securities, Inc. (“SIS”), under a federal statute that permits such discovery from U.S.-based individuals or entities for use in foreign proceedings. 28 U.S.C. § 1782. Under § 1782, a district court in which a “person resides or is found” may order that person to give testimony or to produce documents for use in a foreign proceeding. In the *In re del Valle Ruiz* case, the district court denied discovery from Santander because it concluded that it lacked personal jurisdiction over Santander, but it did grant extraterritorial discovery against SIS.

The first issue addressed by the Second Circuit was the statutory scope of the word “found.” After discussing the competing interpretations of the word “found” given by other courts and legal commentators, the Second Circuit held that the scope of the term “found” “extends to the limits of personal jurisdiction consistent with due process.” The Second Circuit then ruled that under that test, the district court was correct and it did not have personal jurisdiction over Santander for purposes of § 1782.

The second and more interesting issue discussed by the Second Circuit involved the discovery sought from SIS. There was no issue raised that the district court had personal jurisdiction over SIS; it did. The question faced was whether § 1782 permits discovery from SIS of evidence located abroad—i.e., does § 1782 apply extraterritorially? The district court found that § 1782 permitted extraterritorial discovery.

In short, the Second Circuit held that § 1782 does apply extraterritorially and a district court therefore has authority to order a person or entity over whom it has personal jurisdiction to provide documents and electronically stored information overseas within the confines of the discovery rules found in the Federal Rules of Civil Procedure (“Fed. R. Civ. P.”), which also apply to § 1782 proceedings. The Fed. R. Civ. P. authorize extraterritorial discovery of documents so long as the documents to be

produced are “within the subpoenaed party’s possession, custody, or control.”

Whether to permit discovery under § 1782 lies in the sound discretion of the district court. In deciding whether to permit such discovery, the district court’s decision should be mainly guided by four factors, according to the Second Circuit: (1) whether the person from whom discovery is sought is a participant in the foreign proceeding in which event the need for discovery generally is not as apparent as it ordinarily is when evidence is sought from a non-participant in the matter arising abroad; (2) the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal court assistance; (3) whether the discovery request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the U.S.; and (4) whether the request is unduly intrusive or burdensome.

The Second Circuit found that none of these factors existed and affirmed the district court’s grant of extraterritorial discovery in the exercise of its discretion.

The takeaway from the Second Circuit’s decision *In re del Valle Ruiz* is that a foreign litigant can now obtain documents located overseas by way of a § 1782 proceeding brought in New York for use in a foreign proceeding.

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EXERCISING MARITIME LIENS AGAINST CARGO AND SUB-FREIGHTS

By: Thomas H. Belknap, Jr., Partner, Blank Rome LLP, New York

Vessel owners rarely carry cargo for their own account. More commonly by far, a vessel owner will charter its vessel to another party to carry their (or their sub-charterer’s) cargo. The contracts can vary widely—from voyage charters or contracts of affreightment to time charters and negotiable bills of lading (not to mention the more complex arrangements that one often sees for container cargos). But in most instances, vessel owners are in the business of transporting cargo on behalf of others and, all going well, of being paid to do so. This article is about one mechanism the vessel owner may use to ensure that it gets paid: the maritime lien against cargo.

The Impracticalities of Settled U.S. Maritime Law

It has been settled for over a century under U.S. maritime law that a shipowner has a maritime lien against cargo for charges incurred during the course of its carriage. As the Supreme Court stated in its 1866 decision in *Bird of Paradise*,¹ “Ship-owners, unquestionably, as a general rule, have a lien upon the cargo for the freight, and consequently may retain the goods after the arrival of the ship at port of destination until the payment is made.” Traditionally, a maritime lien against cargo for freight and demurrage was considered a “possessory” lien, meaning that the lien is lost upon the delivery of the cargo to the consignee. To exercise its maritime lien, in other words, the vessel owner was expected to retain possession and control of the cargo until payment; if no payment was received, it needed to enforce its lien by maritime arrest while the cargo remained in its possession. It is not difficult to imagine the impracticalities of this rule. For instance, it certainly would not do in most circumstances to simply retain the cargo onboard the vessel pending payment, given that the vessel is presumably looking to complete discharge and commence her next voyage as quickly as possible. And while some kinds of cargo may lend themselves to segregated storage ashore, whether in a bonded warehouse or dedicated storage facility, this is often logistically complicated and expensive. Add to those practical difficulties the additional contractual challenge that some portion of freight and demurrage often are not even due until sometime after the cargo is delivered, and it is not difficult to see why the “possessory” element of the lien can often prove problematic.

The “No Waiver” Presumption

Recognizing these problems, the courts have determined that “it would frustrate commerce to require shipowners to retain their liens only by actual possession of the implicated cargo.” They therefore have found that “a shipowner enjoys a strong presumption that, absent a clear indication to the contrary, he has not waived his cargo lien upon the delivery of cargo.”² As the Fifth Circuit Court of Appeals explained in one case where the charter provided for a lien against cargo for freight and demurrage but also provided for payment of these items after the cargo’s delivery: “No rational person would establish a lien on cargo for certain costs that are due after delivery of the cargo but have delivery of the cargo extinguish the lien. If

that were the case, the lien would be a futile mechanism for protection.”³ What does this “no waiver” presumption mean? It means that although the cargo may have been delivered to the receiver, it may yet be possible for the vessel owner to maintain and enforce its lien by arresting the cargo in an in rem court proceeding. In analyzing whether the lien persists after discharge, the court will look at the available evidence to determine whether the parties intended that the lien would be waived upon delivery. Most relevant in this respect would be the wording in the applicable charter or bill of lading making it clear that the lien survives discharge, but it could also come from a notice from the vessel owner at or before discharge that the delivery is conditioned on the maintenance of the lien. It might even come from established local usage at the port.⁴

New Impracticalities Arise

Of course, this rule presents its own practical difficulties. Notably, once a cargo is discharged, it is not always easy to identify or segregate—particularly with liquid or dry bulk cargoes that may be discharged into storage facilities and commingled with other product. Some commentators have suggested that the lien may yet survive so long as the cargo is commingled with product of the same type and specification; however, once the cargo is admixed or processed, the lien may be extinguished.⁵ It is one thing when the cargo belongs to the charterer who actually owes freight or demurrage, but what if the cargo belongs to a third party? Here, the vessel owner’s rights become far more constrained, and the courts have held that the vessel owner does not have a maritime lien against a third party’s cargo.⁶ Vessel charters do, however, also commonly provide that the vessel owner shall also have a lien against sub-freights—meaning the amounts that may be owed to the charterer by third parties for the carriage of their cargo. Such liens are routinely enforced. A lien against sub-freights is materially different from a lien against cargo. First, the lien can only be exercised to the extent of sub-freights still outstanding, and once the freight is paid the lien right disappears. Moreover, the lien against sub-freights arises solely as a matter of contract, and not under the maritime law. Thus, to be enforceable against a third party (i.e., the party owing the sub-freight), the vessel owner must give actual notice of the lien to the cargo owner before it pays its freight to the charterer; otherwise, the lien is discharged. (If, however, the party owing sub-freights pays the original party after receiving

valid actual notice, that party may be liable to pay the freight twice.)

Final Thoughts

As can be seen, maritime liens against cargo and sub-freights are important tools in the shipowner's enforcement arsenal, both before cargo is discharged and, often, even afterwards. Fully understanding how these tools work—and how far they may (or may not) reach—is important for both the vessel owner and the charterer of a vessel carrying cargo.

- 1 72 U.S. 5 (1866).
- 2 See *Dampskibsselskabet Norden A/S v. 25,001.078 MT of Fly Ash*, 308 F. Supp. 3d 693 (N.D.N.Y. 2018) (quoting *In re World Imports Ltd.*, 820 F.3d 576, 584 (3d Cir. 2016).
- 3 See *Arochem Corp. v. Wilomi, Inc.*, 962 F.2d 496, 500 (1992).
- 4 *In re 4,885 Bags of Linseed*, 66 U.S. 108 (1861); See also *Dampskibsselskabet Norden A/S v. 25,001.078 MT of Fly Ash*, 308 F. Supp. 3d 693, 697 (N.D.N.Y. 2018).
- 5 VOYAGE CHARTERS, 17A-19 (Informa 4th Ed. 2014).
- 6 See *Lykes Lines Ltd. v. BBC Sealand*, 398 F.3d 319, 323 (5th Cir. 2005).

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THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT EXPANDS THE APPLICATION OF THE *IN RE LARRY DOIRON* TEST TO MIXED-SERVICES CONTRACTS

By: James Brown, Michael Wray, Courtney Campion, HFW, Houston

For marine projects, whether a contract is maritime or non-maritime is critical to the application of contractual indemnity and insurance provisions. In the United States Court of Appeals decision *In re Larry Doiron*, 879 F.3d 568 (5th Cir. 2018), the Fifth Circuit adopted what it believed to be a simplified test to determine whether a contract is a maritime contract.

Recently, the Fifth Circuit in *Barrios v. Centaur, LLC*, 942 F.3d 670 (5th Cir. 2019), gave further guidance on how to apply *Doiron's* two-part test to determine if a contract

is maritime in the context of a mixed-services contract. The Fifth Circuit found that although the mixed-services contract called for the application of Louisiana law, which has strict anti-indemnity statutes, the indemnity provisions were ultimately enforceable because the mixed contract was “maritime” in nature, and therefore governed by federal maritime law.

Background

Barrios v. Centaur, L.L.C. arose from a project at a dock on the Mississippi River. Barrios, an employee of Centaur, L.L.C. (“Centaur”), was injured while offloading a generator from a crew boat to a barge after the crew boat separated from the barge and he fell into the river, followed by the 100 pound generator. The crew boat was owned and operated by River Ventures, L.L.C. (“River Ventures”), and the barge was leased by Centaur. Barrios sued both River Ventures and Centaur for vessel negligence under general maritime law and the Jones Act. River Ventures cross-claimed against Centaur for contractual indemnity, however, the district court granted summary judgment to Centaur, and River Ventures subsequently appealed.

Defendant Centaur disputed River Venture's entitlement to indemnity and insurance pursuant to the Master Service Agreement (MSA) between the non-party dock owners, United Bulk Terminals Davant, L.L.C. (“UBT”), and Centaur. According to the MSA, Centaur maintained an obligation to indemnify UBT and its contractors, as well as to obtain insurance covering those parties. However, Louisiana law governed the MSA, which has an express anti-indemnity statute applicable to construction projects. Therefore, if the contract was considered “non-maritime” in nature, state law prevails and the indemnity provision would be voided by the Louisiana Construction Anti-Indemnity Statute. Conversely, if the contract was essentially “maritime” in nature, the indemnity prevails since admiralty and maritime law have no anti-indemnity restrictions.

Maritime vs. Non-Maritime Contracts

Accordingly, whether a contract's indemnity clause is enforceable is contingent on whether a contract is maritime or non-maritime. Thus, an indemnity clause that is invalid under a state's anti-indemnity statute might be enforceable under federal maritime law if the contract is a maritime contract.

The Fifth Circuit held that whether a mixed contract, such as the *Barrios* MSA, is a maritime contract, requires

application of the *Doiron* maritime contract test. Where *Doiron* was intended to simplify the maritime contract inquiry, it was limited in application and addressed only those contracts arising from the oil and gas context.

The Fifth Circuit in *Doiron* adopted a two-question test to determine whether a contract was maritime, which focused the inquiry “on the contract and the expectations of the parties.” Expanding the *Doiron* analysis beyond the scope of just oil and gas contracts, the *Barrios* decision provided further guidance and explicitly held that *Doiron* also applied to mixed-services contracts. The court noted:

In short, Doiron’s two-part test applies as written to all mixed-services contracts. To be maritime, a contract (1) must be for services to facilitate activity on navigable waters and (2) must provide, or the parties must expect, that a vessel will play a substantial role in the completion of the contract.

While the district court in *Barrios* found that the contract was a “land based construction contract,” and therefore governed by Louisiana law, the Fifth Circuit held otherwise. The Fifth Circuit established that *Doiron* applied outside of just the oil and gas sector, and expanded the meaning of maritime contracts to all “activity” that contributed to the facilitation of offshore services. *Barrios* held that this first element was satisfied when it called for Centaur to construct a concrete containment rail necessary to prevent coal and petroleum coke from spilling onto the dock or into the river. Likewise, the second element requiring a party’s expectation of vessel contribution was also satisfied when the parties “recognized that [the vessel] provided a necessary work platform, an essential storage space for equipment and tools, and a flexible area for other endeavors related to the construction work.” Because these two elements were satisfied, the Fifth Circuit found that the contract was maritime and the indemnity obligations were fully enforceable.

Over the decades, the Fifth Circuit has worked toward a bright-line maritime contract test. The *Barrios* decision is the first opinion from the Fifth Circuit since the new *Doiron* test was proclaimed. The Fifth Circuit’s *Barrios* opinion indicates that the *Doiron* test will apply across a wide spectrum of contracts. It will act as important precedent as conflicts inevitably arise regarding the classification of mixed-services agreements, which significantly impacts contractual indemnity and insuring provisions.

Conclusion / Recommendations

The Fifth Circuit in *Barrios* broadened the application of the two-part *Doiron* test to potentially all mixed-services contracts. This expanded application of the *Doiron* test has a potentially significant impact on the enforceability of indemnity and insuring provisions in contracts outside the traditional oil and gas context.

When a mixed-services contract involving marine assets is negotiated, the parties should consider whether or not the *Barrios/Doiron* test calls for the application of general maritime law notwithstanding the parties’ contractual choice of law clause. In the contracting documents, parties should specifically clarify whether a vessel will play a substantial role in the performance of the contract. Specific wording reflecting the parties’ intent would facilitate a court’s finding that the agreed-upon choice of law provision is legally valid, which would ensure that the risk allocation clauses work as intended.

[This article was originally published in the “Briefings” section of the HFW website and is reprinted here with permission.]

IN MEMORIAM: SALLY SIELSKI

**By: Austin Dooley, Former President, SMA,
with thanks to Manfred W. Arnold and David W.
Martowski**

If we polled the SMA members about the following recollections of a former SMA President’s perception and recollections of Sally, I have no doubt it would be a unanimous decision.

The SMA benefited greatly from Sally’s 35 years (1977-2012) of loyal and dedicated work, in which she outlasted 12 SMA presidents. Her retirement luncheon was attended by close to 100 people from the maritime arbitration community. The event was also attended by her nephews on whom she called when some heavy lifting needed to be done; she called and they came to help their Aunt Sally, packing and unpacking office inventories for the several occasions when the office moved about in lower Manhattan. It was this type of practical approach which was helpful and appreciated by the officers of the SMA.

At the retirement luncheon, Sally received a standing ovation from the crowd when she thanked everyone for their support over her many years with the SMA; she took

pride in her people skills. Her office employment started in the days of typewriters and carbon copies and work was effectively done before the computer made its way into the office routine. Somehow she was able to get out mailings of awards to the printers, dues notices to members, luncheon announcements and miscellaneous correspondence on a regular basis. She also became a listener and confidant to stories of personal drama from a few members.

On her passing, Sally's nephew Richard Grammer wrote "...she viewed all of the wonderful people she had worked with over the years at SMA as her extended family. She cherished their Christmas greetings each year and looked forward to their cards and well wishes which continued up to this past Christmas. I am grateful they continued to touch her life each year and made her smile. God Bless."

I first met Sally when I started to attend the SMA luncheons in 1979. Sally was of Polish ancestry and spoke fluent Polish. She grew up in Jersey City. Sally and her sister Irene worked the registration table and always greeted the attendees with good spirit and by name. Somehow she got me to tell her about my Polish immigrant grandparents and from then on there was a bond. My wife Paula and I had the good fortune to sit with Sally and Irene at the 1981 New York ICMA black tie dinner where we were joined at the table by attendees from Japan and South America.

Sally loved to meet and talk to all kinds of people. She would frequently tell stories of whom she met on the train to and from her home in Belmar, New Jersey, especially if it was someone from the maritime industry. She was always invited to the Christmas parties given by the New York firms as well as the SMA social function such as the SMA 50th anniversary dinner dance.

In 1983 she was able to combine a church sponsored trip to the Vatican and an audience with the Pope in Rome with attending the ICMA event in Monte Carlo. There I think she had a good time when at one of the hotel dinners with live music, we again sat together. As the evening slowed down we were joined at the table by Enzo, a member of the ICMA organizing committee. He was rather dashing and extroverted; a shipping man from Italy who entertained the few remaining late night partiers with his solo dancing artistry. As he sat with us, Paula mentioned that Sally liked to dance. Well, with that, he escorted Sally to the dance floor and whorled her around. When she sat down, she whispered to Paula, "That was too much for me".

Then he asked if we would like to join him at his piano bar in town. Saying yes, we met him at the front



Sally, Michael A. van Gelder and Captain John M. Reynolds (sitting)

door of the hotel and got into his convertible Rolls-Royce, me in the front seat and the ladies in the back. As the car climbed up the hill to the city, slowing as it rounded the curves, with the top down and wind in our faces, Sally looked like she was having an unusual evening's experience. It got more interesting as Enzo parked the car near the famous casino.

He brought us to a heavy wooden door down a few steps from the street and knocked several times. Sure enough, a little viewing window opened, Enzo said something, and we were allowed in. It wasn't a piano bar but a full blown Euro disco with a band and a crush of dancers. It certainly was not the Vatican – but it was spirited. We took seats at a little round table overlooking the dance floor, ordered drinks and greatly enjoyed the once in a lifetime experience. In years thereafter, we often remembered the event.

After I joined the SMA in 1993, Sally and I worked closely together until her retirement in 2012. As Treasurer of the SMA I made regular and frequent trips to the 14 Wall Street office to discuss with her the office accounting matters with emphasis on the cash-flow and the handling of the escrow accounts set up for the security of arbitrators' fees. In 2009, during my tenure as president, Sally worked closely with the Education Committee to market the seminar program, attracting substantial numbers of attendees over the years with a good mix of local and international students. Sally was also an effective marketer for the SMA Award Service, selling it to domestic and overseas subscribers and anyone who called the office with questions about the SMA. Likewise, she always pitched the luncheons.

Early in the morning of 9/11, Sally was on her two-hour commute, headed into Manhattan, as we had a board meeting scheduled for that day. She regularly took the PATH from Newark to the World Trade Center. No one

heard from her until much later in the day. It was with great relief when we finally did - that Aunt Sally was safe in Belmar.

One of the things that not too many may know about Sally is that she was an ardent sports fan – she went to see and cheer the NY Yankees, the Knicks and the Rangers; she spoke with players, she rooted for them and she got their autographs. It would have been easier to watch the games on TV but not for Sally; she would rather be in the arena and cheer despite a maybe 3-hour train/subway ride and that after a day's work in the office. She also liked the Metropolitan Opera. Initially, she was a bit tentative but after having found ladies to sit with and talk to, the visits to the Met became more regular. Sometimes, Sally would bring an opera program to the office to discuss the performance with members.

During my term as president, she provided her consistent high level of work to the Society and I am thankful for her advice and support. After her retirement, Sally enjoyed the calls from members asking how she was doing. Paula and I last saw Sally when we had dinner together at Klein's Fish Market and Waterside Café in Belmar. Sally shared with us how she and her late husband Ben Sielski loved the ocean and life at the Jersey shore. I think of her often, as I know my fellow ex-presidents, who had the joy of working with her, do as well.

May she rest in peace.

LOOSE ENDS

Monthly Luncheons

See your fellow members, meet service providers and end-users, hear a great presentation on a topic of interest and relevance! February 12, March 12, and April 8. 3 West Club, 3 West 51st Street, New York, NY 10019. Email pleahy@smay.org to register to attend.

Arbitration in New York Two-Day Seminar February 27-28, 2020

For the 15th year, the SMA will offer its comprehensive two-day seminar on "Maritime Arbitration in New York" on February 27 and 28, 2020. Location is 3 West Club, 3 West 51st Street, New York, NY 10019. Jeffrey Weiss, Professor of Maritime Law at New York Maritime College, with 35 years of college and graduate-level teaching experience, will again be the lead instructor

joined by members of the SMA Education Committee. Lawyers who attend will receive New York CLE credits. We especially encourage law firms to send younger lawyers in order for them to learn about the arbitration process in a structured and systematic way and earn CLE credits in a course relevant to their practice. Prospective SMA members should also attend as should principals and brokers involved in dispute resolution. Details and registration forms can be found at <http://www.smany.org/pdf/SMA-Arbitration-Seminar-2020.pdf>.

CMA Shipping Conference

March 31 - April 2, 2020 (Tuesday-Thursday), Hilton Stamford Hotel, 1 First Stamford Place, Stamford, Connecticut, 06902. Join 2500 attendees over three days, visit booths of 150 exhibitors, celebrate the honoring of New York's Lois Zabrocky, CEO at International Seaways Ship Management, as Commodore! Register at <https://informaconnect.com/cma-shipping/purchase/select-package>.

MLA Spring 2020 Meeting in New York

The MLA Spring Meeting will be in Manhattan, April 28 – May 1. The Committee Meetings offer a wealth of information to keep you up to date on legal, regulatory, and commercial developments. Committee Meetings are open to all and cost nothing to attend. Meeting times and venues have not yet been announced, but will be posted on the MLA website, www.mlaus.org/home.

ICMA XXI in Rio March 8-13, 2020

ICMA XXI in Rio will take place 8-13 March 2020. Sixteen participants/attendees from the US have registered. It is not too late to register. Join us! – <https://www.icma2020.com>.

M.E. DeOrchis (1923-2019)

The SMA joins the maritime legal community in the United States and around the world in mourning the passing of M.E. DeOrchis in November. He immigrated to the United States from Tora, Italy, in 1930 and grew up in Providence. After serving in the US Army in WWII, he graduated from Columbia Law School and joined the firm of Haight Gardner Poor & Havens in 1949. After many years as a partner there, he formed his own firm, DeOrchis & Partners, in 1984, and continued to practice there until 2012. He had a keen eye (and the support of his clients)

for cutting edge issues to take to a decision and was a mentor to many in our community, including his son, Vincent M. DeOrchis. His obituary can be found at <https://www.legacy.com/obituaries/stamfordadvocate/obituary.aspx?pid=194435754>.

L. Antonio Litman (1964-2020)

The SMA joins the maritime industry in New York and around the world in mourning the senseless death of Antonio Litman of IRI and Virginia's House of Hope. To honor his life and legacy, please make a donation to Virginia's House of Hope, www.vhoh.org.

Friends and Supporters

We are grateful for the new and renewed support shown by our Friends and Supporters in recent months. Let's keep it going!

Thanks!

Thanks to those who responded to our ongoing call for articles of interest – and (as always) to Tony Siciliano in particular. The Arbitrator has a long history of providing timely and relevant articles and information to the maritime arbitration community in New York and around the world. We need your continued support! If you have articles and ideas to contribute to future editions, please let us know. Also, we welcome your feedback. Please do not hesitate to contact us, leroy.lambert@ctplc.com or dick.corwin@icloud.com or r.jadhav.0005@outlook.com. Thank you.

THE ARBITRATOR

LeRoy Lambert, Co-Editor
leroy.lambert@ctplc.com

Dick Corwin, Co-Editor
dick.corwin@icloud.com

Raj Jadhav, Co-Editor
r.jadhav.0005@outlook.com

Society of Maritime Arbitrators, Inc.
One Penn Plaza, 36th Floor
New York, NY 10119
(212) 344-2400 • Fax: (212) 344-2402

E-mail: info@smany.org
Website: <http://www.smany.org>