"A WITCH'S BREW OF BANANAS AND OIL, NAPHTHA AND CRUDE BRINGS HURRICANES AND BANKRUPTCY AND LOW - SULFUR FUEL: CURRENT TRENDS IN U.S. MARITIME LAW"

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NEW YORK, NEW YORK

INTERNATIONAL MARITIME LAW SEMINAR
OCTOBER 1, 2015

A "Witch's Brew" may be a bit strong for the title of my speech, but I am sure that a lot of you find the law in the US to be confusing and not entirely predictable. The situation is not helped by the fact that we have 50 state courts issuing their own decisions on the law, sometimes in competition with our separate federal court system, which itself is divided into 12 circuits and they don't always see eye-to-eye. Moreover, the common law system permits judges to bend or change the shape of the existing law so as to accommodate social and political trends, technological developments, global uniformity, or just a plain sense of equity and justice – the American way.

Moreover, American law is becoming increasingly dictated by statutory law which seeks to pre-determine every probability of social and commercial arrangements, sometimes with little success.

One would think that maritime law in the United States should be more consistent, especially since the Judiciary Act of 1789 by our Congress gives original jurisdiction of maritime matters to the federal courts. Indeed, the federal courts have recognized a need to provide a uniform and consistent maritime law around the entire coast of the country.

However, cases are decided by judges, who are human. And those decisions do not necessarily create a solid, singular and stately wall of law. Unfortunately, there are a lot fewer judges with maritime experience than when I started practicing law 40 years ago. The "Admiralty" side of the bar in the federal court ended in 1966. It was a nice tradition of robes, wigs and even a silver oar. But more importantly, there were judges whose primary job was to focus on maritime law. So maritime law in the US goes forward, slipping and sliding from time to time, but I will argue that it is all with good intent and equitable standards.

For instance, the word "discovery" in US litigation brings a sense of dread to everyone. Turning over every document and email related to a shipment or voyage is a daunting task. Depositions seem to involve every seaman on a vessel, including the ship's cook. And, interrogatories are so complex they make tax forms look easy. It has all been a way of life in US litigation. Well, believe it or not, the courts have taken notice. The federal court will institute new rules on December 1, 2015, which make an effort to "balance the expenses of discovery to the value of the case." Specifically, the proposed amendments to Federal Rule of Civil Procedure 26(b)(1) will allow a party to "obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." The amended rule provides various parameters that must be taken into account when evaluating a discovery request,

including the importance of the issue at stake, the importance of the discovery sought in resolving the issue, the value of the case, and the party's access to the information. The result is that the discovery in a $20,000 case will no longer be the same as in a $2 million dollar case. Makes sense, but now it will become law.

Additional good news came a few weeks ago when a judge in the federal court in New York City handed down a 58 page decision holding that Hurricane Sandy, which damaged millions of dollars' worth of cargos sitting on terminals with a 4-meter storm surge back in October, 2012, was an "Act of God." While such a finding may not seem unexpected, the fact is that a hurricane in New York during the "hurricane season," which runs from June to October, is not unexpected. Therefore, the burden is on the carrier to establish that no reasonable precautions were available to prevent damage once the damage from the storm became foreseeable. The court rejected the suggestion by cargo interests that the containers on the pier could be removed from the terminal, or stacked on top of one another, or stacked on rail cars, or re-loaded on an undisclosed vessel, or that the terminal had to build flood barriers. The Court found all these suggestions to be impractical, impossible, or would not have prevented the damage. The court relied on the fact that the official warning that the storm surge would exceed the height of the terminal bulkhead was not known until the day before the storm arrived. Moreover, that last minute change in forecast was labelled an "eye opener" by the government weather services. The case is now on appeal. *Lord & Taylor v. Zim, et al.*, 2015 AMC 1762 (SDNY).

Interestingly, only 3 weeks ago another Hurricane Sandy case came down from the federal court in New York, agreeing with the *Lord & Taylor* case, but holding that the defendant warehouse in that case could not invoke an Act of God defense because the warehouse took absolutely no steps to protect the 1000 copy machines sitting on a warehouse ground floor located in a flood zone, until the morning that the hurricane struck New York. While not a maritime case, the opinion is interesting because many of the same experts from the *Lord & Taylor* case also testified in the new decision titled, *TGI v. National Electronic Transit.* The court noted that in the *Lord & Taylor* case, despite extensive preparations that began a week before the storm arrived, the "massive scale of operations at the container terminal made it unreasonably difficult for the defendant to take any action over the weekend to protect containers from flooding." The lesson learned is that an Act of God case will be won based on having a plan of action for the contingency, and recordkeeping of the efforts made to stay with the plan.

In another maritime case before the federal court in New York, I think we had something of a slip or slide. In a lawsuit involving ripening damage to an entire shipload of bananas carried from Guatemala to Philadelphia, the ripening was not apparent until the day after discharge. The cause of the loss was a mystery, as bananas previously loaded aboard the ship at an earlier port in Costa Rica, some of which were carried in the same hold as the Guatemala bananas, and all shared the same ventilation system, out – turned sound. The judge decided the case based upon whether the plaintiff had established a "*prima facie*" case. The trial judge rejected the carrier's argument that under traditional law involving perishable cargo, the cargo plaintiff has the burden to establish that the bananas were in "actual" good order and condition and free of inherent vice at the time of loading. The judge instead applied a new test for perishable fruit cases which allows a plaintiff to establish a *prima facie* case by establishing that, "the goods were prepared and packaged in accordance with proper procedure and were carried to the ship under conditions

that should have prevented any damage to the content en route." While that test may be adequate for cargo that is damaged inside its own packaging, the test (in my opinion) does not help in cases where the cause of the ripening is due to some metabolic activity within the fruit that can be triggered by the timing of harvest, disease, stress, temperature and other factors that would not be evident from the preparation and packaging of earlier shipments. The case was settled on appeal and therefore does not have the weight of an Appellate decision. *Del Monte Fresh Produce N.V. v. M/V Lombok Strait*, No. 1:12-CV-3567 ALC, 2015 WL 1190113, at *1 (S.D.N.Y., Mar. 16, 2015).

Another case that is sailing through troubled waters is the OW North American and OW USA bankruptcy proceeding in the US. The proceeding resulted from a global collapse set-off by the revelation that its Singapore office lost more than USD 100 million by extending credit to noncredit-worthy customers. Much of this has already been reported to you earlier today by Johannes and Luis. In the United States, the proceeding has been complicated by the efforts of vessel owners to avoid potential multiple arrests of their ships by the contracting and physical suppliers of bunkers, intermediary suppliers, and ING bank and major lender to OW who took an assignment of all receivables. Shipowners have gravitated towards the use of the "interpleader" statute in the United States, which permits a party facing claims of common origin that may expose it to multiple liability, to file a proceeding in the federal court, deposit the sum in dispute with the court, and then ask the judge to determine who is entitled to receive the funds. Nearly 50 interpleader actions have been filed in matters arising out of OW bunkers supplied to ships which have not paid for the fuel. Most of the interpleader actions have been filed in the federal court in New York and are assigned to the same judge. So there is an effort to provide an efficient, coherent and uniform proceeding over the common situation. However, there are a few interpleader actions that have been filed in other port cities where vessels were threatened with arrest. Those cases are operating independently of the one in New York and, conceivably, could result in disparate outcomes. No US court has yet decided any of the OW cases on the merits, and therefore, the issue of double liability when there are competing claimants remains unclear.

US law is also unclear as to whether a vessel can be arrested multiple times for the same bunker contract by different parties claiming a lien, or whether it can be held liable multiple times for the same bunker contract.

Moreover, the bankruptcy court in which OW USA and North American filed their petition for Chapter 11 technically has jurisdiction over maritime claims. However, the bankruptcy court has so far avoided most of the maritime issues.

One of the biggest problems for shipowners in the OW proceedings is that the federal judge in the interpleader actions in New York has issued judicial orders preventing any actions against the ships who posted security. The restraining order explicitly extends to "anywhere in the world." Although no party has challenged the federal judge on the scope of her injunction, it is doubtful that the Orders by the judge in New York will be recognized or enforced overseas by foreign judges. That leaves the vessels exposed to additional arrests and posting of duplicate security abroad. I do think that the situation calls for a maritime convention that would recognize Orders staying maritime arrests or attachments, regardless of where the ship is located around the world. This situation does raise the issue of whether there should be consideration for an international

convention which allows for cross border recognition of security posted by vessels in situations involving multiple claimants on a claim of similar origin.

On another front, the North American and Caribbean Emission Control Areas (ECAs), which require consumption of low-sulfur fuel, became effective on August 1, 2012. While this development was anticipated by the global shipping community and not unique to the US, the way in which these are being enforced in the US is worth briefly discussing. Pursuant to a memorandum of understanding, the US Coast Guard and US EPA share ECA enforcement responsibility. A few months prior to the effective date, in June 2012, the US EPA issued guidance encouraging vessel owners and operators to voluntarily disclose when their vessels could not comply with the ECA rules because low sulfur fuel was not available for purchase prior to entering the ECAs. Many vessel owners and operators followed the guidance and voluntarily disclosed non-compliance – perhaps under the mistaken belief that voluntary disclosure would absolve them from liability – only to be met several months or even years later with allegations of violations and corresponding administrative subpoenas for civil investigations. For a handful of vessel owners and operators that submitted as many as 30 to 40 "FONARs" (Fuel Oil Non-Availability Reports), the administrative subpoenas were very broad in scope for other vessel owners and operators that submitted one or two FONARs, the administrative subpoenas were more narrowly focused. The common thread in both instances is that the US government is seeking to enforce the ECAs regardless of whether vessel owners and operators voluntarily disclosed non-compliance. In this regard, on January 16, 2015, the US EPA published a civil penalty policy which sets forth a formula for calculating the civil penalty amount. The formula contains both objective factors like the price difference between compliant and non-compliant fuel as well as objective factors like the degree of cooperation. Hence, vessel owners and operators that voluntarily disclose non-compliance might obtain some discount on the proposed civil penalty, but they will not be completely absolved from liability for the violation. Of course, in our opinion, voluntary disclosure still beats the alternative: getting caught and being subjected to a full Department of Justice investigation with far greater consequences just like the well-publicized "magic pipe" oily water separator criminal investigations.

And lastly, so you can all get out of here and enjoy a drink, I should mention the a recent ruling by U.S. Customs and Border Patrol in respect to denatured ethyl alcohol. Not the drinking type. The question involved the Jones Act, which prohibits non US flag vessels from carrying cargo between two ports in the US, unless there is a coastwise endorsement. However, an endorsement is not needed if the merchandise is processed into a "new and different" product before being transported back to a US port. Customs concluded that mixing of denatured ethyl alcohol and un-denatured alcohol is not a new product, but just a question of blending to adjust impurities. Consequently, the transportation was in violation of the Jones Act. On the other hand, Customs issued a further ruling that blending Naphtha, Butane or Alkylates into gasoline is indeed creating a new product and therefore permissible.

I thank you all for your patience with my comments. I believe that Nick will now invite you for a much more invigorating brew in celebration of our 10th Anniversary.