Ninth Circuit Applies U.S. Maritime Lien to a Pervasively Foreign Dispute

Breaking Developments In London Market Law
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On 11 March 2008, the Ninth Circuit Court of Appeals issued its opinion in *Trans-Tec Asia v. M/V Harmony Container*. The Court held that a lien under the Federal Maritime Lien Act ("FMLA") attached to a *foreign*-owned and *foreign*-flagged vessel based on non-payment to a *foreign* "necessaries" supplier for goods delivered in a foreign port. The FMLA allows persons with claims against a vessel's owner or operator to enforce maritime liens against the vessel itself under the legal fiction that the vessel is responsible. (Although this case applied a FMLA lien to a vessel when it was found in a U.S. port, the implication of the holding is that U.S. law could apply under these circumstances regardless of the port of call.)

After determining that a U.S. choice-of-law clause was part of the contract, the court held that the clear language of the FMLA statute supported application of a maritime lien to such a foreign transaction.

An Asian Contract in a U.S. Court

The *M/V Harmony Container* ("*Harmony*") is a Malaysian-flagged vessel initially owned by Splendid Shipping ("Splendid"), a Malaysian corporation, and chartered by the Taiwanese corporation Kien Hung. The Harmony called in ports around the Pacific, including regular stops at Long Beach, California. Kien Hung contracted to buy fuel bunkers from Trans-Tec, a Singaporean company, for delivery in South Korea.

In a series of faxes and e-mails, Trans-Tec specified that its agreement with Kien Hung "incorporated [Trans-Tec's] standard terms and conditions." These "terms and conditions" – never requested or reviewed by Kien Hung – specified that "the laws of the United States and the State of Florida" would govern the contract. After Kien Hung failed to pay Trans-Tec for the fuel, the *Harmony* sailed to Long Beach, where Trans-Tec filed suit in federal court in Los Angeles, asserting an FMLA maritime lien.

The FMLA Applies to Foreign Transactions Where the Parties Have Selected U.S. Law

The Court first applied Malaysian law (derived largely from English Law), to determine that the "choice of law" clause designating U.S. law was indeed part of the contract. The Court then

turned to the main question: whether the FMLA could apply to a transaction with no "contacts" with the U.S. apart of the "choice of law" clause.

The Court noted that the clear language of FMLA does not distinguish between domestic and foreign transactions or parties. The Court therefore rejected Splendid's argument that the dispute was simply "too foreign" to permit application of the FMLA, and upheld the lien on the *Harmony*.

The result in the *Harmony* case is consistent with other U.S. decisions: American courts have consistently held that foreign parties may choose U.S. law for their maritime transactions. For example, in *Liverpool & London S. S. Protection v. Queen of Leman MV*, the Fifth Circuit upheld the application of U.S. law on the basis that the parties' contract permitted right of lien under *any* local law of *any* jurisdiction.

Canadian courts have reached similar results. In *Kirgan Holding S. A. v. Ship Panamax Leader* (2002), virtually all transactions concerning the dispute were "foreign" to Canada and the U.S. However, the court nevertheless respected the parties' U.S. choice-of-law clause and upheld the application of maritime liens under FMLA.

How Does This Affect London Market Insurers?

The willingness of U.S. courts to honor "choice of law" clauses designating U.S. law and to apply the FMLA to foreign transactions has two chief consequences for insurers. First, London Market Insurers may find themselves defending lien cases in the U.S. when they were not expecting to do so.

On the other hand, the willingness of U.S. courts to apply the FMLA to foreign transactions presents an opportunity for London Market Insurers – as a foreign party engaged in transactions outside the U.S. – seeking to assert subrogation claims against vessels or collect amounts due under its marine insurance policies involving non-U.S. vessels, provided that the necessary choice-of-law clause is present.

* If you wish to discuss the FMLA or any other aspect of maritime law, please contact Katie Matison, Mark Beard, Ron Beard, John Devlin or Brewster Jamieson via e-mail or telephone, 011-503-778-2100, to arrange a mutually convenient time. Our maritime attorneys are experienced in handling marine and insurance issues, including the defense and filing of maritime liens under the FMLA.

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