the date of the accident, *see Central Rivers Towing*, 750 F.2d at 574, which in this case was 1979. As far as the rate at which interest should be calculated, we recognize that such a determination is traditionally left to the district court's discretion. *Id.* But we have said on previous occasions that the best starting point is to award interest at the market rate, which means an average of the prime rate for the years in question. *See Amoco Cadiz*, 1992 AMC at 982, 954 F.2d at 1332; *accord Gorenstein Enterprises, Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431, 436-37 (7 Cir. 1988); *Central Rivers Towing*, 750 F.2d at 574. In addition, the district court may also want to consider the City's status as a municipality, not as basis to deny prejudgment interest altogether, but as a guide to setting the interest rate. As pointed out by *Amoco Cadiz* and *Gorenstein*, one of the factors used in determining the rate of prejudgment interest is the creditworthiness of the judgment debtor. Thus, the district court could, in its discretion, set the rate of interest to match that which lenders would charge the City for short-term, unsecured loans. *See Amoco Cadiz*, 1992 AMC at 981-82, 954 F.2d at 1332; *Gorenstein*, 874 F.2d at 436. As to whether to award compound interest, we conclude that that, too, is a determination better left to the discretion of the district court. *See Transorient Navigators Co., S.A. v. M/S Southwind*, 788 F.2d 288, 293 (5 Cir. 1986). Finally, in calculating its eventual award, we ask the district court to memorialize its reasoning in order to assist us in the event of future review.

III.

The district court's order denying prejudgment interest is reversed. This case is remanded to the district court for a determination of prejudgment interest consistent with this opinion.

FETINIA BASARGIN, *Plaintiff*

v.

SHIPOWNERS' MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG), *Defendant*

United States District Court, District of Alaska, February 16, 1995
No. A94-474-CV

MARINE INSURANCE — 295. Indemnity, "Pay As May Be Paid" — 32. Direct Liability of Underwriters to Third Parties.

Whether a judgment can be enforced against the judgment debtor's insurer is governed by state law. An injured seaman with a judgment against a vessel owner cannot enforce it against the vessel's P&I club because Alaskan law allows no such direct action and also because the club has no liability until the judgment is paid.

MARINE INSURANCE — 20. Defense Duty.

The duty to defend only arises from a contractual undertaking to do so, and the reservation of a right to defend by a P&I club or other insurer is not the assumption of such a duty but an indication that there is none.

ARBITRATION — 120. Foreign Arbitration Awards Conventions — 124. Agreement to Arbitrate, Effect on Other Proceedings.

The claim of the widow of a fisherman and fish boat owner killed at sea, who has taken a consent judgment against his estate and an assignment of its insurance rights, is a maritime contract claim and must be arbitrated in London in accordance with the rules of the P&I club, which asserts a defense of breach of warranty; her court action is therefore dismissed since the arbitration is broad enough to embrace all issues.

Edward J. Reasor *for Plaintiffs*
Lanning Trueb (LeGros, Buchanan & Paul) *for Defendant*

JOHN W. SEDWICK, D.J.:

Introduction

This matter comes before the court on defendant Shipowners' Mutual Protection and Indemnity Association's ("Association") motion for an order dismissing plaintiff Fetinia Basargin's individual claim and claims brought as assignee of the estate of Julian Basargin, plaintiff's deceased husband, and for an order compelling arbitration of plaintiff's assigned claims pursuant to 9 U.S.C. §§3 and 202. The motion is opposed. No oral argument has been requested, and it is not deemed necessary. Because evidence outside the pleadings has been presented by the parties, to the extent that resolution of the instant matters have

been brought pursuant to Fed. R. Civ. P. 12(b)(6), the court treats the motion as one for summary judgment. Fed. R. Civ. P. 12(b); *Underwood v. Hunter*, 604 F.2d 367, 369 (5 Cir. 1979).

Background

The present action finds its roots in an incident which occurred during the summer of 1989 while Julian Basargin was engaged in drift-net fishing in Bristol Bay, Alaska, aboard the F/V *Cruiser*. On July 6, 1989, Julian Basargin, the owner of the *Cruiser*, was letting out his net when he fell over the back of the vessel and into the water. Plaintiff Fetinia Basargin, the wife of Julian Basargin, was injured in the July 6, 1989, event.

On May 28, 1991, plaintiff sued the estate of her deceased husband, Julian Basargin, alleging that she was a crew member on the vessel and asserting theories of Jones Act negligence, maintenance and cure, and unseaworthiness. Plaintiff was also acting as the personal representative of her husband's estate, and in that capacity, plaintiff accepted service of her own complaint on June 27, 1991. Following a confession of judgment to plaintiff's claims, Judge Cranston of the Superior Court for the State of Alaska ordered the estate of Julian Basargin to pay damages to plaintiff in the amount of $1,022,534.04. In consideration of a covenant not to execute on that judgment, the Estate assigned all its claims against the Association to plaintiff.

Defendant Association is a mutual protection and indemnity association organized and registered under the laws of Luxembourg. Effective May 23, 1989, the *Cruiser* was entered with the Association for protection and indemnity coverage by her owner, Julian Basargin. Julian Basargin originally became a member of the Association effective on or about May 23, 1988.

As a member of the Association, Julian Basargin agreed to be bound by all the Association's Rules. Association Rule 64 provides for arbitration in London of any difference or dispute between a member or former member and the Association in connection with the Rules or arising out of any contract between the member or former member and the Association:

> If any difference or dispute shall arise between a Member or former Member and the Association out of or in connection with these Rules or arising out of any contract between the Member or obligations of the Association or as to the rights or obligations of the

> Association or the Member or former Member thereunder or in connection therewith or as to any other matter whatsoever, such difference or dispute shall be referred to the Arbitration in London of a sole legal Arbitrator. . . ."

Assoc. Rule 64.

Plaintiff's present action is premised on the judgment she received against the Estate in the underlying action, and on the assignment of the Estate's claims against the Association that she obtained in consideration for her covenant not to execute on the judgment against the Estate. Suing individually and as assignee of Julian Basargin's estate, plaintiff alleges defendant acted in bad faith in the handling of an insurance claim, and with breach of an insurance contract. Plaintiff originally filed this action in the Superior Court for the State of Alaska. Defendant timely removed the action to this court on the basis of diversity of citizenship.

Defendant now moves for dismissal of plaintiff's individual claim and claims brought as assignee, and for an order compelling arbitration on the assigned claims, arguing that plaintiff's individual claim against the Association must fail as a matter of law, and because plaintiff stands in the shoes of the Estate in relation to the assigned claims, the assigned claims are subject to arbitration and should be dismissed.

Motion for Summary Judgment

*Summary Judgment Standard**

* * *

Plaintiff's Individual Claim

Plaintiff's claim brought in her individual capacity seeks the enforcement of the judgment she obtained in the underlying action. She seeks payment directly from the Association pursuant to the insurance contract entered between the Association and Julian Basargin. Maritime law neither allows nor prohibits an injured third party from directly suing a vessel owner's insurance provider. *Steelmet, Inc. v. Caribe Towing Corp.*, 1986 AMC 1641, 1643, 779 F.2d 1485, 1487 (11 Cir. 1986). In determining a third party's right to maintain a direct action, the law of the state in which the dispute arises is applied, provided the state

* Discussion omitted — Eds.

law does not conflict with other aspects of maritime law. 1986 AMC at 1644, 779 F.2d at 1487-88. Accordingly, Alaska law informs the court on this issue.

Defendant argues that plaintiff, not a party to the indemnity insurance policy between Julian Basargin and the Association, is barred as a matter of law from bringing a direct action against the Association. Under Alaska law, no direct cause of action can lie against an insurer by a third person not a party to the insurance contract because insurance is for the benefit and protection of the insured. *Severson v. Severson*, 627 P.2d 649, 651 (Alaska 1981). Even when insurance is mandated by statute, no third-party direct action is allowed against the insurer. *Evron v. Gilo*, 777 P.2d 182, 187 (Alaska 1989). Furthermore, because the policy at issue here is one of indemnity, not liability, no action can be maintained directly by a third-party as a matter of law, because indemnity coverage is not triggered unless the insured suffers actual loss by paying the third-party. *See Theodore v. Zurich General & Liabil. Ins. Co.*, 364 P.2d 51, 56 (Alaska 1961). This holds even after a judgment has been entered against the insured. *Id.*

Here, plaintiff's direct action against the Association fails as a matter of law. The policy at issue is one for protection and indemnity, not liability. Accordingly, plaintiff's individual claim is dismissed.[1]

Motion to Compel Arbitration on Assigned Claims

As the assignee of the claims of Julian Basargin's estate, plaintiff stands in the shoes of the estate, with no greater rights in relation to her claims against the Association than the estate, had the estate brought the claims in its own stead. *See Robert Lamb Hart Planners & Architects v. Evergreen, Ltd.*, 787 F.Supp. 753 (S.D. Ohio 1992); *Restatement (Second) Contracts* §336 (1981). Additionally, any and all rights and defenses available to the Association in relation to a claim brought by the estate are equally applicable to a claim brought by plaintiff. *See Pacific Northwest Life Ins. Co. v. Turnbill*, 754 P.2d 1262 (Wash.App. 1988); *Restatement (Second) Contracts* §336 (1981).

1. Notice is also taken of plaintiff's failure to respond to defendant's arguments urging the dismissal of plaintiff's individual claim. The court shall treat the failure to object as an admission that, in the opinion of counsel, defendant's arguments are well-taken.

Arbitration — Governing Law

An arbitration agreement arising out of a commercial legal relationship is subject to the Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"). 9 U.S.C. §§1 *et seq.* and 201 *et seq.* Maritime transactions and contracts are expressly included within the scope of both the Act and the Convention.

Title 9 U.S.C. applies to "maritime transactions", which are defined by 9 U.S.C. §1 as "charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collision, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction." A marine insurance contract is a maritime contract, *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 313, 1955 AMC 467, 470-71 (1954); *Organ v. Conner*, 1992 AMC 2160 (D. Alaska 1992). Marine insurance contracts, therefore, are subject to the Act and the Convention. *See Montauk Oil Transp. Corp. v. Steamship Mutual Underwriting Assn. (Bermuda) Ltd.*, 1991 AMC 1477, 1481-82 (S.D.N.Y. 1991); *Organ*, 1992 AMC at 2160.

9 U.S.C. §2 makes arbitration agreements relative to any maritime transaction valid, irrevocable, and enforceable.[2] 9 U.S.C. §3 requires the court, on application of one of the parties, to stay the trial of any issue referable to arbitration under an agreement in writing for such arbitration, until the arbitration has been completed in accordance with the terms of the agreement. However, where the arbitration clause is sufficiently broad to bar all of plaintiff's claims, dismissal, rather than a stay, of plaintiff's claims is within the court's discretion. *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 638 (9 Cir. 1988). 9 U.S.C. §4 provides the court with the authority to compel arbitration.

The Convention governs arbitration agreements arising out of a legal relationship, which is commercial, between citizens of the United States and citizens of foreign countries. 9 U.S.C. §§2, 202; *see Atlas Chartering*

2. 9 U.S.C. §2 provides in part:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, . . . shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract.

Services, Inc. v. World Trade Group, Inc., 1978 AMC 2033, 2035, 453 F.Supp. 861, 863 (S.D.N.Y. 1978). The Supreme Court has stated:

> The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbital awards are enforced in the signatory countries.

Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974). Where there is a written agreement to arbitrate contained in a commercial contract between a foreign party and a U.S. citizen, arbitration pursuant to that agreement must be compelled. *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co.*, 1986 AMC 706, 710-11, 767 F.2d 1140, 1144 (5 Cir. 1985); *see also Tennessee Imports, Inc. v. Filippi*, 745 F.Supp. 1314, 1322-23 (M.D. Tenn. 1990) ("When a claim falls within the scope of an arbitration clause enforceable under the Convention, the court has no choice but to enforce it by referring the parties to arbitration.").

Association Rule 64—The Arbitration Clause

Association Rule 64 mandates arbitration in London by a sole legal Arbitrator "[if] any difference or dispute shall arise" between a member, or former member, and the Association "in connection with [Association] rules or arising out of any contract . . . or as to any other matter whatsoever. . . ." In that plaintiff now stands in the shoes of Julian Basargin, plaintiff must submit to arbitration. Both of plaintiff's assigned claims—bad faith and breach of contract—arise out of the protection and indemnity policy entered between Julian Basargin and the Association, and clearly fall within the broad scope of the arbitration clause and are, therefore, subject to arbitration. *See Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 638 (9 Cir. 1988).[3]

3. Defendant maintains that Julian Basargin's estate nevertheless is barred from claiming coverage for violating Association rules. In specific, the Association alleges a violation of the express warranty provisions of the indemnity policy limiting the number of crewmembers to two, evidenced by plaintiff's own allegation in her complaint in the underlying action that three crew members—including Fetinia Basargin—were aboard the *Cruiser* at the time of the July 6, 1989, incident; and that the Estate's confession of judgment to plaintiff's claims on January 11, 1993, was in violation of Association Rule 25(2). Defendant further contends that Association Rule 11 expressly limits payment under the indemnity policy when an insured actually incurs losses because of payments the insured was required to make. However, these defenses go to the merits of plaintiff's assigned claims and involve matters the consideration of which the insurance contract bestows upon the arbitrator.

Plaintiff alleges, without the support of competent evidence, that Julian Basargin never received the certificate of insurance incorporating the Association Rules nor was made aware that the Association's rules were part of the policy, and that the indemnity policy was never submitted to the Commissioner of Insurance for approval. However, plaintiff has submitted no affidavit, and, thus, fails to authenticate any of the exhibits attached to her opposition brief. "Unauthenticated documents cannot be considered on a motion for summary judgment." *Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9 Cir. 1990). Authentication requires attaching the documents in question to an affidavit submitted by a "person through whom the exhibits could be admitted into evidence." *Id.* at 1550-51. Documents not so authenticated may not be considered. *Id.* at 1551.

Plaintiff also argues that the arbitration clause here is contrary to AS §21.33 and AS §21.43. Alaska law, however, would only control the issue of enforceability of the arbitration clause "in the absence of a federal statute, a judicially fashioned admiralty rule, or a need for uniformity in admiralty practice." *See Wilburn Boat Co.*, 348 U.S. at 314, 1955 AMC at 471. The Federal Arbitration Act specifically addresses the issue of enforceability of the arbitration clause. 9 U.S.C. §1 *et seq.* "Matters within admiralty jurisdiction are contemplated by the Federal Arbitration Act." *Organ*, 1992 AMC at 2164. The Federal Arbitration Act authorizes this court to compel arbitration pursuant to a valid arbitration clause.

Duty to Defend

Plaintiff contends that the Association had a duty to defend the Estate in the underlying action and, in failing to do so, the Association has waived its right to move for arbitration in the present action. The duty to defend is a contractual duty; where there is no contract to defend, there is no duty to defend. *B & D Appraisals v. Gaudette Machinery Movers*, 752 F.Supp. 554, 556 (D.R.I. 1990); 14 *Couch on Insurance 2d* §51:35 (1982). A clause within a policy of insurance which confers a right upon an insurer to defend does not create a duty to defend. *Healy Tibbitts Constr. Co. v. Foremost Ins. Co.*, 1980 AMC 1600, 1609, 482 F.Supp. 830, 837 (N.D. Cal. 1979) (*citing Kienle v. Flack*, 416 F.2d 693, 696 (9 Cir. 1969)). The fact that an insurer maintains the

right to defend is an indication that the insurer has not taken on the obligation to defend. *Save Mart Supermarkets v. Underwriters at Lloyd's London*, 843 F.Supp. 597, 603 (N.D. Cal. 1994); *Botany Bay Marina, Inc. v. Great American Ins. Co.*, 1992 AMC 2993, 2996, 760 F.Supp. 88, 90-91 (D.S.C. 1991); *B & D Appraisals*, 752 F.Supp. at 556-557.

The indemnity policy between Julian Basargin and the Association conferred on the Association the right, not the obligation, to defend claims against Basargin. There is no express duty to defend clause in the indemnity policy. Association Rule 27 provides in-part:

> . . . the Managers may at any time and all times appoint and employ on behalf of a Member upon such terms as they may think fit lawyers . . . for the purpose of dealing with any matter liable to give rise to a claim by the Member upon the Association. . . . The Managers may also at any time discontinue such employment as they may think fit.

The Association did not have a duty to defend in the underlying action. *See Save Mart Supermarkets*, 843 F.Supp. at 603; *Botany Bay Marina*, 1992 AMC at 2996, 760 F.Supp. at 90-91; *B & D Appraisals*, 752 F.Supp. at 556-557. Therefore, defendant is not barred from seeking enforcement of the arbitration clause for the alleged violation of a non-extant duty.

It is therefore ordered that:

For the reasons set forth above, defendant Association's motion for an order dismissing plaintiff's individual claim and claims brought as assignee of the estate of Julian Basargin, and for an order compelling arbitration of plaintiff's assigned claims is granted. The court finds it appropriate to dismiss rather than to stay this action because the arbitration contemplated is broad enough to address all issues.

RONALD FITZGERALD, *Plaintiff*

v.

JAMES MERRYMAN, *Defendant*

United States District Court, District of Maine, September 22, 1994
Civ. No. 93-321-P-C.

COLLISION — 2434. Proportional Fault — 95/5% — 47. Lookout — DAMAGES — 191. Proportions — 95/5%.

Collision between two lobster boats in a crossing situation resulted from mutual fault, 95% due to the burdened vessel's failure to keep a proper lookout and take necessary maneuvers to avoid the collision and 5% due to the privileged vessel's failure to survey the area during lobstering operations, despite the operator's knowledge that there were other boats in the vicinity. Plaintiff is thus entitled to recover for lost wages and equipment, plus $10,000 for emotional distress and pain and suffering caused by the accident, reduced by 5% for the plaintiff's own fault.

DAMAGES — 143. Constructive Total Loss.

On conflicting evidence, plaintiff is entitled to replacement rather than repair cost of his boat, considering especially its vigorous use, but not replacement of the outboard motor on grounds of lack of confidence after immersion, considering its tests after repair.

DAMAGES — 1426. Deteriorations, Depreciation.

Damages for loss of a number of untended lobster pots after sinking of lobster boat are to be reduced by the number ordinarily lost in that period from other causes.

Reported also at 865 F.Supp. 9

U. Charles Remmel, II and R. Terrance Duddy (Kelly, Remmel & Zimmerman) *for Plaintiff*

Laurence Minott (Sawyer & Minott) *for Defendant*

GENE CARTER, Ch.J.:

This civil action arises out of a collision of two lobster boats on August 28, 1993, in Potts Harbor, Maine. Plaintiff filed this action in admiralty seeking damages arising from Defendant's alleged negligence. The case was tried without a jury. Based on the testimony at trial and the exhibits submitted in evidence, the Court makes the following findings of fact and conclusions of law.

I. Findings of Fact

On the sunny and calm morning of August 28, 1993, Plaintiff set out in his eighteen-foot wooden lobster skiff, *ME 9813L*, [illegible] set