

1ST CASE of Level 2 printed in FULL format.

NILDO MACHADO CASTELAN, JOSE DE RIBAMAR L. ALVES, JOSE BANDEIRA FARIAS, SEBASTIAO MANOEL DA SILVA, GILDESON KLIPPEL, EIMAR PINHEIRO, NILO FERRERIRA, HILDEBRANDO MATIAS DE ARAUJO, LUCIO ALBINO A. DA SILVA and ROMERO JOSE LOPES, Plaintiffs, v. M/V MERCANTIL PARATI, Her Engines, Boilers, Tackle, Appurtenances, Cargo, etc., in rem, and MERCANTIL CHEMECAL E. NAVEGACAO, S.A., Defendants. AGRO PRODUCTS TRADING CORPORATION, and HUILERIES HAITIENNES, S.A., Plaintiffs, v. M/V MERCANTIL PARATI, Her Engines, Boilers, Tackle, Appurtenances, etc., in rem, EMPRESA de NAVEGACAO MERCANTIL S.A. a/k/a MERCANTIL NAVEGACAO TAMAR SHIPPING, LTD., in personam, THE CARGO OF 2,002.295 METRIC TONS OF RBD PALM OLEIN SHIPPED ABOARD THE M/V MERCANTIL PARATI AND CARRIED UNDER BILLS OF LADING NOS. PG/H-1 AND PG/H-2 DATED DECEMBER 30, 1990 AT JOHORE PORT MALAYSIA, in rem, Defendants

MACHADO CASTELAN v. M/V MERCANTIL PARATI

Civil Action No. 91-1351

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

1991 U.S. Dist. LEXIS 6472; 1991 AMC 2141

May 8, 1991, Filed

NOTICE: [*1]

NOT FOR PUBLICATION

COUNSEL: John E. Bradley, Esq., Thomas E. Stiles, Esq., Nourse & Bowles, Newark, New Jersey, Attorneys for Defendants Merchem Mercantil E. Navigacao, S.A. and Motor Vessel Mercantil Parati.

George J. Koelzer, Esq., Ober, Kaler, Grimes & Shriver, Edison, New Jersey -AND- Robert J. Zapf, Esq., Burlingham, Underwood & Lord, New York, New York, Attorneys for Intervening Plaintiffs.

JUDGES: Alfred M. Wolin, United States District Judge.

OPINIONBY: WOLIN

OPINION: OPINION

Defendant Merchem Mercantil E. Navegacao, S.A. ("Merchem"), the owner of the Brazilian flag Motor Vessel Mercantil Parati (the "Vessel"), has moved to vacate the order of arrest entered by this Court on behalf of intervening plaintiffs ("plaintiffs") Agro Products Trading Corporation ("Agro") and Huileries Haitiennes, S.A. ("Huileries"). For the reasons set forth herein Merchem's motion to vacate will be denied.

I. BACKGROUND

Plaintiffs Agro and Huileries are alleged to be the Panamanian shipper and Haitian consignee, respectively, of a cargo of palm oil aboard the Vessel. Complaint paras. 2-3. The palm oil was loaded aboard the Vessel in Malaysia and was bound for discharge and delivery in Haiti. Id. Plaintiffs allege that they [*2] hold two bills of lading for the cargo. Id. The bills of lading issued by defendants Empresa de Navigacao and Tamar Shipping Ltd. incorporate the terms of a voyage charter between Tamar and Transgrain, B.V., the seller of the cargo to Agro Products. Clause 13 of the charter provides that "this contract shall be governed by the laws of England. . . ." Clause 18 provides that "any dispute arising during execution of this charterparty shall be settled in London. . . ."

Plaintiffs' first cause of action seeks recovery of damages allegedly resulting from delays in the voyage from Malaysia due to the ship's unseaworthiness. In their second cause of action, plaintiffs allege damages resulting from misrepresentations made by the in personam defendants. Third, plaintiffs seek security in aid of arbitration in connection with their in rem claims. In their fourth cause of action, plaintiffs seek possession of the cargo and transshipment to Haiti. Plaintiffs do not allege that their cargo has sustained any physical damage.

This action began with an order of arrest entered on behalf of the Vessel's crew. Before the crew entered into a settlement with defendants, plaintiffs Agro and Huileries [*3] intervened. The Court ordered the arrest of the Vessel on their behalf, and it is this order of arrest that Merchem now moves to vacate.

II. DISCUSSION

The parties have agreed to arbitrate their disputes in London. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), reprinted following 9 U.S.C.A. @ 201 (Supp. 1991), provides for the arbitration of commercial disputes pursuant to any arbitration agreement in which one or both parties is not a United States citizen. See also @ 202 (Convention governs all arbitration agreements other than those between two U.S. citizens). The Convention applies to this dispute, in which all the parties are foreign corporations that have agreed to arbitrate their disputes in England, which is a signatory to the Convention.

The Court must first decide whether the applicability of the Convention prohibits the Court from maintaining its arrest of the Vessel. The Court of Appeals for the Third Circuit has held that the Convention requires a federal court to discharge state provisional remedies after a case is removed to federal court. *McReary Tire & Rubber Co. v. CEAT*, 501 F.2d 1032, 1038 (3d Cir. 1974). [*4] n1 The Third Circuit has not extended *McReary* to pre-arbitration vessel arrests. Other courts have considered and rejected such an extension. *E.A.S.T, Inc. of Stamford v. M/V Alaia*, 876 F.2d 1168, 1173 (5th Cir. 1989), affirming 673 F. Supp. 796 (E.D. La. 1987).

-----Footnotes-----

n1 Plaintiffs' third cause of action seeks security in aid of arbitration. It appears that neither plaintiffs nor Merchem has demanded arbitration. Cf. *McReary*, 501 F.2d at 1037 (court shall refer case to arbitration at request of party to arbitration agreement) However, the Court will construe plaintiffs' complaint a demand for arbitration for purposes of this motion because, as is discussed infra, plaintiffs may proceed in rem only if they pursue

arbitration.

-----End Footnotes-----

This Court agrees that McReary does not bar pre-arbitration vessel arrests. The Court of Appeals held in McReary that plaintiff's use of Pennsylvania's foreign prejudgment attachment remedies sought "to bypass the parties' agreed [*5] upon method of settling disputes." 501 F.2d at 1038. Because Article II(3) of the Convention makes reference to arbitration mandatory at the request of either party, state provisional remedies are unavailable. *Id.* The Court of Appeals did not hold that the Convention rendered all provisional remedies available, and an analysis of the Convention reveals that it permits the type of remedy plaintiffs seek here. Nine U.S.C.A. @ 208 provides that the Federal Arbitration Act, 9 U.S.C.A. @@ 1-14 (1970 & Supp. 1991), applies to actions and proceedings governed by the Convention unless the Federal Arbitration Act conflicts with the Convention or with the act that enforces it, 9 U.S.C.A. @@ 201-08. The Federal Arbitration Act preserves the right of a party to employ traditional admiralty procedures, including the arrest of a vessel, even though that party has agreed to arbitration. *The Anaconda v. American Sugar Refining Co.*, 322 U.S. 42, 46 (1944) (citing 9 U.S.C. @ 8). Because the Convention does not forbid pre-arbitration remedies in maritime cases, such remedies continue to be valid under the Federal Arbitration Act. E.A.S.T., 876 F.2d at 1173. [*6] This Court will follow E.A.S.T. instead of extending McReary to this maritime case. The Court will therefore turn to whether plaintiffs can proceed in in rem.

Supplemental Admiralty Rule C provides in relevant part: "(1) An action in rem may be brought: (a) To enforce any maritime lien; (b) whenever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto." Thus, under Rule C(1), Agro and Huileries may only maintain their action in rem if they have a maritime lien against the Vessel; if a United States statute provides for a maritime action in rem; or if a United States statute provides for a proceeding analogous to a maritime action in rem. The Court will consider each of these potential bases for an in rem action.

A. Rule C(1)(a): Under English Law, Plaintiffs Do Not Have a Maritime Lien

A forum selection clause is presumptively valid. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972); *Hodes v. S.N.C. Achille Lauro Ed Altri-Gestione*, 858 F.2d 905, 912-13 (3d Cir. 1988), cert. dismissed, 109 S.Ct. 1633, overruled on other grounds, [*7] 109 S.Ct. 1976 (1989). A broad arbitration clause covers the parties' in personam and in rem claims. *M/S Bremen*, 407 U.S. at 21 (forum selection clause governed "any dispute"). In *Hodes*, the passengers from a cruise ship alleged breach of contract and negligent and intentional torts against the owner of the ship. The plaintiffs' tickets contained an Italian forum selection clause which governed "all controversies" arising under the contract. *Id.* at 907. The contract also contained an Italian choice-of-law clause. *Id.* The Third Circuit held that the forum selection clause was valid and enforceable. *Id.* at 912-13. The Court also held that it was appropriate that Italian law govern in a case to be decided in Italy. *Id.* at 913.

In this case, the parties have agreed to submit "any dispute" to arbitration in London for resolution under English law. The parties have not asserted any reason why the Court should not honor their choice of law or forum. Even if they had, the arbitration provision in the charter is broad enough to govern Agro's

and Huileries' claims. Moreover, under Hodes, it is appropriate for English law to [*8] apply to a matter to be decided in England. Therefore, the Court will give full effect to the parties' choice of forum and law. Because there is no question that English law governs whether plaintiffs are entitled to a maritime lien, the Court need not discuss American law. See generally *Melwire Trading Co. v. M/V Cape Antibes*, 811 F.2d 1271, as amended, 830 F.2d 1083 (9th Cir. 1987) (no maritime lien under American law for claim for breach of shipping contract that results only in economic damages). But see also *Morrisey v. S.S. A&J Faith*, 252 F. Supp. 54, 59 (N.D. Ohio 1966) (maritime lien for delay damages caused by economic unseaworthiness).

The parties have presented their respective understandings of English law to the Court. Alexander Tudor Collella Andrews, a Solicitor of the Supreme Court in England, has submitted on defendants' behalf a declaration under penalty of perjury ("Andrews Declaration"). Mr. Andrews declares that, under English law, a maritime lien exists only for bottomry, salvage, seamen's wages, collision, and master's wages and disbursements. Andrews Declaration para. 3. Accord *C. Hill, K. Soehring*, [*9] *T. Hosoi & C. Helmer, Arrest of Ships 2-3* (1985) (wages, master's disbursements, collision and salvage); *S. Harley, How to Secure a Maritime Lien*, 40-43 (1981) (maritime lien for seamen's wages, master's wages and disbursements, salvage and collision damage). Plaintiffs' claims for breach of a bill of lading are not claims for which a maritime lien attaches. Andrews Declaration para. 3.

John Bassindale, a fellow Solicitor of the Supreme Court in England, has submitted a declaration under penalty of perjury on behalf of plaintiffs ("Bassindale Affidavit"). Mr. Bassindale does not state that a maritime lien attaches to plaintiffs' claims under English law. He does, however, declare that the admiralty jurisdiction of the English High Court is set forth in @ 20(2) of the Supreme Court Act 1981, which includes "(g) Any claim for loss of or damages to goods carried in a ship" and "(h) Any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship." Bassindale Declaration para. (c). A claim for a breach of a bill of lading contract is within @ 20(2)(f) and perhaps within (g) as well. *Id.* Thus, plaintiffs would have a statutory [*10] lien under English law. Andrews Declaration para. (statutory right to proceed in rem sometimes called "statutory lien"). The High Court has jurisdiction of such claims and could order the arrest of a ship within its jurisdiction. Bassindale Declaration para. (c). Accord Andrews Declaration para. 2 (breach of bill of lading would give rise to rights in rem against vessel in England).

Thus, if the Vessel were in England, although the High Court could arrest it and plaintiffs could proceed in rem against it on the claims stated in this case, they would not have a maritime lien against the Vessel. Rule C(1)(a) allows a plaintiff to proceed in rem to enforce a maritime lien. Because, under English law, plaintiffs would not have a maritime lien, but only a statutory lien, plaintiffs have no right to proceed in rem under Rule C(1)(a).

B. Rule C(1)(b) -- Part One: No United States Statute Provides for a Maritime action in Rem

Plaintiffs argue that a party to an arbitration clause may commence an action by an in rem arrest of a vessel where the charter party contains an arbitration clause. Initial Brief at 2-3. Section 8 of the Federal Arbitration Act, 9 U.S.C.A. [*11] @ 8 (1970), provides in relevant part:

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings. . . .

Section 8 "does not of itself confer an in rem right against a vessel." E.A.S.T., 673 F. Supp. at 800. To proceed in rem, there must exist an independent in rem claim based upon a cognizable maritime lien. *Id.* at 800-01. Plaintiffs cannot proceed in rem merely by virtue of the Federal Arbitration Act.

C. Rule C(1)(b) -- Part Two: The Federal arbitration act Provides in This Case For a Proceeding Analogous to a Maritime Action in Rem

Rule C(1)(b) provides, in part, for a party to proceed in rem when a United States statute provides for a proceeding "analogous" to a maritime action in rem. Section 8 of the Federal Arbitration Act provides, under the facts of this case, for a proceeding analogous to a maritime action in rem. Section 8 provides [*12] for a vessel arrest "if the basis of jurisdiction be a cause of action otherwise justiciable in admiralty. . . ." This provision raises the question of whether plaintiffs have stated "a cause of action otherwise justiciable in admiralty. . . ." n2 As discussed above, the parties have agreed to arbitration in London, where, under English law, plaintiffs have a cause of action in admiralty. Specifically, they have stated a claim for breach of "the carriage of goods in a ship. . . ." Supreme Court Act of 1981 @ 20(2)(b). Because plaintiffs' claim is subject to English law and to arbitration, the Federal Arbitration Act provides for a proceeding analogous to a United States statute that provides for a maritime action in rem.

-----Footnotes-----

n2 *Merchem* emphasizes that plaintiffs must proceed "according to the usual course of admiralty proceedings. . . ." Reply at 2 (quoting 9 U.S.C. @ 8). The procedure by which plaintiffs have arrested the Vessel is not at issue. The question before the Court is whether plaintiffs have a claim against the Vessel itself.

-----End Footnotes-----

[*13]

Sembawang v. M/V Charger, 1989 A.M.C. 2654, 1989 WL 98842 (E.D. La. 1989), provides several important parallels to this case. Plaintiff had the Vessel arrested under Rule C for failure to pay for ship repair services, a matter that the parties had agreed to arbitrate. 1989 WL 98842 at *1. The law of Singapore, although not providing for a maritime lien for the claim at issue, did provide for a statutory right to commence an action in rem. See *id.* at *2. As in this case, defendant argued that, under American law, an action in rem cannot exist without a maritime lien. *Id.* Finding this proposition "questionable at best," the *Sembawang* Court held that Singapore's statutory right to proceed in rem provided the basis for the court to retain the security against the Vessel pending arbitration. *Id.* *Sembawang* can be viewed as erasing the distinction, discussed *supra* in the context of English law, between a maritime lien and a statutory right to proceed in rem. n3 However, *Sembawang*, like this case, involves substantive rights to be determined under an arbitration clause. In

both cases, because of the foreign law to be applied, the Federal [*14] Arbitration Act provides for a proceeding analogous to a United States statutory provision for a maritime action in rem.

-----Footnotes-----

n3 Sembawang is also confusing in that it states that Rule C(1)(b) and @ 8 of the Federal Arbitration Act, when read together in a dispute to be resolved by arbitration, furnish subject matter jurisdiction. 1989 A.M.C. 7654, 1989 WL 98842 at *1. This Court has exclusive jurisdiction over admiralty cases under 28 U.S.C. @ 1333. The Federal Arbitration Act does not confer subject matter jurisdiction upon the federal district court. *Drexel, Burnham, Lambert, Inc. v. Valenzuela Bock*, 696 F. Supp. 957, 960-61 (S.D.N.Y. 1988). At issue here is jurisdiction over the res, i.e., over the fictional personality of the Vessel.

-----End Footnotes-----

The Court is not troubled by the fact that in this case, unlike *Sembawang*, neither party to the arbitration agreement has demanded arbitration. Rule C(1)(b) permits a party to proceed in rem when arbitration and choice of law clauses [*15] provide, in combination, for a proceeding analogous to an American statutory in rem proceeding. Although the parties have not yet availed themselves of the proceeding, it exists. The Court will give the parties three days from the entry of the attached Order to demand arbitration. If none of the parties demands arbitration within that period, the Court will entertain a renewed motion to vacate the arrest.

III CONCLUSION

For the foregoing reasons, Merchem's motion to vacate the order of arrest will be denied. An appropriate order is attached.

ORDER - May 8, 1991, Filed

In accord with the Court's opinion filed herewith,

IT IS on this 8th day of May, 1991

ORDERED that the motion of defendant Merchem Mercantil E. Navigacao, S.A. ("Merchem"), the owner of the Brazilian flag Vessel Mercantil Parati ("the Vessel") to vacate the April 26, 1991 order of arrest is denied; and it is further

ORDERED that defendants may renew their motion to vacate if the Court is not presented with a demand to arbitrate the dispute within three days of the entry of this order.