Marilyn Raia
San Francisco,
Shareholder

Direct Dial: 415.352.2721
Fax: 415.352.2701
Email Attorney

The Court Is Always Open - Sometimes

By Marilyn Raia

Most admiralty lawyers learn early in their careers that the federal courts are always supposed to be open even though the sign on the front door says "Mon-Fri 9-5". That is because vessels are not always in port during regular weekday business hours and certain legal proceedings may be necessary at other times. For example, claimants may need to arrest a vessel coming into port on a weekend to enforce a maritime lien for necessaries (see Pacific Maritime Magazine, July 2010). However, litigants in a maritime case might find the federal court is not open to them even on a weekday from 9-5. This column explains four of the circumstances under which a federal court may close its doors.

Political Question Doctrine

In Wu Tien Li-Shou v. United States of America, 997 F.Supp.2d 307 (D. Md. 2014), the widow of Wu Lai-Yu sued the United States in admiralty for the wrongful death of her husband, the destruction of his fishing vessel ***Jin Chun Tsai 68***, and the loss of his cargo. Yu was a hostage of Somali pirates and killed by gunfire from the US Navy vessel ***Groves*** off the coast of Somalia. The ***Groves*** was part of a NATO-led counter piracy operation. It was attempting to force the pirates to stop and surrender. After an exchange of gunfire, the pirates surrendered. When the members of the crew of the Groves boarded the Jin Chun Tsai 68, they found Yu dead from a gunshot wound.

Yu's widow alleged the Groves violated various naval directives resulting in Yu's death. While acknowledging Yu's widow presented "a very sympathetic case", the court dismissed it because of a lack of subject matter jurisdiction. That is, the case was not justiciable as an admiralty case because the conduct of a belligerent operation was allocated by the Constitution to the executive branch of the government, subject to review by the legislative branch. If the court had permitted the case to proceed, the judicial branch would be reviewing a military operation, which is not provided for by the Constitution.

Foreign Arbitration Clause

Under federal statutory law, a bill of lading reflecting a contract of carriage of goods by vessel to or from the United States in foreign trade is to be governed by the United States Carriage of Goods by Sea Act, otherwise known as COGSA. COGSA imposes certain duties on carriers and does not allow them to lessen or avoid those duties by bill of lading provisions. American courts routinely close their doors to litigants in a cargo damage case subject to COGSA if the bill of lading contains a clause requiring proceedings in another country.

In Vimar Seguros Y Reaseguros v. ***M/V Sky Reefer*** 515 U.S. 528 (1995), the US Supreme Court considered a clause in a bill of lading governing the transportation of a shipment of oranges and lemons from Morocco to Boston. Vimar was the insurer of the shipment. The shipment shifted in the ship's cargo hold during transit and suffered damage. Vimar paid the owner of the shipment for a portion of the damage, and both sued the vessel owner and the vessel in rem in federal court in Massachusetts for reimbursement.

The bill of lading governing the transportation of the shipment contained a clause 1) providing for the application of Japanese law; and 2) requiring disputes under the bill of lading to be arbitrated in Tokyo by the Tokyo Maritime Arbitration Commission under its rules. The defendants asked the court to stay the proceedings in Massachusetts and enforce the bill of lading provision requiring arbitration in Japan. The plaintiffs opposed the motion arguing the

Japanese arbitration provision violated COGSA by lessening the carrier's liability. They reasoned requiring American cargo owners to arbitrate claims for cargo damage in a foreign country would be inconvenient and costly, and that cargo owners would settle for less than what was due to avoid that inconvenience and cost.

The district court enforced the arbitration provision. The First Circuit affirmed. The United States Supreme Court also affirmed. It agreed COGSA prohibits carriers from putting clauses in their bills of lading that lessen their liability. However, it held an arbitration clause did not lessen the carrier's obligations under COGSA. Rather, the Japanese arbitration clause was an agreement between the parties about how to resolve their differences which was not prohibited by COGSA. Nonetheless, the district court retained jurisdiction to make sure the correct law was applied in the Tokyo arbitration.

Forum Selection Clause

Sometimes the parties to a maritime contract choose where they want to resolve their disputes and identify that place in the contract. Courts in the United States routinely hold the parties to their choice.

M/S Bremen v. Zapata Off-Shore Company (1972) 407 US 1, involved an international towage contract. Under the contract, Unterweser, a German company, was to tow Zapata's drilling rig from Louisiana to Italy. When the tow was in international waters in the Gulf of Mexico, the rig sustained serious damage in a storm. It put into the nearest port of refuge, Tampa, Florida.

Although the contract contained a provision requiring any dispute to be "treated before the London Court of Justice", Zapata sued Unterweser in Florida. Unterweser moved to dismiss the case based on the London forum selection clause. The district court denied the motion and the denial was upheld on appeal. The United States Supreme Court reversed. It held given the modern realities of international business dealings, forum selection clauses should be considered prima facie valid and enforceable unless the party resisting the chosen forum shows it is unreasonable under the circumstances. The Supreme Court rejected the argument that the clause should not be enforced because the chosen forum was inconvenient for the litigation. It reasoned the parties to the contract must have contemplated any inconvenience when negotiating and signing the contract.

Forum Non Conveniens Doctrine

Although a federal court has jurisdiction over a maritime case, it may decide not to hear it on the grounds another court, perhaps even in a foreign country, would be a more convenient place for the litigation. Giglio Sub S.N.C. v. Carnival Corporation, 2012 AMC 2705 (S.D. Fla. 2012), a case arising out of the wreck of the ***Costa Concordia*** off the coast of Italy near Giglio Island in January 2012, illustrates the point. In that case, an Italian corporation and an Italian individual, who were residents of Giglio Island, filed an admiralty class action in the federal court in Florida against Carnival Corporation which has its principal place of business there, and against three related corporations that have their principal places of business in London, Genoa, and Florida respectively. In response to the lawsuit, the defendants filed a motion to dismiss the case on the ground Florida was not a convenient place for the litigation. They argued the case should be litigated in Italy. The district court granted the motion and the ruling was upheld on appeal.

Under ordinary circumstances, a plaintiff's choice of where to sue is given great deference.

However, a court may disregard the plaintiff's choice and dismiss a case under the doctrine of forum non conveniens or inconvenient forum. When seeking a dismissal on forum non conveniens grounds, the defendant must prove 1) there is another adequate place to litigate the case; 2) the public and private factors weigh in favor of dismissal; and 3) the plaintiff can re-file the suit in the alternate place without undue inconvenience or prejudice.

In this case, the court found Italy was an available and adequate place to litigate the claims. Among other things, the plaintiffs argued Italy was not an adequate place to litigate because of 1) court delays (plaintiffs' expert estimated it would take 15-20 years to resolve the case); and 2) the lack of a class action mechanism. The court disagreed with those arguments. It reviewed the private interest factors finding the access to evidence needed to prove plaintiffs' case "tilted towards Italy". It noted the vessel was Italian-flagged with an Italian crew. Witnesses to what happened during the wreck and salvage efforts were in Italy or elsewhere in Europe. The court also noted physical evidence including the wreck itself, the Italian government reports, the vessel's log, maintenance records, the recording from a shore-based camera, and evidence relating to the damages suffered by the Italian plaintiffs were in Italy. It also concluded the cost of bringing the necessary witnesses from Italy to the United States would "significantly outweigh" the cost of bringing witnesses from the United States to Italy because there were more witnesses in Italy and Europe. The court also rejected plaintiffs' argument that Italy was not an adequate place to litigate because a contingency attorneys' fee system is not available there. With respect to the public interest factors, the court found Italy had a "blatantly stronger interest" in the case and Italian law would likely apply. Finally, because the defendants agreed to the re-filing of the case in Italy, the court concluded the plaintiffs, who were Italian, would not suffer any undue inconvenience or prejudice if the lawsuit proceeded in Italy.

Theoretically, the federal court is always open for maritime matters. Nonetheless, it may decline to decide a case that would otherwise be within its jurisdiction.