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MARITIME LAW ASSOCIATION

Cruise Lines + Passenger Ships Committee Newsletter

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JOINT COMMITTEE MEETING CRUISE LINES AND PASSENGER SHIP COMMITTEE, MARITIME TORTS AND CASAULTY COMMITTEE, AND SALVAGE COMMITTEE

Date/Time:
Wednesday, May 3, 2016 @ 11:00 am – 1:00 pm

Location:
Midtown Hilton Hotel
1335 Ave of the Americas
New York, NY 10019
Telephone: (212) 586-7000
Sutton North and Center

AGENDA

JOINT COMMITTEE MEETING
CRUISE LINES AND PASSENGER SHIPS
MARINE TORTS AND CASUALTIES, AND SALVAGE COMMITTEE

CHAIRS:
CAROL FINKLEHOFFE, ESQ.
CHARLES DELEO, ESQ.
JASON HARRIS, ESQ.

I. Panel discussion on the Costa Concordia operation and other issues

Discussion Panel: R. Michael Underhill with John A. Witte, President ISU and Pietro Palandri, attorney for Costa Concordia

II. The El Faro and Potention Limitation Implications

Lisa Reeves, Esq.

Lessons Learned: Casualty Responses
From a Club's Perspective

Nick Platt

III. Cruise Passenger Rights & Remedies 2016

Judge Thomas A. Dickerson

NAVIGATING THE UNITED STATES LIMITATION OF LIABILITY ACT

By: Carlos Felipe Llinas Negret, Esq., Lipcon, Margulies, Alsina & Winkleman, P.A., Miami, Fl

El Faro was a United States-flagged, cargo ship. On September 30, 2015 at 2:00 a.m., *El Faro* left Jacksonville, Florida for San Juan, Puerto Rico, carrying a cargo of 391 shipping containers, about 294 trailers and cars, and a crew of 33 people – 28 Americans and 5 Poles.[1]

At the time of the departure, Hurricane Joaquin was still a tropical storm, but meteorologists at the National Hurricane Center forecast that it would likely become a hurricane by the morning of October 1, on a southwest trajectory toward the Bahamas.[2] Joaquin became a hurricane by 8:00 a.m. on September 30, then rapidly intensified.[3] The storm reached Category 3 intensity by 11:00 p.m., packing maximum sustained winds of 115 mph.[4] *El Faro's* charted course took it within 175 nautical miles of the hurricane. 10 hours after departing Jacksonville, *El Faro* was steaming at full speed and deviating from its charted course, heading directly into the storm.[5] At around 7:30 a.m. on October 1, less than 30 hours after the ship sailed from Jacksonville, the United States Coast Guard received a satellite notification that the vessel had lost propulsion, taken on water, and had a 15-degree list.[6] The loss of propulsion doomed the ship as it was engulfed by high seas whipped up by Joaquin.[7] The *El Faro* and its 33 crewmembers disappeared on October 1. It was the worst disaster involving a U.S.-flagged vessel since 1983.[8]

On October 30, 2015, Sea Star Lines, LLC, d/b/a TOTE Maritime Puerto Rico, Owner pro hac vice of the S.S. El Faro, filed a Verified Complaint seeking exoneration from or limitation of liability, under the United States Limitation of Liability Act, 46 U.S.C. §§30505-30511 ("Limitation Act"). In the Verified Complaint, TOTE declared that the value of El Faro is zero. This proceeding, referred to as a

[1] *U.S.-Based Cargo Ship With Crew of 33 Sank in Storm*. The New York Times, October 10, 2015. http://www.nytimes.com/2015/10/06/us/el-faro-missing-ship-hurricane-joaquin.html

[2] Daniel P. Brown (September 30, 2015). Tropical Storm Joaquin Discussion Number 9 (Report). Miami, Florida: National Hurricane Center. Retrieved October 7, 2015.

[3] Jack L. Beven (September 30, 2015). Hurricane Joaquin Public Advisory Number 10-A (Advisory). Miami, Florida: National Hurricane Center. Retrieved October 7, 2015.

[4] Daniel P. Brown and Stacy R. Stewart (September 30, 2015). Hurricane Joaquin Public Advisory Number 13 (Advisory). Miami, Florida: National Hurricane Center. Retrieved October 10, 2015.

[5] *Doomed cargo ship reportedly left normal course, sailed into the track of Hurricane Joaquin*. Fox News (Fox Entertainment Group). Associated Press. October 9, 2015.

[6] Update 2: Coast Guard Searching for Container Ship Caught in Hurricane Joaquin. Miami, Florida: United States Coast Guard. October 3, 2015.

[7] *El Faro reported 'hull breach' before sinking in hurricane*. Reuters, October 20, 2015. http://www.reuters.com/ article/us-ship-elfaro-idUSKCN0SE2UM20151020

[8] Id.

limitation action, seeks to limit a shipowner's liability to the value of the vessel after a maritime casualty. In the case of El Faro the limitation action seeks to limit TOTE's liability to zero. To understand whether TOTE will ultimately prevail in the limitation action, requires a close analysis of the origins, applications and exceptions to the Limitation Act.

Admiralty and maritime law includes a host of special rights, duties, rules and procedures. See, *e.g.*, 46 U.S.C. App. § 721 *et seq.*(wrecks and salvage); § 741 *et seq.* (suits in admiralty by or against vessels or cargoes of the United States); 46 U.S.C. § 10101 *et seq.*(merchant seamen protection and relief). Among these provisions is the Limitation Act, 46 U.S.C. §§30505-30511. The Limitation Act allows a vessel owner to limit liability for damage or injury, occasioned without the owner's privity or knowledge, to the value of the vessel or the owner's interest in the vessel. The central provision of the Act provides at §30505(a)-(b):

> **(a) In general.**--Except as provided in section 30506 of this title, the liability of the owner of a vessel for any claim, debt, or liability described in subsection (b) shall not exceed the value of the vessel and pending freight. If the vessel has more than one owner, the proportionate share of the liability of any one owner shall not exceed that owner's proportionate interest in the vessel and pending freight.
>
> **(b) Claims subject to limitation.**--Unless otherwise excluded by law, claims, debts, and liabilities subject to limitation under subsection (a) are those arising from any embezzlement, loss, or destruction of any property, goods, or merchandise shipped or put on board the vessel, any loss, damage, or injury by collision, or any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of the owner.

Congress passed the Limitation Act in 1851 "to encourage ship-building and to induce capitalists to invest money in this branch of industry." *Norwich & N.Y. Transp. Co. v. Wright,* 13 Wall. 104, 121 (1871). See also *British Transport Comm'n v. United States,* 354 U.S. 129, 133-135, (1957); *Just v. Chambers,* 312 U.S. 383, 385 (1941). The Act also had the purpose of "putting American shipping upon an equality with that of other maritime nations" that had their own limitation acts. *The Main v. Williams,* 152 U.S. 122, 128 (1894). See also *Norwich Co., supra,* at 116-119 (discussing history of limitation acts in England, France, and the States that led to the passage of the Limitation Act).

An example of the use of the Limitation Act is the sinking of the RMS *Titanic* in 1912. Upon her sinking the owners rushed into the federal court in New York to file a limitation of liability proceeding. After the *Titanic* sank, the only portions of the ship remaining were the 14 lifeboats, which had a collective value of

about $3,000. This was added to the "pending freight"—which means the ship's earnings from the trip from both passenger fares and freight charges[9]—to reach a total liability of about $91,000. The cost of a first-class, parlor suite ticket was over $4,350. The owners of the *Titanic* were successful in showing that the sinking occurred without their privity and knowledge, and therefore, the families of the deceased passengers, as well as the surviving passengers who lost their personal belongings, were entitled only to split the $91,000. Another example was when Transocean filed in the U.S. District Court for the Southern District of Texas in 2010 to limit its liability to just its interest in the *Deepwater Horizon* which it valued at $26,764,083. This was in the wake of billions of dollars in liabilities resulting from the Deepwater Horizon oil spill that followed the sinking.[10]

The Limitation Act is much criticized. The Supreme Court has observed that it is not a "model of clarity" *Lewis*, 531 U.S. at 447 (quoting to T. Schenbaum, Admiralty and Maritime Law, 299 (4th Ed. 2004)("This 1851 Act, badly drafted even by the standards of the time, continues in effect today"). Having created a right to seek limited liability, Congress did not provide procedures for determining the entitlement. It wasn't until 1872 (20 years after its passing) that the Supreme Court designed procedures for determining the entitlement to limitation. The Eleventh Circuit has described it as "hopelessly anachronistic and long ago due for a general overhaul." *See Lewis Charters Inc. v. Huckins Yatcht Corp.*, 871 F. 2d 1045, 1054 (11th Cir. 1989); see also, In Re: Esta Later Charters, Inc., 875 F. 2d 234 (9th Cir. 1989), (the Limitation Act is "a vestige of time gone by").

On several occasions the Eleventh Circuit has criticized the Limitation Act as particularly illogical when applied to pleasure vessels, and has observed that insurance companies are the true beneficiaries of the Limitation Act. *See Keys Jet*, *In Re: Keys Jet Skis*, *Inc.*, *v. United States*, 893 F. 2d 1225, 1228 (11th Cir. 1990), *citing Lewis Charters Inc. v. Huckins Yatcht Corp.*, 871 F. 2d 1045, 1054 (11th Cir. 1989) ("owners of pleasure vessels may limit their liability under the Limitation Act [although] ... there is little reason for such a rule.").

The commentators agree that the statute is outdated and obsolete. *See Esta Later Charters, Inc., v. Ignacio*, 875 F. 2d 234 (9th Cir. 1989):

> Judicial expansion of the Limited Liability Act at this date seems especially inappropriate. Many of the conditions in shipping industry which induced the

[9] Frederick B. Goldsmith (November 2011). *The Vessel Owners' Limitation of Liability Act: An Anachronism that Persists, For Now*." Legal. *Marine News*. p. 44. Retrieved 2014-06-12.

[10] Transoncean, Ltd. Press Release, May 13, 2010. http://phx.corporate-ir.net/phoenix.zhtml?c=113031&p=irol-newsArticle&ID=1426526&highlight=

> 1851 Congress to pass the Act no longer prevail … Commentators agree: "[T]he Limitation Act, passed in an era before the corporation had become the standard form of business organization and before present forms of insurance protection (such as Protection and Indemnity Insurance) were available, shows increasing signs of economic obsolescence.

Procedural Requirements

Rule F. The procedures for a limitation action are found in Supplemental Admiralty and Maritime Claims Rule F. Rule F sets forth the process for filing a complaint seeking exoneration from, or limitation of, liability. The district court secures the value of the vessel or owner's interest, marshals claims, and enjoins the prosecution of other actions with respect to the claims. In these proceedings, the court, sitting without a jury, adjudicates the claims. The court determines whether the vessel owner is liable and whether the owner may limit liability. The court then determines the validity of the claims, and if liability is limited, distributes the limited fund among the claimants. *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438 (2001).

A single forum is provided for determining (1) whether the vessel and its owner are liable at all; (2) whether the owner may in fact limit liability to the value of the vessel and pending freight; (3) the amount of just claims; and (4) how the fund should be distributed to the claimants. Limitation extends both *in personam* to the shipowner as well as *in rem.*[11]

The complaint (formerly petition) for exoneration or for limitation of liability must be filed in the federal district court in admiralty jurisdiction.[12] The shipowner may plead for exoneration or limitation in the alternative in a single complaint.[13] Venue is proper in any district where the vessel has been attached or arrested or, if there has been no attachment or arrest, in the district where the owner has been sued.[14] If suit has not yet been commenced against the owner, the limitation complaint may be filed in any district where the vessel is physically present, or, if the vessel is not within any district (because it is lost or in a foreign country), the complaint may be filed in any district. Limitation may be invoked either as a defense to an action seeking damages or as an independent complaint in admiralty.[15]

Six-Month Statute of Limitation to File Claims. The complaint must be filed within six months after the owner has received written notice of a claim.[16] The six months notice requirement is strictly construed, and pleading limitation as a defense in an answer to a claimant's complaint will not extend or toll the time limit. If a shipowner files in the wrong

[11] T. Schoenbaum, Admiralty and Maritime Law, §15-5 (5th ed. 2015), citing *Hartford Accident & Indemnity Co. v. Southern Pacific Co.*, 273 U.S. 207 (1927).

[12] The only court of competent jurisdiction is the district court in admiralty. The state courts accordingly do not have concurrent jurisdiction under the saving to suitors clause, 28 U.S.C. § 1333. This is based upon the fact that the remedy of limitation is not one at common law. T. Schoenbaum, Admiralty and Maritime Law, §15-5 (5th ed. 2015), citing *Norwich & New York Transp. Co. v. Wright*, 80 U.S. (13 Wall.) 104 (1871).

[13] *In re Tetra Applied Technologies LP*, 362 F.3d 338 (5th Cir. 2004).

[14] T. Schoenbaum, supra.

[15] T. Schoenbaum, supra.

[16] T. Schoenbaum, supra. 46 U.S.C. § 30511. *In re Oceanic Fleet, Inc.*, 807 F.Supp. 1261 (E.D.La.1992). *See also* Rule F(1). Notice of a claim is usually in the form of service of a summons and a complaint, but it may also be asserted by letter. For a discussion of the tests employed by courts to determine whether a writing contains all the information needed to constitute a "written notice of claim" under the Limitation of Liability Act, see *P.G. Charter Boats, Inc. v. Soles*, 437 F.3d 1140, 2006 AMC410 (11th Cir. 2006).

venue, and after the action is dismissed, files in the correct venue out of time, the court may reject equitable tolling if it finds the shipowner's oversight was not in good faith.

Limitation Fund. A limitation action cannot be maintained unless the shipowner deposits with the Court money, or as is usually done, a bond equal to the value of the vessel. *See* Fed. R. Civ. P. Supp. F(2). Posting of this security creates a limitation fund from which successful claimants in the action can be paid pro rata. Fed. R. Civ. P. Supp. F(1)(b).

If the limitation fund is insufficient to pay injury or death claims (e.g. the shipowner posts a bond of $1,000, when Claims amount to $20 million), under Fed. R. Civ. P. Supp. Rule F(7) a claimant can file a motion to compel the shipowner to increase the value of the limitation find. Pursuant to Supplemental Admiralty Rule F(7), "any claimant may demand that the deposit or security be increased on the ground that it is insufficient to carry out the provisions of the statutes relating to claims in respect of loss of life or bodily injury; and … the court may similarly order that the deposit or security be increased or reduced."

The Claimant can do this in two ways. The Claimant can petition the court to require the shipowner to increase the limitation fund to include the value of all the vessels in its flotilla. Under this mechanism, known as the 'flotilla doctrine' and developed by Judge Learned Hand in *Standard Dredging v. Co. v. Kristiansen,* 67 F. 2d 548 (2d Cir. 1933), if the shipowner operates more than one vessel, the court can order the shipowner to post a bond for the value of all of the vessels in its fleet. *See Foret v. Transocean Offshore (USA), Inc.,* 2011 U.S. Dist. LEXIS 96679 (E.D. La. 2011):

> Procedurally, courts have permitted [claimants] to invoke the flotilla doctrine in a variety of ways. Where a limitation fund already exists, Rule F(7) of the Supplemental Rules for Certain Admiralty and Maritime Claims permits Plaintiffs to file a Motion to Increase the Limitation Fund, when the amount tendered is less than the value of the [combined group of] vessel(s).

Courts determine whether vessels together constitute a flotilla by applying the "single venture test." Id. For a group of vessels to be considered a flotilla, the single venture test sets forth three requirements: they must (1) be owned by the same person, (2) be engaged in a common enterprise, and (3) be under single command. Id.; *See also Complaint of Tom Quin Co.*, Inc., 806 F. Supp. 945 (M.D. Fla. 1993), citing *Patton–Tully Transportation Co. v. Ratliff*, 715 F. 2d 219, 222 (5th Cir.1983)("the limitation fund liability of a defendant ship-owner may be increased to include his interest in the value of all vessels engaged in a common enterprise or venture with the vessel aboard which the loss of or injury was sustained").

Personal injury claimants can also challenge the limitation fund by filing a motion to increase the fund under 46 U.S.C. § 30506(b). To increase the fund under § 30506(b), two requirements must be met: (1) the amount of the fund must be insufficient to pay all claims in full; and (2) the portion of the fund available to pay personal injury and death claims must be less than $420 times the tonnage of the subject vessel. 46 U.S.C. § 30506(b); *Complaint of Caribbean Sea Transport, Ltd.*, 748 F.2d 622 (11th Cir. 1984); *In Re Pan Oceanic Tankers Corp.*, 332 F.Supp. 313 (S.D.N.Y. 1971); *In Re Alva Steamship Co.*, 262 F.Supp. 328 (S.D.N.Y. 1966).

Privity or Knowledge

The Limitation Act provides that the owner may limit liability only if it shows that the fault causing the loss occurred without its "privity or knowledge." See 46 U.S.C. §183(a); *Moeller v. Mulvey*, 959 F. Supp. 1102 (D. Minn. 1996); *Carr v. PMS Fishing Corp.*, 191 F. 3d 1 (1st Cir. 1999); *Keller v. Jennette*, 940 F. Supp. 35 (D. Mass. 1996). The privity and knowledge issue is the favored method claimants use to deny shipowners the benefits of the Limitation Act. *See* T. Schenbaum, Admiralty and Maritime Law, 820 (4th Ed. 2004).

Privity and knowledge under the statute "have been construed to mean that a shipowner knew or should have known that a certain condition existed." *Potomac Transport, Inc., v. Ogden Marine, Inc.*, 909 F. 2d 42, 46 (2d Cir. 1990). The determination of whether a shipowner may limit liability involves a two-step analysis: (1) a determination of what acts of negligence or unseaworthiness caused the casualty and (2) whether the shipowner had knowledge or privity of these acts. The burden of proving negligence or unseaworthiness is on the claimant; then the burden shifts to the shipowner to prove lack of privity or knowledge. *Hercules Carriers, Inc. v. Claimant State of Florida, Dep. of Transp.*, 768 F. 2d 1558 (11th Cir. 1985):

> Under this statute, Hercules is liable beyond the value of the ship if it had privity and knowledge before the start of the voyage of acts of negligence or conditions of unseaworthiness that caused the accident. Moreover, Hercules is not entitled to limitation if the ship was unseaworthy due to an incompetent crew or faulty equipment. Therefore, a determination of whether a shipowner is entitled to limit his liability involves a two-step analysis. As stated in *Farrell Lines, Inc. v. Jones,* 530 F.2d 7 (5th Cir.1976): "First, the court must determine what acts of negligence or conditions of unseaworthiness caused the accident. Second, the court must determine whether the shipowner had knowledge or privity of those same acts of negligence or conditions of unseaworthiness." 530 F.2d at 10. Moreover, once a claimant satisfies the initial burden of proving negligence or unseaworthiness, the burden of proof shifts to the shipowner to prove the lack of privity or knowledge.

Lack of actual knowledge by the shipowner is not sufficient to invoke the protections of the Limitation Act. As the Eleventh Circuit explained in *Hercules Carriers*, the shipowner's "burden is not met by simply by proving a lack of actual knowledge, for privity and knowledge is established where the means of obtaining knowledge exist, or where reasonable inspection would have led to the requisite knowledge." *Hercules Carriers, Inc.*, 768 F. 2d 1558, 1564 (11th Cir. 1985). "Thus, knowledge is not only what the shipowner knows but what he is charged with discovering in order to appraise himself of conditions likely to produce or contribute to a loss." Id.

INTERNATIONAL INSOLVENCY AND THE ARREST AND JUDICIAL SALE OF SHIPS IN GERMANY AND OTHER EU MEMBER STATES

Lina Wiedenbach, Dabelstein and Passehl, Hamburg, Germany

In recent years the maritime industry has become unpleasantly familiar with cross-border insolvencies, the OW Bunker global collapse amongst them. Whereas under normal circumstances, the power to arrest a vessel is an efficient means for a creditor to secure its interests against a debtor, such arrest may conflict with the rights and duties of the insolvency administrator to preserve all assets within the insolvent enterprise for the protection of the body of creditors. The same conflict of interests arises where a creditor wishes to realize this by pursuing a judicial sale.

This article aims to show how a creditor (foreign or domestic) may obtain an order for the arrest of a vessel belonging to an insolvent shipowner and/or pursue the judicial sale of such vessel:

- in Germany in the course of German insolvency proceedings,
- in another EU member state in the course of German insolvency proceedings and vice versa in Germany in the course of insolvency proceedings in another EU member state, or
- in Germany in the course of insolvency proceedings initiated in a non-EU member state (e.g. United States of America)

Insolvency Stages

German law distinguishes between two phases of the insolvency proceedings – the preliminary and the regular insolvency proceedings. The former essentially serves as a period of time to determine whether the company is de facto insolvent and if so, whether there are sufficient funds to cover the costs of the proceedings. The Insolvency Court generally appoints a preliminary insolvency administrator to evaluate the financial status of the company and supervise, or more rarely, take over the management. When the Insolvency Court

thereafter decides to open regular proceedings, the preliminary insolvency administrator will generally be appointed insolvency administrator.

Equal Treatment of Foreign and Domestic Creditors

German law makes no distinction between foreign and domestic creditors so the possibility to pursue an arrest or judicial sale in the course of German Insolvency proceedings is governed by the same rules for all creditors.

Ship-Arrest

Regular Insolvency Stage

Once regular insolvency proceedings are opened sec. 89 of the German Insolvency Act prohibits execution into the movable and immovable insolvent estate by individual creditors. This prohibition includes an arrest as a measure supporting the execution of claims. Arrest orders already granted over the insolvency estate will be lifted.

Preliminary Insolvency Stage

During the preliminary insolvency stage, the position is less clear. In theory, a creditor is free to apply for an arrest order. However, under sec. 21 of the Insolvency Act the Insolvency Court may, in its own discretion, put a stop to a creditor's execution measures – including an arrest – by issuing a protective prohibition order – but only in relation to *movables*, not *immovable property*. It is disputed if, under German law vessels shall be considered *immovable* property for the purpose of this provision and thus, excluded from its scope of application. As will be shown below the issue is of relevance if the vessel of an insolvent owner happens to be abroad in foreign waters.

The prevailing opinion among legal academics is that they are to be considered immoveable because 1) as stated above arrest is considered a measure of execution in German law, and 2) according to sec. 864 the German Code of Civil Procedure *registered ships* are subject to the rules applicable to immovable property for the purpose of measures of execution.

This line was followed by the Hamburg Local Court in a recent decision in 2015[17]. The court held that any registered ship is subject to the rules of immovable property – regardless of whether the property in question is located abroad. It thereby rejected a much criticized decision by the Bremen Regional Court made in 2011[18]. In that case involving a vessel located in Australia and belonging to an insolvent owner the Bremen court did indeed concede that, generally, registered vessels are to be treated as immovable property for the purpose of measures of execution (in this case by the financing bank seeking to arrest the ship and to enforce the mortgage). Nevertheless and based on the interpretation of sec. 21 in the light of the preparatory works, the court concluded that registered vessels located *outside of Germany* are to be treated as *movable property*. The Court reasoned that the legislator's intention had been to relieve the Insolvency Court from the additional burden of deciding on measures of execution into *immovables* by leaving this area to the competent Enforcement Court (the court where the immovable is located) – which the Bremen Court surmised correctly. However, the following assumption by the Bremen court that the legislator in doing so *had overlooked* the fact that when the relevant property is located outside the German jurisdiction there would be no German competent court to prevent measures of execution is not well founded. Nevertheless, the court decided to close this perceived "lacuna" in sec. 21 by reasoning that the legislator's overriding objective was the protection of the community of creditors which would be compromised if the arrest by an individual creditor against property abroad was excluded from the insolvency court's jurisdiction under sec. 21.

[17] AG Hamburg, Decision from 3.3.2015 – 67a IN 400/14.
[18] LG Bremen, Decision from 14.08.2011 – 2 T 435/11.

So far there are these two conflicting judgments from the Bremen and the Hamburg court on the issue of ships being a moveable or immoveable object in the context of the preliminary insolvency stage so it seems that a creditor's right to proceed with an arrest depends on whether other courts follow either Hamburg or Bremen.

It is suggested, however, that the decision by the Bremen District Court is based on the erroneous premise of a "lacuna" and that questions regarding measures of execution into registered vessels, whether located in German waters or not, are subject to the rules of immovable property. As emphasized by the Hamburg Local Court, it is obvious that vessels as well as real estate can and often will be located abroad and that the decision by the legislator to exclude property not located in Germany was a conscious one. As a consequence, German law offers no means to prevent the arrest of a registered vessel outside of Germany in the course of the preliminary insolvency proceedings. This may be a blessing or a curse, depending on the interest involved. Also, this does not mean that the insolvency administrator may not be able to hinder an arrest in the foreign jurisdiction where the vessel is located under the applicable foreign regime.

Security Issued

Even a security issued by the insolvent debtor prior to the preliminary proceedings may be revoked under certain conditions. Among other things, since 2014 the Insolvency Act contains a provision *automatically* revoking a security issued within one month prior to the application to open insolvency proceedings. This presumably includes also an arrest lien registered against the vessel within the one month period. The rule, however, does not affect the validity of a security issued by a third

party such as a bank or P&I Club letter of Undertaking. Neither does the rule apply if the creditor has already enforced a security issued by the insolvent debtor by way of judicial sale.

Enforcement

As far as immovable property is concerned, the German Insolvency Act contains an exception to the rule that acts of enforcement against the debtor's property are prohibited once the insolvency proceedings are instituted. As stated above under "Ship-Arrest", for the purpose of measures of execution, registered vessels are subject to the rules applicable to immovable property. In effect, a creditor with an enforceable claim may apply for a judicial sale despite ongoing insolvency proceedings. The application must be made to the court where the *property is located* – the enforcement court – (i.e. not the Insolvency Court). Also foreign vessels that would have had to be registered in Germany, if they would have been German vessels (e.g. commercial ships of a LoA of more than 15 meters), count as registered vessels.

The judicial sale can be stayed by the enforcement court upon application of the insolvency practitioner. Once the regular insolvency proceedings have been opened, the court handling the judicial sale will grant a stay in the following situations: (i) where the first creditor's meeting has not yet taken place, (ii) where the immovable property is necessary for the continuation of the enterprise (also if the continuation is only preliminary and liquidation the ultimate aim), (iii) where the execution would put an already issued insolvency plan at risk, or (iv) where the judicial sale would not generate a reasonable compensation for the insolvency estate. Exception is made for the case however, that, based on the creditor's financial situation, it cannot be reasonably required that the sale is postponed. Already during the preliminary insolvency proceedings, the administrator can apply for a stay although at this stage, a stay will only be granted if the court is convinced that it is necessary to avoid any prejudice to the financial status of the estate.

Recognition of Insolvency Proceedings and Judgments between EU Member States

Germany, as most EU member states, has not adopted the UNCITRAL Model Law on Cross Border Insolvencies. Instead the Regulation EC 1346/2000 on Insolvency Proceedings settles questions of jurisdiction, applicable law recognition and enforcement in relation to other EU member states (with exception for Denmark). The Regulation will be replaced in June 2017 by Regulation (EU) 2015/848, which, however, is essentially based on similar principles as its predecessor.

Under both Regulations the law applicable to the main insolvency proceedings is that of the member state where the proceedings have been initiated. Other member states are obliged to recognize any judgment by the initiating state by which the insolvency proceedings are opened and such judgment shall, with no further formalities, produce the same effect in all other member states as in the "opening state". Thus, for example, once regular insolvency proceedings have been opened in Germany, no other EU member state is allowed to arrest property belonging to the insolvent estate because of the above mentioned prohibition in German law for creditors to execute into the insolvency estate after this point of time. The obligation to recognize judgments (the term being used here in a broad sense including orders with a similar effect) also extends to judgments concerning the course and closure of the proceedings and as judgments relating to preservation measures

taken after the application to institute insolvency proceedings. Consequently, also a decision by a German court of the kind described above prohibiting measures of execution into the debtor's assets during the preliminary insolvency proceedings must be recognized by all other EU member states.

The picture becomes complicated, however, by a provision in the Regulation(s) excluding rights *in rem* from the recognition when the property in which the right is vested is situated *within the territory of another member state* than the "opening state". With regard to ships the exception means that the fact that main insolvency proceedings were opened against a shipowner in member state "A" does not prevent member state "B" to issueB an arrest order upon the application of a creditor with a right *in rem* in the vessel, *regardless* whether the insolvency law of member state "A" prohibits individual creditors to execute into the insolvency estate. The definition of what constitutes a right *in rem* in a vessel, however, is not uniform throughout the member states and the definition provided by the Regulations (in extract: "The rights referred to in paragraph 1 [rights in rem] shall in particular mean: […] the rights to dispose of assets […] by virtue of a lien or a mortgage [….]") is neither clear nor exhaustive. Indeed, the question has been answered differently across the member states. The following may serve as examples:

In a French decision[19] a maritime claim for bunker supplies was not considered a right *in rem*. A mortgage on the other hand, was, and the creditor bank obtained an arrest order in France despite ongoing insolvency proceedings against the Owner in Italy. Both Belgium[20] and Malta[21], unlike France, have interpreted "*rights in rem*" to also include maritime claims. In an Italian decision[22] the court took a completely different, quite interesting approach: As the Regulation provides that "*property and rights of ownership of entitlement to which must be entered in a public register*" shall be considered situated in the member state in which the *register* is kept, so the abovementioned exception in the Regulation concerning rights *in rem* did not apply in the first place because under the Regulation the location jurisdiction of a registered vessel and the state of where the register is kept are always identical.

Recognition of Insolvency Proceedings and Judgments of Non-EU Member States

In relation to non-EU member states, German law recognizes ipso jure the act of instituting and concluding foreign insolvency proceedings as well as preservation measures ordered prior to the opening of such proceedings subject to two conditions: (1) the recognition must not be manifestly incompatible with fundamental principles of German law, and (2) the courts of the state of the opening of proceedings must have *jurisdiction in accordance with the principles for founding jurisdiction under German law*: the so-called "mirror-image" doctrine. The decisive test in other words is whether the foreign court would have had jurisdiction to institute insolvency proceedings, if, hypothetically, the German Insolvency Statute applied. Exclusive jurisdiction pursuant to the German Insolvency Statute is established where the centre of the

[19] *Puglia di Navigazione S.p.a. v. Cambiaso & Risso Marine S.p.a., Il Diritto Marittimo* 2013, 198 and *Droit Maritime Français* 2012, 131.
[20] *MS Hannes C*, Antwerp Court of Appeal, issued on 4 March 2009.
[21] *Av Louis Cassar Pullicino vs MV Beluga Sydney*, Sworn Application No. 1136/2011, decided by the First Hall, Civil Court on 30 December 2011.
[22] *Svitzer Salvage BV v. Celia Schiffahrtsgesellschaft MNH & Co Reederei KG, Il Diritto Marittimo* 2013, 69. The La Spezia court upheld the precedent set by the Venice court in AS Dan-Bunkering Ltd v Delphin Kreuzfahrt GmbH, Tribunale Di Venezia 21-XII-2010 [2011] *Il Diritto Marittimo 276-286*.

debtor's business activity is situated. Where the "mirror-image" test fails the ongoing foreign proceedings will not prevent a creditor from arresting a ship or selling it through a judicial sale.

If on the basis of the "mirror-image" test the foreign decision to institute insolvency proceedings is recognized the main rule applies that the effects of an insolvency are governed by the laws of the jurisdiction where the insolvency proceedings were opened. No rule without exemption, however: when it comes to ***ships*** as part of the debtor's insolvent estate the insolvency proceedings are governed by laws of the state where the ship's register is kept (*lex libri siti*). Thus, if for example the relevant ships are registered in Germany the German Insolvency Act applies and the question whether the foreign creditor can actually jump the queue and arrest and sell the vessel is subject to that Act and its interpretation by German courts as referred to above.

Disclaimer: The authors s are not responsible for any actions (or lack thereof) taken as a result of relying on or in any way using information contained in this article and in no event shall be liable for any damages resulting from reliance on or use of this information. Readers should take specific advice from a qualified professional when dealing with specific situations.

UPDATE ON THE LAW

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Passenger Claims

Admiralty Jurisdiction

***Lipkin v, Norwegian Cruise Line Ltd.*, 2015 U.S. Dist. LEXIS 42243 (S.D.Fla. March 6, 2015)**

Admiralty jurisdiction applies where passenger was injured in walkway in terminal because the disembarking process is part of unloading passengers which satisfies the location test. The Nexus test is satisfied because the safe unloading of passengers from a cruise ship has obvious potential to disrupt maritime commerce. The Court found that the cruise line has a duty to warn of dangers beyond the point of disembarkation where passengers were invited or reasonably expected to visit.

***Newell v. Carnival Cruise Lines*, 2015 Fla. App. LEXIS 17260 (Fla. 3d DCA November 18, 2015)**

Case was governed by general maritime law where passenger sued for injuries as a result of a fall in the terminal after disembarking the vessel at the conclusion of her cruise. The two prong admiralty test was satisfied. First, there was connectivity as the plaintiff alleged the cruise line failed to provide her with a safe walkway. The location test is satisfied because a vessel being unloaded has an impact is felt on shore at the time and place not remote from the wrongful act.

Costa Concordia

***A Beid-Saba v. Carnival Corp.*, 2016 WL 314096 (Fla. 3rd DCA 2016)**

The Third District Court of Appeal upheld the dismissal of a lawsuit brought by 57 plaintiffs, including 5 US citizens based upon *forum non conveniens*. The Court ruled that Italy was an adequate forum and the plaintiffs could pursue their claim there without any undue hardship. The public and private interests favored Italy and Carnival would suffer material injustice if the case was litigated in Florida. The Court found that a delay of many years was not reason to try the case in Florida when nearly all the evidence was in Italy.

Discovery

***Parker v. MSC Crociere S.A.*, 14-62475-CIV-UNGARO/OTAZO-REYES (S.D. Fla. May 18, 2015)**

Plaintiff's Motion to Compel a better response to her interrogatory, seeking details of prior slip and falls on a particular tile floor for the preceding three years, that the request was relevant or reasonably calculated to lead to the discovery of admissible evidence.

***Terman v. NCL (Bahamas) Ltd.*, case no.: 14-24727 (S.D. Fla. June 16, 2015)**

Surveillance video is not protected by the work product privilege and is discoverable. Defendant was required to produce CCTV footage of the plaintiff's incident prior to his deposition.

***Brown v, NCL (Bahamas) Ltd.*, case no.: 15-cv-21732-JAL (S.D. Fla. October 30, 2015)**

Surveillance video is not protected by the work product privilege and is discoverable. However, under the unique circumstances of the case, the plaintiff giving three different versions of the incident: her shipboard statement, the complaint, and the interrogatory response. The surveillance tape would be required to be turned over after the deposition of the plaintiff.

Forum Selection

***Sellers v. Carnival Cruise Line*, 2015 N.Y Misc. LEXIS 3550 (N.Y. Civ. Ct. Kings County Aug. 31, 2015).**

The New York state court held that it was not necessary to enforce Carnival's forum selection clause in a small claims matter because it was unreasonable to expect the plaintiff to bring that claim to Florida. Nonetheless, the plaintiffs case was dismissed as the court had no jurisdiction over Carnival's business activities in New York.

Loss of consortium

***Williams v. Carnival Cruise Lines*, 2016 WL 245312 (S.D. Fla. Jan. 21, 2016)**

Despite the plaintiffs' argument that the Supreme Court's decision in *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009) lifts the prohibition on loss of consortium claims in non-fatal personal injury maritime cases, the district court held that binding Eleventh Circuit precedent bars loss of consortium claims under maritime law. Even though the Eleventh Circuit has not addressed loss of consortium claims for maritime personal injury since *Townsend*, the overwhelming majority of courts within the Eleventh Circuit (and throughout the country) have continued to bar such loss of consortium claims.

Medical Malpractice

***Casorio v. Princess Cruise Lines, Ltd.*, 2015 U.S. Dist. LEXIS 100576 (C.D.Cal. July 30, 2015)**

In a decision limiting the holding in *Franza* , the courts ruled that a carrier does not have a legal to provide transportation to a particular type of hospital to obtain specialized care.

Rojas v. Carnival Corp., 2015 U.S. Dist. LEXIS 160201 (S.D. Fla. November 30, 2015)

While the court recognized a duty to timely secure medical treatment, summary judgment was granted where the plaintiff could not show that the delay caused by the cruise line caused any injury or exacerbation of injury.

***Cordani v. NCL (Bah.) Ltd.*, 2015 U.S. Dist. LEXIS 160893 (S.D.Fla. December 1, 2015)**

The plaintiff properly pled a liability claim for negligence of the ship's medical staff based upon joint venture. The complaint alleged that the cruise ship operator and medical defendants intended to create a joint venture and joined forces to operate the medical facility. As to joint control and interest the complaint alleged that the cruise line had the interest in the money it devoted to setting up the medical facility and the medical defendant had the interest in the time and labor expended in

operating the facility. Profits and losses where shared as the cruise line collected the charges and then shared them with the medical defendants. There was also a contractual arrangement laid out the the profit-sharing.

Negligent Infliction of Emotional Distress

***Crusan v. Carnival Corporation*, case no. 13-cv-20592-KMW (S.D.Fla. February 24, 2015)**

Applying the zone of danger test to limit recovery to those who sustain physical impact or who are placed in immediate risk of danger.

Pucci v. Carnival Cruise Line, 2016 U.S Dist. LEXIS 18392 (S.D.Fla. February 16, 2016)

General maritime law does not allow the plaintiffs in a wrongful death action brought on behalf of a nonseafarer to recover NEID. However, the plaintiff could seek emotional distress remedies under Virgin Islands' wrongful death statute as it supplements DOHSA applying the principles of *Yamaha*, 40 F.3d 622, 642 (2d DCA 1994).

***Tinker v. Yankee Freedom III, LLC*, case no. 15-10080-civ-JEM, (S.D.Fla. March 23, 2106)**

The plaintiff was found to be in sensory perception: (sight, sound, touch) when she witnessed the drowning death of her husband satisfying the zone of danger test.

***Martins v. Royal Caribbean Cruises*, Ltd., 2016 U.S. Dist. LEXIS 42516**

DOHSA did not preempt a claim for negligent inflection of emotional distress where the claim was not brought for the loss of the decedent, but the survivor's own experience. A plaintiff who is present at the scene of the decedent's death and suffers directly from the same negligent act is not precluded from recovering for their own losses a non-present plaintiff would be precluded.

New Trial

***Hausman v. Holland America Line-U.S.A. et.al.*, case no.: CV13-0937 BJR (W.D.Wa. January 5, 2016)**

The Court vacated a $21.5 million jury verdict award and ordered new trial in case where the plaintiff claimed he suffered from traumatic brain injury after being struck in the head by automatic sliding glass doors. Following trial the plaintiff's personal assistant came forward claiming that the plaintiff deliberately sabotaged the defendant's pre-trial discovery efforts. Plaintiff allegedly failed to produce and/or failed to disclose emails that he knew were relevant to his case, tampered with witness testimony, fabricated and/or

exaggerated the extent of his injuries and testified falsely at trial.

The moving party had the burden to demonstrate that the alleged discovery misconduct substantially interfered with the aggrieved party's ability to fully and fairly prepare for and proceed to trial. Substantial interference is shown by establishing the discovery misconduct precluded inquiry into a plausible theory, denied it access that could have been probative on an important issue or closed off a potentially fruitful avenue of direct or cross examination. Substantial interference may also be shown thought a presumption of interference. The court looks to the parties intent, accidental or inadvertent. Thus if there was a knowing and purposeful intent to suppress evidence than there is a presumption of interference.

Notice

***Lipkin v, Norwegian Cruise Line Ltd.*, 2015 U.S. Dist. LEXIS 42243 (S.D.Fla. March 6, 2015)**

Warning signs or warning labels may be evidence that a defendant had actual or constructive notice of a dangerous condition. However the mere implication of actual or constructive notice is insufficient to survive summary judgment. A plaintiff must show specific facts demonstrating, at least, that the purported defect was detectable with sufficient time to allow for corrective action.

Pleading Requirements

***Cordani v. NCL (Bah.) Ltd.*, 2015 U.S. Dist. LEXIS 160893 (S.D.Fla. December 1, 2015)**

The Court will not embark on an analysis of each alleged act or omission to determine whether the ship owner breached a duty. Even though certain of the alleged breaches of the ship owner's duty of reasonable care may not adequately state a negligence claim, the Court will not strike the alleged breaches in a line-item fashion.

Punitive Damages

***Crusan v. Carnival Corporation*, case no. 13-cv-20592-KMW (S.D.Fla. February 24, 2015)**

In order to properly plead intentional misconduct for the purposes of recovering punitive damages the plaintiff must allege the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result, and despite that knowledge intentionally pursued the course of conduct resulting in injury or damage.

***Fleischer v. Carnival Corp.*, case no.: 15-cv-24531-KMM (S. D. Fla. March 17, 2016)**

Punitive damages are recoverable under general maritime law when the defendant engaged in wanton, willful, or outrageous conduct. The plaintiff's claim for punitive damages would not be dismissed where the plaintiff alleged two prior incidents at the subject location. The defendant was not precluded at a later stage of the litigation from challenging the sufficiency of the facts alleged to support the demand for punitive damages.

Open and Obvious

***Lipkin v, Norwegian Cruise Line Ltd.*, 2015 U.S. Dist. LEXIS 42243 (S.D.Fla. March 6, 2015) and *Pucci v. Carnival Corp.*, 2015 U.S. Dist. LEXIS 156042 (S.D.Fla. November 18, 2015)**

A context specific inquiry which necessitates the development of factual records before the court can decide whether as a matter of law the dangerous was open or obvious. This Court

stated that this issue is more appropriately addressed at summary judgment phase and not on a motion to dismiss.

Shore Excursion

Richards v. Carnival Corp., 2015 U.S. Dist. LEXIS 52191 (S.D. Fla. April 21, 2015)

Motion to Dismiss was granted where the plaintiff failed to plead a factual basis as to why the cruise line knew or should have known that the ATV excursion was not safe in order to trigger a duty to warn. Plaintiff did properly plead a cause of action for apparent agency where the allegations could establish the necessary representation which could cause the plaintiff to reasonably believe the tour company was agent of cruise line. Plaintiff alleged that the cruise line negotiated a contact, marketed the tour, had a dedicated shore excursion desk, determined the price charged, collected the money onboard and had the sole discretion to determine refunds.

Pucci v. Carnival Corp., 2015 U.S. Dist. LEXIS 156042 (S.D. Fla. November 18, 2015)

Motion to Dismiss was denied where the cruise line argued it had no duty to warn of an open and obvious nature such as snorkeling in an open body of water. Cruise line failed to warn the plaintiff that the activity might not be appropriate for someone in her condition (age, limited swimming ability, and physical disability), or otherwise adequately train or supervise her. While cruise line's knowledge of her limited swimming ability and advanced age does not change the duty of reasonable care, cruise line may have had to do more for her than passenger with no disabilities.

Rojas v. Carnival Corp., 2015 U.S. Dist. LEXIS 160201 (S.D. Fla. November 30, 2015)

Summary judgment granted where the plaintiff was injured when she crashed a scooter rented while ashore from outside vendor. The plaintiff was unable to produce any evidence that would permit the jury to infer, without speculating, that improper maintenance caused the brakes to fail and therefore the plaintiff failed to state a cause of action for negligence and the therefore the cruise line had no duty to warn.

Witover v. Celebrity Cruises, Inc., 2016 U.S. Dist. LEXIS 22470 (S.D.Fla. February 4, 2016)

Plaintiff sued when injured on shore excursion that the cruise line represented would satisfy her special needs in a scooter. While there is no breach of contract of carriage against the cruise line absent a provision of safe passage in the ticket contract, the plaintiff could bring a claim for breach of contract of the shore excursion. Court held that the cruise line also had supplemental duties under reasonable care when it knows of passenger disabilities or handicaps. The Court added that whether the cruise line knew or should have known of the danger the passenger faced when being unloaded during the shore excursion is more appropriate at the summary judgment phase or at trial. Plaintiff did state a cause of action for negligent hiring and retention. She pled that the tour operators practiced and procedures were unsafe which satisfied the negligent retention claim that the operator was unfit or incompetent. The length of the cruise lines relationship with the tour operator satisfied the knew or should have known requirement. The scope of the relationship between the cruise line and tour operator is not controlled by the labels in their contract but rather it is intensively factual and requires discovery.

***Flaherty v. Royal Caribbean Cruises, Ltd.*, 2016 U.S. Dist. LEXIS (S.D.Fla. March 23, 2016)**

Cruise line had a duty to warn passenger that tour operator had a dangerous practice of having guests hold hands while hiking. The plaintiff does not have to allege what caused the passenger he was holding hands with to fall. Holding hands while hiking is also not an open and obvious danger to ordinary passengers without experience and knowledge of safe hiking practices.

***Thompson v. Carnival Corp.* 2016 U.S. Dist. LEXIS 41933, (S.D.Fla. March 30, 2016)**

The Court lacked general jurisdiction over the tour operator. Applying the recent Supreme Court holding in *Daimler AG v. Bauman,* 134 S.Ct. 746 (2014), the foreign corporation's operations in the forum must be so substantial and of such a nature as to render the corporation at home in forum only in exceptional circumstances.

***Kadylak v. Royal Caribbean Cruise, LTD.*, 2016 U.S. Dist. LEXIS 32320 (S.D. Fla. Mar. 1, 2016)**

The Plaintiff brought suit against the excursion provider and cruise line after the ship's Staff Captain, who was participating in an onshore motorcycle tour, crashed his bike into her and crushing her leg. The court deemed the waiver, which was governed by Tennessee law, unenforceable because general hold harmless provisions do not bar claims of negligence. The excursion provider's motion for summary judgment was denied because there were issues of fact as to whether the provider failed to follow its own policy when it allowed the inexperienced Staff Captain to ride, and whether the Staff Captain was actually part of the tour. The cruise line's motion for summary judgment was granted for the Plaintiff's negligence count because there were no facts to establish notice of a dangerous condition, and for Plaintiff's vicarious liability count because there was were no facts to establish that the Staff Captain was acting within the scope of his employment.

Standard of Care

***Cox v. Princess Cruise Lines, Ltd.*, 2015 U.S. Dist. LEXIS 112666 (C.D.Cal. August 25, 2015)**

Court acknowledged the reasonable care under the circumstances standard but noted that it is case specific. The greater the foreseeable risk, the greater the care and precaution required for the finding of reasonable care.

***Pucci v. Carnival Corp.*, 2015 U.S. Dist. LEXIS 156042 (S.D. Fla. November 18, 2015)**

A carrier with knowledge of a passenger's abnormal physical disability may have to do more under the reasonable care standard toward that passenger than it would toward a passenger with no physical disability.

Summary Judgment

***Smith v. Royal Caribbean Cruises, Ltd.*, 2015 U.S. App. LEXIS 13159 (11th Cir. July 29, 2015)**

The plaintiff was injured while swimming underwater in the onboard pool when his head hit the wall, which he could not see because the water was murky. The cruise line had no duty to warn the plaintiff because the murkiness of the water was an open and obvious condition.

***Pettit v. Carnival Corp.*, 2015 U.S. Dist. LEXIS 104490 (S.D. Fla. Aug. 10, 2015)**

Summary judgment granted after an injured cruise line passenger missed the statute of limitations. She filed her complaint in state court just 12 days before the ticket contract's one year statute of limitations ran, served the defendant two months later, and filed a new

complain in the district court only after the defendant sought dismissal in the state court. The court held that equitable tolling was not available because the plaintiff failed to bring suit in a timely fashion despite knowing the limitations period is running.

Cox v. Princess Cruise Lines, Ltd., 2015 U.S. Dist. LEXIS 112666 (C.D.Cal. August 25, 2015)

Disable passenger injured when ramp to balcony in her cabin came apart and caused her scooter to tip over. There was a genuine issue of fact as to whether the cruise line's act of supplying the unconnected ramp created a dangerous condition, or an unreasonable risk, which the cruise line failed to take appropriate measures to mitigate. Even if the defendant lacked actual notice of a structural defect, the cruise line could still be liable if the jury concluded that it should have known of the defect. Strict liability was not applicable because the cruise line is not a person engaged in the business of selling ramps for us or consumption and summary judgment granted as to that cause of action.

McQuillan v. NCL (Bah.) Ltd., 2015 U.S. Dist. LEXIS 156655 (S.D.Fla. November 19, 2015)

Summary judgment denied where a passenger fell off a step or drop-down. A difference in flooring level does not by itself constitute an inherently dangerous condition because the condition is open and obvious. However, a step may not be open or obvious where the character, location or surrounding conditions of the step down are not such that a reasonable person would expect it. Even though there was no evidence of knowledge of any prior injury causing incidents, notice was not required where the ship owner created the condition. It was a question of fact for the jury to determine if the defendant created a dangerous condition by failing to differentiate the flooring color, arranging luggage in a manner that concealed the drop-down and not posting warning or caution signs.

Lugo v. Carnival Corp., 2015 U.S. Dist. LEXIS 173398 (S.D. Fla. Dec. 31, 2015)

Defendant's motion for summary judgment was granted because the bunkbed ladder that did not reach the floor was an open and obvious condition. The Plaintiff and his family had been in the same cabin for four days and his children had used the ladder without incident.

Jaber v. NCL (Bahamas) Ltd., Case No. 1:14-cv-20158-KING (S.D. Fla. Mar. 2, 2016)

The plaintiff was injured in her stateroom when a bunk bed fell on her. The plaintiff's motion for partial summary judgment was granted as to liability because the defendant's merely denied the plaintiff's evidence of duty, causation, and notice, and offered no evidence of its own.

Teddivairma v. Carnival Corp., 2016 U.S. Dist. LEXIS 30160 (S.D. Fla. Mar. 9, 2016)

Defendant's motion for summary judgement on plaintiff's claim for punitive damages following her slip and fall was granted because the plaintiff could not show that the deck was actually wet. Further, defendant, which knew that the subject deck had an insufficient level of slip resistance, but took extensive steps to remedy the problem, displayed willful, wanton, or outrageous conduct.

***Taiariol v. MSC Crociere, S.A.*, 2016 U.S. Dist. LEXIS 48966 (S.D. Fla. Apr. 12, 2016)**

Plaintiff was injured when she slipped on the illuminated metal stair nosing in the ship's theater. The court granted defendant's motion for summary judgment, holding that the stair nosing was an open and obvious condition because it was illuminated and plaintiff stated that she had noticed it before her fall. Plaintiff's argument that the slipperiness of the stair nosing was not open and obvious was rejected. Alternatively, the court found that defendant's notice was not established by a "watch your step" sticker that was placed on the subject step by a third-party shipbuilder.

***Lombardie v. NCL (Bahamas) Ltd.*, 2016 U.S. Dist. LEXIS 48967 (S.D.Fla. April 12, 2016)**

Summary judgment granted in case where the plaintiff tripped over the threshold to the bathroom in her cabin. Court found that the bathroom step is not a dangerous condition and it is open and obvious through the ordinary use of plaintiff's senses. The condition was not unique to ships to have altered the standard of care.

Crew Claims

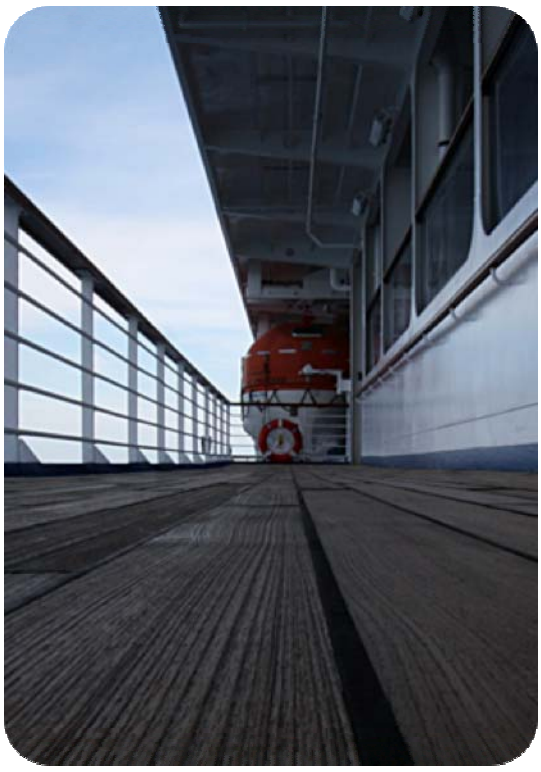
Arbitration

***Sierra v. Cruise Ships Catering & Servs. Int'l, N.V.*, 2015 U.S. App. LEXIS 19535 (CA11 Nov. 10, 2015)**

The Eleventh Circuit held that an arbitration agreement was "in writing within the meaning of [The Convention on the Recognition and Enforcement of Foreign Arbitral Awards]" when an arbitral clause–found in the collective bargaining agreement–was incorporated by reference into the plaintiff's signed employment contract. The district court need not have an actual arbitration agreement if an arbitral clause appears in a contract.

***Hodgson v. NCL (Bah.), Ltd.*, 2015 U.S. Dist. LEXIS 165323 (S.D. Fla. Nov. 24, 2015)**

It is well-established that a case will be dismissed when all the issues raised in the district court must be submitted to arbitration. The court refused to make an exception to the "frivolous" requests of a plaintiff asking for a stay in the action, rather than a dismissal, so the plaintiff could avoid filing fees and use the district court to obtain discovery for arbitration, among other things.



Bendlis v. NCL (Bahamas), Ltd., 2015 U.S. Dist. LEXIS 88845 (S.D. Fla. July 5, 2015)

The plaintiff argued that his written arbitration agreement was inapplicable because his employment contract with cruise line had expired prior to the litigated incident. The court held the arbitration clause survived expiration because of the broad language used – "any and all claims ... of any kind whatsoever relating to or in any way connected with the Seaman's shipboard employment ... shall be referred to and resolved exclusively by binding arbitration."

Ringewald v. Holland Am. Line - USA, Inc., 2015 U.S. Dist. LEXIS 89758 (S.D. Fla. July 10, 2015)

A cruise ship employee's claims were compelled to arbitration after the court concluded that all of the jurisdictional requirements of the New York Convention were met. The plaintiff's performance of duties aboard the ship at sea constituted "abroad" within the meaning of the Convention. The plaintiff's claims against defendants who were not signatories to her employment agreement were also compelled to arbitration because her claims against the non-signatory defendants were based on the same facts and were inherently inseparable from those against the signatory defendant.

Sierra v. Cruise Ship Catering and Srvcs. Int'l, N.V., Costa Crociere S.P.A, D.C. Docket No. 0:13-cv-62827-DPG (11th Cir. Nov. 10, 2015)

A copy of the employment agreement and incorporated CBA is sufficient to satisfy valid written arbitration on agreement. The court disagreed with the plaintiff's second argument because the Supreme Court has never applied the effective vindication doctrine to invalidate any provisions in an arbitration agreement.

Smith v. NCL (Bahamas) Ltd., 2015 U.S. Dist. LEXIS 115456 (S.D. Fla. Aug. 31, 2015)

Mere delay is insufficient to support a claim that a defendant has waived its agreement to arbitrate. The court held that the cruise line did not waive arbitration when, rather than paying the $3,000 filing fee for arbitration, it payed the plaintiff the entirety of the $1,440 he sought in his statement of claim.

Navarette v. Silversea Cruises, Ltd., 2015 U.S. App. LEXIS 13634 (11th Cir. Aug. 5, 2015)

The court held that there was a valid enforceable written agreement to arbitrate when the plaintiff separately signed Standard Terms, which contained an arbitration provision. A second employment contract signed by the plaintiff that did not contain an arbitration clause did not constitute a novation of the original employment contract because the plaintiff could not show any intent by the parties to extinguish the original contract.

Choice of law

Sierra v. Cruise Ships Catering & Servs. Int'l, N.V., 2015 U.S. App. LEXIS 19535 (CA11 Nov. 10, 2015)

The court held that the Supreme Court's holdings regarding the effective vindication doctrine did nothing to disturb its holding in *Lindo v. NCL (Bahamas) Ltd.*, 652 F.3d 1257, 1275 (CA11 2011)–"that an arbitration provision in a seaman's employment contract containing a choice-of-law provision is enforceable"–because those holdings did not apply the doctrine to invalidate "any provisions in an arbitration agreement, much less to invalidate [a] choice-of-law provision .. ."

Class action

***Celebrity Cruises, Inc. v. Rankin*, 2015 Fla. App. LEXIS 13778 (Fla. 3d DCA Sep. 16, 2015)**

The cruise line had all of its doctors sign an identical contract stating that it would pay them a commission on "total medical revenues." The doctors filed suit alleging that the cruise line had breached the contract by refusing to pay them for the sale of medications. The court affirmed an order certifying the doctors as a class because all the doctors' claims posed the same basic legal question arising from identical written provisions, and the calculation of each doctor's damages could be calculated using the same formula.

The difference in size between The Titanic and the modern cruise ship .

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