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In this issue of *The Arrest News*

Recent U.S. Admiralty Decisions Involving Coronavirus by George Chalos, Chalos & Co (USA)

As the world has been dealing with the evolving global pandemic brought on by the Novel Coronavirus ("COVID-19"), courts and arbitration tribunals in the United States of America have pressed forward with determining how parties' rights and remedies for traditional maritime claims have been modified, changed, and/or affected by COVID-19, if at all.

A/S Klaveness Chartering v. XCoal Energy & Resources, S.M.A. No. 4397 (April 20, 2020)

The Society of Maritime Arbitrators ("SMA") issued a partial final award directing the charterer XCoal to make a 95% freight payment as directed by Clause 30 of the charter party contract which provided that the initial payment was "payable on Bill of Lading weight against Owner's invoice 5 (five) working/banking days after loadport agents telegraphically confirm (to Charterers and Owners) that 'clean onboard' Bills of Lading marked 'freight payable as per Charter Party' have been signed and released to the parties as instructed by Charterers, less address commission." The charter party was a form Americanized Welsh Coal Charter, amended 1979. Owners claimed freight had been earned as of February 15, 2020, but not paid. Xcoal countered that the tariff battle between the US and China affected coal purchases in particular, and the situation had become complicated by the economic consequences of the coronavirus pandemic in China. The arbitrators rejected the coronavirus excuse, holding that Clause 30 is clear as is the law and commercial practice about the sanctity of freight payments under such clauses and in circumstances such as presented here. The obligation to pay the freight "is a separate, independent claim, not subject to

any offset, and, being wholly independent of other issues, [can] be disposed of separately." citing Metallgesellschaft A.G. v. M/V Capitan Constante, 790 F.2d 280, 281 (2d Cir. 1986). Payment was directed to be made within five (5) days of the Award and awarded interest from February 15, 2020.

Antares Mar. Pte Ltd. V. Bd. Of Comm'rs, 2020 U.S. Dist. LEXIS 222691 (Nov. 30, 2020)

On April 12, 2018 the M/V PAC ANTARES collided with the Nashville Avenue Wharf in New Orleans. As the vessel manuevered into position alongside the dock, a piece of steel plating that had been installed on the wharf came into contact with the vessel's starboard hull, ultimately puncturing the hull and the vessel's starboard bunker tank. The puncture resulted in a spill of about 2,000 gallons of heavy fuel oil into the Mississippi River. Antares Maritime sued the Dock Board and other interested parties as Owners of the wharf for damages in excess of $10,000,000. The Defendants counterclaimed against the Vessel and her Owners for negligence.

As part of the discovery process in U.S. litigation, parties are entitled to depose a corporate representative pursuant to Rule 30(b)(6). Generally, even when a plaintiff corporation is a foreign company (Antares is based in Singapore), the Federal Rules provide that the party representative witness must be produced for deposition in the jurisdiction where the action was commenced, i.e. New Orleans, Louisiana (located within the Eastern District of Louisiana). Antares moved for an order to Quash/Modify the Dock Board's notice of Rule 30(b)(6) deposition, seeking the Court's approval for the deposition of Antares' corporate representative to occur via videoconference in light of the COVID-19 pandemic. Defendant opposed the motion and requested the Court require the witness to appear in New Orleans (once safe to do so), consistent with the Federal Rules and traditional practice.

The Court found that the health concerns created by the COVID-19 pandemic constitutes "good cause" for the entry of an order requiring that the deposition take place by remote videoconference. citing In re Broiler Chicken Antitrust Litig., No. 1:16-CV-08637, 2020 U.S. Dist. LEXIS 111420, at *5 (N.D. Ill. June 25, 2020) (finding unless the Court is going to stay all depositions, which it was unwilling to do on a blanket basis, "the parties and their counsel are going to have to have to adapt, make some choices, be creative, and compromise in this and every other case in which they are involved during this time without modern precedent" until such time as there is a cure a vaccine for COVID-19, or something approaching so-called herd immunity).

Turner v. Costa Crociere S.P.A., 2020 U.S. LEXIS 184230 (S.D. Fla. Sept. 9, 2020)

Plaintiff, a passenger on the cruise ship the Costa Luminosa, filed a lawsuit against Costa Crociere S.P.A. and Costa Cruise Lines Inc. (collectively "Costa") alleging negligence by the operators of the ship which resulted in an outbreak of COVID-19 and claiming that Costa failed to warn the passengers of the associated risks. The Defendants argued that the case was required to be dismissed as all ticketed passengers had agreed to a forum selection clause which called for any and all disputes to be brought in Italy. Among Plaintiff's arguments for sustaining the lawsuit in Miami, Florida, were the arguments that requiring Plaintiff to litigate in Italy while recovering from complications of COVID-19 would be fundamentally unfair, plus the pandemic limited and restricted travel making it near impossible to pursue the claim in Italy. The district court rejected both claims.

First, the court held that while COVID-19 and a worldwide pandemic were not foreseeable at the time of contracting, it was always foreseeable that Plaintiff might be required to litigate in Italy while suffering from a lingering complication or physical injury. As the Court held, the fact that Plaintiff's injuries result from an unexpected and novel coronavirus, rather than a more traditional accident, does not change the fact that the parties anticipated all injury claims to be brought in Italy. In addition, the district court rejected that it was unfair to enforce a forum selection clause requiring a suit to be brought in Italy. The court cited the fact that while tourism travel is still restricted, Italy has started permitting visitors for specific reasons, including court

proceedings. The court further found that with the increase in technology and remote access to courts, Plaintiff did not establish any evidence that actual travel to Italy would be necessary to prosecute the case. Citing Petersen Energia Ingersora S.A.U. v. Argentine Republic, 2020 WL 3034824, at *11 (S.D.N.Y. June 5, 2020) (Preska, J.) ("Indeed, sure to be one of the enduring lessons of the ongoing COVID-19 pandemic is that we can accomplish far more remotely than we had assumed previously."). The court ruled that plaintiff had not demonstrated that the COVID-19 pandemic renders enforcement of the forum-selection clause fundamentally unfair to Plaintiff and dismissed the case on the basis that Italy was a valid and adequate alternative forum for Plaintiff to pursue its claims.

George Chalos
Chalos & Co., USA
w: www.chaloslaw.com
e: gmc@chaloslaw.com
t: +1 516 714 4300

Options of Registering Foreign Vessels Under the Russian Flag

By Alexey Karchiomov, EPAM Law Offices (Russia)

Recently one matter in particular has received significant attention from various foreign companies – the right to fly the Russian flag on foreign vessels.

The rising interest in sailing under the Russian flag is clear when one considers the restrictions Russian law places on foreign vessels. For example, cabotage in the Russian Arctic waters can only be performed by a vessel flying the Russian flag. In short, entities with intentions to participate in Arctic projects will almost positively need to sail under the Russian flag.

What are the options for registering a vessel in Russia?

Russia has six ship registers, and each of them has its own features. However, in this alert only four of these registers, which are relevant to our discussion, will be highlighted.

1. The State Ship Register

This is a general register designated for nearly all vessels which are owned by Russian entities. Considering that the owner of the vessel must be a Russian entity, the State Ship Register is not an attractive option for foreign companies wishing to retain ownership over their vessels.

A solution here might be to bareboat charter the vessel to a Russian entity since Russian law allows for the temporary right to fly the Russian flag for a period not exceeding the term of the bareboat charter.

2. Bareboat charter Register of Ships

There are certain general requirements that must be met in order for the vessel to be included in this register. These include:

- the bareboat charterer must be a Russian entity;
- the shipowner has given written consent thereof to the placement of the ship under the Russian flag;
- the mortgagee of the vessel (if any) has given the same consent;
- the legislation of the shipowner's State allows temporary re-flagging;
- the right of sailing under the foreign flag is or will be suspended at the time of granting the ship the right of sailing under the Russian Flag.

Besides the aforementioned ship registers, Russia also has two so-called preferential registers.

3. The Russian International Register of Ships

The main advantages of this Register are tax preferences and easier customs clearance. For instance, a vessel registered in the Russian International Register is exempt from property tax, vessel tax, income tax, import VAT and customs clearance fee.

However, you have to pay for the preferences. Therefore, the presence of the vessel in this register must be annually confirmed and an annual duty must

be paid, the amount of which depends on the size of particular vessel (gross tonnage).

It is important to note that not every vessel may be registered in the Russian International Register of Ships. Vessels are only eligible for registration if they meet the following the criteria:

- are owned or bareboat chartered by a Russian entity (on the terms described previously); and
- correspond to applicable age limits set depending on the type of vessel's activity.

For example, vessels used in the international carriage of goods can only be registered in the Russian International Register if they are under fifteen years old. An interesting point here is that the vessel retains her right to fly the Russian flag even after she becomes older than the prescribed age limit, provided that after inclusion in the register such vessel does not for any reasons lose the right to fly the Russian flag.

4. The Russian Open Register of ships

This Register was introduced as the first register in Russia for ships owned by foreign companies. However, this is not a straightforward rule - the company with ownership or the bareboat chartering company must redomicile in the Special Administrative Region in Russia and obtain the special status of an International Company, which requires investments in Russia and meeting other relatively specific conditions.

As for the preferences, they are nearly the same as those provided for the vessels registered in the Russian International Register with the exception of payment of custom clearance fees.

It should be noted that vessels included in the Russian Open register of Ships are not allowed to perform certain types of activities including cabotage and sea transportation of oil, gas and coal mined from Russian territory from the point of their extraction to the first Russian port. Therefore, the Open Register might not be a suitable option for companies involved in Arctic projects.

As you can see in order to choose the most suitable Ship Register in Russia, you must first analyse your firm's demands and then identify the most pressing goals. Only then will the optimal registration path be clear.

For video link on the topic, please see here: https://www.youtube.com/watch?v=yHEMzEqiMD0&t

Alexey Karchiomov
Egorov Puginsky, Afanasiev & Parters, Russia
w: www.epam.ru
e: alexey_karchiomov@epam.ru
t: +7 (812) 322 9681

Possible Problems With Judicial Auctions Of Vessels By Ashwin Shanker, George Rebello Chambers (India)

1. The Indian Admiralty court works efficiently in ship auctions and is fast improving. The Admiralty Court calls for separate valuation for Defendant vessels basis scrap demo value / trading value. Some thinkers say that there can be only one value for a Defendant vessel.

2. Admiralty Court auction orders / Bill of Sale allows use only for specified either further demo or trading. Is the ship truly free from liens and encumbrances if it is being judicially sold with conditional use? What happens if an auction purchaser changes his mind about how he wishes to use the vessel due to commercial market forces? What if the auction purchaser further onward sells her – is that ultimate buyer also bound by the Court's direction under which the vessel came to be sold?

3. The Bill of Sale issued might not suit the format of the intended flag requirements.

4. Courts sometimes permit the removal of third party equipment from a vessel after she has been sold. Is this unfair for the buyer since (a) it defeats the purpose of "as is where is" sale, (b) buyer had differently valued its bid, (c) unfair that buyer be later told that these items are not available for her use?

5. Sheriffs' Terms of sale and Court orders of auction often won't clarify how Port dues and unpaid agency fees are to be dealt with. Ports and agents seek to exercise their possessory lien over the Defendant vessel by preventing their outward Port clearance against the successful purchaser. This ambiguity creates inconvenience and financial concern to the successful bidder.

6. Often, unpaid crew remaining on board are unwilling to disembark from the vessel due to their attempt at exercising some sort of a possessory lien to recover their outstanding dues. This causes difficulty to the new buyer's incoming crew.

7. Customs department don't allow Port Clearances to vessels, unless the Vessel's previous import papers are shown. These are often available only with the original owner, and not with the auction purchaser of the Defendant vessel.

8. The bidding system is a peculiar combination of sealed bids and oral bids. Is there any purpose in having both?

9. Admiralty Courts have taken differing positions on what is to be done when bids don't meet their intended reserve price. Some have invited re-bidding, while others have taken a view that no purpose will be met, and simply sell it at the best available low price.

10. Some Admiralty Courts have taken a view that the vessel should not be sold to the original defendant, or its group company or related entities. Is this against the creditor's interest in blocking out potential highest bidders, most competent to run a ship that they previously owned?

11. In the event that a successful bidder defaults in purchasing the vessel, the token money / EMD gets forfeited. This amount is often higher than any actual financial loss that the Courts / creditors have suffered due to a failed bid. Forfeiting the EMD, in excess of what the actual losses are, is punitive and unfair.

Ashwin Shanker
George Rebello Chambers,
Mumbai, India
e: ashwin@georgerebello.com
t: +91 22 22820342

Subrogation Claims In Israel By Amir Cohen-Dor and Roiy Cohen, S. Friedman & Co. (Israel)

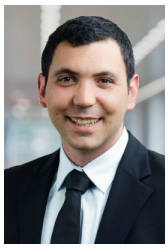
On February 2018 an oil tanker collided with a sea barge performing construction work for extension of the Haifa Port breakwater. The owners of the Barge were indemnified by their Romanian Insurers for the physical damages caused to the Barge, and the Insurer represented by our firm submitted a subrogation claim in Israel against the Haifa Port and the owners of the colliding tanker. The Haifa Port motioned the Haifa District Court requesting a dismissal of the subrogation claim, since the Romanian insurer was not registered as an insurer in Israel. The issue of a foreign insurer subrogation claim has been disputed for several decades in Israel, and there were contradictory judgments issued over the years.

The Haifa District Court denied the Haifa Port's motion and a motion to grant permission to appeal was submitted to the Supreme Court. Within the appeal proceedings the Haifa Port agreed that a marine insurer may submit subrogation claim in Israel, but that in the present matter the insurance policy is restricted to Israeli waters, and therefore the policy is lacking necessary international characteristics for it to be considered a marine insurance policy. On 22 December 2020 the Supreme Court published its precedential decision, affirming the District Court's decision allowing a marine foreign insurer to submit subrogation claim in Israel. The Supreme Court also ruled that the question whether an insurance policy is a marine policy is decided based on the nature of the insured risks, and not geographical characteristics. The Supreme Court held that a collision at sea between sea-going vessels could not be considered as nothing but a marine risk.

This Supreme Court precedent is crucial for insurance companies whose assureds operate in Israel, ensuring that these insurers may issue marine insurance policies without any concerns if they will be able to seek indemnity of the liable party which caused the damage.

We also believe that this precedent will lead to precedents in future cases allowing all insurers to submit subrogation claims in Israel, regardless of the nature of the insured risk. In our opinion, if insurance companies are denied the right of recourse simply because they are not registered in Israel, it is unjustified and may lead to foreign insurers to consider if to insure assets or operations in Israel.

Amir Cohen-Dor, Adv., Partner
e: amirc@friedman.co.il



S. Friedman & Co.
Haifa, **Israel**
w: www.friedman.co.il
t: +972 4 854 66 66

Roiy Cohen, Adv., Partner
e: roiyc@friedman.co.il

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"Who's New" Legal Members

Norway

Advokatfirma Økland & Co.
Lillestrøm, **Norway**
w: www.oklandco.no
t: +47 64 84 60 60
e: post@oklandco.no
Contact: Audun Ludvig Bollerud

Turkey

Memisoglu Kurun Law Firm
Istanbul, **Turkey**
w: www.memisoglukurun.com
t: +90 5327468701
e: cavit@memisoglukurun.com
Contact: Cavit Memisoglu

Ülken Law Firm
Antalya, **Turkey**
w: http://ulken.av.tr
t: +90 242 241 97 00
e: efe@ulken.av.tr
Contact: Efe Ülken