Admiralty Practicum

Volume 1995
Issue 1 *Fall 1995*

Article 6

Yang Machine Tool Co. v. Sea-Land Service, Inc., CA9, 58 F.3d 1350, 6/30/95

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courses converged near the entrance to St. Tropez Bay at a mark designated as "A." As it approached mark "A," the *Charles Jourdan* was sailing to leeward and believed it had the right of way pursuant to International Yacht Racing Rule (IYRR) 37.1: "[A] windward yacht shall keep clear of a leeward yacht." The crew of the *Endeavour* failed to make an attempt to change course to windward until the last minute and as a result the boom of the *Endeavour* struck the backstay of the smaller *Charles Jourdan*, causing substantial damage.

An International Jury was convened, as per the IYRR, to determine fault for the collision. The International Jury, applying the rules agreed to by the participants in the race, found the *Endeavour* at fault.

In September 1993, the owner of the *Charles Jourdan* filed an action in admiralty, seeking compensation for the damage sustained, and had the *Endeavour* arrested. The *Endeavour*'s owners denied liability and counterclaimed for losses due to alleged false arrest of the vessel. The district court held that Articles 12 and 13 of the Convention on International Regulation of Collisions at Sea (COLREGS), 33 U.S.C. § 1600 et seq., 33 C.F.R. § 80.01 et seq., preempted application of the rules of a private yacht racing organization.

The district court ignored the findings of the International Jury and concluded, under COLREGS Rule 13, 33 U.S.C. foll. § 1602, that the *Charles Jourdan* was an overtaking vessel required to keep clear of the *Endeavour*. Pursuant to the "Pennsylvania Rule," *The Pennsylvania*, 86 U.S. (19 Wall.) 125, 22 L.Ed. 148 (1873), failure to abide by navigation rules creates a presumption of negligence. Accordingly, the *Charles Jourdan* was presumed to be at fault. The *Endeavour*'s failure to take action to avoid the collision was found to be significant and was apportioned 40% of fault. The court determined that the physical damage to the *Charles Jourdan* was valued at $10,000, which was reduced to $4,000.

The first circuit, although noting that the COLREGS were historically meant to be the "international rules of the road for maritime traffic," 58 F.3d at 4, also stated: "[N]othing in their history, or in the public policy issues that led to their enactment, indicates that they were meant to regulate voluntary private sports activity in which the participants have waived their application and in which no interference with nonparticipating maritime traffic is implicated." *Id.* The court based its conclusion not only on the nature of the COLREGS and the private activity involved, but also on the "strong public policy in favor of the private settlement of disputes." 58 F.3d at 5. The court traced through a number of venerable English decisions the premise that "when one voluntarily enters a yacht race for which published sailing instructions set out the conditions of participation, a private contract results between the participants." *Id.* Such a contract established the conditions under which the participants agreed to be bound. "The parties agreed to the substantive rules for determining fault, they agreed to the adjudicating forum, and they were apprised of the procedures. They appeared before [the International Jury], submitted to its jurisdiction, presented evidence and argument, and thereafter were served with that body's findings and final decision." 58 F.3d at 6.

The appeals court also took note of federal policy favoring arbitration under § 2 of the Federal Arbitration Act, which specifically defines "collisions" as arbitrable "maritime transactions." The two yachts had agreed to be contractually bound by the rules of the road as set forth in the IYRR. The court, finding that the IYRR procedures adequately addressed due process concerns, reversed the district court, commenting "It is hard to find fault with such a process, particularly when it is exactly what the participants agreed to." 58 F.3d at 7.

The first circuit, however, agreed with the district court that it had valid jurisdiction over the damages issue, stating that courts were the rightful forum for the litigation of damages, unless yacht racing authorities provided for private means of resolution. The court of appeals affirmed the district court's finding that there were $10,000 in damages resultant from the collision. However, the first circuit held that it was error for the lower court to have mitigated the damages by assessing the *Charles Jourdan* for comparative fault, since the International Jury had preemptively found the *Endeavour* responsible for the collision, thereupon reinstating the full $10,000 award to the *Charles Jourdan*.

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Maritime Cargo

SUBSTITUTE VESSEL IS NOT A COGSA UNREASONABLE DEVIATION UNDER TERMS OF BILL OF LADING

A carrier's restowage of cargo onto a vessel different from that originally named in a contract of carriage is not an "unreasonable deviation" from the contract if a provision allows for vessel substitution "to perform all or part of the carriage."

(Yang Machine Tool Co. v. Sea-Land Service, Inc., CA9, 58 F.3d 1350, 6/30/95)

The Yang Machine Tool Company (Yang Machine) contracted with Sea-Land Service, Inc. (Sea-Land) to transport a large horizontal machining center from China to California. Since the cargo was too large to fit inside a standard 40-foot enclosed container, it was secured by steel bands in two parts on open "flat racks," metal pallets without side walls or tops, and placed on board the *Merchant Prince*. The *Merchant Prince* carried the cargo from China to Yokohama, Japan, where it was offloaded onto the *Sealand Patriot* for completion of the carriage to California. During loading onto the *Sealand Patriot*, a hoisting cable broke, resulting in damage to the cargo.

The bill of lading identified the *Merchant Prince* as the carrying vessel. Nothing in the bill indicated that the cargo would be restowed aboard the *Sealand Patriot*. The bill contained a

provision reserving the right of Sea-Land to use another vessel "to perform all or part of the carriage without giving notice to the shipper. It also contained a provision limiting liability to $500.00 per container for damage occurring during carriage unless the shipper declared a higher value on the face of the bill. Yang Machine had not declared a higher value.

Yang Machine brought suit against Sea-Land in district court, bringing a summary judgment motion for damages in the amount of $241,700. Sea-Land cross-motioned for summary judgment, to limit its liability to $1,000.00 based on the contract and 46 U.S.C. app. § 1304(5).

The lower court granted Yang Machine's motion, finding Sea-Land had unreasonably deviated by its restowage of cargo aboard the *Sealand Patriot*. On appeal, the ninth circuit reversed, holding that Sea-Land had not unreasonably deviated from the contract and Yang Machine had failed to exercise its option to declare value beyond the $500 limitation. The appeals court remanded, limiting Sea-Land's liability.

The question before the appeals court was whether Sea-Land's transfer of Yang Machine's cargo from the *Merchant Prince* to the *Sealand Patriot* constituted an unreasonable deviation, ousting Sea-Land from the $500 package limitation of 46 U.S.C. app. § 1304(5).

Under COGSA, carrier liability for damage to cargo is limited to $500 per package. This limitation does not exist if either an unreasonable deviation from the terms of the bill of lading occurs, or if the shipper has not been afforded the opportunity to declare a value exceeding the $500 package limit.

The ninth circuit first discussed the district court's assertion that Sea-Land unreasonably deviated because the bill of lading did not contain a transshipment clause, which allows a carrier to transfer cargo from one vessel to another during carriage. The district court opined that the transfer from one ship to another violated the contract. The ninth circuit found that Clause 3 in the bill of lading gave Sea-Land the right to use another vessel to complete all or part of the voyage and provided sufficient notice to Yang Machine of that possibility. Clause 3 in Sea-Land's bill, although not containing the word "transshipment," contained language found in bills of lading of other major carriers which the district court agreed contained sufficient notice of potential transshipment. Using a substitute vessel for completion of the voyage was, the appeals court held, a transshipment and not a deviation from the contract of carriage.

Yang Machine contended that Clause 3 in Sea-Land's bill of lading was a "liberty clause." A liberty clause is a clause which may be unenforceable if it gives a carrier unreasonable freedom to alter aspects of carriage. In evaluating the content of Clause 3, the ninth circuit determined that the clause contained two separate and distinct paragraphs. Although the first paragraph contained language found in a typical liberty clause, the second, containing language permitting Sea-Land to use a substitute vessel for all or part of the carriage, was enforceable, since it did not contain typical liberty clause language.

The limitation under COGSA would not have been available, the court also stated, if the shipper had not been given "fair opportunity" to declare a value higher than $500. The court was unconvinced by Yang Machine's claim that the limitation of liability provisions noted on the bill prevented it from declaring actual value, since the shipper had never inquired into making a declaration of higher value. Yang Machine's contention regarding lack of opportunity was further weakened by the fact that the company had previously shipped via Sea-Land on many occasions and never contested the limitation clause in the bill nor attempted to declare higher value. The shipper's failure to claim higher value was probably prompted, the court observed, by an economic decision, since it would have had to pay higher fees to insure the cargo beyond the express limitation. This rationale was supported by the fact that Yang Machine separately insured the cargo, receiving payment from its insurer after the cargo was damaged.

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Seaman's Damages

NO PUNITIVE DAMAGES FOR FAILURE TO PAY MAINTENANCE & CURE TO JONES ACT SEAMAN

Ninth circuit awards reasonable attorney's fees— but not punitive damages— on claim for willful and persistent failure of employer to either investigate maintenance and cure claim or to pay maintenance.

(Glynn v. Roy Al Boat Management Corp., CA9, 57 F.3d 1495, 6/21/95)

Christopher Glynn (Glynn) was hired as a crew member in late January 1992 by Daniel J. Shawhan (Shawhan), captain and master of the F/V *No Problem*, a boat owned by Roy Al Boat Management Corporation (Roy Al). Glynn signed a written agreement which stated terms of his employment, such as the compensation arrangement, grounds for termination, etc. While the *No Problem* was docked in Honolulu, Hawaii, Glynn was fired for coming late to work.

Glynn brought suit under the Jones Act and general maritime law, alleging he had sustained injuries while he was a crew member of the *No Problem*. The jury returned verdicts favoring Glynn on his claims for unseaworthiness, negligence and maintenance against both Roy Al and Shawhan, finding both to be Jones Act employers. (The court had left the issue of whether or not Shawhan was an employer to the jury.) The jury also awarded punitive damages after determining defendants had acted "arbitrarily, willfully, and with bad faith" in neglecting to provide maintenance and cure. The district judge granted judgment n.o.v. in favor of defendants on the issue of punitive damages on the basis that such damages were unavailable as a matter of law, but awarded attorney's fees on the claim for maintenance and cure. The court denied Glynn prejudgment interest since he had failed to request that the jury consider the question. Plaintiff and defendants appealed to the ninth circuit.

The main issues in the case involved determination of who was Glynn's true Jones Act employer; whether attorney's