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## Result Shipping Co., Ltd. v. Ferruzzi Trading USA, Inc., CA2, 56 F.3d 394, 5/25/95

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Upon arrival in Texas, some of the cargo was damaged. Thyssen and other plaintiffs brought an action against the M/V *Kavo Yerakas*, Dodekaton and Eurolines for cargo damage occurring during transit. The district court entered judgment in favor of vessel owner Dodekaton. The other defendants settled and plaintiffs appealed the judgment in favor of Dodekaton.

Under COGSA, a cargo owner may only recover from the carrier of the goods. *Pacific Employers Ins. Co. v. M/V Gloria*, 767 F.2d 229, 234 (5th Cir. 1985). A "carrier" is "the owner or the charterer who enters into a contract of carriage with a shipper." 46 U.S.C. app. § 1301(a). A "contract of carriage" takes the form of a bill of lading or other similar document of title. 46 U.S.C. app. § 1301(b). A contract of carriage with a vessel owner may be directly between the parties or through the charterer's authority to sign bills of lading "for the master." *Pacific Employers*, 767 F.2d at 236. If, however, the charterer signs without the authority of the vessel owner, then the owner will not be a party to the contract of carriage and will not be a "carrier" under COGSA. *Pacific Employers*, 767 F.2d at 237; *J. Gerber & Co. v. M/V Inagua Tania*, 828 F.Supp. 458, 460 (S.D. Tex. 1992). To establish liability for the vessel owner, the cargo owner must show that the shipowner was a party to the contract; failure to do so will show that the cargo owner did not rely on the owner to perform the contract.

The district court did not confront the contention that Eurolines, the charterer, had power to sign bills of lading on behalf of Dodekaton based on charter party provisions nearly indistinguishable from those contained in the *Pacific Employers* case. In *Pacific Employers*, the fifth circuit found that charter party provisions largely identical to Clause 8 and 45 of the *Thyssen* charter party entitled the charterer to sign bills of lading on behalf of the vessel owner. *Pacific Employers*, 767

F.2d at 237-38. However, the major departure from the *Pacific Employers*' charter versus that of *Thyssen* is that the latter charter contained an indemnification provision, making the case more factually similar to a case in the fourth circuit, *Yeramex International v. S.S. Tendo*, 595 F.2d 943 (4th Cir. 1979). The fifth circuit considered the *Yeramex* case in its analysis when examining the effect of the indemnity clause.

A provision in a contract of carriage that purports to relieve a party of liability is expressly void under the Carriage of Goods by Sea Act. See 46 U.S.C. app. § 1303(8). In the *Yeramex* case the fourth circuit did not allow a much more elaborate indemnity provision by itself alone to exonerate the vessel owner from traditional responsibilities for vessel seaworthiness, etc. The fifth circuit agreed with this concept, deciding that the indemnity provision did not have a bearing on the owner's liability as a COGSA carrier.

In sum, the fact that the parties had a charter party and bill of lading nearly identical to those found in *Pacific Employers* was controlling. Clause 45 of the *Thyssen* charter party entitled the master to allow Eurolines' agent to sign the bills of lading, binding the owner. If, the court stated, on remand, the shippers proved that the master had actually authorized Eurolines to sign on his behalf, then the *Pacific Employers* framework would be fulfilled, providing necessary privity with the vessel owner thereby meeting the definition of COGSA carrier.

In the absence of this proof, the court held that the fifth circuit's standard for COGSA liability required privity, rejecting arguments by the plaintiffs holding up second circuit cases where claims were directly asserted against vessel owners in privity's absence. A better argument by *Thyssen*, which was entertained by the court, was the assertion that the district court had erred in finding no common law bailment claim against the vessel owner for cargo damage. In the absence of COGSA "carriage of goods," which is defined as covering "the period from the time when the goods are loaded on to the time when they are discharged from the ship," 46 U.S.C. app. § 1301(e), the

plaintiffs argued that Dodekaton was liable under common law as a bailee of cargo for damage caused by its own negligence.

The fifth circuit, however, found that plaintiff-appellants had not established a *prima facie* bailment claim against the owner. First, plaintiffs did not show that an express or implied bailment contract existed. Second, the plaintiffs failed to establish that the cargo was within Dodekaton's exclusive possession during transit. (The cargo was also within Eurolines'— the charterer's— possession.) The appeals court affirmed the district court, finding that, even if a general maritime bailment claim were permissible as a matter of law, Dodekaton was not liable as a bailee for cargo damage.

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## Supplemental Rules

### SECOND CIRCUIT RULES COURTS CAN'T DENY COUNTERSECURITY ON ARBITRABLE ACTIONS

**While trial courts have broad discretion when ordering countersecurity in proceedings brought under Section 8 of the Arbitration Act, arbitrability is not permissible basis for denying countersecurity since the result would conflict with clear purposes of the Arbitration Act and Supplemental Fed. R. Civ. P. E(7).**

(*Result Shipping Co., Ltd. v. Ferruzzi Trading USA, Inc.*, CA2, 56 F.3d 394, 5/25/95)

Grain was shipped from the United States to Jordan pursuant to a contract between defendant Ferruzzi Trading USA, Inc. (Ferruzzi) and the Jordanian Ministry of Supply. Ferruzzi chartered the M/V *Bulk Topaz* from Result Shipping Co., Ltd. (Result) in order to ship the grain. The charter party between Ferruzzi and Result provided that all disputes arising out of the charter would be subject to arbitration in London.

When the vessel arrived in Jordan, the Jordanian Ministry rejected the grain in two of the vessel's holds as damaged and seized the M/V *Bulk Topaz*. Result was forced to post bond in order to secure the vessel's release and commenced suit against Ferruzzi by attaching Ferruzzi's property in the District of Connecticut to secure an *in personam* admiralty claim for breach of the charter party. The property consisted primarily of a \$66,000 mortgage on residential property owned by two Ferruzzi employees. Result claimed total damages of \$1,082,139.30.

Ferruzzi answered by filing a counterclaim, alleging that the crew of the M/V *Bulk Topaz* was responsible for damaging the grain after it had been loaded onto the vessel, and that Result was therefore liable to Ferruzzi for damages totalling \$375,000. Ferruzzi moved for security for its costs in connection with Result's attachment of its property, and for countersecurity on its counterclaim. The district court denied both motions and granted Result's motion to stay the proceedings pending arbitration on the merits in London.

Ferruzzi appealed the order denying its motion for security and countersecurity, arguing, *inter alia*, that the district court denied its motion for security and countersecurity solely because the underlying dispute was to be resolved in arbitration. Because this case presented "issues concerning the interplay of the Arbitration Act, \* \* \* and the Supplemental Rules governing availability of security and countersecurity," *Result Shipping Co., Ltd. v. Ferruzzi Trading USA, Inc.*, 56 F.3d 394, 399 (2d Cir. 1995), which had not been previously addressed in the second circuit, the appeals court exercised its jurisdiction to hear the appeal under the collateral order doctrine. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 547-47, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528 (1949).

The issue in the case was whether or not the court, in the exercise of its discretionary power to order countersecurity, could deny such security to a defendant because the action giving rise to the counterclaim was subject to contrac-

tually stipulated arbitration.

While acknowledging that the trial court has broad discretionary powers with respect to ordering countersecurity in proceedings brought pursuant to § 8 of the Arbitration Act, 9 U.S.C. § 8 (1988), the court of appeals held that denying countersecurity solely because the underlying dispute was to be resolved in arbitration would conflict with the clear purposes of the Act and Supplemental Rule E(7) of Fed. R. Civ. P.

Section 8 allows an "aggrieved party" to enjoy the advantages of *both* arbitration *and* traditional maritime security devices, and a counterclaiming defendant is an "aggrieved party" within the meaning of the statute who is as entitled to both these remedies as is the plaintiff. \* \* \* [T]he purpose of Rule E(7) is to equalize, where not otherwise inequitable, the positions of the plaintiff and the defendant with respect to security. A plaintiff may not be denied an order of attachment merely because the parties' dispute is to be resolved in arbitration. \* \* \* [S]uch arbitration is not a permissible basis on which to deny the defendant the benefit of traditional maritime security devices, such as countersecurity under Rule E(7).

56 F.3d at 400. (Emphases in original.)

Because the record of the proceedings in the district court was unclear as to the judge's basis for denying Ferruzzi's motion for countersecurity, the court of appeals remanded "in order to allow the District Judge to exercise his discretion without reference to the impermissible consideration of arbitration." *Id.* at 401.

As to Ferruzzi's motion for security for its costs in connection with Result's attachment of its property, including legal fees, the court of appeals upheld the district court's denial of the motion and noted that Ferruzzi had "pointed to no federal statute authorizing awards of attorney's fees to a prevailing defendant in a maritime case merely because the litigation was initiated by attachment." *Id.* In a footnote, the court, relying on *Incas & Monterey Printing & Packaging, Ltd. v. M/V Sang Jin*, 747 F.2d 958, 965, 965 n.19 (5th Cir. 1984), *cert. denied*, 471 U.S. 1117, 105 S.Ct. 2361, 86 L.Ed.2d 261 (1985), stated further that even had Ferruzzi based its counterclaim on wrongful attachment, countersecurity would not be mandatory under

Rule E(7) because the act of the wrongful attachment would not have arisen "out of the same transaction or occurrence with respect to which the action was originally filed." 56 F.3d at 402.

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## Admiralty Procedure

### BAREBOAT CHARTERER HELD LIABLE IN SEPARATE *IN* *PERSONAM* ACTION ON FACTS OF PRIOR *IN REM* SUIT

**Admiralty courts presiding over *in rem* actions may award damages in excess of the value of the *res*; bareboat charterer collaterally estopped from relitigating damages and liability questions in subsequent suit, although prior *in rem* action held not *res judicata* on separate *in personam* claim against charterer.**

(*Central Hudson Gas & Electric Corp. v. Empresa Naviera Santa S.A.*, CA2, 56 F.3d 359, 5/17/95)

On January 16, 1988, the M/V *Lunamar II* (the Vessel) dragged an anchor in the Hudson River, damaging an electrical cable pipeline owned by Central Hudson Gas & Electric Corporation (Central Hudson). The Vessel was operated by Empresa Naviera Santa S.A. (Empresa) pursuant to a bareboat charter party. Central Hudson thereafter commenced an action in the Southern District of New York against the Vessel *in rem* and *in personam* against the registered owner, Seiriki One (Panama) S.A. (Seiriki). A \$3 million letter of undertaking which did not expressly include any charterparties was delivered to Central Hudson by the Vessel's underwriters on behalf of Seiriki. Seiriki

