Admiralty Practicum

Volume 2002
Issue 2 *Spring 2002*

Article 2

Yang Ming Marine v. Okamoto Freighters LTD. 259 F3.d 1086 (9th Cir. 2001) (Filed August 7, 2001)

ADMIRALTY PRACTICUM
ST. JOHN'S UNIVERSITY SCHOOL OF LAW
ADMIRALTY LAW SOCIETY

Spring 2002
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DAMAGES FOR INDEMNITY CLAIM OF BREACH OF WARRANTY AS TO ACCURACY OF PARTICULARS

Timing determines the calculation of damages for claim of breach of warranty as to accuracy of particulars where the bill of lading and tariff control.

Yang Ming Marine v. Okamoto Freighters LTD.

259 F3.d 1086 (9th Cir. 2001)

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Philip Morris, through its agent G. E. International, contracted to ship ten containers of cigarettes from Long Beach, California to Tokyo, Japan with a non-vessel-operating common carrier ("NVOCC"), Oceanbridge. Oceanbridge contracted with another NVOCC, American, for the shipment. American's bill of lading to Oceanbridge stated that Oceanbridge was the "exporter/shipper" and that Okamoto Freighters was the consignee. The bill stated that the cargo was "9600 Cases Cigarettes."

Another NVOCC, Laufer, was contracted by American to transport the cigarettes. Laufer issued a bill of lading to American, calling American the "exporter" and described the contents of the shipment as "Cigarettes and Cigars." Laufer shipped the containers on the M/V Seto Bridge, owned by Yang Ming, with whom Laufer had contracted to do. The Yang Ming bill of lading to Laufer described the goods as "STC: 9600 CARTONS OF CIGARS AND CIGARETTES."

Problems arose in Japan upon inspection. An examination of the goods found that the containers were filled with used tires. The shipment was rejected and abandoned by Okamoto, leaving the containers in Yang Ming's yard. These tires had no commercial value in Japan or Asia. To dispose of the tires in Japan would cost $25,000. The tires could be disposed of in

Hong Kong provided Yang Ming paid the cost of shipment. Yang Ming shipped the tires to Hong Kong.

Yang Ming filed a complaint against Oceanbridge, Laufer and Okamoto. Laufer answered and cross-claimed for indemnity against Oceanbridge and Okamoto and filed a third-party complaint against American.

Okomoto's motion to dismiss Yang Ming's complaint for lack of personal jurisdiction was granted. Oceanbridge's third-party complaint against Philip Morris was dismissed without prejudice pursuant to stipulation by the parties.

Yang Ming moved for summary judgment on its breach of contract and violation of COGSA claims against Oceanbridge and Laufer. Laufer sought summary judgment against Yang Ming in return. American sought summary judgments against Yang Ming and Laufer. Yang Ming's motion was denied. American's was granted. Oceanbridge's summary judgment motion against Laufer was denied and its motion for partial summary judgment was partially granted. After furnishing more evidence Yang Ming's motion for summary judgment against Laufer and Oceanbridge was granted. Laufer duly appealed.

Yang Ming sought to recover in indemnity against Laufer on three grounds: (1) breach of warranty as to accuracy of particulars, (2) Laufer's lack of defenses to the indemnity claim, (3) the reasonable nature of the damages.

The court held that Laufer was in breach of warranty and that Laufer had sufficient evidence that the contents were not cigarettes because of Laufer's inspection upon arrival in Japan. Laufer argued that there was no evidence that the containers held anything other than cigarettes. However, the court found against it because Laufer could show no evidence that the containers held anything other than tires. As to the lack of defenses, Laufer indeed offers none.

The district court calculated the damages by looking to the demurrage charges incurred to Yang Ming's tariff (it having been incorporated into the bill of lading) the shifting charges in Tokyo, the ocean freight charges for the shipment to Hong Kong and the terminal handling charges in Hong Kong. The court arrived at damages of $67,385.63.

Laufer claims that the court miscalculated the damages. It argued that the court did so by misinterpreting the indemnity clause in the bill of lading, that the court awarded demurrage without first showing actual loss, and that Yang Ming could have disposed of the tires for $25,000.

The court held that "to indemnify" would be construed liberally to mean simply "to compensate" rather than to "compensate for losses" *Atari Corp. v. Ernst & Whinney, 981 F.2d 1025* (9th Cir. 1992) for purposes of the bill of lading. Combining the bill of lading with the tariff the court then calculates the damages in total. To do this the court divides the events into three periods: (1) the period of time from the arrival in Tokyo until the end of the "free time" in which the shipper must hold the cargo free of charge, (2) the period between the start of demurrage charges and the abandonment of the cargo, and (3) the time after the abandonment but before the shipment to Hong Kong.

Period (1) was held to be "free time" in which no injury was sustained and therefore no damages were available. Period (2) was subject to the rates of demurrage stated in the tariff. Period (3) was not a period in which a service was provided due to the abandonment of the containers. Therefore, no damages pursuant to the tariff could be claimed and no demurrage was available. Though demurrage could not be claimed, the indemnification pursuant to the bill of lading allowed for losses sustained for all "loss, damage, expenses, liability, penalties, and fines' arising from the inaccurate description of the cargo." For this reason Yang Ming could recover for damages under the bill of lading but not the tariff.

Yang Ming may seek compensation for the shipment of the containers to Hong Kong. The tariff does not apply to the shipment occurring after the abandonment and damages cannot be collected in excess of those prescribed in the bill of lading. These calculations were remanded to the district court.

Laufer also claimed that the Yang Ming must show actual loss to recover citing *Trans-Asiatic Oil Ltd. v. Apex Oil Co.* 804 F.2d 773, 782 (1st Cir. 1986). The court distinguished *Trans-Asiatic* on the grounds that it dealt with losses sustained due to loss of use of a vessel, whereas here demurrage was sought for the use of terminal facilities. The court held that the proof of damages provided by Yang Ming was sufficient.

Finally, Laufer claims that Yang Ming failed to mitigate damages. The court held that the damages were reasonable and that extraordinary measures to reduce harm need not be taken. The duty to mitigate arises only when the measures are small in relation to the possible loss. The $25,000 to dispose of the tires in Japan was a significant cost that Yang Ming was not required to take. Shipping reduced the out-of-pocket expenses of the company.

The court affirmed the summary judgment for Yang Ming but reversed and remanded the district courts award of damages.

LIMITATION OF LIABILITY IN CLAIMS INVOLVING THE PARK SYSTEM RESOURCES PROTECTION ACT

The Eleventh Circuit Court of Appeals in considering whether a vessel owner may limit his liability, pursuant to 46 U.S.C. app. § 183(a) ("Limitation Act"), in a claim brought by the United States for damages under the Park System Resources Protection Act ("PSRPA"). 16 U.S.C. § 19jj-1 held that the two statutes irreconcilably conflicted with one another and that the Limitation of Liability Act does not protect vessel owners from PSRPA claims because the PSRPA is the more recent and more specific statute.

Tug Allie-B, Inc. v. United States
273 F.3d 936 (11th Cir. 2001)

On July 20, 1998, the tug ALLIE-B, while towing a barge through Ledbury Reef in the Biscayne National Park, ran aground alliding with coral reefs in the national park. When the tugboat pulled itself and the barge free from the reefs, it damaged the corals and the reef framework. When Tug Allie-B, Inc. ("Tug Allie"), as owner of the vessel, filed a petition for limitation of liability of damages caused by the collision in the sum of $1,204,860, the United States filed an answer and counterclaim for damages to the national park for $3,069,200.

The Limitation Act provides, in pertinent part, that "the liability of the owner of any vessel . . . for any loss, damage, or injury by collision . . . without the privity or knowledge of such owner or owners, shall not . . . exceed the amount or value of the interest of such owner in such vessel and her freight then pending." 46 U.S.C. app. § 183 (a). Tug Allie argued that its