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Article 6

In re: M/V MSC JOANNA United States District Court for the District of South Carolina 531 F.Supp.2d 680 (Filed November 1, 2007)

Costas Cyprus, Class of 2009

MOTION TO DISMISS GRANTED ON FORUM NON CONVENIENS GROUNDS IN A RULE F LIMITATION OF LIABILITY PROCEEDING WHERE PARTY OPPOSING DISMISSAL RENDERED CONVENIENT FORUM UNAVAILABLE BY ITS OWN PURPOSEFUL INACTION

In accordance with federal forum non conveniens doctrine, the district court of South Carolina in Charleston was not the proper forum for the litigation of a maritime dispute over a collision between two foreign owned and operated vessels, where the collision and subsequent salvage efforts occurred in Chinese territorial waters and the petitioners appeared not to have satisfactory connections with the United States to warrant proper venue.

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On March 8, 2007, a collision occurred between the container vessel MSC JOANNA ("JOANNA") and the W.D. FAIRWAY ("FAIRWAY"), the world's largest suction hopper dredge, in the territorial waters of the People's Republic of China, in an area under the jurisdiction of the Tianjin Admiralty Court. The FAIRWAY sustained significant damage.

The FAIRWAY, is owned by Westminster of the Netherlands, a Dutch corporation. The ship was registered in the Netherlands. The vessel was chartered to Tianjin Dredging Company, a Chinese corporation. The ship's crew at the time of the collision did not include any American nationals. Kininklijke Boskalis Westminster NV, Westminster International BV and Boskalis International BV ("claimants") filed a claim for damages of approximately $326 million.

The JOANNA is owned by Compania Naviera Joanna, S.A. ("Compania"), a Panamanian corporation. The ship was registered in Panama. At the time of the collision, MSC Mediterranean Shipping Company ("MSC Mediterranean"), organized under the laws of Switzerland, was the bareboat charterer of the JOANNA and continues to charter the vessel. The ship operates exclusively between Europe and China and has never called at a United States port. The ship's crew at the time of collision did not include any American nationals.

Claimants arrested the JOANNA on March 16, 2007 in Chinese waters and then instituted Rule B attachment proceedings against four of MSC Mediterranean's chartered vessels in different United States District Courts, including the District of South Carolina. On June 1, 2007, Compania and MSC Mediterranean ("petitioners") filed a Rule F limitation action seeking exoneration or limitation of its liability. Claimants answered on June 15, 2007.

The preliminary procedural issue was whether petitioners could move for a motion to dismiss on forum non conveniens grounds after commencing a Rule F limitation of liability proceeding. The Supreme Court has found that a petitioner is not foreclosed from filing a limitation action and requesting enforcement of a forum selection clause.[1] The district court found that petitioners could commence a Rule F Limitation of Liability proceeding and make a motion to dismiss on forum non conveniens grounds, finding the Court of Appeals for the Fifth Circuit persuasive.[2]

The main procedural issue was whether the court should grant petitioner's motion to dismiss on forum non conveniens grounds. Federal forum non conveniens doctrine requires a two-step analysis. A

[1] M/S BREMEN v. Zapata Offshore Co., 407 U.S. 1 (1972).
[2] Karim v. Finch Shipping Co., Ltd., 265 F.3d 258 (5th Cir. 2001).

court must first decide whether an alternative forum is available and, if so, must proceed to look at various factors to determine whether private litigant's interests and the public interest require dismissal.[3]

In the first step of the analysis the district court found that an alternative forum existed in the Chinese courts. A general rule on a motion to dismiss on forum non conveniens grounds is that dismissal shall be denied if the statute of limitations in the alternate jurisdiction has expired. There is an exception to this general rule, however, which states that dismissal may still be appropriate if the statute of limitations has expired due to the purposeful inaction or dilatory behavior of the nonmoving party.[4] This exception, which was created by the three courts having addressed this issue, was the basis for the ultimate dismissal of this case.

Here, the Chinese maritime court had established a deadline, June 30, 2007, for filing claims in the limitation action, which the Court found that claimants purposefully and knowingly allowed it to expire. The claimants filed their answer to petitioner's complaint on June 15, 2007, having at least fifteen days notice of petitioners' intention of moving to dismiss on forum non conveniens grounds before the statute of limitations would expire for filing claims in the Chinese court. Claimants contend that they purposely missed the Chinese court' deadline because under Chinese law petitioners' liability is limited to $20 million and that their claims would be subordinated to those of third-parties. The court found claimant's assertions unconvincing since case law suggests that changes in substantive law that would affect claimant's remedies are inadequate to deny dismissal on forum non conveniens.[5]

Regardless of the inadequacy of the remedy asserted by the claimants, the Court in the second step of the analysis found that the pubic and private interest factors favor the Chinese forum so strongly as to warrant dismissal. The private interest factors are those that would affect the relative time, cost and ease of a trial such as ease of access to sources of proof or location of the accident scene.[6] The public interest factors are those which clearly evince the public interest in the litigation such as local interest in having local matters decided in a local forum or the overall administrative burden on the local forum.[7] Here, the private interest factors favor a Chinese forum. Both parties are foreign entities, the FAIRWAY was charted to a Chinese corporation, the events occurred exclusively in China, and the evidence and witnesses are more likely to be found in China rather than the United States. Moreover, the pubic interest factors favor dismissal since the events associated with this accident did not occur within the United States, the parties are foreign entities, witnesses would require foreign translators and Chinese substantive law of liability would have to be applied. Upon consideration of all the factors, the Court found this litigation would unduly burden a United States forum.

For the foregoing reasons, the District Court of South Carolina in Charleston dismissed this case on forum non conveniens grounds.

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[3] Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 (1981); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506 (1947).
[4] In re Bridgstone/Firestone, Inc., 420 F.3d 702, 703 (7th Cir. 2005); Veba-Chemie A.G. v. M/V Getafix, 711 F.2d 1243 (5th Cir. 1983); Castillo v. Shipping Corp. of India, 606 F. Supp. 497 (S.D.N.Y. 1985).
[5] Piper, 454 U.S. at 254; Alcoa S.S. Co., Inc. v. M/V Nordic Regent, 654 F.2d 147,159 (2d Cir. 1980 en banc).
[6] Gulf Oil, 330 U.S. at 508.
[7] Piper, 454 U.S. at 241.