Royston Rayzor
Texas Ports & Courts Update

***In this edition*: (1) Texas Port Activities and Developments – Some updates regarding projects and operations along the Texas coast; and**

(2) Recent Maritime Cases – Summaries of noteworthy opinions and orders recently issued by Texas courts and the Fifth Circuit Court of Appeals

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Serving the legal needs of marine transportation companies and their insurers from four offices located along the Texas coast.

Houston / Galveston / Corpus Christi / Brownsville

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TEXAS PORT ACTIVITIES AND DEVELOPMENTS

Brownsville

(1) Becoming One of the Deepest Ports Along the Gulf of Mexico

Brownsville port officials recently signed an agreement with federal authorities that puts the Port of Brownsville one step closer to having one of the deepest ports along the Gulf of Mexico. On July 6, the Brownsville Navigation District and the U.S. Army Corps of Engineers signed a joint agreement to deepen the 17-mile-long ship channel from 42 feet to 52 feet. Phase 2 of the Brazos Island Harbor Channel Improvement Project will increase goods that can come and go through the 17-mile-long shipping channel in South Texas, located just miles from the US-Mexico border.

(2) Nearby Port Mansfield Seeks to Develop Port Operations

Following the US Army Corps of Engineers' recent dredging of a 17-feet-deep channel from the Gulf of Mexico to Port Mansfield, local port officials in Port Mansfield are making efforts to increase tug and barge traffic along the channel. Prior to the recent dredging, the "cut" in the South Padre Island sand barrier between the Gulf of Mexico and the Laguna Madre bay system was only three feet deep – barely enough for small fishing boats to negotiate. Now, in response to the recent increase to a 17-foot depth, potential customers are weighing options for use of facilities along the harbor at Port Mansfield. Port officials have reported that, in addition to warehousing, potential customers are evaluating installation of a concrete plant and steel fabrication facilities. Another potential option is container transport via barge to help alleviate the persistent trucking congestion along the US-Mexico border.

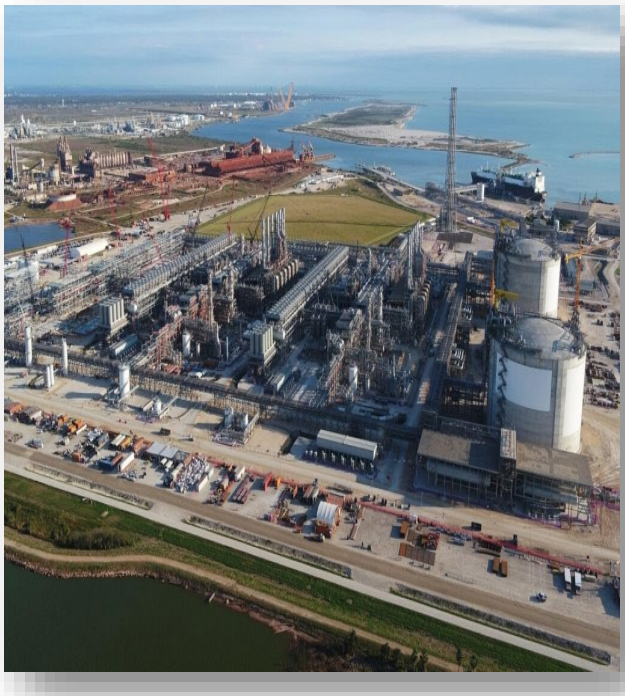
Corpus Christi

(1) Petroleum Transport Activities Continue to Increase

The Port of Corpus Christi moved 15.2 million tons of cargo in May 2022, which was a 9% year-over-year increase from May 2021. Total shipments of crude oil in May 2022 reached 8.7 million tons, of which 8 million tons were exports. Exports of crude oil saw an 8% increase from the same month last year.

2Q 2022 throughput of domestic crude through the Port of Corpus Christi increased by more than 150,000 bpd to reach 1.86m bpd, up from a total 1.7m in the first quarter of 2022, greatly exceeding pre-Covid levels. The Port of Corpus Christi had 635 ship calls in May 2022, including 374 liquid cargo barges and 180 liquid cargo ships. This represents a 10% year-over-year increase in total ship calls compared to May 2021.

(2) Cheniere Moves Forward with Expansion Project



Cheniere Energy, Inc. recently announced that its board made a positive Financial Investment Decision with respect to its LNG Corpus Christi Stage 3 Liquefaction Project (CCL Stage 3) and has issued full notice to proceed to Bechtel Energy Inc. to continue construction on CCL Stage 3, which began earlier this year under limited notice to proceed.

Cheniere is currently the leading producer and exporter of liquefied natural gas (LNG) in the United States, operating one of the largest liquefaction platforms in the world, consisting of the Sabine Pass and Corpus Christi liquefaction facilities on the U.S. Gulf Coast, with total production capacity of approximately 45 million tonnes per annum (mtpa) of LNG in operation and an additional 10+ mtpa of expected production capacity under construction.

Freeport: Freeport LNG May Restart Operations in October 2022

A June 8 blast incident at Freeport LNG has continued to keep the US's second-largest LNG export facility offline. Freeport LNG currently plans a partial restart of the plant in October 2022, with full operations returning by the end of the year.

In the wake of the incident, the US Department of Energy's Energy Information Administration (EIA) anticipates that US LNG exports will fall to an average of 10.9 billion cubic feet per day from the 11.9 billion cubic feet per day estimate that was projected prior to the incident.

Freeport LNG's suspension of exports has significantly reduced the volume of liquefied natural gas exported from the US at a critical time for European consumers, who continue to grapple with supply issues in the wake of sanctions directed at Russian exports. The shutdown of the facility has also pushed US domestic natural gas prices lower in recent weeks. At the time of the incident, exports from the Freeport LNG facility were primarily directed to Europe, and some estimates claim that they accounted for about 10% of European imports.

Once the terminal returns to full service in 2023, the EIA expects that LNG exports could rise to an average of 12.7 billion cubic feet per day in 2023.

Galveston: RORO Tonnage Sees Promising Growth in 2022

Following a pandemic-related 23% decline, the Port of Galveston's roll-on/roll-off (RORO) tonnage has fully recovered and is expected to grow beyond pre-pandemic levels in 2022. The Port of Galveston moves all types of RORO cargoes including automobiles, agricultural and construction machinery, heavy equipment, and household goods for US military personnel returning from overseas deployments. RORO tonnage accounts for about 10% of Galveston's cargo. Wallenius Wilhelmsen, "K" Line and American Roll-On Roll-Off Carrier (ARC) are some of the RORO shippers that regularly have vessels at the Port of Galveston.

In 2021, the Port of Galveston invested in infrastructure improvements at its West Port Cargo Complex to consolidate operations and accommodate additional large RORO cargoes of construction and farming equipment. The project included new paving, dock repairs, an equipment processing center, and an industrial wash pad for equipment exports. The complex is designed to handle a wide range of cargoes including RORO cargoes, large wind turbine pieces, and grain, all with available rail service and laydown areas.

Houston

(1) Houston Breaks Another Monthly Container Record and New Container Yard Set to Open

The Port of Houston Authority announced record-breaking activity across its terminals, with 335,866 twenty-foot equivalent units (TEUs) handled in May 2022 in what currently stands as the best month in the port's history. June 2022 results were just released, and they were fairly close to the previous month's high – 323,823 TEUs. Year-to-date totals (1,897,065 TEUs) represent an 18% increase compared to 2021. On June 4, port authorities added Saturday gate hours to support the flow of cargo through the port's Barbours Cut and Bayport Container Terminals. Tonnage at Port Houston's general cargo facilities was up 16% in June and 24% for the first half of 2022 as compared to 2021. Steel imports were up 33% for June 2022 and 102% year-to-date, as drilling operations and the demand for Oil Country Tubular Goods (OCTG) are up. Auto import units showed an increase of 411% in June 2022, bringing the year-to-date number to just 1% shy of the same time in 2021.

Ceres Terminals has announced the upcoming opening of a new permanent pop-up container yard. Ceres' 75-acre terminal depot will be directly adjacent to the Barbours Cut Terminal, making it the closest yard to the terminal.

(2) Weeks Marine and Curtin Maritime Corporation Awarded Dredging Contracts Totaling Nearly $430 Million

The Port of Houston Authority awarded two of the largest contracts in the organization's history to further Project 11, the widening and deepening of the Houston Ship Channel. The port's commissioners approved a staff recommendation to award Weeks Marine and Curtin Maritime Corporation contracts totaling almost $430 million to complete the remaining Galveston Bay segments of the Houston Ship Channel expansion project.

Weeks Marine and Curtin Maritime will dredge a 17.3-mile section of the Houston Ship Channel that includes the Bayport Ship Channel as well as the Barbours Cut and Bayport Terminals. The portion of the ship channel from Redfish Island to the Barbours Cut Terminal will be widened to 700 feet. A section of the channel near the Bayport Terminal will be widened to 455 feet. Weeks Marine will

perform hydraulic dredging for a contract totaling $329.6 million. Curtin Maritime will perform mechanical dredging for a contract totaling $99.8 million. Great Lakes Dredge and Dock Co. was previously awarded a $95 million contract in October, which also includes oyster mitigation and construction of a bird island.

Port officials noted that their staff recommended Weeks Marine and Curtin based on the best value, including cost, schedule, environmental components, and small, minority and woman-owned business enterprises (S/MWBE) inclusion. According to port officials, approximately 30% of contracts will go to S/MWBE companies, furthering the port's commitment to business equity, which is spearheaded by the port's M/WBE Business Equity Program and Initiative that was formed last year.

Port Arthur/Beaumont: ConocoPhillips Eyes Port Arthur LNG Project

ConocoPhillips recently entered into a Heads of Agreement (HOA) with Sempra to acquire a 30% direct equity holding in Port Arthur Liquefaction Holdings LLC and an LNG offtake equivalent to approximately five million tonnes per annum (mtpa) from the Port Arthur LNG project.

The first phase of the project is fully permitted and is expected to include two liquefaction trains and LNG storage tanks, plus associated facilities capable of producing up to approximately 13.5 mtpa of LNG.

As one of the top five natural gas marketers in North America, ConocoPhillips brings extensive commercial expertise and resources to benefit the project. Under the terms of the HOA, ConocoPhillips will supply the gas for its 5 mtpa offtake and may provide additional gas supply services to the Port Arthur LNG facility. ConocoPhillips will also have the option to acquire certain LNG offtake and equity ownership from future contemplated LNG trains at the Port Arthur LNG site, where a similarly-sized Phase 2 project is also under development.

In recent months, Sempra has additionally lined up preliminary agreements with clients in Great Britain, Poland and Germany to take shipments of natural gas from the Port Arthur project.

RECENT MARITIME OPINIONS FROM TEXAS COURTS AND THE FIFTH CIRCUIT

- ***Ballard v. Hilcorp Energy Co.*, No. 21-30632, 2022 WL 2067831 (5th Cir. June 7, 2022) – Plaintiffs in a removed action arising from an allision incident add a non-diverse defendant and the district court then remands the case despite having admiralty jurisdiction, but the Fifth Circuit cannot help as it lacks jurisdiction to reverse the remand.**

Background

At approximately 8:45 pm on July 6, 2019, Plaintiffs Teddy and Rachal Ballard were travelling along the Orange Barrel Bayou in Louisiana in their 16-foot recreational boat. This was Mr. Ballard's first time to operate a boat in that area. The Ballards' boat allided with a wellhead owned by Defendant Hilcorp. Defendant Facilities Automation of Lafayette ("Facilities") was a contractor retained by Hilcorp to maintain and inspect the navigational light aids on the wellhead.

The Ballards filed suit against Hilcorp in Louisiana state court, alleging various serious injuries and disabilities arising from the incident. Hilcorp removed the suit to Louisiana federal court. Almost 11 months later, the Ballards sought leave to add Facilities, after they allegedly first learned that Facilities was responsible for inspecting and maintaining the navigational light aids on the wellhead.

Hilcorp asserted no objection to the amendment of the complaint at the time the motion was filed, and the district court granted the motion to amend. Later, the Ballards filed a motion to remand the lawsuit to state court, alleging that, at the time the amendment was sought, Facilities was described as a domestic limited liability company, but the citizenship of its members was unknown and not pled. The Ballards further claimed that they had since "come to learn" that Facilities was a citizen of Louisiana. Accordingly, they asserted there was "no longer complete diversity between the parties," and the court now lacked "subject matter jurisdiction," requiring the mater to "be remanded back to the state court."

The district court found that, following the addition of Facilities as a defendant, the district court lacked subject matter jurisdiction over the Ballards' claims and remanded the suit back to Louisiana state court. Hilcorp and Facilities appealed.[1]

The Appeal

An order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the state court from which it was removed pursuant to the federal officer removal statute or the civil rights removal statute shall be reviewable by appeal or otherwise. 28 U.S.C. § 1447(d).

Hilcorp and Facilities pointed to a recent Supreme Court decision, *BP P.L.C. v. Mayor & City Council of Baltimore*, which held that appellate review is available for certain types of remand orders. However,

[1] The district court seemingly disregarded the fact it should have possessed subject matter jurisdiction over the Ballards' maritime claims. Unfortunately, given the very limited scope of appellate review of remand orders, the Fifth Circuit's opinion did not address this issue.

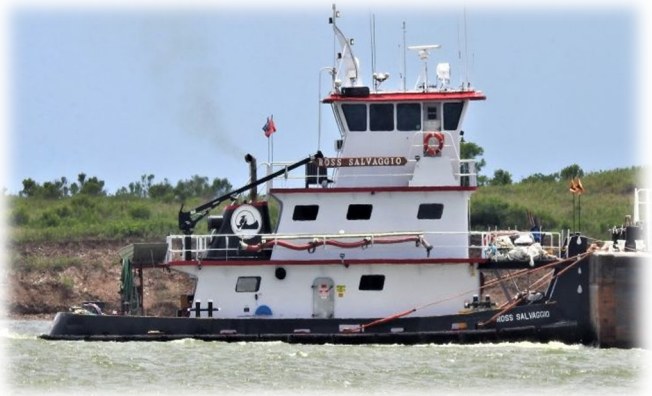
the exception specified by the Supreme Court in *BP* was a statutory one relating, explicitly, to a case removed based upon the federal officer removal statute. However, in this case, the Ballards' suit was removed to federal court solely on the basis of diversity jurisdiction. Because the case was not removed pursuant to either of the two narrow, statutory exceptions identified in *BP*, the Fifth Circuit panel found that it lacked jurisdiction to review the remand order and dismissed the appeal for lack of jurisdiction.

A copy of the Court's opinion many be accessed via the following link:
https://www.dropbox.com/s/u889zkciatjhh1m/Ballard%20v.%20Hilcorp%20Energy%20Co..pdf?dl=0

- ***Risher v. Marquette Transportation Co. Gulf Inland LLC*, No. 05-21-00289-CV, 2022 WL 2062875 (Tex. App.—Dallas June 8, 2022) – Jones Act seaman bound by forum selection clause in employment contract.**

Background

Westley Risher, a Jones Act seaman, filed suit in Harris County state court against his employer, Marquette, alleging that he was injured while working aboard one of Marquette's vessels, the *Ross Salvaggio*. According to Risher's petition, Marquette's captain allegedly ordered him to perform a dangerous task — to manually pull a wire that had become entangled in a winch — and that doing so required him to use so much force that he suffered a herniation in his back.



Risher's employment contract with Marquette included the following forum selection clause:

> A. Agreed Upon Venues and Process.
>
> … all parties agree that any legal action seeking relief for a covered dispute must be filed in either (1) the United States District Court for the Western District of Kentucky, or (2) the McCracken County Circuit Court in Paducah, Kentucky.
>
> The employment contract further provided:
>
> B. Covered Disputes.
>
> This venue selection agreement … will cover all matters directly or indirectly related to your recruitment/potential employment, employment, or possible termination of employment, including, but not limited to, claims involving laws against discrimination whether brought under federal and/or state law, and/or personal injury claims/Jones Act claims or tort claims of any type, against Marquette or any of its current/former employees, supervisors, officers or directors.

Marquette filed a limitation of liability action in Houston federal court.[2] Additionally, in the Harris County state court action, Marquette moved to dismiss Risher's claims pursuant to the employment contract's Kentucky forum selection clause. Risher initially argued that Marquette waived its right to seek dismissal by filing the limitation suit in Houston. Marquette replied that there was no waiver and the agreement is a forum-selection agreement requiring dismissal of the Harris County case.

Risher eventually (and correctly) dropped his waiver argument, and instead focused on his contentions that the employment contract contained an impermissible venue selection agreement. Following multiple rounds of briefing and at least two hearings, the Harris County trial court sided with Marquette and dismissed Risher's suit. Risher then appealed.[3]

The Appeal

Risher's sole issue on appeal concerned the enforceability of the venue selection agreement. As this was an admiralty case, the Texas appellate court looked to US general maritime law to address the issue.

Under maritime law, forum-selection agreements are presumptively valid and are enforced unless the party seeking to avoid the agreement shows that enforceability "would be unreasonable" or against "a strong public policy of the forum in which suit is brought."

Risher argued that the contractual clause was void as against public policy, contending that the agreement's use of the word "venue" rendered it is an impermissible venue selection agreement. The appellate panel disagreed.

The panel noted that the Fourteenth Court of Appeals considered and rejected a similar argument in *In re OSG Ship Mgmt.*, 514 S.W.3d 331 (Tex. App.—Houston [14th Dist.] 2016, no pet.). In *OSG*, the Jones Act claimant argued that an agreement designating a federal or state court located in Hillsborough County, Florida constituted an unenforceable venue selection agreement. The *OSG* opinion observed that "[n]ot all agreements can be neatly labeled as selecting a forum or a venue. Some agreements select both." The *OSG* court concluded that the agreement also included a forum selection clause because "the choice … to select a county in the State of Florida as the proper venue necessarily implies that [the parties] chose the State of Florida as the forum for a suit … ."

The appellate panel further observed that Texas courts routinely enforce agreements selecting foreign fora as valid forum-selection clauses, regardless of whether the agreement specifies a particular venue in the chosen forum.

In Risher's employment contract, the parties agreed on a forum – Kentucky – in which disputes were to be litigated. That the agreement also specified venue in the designated forum did not change the character of the agreement from a forum-selection agreement to a venue selection agreement. Accordingly, the trial court's dismissal order was affirmed.

A copy of the Court's opinion many be accessed via the following link:
https://www.dropbox.com/s/w7akkgntolu8tf5/Risher%20v.%20Marquette%20Trans.%20Co..pdf?dl=0

[2] Per Rule F(9) of the Supplemental Rules for Admiralty and Maritime Claims, Marquette's limitation of liability action was necessarily filed in Houston, the district where it was sued.

[3] Although Harris County appeals are normally assigned to the First or Fourteenth Courts of Appeals in Houston (and this case was initially assigned to the Fourteenth Court of Appeals), this appeal was eventually transferred to the Dallas Court of Appeals as part of an appellate court docket equalization order issued by the Texas Supreme Court.

- **_XL Ins. Am., Inc. v. Turn Services, L.L.C._, 37 F.4th 204 (5th Cir. June 10, 2022) – The _Robins Dry Dock_ Economic Loss Rule Did Not Preclude Insurer's Subrogation Claim on Behalf of an Additional Insured.**

Background

Plains Marketing LP ("Plains") retained Boh Bros. to build a dock along the Mississippi River. The project required Boh Bros. to install mooring dolphins in the river. On the night of February 12, 2019 – while the construction project was ongoing – the *Affirmed*, a vessel owned by Turn, allided with one of the mooring dolphins.

Boh Bros. was insured under a builder's risk insurance policy from XL covering the project. The policy also covered Plains as an additional insured. Boh Bros. repaired the dolphin at a cost of $1.254 million and submitted a claim to XL, which paid Boh Bros. that amount less the deductible. XL also paid Boh Bros. $485,000, which Boh Bros. remitted to Plains after subtracting Plains' share of the deductible.

XL, in turn, filed a subrogation suit against Turn in an effort to recover the more than $1.7 million that XL had paid out under the policy. The district court dismissed the suit on Turn's summary judgment motion, concluding that, pursuant to precedent emanating from the US Supreme Court's 1927 decision in *Robins Dry Dock* (*i.e.*, the maritime law rule that a plaintiff cannot recover economic loss damages without some kind of physical injury to a proprietary interest), XL was precluded from recovering from Turn. XL appealed.

The Appeal

While the Fifth Circuit has emphatically rejected previous attempts to abandon *Robins Dry Dock's* physical injury requirement, it has also repeatedly found that *Robins Dry Dock* is inapposite when the risk of double recovery from the tortfeasor does not remain. The panel observed that *Robins Dry Dock* was inapposite to this subrogation suit.

With respect to the $1.245 million payment for the dolphin repairs, the panel found that XL's subrogor, Boh Bros., did not suffer a pure economic loss. Rather, the $1.245 million claim was paid for the cost of repairing physical damage to the dolphin. The fact that Plains owned the dolphin was irrelevant: The $1.245 million went towards repairing physical damage, and that was dispositive, as there was no risk of a double recovery.

The remaining $485,000 of XL's claim was a separate issue. XL conceded that these paid sums were not for direct physical damage to the dolphin or the dock project. The Fifth Circuit panel thus assumed that this claimed amount pertained to some sort of economic damages. Record evidence indicated, however, that Boh Bros. passed the $485,000 along to Plains, subtracting only an agreed-upon portion of the deductible. Noting that *Robins Dry Dock* would not apply had XL paid Plains (the owner of the

dolphin) directly, the fact that the funds passed through, an intermediary (Boh Bros.) before being paid to Plains was irrelevant to the double recovery concerns addressed by *Robins Dry Dock* at its progeny. Nevertheless, given the limited facts available with respect to this portion of XL's claim, the Fifth Circuit panel left it to the district court to make further fact findings as to the $485,000 portion of the claim. Accordingly, the district court's judgment was vacated and remanded for further proceedings consistent with the Fifth Circuit's opinion.

A copy of the Court's opinion many be accessed via the following link:
https://www.dropbox.com/s/rgb2xcq3ds78bsc/XL%20Ins.%20Am.%2C%20Inc.%20v.%20Turn%20Services%2C%20LLC.pdf?dl=0

- ***Diamond Offshore Drilling, Inc. v. Black*, No. 14-19-00905-CV, 2022 WL 2128337 (Tex. App.—Houston [14th Dist.] June 14, 2022) – Appeals court overturns $2.2 million judgment and dismisses vessel owner (UK citizen rig mechanic did not have a recognized US unseaworthiness claim for accident that occurred in Spain), but remands claim against related entity back to the trial court.**

Background

William Black, a resident of the United Kingdom was injured on January 2, 2015, while working as a mechanic on board the *Ocean Valiant*, a mobile offshore drilling unit (MODU) that was docked in Spain. As Black was working on a piece of equipment located below knee level, he sat on a bucket containing a caustic cleaning chemical called "AlfaNeutra." The bucket's lid was not completely fastened and, when Black sat down, the AlfaNeutra leaked out and soaked through Black's clothes. Not long after, Black felt a burning pain on his right buttock. Black initially was treated on the vessel by a safety department representative. He was later transported to a local hospital where his wound was dressed. Black returned to the vessel the same day and continued working.

Over the next several days, Black's pain worsened. Black returned home to the United Kingdom and visited his local doctor. His injury was diagnosed as a third-degree chemical burn, and he was scheduled for a skin graft the following day. He remained in the hospital for a week following his surgery. About five months later, Black's employment was terminated as part of a planned reduction-in-force.

Several Diamond entities were involved in this claim, and a brief description follows:

- Diamond Offshore Drilling, Inc. ("Diamond Drilling"): Parent of Diamond Offshore Drilling (Bermuda) Limited, Diamond Offshore Services Limited, and Diamond Rig Investments Limited. Diamond Drilling maintains its office in Houston, but has no official employees.

- Diamond Offshore Drilling (Bermuda) Limited ("Diamond Bermuda"): This "employment subsidiary" of Diamond Drilling employed third-country nationals like Black. Black signed an employment agreement with Diamond Bermuda in 2008. The agreement required Black to bring any claims against Diamond Bermuda in the courts of Bermuda.

- Diamond Offshore Services Limited: Another "employment subsidiary" that employed US citizens.

- Diamond Rig Investments Limited ("Diamond Rig"): Registered owner of the *Ocean Valiant*. It has no employees.

The seamen working on the *Ocean Valiant* at the time of Black's injury had employment agreements with Diamond Bermuda and Diamond Offshore Services Limited. Although Black sued various Diamond entities, he proceeded to trial against Diamond Drilling and Diamond Rig, asserting claims under the Jones Act, US general maritime law, and the laws of the United Kingdom.

The jury trial lasted four days. Before closing arguments, the trial court granted a directed verdict on Black's Jones Act claim. The jury then returned a verdict finding that Diamond Drilling, Diamond Rig, and Black were negligent with respect to the incident. The jury apportioned liability as follows:

- Diamond Drilling: 52%
- Diamond Rig: 28%
- Black: 20%

The jury assessed $2.75 million in damages, and the trial court signed a final judgment awarding Black damages of $2.2 million.

Diamond Drilling and Diamond Rig appealed, challenging (1) the wording of the sole jury question on liability; (2) the legal and evidentiary bases for liability with respect to them; and (3) the sufficiency of the evidence supporting the damages assessed for Black's future medical expenses.

Issue No. 1: Jury Question on Liability

Diamond Drilling and Diamond Rig contended that Question No. 1 improperly pertained to a Jones Act claim rather than a negligence claim because the phrase "proximate cause" was omitted and replaced with "cause, in whole or in part." They contended that the absence of the phrase "proximately caused" automatically incorporated the "featherweight" causation standard utilized for Jones Act claims. The appellate court disagreed.

First, the court noted that the question submitted did not omit a specific element necessary to support Black's recovery under a general negligence theory, the three elements of which are (1) a legal duty, (2) breach of that duty, and (3) damages proximately caused by the breach. The court found that each of the three elements was substantially submitted to the jury. While the element of causation as stated in Question No. 1 neglected to include the "proximate" designation, the definition of "proximate cause" was included in the "Definitions and Instructions" portion of the charge immediately preceding Question No. 1. Under such circumstances, the omission of the phrase "proximate cause" from Question No. 1 did not submit another or wrong theory of liability to the jury; instead, it constituted (at most) an independent theory of recovery that was submitted defectively. As Diamond Drilling and Diamond Rig did not object to the alleged error in Question No. 1, the failure to do so waived the complaint on appeal.

The court also looked at the Fifth Circuit's pattern jury instructions for Jones Act claims, but ultimately concluded they did not support a conclusion that Question No. 1 was consistent with a Jones Act claim.

Issue No. 2: Legal and Evidentiary Bases for Liability

Diamond Drilling and Diamond Rig also contended that (1) there was no legal basis for the imposition of a duty as to them, and (2) there was no evidentiary basis to support the existence or breach of any such duty.

With respect to the alleged lack of a legal basis for a duty, they argued that no jury findings were requested or made with respect to alter ego, agency, *respondeat superior*, or any other legal theory that could establish a cognizable duty on the part of them and separate from Diamond Bermuda, with whom Black had signed his employment agreement. However, as there was no objection to the charge on grounds that this element was omitted nor were written findings made by the trial court on this point, the omitted element is deemed to have been found by the trial court in such a manner as to support the judgment.

Under Texas law, a plaintiff seeking to establish liability for negligence must prove the existence and violation of a duty owed to him by the defendant. The existence of a duty is a question of law for the court to decide from facts surrounding the occurrence in question. Thus, when the trial court submits a negligence question to the jury, the court has implicitly concluded that a duty exists – a decision appellate courts review *de novo*. As Diamond Drilling and Diamond Rig challenged this implicit finding at the trial court level and preserved same for appeal, the appellate panel next examined whether the evidence was legally sufficient to support the implied finding.[4]

Diamond Drilling contended that the evidentiary record did not support Black's effort to formulate a duty owed by Diamond Drilling to Black. In response, Black argued that Diamond Drilling owed duties to Black as his employer and the employer of his fellow crewmembers. A corporation generally is not liable for the negligence of someone who is not its employee. Thus, to warrant the imposition of a duty upon Diamond Drilling, the record needed to contain legally sufficient evidence to support a finding of an employment relationship between Diamond Drilling and the actors involved in this incident.[5]

The appellate panel ultimately found that the evidentiary record sufficiently supported the trial court's implied finding that an employment relationship existed between Diamond Drilling and the actors involved in this incident. Specifically, the panel concluded that the evidence showed:

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[4] Diamond Drilling and Diamond Rig successfully argued at trial that Black's untimely-filed "Notice of Intent to Rely on Foreign Law" could not supply a legal basis for the duty to be imposed upon them. Black's notice sought to apply English law to the substantive legal issues in the case. Under the Texas Rule of Evidence 203, a party that intends to raise an issue about a foreign law must: (1) give reasonable notice by a pleading or writing; and (2) at least 30 days before trial, supply all parties a copy of any written materials or sources the party intends to use to prove the foreign law. If the party seeking the application of foreign law fails to provide the necessary information to the trial court, there is a presumption that the law of the foreign jurisdiction is identical to that of Texas. While Black's petition pleaded English law claims, his "Notice of Intent to Rely on Foreign Law" was filed only four days before trial began, thus failing to comply with the 30-day filing deadline for sources establishing the substance of the foreign law. Consequently, Black could not rely on UK law to establish a cognizable basis for liability.

[5] Evidence is legally insufficient when (1) there is a complete absence of evidence of a vital fact, (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence conclusively establishes the opposite of the vital fact. Evidence is more than a scintilla if it rises to a level that would enable reasonable and fair-minded people to differ in their conclusions. If, however, the evidence does no more than create a mere surmise or suspicion and is so slight as to necessarily make any inference a guess, then it is no evidence.

- Black's 2008 employment contract was signed by a Diamond Drilling representative.
- Black completed safety leadership and manual handling training with Diamond Drilling in Houston.
- During his employment, Black had not visited or spoken with anyone in Bermuda, and he only went to Houston for training.
- On the daily drilling reports completed a week before and on the day of the incident, Diamond Drilling was listed as the *Ocean Valiant's* "contractor," and the daily drilling reports did not list any other contractors.
- Daryl Tankersley, the *Ocean Valiant's* safety department representative and medic testified that he was employed at least in some capacity for Diamond Drilling. Tankersley performed "housekeeping" duties on the vessel, which included making sure that everything is put up and properly stored. He was aware that some hazardous chemicals were removed from their usual storage area on the *Ocean Valiant*, including the bucket of AlfaNeutra that Black sat on.
- On the day of Black's injury, Black said he was not told to look for any hazardous chemicals in his workplace nor did he expect any to be located in the auxiliary machine room.
- Tankersley was also involved in the investigation of Black's injury and concluded that an employee on the vessel was responsible for the improper storage of the AlfaNeutra. According to Tankersley, the investigation was not able to identify who this employee was or which Diamond entity the employee worked for.
- Clyde Reeves, Black's supervisor, also participated in the investigation. Reeves had a Diamond Drilling email address, and Black testified that Reeves worked for Diamond Drilling. Reeves instructed Black to work on the water maker on the day of the incident.
- The incident investigation made no connections to Diamond Bermuda.
- The supervisor listed on Black's injury report had a Diamond Drilling email address.
- When Black was emailed regarding his termination, Black was directed to contact a Diamond Drilling employee with any questions he had about benefits. The human resources representative that contacted Black via email had a signature line on the email that identified her as a Diamond Drilling employee.

Considered together, the appellate panel found that the evidence demonstrated that Diamond Drilling assumed responsibility as the contractor for the *Ocean Valiant* and employed, at least in some capacity, the crewmembers. Various crewmembers were involved in all pertinent aspects of the incident, including: (1) ensuring housekeeping policies and procedures were followed on the ship, (2) failing to ensure those procedures were followed with respect to the AlfaNeutra bucket Black sat on, (3) instructing Black to work on the water maker, (4) treating Black's injury, and (5) investigating the incident. More broadly, the panel found that the evidence showed Diamond Drilling representatives participated in Black's hiring, training, and termination. The evidence did not show such a level of involvement for any other Diamond entity, including Diamond Bermuda and Diamond Offshore Services Limited. Accordingly, the panel concluded that the record contained sufficient evidence to support the trial court's implied finding of an employment relationship as necessary to impose a duty

of care upon Diamond Drilling. Moreover, the panel found there was legally sufficient evidence to support the jury's finding that Diamond Drilling breached its duties to Black. Thus, Diamond Drilling's evidentiary challenges were overruled.

Diamond Rig additionally contended that the evidentiary record provided no basis for a duty running from Diamond Rig to Black or a determination that Diamond Rig breached any such duty. In response, Black asserted that Diamond Rig owed duties to Black as the owner of the vessel on which his injuries occurred. Black's argument was thus premised on the doctrine of unseaworthiness, which arises under US general maritime law.

With respect to foreign seamen, 46 U.S.C. § 30105(b) provides that a civil lawsuit for personal injury damages may not be brought under the Jones Act or other federal maritime law if three conditions are satisfied: (1) the individual suffering the injury or death was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action; (2) the incident occurred in the territorial waters or waters overlaying the continental shelf of a country other than the United States; and (3) the individual suffering the injury or death was employed at the time of the incident by a person engaged in the exploration, development, or production of offshore mineral or energy resources, including drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment, or personnel, but not including transporting those resources by a vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces. Two exceptions to this exclusion provide that a seaman may bring a civil action under general maritime law if he establishes that a remedy is not available under the laws of either: (1) the country asserting jurisdiction over the area in which the incident occurred; or (2) the country in which the individual suffering the injury or death maintained citizenship or residency at the time of the incident. The burden is on the plaintiff to establish that either of these exceptions apply.

The panel found that the record conclusively established that Black was precluded from pursuing a claim under general maritime law: Black was not a citizen or permanent resident alien of the United States when the incident occurred; the incident occurred in the territorial waters of a country other than the United States; and Black was employed at the time of the incident by a company engaged in the production of offshore energy resources. Moreover, these same facts were relied upon by Diamond Rig in its oral motion for a directed verdict on Black's Jones Act claim, which the trial court granted, and which Black did not challenge on appeal. On appeal, Black did not argue, and the record did not show, that Black met either of the two exceptions. Thus, the record supported the conclusion that Black had a remedy available under the laws of the country in which he maintained citizenship, as evidenced by his untimely attempt to apply English law to the substantive legal issues in the case. Accordingly, Black was precluded from pursuing a cause of action under US general maritime law and could not rely on its doctrine of unseaworthiness to establish a duty owed to him by Diamond Rig.

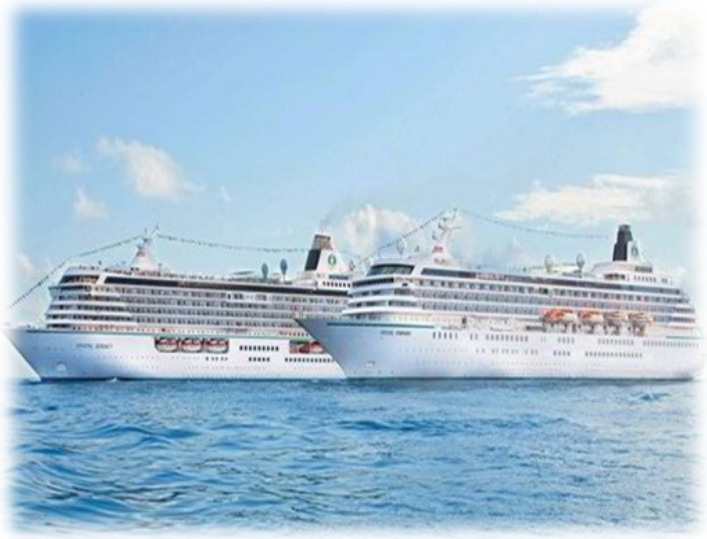
Given that US general maritime law did not apply and Black's effort to invoke UK law was untimely, Black could only look to Texas law to establish a duty upon Diamond Rig. The appellate panel found that the evidence did not get him there. Aside from owning the *Ocean Valiant*, Diamond Rig did not have any connection to Black or to the relevant facts or actors underlying the incident, and, while such evidence may have supported a premises liability theory, Black did not asserted a premises liability theory against Diamond Rig. Thus, the appellate panel found that the trial court erroneously determined that Diamond Rig owed a duty to Black, and Diamond Rig's objection on this point was sustained. The appellate panel further found that, as a consequence of removing Diamond Rig from the liability equation, the case would need to be remanded for a new trial on the negligence claim against Diamond Drilling. Moreover, given the need to remand, the appellate panel declined to address Diamond Drilling's objections to the damages award for Black's future medical expenses.

A copy of the Court's opinion many be accessed via the following link: https://www.dropbox.com/s/mut3prcdeboup3k/Diamond%20Offshore%20Drilling%2C%20Inc.%20v.%20Black.pdf?dl=0

- ***Peninsula Petroleum Far E. Pte. Ltd. v. Crystal Cruises, LLC*, No. 4:22-CV-337, 2022 WL 2239847 (S.D. Tex. June 22, 2022) (Hanks) – Equitable vacatur of Rule B attachment was not appropriate where debtor lacked meaningful recoverable assets in other jurisdictions and debtor had repeatedly attempted to thwart fuel supplier creditor's attempt to recover unpaid sums.**

Background

The widespread fallout from the Genting/Crystal Cruises collapse has reached Texas courts as well. In this case, a bunker fuel supplier creditor, Peninsula Petroleum Far East Pte. Ltd. ("Peninsula"), filed an application pursuant to Rule B to attach one of Crystal's bank accounts in order to recover unpaid sums associated with fuel that Peninsula supplied to the *Crystal Serenity* and the *Crystal Symphony*. Peninsula had been on the hunt for quite some time and in multiple jurisdictions. At various points when Peninsula moved to arrest the *Serenity* and *Symphony*, Crystal diverted the vessels (sometimes with passengers onboard) before the vessel arrests could be effectuated at their scheduled destinations.



The *Symphony* and the *Serenity* eventually both ended up in the Bahamas where they were arrested by the vessels' mortgage bank, DNB. The vessels were then sold, leaving DNB with a $28 million deficiency on its loans. Moreover, according to Bahamian law, DNB's mortgage liens apparently took priority over Peninsula's liens.

Although Peninsula was able to previously recover a portion of the sums owed, at the time of the Rule B application, Peninsula was still owed nearly $630,000. The district court granted the Rule B application, and Crystal subsequently appeared and moved for equitable vacatur of the attachment.

A Quick Overview of Rule B

Under Supplemental Admiralty Rule B, if a defendant is not "found within the district"[6] when a verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property – up to the amount sued for – in the hands of garnishees named in the process.

[6] Federal case law has established a two-prong test for determining whether a defendant can be "found within the district." First, can the defendant be found within the district in terms of jurisdiction? Second, can the defendant be found within the district for service of process? If the answer to both questions is affirmative, then the defendant can be "found within the district" for the purposes of Rule B(1) and the process of attachment and garnishment is not available to the plaintiff.

Rule B allows a maritime attachment of property when a plaintiff complies with the Rule's filing, notice, and service requirements and establishes that: (1) the plaintiff has a valid *prima facie* admiralty claim against the defendant; (2) the defendant cannot be found within the district; (3) the defendant's property may be found within the district; and (4) there is no statutory or maritime law bar to the attachment.

After an attachment order has been issued, a defendant or any person claiming an interest in the restrained property may move to vacate the attachment and demand a "prompt hearing" under Rule E(4)(f). At the Rule E(4)(f) hearing, the plaintiff bears the burden of establishing that the requirements of Rule B and Rule E have been satisfied and showing that the attachment should not be vacated.

If the plaintiff meets its burden, the party seeking to vacate the attachment may still call on the Court's equitable vacatur power. Equitable vacatur may be granted under any of the following conditions: 1) the defendant is subject to suit in a convenient adjacent jurisdiction; 2) the plaintiff could obtain *in personam* jurisdiction over the defendant in the district where the plaintiff is located; or 3) the plaintiff has already obtained sufficient security for the potential judgment, by attachment or otherwise. Equitable vacatur is *not required* even if the defendant shows at a Rule E hearing that one of the limited grounds for equitable vacatur is present. Instead, the court must exercise its discretion to determine whether equity weighs in favor of vacating the attachment. The party seeking to vacate the attachment bears the burden of showing that equitable vacatur is appropriate.

The Court's Analysis

Crystal first argued that equitable vacatur may be appropriate if the defendant is subject to suit in a convenient adjacent jurisdiction. Crystal pointed out that Peninsula had previously filed a lawsuit to try to arrest the vessels in the Southern District of Florida. Crystal contended that, as a result, the Southern District of Florida, though not literally adjacent to the Southern District of Texas, was a "convenient" forum.

The Court disagreed. In the Court's view, "convenience" is a narrowly circumscribed concept: A district court may vacate a maritime attachment only if the defendant would be subject to an *in personam* lawsuit in a jurisdiction adjacent to the one in which the attachment proceedings were brought. An "across the river" case where, for example, assets are attached in the Eastern District of Texas but the defendant is located in the Southern District of Texas would be a paradigmatic example of a case where an attachment should be vacated. Vacatur of an attachment on convenience grounds where the adjacent district is more remote and therefore less obviously "convenient" to the plaintiff failed to fit within such narrow parameters. Thus, the Court found that Crystal failed to show that it was subject to suit in a convenient adjacent jurisdiction.

Crystal next argued that Peninsula had already obtained sufficient security for the potential judgment, by attachment or otherwise. Crystal pointed out that Peninsula arrested the two vessels in the Bahamas and contended that "[i]t cannot reasonably be disputed that the value of those vessels … far exceeds the … claims that are the basis of [Peninsula's] Rule B attachment." Crystal further argued that, consequently, "[Peninsula] is grossly over-secured and the Rule B attachment serves no legitimate purpose."

The Court again disagreed. According to the uncontested information before the Court, the *Symphony* and the *Serenity* had been sold in the Bahamas for a total of $128 million, but DNB was owed almost $156 million on its mortgages – resulting in a post-sale deficiency of nearly $28 million on DNB's liens alone. Also, as noted above, it was represented to the Court without contradiction that, under Bahamian

law, DNB's liens took priority over and would extinguish Peninsula's liens. As the two vessels could no longer secure a potential judgment for Peninsula, the Court found that Crystal failed to show that Peninsula had already obtained sufficient security for the potential judgment, by attachment or otherwise.

In a final observation, the Court noted that, even assuming that Crystal had shown "that one of the limited grounds for equitable vacatur was present, the Court in its discretion still had to determine whether equity weighed in favor of vacating the attachment. Here, the Court did not believe that Crystal had shown that equity favored the application of equitable vacatur. Crystal pointed to no assets that could provide security, and the record reflected that Crystal actively steered the *Symphony* and the *Serenity* away from ports in which it feared that Peninsula would try to arrest them and eventually directed the two vessels to a jurisdiction where DNB's liens extinguished Peninsula's liens. Thus, the Court found that a balance of the equities weighed against vacatur because, without this Rule B attachment, there was a meaningful possibility that any judgment on the merits procured by Peninsula would go unsatisfied. Accordingly, Crystal's motion to vacate was denied.

A copy of the Court's opinion many be accessed via the following link:
https://www.dropbox.com/s/idhrzb8ourmpa7u/Peninsula%20Petroleum%20Far%20East%20Pte.%20Ltd.%20v.%20Crystal%20Cruises%2C%20LLC.pdf?dl=0

Update: *ZF Automotive US, Inc. v. Luxshare, Ltd.* and *AlixPartners, LLP v. The Fund for Prot. of Inv.'s Rights in Foreign States* – The Supreme Court Shuts the Door on Section 1782 Discovery in Aid of Private International Arbitration Proceedings.

As noted in some of our previous reports, the US Supreme Court set out to resolve an appellate circuit split on whether Section 1782 discovery is available in support of foreign private international arbitration proceedings. Last month, the Supreme Court unanimously said no, holding that Section 1782 "reaches only governmental or intergovernmental adjudicative bodies," and that neither of the arbitral panels in these consolidated cases qualified as governmental or intergovernmental. Private adjudicatory bodies do not fall within Section 1782. The Court has now clarified that the term "foreign tribunal," refers to a body that "exercises governmental authority conferred by a single nation." An "international tribunal" refers to a similar body acting with governmental authority bestowed by two or more nations. While this may be unwelcome news to some claimants, it at least brings certainty and predictability with respect to this issue, which had been an unsettled question for quite some time.

A copy of the Court's opinion may be accessed via the following link:
https://www.dropbox.com/s/oks0666e922fsx1/ZF%20Automotive%20US%2C%20Inc.%20v.%20Luxshare%2C%20Ltd..pdf?dl=0

This update was jointly prepared by Royston Rayzor's team of maritime lawyers and marine investigators. Royston Rayzor's fully-staffed offices are conveniently located near each of Texas' major ports. We can be reached on a 24/7 basis at the following locations:

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