U.S. legal decisions at the intersection of Novel Coronavirus and Admiralty law


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As the world has been dealing with the evolving global pandemic brought on by the novel coronavirus ("COVID-19"), courts and arbitration panels in the United States of America have pressed forward with determining how parties' rights and remedies for traditional maritime claims have been modified, changed, and/or affected by COVID-19, if at all.

Below is a survey of recent decisions which touch on the impact of COVID-19 in maritime and admiralty cases in the United States, most of which have dealt with procedural and jurisdictional issues. Part two of this series (next month's edition) will focus on how *force majeure* claims due to COVID-19 might be treated under U.S. law and whether recent decisions in hurricane litigation can provide any insights into how U.S. courts and arbitration panels might analyse the issue.

- ***A/S Klaveness Chartering v. XCoal Energy & Resources*, S.M.A. No. 4397 (April 20, 2020)**

  The Society of Maritime Arbitrators issued a partial final award directing the charterer XCoal to make its 95% freight payment as directed by Clause 30 of the charter party contract which provided that the initial payment was "payable on Bill of Lading weight against Owner's invoice 5 (five) working/banking days after loadport agents telegraphically confirm (to Charterers and Owners) that 'clean onboard' Bills of Lading marked 'freight payable as per Charter Party' have been signed and released to the parties as instructed by Charterers, less address commission." The charter party was a form Americanized Welsh Coal Charter, amended 1979. Owners claimed freight had been earned as of February 15, 2020, but not paid. Xcoal countered that the tariff battle between the US and China affected coal purchases in particular, and the situation had become complicated by the economic consequences of the coronavirus pandemic in China. The panel rejected the coronavirus excuse, holding that Clause 30 is clear as is the law and commercial practice about the sanctity of freight payments under such clauses and in circumstances such as presented here. The obligation to pay the freight "is a separate, independent claim, not subject to any offset, and, being wholly independent of other issues, [can] be disposed of separately." citing *Metallgesellschaft A.G. v. M/V Capitan Constante*, 790 F.2d 280, 281 (2d Cir. 1986). The Panel directed payment to be made within five (5) days of the Award and also ordered interest from February 15, 2020.


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- ***Turner v. Costa Crociere S.P.A.*, 2020 U.S. LEXIS 184230 (S.D. Fla. Sept. 9, 2020)**

  Plaintiff, a passenger on the cruise ship the Costa Luminosa, filed a lawsuit against Costa Crociere S.P.A. and Costa Cruise Lines Inc. (collectively "Costa") alleging negligence by the operators of the ship which resulted in an outbreak of COVID-19 and claiming that Costa failed to warn the passengers of the risk associated with the virus. The Defendants argued that the case was required to be dismissed as all ticketed passengers had agreed to a forum selection clause which called for any and all disputes to be brought in Italy. Among Plaintiff's arguments for sustaining the lawsuit in Miami, Florida, were the arguments that requiring Plaintiff to litigate in Italy while recovering from complications of COVID-19 would be fundamentally unfair, plus the pandemic limited and restricted travel making it near impossible for Plaintiff to pursue the claim in Italy. The district court rejected both claims.

Costa Luminosa

First, the court held that while COVID-19 and a worldwide pandemic were not foreseeable at the time of contracting, it was always foreseeable that Plaintiff might be required to litigate in Italy while suffering from a lingering complication or physical injury. As the court held, the fact that Plaintiff's injuries result from an unexpected and novel coronavirus, rather than a more traditional accident, does not change the fact that the Parties anticipated all personal injury claims to be brought in Italy. In addition, the district court rejected that it was unfair to enforce a forum selection clause requiring a suit to be brought in Italy. The court cited the fact that while tourism travel is still restricted, Italy has started permitting visitors for specific reasons, including court proceedings. Furthermore, the court found that with the increase in technology and remote access to courts, Plaintiff did not establish any evidence that actual travel to Italy would be necessary to prosecute the case. *Citing Petersen Energia Ingersora S.A.U. v. Argentine Republic*, 2020 WL 3034824, at *11 (S.D.N.Y. June 5, 2020) (Preska, J.) ("Indeed, sure to be one of the enduring lessons of the ongoing COVID-19 pandemic is that we can accomplish far more remotely than we had assumed previously.").

The court ruled that plaintiff had not demonstrated that the COVID-19 pandemic renders enforcement of the forum-selection clause fundamentally unfair to Plaintiff and dismissed the case on the basis that Italy was a valid and adequate alternative forum for Plaintiff to pursue its claims.

- ***Maa v. Carnival Corp. & PLC*, 2020 U.S. Dist. LEIX 172621 (C.D. Cal. Sept. 21, 2020).**

  Wilson Maa was a passenger on the Coral Princess, which set sail from San Antonio, Chile on March 5, 2020. A California resident, he contracted COVID-19 onboard the vessel and his diagnosis was confirmed on April 1, 2020. The Vessel docked in Miami, Florida on

Coral Princess

or about April 4, 2020, but Mr Maa (along with many other passengers), was not permitted to immediately disembark. An ambulance arrived at 10:00 p.m. on the evening of April 6, 2020 to take Mr Maa to the hospital, where he died two (2) hours later. Mr Maa's wife (who also contracted COVID-19 and was hospitalized for over two (2) weeks), commenced a lawsuit in California state court alleging negligence and seeking recovery for wrongful death.

Defendants' moved to dismiss the wrongful death cause of action under California state law on the argument that the claim is pre-empted by federal law, specifically the Death on the High Seas Act ("DOHSA").

The court ruled in dismissing the Plaintiffs' claim that U.S. law is clear that it does not matter that Defendants *may* have been negligent before or after the 'accident' which caused Mr Maa's death, or that he ultimately died on shore. For the purposes of determining the site of the accident, the relevant site is "the place where the deceased passenger contracted COVID-19." The district court determined that since the Vessel had been in international waters from the time of departing Chile on March 5, 2020 until it came into Miami, Florida, on April 4, 2020, Mr Maa contracted COVID-19 on the 'high seas' and therefore DOHSA preempts state law causes of action for survival claims and pre-death pain and suffering. The court did grant Plaintiffs leave to amend the lawsuit to bring an appropriate claim under DOHSA.

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