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LONDON MARKET NEWS

## Ninth Circuit Enforces Forum Selection Clause in Ocean Bill of Lading in Favor of Subcontracting Vessel

### Breaking Developments In London Market Law 05/26/09

Last week in *Mazda Motors of America, Inc. and Indemnity Insurance Co. of North America v. M/V COUGAR ACE*, \_\_\_ F.3d \_\_\_ (9th Cir. 2009), a panel of the Ninth Circuit Court of Appeals enforced the Japanese forum selection clause contained within an ocean carrier's bill of lading in an *in rem* action filed by the cargo owner seeking damages for cargo damage against the contracting vessel. Specifically, the Court held that the M/V COUGAR ACE, which was operated but not owned by the ocean carrier Mitsui, was entitled to assert the defenses and protection of the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. Section 30701, Notes, contained within Mitsui's ocean bills of lading that were extended to the M/V COUGAR ACE through the Himalaya Clause.

#### Factual Background

The ocean carrier Mitsui O.S.K. Lines ("Mitsui") issued six identical bills of lading to Mazda Motors of America, Inc. ("Mazda") for the carriage of automobile cargo from Japan to certain United States ports. The Mitsui bills of lading specifically identified the carrying "Vessel" as the M/V COUGAR ACE. Although Mitsui operated the M/V COUGAR ACE, the Vessel was owned by MOB Cougar (PTE) Limited ("MOB Cougar"). The automobile cargo allegedly suffered more than \$40 million in water damage during the Pacific crossing aboard the M/V COUGAR ACE. Plaintiff Mazda and its subrogated insurer, Indemnity Insurance Company of North America (collectively "Mazda"), filed an *in rem* lawsuit against the M/V COUGAR ACE. The lawsuit did not contain *in personam* claims and neither Mitsui nor MOB Cougar were named as defendants to the lawsuit.

MOB Cougar made a restricted appearance in the *in rem* action filed by Mazda in the United States District Court in Oregon to claim the Vessel and defend the suit pursuant to Supplemental Rule E(8) of the Federal Rules of Civil Procedure. MOB Cougar moved to dismiss based upon the forum selection clause contained in the Mitsui bills of lading mandating that any lawsuits arising out of the carriage of the cargo could only be brought in Tokyo, Japan. The trial Court rejected Mazda's contention that the forum selection clause was applicable only to *in personam* lawsuits. The Court held that (i) the M/V COUGAR ACE ratified the terms of the bills of lading by transporting the cargo and (ii) that the Himalaya Clause entitled the M/V COUGAR ACE in its capacity as the carrying vessel to enforce the forum selection clause because the M/V

COUGAR ACE was a third party whose services contributed to the performance of the carriage of cargo contract by Mitsui. Mazda and its subrogated insurer appealed the trial court decision to the Ninth Circuit Court of Appeals.

### **The Ninth's Circuit's Analysis: The Subcontracting Vessel Was Not a Party to the Mazda and Mitsui Contract of Carriage**

The panel of the Ninth Circuit examined the scope of the forum selection clause and choice of law provision contained within all six identical bills of lading providing that (i) each bill of lading should be governed by Japanese law, and (ii) that any dispute could only be pursued in the Tokyo district Court in Japan. The Court further examined the breadth of the Himalaya Clause under the *Subcontracting and Indemnity Provision* of the bills of lading. The Court identified Mazda as the merchant and consignee of the goods and the carrier as Mitsui who issued the bills of lading. The panel found that the "M/V COUGAR ACE was the 'subcontractor' . . . directly employed by the carrier in performance of the carriage."

The Court applied general contract principles for interpretation of the Himalaya Clause in conformity with Ninth Circuit precedent in *Starrag v. Maersk, Inc.*, 486 F.3d 607, 616 (9th Cir. 2007). The panel held that the plain contractual language of the Himalaya Clause in Mitsui's bills of lading extended the protection of COGSA to Mitsui's subcontracting vessels such as the M/V COUGAR ACE. The Court held that the M/V COUGAR ACE was a "sub contractor" because "it plainly assisted the performance of carriage as the carrying vessel, it was indispensable to that performance. Mazda does not dispute the forum selection clause is a provision . . . benefiting the carrier, so we see no reason why the forum selection clause should not benefit the defendant vessel here." The Court relied upon the analysis of *Mori Seiki U.S.A., Inc. v. M/V ALLIGATOR TRIUMPH*, 990 F.2d 444, 450 (9th Cir. 1993) holding "therefore, the COUGAR ACE, not unlike a stevedore, is 'directly related to the carrier's responsibilities under the carriage contract' and can benefit from the Himalaya Clause." *Id.*

The panel further analyzed the ratification doctrine contained in the Fifth Circuit decision of *Lykes Lines*, 398 F.3d 319, 325 (5th Cir. 2005), stating the general ratification rule as follows:

When cargo has been stowed on board the vessel and bills of lading are issued, the bills of lading become binding contracts on the vessel *in rem* upon the sailing of the vessel with the cargo. A sailing of the vessel constitutes a ratification of the bills of lading. This action gives rise to a maritime lien which is the basis of the *in rem* recovery.

*Id.*, quoting *Cactus Pipe & Supply v. M/V MONT MARTRE*, 756 F.2d 1103, 1113 (5th Cir. 1985). Similarly, in *All Pacific Trading, Inc. v. Vessel M/V HANGIN YOSU*, 7 F.3d 1427, 1433 (9th Cir. 1993), the Ninth Circuit held that "when a cargo owner has a direct contractual relationship with the owner of the vessel, the cargo owner has a lien on the vessel for injury caused by the operator's lack of due diligence." Accordingly, the panel distinguished the controlling fact that although the M/V COUGAR ACE ratified the terms of the bill of lading as Mitsui's subcontracting vessel, the M/V COUGAR ACE did not then automatically become a party to the contract of carriage between Mitsui and Mazda. Instead, Mazda's basis for recovery for damaged cargo constituted a maritime lien against the M/V COUGAR ACE that could be

enforced through an *in rem* claim. Therefore, the Court reasoned that enforcement of the forum selection clause in Mitsui's bills of lading was not strictly enforceable solely for *in personam* actions. Accordingly, the Court dismissed Mazda's *in rem* lawsuit pending in Oregon against the subcontracting vessel, M/V COUGAR ACE, holding that the proper venue in accord with the terms of the bills of lading was Tokyo, Japan.

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