In the Matter of the Arbitration	:	
between	:	
L.R. MIMOSA LIMITED, As Owner – Claimant	:	PARTIAL FINAL AWARD
	:	
and	:	
PANAMAX INTERNATIONAL SHIPPING CO., As Charterer – Respondent	:	

Before: David W. Martowski
Manfred W. Arnold
Charles B. Anderson, Chair

Appearances: Eversheds Sutherland (US) LLP
for and on behalf of L.R. Mimosa Limited
by James M. Textor, Esq.

Freehill Hogan & Mahar, LLP
for and on behalf of Panamax International Shipping Co.
by Michael E. Unger, Esq. and Manuel A. Molina, Esq.

Introduction

This arbitration arises under a time charterparty dated April 30, 2014 between LR Mimosa Ltd., as Owner of the M/T L.R. MIMOSA ("Owner") and Panamax International Shipping Company Limited, as Charterer ("Panamax"). On October 21, 2014 Owner commenced arbitration against Panamax, seeking to recover outstanding hire and other expenses in the amount of $461,881.25 and reserving its right to seek indemnity arising from a pollution incident at Quintero, Chile on September 24, 2014.[1] The gravamen of Owner's claim is that Panamax breached its duty of due diligence to nominate a safe berth at Quintero. Panamax denied liability and submitted a

[1] Owner's P&I Club issued a Letter of Undertaking in the amount of $56.5 million and oil spill liability claims were estimated to be $147 million.

counterclaim for lost profits for loss of use of the vessel as a result of the oil spill. Both parties also claim interest, attorneys' fees and costs.

The Proceedings

In its demand for arbitration, Owner nominated Manfred W. Arnold as arbitrator. Panamax responded with the appointment of David W. Martowski. The Panel was completed with the appointment of Charles B. Anderson as third arbitrator and chairman for procedural matters. An initial dispute arose between the parties concerning the production of documents relating to an investigation into the oil pollution incident by the Chilean government authorities, referred to as the Investigación Sumaria Administrativa ("ISA"). On March 9, 2015 the Panel issued a Partial Final Award[2] directing Owner to produce all ISA documents in its possession or control and requiring the documents to remain private and confidential to the parties, their experts and the Panel pending the removal of any restrictions on their disclosure imposed by Chilean law.[3] The parties subsequently engaged in extensive document discovery which included production of the entire ISA investigation documents and findings. In addition, on March 21, 2015, counsel for Panamax and his expert conducted a joint inspection with Owner's counsel of the L.R. MIMOSA ("MIMOSA") while the vessel was at the Sabine Anchorage in Texas.

On August 9, 2015 the Panel denied Owner's request to stay the arbitration pending conclusion of legal proceedings in Chile and ordered bifurcation of the arbitration with respect to liability and damages. On August 21, 2015 Owner served its Statement of Claim comprising recovery of hire in the amount of $461,881.25, pollution cleanup costs of $1,712,527.04, and manifold damage repairs of $136,489.55, for a total claim of $2,310,897.84. On September 20, 2015, Panamax served its Statement of Counterclaim in the amount of $548,804.00. On February 4, 2016 Owner

[2] SMA No. 4245.
[3] Any such restrictions were removed at the conclusion of the ISA proceedings in October 2016.

served its Pre-Hearing Submission Statement and Panamax served an amended Pre-Hearing Statement of Counterclaim for lost profits in the amount of $172,460.59. On March 22, 2016 Panamax served its Pre-Hearing Statement of Defense. On April 18, 2016, in response to Owner's application for a partial final award on the issue of whether Panamax had breached its obligation to exercise due diligence in the selection of a safe berth and Panamax's application for a partial final award on the issue of burden of proof, the Panel deferred ruling on the parties' respective applications pending the conclusion of Owner's case in full and Panamax's rebuttal.

Nine evidentiary hearings were held between May 25, 2016 and January 18, 2017. Owner presented the following witnesses who appeared before the Panel:

Theodoros Maroulakis, Director, Empire Navigation (UK) Ltd.[4]

Captain John Dudley, Vetting Consultant

Captain Gener Dimaculangan, Master, MIMOSA

Robert Ryan Rivera, Second Officer, MIMOSA

Alvaro Pizarro, Owner's P&I Club Surveyor[5]

Nikolaos Papamichalis, Marine Operations Manager/Superintendent, Empire Navigation

Captain Peter Holloway, Navigation Expert

On January 18, 2017 Owner rested its case in chief, and Panamax subsequently requested leave to file a motion to dismiss Owner's claim pursuant to SMA Rule 21 on the ground that Owner failed to carry its burden of proof that Panamax breached its duty of due diligence in nominating an unsafe berth at Quintero. Owner opposed Panamax's application. In a Partial Final Award

[4] Empire Navigation (UK) Ltd. acts as commercial manager for Empire Navigation Inc., which was the operator of the MIMOSA.

[5] Mr. Pizarro's testimony was taken by video conference.

dated February 24, 2017[6] the Panel granted Panamax's application without prejudice to its right to present its defense submissions and witness testimony if the Rule 21 motion were denied.

The Charterparty

On April 30, 2014, LR Mimosa Ltd., as Owner, entered into a charterparty of the MIMOSA on an amended Shelltime 4 form with Panamax, as Charterer, with terms memorialized in a fixture recap and subsequently confirmed by the parties on May 1, 2014 (the "Charterparty"). The Charterparty was for a period of 30 days minimum 120 maximum in Charterer's option, which was extended by addenda to January 31, 2016.

Clause 4 of the Charterparty provided as follows:

"Charterers shall use due diligence to ensure that the vessel is only employed between and at safe places (which expression when used in this charter shall include ports, berths, wharves, docks, anchorages, submarine lines, alongside vessels or lighters, and other locations including locations at sea) where she can safely lie always afloat. Notwithstanding anything contained in this or any other clause of this charter, Charterers do not warrant the safety of any place to which they order the vessel and shall be under no liability in respect thereof except for loss or damage by their failure to exercise due diligence as aforesaid. Subject as above, the vessel shall be loaded and discharged at any places as Charterers may direct, provided that Charterers shall exercise due diligence to ensure that any ship-to-ship transfer operations shall conform to standards not less than those set out in the latest published edition of the ICS/OCIMF Ship-to-Ship Transfer Guide. **Charterers shall have the right to require the vessel to perform lighterage operations and/or Ship to Ship transfer operations at anchor or underway at a safe anchorage or place and these Ship to Ship transfer operations shall be conducted in**

[6] SMA No. 4304.

accordance with the provisions of the latest ICS/OCIMF Transfer guide (petroleum) and always at charterers' time/expenses/risk and subject to the master's satisfaction on safety and weather considerations. Charterers shall provide the vessel with fenders, hoses and all other equipment necessary for safe operation to the satisfaction of the master. Lightering operations are to be at the discretion of the master at all times, and if master, at any time considers that the operations are, or may become, unsafe, he may choose to discontinue the STS operations until he considers it is safe to resume such operations, during such suspension, the vessel shall not be counted off-hire. Maximum 4 consecutive lighterings and maximum total 10 lighterings per 6 months. It is understood and agreed that the crew of the vessel will be required to assist in handling the fenders and cargo hoses as well as mooring and unmooring of the vessel as designated by the mooring master at the STS transfer site at no additional cost to the charterers. All extra equipment/personnel required for such transfer operation shall be provided by charterers at their expense. Any extra cost of insurance incurred for such operations, if any are to be for charterers account. Owners warrant vessel complies with the 'recommendations for equipment employed in the mooring of vessels at single point moorings' as published and as amended by OCIMF from time to time" [emphasis in original].

Clause 16 provided in relevant part:

"Owners hereby indemnify Charterers, their servants and agents against all losses, claims, responsibilities and liabilities arising in any way whatsoever from the employment of pilots, tugboats or stevedores, who although employed by Charterers shall be deemed to be the servants of and in the service of Owners and under their instructions (even if such pilots, tugboat personnel or stevedores are in fact the servants of Charterers, their agents or any affiliated company) …."

Clause 41 provided:

"**This agreement is governed by and shall be construed in accordance with the laws of States** [sic] **of New York, USA without regard to conflicts of laws principles.**

Any dispute or difference arising out of or in connection with this Agreement shall be settled by arbitration in New York, USA administration and conducted in accordance with the rules of Society of Maritime Arbitrators ("SMA"). The arbitration panel shall consist of three (3) persons (one to be appointed by each party and the third to be appointed by the two so chosen) except the requirement for the appointment of SMA arbitrators shall be optional at the sole discretion of the appointing party and judgement on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. The third appointed arbitrator shall act as chairman and not as umpire. The language of the arbitration shall be English" [emphasis in original].

The Facts

The MIMOSA is a Panamax double hull tanker built in 2006, with an LOA of 228.6 meters, a summer DWT of approximately 74,035 tons and a summer draft of 14.518 meters. The distance from the bridge to the bow is 188.3 meters and from the bridge to the stern is 40.3 meters.

The vessel was fixed with Panamax who as time-chartered Owner placed the MIMOSA into the Panamax Pool, which among other partners included Overseas Shipholding Group ("OSG") and Flota Petrolera Ecuadoriana ("Flopec"). Under the April 30, 2014 time charter, Panamax had the right to sub-let/sub-charter the vessel. In this instance, the vessel was employed under a sub-charter between Flopec and Petrochina.

On September 9, 2014, Cape Tankers, the Panamax Pool manager, instructed Owner to load approximately 396,000 net barrels of Oriente crude oil at Puerto Esmeraldas, Equador and

proceed to the discharge port of Quintero, Chile, with the terminal TBA. On September 16 the vessel was instructed to discharge 28,000 metric tons of her cargo at Quintero via ship-to-ship transfer with the M/T CABO TAMAR, and to discharge a further 34,981 metric tons at the Single-Point Mooring Buoy ("SPM") operated by Empresa Nacional de Petroleo ("ENAP"), the Chilean national oil company. On September 20, 2014, the vessel arrived and tendered NOR at Quintero. On September 23, Panamax revised the discharge instructions and ordered the vessel to discharge approximately 62,981 metric tons of cargo via the SPM.

According to information supplied by Owner, the SPM is a Catenary Anchor Leg Mooring buoy built by SBM Offshore Inc. located approximately 1.5 km northeast of Quintero and anchored to the seabed by six chain legs secured by mud and gravel anchors. Crude oil is pumped from tankers to the SPM by means of two floating flexible cargo hoses through submarine hoses to a pipeline end manifold and into the pipeline system supplying the Quintero Marine Terminal.

The SPM consists of a flat cylindrical buoy body approximately 12 meters in diameter and 5.3 meters high with a center well that is open to the sea. There is a roller bearing assembly on the buoy body that supports a turntable structure incorporating a mooring bridle and ancillary equipment. The turntable and roller bearing design permit a moored tanker to rotate freely around the SPM. The SPM can accommodate tankers up to 350,000 DWT. It is undisputed that the MIMOSA's characteristics were well within the parameters for the safe mooring of vessels and the performance of cargo operations at Quintero.

In accordance with port regulations, the MIMOSA was secured to the SPM with double mooring hawsers with a chafe chain attached to the end of each hawser. The chafe chains were then passed through the ship's fairleads and connected to chain stoppers located in the forecastle. The regulations also require the use of at least one 50-ton bollard pull tug tied to the stern of the

vessel to maintain a safe distance from the SPM and prevent the vessel from swinging and damaging the flexible cargo hoses.

At 13:54 hours local time on September 23 the MIMOSA shifted from anchorage to the SPM with the assistance of two local pilots as required by port regulations. Mooring to the SPM commenced at 14:24 and the MIMOSA was all fast at 14:42. Alejandro Hermann, one of the two pilots, remained on board and the tug HORCON was positioned astern of the vessel with instructions to maintain a static tow. After completing the required pre-discharge safety checks, the vessel commenced discharge operations at 20:10 hours using the ship's two portside manifold connections to the two SPM cargo hoses.

At 21:35 Lieutenant Commander Pilot Jamett relieved Pilot Hermann and assumed control of the discharge operations. Pursuant to arrangements between the vessel agents and the tug operator, Ultramar Ltda., the tug PUYEHUE was scheduled to replace the HORCON during the early morning hours of September 24 because the HORCON had been assigned to another operation at the LNG terminal scheduled for 07:00. Both Pilot Jamett and the MIMOSA's Master, Captain Dimaculangan, were notified of the tug changeover, which was scheduled to be carried out around 04:00. The Master in turn advised the watch officer and the Chief Officer of the changeover and noted the changeover on a "white board" in the Cargo Control Room (CCR) before retiring to his cabin around 23:00. Second Officer Robert Ryan Rivera, who assumed the watch at midnight, and the Pilot were on duty for the tug changeover while the Master rested in his cabin.

At 03:45 the PUYEHUE arrived at Quintero and proceeded to maneuver alongside the HORCON. At 03:46[7] the HORCON's captain advised Jamett that the tug would commence slackening the

[7] The times commencing at 03:46 on September 24, 2014 and afterwards are taken from the MIMOSA's Vessel Data Recorder (VDR), which recorded conversations on the ship's bridge as well as VHF radio transmissions and navigational data from the MIMOSA's Electronic Chart Display and Information System (ECDIS) and Automatic Identification System (AIS). The voice recordings were transcribed and translated from Spanish and Tagalog by Panamax.

towline so that it could be passed to the PUYEHUE, and Jamett informed the HORCON that he and Rivera would proceed to the poop deck at the MIMOSA's stern to monitor the changeover. At 03:53 Jamett requested the PUYEHUE to let him know when it started to tighten the line because of the MIMOSA's tendency to move ahead toward the SPM. At 03:54 the HORCON reported that the towline had been transferred to the PUYEHUE and Jamett ordered the PUYEHUE to "tighten up your line as long as you can in the same direction that the HORCON was pulling, a delta more to starboard of your present position" and the PUYEHUE confirmed that it would comply with the Pilot's orders.

According to Second Officer Rivera's testimony, at the time of the changeover, AB Ariel, who was assigned the bow watch, reported the SPM's position relative to the MIMOSA's bow as "3 o'clock at distance of 40 meters with moderate tension." When the PUYEHUE commenced pulling, Rivera testified that Ariel reported the SPM position as "4 o'clock distance 50 meters", then "4 o'clock distance 55 meters", and finally "4 o'clock distance 60 meters with moderate tension." Rivera confirmed that he relayed each of these reports to Pilot Jamett.

At 03:57 Jamett asked the PUYEHUE to confirm when it was about to reach five tons of tension on the towline and at 03:58 informed the tug that it was positioned at the right distance and should remain aligned with the LNG terminal and move slightly to port to prevent the MIMOSA from turning. The PUYEHUE replied that it was "in position with 5%" to which Jamett responded "excellent, we are very good here. The area here is greased, the line is working fine onboard."

At 03:59 the Pilot ordered the tug to keep the line tight because the SPM was at the MIMOSA's starboard bow and at 04:01 ordered the PUYEHUE to "tighten up your lines because the vessel is turning quickly." At 04:01:50 the tug confirmed "OK, received, tighten up."

Rivera testified that at approximately 04:02 Jamett decided to proceed from the poop deck to the bridge to monitor the SPM and Rivera had already returned to the CCR to hand over the watch

to the third officer. According to Rivera, when the first report was received from the bow watch that the SPM was positioned at 3 o'clock at 40 meters, both he and Jamett had left the poop deck and were standing at the starboard door to the accommodation area on the main deck. At 04:02 pilot Jamett asked the PUYEHUE how much pull the tug was exerting and the tug replied "at 7." Jamett then replied "OK, keep at 7." Rivera testified that he received a subsequent report from AB Ariel that the SPM was at its normal position of 12 o'clock at 60 meters, but did not report this to pilot Jamett because he believed the Pilot was already on the bridge monitoring the SPM.

The ISA investigation determined – and both Owner and Panamax now agree - that the two hawsers securing the MIMOSA to the SPM parted at approximately 04:02.[8] At approximately 04:05 Jamett answered a call from Rivera on the bridge telephone by immediately inquiring about the distance to the SPM and Rivera reported that "the chain's cut."[9] Jamett twice asked "1 or 2?" but did not receive an answer. At 04:06 he nevertheless ordered the PUYEHUE to continue pulling "at 7" but twelve seconds later ordered the tug to "reduce to 5." At 0406 Ariel reported to Rivera that "the lines of the buoy parted, the chain is still here" and that "the buoy is now far." At the same time the AB stationed at the ship's manifold reported "the hose here is getting tight... Sir, it's getting tight!" while Rivera and the Chief Officer in the CCR were attempting to clarify whether the chafe chain was still connected to the MIMOSA.

At 04:07 an order was given by an unidentified crew member – possibly the Chief Officer – to close the manifold and the deck watch confirmed "close manifold." Rivera stated that the "vessel at this time was drifting fast going to astern." Pilot Jamett then asked Rivera if the MIMOSA was still moored and Rivera replied "we're still moored, the chain's still there, only the moor.., only the

---

[8] During the ISA investigation and in the early part of this arbitration, Owner maintained that the mooring hawsers parted at 04:06; however, Owner's navigational expert Captain Holloway conceded that the hawsers parted between 04:02 and 04:03 based on his analysis of the vessel's movements as recorded by the VDR, and in its response to Panamax's Rule 21 motion, Owner acknowledged that the hawsers parted at approximately 04:02:30.

[9] Rivera later testified that Ariel reported to him that the "line" was cut and that he used the word "chain" because he was "nervous."

buoy." At 04:07 the AB at the manifold reported "the hose broke! It's spilling! It's spilling!" indicating that the flexible cargo hoses had broken from the ship's portside manifold with the manifold reducers still attached to the hoses.[10] At 04:07:43 pilot Jamett ordered the PUYEHUE to stop tightening the lines and at 04:07:55 the tug confirmed "we are stopped." Second Officer Rivera then ran from the CCR to the bridge and activated the ship's emergency alarm and alerted the ship's crew to the oil spill over the public address system.

Because of the MIMOSA crew's prompt action in closing the ship's cargo manifold valves at 04:07, only a small quantity of oil spilled from the manifold and was contained on the ship's deck; however, as a result of the rupture of the cargo hoses, a significant amount of oil, estimated to be around 39 metric tons (about 273 bbls.) entered Quintero Bay, causing substantial cleanup costs and property damage for which Owner now seeks to be indemnified by Panamax.

The ISA Proceedings

On September 24, 2014, the Valparaiso Maritime Governorship ordered the Valparaiso Naval Prosecutor to initiate the ISA proceedings to determine the causes of the incident and to identify the responsible parties for the oil spill. The Naval Prosecutor issued his findings on November 26, 2014. He found that the mooring hawsers parted at 04:02 on September 24, 2014 based on the distance between the MIMOSA and the SPM, the length of the hawsers, and the fact that the cargo hoses ruptured shortly before 04:07. He determined that after the mooring hawsers parted, "the vessel kept moving astern because the OGTV 'PUYEHUE' pulled until the tension directly affected the bolts of the flanges of the cargo hoses and the manifolds, thus detaching them."[11]

The Prosecutor found that Captain Dimaculangan was timely advised of the tug changeover and duly informed his officers, but did not provide further instructions to the watch officer other than general information about the terminal's requirements regarding the tug. He found the Master

[10] Owner has claimed $136,489.55 for the cost of repairs to the manifold.
[11] An English translation of the ISA findings was provided in Owner"s document production.

partly responsible for the incident because he did not "properly supervise his vessel during the discharge of crude oil, while she was being pulled by a tugboat; the lines that kept her moored to the Monobuoy Terminal of ENAP S.A. parted, and the hoses became disconnected, causing the spill of approximately 38.7 m3 of crude oil," but found that a mitigating circumstance was the adequate measures taken by the crew to stop the discharge of oil. The Master was ordered to pay a fine of 80,000 gold pesos (570,000 US dollars).

The Prosecutor determined that pilot Jamett's decision to conduct the tug changeover from the poop deck rather than the bridge "hindered his visual of what was happening, and without support from the navigation equipment, so he did not notice the movements of the vessel." He declined to fine Jamett, however, because as an officer of the Chilean Navy the Pilot was not subject to the Prosecutor's jurisdiction but rather to the Navy's disciplinary procedures.

The master of the tug PUYEHUE was also found to be at fault for "pulling the T/V MIMOSA with his tugboat with greater power than required, causing the parting of the lines that united her to the Monobuoy Terminal of ENAP S.A. and the disengagement of the hoses," resulting in the oil spill. The tug master was also ordered to pay a fine of 80,000 gold pesos.

The Prosecutor further found that a 2006 ENAP Maneuverability Study for the SPM required mooring hawsers to be 100 meters long and withstand a pull of 350 tons each, whereas the hawsers supplied by ENAP were only 55 meters long and according to their certificates were only able to withstand a rupture force of 310 tons. Moreover, subsequent laboratory tests of the hawsers that parted showed that they did not did not comply with the minimum mechanical resistance established by the manufacturer. ENAP was accordingly found at fault for not maintaining the SPM's mooring system in compliance with the conditions stipulated in the Maneuverability Study and for failing to consider procedures to minimize the risk of oil spills during tug changeovers at the terminal, and was fined 100,000 gold pesos (720,000 US dollars). A mitigating factor was the measures taken to minimize the pollution damage.

On January 13, 2015 the Naval Prosecutor reopened the ISA proceedings to determine the responsibility of Second Officer Rivera and reassess pilot Jamett's liability for the spill in light of subsequent expert testimony.

On June 5, 2015 the Prosecutor issued an additional ruling confirming his prior findings regarding the MIMOSA's master, ENAP and pilot Jamett. He found that Rivera's decision to monitor the tug changeover from the poop deck and later the CCR rather than from the navigation bridge made it impossible for him to take notice of the ship's astern movement in derogation of his duty as watch officer. The Prosecutor imposed a fine of 40,000 gold pesos (285,000 US dollars) on Rivera.

An independent expert, Captain Carlos Valderrama, with over 14 years experience as a pilot at Quintero, was appointed to assess the actions of pilot Jamett. Valderrama opined that Jamett should not have left the bridge to monitor the tug changeover. The bridge offered the best position because it would have enabled Jamett to use the ship's navigational equipment to assess the MIMOSA's speed, heading and other factors.

Based on his analysis of the vessel's VDR data, Valderrama observed that the MIMOSA remained in a virtually static position when secured to the HORCON; however, he noted a substantial increase in the MIMOSA's movement astern – which he estimated to be 2.5 knots at 04:03 - after the PUYEHUE began to pull. From this information Valderrama concluded that the PUYEHUE used excessive force in pulling the MIMOSA, causing the hawsers to part as a result of the ship's speed and displacement. Valderrama estimated that the hawsers parted at 04:01, since the ship's bow subsequently moved quickly to starboard as a result of the force exerted by the cargo hoses on the vessel's port side manifolds. The Pilot's decision to increase to a bollard pull of 7 tons contributed to the rupture of the cargo hoses, which Valderrama estimated occurred at 04:04:30.

The Naval Prosecutor concluded that the MIMOSA moved too far astern as a result of the Pilot's actions, causing the parting of the cargo hoses and the oil spill.

On August 12, 2015 the Prosecutor affirmed the fines imposed on Captain Dimaculangan, Second Officer Rivera, the PUYEHUE's master and ENAP, and also affirmed the finding of Pilot Jamett's responsibility for the oil spill.

On October 16, 2016 the Maritime Governor adopted in full the findings and conclusions of the Naval Prosecutor, concluding the ISA proceedings.

Panamax's Contentions

The ISA Proceedings and the Duty to Indemnify

Panamax maintains that Owner cannot selectively use the evidence and findings in the Chilean ISA proceedings to establish its *prima facie* case that the SPM Facility was unsafe, while ignoring the ISA findings against the Pilot and vessel personnel. Since Owner was a party to the Chilean proceedings, but Panamax was not, it urges the Panel to apply the doctrine of non-mutual collateral estoppel against Owner. Under that doctrine, a litigant who was not a party to a prior judgment may use the judgment offensively to prevent a defendant from re-litigating issues in the prior proceeding; conversely, a determination made in an earlier proceeding in a party's favor may not be given preclusive effect against a party that did not participate in the action. Panamax maintains that the ISA findings regarding the negligence of the vessel's crew and Pilot in causing the oil spill should therefore be binding on Owner in this arbitration.

Even if the Panel declines to apply the doctrine of non-mutual collateral estoppel in this case, Panamax argues that the Panel should accord no evidentiary weight to the ISA findings against it since it was not a party to those proceedings, but should require Owner to establish its *prima facie* case independently of the ISA investigation.

Panamax denies that that it is obligated to indemnify Owner for third-party and Chilean government claims arising from the incident, pointing out that Owner's demand was limited to outstanding hire and other expenses. It cites legal authority that a claim for indemnity arises only under an express contract of indemnification or where one defendant is vicariously liable for the negligence of another. It does not apply where the indemnitee's own wrongdoing contributed to the injury. In this case, the ISA finding of vessel fault bars Owner's indemnity claim as a matter of law. Similarly, Owner failed properly to tender the defense of the Chilean proceedings since it did not expressly demand that Panamax assume its defense.

Burden of Proof

Panamax asserts that Owner has failed to carry its burden of proof on each of the three elements necessary to establish Charterer's liability, namely that (1) the ENAP SPM facility was unsafe at the time of the incident; (2) to the extent the facility was unsafe and exposed the vessel to navigational hazards, those hazards and the resulting oil spill could not have been avoided by the exercise of prudent seamanship; and (3) to the extent the incident could not have been avoided by prudent seamanship, Panamax nevertheless complied with its contractual duty to exercise due diligence in nominating the ENAP SPM facility.

Panamax cites a number of evidentiary principles in support of it position. It maintains that the majority of Owner's evidence is hearsay. Acknowledging that under SMA Rules the Panel need not strictly follow rules of evidence, Panamax maintains that Owner's hearsay evidence should be accorded no weight and is insufficient to satisfy Owner's *prima facie* case.

Panamax further maintains that Owner's experts in the field of SPM operations (Captain Holloway) and oil terminal vetting (Captain Dudley) are unqualified to satisfy Owner's *prima facie* case under the standard established by the US Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals.*[12]

[12] 509 US 579 (1993).

Under *Daubert*, a party seeking to introduce an expert opinion to satisfy its *prima facie* case must establish that the witness is in fact qualified to be an expert; the expert's opinion is based on reliable data and methodology; and the expert's testimony will assist the trier of fact. Applying the *Daubert* standard, Panamax argues that neither Captain Holloway's nor Captain Dudley's opinions and testimony are reliable because they concern aspects of the case in areas for which they are not qualified and are based on the opinions of others.

<u>The ENAP Facility was Safe</u>

Panamax points out that there is no "bright line" test to determine whether a particular port or berth is safe. The safety of a port or berth depends on a number of "subjective factors" such as the size and characteristics of the particular vessel; whether the vessel had previously called at the port or berth; the number of previous calls by other vessels of the same size and characteristics; the prevailing weather; the obvious nature of the unsafe conditions; and the skill and seamanship of the vessel's crew and pilot.

Panamax maintains that the ENAP SPM facility was safe for the following reasons:

(1) the SPM was designed to accommodate vessels of up to 350,000 DWT and LOAs of up to 345 meters, which was more than adequate to accommodate the MIMOSA while moored to the SPM. The SPM was therefore physically safe for vessels of similar size and characteristics as the MIMOSA;

(2) the SPM had a clean safety record during the three years preceding the casualty. In that period, approximately one hundred vessels of similar size or larger than the MIMOSA safely conducted cargo operations at the SPM. In the year before the casualty, there were 39 calls at the SPM by vessels owned or chartered by Panamax or its affiliated companies without incident;

(3) it is undisputed that weather did not pose a hazard and was not a factor in the incident;

(4) nightime tug changeovers are not uncommon and are safe;

(5) the Quintero Maritime Authorities annually inspected and certified the safety of the SPM;

(6) no maritime publications, including notices to mariners, the OCIMF and Q88 questionnaires and the IHS Maritime Port and Terminals Guide, identified any risks or hazards associated with the ENAP SPM at Quintero.

Conversely, Panamax advances numerous reasons why Owner failed to prove the ENAP facility was unsafe.

Firstly, Owner failed to demonstrate that there were any oil spill incidents or hawser failures in the three years prior to the incident or that any incidents prior to 2011 were the result of defective hawsers or poor hawser maintenance. Captain Holloway's testimony concerning five previous minor spills at the Facility based on a 2014 Sustainability Report was incorrect; the report shows that the spills occurred at other facilities in Argentina. The 2014 expert opinion of Captain Valderrama during the ISA proceedings showed that there were only two incidents of hawser failure at the SPM, one involving an anchor dragging incident in heavy weather and the other attributable to sabotage.

Secondly, Owner failed to prove the mooring hawsers were defective. The Chilean expert reports on the post-casualty testing of the hawsers on which Owner relies are hearsay and insufficient to support Owner's *prima facie case.* Although the reports indicated that the hawsers were defective in that they lacked the minimum recommended 60% residual tensile strength, Owner failed to produce the authors of the reports or provide testimony from a qualified forensic expert supporting the validity and reliability of the testing procedures. Panamax points out that the reports are based

on the testing of recovered broken hawser lengths and that neither Captain Dudley nor Captain Holloway were qualified to proffer an opinion as to whether the tests provided a reliable indication of the actual residual tensile strength of the hawsers prior to the casualty. Tests performed on unused and intact mooring lines which had been in storage since their purchase in June 2012 showed a residual strength of 66.7%, only minimally above the recommended strength of 60% and significantly below the minimum breaking load (MBL) of 310 tons, but the ISA experts did not offer any explanation to account for the significant loss of tensile strength on an unused mooring line meeting all the manufacturer's MBL requirements at the time of purchase.

Panamax further argues that even if the testing procedures were reliable, the testing results were meaningless absent any calculation of the dynamic stress applied on the hawsers during the tug changeover. The tug HORCON had maintained a 5-ton bollard pull to keep the static tow from 14:42 hours on September 23 until the time of the changeover. The hawsers parted as a result of additional dynamic energy applied to the hawsers by the vessel's speed, mass and other factors following the changeover, but no testimony was presented as to whether the total energy applied exceeded the absorption capacity of hawsers in sound condition, i.e., a minimum of 60% of their original MBL. The possibility can therefore not be excluded that the hawser partings were caused by the negligence of the crew and Pilot in allowing the vessel to gain excessive speed after the changeover.

Neither the testimony of Pizarro nor Papamichalis was sufficient to establish the reliability of the Chilean expert reports or the alleged inadequate hawser strength because, among other things, neither was familiar with the standards applicable to the sampling and testing of mooring lines or was present during the actual testing of the samples. Similarly, Dudley's and Holloway's testimony is equally incompetent because neither was a qualified forensic hawser expert and their opinions were based entirely on the ISA experts' test results and other hearsay evidence.

There was no requirement for a tension meter aboard the tug PUYEHUE under port regulations or Chilean law, and the Chilean Naval Prosecutor found that the lack of a tension meter did not cause or contribute to the incident. The alleged lack of experience of the PUYEHUE master was not a causative factor according to the Naval Prosecutor, and Captain Holloway conceded that neither the lack of a tension meter nor the tug master's inexperience played a role in the incident. In any event, any negligence on the part of the Pilot or the tugboat is imputed to Owner under Clause 16 of the Charterparty. It was rather the inattentiveness of the Pilot and the ship's watchstanders in failing to monitor and report the effect of the tug's pull and the resultant acceleration and speed of the vessel that caused the hawsers to fail.

Addressing Owner's contention that the ENAP 55-meter hawsers failed to comply with a 100-meter length requirement established in ENAP's 2006 Maneuverability Study, Panamax argues that at least since 2001, the SPM had safely operated with dual 50-meter mooring hawsers as established by a 2005 Mooring Upgrade Analysis prepared by the SPM manufacturer introduced during the ISA proceedings. The 2005 Mooring Upgrade showed that the 50-meter hawsers were still adequate for use in loading operations involving tankers up to 350,000 DWT. Moreover, satellite pictures of the Quintero SPM showed that as of 2016, 55-meter hawsers were still being used at the Facility.

With respect to Owner's contention that the lack of a terminal procedures booklet rendered the SPM unsafe, Panamax refers to the testimony of Captain Dimaculangan that continuation of cargo operations during a tug changeover did not pose a risk and that tug changes are frequently done at night without notice. The Master did not consider the lack of a terminal booklet to be a hazardous condition because he failed to issue a letter of protest, as required by the vessel's SMS.

The installation of breakaway valves is not a requirement under OCIMF guidelines or Chilean law; the terminal has absolute discretion whether or not to install them, and the presence of manual valves at the end of the flexible cargo hoses and the attendance of an ENAP employee on board to close the valves in an emergency was sufficient under applicable regulations.

The Proximate Cause of the Oil Spill was the MIMOSA's Imprudent Navigation

Panamax maintains that the sole and proximate cause of the oil spill was the imprudent navigation of the vessel by her crew and pilot. It cites many examples of crew and vessel management actions which its asserts would have prevented the hawsers from breaking:

(1) the Master's failure to provide specific orders to the officers and crew assigned to monitor the tug changeover operation;

(2) detailed procedures for SPM operations in the vessel's SMS, such as individual watchstanders' duties, interaction with terminal and port representatives and pilots, crew guidance for cargo operations at SPMs, use of tugs for static tows, and tug changeover procedures;

(3) the Pilot's decision to monitor the tug change operation from the poop deck rather than the bridge, where he could have observed the vessel's position relative to the SPM and her speed;

(4) the failure of the Master to confer with the Pilot regarding the tug changeover;

(5) the Pilot's failure to provide proper oversight and correct orders to the tug and his lack of situational awareness in instructing the tug to continue pulling after the vessel had broken her moorings, causing the cargo hoses to be pulled from the manifold;

(6) the failure of the Second Officer to supervise the tug changeover from the bridge where he could have monitored the vessel's movement and speed and the actions of the Pilot, and taken the required measures to prevent the hawsers and cargo hoses from parting;

(7) the failure of Second and Third Officers to ensure a proper lookout was maintained at the bow and timely reports received from the AB assigned to the bow watch regarding the ship's position and tension on the hawsers;

(8) the bow AB's failure to maintain a proper watch and his nearly four-minute delay in reporting that the hawsers had broken;

(9) the decision of the Second and Third Officers to change the watch in the Cargo Control Room, making them unaware of the ship's position and speed while the tug changeover was in progress, and leaving the Pilot without the means to communicate with the bow watch;

(10) the general breakdown in communications among the vessel personnel and Pilot which prevented them from assessing the situation and taking effective measures to prevent the oil spill;

(11) Jammet and Rivera's failure to order an ahead bell on the ship's engines to counter the vessel's astern movement;

(12) the failure of the MIMOSA's watchstanders to alert the on board ENAP representative that the hawsers parted at 04:02, which would have had given him sufficient time to close the valves at the vessel manifold, thus avoiding the oil spill.

Panamax argues that Owner failed to carry its burden of demonstrating that none of these actions would have prevented the hawsers from breaking or the flexible cargo hoses from parting from the manifold.

Panamax maintains that Owner's navigational expert Captain Holloway was not a credible expert witness because his opinions were based on hearsay evidence that the hawsers were defective and because he failed to consider alternate factors which could have caused or contributed to the accident, such as crew or pilot negligence, in particular the failure of the bow AB to report that the

hawsers had broken at 04:02 and the failure of the Second Officer to monitor the effect the PUYEHUE was exerting on the vessel. Panamax emphasizes Holloway's admission that timely reporting of the hawser parting would have given the ENAP representative sufficient time to close the hose valves and prevent the spill.

Panamax further maintains that Holloway failed to take into account the negligence of the Pilot in leaving the bridge to monitor the tug change, citing testimony from Papamichalis, as well as Captain Valderrama's evidence in the ISA proceedings, that the bridge is the best place to monitor and control tug changeover maneuvers. Panamax also criticizes Holloway's dismissal of the Master's failure to provide precise orders to his officers and crew as well as his failure to consult with the Pilot regarding the changeover as causative factors.

Owner's Contentions

Owner claims that Panamax is obligated to indemnify it for all third-party and Chilean government claims arising from the pollution incident and that it properly tendered the defense of the claims in the ISA proceedings to Panamax, which rejected the tender. Owner denies that contributory negligence will bar its indemnity claim and points out that under US maritime law, damages resulting concurrently from an unsafe port or berth and vessel negligence may appropriately be divided between the parties. Owner maintains that it gave Panamax adequate notice of the ISA proceedings and an opportunity to defend, and Panamax is therefore bound by the findings in those proceedings, in particular the Chilean hawser breaking strength test results. Owner relies primarily on the initial ISA ruling dated November 24, 2014, which found that ENAP failed to comply with the conditions for use of the SPM regarding the length and breaking strength of the hawsers and to implement procedures to minimize the risks of pollution during the tug changeover, including the installation of valves and couplings on the cargo hoses to allow quick disconnection.

In further support of its claim that the ISA findings are binding on Panamax, Owner cites its production of the entire ISA investigation file in response to Panamax's request. It also asserts that Panamax is part of the Ultranav Group, which it claims participated in the ISA proceedings through its tugboat subsidiary Ultratug.

Owner points out that neither the Federal Arbitration Act nor the SMA Rules prohibit the Panel's consideration of hearsay evidence. Hearsay evidence should not be stricken as inadmissible; rather, the Panel may judge the relevancy and materiality of such evidence. Moreover, the Federal Rules of Evidence (FRE) do not mandate the exclusion of hearsay evidence. Under FRE Rule 807, hearsay evidence may be considered even if not specifically covered by a hearsay exception if the evidence is trustworthy, material, probative, and serves the interest of justice.

Owner maintains that the ISA hawser test results are credible because Santa Maria University, where the testing was performed, is "well known and respected"; the University technicians used the correct ISO 2307:2010 standard; ENAP's challenges to the results were twice denied; and no protests were received from ENAP or Ultratug. Owner further maintains that when purchased new, the hawsers' 310 tons MBL was below the Maneuverability Study's 350-ton requirement. Owner cites to its experts' testimony that the MIMOSA's estimated speed and the tug's bollard pull of 12 tons would have been insufficient to cause hawsers with the required MBL to break.

Owner objects to Panamax's *Daubert* challenge to the testimony of Captain Dudley and Captain Holloway on the basis that *Daubert* is inapplicable to commercial arbitration. Their testimony should not be excluded but rather given the weight it deserves. Neither Captain Dudley nor Captain Holloway were offered as forensic witnesses but rather as experts on petroleum trade vetting practices and vessel navigation, respectively.

The SPM Buoy Was Unsafe

Owner maintains that the SPM was unsafe for the following reasons:

(1) the nighttime tug changeover was a routine procedure;

(2) the SPM was allegedly suitable for a 350,000 DWT vessel and should have been able to accommodate a 74,000 DWT Panamax tanker;

(3) there was no adverse weather;

(4) the IHS Port Directory for Quintero contains no meaningful information about the SPM;

(5) contrary to established tanker practice, neither Panamax nor ENAP provided any guidelines for SPM operations to the vessel;

(6) the ISA proceedings determined that ENAP did not operate the SPM in accordance with the ENAP Maneuverability Study, including proper hawser length, breaking strength and maintenance;

(7) local statutes required an emergency breakaway shutoff coupling, which ENAP permanently removed without authorization. The Chilean Naval Prosecutor found that the spill could have been prevented or minimized had the couplings not been removed;

(8) breakaway couplings are a well-established industry standard based on OCIMPF SPM Guidelines. Although Clause 4 of the Charterparty does not incorporate the SPM Guidelines, the OCIMPF Guidelines for Ship-to-Ship Transfers (STS) are specifically incorporated in Clause 4 and the application of the SPM Guidelines should therefore be implied in Clause 4;

(9) it was ENAP's decision to continue cargo operations during the tug changeover;

(10) the ENAP SPM was nominated by Panamax, not Owner;

(11) the SPM Q-88 contains significantly wrong information;

(12) the ENAP Terminal report is missing most of the information required by the OCIMF Marine Terminal Information System (MTIS).

Owner further argues that the absence of prior incidents at the ENAP Facility does not make it reasonable for Panamax to assume the Facility was safe or to excuse Panamax from checking the MTIS database to verify the Facility's safety.

Owner's Obligation to Exercise Prudent Seamanship

Owner maintains that standard SPM practice calls for vessel personnel and the pilot to monitor tug changeovers from the stern rather than the bridge, citing testimony from Second Officer Rivera and Captain Dudley. Although Owner amended its SMS after the casualty to provide for a deck officer on the bridge for SPM operations, it asks the Panel to disregard the amendment as a post incident remedial measure that is contrary to prudent seamanship and of no benefit in preventing accidents.

Owner does not dispute that based on the VDR evidence, the first hawser parted at 04:02 and was not reported by the bow watch AB until 04:05:49. Although in the ISA proceedings Owner contended that the hawsers did not part until 04:06, Owner attributes this discrepancy to a difference of one to two minutes between the VDR times and the times as observed and recorded on the ship's clocks. Based on Captain Holloway's testimony, Owner attributes the bow AB's failure immediately to report the hawser partings to the fact that the hawsers and chain are wrapped in canvas, which may have muffled the sound, or his temporary absence from his station after observing that the vessel was returning to its normal 12 o'clock position relative to the SPM.

Owner maintains that the vessel personnel could do nothing to prevent the spill for the following reasons: the ship's engineers required three minutes' notice to start the vessel's engines from their standby position and it would in any case have been imprudent to maneuver the vessel in darkness because of the risk of damaging the cargo hoses and the SPM; it would have been very dangerous for the ENAP representative on board the vessel to attempt to close the cargo hose butterfly valves at the ship's manifold during the five minute interval between the parting of the hawsers at 04:02 and the parting of the cargo hoses at 04:07 because of the risk of serious injury when the cargo hoses came under strain and were subsequently pulled from the manifold due to the vessel's astern motion. Owner further maintains that it is not standard practice for the Master to issue Night Orders unless the vessel is underway in navigation and such orders are never issued for cargo operations including tug changeovers.

The ISA Findings Concerning Vessel Negligence

Owner takes issue with the ISA findings in respect of the Master and Second Officer. Owner points out that the Master was asleep during the tug changeover; the vessel was secured; vessel personnel had no operational responsibility for the tug changeover or advance notice as to how the operation would be carried out; two deck watch officers were present for the changeover; and the SPM hawsers are not vessel equipment. Owner maintains that the ISA findings were contrary to shipboard practices for tug changeovers and that the vessel officers were unfairly criticized.

Charterer's Due Diligence Obligation to Nominate a Safe Port

Owner does not dispute that there are no legal decisions or arbitration awards that address a charterer's due diligence obligation to perform electronic vetting of terminals or that there is no contractual or statutory regulation or rule requiring such vetting. Owner maintains, however, that such vetting is an established practice in the tanker industry and that it is necessary for safety reasons and for pollution prevention. Owner cites Captain Dudley's testimony that electronic

vetting is a "best industry practice" and would have revealed many "red flags" concerning the safety of the ENAP terminal. Owner maintains that Panamax failed to perform any due diligence to ascertain the safety of the terminal, citing its admission that it did not consult the OCIMF MTIS or make any inquires during fixture negotiations regarding the SPM Facility.

Owner argues that the MTIS database, which currently contains information about the physical properties, operations and management systems of 654 terminals worldwide (including the ENAP terminal), is an easy and cost effective method of complying with a charterer's due diligence obligation. Owner points out that the MTIS entry for the ENAP terminal was missing information and observations in 47 out of 50 data fields which would have alerted Panamax to the need to make further inquiries about the safety of the SPM Facility. Owner emphasizes that OCIMF is not merely a trade association, but is focused on promoting industry wide standards for the safe handling and transport of petroleum cargoes.

Owner acknowledges that on-site inspections of terminals would be overly burdensome and commercially impractical, but argues that under a cost/benefit analysis, use of the MTIS database should be accepted as an industry standard and a means of determine whether a charterer has exercised due diligence in the nomination of a port or berth.

Discussion and Decision

Panamax has moved to dismiss Owner's unsafe berth claim pursuant to SMA Rule 21, which provides in pertinent part as follows:

> "Arbitrators shall apply burdens of proof and if by majority vote, the Panel concludes that the claimant has not made its case, no further evidence need be taken from the respondent, unless that respondent is asserting a counterclaim."

In its Partial Final Award of February 24, 2017, the Panel noted that Rule 21 is akin to a motion for judgment pursuant to Rule 52 of the Federal Rules of Civil Procedure (FRCP), which authorizes dismissal of an action at the close of the plaintiff's case if the plaintiff has failed to carry an essential burden of proof. Under FRCP Rule 52(c), a motion made by a defendant may be granted where the plaintiff has failed to make out a *prima facie* case or where the plaintiff has made out a *prima facie* case but the court determines that a preponderance of the evidence goes against the plaintiff's claim. The court's task on such a motion is to weigh the evidence, resolve any conflicts in it, and decide for itself where the preponderance lies. The court is not required to draw any inferences in favor of the non-moving party, as would be required for a motion for judgment as a matter of law under FRCP Rule 50, but can make findings in accordance with its own view of the evidence. The Panel has followed these general principles in ruling on Panamax's Rule 21 motion in this case.

In its ruling of April 18, 2016, the Panel held that Owner had the initial burden of producing evidence sufficient to establish its *prima facie* case that (1) the ENAP SPM Facility was unsafe at the time of the incident; (2) to the extent the facility was unsafe and exposed the vessel to navigational hazards, those hazards and the resulting oil spill could not have been avoided by the exercise of prudent seamanship; and (3) to the extent the incident could not have been avoided by prudent seamanship, Panamax nevertheless complied with its contractual duty to exercise due diligence in nominating the ENAP SPM Facility.

<u>Owner's Tender of Defense of the ISA Proceedings and Indemnity Claim</u>

In its response to Panamax's Rule 21 motion, Owner maintains that it properly tendered the defense of the third-party damage claims and Chilean government fines arising from the oil spill incident at Quintero Bay to Panamax, which rejected the tender. Owner therefore asserts that Panamax is bound by the findings and conclusions in the ISA proceedings. Owner further

maintains that Panamax is obligated to indemnify it for the fines, cleanup costs and third-party damages arising from the oil spill.

As evidence of Owner's tender, the Panel has taken notice of an e-mail dated October 4, 2014 from Dimitris Kontes, Operations Manager/Tankers for Empire Navigation to Oscar Andrade of Ultratank[13], which provides in relevant part as follows:

> "So whilst Charterers have urged Owners to arrange the release of the Vessel in order for 'LR MIMOSA' to resume her services under Charterers' orders, and have confirmed that they will comply with the terms of the C/P, Owners call upon Charterers to provide their urgent advices as to what they are doing to procure the departure of the vessel, and *to confirm that they will assume the defence of any actions brought against the Owners as a result of the Quintero spillage from the SBM and that they will indemnify the Owners as required by the C/P terms*" (emphasis added).[14]

Assuming - without deciding - that a party in interest in a foreign government investigation may validly tender the defense of the investigation to a non-party and that Mr. Kontes' message met the minimum formal requirements for such tender, the Panel majority[15] finds that Owner's tender was nevertheless invalid as a matter of law. A tender of defense is applicable only in cases where

[13] Mr. Andrade was Senior General Manager of Operations for Ultratank in Santiago, Chile, which acted as agents for Panamax.
[14] Owner's counsel also refers to a lengthy exchange of e-mails between Mr. Kontes and Mr. Andrade following the casualty dealing, among other things, with Panamax's offhire claim. Among these is an e-mail dated September 27, 2014 from Mr. Kontes which states: "Charterers designated the place of discharge and are liable to the Owners in damages or for an indemnity arising out of the Owners' compliance with the Charterers' trading instruction, including in respect of any exposure the Owners may face to third party claimants."
[15] Mr. Arnold dissents from this and certain other portions of this Award, as indicated below.

a party to a suit has a right to indemnity, either by operation of law or by express contract. Panamax had no contractual duty to indemnify Owner. While Owner argues that a charterer's breach of a safe port or safe berth warranty supports a right of indemnity, Panamax's obligation in this case was one of due diligence in the nomination of the SPM Facility, not a warranty of its safety.

It is well-established law that a right to indemnity between tortfeasors exists when tortfeasors are not between themselves *in pari delicto* and their interests are not in conflict. Where the party seeking indemnity is concurrently negligent, no right to indemnity arises because there can be no complete transfer of liability to the indemnitor and the indemnitee's interests cannot adequately be represented by the indemnitor.[16] Panamax's interest in the ISA proceedings was in direct conflict with Owner's. To protect its interest Owner was obliged vigorously to defend the actions of the vessel's crew and Pilot and to demonstrate that the unsafe conditions at the SPM were the sole and proximate cause of the incident. Panamax would have been obliged to make the opposite argument. Owner's tender was therefore invalid and Panamax is not bound by the ISA findings and conclusions.[17]

<u>Admissibility of the ISA Findings and Conclusions</u>

A key issue in this case is whether the findings and conclusions of the Naval Prosecutor and the Maritime Governor in the Chilean ISA proceedings should be admissible to establish Owner's unsafe berth claim. Neither party disputes that the formal rules of evidence need not be applied

---

[16] See, *e.g., Universal American Barge,* 946 F.2d 1131, 1140 (5th Cir. 1991) ("an alleged indemnitor who is vouched in to the primary action but declines to defend is bound by the findings in that action, but only as to those unconflicted issues on which its interests were adequately represented in the action.")
[17] The Panel finds no merit in Owner's argument that the ISA findings are binding on Panamax because of Owner's production of the ISA investigation documents and because Ultratug, an alleged affiliated company, participated in the ISA proceedings. The production of documents in response to Panamax's discovery requests clearly does not provide a basis to prevent Panamax from challenging the ISA findings, and no convincing evidence was presented to the Panel that would support a finding of any *alter ego* relationship between Ultratug and Panamax.

in SMA arbitrations. The issue is rather the weight, if any, the Panel should give to the ISA evidence. Panamax argues that the ISA findings as to the negligence of the MIMOSA's Master, Second Officer, Pilot and tug master should be binding on Owner since it was a party to those proceedings and has cited extensively to those findings in its submissions. Under the doctrine of non-mutual collateral estoppel, however, Panamax urges the Panel to disregard the ISA findings as to the negligence of the ENAP terminal since Panamax was not a party to the ISA proceedings.

Owner also relies heavily on the ISA findings regarding ENAP's fault and claims that it properly tendered the defense of the ISA proceedings to Panamax, which is now bound by those findings. It also reminds the Panel that Rule 807 of the Federal Rules of Evidence (FRE) permits the introduction of hearsay statements if (1) the statements have the equivalent circumstantial guarantees of trustworthiness as the other hearsay exceptions in FRE Rules 803 and 804; (2) they are offered as evidence of a material fact; (3) they are more probative on the point for which they are offered than other evidence the proponent can obtain through reasonable efforts; and (4) admitting them will serve the interest of justice.

It is well-established that a litigant may introduce a government record, including public records generated by agencies of foreign governments, over a hearsay objection.[18] FRE Rule 803 (Exceptions to the Rule Against Hearsay) provides as follows (emphasis added):

> "The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:
>
> (8) *Public Records.* A record or statement of a public office if:
>
> (A) it sets out:
>
> (i) the office's activities;

---

[18] *United States v. Mena,* 863 F.2d 1522, 1530-32 (11th Cir. 1989) (referring to a document signed by the Commander General of the Honduran Navy).

(ii) a matter observed while under a legal duty to report, but

not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness."

In *Beech Aircraft Corp. v. Rainey,*[19] a case involving the admissibility of a U.S. Navy investigation report concerning an aircraft accident which concluded that the crash was the result of pilot error, the Supreme Court made it clear that it favored a broad, liberal interpretation of this statutory language. The Court stated that "portions of investigatory reports otherwise admissible under Rule 803(8)(C) [now 803(8)(A)(iii)] are not inadmissible merely because they state a conclusion or opinion. As long as the conclusion is based on factual investigation and satisfies the Rule's trustworthiness requirement, it should be admissible along with other portions of the report." The Court's expansive reading of Rule 803 has been interpreted as authorizing the receipt of conclusory factual findings in government reports that may include expert opinions. The factors that determine the trustworthiness of government evaluative reports include the timeliness of the investigation, the special skill or experience of the investigating authority, whether a hearing was held and the level at which it was conducted, and possible motivation problems with the investigating authority.[20]

The findings in the ISA proceedings meet the criteria for admissibility under FRE 803(8)(A)(iii) and *Beechcraft.* They were convened immediately after the casualty and continued for over one year. The Panel has no reason to doubt the qualifications and experience of the Chilean Naval

[19] 488 U.S. 153 (1998).
[20] Notes of Advisory Committee on Proposed Rules (Pub. L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1939; Pub. L. 94-149, §1(11), Dec. 12, 1975).

Prosecutor and the ISA investigators or their objectivity. Numerous hearings were held and the findings were subject to appeal and review by the Valparaiso Maritime Governor. Moreover, both Owner and Panamax rely heavily on the ISA findings in support of their respective positions. While both parties have challenged the findings that are adverse to their claims, these challenges are properly directed to the evidentiary weight to be given to the findings rather than their admissibility.

The Panel holds the factual findings in the ISA proceedings admissible and has evaluated the weight to be given to the individual findings in subsequent portions of this Award.

Was the ENAP SPM Facility Safe?

Owner has cited numerous reasons to sustain the first part of its burden of proof that the ENAP SPM Facility was unsafe, but has cited as the "root cause" of the incident the tensile strength of the mooring hawsers supplied by the terminal at the time of the tug changeover, which was below the 60% MBL warranted by the manufacturer. Among Owner's other "core contentions" are that the 55-meter length of the mooring hawsers did not comply with the 100-meter length requirement in the 2006 ENAP Maneuverability Study, that ENAP lacked proper procedures and guidelines for tug changeovers, and that the installation of automatic breakaway valves on the cargo hoses would have prevented the spill.

In support its contentions, Owner relies almost exclusively on the findings of the ISA Naval Prosecutor that the SPM mooring system did not comply with the Maneuverability Study in respect of the minimum breaking load and length of the mooring hawsers; that ENAP lacked any protocol for the maintenance and inspection of the hawsers; that ENAP improperly removed the emergency breakaway couplings from the cargo hoses and did not implement a procedure for stopping cargo operations during tug changeovers.[21] Owner emphasizes that the hearings were

[21] Owner did not produce a forensic expert to testify as to the condition of the SPM mooring hawsers prior to the casualty and by his own admission, Owner's navigation expert Captain Holloway lacked such

re-opened several times at ENAP's request but the findings were upheld by the Naval Prosecutor and ultimately affirmed by the Maritime Governor.

Panamax vigorously challenges the ISA findings in respect of ENAP's responsibility for the incident on the basis that while admissible in arbitration, the findings should be accorded little or no weight and are insufficient to establish Owner's *prima facie* case. The authorities cited by Panamax, however, deal with hearsay testimony contained in witness and expert affidavits and reports which were clearly inadmissible under the FRE and do not address government investigative reports that are excluded from the hearsay prohibition under FRE Rule 803.

We believe the ISA findings to be sufficiently trustworthy to meet the standard for admissibility established by the Supreme Court's decision in *Beechcraft* and to be of sufficient weight to support Owner's "core contentions" and its *prima facie* case that the ENAP SPM Facility was unsafe for the MIMOSA on September 24, 2014. We hasten to add that our finding with respect to this element of Owner's burden of proof means only that Owner has produced sufficient evidence to require Panamax to proceed with its defense. Even if Owner carried its initial burden as to the other two elements, discussed below, It would not in any way preclude Panamax from making a *Daubert* challenge to the reliability of the ISA expert reports and testimony or otherwise contesting the ISA findings and conclusions in its rebuttal.

Could the Oil Spill Have Been Avoided by the Exercise of Prudent Seamanship?

The 1958 decision of the English Court of Appeal in *The Eastern City*[22] generally provides the starting point for an analysis as to whether imprudent seamanship will negate a breach by a

---

expertise and relied on the ISA findings in respect of the hawsers' condition. The Panel therefore finds little probative value in Captain Holloway's testimony on this issue.

[22] *Leeds Shipping v. Societé Francaise Bunge* [1958] 2 Lloyd's Rep. 127, 131. The court held that "...a port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship...."

charterer of a safe port or safe berth warranty. This issue "is predicated on the assumption that the vessel is properly manned, equipped, navigated and handled without negligence and in accordance with good seamanship."[23] For the reasons set forth above, the Panel has determined that the ISA findings and conclusions are also admissible with respect to the issue of whether the MIMOSA's Master, watch personnel and Pilot failed to exercise prudent seamanship to avert the oil spill. Indeed, the Panel has given considerable weight to the ISA findings on this issue because Owner was a party to the ISA proceedings. The Panel majority (Mr. Arnold dissenting) has, however, made its own independent assessment based on the testimony and evidence presented to it and finds there is ample evidence of negligent conduct on the part of the vessel personnel and Pilot.

Captain Dimaculangan

The tug changeover should have been a relatively simple and routine maneuver, but given the fact that cargo operations involving the transfer of large quantities of crude oil were ongoing, the Panel majority finds that the Master displayed a complacent attitude toward the changeover and failed to provide sufficient direction to the ship's officers and crewmembers as to their duties in the event of an emergency at the SPM. The lack of direction manifested itself in the failure of Second Officer Rivera to properly monitor the vessel's position and speed relative to the SPM immediately following the changeover and to maintain proper communications with Pilot Jamett after leaving the poop deck, as well as the bow AB's failure to remain at his station and to immediately report the parting of the mooring hawsers.

Second Officer Rivera

Rivera should have proceeded to the bridge with the Pilot, where he could have relayed further reports from the bow AB, rather than returning to the Cargo Control Room to turn over the watch

[23] PETROJAM TRADER, SMA No. 3493 (1998).

and leaving the Pilot with no means of communication with the bow watch. Rivera was negligent in failing to verify the vessel's position relative to the SPM himself, instead of simply accepting the pilot's assurances that the situation was normal and his presence was no longer required on the bridge.

Bow AB Ariel

AB Ariel was required to remain at the ship's bow and monitor the mooring lines at all times during his watch. His inexplicable delay in reporting the parting of the mooring hawsers and his apparent absence from his duty station during a critical time after the tug changeover prevented the Pilot and ship's personnel from taking prompt measures to check or slow the vessel's movement astern and prevent the cargo hoses from parting.[24]

Pilot Jamett

The Panel finds that Pilot Jamett's decision to leave the bridge temporarily with the Second Officer to monitor the tug changeover from the poop deck was not unreasonable, given the fact that Jamett was able to observe the SPM's position from the starboard side of the deck and returned promptly to the bridge after the changeover was completed. However, once back on the bridge and after receiving the initial report from Rivera that "the chain" had been cut, Jamett did not take any action to ascertain the ship's position and speed, but instead directed the PUYEHUE to keep tightening the towline and upon being advised that the bollard pull was "at 7", ordered the tug to maintain that tension, although subsequently reducing it to "5" within seconds. Jamett did not direct the tug to stop pulling until 04:07:43, after both flexible cargo hoses had been torn off the manifold due to the MIMOSA's astern movement. The evidence suggests that even as late as

[24] Among other measures, Panamax maintains that the ENAP on board representative would have had sufficient time to close the manifold valves if he had been timely advised that the hawsers had parted. The Panel, however, does not consider the five-minute period before the cargo hoses ruptured to be sufficient time, given the safety risk posed by the fully charged hoses attached to the manifold.

04:10:35, eight minutes after the hawsers parted, Jamett still believed the MIMOSA remained moored to the SPM and initially refused the HORCON's offer of assistance until changing his mind 24 seconds later and requesting the HORCON to come alongside the vessel's port bow to assist.

The Panel was presented with no evidence as to the dynamic stress actually applied to the mooring hawsers after the tug changeover and is therefore unable to determine whether such stress exceeded 60% of their certified MBL, although both Captains Holloway and Dudley conceded the excessive force applied by the PUYEHUE caused the MIMOSA's rapid astern movement and could have exceeded the absorption capacity of the hawsers – the same conclusion reached in the ISA investigation. There is no question, however, that Rivera's and Jamett's inattention to the MIMOSA's speed and position relative to the SPM after the hawsers parted caused the cargo hoses to stretch and ultimately break their connection to the ship's manifold.

The Panel majority finds that Pilot Jamett's lack of situational awareness following the parting of the hawsers prevented him from taking appropriate action to slow the vessel's astern movement and was a major contributory cause of the oil spill.[25]

Despite the evidence of imprudent seamanship on the part of the MIMOSA's Master, watch standers and Pilot, the Panel does not endorse the view – largely the result of early interpretations of *The Eastern City* decision – that *any* degree of negligent navigation or seamanship would vitiate the safe port or safe berth warranty or, in this case, a charterer's due diligence obligation. We favor the application of the comparative fault rule established by the US Supreme Court in *United*

[25] Pursuant to Clause 16 of the Charterparty, Owner assumed responsibility for the negligence of Pilot Jamett and the assisting tug PUYEHUE. Owner argues that Clause 4 of the Charterparty, as amended, pre-empts Clause 16 with respect to SPM operations involving the use of pilots and tugs and shifts the risk of liability to charterers; however, the provisions in Clause 4 on which Owner relies only apply to Ship-to-Ship (STS) transfer operations. Clause 4 is relevant to SPM operations only insofar as it contains a warranty by <u>owners</u> that the vessel complies with OCIMF recommendations for SPM moorings.

States v. Reliable Transfer[26] which permits the apportionment of liability for damages between an owner and charterer where an unsafe berth or port combines with vessel negligence and damage is caused to the environment and third parties as a result. The Panel must therefore consider the third component of Owner's burden of proof, namely whether Panamax exercised due diligence in the nomination of the ENAP SPM Facility for the discharge of the MIMOSA's crude oil cargo.

Did Panamax Exercise Due Diligence in the Selection of the ENAP SPM Facility?

Clause 4 of the Charterparty expressly abrogates the creation of a safe port or safe berth warranty and instead imposes an obligation to exercise due diligence in the selection of a port or berth. In the PETROJAM TRADER[27], the panel defined "due diligence" as "that degree of care that a reasonable prudent person would exercise in like or similar circumstances in the conduct of his own business." The authors of the current edition of *Voyage Charters* further describe the obligation of due diligence as follows:

> "The content of the diligence obligation has not been authoritatively determined. As the obligation is that of the charterer (or its delegate), it would seem that the criterion should be that of the reasonable prudent charterer (or its delegate) and whether such a person would order the vessel to a particular port or berth, having made proper enquiries and taken proper precautions. However, there are material differences between the interests of the charterer and the interests of the owner; it is submitted that the criterion should be supplemented so that it is referable to the standards of a reasonable prudent charterer (or its delegate) *with the desire to promote the safety of the vessel* "[28] [emphasis in original].

[26] 421 U.S. 397 (1975).
[27] SMA no. 3493.
[28] Cooke, et al., *Voyage Charters*, §5.48, p. 129 (4th ed. 2014).

Owner seeks to impose on Panamax an implied obligation to vet a terminal before nomination on the basis that such vetting now constitutes a "best practice" in the tanker industry to insure the safety of the vessel and the environment. Owner concedes there is no express contractual, statutory or regulatory requirement for pre-nomination vetting and the issue is one of "first impression" in maritime law and practice. However, Owner urges the Panel to find that "vetting has been for many years a well-established petroleum industry practice."[29] In support of its position, Owner relies on a database known as the Oil Companies International Marine Forum (OCIMF) – Marine Terminal Information System ("MTIS"), created in 2011 and currently in use by many terminals worldwide, the use of which Owner argues would have uncovered numerous vetting "red flags" concerning the ENAP SPM Facility and alerted Panamax to conduct a more detailed inquiry into the safety of the Facility.

The only testimony presented to the Panel in support of Owner's position was that of Captain John Dudley, a consultant with experience in vetting oceangoing petroleum tankers. Captain Dudley testified that marine terminal vetting varies widely from company to company, with major oil companies and OCIMF members (including ENAP) generally exhibiting the highest levels of vetting "due diligence." He explained that a higher degree of care should be exercised by a charterer when sending a vessel to an SPM buoy than to a conventional dock because of hazards such as corrosion, marine growth, collisions and wave impacts, and because the SPM mooring hawsers and cargo hoses cannot be closely inspected by vessel personnel to verify their condition. It was Dudley's opinion that Panamax should have implemented a vetting process that would

[29] Owner's reliance on the award in the FALCON CARRIER, SMA No. 4217, to establish an industry standard practice of terminal vetting is misplaced. That case involved the interpretation of a charterparty clause requiring a vessel to hold the approval of three "oil majors" and has no application to the terminal vetting at issue here.

include a review of the OCIMF database for berth information, with particular emphasis on the condition and maintenance of mooring hawsers; a questionnaire to ENAP terminal management for information not available from the database or published port guides; a telephone call to the terminal for any missing information; and sending an inspector to the terminal "in case of doubt." The Panel understands from Captain Dudley's testimony that such measures would conform to what he described as a "well established industry practice for charterers to perform pre-fixture tanker vetting reviews and to perform pre-nomination review of marine terminals."

Captain Dudley's testimony and the use of the OCIMF MTIS - however desirable the latter may be as a future vetting tool for the tanker industry – are insufficient, in the Panel majority's view (Mr. Arnold dissenting), to establish a current industry standard of care or "best practices." OCIMF is a purely voluntary organization and no persuasive evidence was presented to demonstrate that the MTIS has achieved industry wide acceptance as a vetting aid. For example, Owner cites a 2014 OCIMF Annual Report which makes it clear that use of the MTIS is not mandatory and in fact was in use by only about 400 terminals out of 3,500 terminals worldwide. No evidence was shown whether the database contained sufficient information concerning the terminals in the MTIS system to form a reliable source of information for charterers accurately to assess the safety of a particular facility. Moreover, Captain Dudley's testimony did not point to a uniform, normative industry vetting standard, but rather an evolving, subjective standard that lacks industry consensus and currently varies depending on the particular port or berthing facility:

> "I think what we are looking for here and grasping, groping toward is trying to figure out where berth vetting, due diligence, lived in the year 2014, not where it was in 2008... but where it was in 2014, as it is evolving. To the degree that every user of port facilities will have a different subjective point of view on what their due diligence should be, it has been very difficult for us to accurately define that. All I have tried to do in this report of mine is indicate that it is an area of steadily

Increasing concern from 2004, steadily increasing attention, combined with a total absence of regulation. There are no regulations requiring – the IMO has not said anything, the US Coast Guard has not said anything about a standard of pre-terminal vetting that should be applied."

Had it wished to do so, Owner could have insisted on a provision for pre-nomination terminal vetting in the Charterparty. Instead, Owner now seeks to impose by implication a higher standard of due diligence on charterers than that currently required by law or industry custom and practice. Owner would impose on charterers an onerous duty of inquiry aimed at the discovery of any number of latent defects in a given facility's premises, systems and equipment in order to fulfill their due diligence obligations.[30]

Panamax's due diligence obligation does not extend this far. The evidentiary record in this case established that the SPM's physical characteristics could safely accommodate the MIMOSA; the HIS Maritime Port & Terminals Guide for the Port of Quintero contained no warnings concerning the operational safety of the SPM; the OCIMF and Q88 questionnaires for the SPM did not identify

---

[30] If Owner's "core contention" that defective mooring hawsers which failed to meet the minimum residual strength and length requirements of the ENAP SPM Maneuverability Study were the proximate cause of the oil spill were proven, this would represent a latent defect for which ENAP ultimately may be liable. It was not, however, discoverable by the exercise of due diligence by Panamax under the widely accepted standard articulated by the Fifth Circuit Court of Appeals in *Orduna, S.A. v. Zen-Noh Grain Corp.*, 913 F.2d 1149 (5th Cir. 1990). In *Orduna,* a vessel sustained damage when the loading arm of a grain elevator fell onto the ship's deck during loading operations at the loading facility. The grain terminal had failed to inspect the loading arms in the two years prior to the casualty even though such inspections should have been conducted annually. Although the Fifth Circuit affirmed the district court's ruling finding the terminal negligent, it reversed the lower court's finding that the charterer was concurrently liable for violating the charterparty's safe berth warranty because the charterer's liability was governed by a due diligence standard rather than a warranty. It is also of considerable significance that Captain Dudley did not consider it part of Panamax's due diligence obligation to ascertain the residual strength of the mooring lines.

any special risks or hazards; in the three years prior to the oil spill, approximately 100 vessels called at the ENAP Facility without incident; and the Chilean maritime authorities periodically inspected and certified the satisfactory condition of the equipment and systems at the Facility. In addition, Owner's vetting expert Captain Dudley admitted that he "had no idea of any event that occurred that would have converted the SPM from a declared safe berth to an unsafe berth." The Panel majority finds that this evidence is sufficient to establish that Panamax exercised due diligence in the selection of the SPM Facility under Clause 4 of the Charterparty and under applicable law.

Conclusion

For the foregoing reasons, the Panel majority holds that Owner has not carried its burden of proving that Panamax breached its duty of due diligence in its nomination of the ENAP SPM Facility. Panamax's motion to dismiss Owner's claim pursuant to SMA Rule 21 is granted and Owner's claim is hereby dismissed.

Mr. Arnold's dissenting opinion is attached to this Award as Appendix A.

The Panel is prepared to accept evidence of Panamax's counterclaim for lost profits and will await counsel's advice with respect to the scheduling of further hearings.

Interim Award of Fees and Expenses

L.R. Mimosa Limited is directed to pay $1,092,938.00 to Panamax International Shipping Co. calculated as follows:

Allowance toward Panamax's costs and attorneys' fees in connection with its Rule 21 motion to dismiss	$1,038,340.00
Reimbursement of the Panel's fees paid by Panamax	54,598.00
Total amount due Panamax	$1,092,938.00

If full payment is not made of the total principal amount specified above of $1,092,938.00 within thirty (30) days from the date of this interim award, interest shall accrue thereon at the prime lending rate published by the Federal Reserve Bank until payment is made or this award is confirmed as a judgment, whichever first occurs.

This Partial Final Award may be entered as a judgment in any court of competent jurisdiction in accordance with Clause 41 of the Charterparty.

David W. Martowski

Charles B. Anderson

New York, New York

March 9, 2018

In the Matter of the Arbitration

between

L.R. MIMOSA LIMITED,
as Owner - Claimant

and

PANAMAX INTERNATIONAL SHIPPING CO.,
as Charterer - Respondent

APPENDIX A

I find myself in partial agreement as well as dissent with my fellow arbitrators. Although the main body of the award, in several instances, reflects my concurrence or dissent, for clarity's sake, in the following, I will address the various topics raised and my conclusions.

Prima Facie. In its ruling of April 18, 2016, the panel held that Owner had the initial burden of producing evidence sufficient to establish its *prima facie* case that,

- the ENAP SPM Facility was unsafe at the time of the incident;
- the facility was unsafe and exposed the vessel to navigational hazards, those hazards and the resulting oil spill could not have been avoided by the exercise of prudent seamanship;
- the incident could not have been avoided by prudent seamanship.

In response to this preliminary ruling and after receiving further submissions from both parties, the panel majority has concluded that the Owner did not carry its burden of proof, with which I do not agree. Based upon my interpretation of the term

prima facie; i.e., at first sight or presumably,[1] I find that the Owner presented numerous arguments in support of its contentions that the ENAP SPM was unsafe at the time of the MIMOSA's call on September 23, 2014. In my view, the standards and expectations are different when dealing with the concepts of *prima facie*, which, more likely than not, plays a role and Burden of Proof (*onus probandi*) which requires proof by a preponderance of evidence. In contrast, a *prima facie* case can be made on the basis of a presumption which, thereafter, requires the production of proof or rebuttal evidence.

While there is no dispute that formal rules of evidence need not be applied and are not strictly followed in SMA arbitrations, it is equally true that arbitrators nevertheless observe and apply basic rules and standards governing the sufficiency of such evidence.[2] Clearly, the ideal result to any dispute resolution would be if the final decision is always a reflection of applicable law, the available facts, the governing contractual terms, tempered by consideration of fairness and the assurance that all options are pursued to discover facts and circumstances not readily available at first glimpse. The stakes in this dispute are high and, because of their nature, not as yet readily quantifiable and, as such, should entitle both parties to the fullest extent of discovery as well as the testimony of Panamax's and ENAP's representatives. Also, it would have been beneficial to have the testimony of those who examined the physical evidence after the incident at the SPM.

---

[1] See BLACK'S LAW DICTIONARY, West Publishing Co., St. Paul, Minn (1990).
[2] Panamax's Main Brief, May 3, 2017, at p. 29.

A granting of a dismissal motion at this time is a draconic ruling considering the existence of certain facts and circumstantial evidence presented by the Owner. It is a coincidence that when preparing this position paper, I learned about a speech Mr. Heard[3] delivered at the February 2018 luncheon of the Society of Maritime Arbitrators discussing the Award Service of the SMA which included the reference to "applications for an order." He stated that motion practice is a hallmark of litigation and not a hallmark of arbitrations; he also indicated that, "If you make it too much like litigation, the advantages of arbitration will disappear and parties may begin to wonder why they should opt for one over the other." These comments were prompted by Mr. Heard's reading of the *CAPE BARI* decision,[4] in which the panel stated unanimously that, ". . . as a general concept, under the terms of the Contract, the parties are entitled to file well-founded motions for any remedy and relief in the discretion of the arbitrators."[5] He expressed his personal belief that motion practice certainly has its place for cases such as jurisdiction, time bar, failure to prosecute, etc.; it really should not be encouraged across the board in arbitration; that the SMA should make motion practice the limited exception and not the norm.

The idea that commercial arbitration is meant to be expeditious and cost effective should not be the overwhelming concern or motivation to dismiss a claim. In a general sense, motion practice *i.a.* relies on rules and technical maneuvers and not necessarily

---

[3] Partner at the New York law firm of Burke & Parsons and has practiced maritime law since 1980.

[4] SMA 4282; designated as an Interlocutory Ruling.

[5] That decision was rendered in response to a motion to stay arbitration under a specifically negotiated arbitration clause for an Agreement for Storage and Handling of crude oil between Borco and P66. The panel also stated that, "This is a ruling on the motion . . . , it does not interfere or prejudice other ongoing legal and/or arbitral proceedings."

takes into account commercial realities or standards. If parties wanted to have their disputes decided pursuant to statutes and court proceedings/rules, they should have elected litigation. I recall a statement by Judge Learned Hand, holding that:

> *Arbitration may or may not be a desirable substitute for trials in courts; as to that the parties must decide in each instance. But when they have adopted it, they must be content with its informalities. They must content themselves with looser approximations to the enforcement of their rights than those that the law accords them, when they resort to its machinery.*[6]

Over the years, many other judges have echoed this sentiment in support of arbitration.

The "informalities" mentioned in the above quote are not only prompted by different requirements or guidelines, but also by the diversity of background, education and experiences of arbitrators, specifically relating to legal compared with commercial roots. For example, discovery, particularly pre-hearing discovery, has become a tool adopted from the FRCP Rules, however, it is applied at varying levels and may run the whole gamut. Those favoring the litigation standards might opt for wholesale discovery, whereas others, to the extreme, will not agree to any. Obviously, there has to be a happy medium, particularly since certain data or documents are in the control of one of the parties and the only way to gain access is by discovery. Discovery should not become a fishing expedition, but a device to provide an even playing field.

Based upon the foregoing observations, it is my finding that although the Owner has not proven its position by a preponderance of credible evidence, in my view, the Owner has made a *prima facie* showing that, if given the opportunity to examine

---

[6] *American Almond Prod. Co. v. Consolidated Pecan* 144 F.2d 448 (2nd Cir. 1944) at p. 451; see also *Western Canada S.S. Co. v. Cie. De Nav. San Leonardo* D.C.N.Y 1952, 105 F. Supp. 452.

Panamax's corporate witnesses, its position might be strengthened and prove its contentions.

Safe Berth/Safe Port and Due Diligence. The charterparty imposes an obligation to exercise due diligence in the selection of a port or berth;[7] a succinct question for which there should be a definitive response. My fellow arbitrators rely *i.a.* upon and cite from VOYAGE CHARTERS[8] and the *PETROJAM TRADER.*[9] Under reliance upon other New York arbitrations,[10] the *PETROJAM TRADER* panel stated that owners did not sustain their burden of proof as to charterers' lack of due diligence and defined "due diligence as "that degree of care that a reasonable prudent person would exercise in like or similar circumstances in the conduct of his own business." It is of interest to note the more recent comment in VOYAGE CHARTERS,[11] where it is stated in §548:

> *The content of the diligence obligation has not been authoritatively determined. As the obligation is that of the charterer (or its delegate), it would seem that the criterion should be that of the reasonable product charterer (or its delegate) and whether such a person would order the vessel to a particular port or berth, having made proper enquiries and taken proper precautions. However, there are material differences between the interests of the charterer and the interests of the owner; it is submitted that the criterion should be supplemented so that it is referable to the standards of a reasonable prudent charterer (or its delegate)* ***with the desire to promote the safety of the vessel****. . . . Where a charterparty contains terms which impose both due diligence undertakings, it will be a question of construction as to which prevails. (emphasis in original text)*

The majority concludes that the "Owner seeks to impose on Panamax an implied obligation to vet a terminal before nomination." I agree with this statement but only in

[7] *Supra.*
[8] *Supra.*
[9] *Supra;* SMA 3493 (1998).
[10] *DEA BROVIG,* SMA 1921 (1984); *EUROPA,* SMA 3423 (1998).
[11] *Supra,* at p. 129.

the context of the Best Practices concept, a charterer's duty to inquire about physical/mechanical conditions and limitations, including safety features about ports and terminals, should be an ongoing endeavor. I find the ISA report to be quite explicit as to the lack of the breakaway valves and I do not find any support for Charterer's argument that,

> *the installation of breakaway valves is not a requirement under . . . Chilean law, the terminal has absolute discretion whether or not to install them . . . and the presence of manual valves at the end of the flexible cargo hoses and the attendance of an ENAP employee on board to close the valves in an emergency was sufficient under applicable regulations.*[12]

Panamax did not exercise such prudence and rather relied on outdated information with regard to the hawsers in use and the absence of the automatic breakaway shutoff coupling. The mere fact that no incidents/breakaway accidents had been reported does not, by itself, establish the fact that none could have occurred or remained unreported.

A further point I have considered is the argument by the MIMOSA interest that the Owner was a third-party beneficiary of a safe port warranty under a sub-charter[13] on the ASBATANKVOY charter form.[14]

The Owner has argued that the re-let fixture between Panamax, as disponent owners, and Flopec[15] was not on back-to-back terms; in fact, in that instance, Panamax

---

[12] Award at p. 20.

[13] Panamax, as disponent owner, and Flopec, as charterers, dated September 8, 2014. Please note that voyage orders were given by Petrochina (Owner's Exhibit 30) -- exchanges between Flopec and Petrochina concerning the oil spill and Flopec's reservation of rights against Petrochina and Panamax (Owner's Exhibit 114).

[14] *Paragon Oil v. Republic Tankers*, 310 F.2d 169 (2d Cir. 1962); *Ore Carriers of Liberia v. TYNE ORE*, aff'd 435 F.2d 549 (2d Cir. 1970).

was granted an unqualified warranty of a safe port/berth under applicable terms.[16] This fact, coupled with the historical data on the safety experiences at the SPM facility, could reasonably explain why Panamax did not perform a pre-nomination review. In this context, it is interesting to note an entry in a document[17] dated December 18, 2014 stating:

> *Fees for legal advice taken in relation to the incident US$47,468.09 (concurrent figure – the amount will increase) An indemnity in respect to any liability that we may have towards head owners or others (see our message to you on 12th November 2014) arising out of or connected with the incident – figure yet to be determined.*[18]

Based upon the foregoing reasons, I concluded that the Charterer has not proven its due diligence.

Vouching-In. BLACK'S LAW DICTIONARY[19] provides the following definition:

> *Common law procedural device whereby person against whom action is brought may give notice of suit to third party who is liable over to him with respect to matter sued upon, and third party thereafter will be bound by decision in appropriate circumstances. Lester Bldg. Associates, Inc. v. Davidson, Del.Ch., 514 A.2d 1100, 1102. Though largely supplanted by third-party practice, vouching-in remains marginally viable under the federal rules. Humble Oil & Refining Co. v Philadelphia Ship Maintenance Co., C.A.Pa, 444 F.2d 727, 735.*

There is no question that on various occasions the Owner notified Panamax[20] and Ultratank[21] tendering the defense of third-party damages and the Chilean government fines; based upon the various cases cited by the parties in support of the vouching-in, it

---

[15] Owner's Exhibit 113.
[16] *Ibid*, in Clause 9, Part II.
[17] Voyage Or Other Revenue Invoice (Owner's Exhibit 117).
[18] See also Owner's Exhibit 119.
[19] *Supra.*
[20] Email of October 4, 2014 (Owner's Exhibit 51), letter of October 21, 2014 (Exhibit B to Owner's Preliminary Statement of February 4 2016).
[21] Email of October 4, 2014, *supra.*

appears that the procedural aspects were met, but the majority finds that the tender was invalid as a matter of law. As a point of explanation, I agree with the argument made that Ultratank is not Charterer's *alter ego*, but it is reasonable to presume that through the corporate affiliation, Panamax would become privy to the proceedings. The majority points out that because of the distinction between the obligation of due diligence and warranty of safety, no liability for indemnity can accrue to Panamax. On the other hand, if Panamax failed in its efforts to exercise due diligence with respect to the safety of the SPM, then such breach would lead to liability and, thus, no concurrent negligence would exist to affect or negate Owner's rights.

Panamax raised the argument that it should not be bound by the findings of the Chilean authorities as it was never a target and did not participate in the proceeding[22] and, furthermore, that "active vessel negligence precludes, as a matter of law, Owner from seeking indemnity from Panamax from binding it to the ISA factual findings under a vouching theory."[23]

I am not persuaded by the reference to and reliance upon the *Universal American Barge* case,[24] as I do not see the alleged conflicts of interest with respect to the ISA proceedings and particularly dealing with the proximate cause; *i.e.*, the failure of the hawsers.

Considering that Chilean law, promulgated on May 22, 2008, states and as paraphrased in the ISA ruling of November 26, 2014, ". . . the valves and the couplings

[22] Panamax Main Brief, March 3, 2017 at p. 19.
[23] Panamax Sur-Reply Brief, October 13, 2017 at p. 6.
[24] Majority opinion at p. 30, footnote 16; 946 F.2d 1131 (1991).

of the cargo hoses to the connection of the tanker vessel shall be designed so as to allow an easy and quick disconnection," combined with the provisions of Article 241, I find that Owner's position prevails.

ISA Proceedings. I am in agreement with the majority's position on the admissibility of the ISA Findings and join them in the belief that the "ISA findings are sufficiently trustworthy to meet the standard for admissibility established by the Supreme Court's decision in *Beechcraft*[25] and to be of sufficient weight to support Owner's 'core contentions' . . . ."

ISA Records/Captains Dudley and Holloway. Certain questions were raised as to what weight should be given to their testimony with regard to the ISA documents. It is my view that Captain Dudley and Captain Holloway were not called as forensic witnesses *per se*,[26] but rather were intended to comment, based upon their career experiences.[27]

Daubert v. Merrell.[28] Panamax has cited this case in its questioning of the qualifications of Owner's witnesses, Captain Dudley and Captain Holloway, asking the panel to disqualify them to be considered as expert witnesses. The panel, as a whole, did not explicitly rule on this request under Daubert, however, the panel majority expressed a view.[29] It is my understanding that the panel has taken note of the

---

[25] *Supra*, at award p. 32 (488 U.S. 153 [1988])
[26] Owner's Preliminary Statement (supra) describes Captain Dudley as vetting expert and Captain Holloway as SPM operations expert.
[27] See also comments at Daubert below.
[28] 509 U.S. 579 (1993).
[29] See footnote 21 of the award at p. 39.

testimony by both witnesses, but applied different levels of acceptance and reliance on their statements. In any event, the ISA reports speak for themselves.

With respect to the *Daubert* case, on the face of it, and for general purposes, the conditions suggested and addressed make sense, but how practical are they? Panamax argues that "the sufficiency of an expert's opinion in satisfying a party's *prima facie* case necessarily depends on: (1) whether the witness is, at the outset, qualified to be an expert; (2) whether the opinion is based upon reliable data and methodology; and (3) whether the expert's testimony on a particular issue will assist the trier of fact."[30] "The party seeking to rely on expert testimony bears the burden of establishing, by a preponderance of the evidence, that all requirements have been met."[31] Panamax quite fairly explains that it "in relying on this pertinent body of law in this arbitration, does not seek to exclude or preclude any documentary evidence or testimony as being inadmissible or beyond the panel's purview."[32] It needs to be kept in mind that, in *Daubert*, the court interpreted Rule 7 of the Federal Rules of Evidence, which, for example, requires "scientific knowledge" because of the nature of the case; *i.e.*, dealing with the ingestion of Bendectin and birth defects. Also, the matter was vacated by the Supreme Court decision and remanded.[33] It was a reversal of a summary judgment, rendered in the 9th Circuit dealing with experts' opinions which were inadmissible for being considered unreliable. The basic issues in *Daubert v. Merrell* are well outside the

---

[30] Panamax's Main Brief of May 3, 2017 with reliance on *Daubert v. Merrell*, 509 U.S. 579 (1993); *Nimely v. City of New York*, 414 F.3d 381 (2005).
[31] *United States v. Williams*, 506 F.3d, 151 (2d Cir. 2007).
[32] See footnote 7 in Panamax's Main Brief (*supra*) at p. 32.
[33] 951 F.2d 1128 (1993).

scope and impact of a privately negotiated contract, and it was a case which, by its nature, could give rise to class action suits or matters of public policies. In making this distinction, I am not minimizing standards or expectations for expert witness testimony, but in a commercial arbitration there should be distinctions made between academic or legally guided testimony and those represented by industry-trained experts. On occasion, the words of an industry expert might not impart new data, but the testimony might clarify language or application. One of the "safeguards" for the arbitral process is that the trier of facts has the discretion to exercise the right of peers to judge the testimony offered; accept it in full, reject it or consider it in part. The optimal condition is to have an open-minded arbitrator and a qualified witness. I certainly expect that an expert witness should assist the trier of facts[34] and not simply parrot the findings of another witness given in a different context.[35]

ENAP Facility. It is my position that the factual findings in the ISA proceeding form the basis and justification for Owner's claim as to the safety of the SPM facility, specifically the absence of an emergency quick shut-off valve and the condition of the hawsers.

I am not persuaded by the argument that since the facility was designed to accommodate vessels larger than the MIMOSA and had no recorded incidents in the recent past, the ENAP SPM terminal was automatically safe and suitable for the discharge of the MIMOSA. There are multiple decisions which hold that the safety of

---

[34] *Daubert, supra.*
[35] *Quiles v. Bradford-White* No. 10-747, 2012 (N.D.N.Y April 18, 2012) LEXIS 54662.

the port/berth conditions must be in existence at the time of the vessel's call at the facility. Timing is a crucial part of this condition. Unexpected natural events, which can affect the safety of a port or berth, are not foreseeable, but technical data in the official documents which are no longer in accordance to currently published data do not fall into this category. ENAP had a duty to ensure that the official and published information did indeed correctly reflect the existing condition. Likewise, Panamax, as a user of the facility, had a duty to inquire and confirm that conditions of the ENAP SPM in September 2014 were in accordance with prior published and approved data which were also reflected in the OCIMF[36] and MTIS[37] records.

MIMOSA has drawn attention to the provisions of Chilean law, specifically Article 242,[38] stating,

. . . hoses or flexible elements shall be designed in accordance with the provisions of this Regulation and to foreign standards or best practices, recognized internationally.

The union of the element or flexible hose to the connection of the tanker should be designed in such a way that it allows quick and easy disconnect.

Panamax counters with the argument that on January 19, 2012, Chile's General Directorate of Maritime Territory and Merchant Navy issued a certificate for the operational safety of ENAP's SPM facility and the Quintero Maritime authorities, based upon the inspection by the Port Captain, certified the SPM to be in full compliance. In weighing these two contentions, I am more persuaded by Owner's reliance on the

[36] Oil Companies International Marine Forum.
[37] Marine Terminal International System.
[38] Owner's Exhibit Q to the Preliminary Statement of February 4, 2016.

Chilean law provision[39] and the reference to par. 30 of the initial ISA Ruling of November 26, 2014,[40] citing Article 242.

Industry Standards / Best Practices. It cannot be disputed that the express terms of a contract take precedence over custom and trade usage;[41] conversely, it does demonstrate that industry or trade standards do play a role and have a place in dispute resolution.

There are contracts which might provide that certain rules or regulations shall apply as in force at the date of the contract, but then others do not, which, however, leaves open the option to apply industry or trade standards. In my view, the criteria which would support this concept are *i.a.* evolutions in communication and information sharing, safety, environmental and public concerns. A further and important point is the industry or trade in itself; shipping and energy readily come to mind.

With regard to this arbitration, the question is whether the OCIMF-MTIS[42] published document should be considered industry standards and/or best practices. I have carefully reviewed the OCIMF publications in evidence which are based upon worldwide sources for the benefit of its members; i.e., oil companies, including ENAP "To identify safety and environmental issues facing oil tankers, barges, terminals and offshore marine operations, and develop and publish recommended standards that will

---

[39] Preliminary Statement by MIMOSA.
[40] Owner's Exhibit 100.
[41] *IBE Trade v. Transfert* SMA 3782 (2003).
[42] See majority decision at p. 40.

serve as technical benchmarks."[43] The report also states[44] that "OCIMF membership includes almost all of the world's oil companies."

ENAP's entry[45] into the OCIMF-MTIS program's Berth TPQ[46] for this monobuoy was rather incomplete and should have given rise to questions if it had been consulted.

The majority cites from Captain Dudley's testimony that "there are no regulations requiring – the IMO has not said anything, the US Coast Guard has not said anything about a standard of pre-terminal vetting that should be applied." This statement neither supports Owner's nor Charterer's contentions because, if there were regulatory requirements, the argument of industry standards or best practices would be moot.

As stated previously, I considered the OCIFM-MTIS published documents as best practices in an evolving industry.

Prudent Seamanship. The majority has determined that, based on the testimony and evidence presented, there is ample evidence of negligent conduct on the part of the vessel personnel (and the pilot).

I have carefully considered the ISA findings and the presentations made during the hearings, and cannot accept Panamax's contention that the imprudent navigation of the MIMOSA by her crew and the local pilot was the sole and proximate cause of the oil spill. It is my view that the hawsers parted first, which then triggered the subsequent

---

[43] OCIMF Annual Report 2014, Owner's Exhibit 120.
[44] *Ibid*, at p. 3.
[45] One of more than 650 worldwide terminals.
[46] Owner's Exhibit 122.

events. The scene of action was the two tugs during the changeover. At that particular time, neither the vessel nor her officers and crew were playing an active role; the MIMOSA was secured to the SPM with double mooring hawsers with a chafe chain attached to each end. The chafe chains were passed through the vessel's fairleads and connected to chain stoppers aboard the MIMOSA.[47]

The OCIMF's recommendations for SP Moorings,[48] in Chapter 5, provides that mooring hawsers and chafe chains are the responsibility of and provided by the SPM operator. The vessel was securely moored, not navigating, basically in an in-port condition. Furthermore, since the prevailing weather was good, the tug changeover a "routine" matter and the time of it in the early morning hours of September 24, 2014, it should not be unexpected that the Master had gone to bed.[49] Watch and duty responsibilities were assigned. The expectations were that everything would work out, but that is not how it ended. The events around 04.00 on September 24 are not black and white; they have been looked at and argued from different angles, however, without producing tangible results. This reminds me of the idiom, "the buck stops here," in which case, if there is any proven negligent conduct, a degree of responsibility should accrue with the boss or with someone such as the Master.[50]

---

[47]See award at p. 7.

[48] Published July 20, 2007 (updated October 20, 2011), Owner's Exhibit N (INTERTANKO circular dated November 18, 2014).

[49] There is a comment in the record that on the morning of that day, inspectors were visiting the vessel for a customary survey. Standing Orders were part of the vessel's routine.

[50] See also comments in my conclusions at the end of this opinion as well as under the Vessel Negligence section, specifically the reference to apportioned or contributory negligence.

Vessel Negligence. The Owner has taken issue with the ISA findings with respect to the Master's, officers' and crew's conduct. Since the arbitrators have adopted the ISA rulings, albeit with certain reservations by the majority, this particular point also creates a conundrum for me. The MIMOSA interests contend that the vessel's officers and crew adhered to customary shipboard practices, whereas the ISA's ruling could well be perceived as ignoring normal or customarily accepted shipboard practices and focusing more on military/naval standards. Similar observations had been made in matters of spares or replacement units and comparing commercial with naval standards. Whereas it might be acceptable for a commercial ship to carry one or two spare cylinder liners, one might find a greater number of spares on a naval vessel which is dictated by economics and purpose. But these differing standards are not dipositive of what is correct and what is insufficient. Despite all technical advances, precautions and safety installations, there is always the human factor which might provide an unquantifiable element to the equation. There is also the function of time – the crucial minutes around 04.00 on September 24, 2014, when the incident occurred, resulting in damages to the MIMOSA, the SPM as well as the resulting oil pollution. It is undisputed that, because of the crew's prompt action in closing the valves at the cargo manifolds, spillage on the vessel was limited to vessel's "drip tray" and small areas on the deck (in line with proper cargo handling procedure, vessel's main deck scuppers had been plugged). I share the majority's finding not to endorse *THE EASTERN CITY* decision that any degree of negligent navigation or seamanship would vitiate the safe port/berth

warranty. I support the majority's comments on the comparative fault rule[51] and find that, given the uncertain facts but potential possibilities of contributory negligence, the apportionment of liability as proposed under the Reliable Transfer decision should be applied.[52]

Hawsers. This subject has received extensive coverage during this arbitration, the ISA reports and also in this award. It also gave rise to the criticism of Owner's expert witnesses.

Panamax has challenged Owner's reliance on the UTFSM[53] as being hearsay and, in themselves, as insufficient to support the MIMOSA's claim. The reports were prepared by the UTFSM for the ISA proceedings by direction of the Valparaiso Maritime Governorship.[54] There is no indication that the inspections were performed in a partisan or prejudicial manner. Since the Owner relies on the produced results and did not seek further support (as suggested by Panamax, it should have been done), why did Panamax not exercise that available option itself to counter the ISA results.

Since I found the ISA reports to be admissible and credible, I do adopt them as the strongest evidence for this issue. I base this view on the fact that ISA is, for all practical purposes, an independent party without commercial or other ulterior motive. The tests were "clinical" and produced reports unfettered by general and/or industry-related comments. Having reached this conclusion, I am of the opinion that testimony

---

[51] *U.S. v. Reliable Transfer* 421 U.S. 397 (1975).

[52] See also The Case for Apportioned Fault in Safe Port/Berth Cases under U.S. Law – ICMA XIX – Hong Kong; Owner's Exhibit 27; the *WESTWOOD ANNETTE*, SMA 4189 (2012).

[53] *Universidad Técnica Federico Santa Maria;* see Main Brief (supra) at p. 50 *et pass.*

[54] See award starting at page 11.

from an independent forensic expert was not necessary to further establish and verify the deficiencies (in length and condition) of mooring hawsers.

Conclusions. I have carefully reviewed and considered the evidence and arguments as presented; I arrived at the following conclusions.

- Panamax's motion to dismiss Owner's claim under SMA Rule 21 should be denied;
- Owner should have been allowed to cross-examine further witnesses, including Charterer's corporate witnesses;
- Owner has shown that it made vouching-in endeavors;
- ISA findings are sufficiently trustworthy and meet the standard of admissibility;
- Captains Dudley and Holloway were industry experts who could, based upon their own experiences, testify on some, but not all, issues. Their purpose would be to amplify an existing story line or supply other relevant industry data;
- The hawsers were not in compliance and the ISA provided the strongest support, including testing on the hawsers used as well as stress tests on unused hawsers from the same batch. The evidence showed, established by the ISA-appointed experts, that the hawsers did not meet the minimum resistance for use, as established by the hawser manufacturers of 310 tons and the ENAP SPM guidelines of 350 tons. The Final Report of November 13, 2014,[55] prompted by ENAP's challenge/appeal of ISA rules and fines, states "that each mooring line should be removed when its resistance drops to 1828 KN or 186 tons." The latent

[55] Owner's Exhibit 91.

defect defense raised by Panamax in reliance on the *ORDUNA v. ZEN-NOH*[56] is distinguishable from the hawser condition referred to in this case, especially because of the shorter length, which is obvious at first glance, as well as the overall appearance condition shown in the parted hawser photos;[57] Panamax has argued that the Owner failed to carry its burden of demonstrating that none of these actions would have prevented the hawsers from breaking or the flexible cargo hoses from parting from the manifold.[58] There is a saying that *testmoignes ne poent testifier le negative, mes l'affirmative*, which translates into witnesses cannot testify to a negative; they must testify to an affirmative.[59] It would be a hypothetical exercise; in this case, the ISA and other reports confirm the physical results and damages.

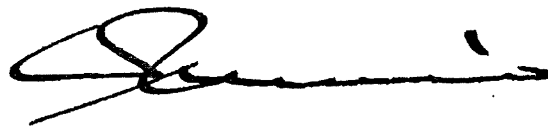
- I do not agree with my colleagues that the failure to exercise prudent seamanship was proven by ample evidence of negligent conduct of the vessel's personnel. There are references, innuendos and conclusion, but certainly no ample evidence. Even if *per arguendo*, assuming a short-coming of prudent seamanship, I have difficulty in reconciling the number of events which supposedly took place in the relatively short period of minutes.[60] For example, according to the VDR evidence, the first hawser parted at 04:02 and was not reported by the bow watch until 04:05:49; in the ISA proceeding, the Owner contended that the hawser did

[56] 913 F.2d 1149 (5th Cir. 1990).
[57]Selected photos (in transit and at Harbor Master's facility); Owner's Exhibit 77.
[58] Award at p. 21, *supra*.
[59] BLACK'S, *supra*.
[60]By the fifth minute, the MIMOSA's crew had closed the vessel's cargo manifold valves.

part not until 04:06. There is no definite statement in the record as to the particular stage of the "parting" action – was it while first observed? While in progress? Or when it had parted? Does it take into account reaction time or delays?

Since I do not agree with my fellow arbitrators on the threshold question, I do not join them in the awarding of attorneys' fees and costs at this time. I would have reserved judgment on this topic until the final decision on liability and damages had been rendered.

Any arguments raised by counsel, but not specifically addressed by me in this decision, were carefully dismissed *sub silentio*.



Manfred W. Arnold

March 9, 2018