Rights of non-US seafarers under US law

We, in the New York office are frequently asked whether a non-US seafarer who suffers an injury or illness in a US port may bring a claim in the US.

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The relevant factors

US general maritime law and the personal injury provision of the Jones Act (presently codified at 46 USC 30104)[1] give a seaman the right to recover:

1. maintenance and cure
2. damages based on unseaworthiness, and damages due to the negligence of the employer or a co-worker.

Traditionally, US courts look to the following eight factors, which are weighed in each case, with all being relevant but no single one being determinative. Having said that, in general numbers 3, 4, 6 and 8 are the key factors:

1. Place of the wrongful act
2. Law of the flag
3. Allegiance or domicile of the injured seaman
4. Allegiance of the defendant shipowner
5. Place where the contract of employment was made
6. Inaccessibility of the foreign forum
7. Law of the forum
8. Shipowner's 'base of operations'

More recently, courts also look carefully at the employment contract and any choice of law/forum clause it may contain in light of factors 5, 6 and 7.

In particular, if the employment contract includes an arbitration clause, a US court is even more likely to dismiss and/or stay any action in the US pending the outcome of the foreign arbitration.

Other limitations

The factors above apply to non-US seafarers, not to passengers, longshore workers or any other person on board. Different considerations apply in those cases.

By statute, non-US seafarers working in the offshore oil and gas industry in foreign countries may not bring an action in US court contending that US law applies.

1 The Jones Act was enacted in 1920 and covers a wide range of maritime issues, including restricting coastwise trading in the US to US built/flag ships. See the article by Blank Rome on page 4 of this bulletin. The Jones Act (at 46 USC 30104) contains a simple provision giving a seafarer a right of recovery against the seafarer's employer: 'A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer.'

Examples

Since the factors are applied flexibly in each case, some examples are helpful.

	Details	Case
Not subject to US law	Danish citizen who signed employment contract in New York which called for application of Danish law, Danish flag ship, injured in Cuban waters.	*Lauritzen v. Larsen*, 345 U.S. 571 (1953).
	Spanish citizen who signed employment contract in Spain which called for application of Spanish law, Spanish flag ship, injured in US waters.	*Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354 (1959).
Subject to US law	Greek citizen, with employment contract signed in Greece which called for application of Greek law before a court in Greece, injured in New Orleans, but the shipowning company was owned by a US resident with offices in New York and New Orleans, and entire income was earned in trade between US and non-US ports. In this case, the court introduced the eighth factor, base of operations, and found that the purposes of the Jones Act could be too easily frustrated if the US-based employer, earning its entire revenue in trade to and from the US, were not subject to the Jones Act.	*Hellenic Lines Ltd v. Rhoditis*, 398 U.S. 306 (1970).
	Filipino citizen, with employment contract signed in the Philippines which called for application of Filipino law and arbitration in the Philippines, injured in New Orleans, Liberian flag ship/Liberian corporation, but with an office in the US. Importantly, the employment agreement, by requiring arbitration, allowed the shipowner to remove the case from state court to federal court.	*Francisco v. Stolt Achievement*, 293 F.3d 270 (5th Cir. 2002)

Advantages under US law of an arbitration clause

Obviously, a member has to take into consideration many factors in deciding whether to agree to arbitration in its employment contracts with seafarers, including the costs, the experience of the arbitrators and the opportunities for review in the arbitral forum, not just to minimise the risk of being subject to suit in the US. Also, US courts have enforced choice of law/forum clauses alone, eg *Marinechance Shipping Ltd v. Sebastian*, 143 F.3d 216 (5th Cir. 1998), regarding Filipino choice of law and forum clause in a Filipino seafarer's contract. At a minimum, the employment contract should contain a choice of law clause as well as a choice of forum clause reasonably related to the seafarer's residence.

Best practice: Include a choice of law and forum (preferably arbitration) clause in all seafarer employment contracts, not just a choice of law clause.

However, there is an important advantage under US law if the employment contract contains an arbitration clause. In such a case, the contract is subject to the United Nations Convention on the Enforcement and Recognition of Foreign Arbitration Awards (Convention). As a result:

- If a suit is filed in state court, the shipowner will be allowed to remove the case to federal court (*Stolt Achievement*, above).
- The US court will stay the US action pending the outcome of the arbitration, eg *Lindo v. NCL (Bahamas) Ltd*, 652 F.3d 1257 (11 Cir. 2011).
- Once the foreign arbitration panel issues its ruling, the US court will enforce the award absent a showing by the seafarer that the award violates the 'public policy' of the US under the Convention, an extremely high burden, eg *Asignacion v. Rickmers Genoa Schiffahrtsgesellschaft mbh & Cie KG*, 783 F.3d 1010 (5th Cir. 2015).

Conclusion

If a non-US seafarer employed on a non-US ship is injured in a US port, it is likely that the claim will not be subject to US law. However, each case is determined on its own facts. The New York office is able to offer advice and assistance in all such cases.

Members may rest assured that club cover will respond to their legal liabilities wherever they arise. As such, if a non-US member finds themselves defending a new claim in US jurisdiction, the New York team will be here to assist and club cover will respond.