



U.S. Department of Justice

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March 20, 2009

BY HAND DELIVERY

Hon. Catherine O'Hagan Wolfe
Clerk of Court
United States Court of Appeals for the Second Circuit
United States Courthouse
500 Pearl Street
New York, New York 10007

Re: *Reino de Espana v. ABSG Consulting Inc.*, Nos. 08-0579-cv, 08-0754-cv

Dear Ms. Wolfe:

Pursuant to the Court's order dated March 4, 2009, I respectfully submit this letter brief on behalf of the United States in the above-referenced appeal.*

As explained below, the United States believes that the district court erred to the extent it suggested that dismissal under the International Convention on Civil Liability for Oil Pollution

* The March 4 order "invite[d] the United States to file a submission as *amicus curiae*." Further, the order directed the United States Attorney's Office for the Southern District of New York to forward the order to

the Department of State, the Department of Justice, or such other appropriate government entity as might properly respond to the following questions: (a) whether the International Convention on Civil Liability for Oil Pollution Damage, 1992, ("the CLC") applies to Spain's action against ABSG Consulting Inc., *et al.* ("ABS"); (2) whether ABS, as a classification society, falls within the scope of the CLC provision immunizing "the pilot or any other person who, without being a member of the crew, performs services for the ship," CLC Art. III(4)(b); and (3) whether Article IX of the CLC requires that Spain's claim against ABS be adjudicated in a CLC-contracting state.

Order dated March 4, 2009.

Damage, 1969, as amended by the 1992 Protocol Amending the Convention (“CLC”), was for lack of subject matter jurisdiction. Because the United States is not a party to the CLC, the CLC is not United States law. Accordingly, the treaty cannot deprive a district court of its statutorily conferred jurisdiction. The treaty may, however, be considered by a district court in determining whether to dismiss a case under discretionary doctrines such as *forum non conveniens* or international comity.

To the extent the Court’s questions invite the United States to apply the CLC to the facts of this case, the United States respectfully declines to do so. The United States is not a party to the CLC, nor is the United States familiar with the subsequent application of the treaty among States party to the CLC. The State Department has informed us that there is no current Executive Branch position as to the proper construction of the treaty provisions that are the subject of the Court’s inquiry, and that the State Department’s review of files relating to the CLC did not disclose any materials that, in the State Department’s view, would resolve the questions posed by the Court.

BACKGROUND

This case’s background is set forth in the parties’ briefs and in the district court’s decision granting defendant’s motion for summary judgment, and is not set forth in detail in this submission. In brief, the Government of Spain commenced this action against a United States corporation, American Bureau of Shipping, Inc. (“ABS”), for its alleged negligence in certifying as fit an oil tanker – the “Prestige” – that was registered in the Bahamas. *See Reino de Espana v. American Bureau of Shipping, Inc.*, 528 F. Supp. 2d 455, 456 (S.D.N.Y. 2008). The Prestige subsequently sank off the coast of Spain, discharging large quantities of oil into Spain’s coastal waters. *Id.* at 456-57. The district court dismissed the claims on the basis of ABS’s defense that, under the CLC, a treaty to which Spain and the Bahamas are parties, actions seeking compensation for pollution damage in the territorial sea of a party State must be brought in the courts of a State that is party to the treaty. *See id.* at 456. The United States is not a party to the CLC.

Under Article III(4) of the CLC,

No claim for compensation for pollution damage may be made against the owner [of a vessel carrying oil as bulk cargo] otherwise than in accordance with this Convention. [Subject to an exclusion not relevant here,] no claim for compensation for pollution damage under this Convention or otherwise may be made against:

- (a) the servants or agents of the owner or members of the crew;
- (b) the pilot or any other person who, without being a member of the crew, performs services for the ship . . .

unless the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

Article IX(1) of the CLC further provides that, “[w]here an incident has caused pollution damage in the territory including the territorial sea of one or more Contracting States, or preventative measures have been taken to prevent or minimize pollution damage in such territory including the territorial sea, actions for compensation may only be brought in the Courts of any such Contracting State or States.”

ABS is a classification society, which determines the fitness of vessels and maintains a listing of vessels in compliance with ABS standards. *Reino de Espana*, 528 F. Supp. 2d at 456. Listing by a classification society is essential to the marketability of a commercial shipping vessel. *Id.* Prior to the accident giving rise to this litigation, ABS listed the Prestige as a vessel classified to carry cargo, including fuel oil. *Id.* In 2002, the Prestige suffered structural failures and sank, in the process discharging millions of gallons of fuel oil near the coast of Spain. *Id.* at 457. The Government of Spain subsequently sued ABS seeking compensation for environmental harms on the ground that ABS had negligently certified the fitness of the Prestige. *Id.*

The district court held that the CLC applies to the claims brought by Spain against ABS because ABS was a “person who . . . performs services for the ship” within the meaning of Article III(4) of the CLC. *See* 528 F. Supp. 2d at 459. The district court reasoned that the owner of the Prestige retained ABS to inspect the vessel to determine whether it complied with relevant requirements and was seaworthy, and that such certification “was necessary for the commercial operation of the vessel.” *Id.* Accordingly, the court concluded, ABS fell within the plain language of Article III(4), and the treaty applied to Spain’s claims against ABS. *Id.*

The district court also held that Spain’s suit was barred by Article IX(1) of the CLC. The district court reasoned that Spain, as a contracting party to the treaty, was bound by its terms in the same way it would be bound by a contractual obligation. *See* 528 F. Supp. 2d at 460. Invoking a Supreme Court holding involving contractual forum selection clauses, the district court reasoned that the exclusive forum provision in Article IX(1) was enforceable unless it was the product of fraud or overreaching; its enforcement would contravene a strong public policy of the forum in which suit was brought; or trial in the contractual forum would be so difficult that the litigant would be deprived of its day in court. *Id.* (citing and quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)). The district court held that none of these exceptions applied. *See* 528 F. Supp. 2d at 460.

In addition, however, the district court suggested that the effect of the CLC was to extinguish the court’s jurisdiction over Spain’s claims against ABS. The district court stated that, under the exclusive forum clause in Article IX(1), “the Court lacks the jurisdiction necessary to adjudicate Spain’s claims” 528 F. Supp. 2d at 461; *see also id.* (characterizing ruling as a dismissal “for lack of subject matter jurisdiction”). Further, the district court

criticized Spain’s argument that the district court had jurisdiction over the action as being based on the erroneous “proposition that a United States court can broaden a cause of action under a treaty to which it is not a signatory by exercising jurisdiction of a claim defined by the treaty under circumstances in which the treaty itself precludes litigation by the plaintiff treaty signatory in the United States forum.” *Id.*

DISCUSSION

A. The CLC Does Not Deprive a District Court of Subject Matter Jurisdiction, But It Can Be Considered by a District Court Determining Whether to Decline to Exercise Jurisdiction

The questions posed by the Court’s order of March 4, in particular the question “whether Article IX of the CLC requires that Spain’s claim against ABS be adjudicated in a CLC-contracting state,” implicate the issue of the CLC’s legal status in the United States and its effect on actions brought in United States courts. In the United States’ view, the district court erred to the extent it held that the CLC deprived it of subject matter jurisdiction over Spain’s claims. *See* 528 F. Supp. 2d at 461. However, a district court may properly look to a treaty such as the CLC in determining whether to decline to exercise its statutory jurisdiction.

As a general rule, “[o]nly Congress may determine a lower federal court’s subject matter jurisdiction” or restrict jurisdiction that it has previously granted. *Kontrick v. Ryan*, 551 U.S. 443, 453-54 (2004). Because the United States is not a party to the CLC, the CLC does not establish United States law. Nor has Congress passed any statute that purports to strip federal courts of jurisdiction over claims governed by the CLC. Accordingly, the CLC could not have divested the district court of subject matter jurisdiction over Spain’s claims against ABS.

Nevertheless, a federal court may consider a treaty to which the United States is not a party a basis for declining to exercising its jurisdiction over particular claims. The United States does not take a position on the applicability of the forum selection clause in the CLC, which concerns the claims of a party State against the citizen of a non-party State based on services performed for a ship registered in a party State. We note as a general matter that a clause of this type may be treated as akin to a forum selection clause in a private contract to which ABS may be a third-party beneficiary. Although a contractual forum selection clause does not oust a federal court of jurisdiction over an action, it may be a basis on which the court declines to exercise its jurisdiction. *See, e.g., New Moon Shipping Co. v. Man B & W Diesel AG*, 121 F.3d 24, 28 (2d Cir. 1997); *see also M/S Bremen*, 407 U.S. at 12-13. Alternatively, a treaty provision channeling litigation to the courts of party States might be entitled to deference by a federal court

under doctrines such as international comity or *forum non conveniens*. See, e.g., *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238-39 (11th Cir. 2004); *Bi v. Union Carbide Co.*, 984 F.2d 582, 585-86 (2d Cir. 1993).*

B. The United States Takes No Position Concerning Whether or How the CLC Applies Here

The United States respectfully declines to take a position as to the questions posed by the Court's order of March 4 insofar as they concern the proper interpretation and application of the CLC. The United States is not a party to the CLC. The treaty does not apply to the United States or to an oil spill that takes place within U.S. coastal waters. Nor is the United States familiar with the practice of party States that has developed under the treaty. Furthermore, the State Department has informed us that there is no current Executive Branch position as to the proper construction of the treaty provisions that are the subject of the Court's inquiry, and that the State Department's review of files relating to the CLC did not disclose any materials that, in the State Department's view, would resolve the questions posed by the Court.

C. Response to the Court's Invitation to Appear at Oral Argument

The United States acknowledges the Court's invitation to appear for oral argument on March 25, 2009. Given the limited nature of this submission, we do not request time to present oral argument. The undersigned counsel will, however, attend the argument, and respond to any questions the Court may have.

Respectfully,

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* The *forum non conveniens* doctrine presumes the existence of some other adequate forum. See *Bank of Credit & Commerce Int'l (OVERSEAS) Ltd. v. State Bank of Pakistan*, 273 F.3d 241, 246 (2d Cir. 2001) ("The first step in a *forum non conveniens* analysis is for the court to establish the existence of an adequate alternative forum.").

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