



Plaintiff's second cause of action (breach of contract) was dismissed in December 2016, the Court having determined that the two contracts discussed below are void and unenforceable.

A bench trial was held March 6 - 8, 2017. Plaintiff was represented by counsel Witten Philippo. Defendants were represented by Assistant Attorney General Eric Iban. Trial evidence consisted of: the pre-trial written declarations of Captain Korent Joel<sup>1</sup>, Eldon Note, Wally Milne and Alson Kelen; the live testimony of Eldon Note, Wally Milne and Alson Kelen; and several exhibits admitted pursuant to stipulation.

During the trial, plaintiff withdrew its first cause of action, its request for declaratory judgment, and its request for \$70,000 in lost profits. As a result, only plaintiff's third cause of action (unjust enrichment) remains. In its closing argument, plaintiff clarified its monetary claims as follows:

<b>Description</b>	<b>Amount</b>
Bokan Eb repair costs (May 2007 through September 2008)	\$16,047.56
Bokan Eb salvage costs	\$131,156.00
Unpaid copra shipping subsidies	\$19,354.43
PII drydock expenses	\$14,238.15
Loss of personal property onboard vessel at time of seizure	\$6,000.00 <sup>2</sup>
<b>Total</b>	<b>\$186,796.14</b>

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<sup>1</sup> Captain Joel died several weeks before the trial. The Court received his written declaration pursuant to Rule of Evidence 807.

<sup>2</sup> Note testified that the value of AMSTS's personal property on board the vessel at the time of seizure was between \$5,000 and \$7,000. He was unable to be more specific because he no longer has access to AMSTS's financial records. Due to the lack of specificity, the Court fixes the value at the mean of his two estimated amounts, or \$6,000.

## II. FINDINGS OF FACT

1. Plaintiff is a corporation that was registered on June 23, 2008.<sup>3</sup> It is the successor of unincorporated Arno/Mili Sea Transportation Services (AMSTS).

2. Defendant MV Bokan Eb (“the vessel”) is a steel-hulled vessel with a cargo capacity of 34 net tons.

3. Defendant Marshall Islands Shipping Corporation (“MISC”) is a corporation that is wholly-owned by the RMI government. It came into existence, pursuant to an act of the Nitijela, on November 16, 2005. On that date, all movable and immovable property of the shipping services, together with all assets, liabilities, rights, duties, obligations, contracts and agreements relating to the shipping services, that had been under the control of the Ministry of Transportation and Communication (“T&C”) were transferred to and absolutely vested in MISC.

4. MISC’s powers and functions are vested in a five-member board of directors (“the board”). The board first met on September 8, 2006. The period from November 2005 through September 2006 was referred to at trial as the “transition period.”

5. In July 2006, i.e. during the transition period, Captain Joel informed Note that T&C was looking for some person or some company to repair and operate the vessel (which at that time was inoperable) pursuant to a government subsidized domestic shipping services program.

6. Note met with T&C Minister Michael Konelios. Konelios directed Note to submit a proposal to Wallace Peter, Chief of T&C’s Transportation Division. Note complied.

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<sup>3</sup> Plaintiff’s corporate charter indicates that the corporation’s correct name is AMSTS, INC.

7. Peter directed Note to prepare a proposed contract (“the operations contract”). Note complied. The operations contract was never signed.

8. When Note submitted the operations contract, Peter gave the vessel’s keys to Note and told Note where to locate parts needed to repair the vessel. Note concluded that Peter’s actions constituted authorization for AMSTS to proceed with repairs and begin operations. Note’s conclusion was reasonable and appropriate under the circumstances.

9. T&C prepared another contract (“the subsidy contract”) in September 2006. The subsidy contract was signed by Konelios, the Attorney General, and AMSTS’s Hinton Johnson. However, it was never signed by the Secretary of Finance.

10. Although neither the operations contract nor the subsidy contract was ever fully executed, taken together, they are illustrative of AMSTS’s and T&C’s intended contractual obligations: T&C would allow AMSTS to operate the vessel free of charge for up to two 15-year periods; AMSTS would carry goods and passengers to and among the outer islands; AMSTS would carry copra from the outer islands back to Majuro; AMSTS would repair and maintain the vessel; AMSTS would furnish all needed fuel, supplies, labor, equipment and tools; AMSTS would “cure all damages”<sup>4</sup> to the vessel during its operation of the vessel; and T&C would subsidize AMSTS’s operations by paying AMSTS \$56.20 for each ton of copra delivered to Majuro by AMSTS.

11. AMSTS completed the initial repairs and placed the vessel into service in November 2006.

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<sup>4</sup> Exhibit P-2 (the operations contract), Section 7.

12. In December 2006, while under AMSTS's control, the vessel experienced mechanical problems and drifted onto a reef near Kili Island.

13. AMSTS notified MISC, which sent a ship to assess the situation. However, no effort was made to pull the vessel from the reef because the MISC ship lacked the necessary power and equipment. Based on this one incident and subsequent alleged communications from MISC officials, AMSTS claimed that MISC abandoned the vessel.<sup>5</sup>

14. AMSTS then retained Captain Joel and a PII tugboat to attempt a salvage operation. The first attempt, in December 2006, was unsuccessful. The second attempt, in February 2007, was successful.

15. The vessel was towed back to Majuro, placed in drydock, and repaired. AMSTS incurred the costs of the salvage operation, towing, drydocking and repairs.

16. In February 2007, Assistant Attorney General Whitlam Togamae reviewed the subsidy contract and authored a written opinion that MISC must pay AMSTS the copra shipping subsidy despite the lack of current funding.

17. In March 2007, AMSTS resumed operating the vessel. AMSTS operated the vessel until December 2008.

18. As of June 2008, MISC's copra subsidy payments to all other small vessels were current. However, AMSTS's copra subsidy payments were being withheld because AMSTS's operations contract and subsidy contract had never been fully executed. Exhibit P-18, page 3.

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<sup>5</sup> Abandonment is a necessary element of some salvage claims. However, because plaintiff withdrew its salvage claim during trial, the Court need not determine whether MISC, through its inaction, abandoned the vessel. The Court does find that MISC did not affirmatively abandon the vessel.

19. During the time it operated the vessel, AMSTS carried sufficient copra to qualify for \$38,555.18 in copra shipping subsidies. MISC paid \$19,200.75 to AMSTS, leaving an unpaid balance of \$19,354.43.

20. In December 2008, MISC seized the vessel and moored it at the Uliga dock.

21. At the time of the seizure, AMSTS had personal property aboard the vessel that was valued between \$5,000 and \$7,000. The property was not re-acquired by AMSTS.

22. Some time later, MISC had the vessel towed away from the dock and anchored in the lagoon.

23. Later still, the vessel broke anchor and ran aground.

24. Today, the vessel lies mostly submerged in the lagoon and is unsalvageable.

### **III. STATUTE OF LIMITATIONS FOR SALVAGE CLAIMS**

The statute of limitations for salvage claims is two years. *See* 47 MIRC §707 and Article 23 of the International Convention on Salvage. Plaintiff's complaint was filed more than two years after the vessel was salvaged from the reef. However, defendants failed to plead the statute of limitations as an affirmative defense, and therefore waived the defense. Plaintiff mooted the issue by withdrawing its first cause of action (salvage) during the trial.

### **IV. UNJUST ENRICHMENT**

The Court elects to analyze and resolve plaintiff's only remaining cause of action (unjust enrichment) pursuant to Section 31(1) of the Restatement (Third) of Restitution and Unjust Enrichment. That section states, in pertinent part:

A person who renders performance under an agreement that cannot be enforced against the recipient by reason of ... the failure to satisfy an extrinsic requirement of enforceability ... has a claim in restitution against the recipient as necessary to prevent unjust enrichment. There is no unjust enrichment if the claimant receives the counterperformance specified by the parties' unenforceable agreement.

In December 2016, this Court ruled that the operations contract and subsidy contract were void and unenforceable because they did not meet the statutory requirements of 3 MIRC §1003(1). The Court now determines that the §1003(1) factors are “extrinsic requirements of enforceability” within the meaning of §31(1) of the Restatement.

It is undisputed that AMSTS, from approximately August 2006 through December 2008, rendered performance pursuant to the unenforceable contracts by repairing, maintaining and operating the vessel. But, was MISC unjustly enriched as a result?

To prevail, AMSTS must prove, by a preponderance of the evidence, that MISC was unjustly enriched. It is here that plaintiff's most significant claims, like the vessel itself, break anchor and run aground.

**a. Repair Costs, Salvage Costs, Drydock Expenses**

As stated in §31(1), there is no unjust enrichment if AMSTS received the counter-performance specified by the unenforceable contracts. In exchange for making the initial repairs to the vessel, operating the vessel, maintaining the vessel, carrying goods and passengers to and among the outer islands, carrying copra back to Majuro, furnishing all needed fuel, supplies, labor, equipment and tools, and curing all damages to the vessel, AMSTS used the vessel free of charge from August 2006 through December 2008. At least for that period of time, AMSTS “receive[d] the counterperformance specified by the parties' unenforceable agreement[s].”

AMSTS had control of or operated the vessel for just over 24 months. One could argue that AMSTS's repair costs, salvage costs and drydock expenses should have entitled AMSTS to a longer (perhaps much longer) period of vessel usage. However, the Court declines to adopt such a position for the following reasons:

First, common sense, experience and logic all dictate that AMSTS would have continued to incur repair and maintenance costs during each and every year of the vessel's operation. The \$16,047.56 in repair costs identified by AMSTS are for the period from May 2007 through September 2008 – not for the full 15 or 30 years of anticipated operation.

Second, the Court would have been willing to consider the initial repair costs as consideration for a longer period of vessel usage, but those were not provided, or if they were provided, they were not identified as initial repair costs. The only repair and maintenance costs submitted were for the period from May 2007 through September 2008. Exhibit P-6, page 1. Page 1 does not appear to include a single repair cost incurred during the initial repair period (August 2006 through November 2006).

Third, the salvage costs and drydock expenses both arise from the December 2006 reefing of the vessel while under the control of AMSTS. The operations contract specifically states that AMSTS will "cure all damages" arising from its operations of the vessel. These one-time costs, arising from a singular incident, do not entitle AMSTS to additional years of vessel usage.

The following claims are therefore denied in their entirety: \$16,047.56 for repair costs, \$131,156.00 for salvage costs, and \$14,238.15 for drydock expenses.

### **b. Copra Shipping Subsidy**

AMSTS presented evidence that it qualified for \$38,555.18 in copra shipping subsidies pursuant to the subsidy contract, and that \$19,354.43 remains unpaid. MISC does not dispute those amounts. Rather, it claims that the subsidy contract is unenforceable, and that there was insufficient money in the subsidy account to pay the remaining \$19,354.43.

This scenario presents a textbook unjust enrichment claim. AMSTS carried copra back to Majuro pursuant to a contract that was later determined to be unenforceable. MISC did not pay the subsidy, and was therefore enriched. It would be unjust to allow MISC to retain the benefit.

The Court notes three additional factors that support a finding of “unjust” enrichment. First, AMSTS did not initiate the venture. It was proposed by T&C, and at a time when T&C should no longer have been involved in the shipping business. Second, in February 2007, Assistant Attorney General Whitlam Togamae opined that MISC was obligated to pay the copra shipping subsidy to AMSTS despite the lack of available funding at the time. And third, contrary to testimony provided at trial to the effect that no subsidy funds were available for *any* vessel operators, the minutes of the June 18, 2008, MISC board meeting state, “Apart from Note and his partner, payments under the small vessel subsidy for all other private ship owners/operators are current.”

The court finds that MISC has been unjustly enriched by AMSTS in the amount of \$19,354.43.

### **c. Loss of Personal Property Onboard Vessel at Time of Seizure**

Note testified that when the vessel was seized in December 2008, AMSTS had personal property on board valued between \$5,000 and \$7,000. As noted above, the Court finds that the

value of the property was \$6,000. MISC does not dispute the amount, but rather, claims that AMSTS failed to re-acquire the property. Once again, the Court is faced with a textbook unjust enrichment claim. Because of MISC's unilateral conversion of the vessel, MISC was unjustly enriched by the value of AMSTS's personal property.

The Court finds that MISC has been unjustly enriched by AMSTS in the amount of \$6,000.00.

## V. JUDGMENT

1. It is hereby ordered, adjudged and decreed that MISC shall pay to plaintiff the total amount of \$25,606.93, which includes court costs in the amount of \$252.50. The judgment amount shall bear interest at the legal rate until paid in full.
2. All other amounts sought by plaintiff are denied with prejudice.
3. Defendants' counterclaim is dismissed with prejudice.
4. Each party shall be responsible for its own attorney's fees, if any.

DATED this 15th day of March, 2017.

BY THE COURT:



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COLIN R. WINCHESTER  
Associate Justice