IN THE SUPREME COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

CHUBB INSURANCE (Thailand) Co., Ltd., Tokio Maritime & Nichido Fire Insurance Co., Ltd., *et al.*,

Plaintiffs-Appellees,

vs.

Eleni Maritime Ltd. *in personaum* and Empire Bulkers Ltd.,

Defendants-Appellants.

Supreme Court No. 2018-005

ORDER DENYING REQUEST TO VACATE AND/OR MODIFY "ORDER DISMISSING INTERLOCUTORY APPEAL"

BEFORE: CADRA, Chief Justice; SEABRIGHT,* and SEEBORG,** Acting Associate Justices

On July 30, 2018, Defendants-Appellants timely filed a "Request to Vacate and/or Modify" a single judge order "Dismissing Interlocutory Appeal" by C.J. Cadra dated July 16, 2018.

The full panel, having considered this matter DENIES Appellants' "Request to Vacate and/or Modify" for the reasons set forth below and as stated in the July 16, 2018, single judge order.

* The Honorable J. Michael Seabright, Chief United States District Court Judge, District of Hawaii, sitting by designation of the Cabinet.

** The Honorable Richard Seeborg, United States District Court Judge, Northern District of California, sitting by designation of the Cabinet.

In summary, the High Court's partial summary judgment order is not a "final decision" from which an appeal lies as of right. That order is interlocutory. Marshall Islands precedent has held the Supreme Court is without power to entertain an interlocutory appeal absent certification by the High Court pursuant to MIRCP Rule 54(b). Certification has not been obtained. We concur in the result of the single judge procedural order and do not engage in an extensive analysis of the above stated findings.

Further, we are not convinced that the historic admiralty practice of allowing an appeal of a liability determination prior to a trial on the damages issue is part of the "general maritime law." Appellant flatly asserts, without citation of authority, that 28 U.S.C. 1292(a)(3) is a codification of the general maritime law of the United States which this Court is to follow under 47 MIRC 113. Appellant argues the single judge erred because 47 MIRC 113 makes no distinction between substantive and procedural "general maritime law." But, as discussed below and discussed in the single judge procedural order, the very definition of "general maritime law" suggests that distinction.

The "general maritime law" is a term of art which denotes federal judge made maritime law. *See, e.g., Coto v. J. Ray McDermott, S.A.*, 709 So.2d 1023, 1028 (La. Ct. App. 1998) ("The General Maritime Law . . . of the United States is a branch of federal common law that furnishes the rule of decision in admiralty and

maritime cases in the absence of preemptive legislation.") (citing Thomas J. Schoenbaum, Admiralty & Maritime Law § 5.1).

Secondary sources indicate that the term "general maritime law" refers to "substantive" rules of maritime law. Robert Force, *Admiralty and Maritime Law*, Federal Judicial Center, 2013, at pp. 22-23, observes:

> ***The General Maritime Law***
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> Like Congress, federal courts have created *substantive* rules of maritime law. These court-made rules are referred to as "the general maritime law," which has two dimensions. To some extent, the general maritime law applies rules that are customarily applied by other countries in similar situations. This reflects that certain aspects of the general maritime law are transnational in dimension, and custom is an important source of law in resolving these disputes. The other aspect of the general maritime law is purely domestic. Because Congress has never enacted a comprehensive maritime code, the courts from the outset, have had to resolve disputes for which there were no congressionally established *substantive* rules. In the fashion of common-law judges, the courts created *substantive* rules out of necessity.

Id. (emphasis added).

The distinction between *substantive* and *procedural* maritime rules is further brought out by William Tetley's definition of the "general maritime law:"

> **"General maritime law"** – A term used particularly in the United States to refer to the non-statutory sources of American admiralty law. The general maritime law of the United States is derived from the historic lex maritima common to all Western European nations, with

> its fundamentally civilian nature and origin. The general maritime law includes such concepts and institutions as the maritime attachment; the theory of abandonment in shipowners' limitation of liability; the legislative treatment of maritime liens *as substantive rights, rather than procedural remedies* dependent upon jurisdiction; remedies for wrongful death; the ocean carrier's possessory lien for bill of lading freight, charter hire and demurrage, maintenance and cure rights of the sick or injured seaman; the role of equity in admiralty law; general average; maritime insurance and pre-judgment interest.

William Tetley, Q.C., Glossary of Maritime Law Terms, 2nd Ed. 2004 (citing Tetley, "The General Maritime Law - The Lex Maritima" (1994) 20 Syracuse J. Int'l L. & Com. 105 -145 at pp. 121-128 and *RMS Titanic, Inc. v. Haver*, 171 F.3d 943, 960, 1999 AMC 1330, 1344 (4th Cir. 1999)).

Thus, it would appear that the very definition of "general maritime law," being a term of art, encompasses the *substantive* law created by the courts. The general maritime law, being *substantive* law, would not necessarily include all *procedural rules or practices* which may have been historically utilized by courts sitting in admiralty.

In determining whether a procedural rule violates the general maritime law, it is worthwhile to examine the preemption cases dealing with a state's obligation to follow the general maritime law.

The United States Supreme Court in *American Dredging Company v. Miller*, 510 U.S. 443 (1994) drew a distinction between *substance* and *procedure* in reaching its conclusion that Louisiana's forum non conveniens doctrine did not work "material prejudice to a characteristic feature of the general maritime law." *Id.* at 450. The Court noted at 453-54:

> Wherever the boundaries of permissible state regulation may lie, they do not invalidate state rejection of *forum non conveniens*, which is in two respects quite dissimilar from any other matter that our opinions have held to be governed by federal admiralty law: *it is procedural rather than substantive*, and it is most unlikely to produce uniform results . . . But venue is a matter that *goes to process rather than substantive rights* . . . Uniformity of process (beyond the rudimentary elements of procedural fairness) is assuredly not what the law of admiralty seeks to achieve, since it is supposed to apply in all the courts of the world . . . Because the *doctrine is one of procedure rather than substance*, petitioner is wrong to claim support from our decision in *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953), which held that Pennsylvania courts must apply the admiralty rule that contributory negligence is no bar to recovery. The other case petitioner relies on, *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 248-249 (1942), held that the traditional maritime rule placing the burden of proving the validity of a release upon the defendant pre-empts state law placing the burden of proving invalidity upon the plaintiff. In earlier times, burden of proof was regarded as "procedural" for choice-of-law purposes such as the one before us here[.] For many years however, it has been viewed as a matter of substance — which is unquestionably the view that the Court took in *Garrett*, stating that the right of the plaintiff to be free of the burden of proof "inhered in his cause of action," "was

> part of the very substance of his claim and cannot be considered a mere incident of a form of procedure." 317 U.S. at 249. Unlike burden of proof (which is a sort of default rule of liability) and affirmative defenses such as contributory negligence (which eliminate liability), *forum non conveniens does not bear upon the substantive right to recover, and is not a rule upon which maritime actors rely in making decisions about primary conduct — how to manage their business and what precautions to take.*

Id. (emphasis added and some internal citations omitted).

While we recognize that "[i]t has always been the practice in courts of admiralty, in certain cases, to first determine the liabilities of the parties to the suit and then refer the case to a commissioner to take evidence and fix the measure of damages . . . to avoid delay and the expense of taking further evidence, that might prove to be useless, if the decree as to liability should be reversed . . . ," *see, e.g. Stark v. Texas Co., et al.*, 88 F.2d 182, 183 (1937), we cannot conclude that this procedural practice was or is part of the general maritime law which we are bound to apply under 47 MIRC 113.

The preemption cases generally stand for the proposition that procedural rules which do not affect substantive rights granted by the general maritime law can differ from those employed by the federal courts in admiralty cases. As noted by Justice Souter in his concurring opinion "[t]he distinction between substance and procedure will, however, sometimes be obscure." *American Dredging*, 510 U.S. at 458.

It appears to us that the practice of allowing appeal of a determination of liability prior to determination of damages by a commissioner or a court is a matter of procedure affecting no substantive right under the general maritime law. Using the factors referenced in *American Dredging*, we reason that this practice is (1) not part of an affirmative defense which can be relied upon by Appellants and (2) would not seem to be the sort of rule upon which maritime actors (such as Appellants) would rely upon in making decisions as to how to manage their business. Therefore, in the absence of any authority cited by Appellants otherwise, we conclude that the common admiralty practice of allowing appeal of a liability determination before determination of damages (which in the U.S. is codified at 28 U.S.C. § 1292(a)(3)) is procedural, not substantive. Because it is not substantive we are not convinced that we are bound to allow the instant interlocutory appeal under the general maritime law.

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For the foregoing reasons, we DENY Appellants' motion and DISMISS the Appeal of the High Court's partial summary judgment order without prejudice to appeal upon entry of a final judgment.

DATED: September 4, 2018 */s/Daniel N. Cadra*
Daniel N. Cadra, Chief Justice

DATED: September 4, 2018 */s/ J. Michael Seabright*
J. Michael Seabright, Associate Justice

DATED: September 4, 2018 */s/Richard Seeborg*
Richard Seeborg, Associate Justice