

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
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ZIM INTEGRATED SHIPPING :  
SERVICES and ZIM DO BRASIL :  
LTDA., :

Plaintiffs, :

- against - :

PPG INDUSTRIES, INC., :

Defendant. :

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SENATOR LINES GMBH and :  
SENATOR DO BRASIL LTDA., :

Plaintiffs, :

- against - :

PPG INDUSTRIES, INC., :

Defendant. :

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MONTEMAR S.A. D/B/A PAN :  
AMERICAN INDEPENDENT LINE, :

Plaintiff, :

- against - :

PPG INDUSTRIES, INC., :

Defendant. :

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**APPEARANCES:** (See last page)

**CHIN, Circuit Judge:**

These actions arise from an explosion and fire aboard the M/V DG HARMONY on November 9, 1998. The ship was located off the coast of Brazil when a shipment of calcium hypochloride

**MEMORANDUM DECISION**

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hydrated ("cal-hypo") self-heated and went into thermal runaway. See In re M/V DG HARMONY, 394 F. Supp. 2d 649 (S.D.N.Y. 2005) ("Harmony I"), aff'd in part and rev'd in part, In re M/V DG HARMONY, 533 F.3d 83 (2d Cir. 2008) ("Harmony V"). The ship and cargo were a total loss. Over the course of the last twelve years, I have issued many decisions in the consolidated case. It is now established that:

- (1) PPG Industries ("PPG") manufactured and shipped the cal-hypo;
- (2) PPG had a duty to warn its carrier of the risks of cal-hypo;
- (3) PPG breached its duty to warn its carrier;
- (4) If PPG had warned its carrier, the cal-hypo would have been stored differently on the HARMONY, and the explosion would not have occurred;
- (5) PPG is 100% at fault for the loss of the HARMONY; and
- (6) The vessel and the non-vessel carriers are 0% at fault for the loss of the HARMONY.

See generally Harmony I, 394 F. Supp. 2d 649 (S.D.N.Y. 2005); In re M/V DG HARMONY, 436 F. Supp. 2d 660 (S.D.N.Y. 2006) ("Harmony II"); In re M/V DG HARMONY, No. 98 Civ. 8394 (DC), 2006 WL 3821851 (S.D.N.Y. Dec. 29, 2006) ("Harmony III"); In re M/V DG HARMONY, No. 98 Civ. 8394 (DC), 2007 WL 895251 (S.D.N.Y. Mar. 16, 2007) ("Harmony IV"); HARMONY V, 533 F.3d 83 (2d Cir. 2008); In re M/V DG HARMONY, No. 98 Civ. 8394 (DC), 2009 WL 3170301 (S.D.N.Y. Sep't 30, 2009) ("Harmony VI").

At issue in the instant motion is whether plaintiffs Montemar S.A. D/B/A Pan American Independent Line ("Montemar"),

Zim Integrated Shipping Services and Zim Do Brasil Ltda. (together, "Zim"), and Senator Lines Gmbh and Senator Do Brasil Ltda. (together, "Senator") are entitled to indemnity from PPG. Plaintiffs are "slot charterers" who chartered cargo space aboard the HARMONY to third parties. After the HARMONY exploded, those third party cargo interests sued plaintiffs in courts in Brazil, Argentina, and Uruguay for the value of their lost cargo. Plaintiffs settled most of the claims; at least two judgments were entered in foreign courts.

Plaintiffs had asserted indemnity claims against PPG in the consolidated litigation in this Court. In September 2009, I dismissed plaintiffs' indemnity claims without prejudice because I was under the impression that they were not fully liquidated, and therefore not ripe. In re M/V DG HARMONY, No. 98 Civ. 8394 (DC), 2009 WL 3241238, at \*8 (S.D.N.Y. Sept. 30, 2009) ("Harmony VII"). At an on-the-record conference on October 23, 2009, plaintiffs represented that all claims were ripe. (10/23/10 Tr. at 4-5). At the suggestion of the Court, to sever the remaining and still undecided South American indemnity claims, plaintiffs agreed to re-file the claims against PPG under new docket numbers. (Id. at 12). PPG agreed not to dispute the reasonableness of the amounts that plaintiffs paid to settle the third party claims, not to raise a statute of limitations defense, and not to argue that plaintiffs' claims were barred under the compulsory counterclaim rule. (Id. at 5-8). Now, the only question is whether, as a matter of law, plaintiffs are entitled to indemnity from PPG for

the cost of litigating and settling the third party cargo claims. For the reasons set forth below, I conclude that PPG is liable to plaintiffs for indemnity. Plaintiffs' motions for summary judgment are granted.

## **DISCUSSION**

### **I. Choice of Law**

Plaintiffs and PPG agree that United States general maritime law applies to plaintiffs' claims for indemnity. (Def. Br. at 7 n.4; Zim Br. at 5; Montemar Br. at 7-8; Senator Br. at 9). Moreover, I have already held that pursuant to choice of law principles set forth in Lauritzen v. Larsen, 345 U.S. 571 (1953), United States law applies. See Harmony III, 2006 WL 3821851, at \*1 n.2. Accordingly, I apply United States law.

### **II. Indemnity**

In the absence of an express indemnity agreement between two parties, a tort-based right to indemnification arises where one party pays for a loss that is primarily the fault of another party. See Peoples' Democratic Republic of Yemen v. Goodpasture, Inc., 782 F.2d 346, 351 (2d Cir. 1986). This indemnification right arises when there is a "great disparity" in the fault of the respective parties. In re Kreta Shipping, No. 96-1137 (KMW), 2000 WL 33249253, \*2 (S.D.N.Y. Jun. 21, 2000) (citations omitted). It is an equitable right that "rests upon the principle that the true wrongdoer should bear the ultimate burden of payment." Victoria Sales v. Emery Air Freight, Inc., 917 F.2d 705, 708 (2d Cir. 1990) (quoting Incersoll Milling Mach. Co. v. M/V Bodena, 829 F.2d 293,

305 (2d Cir. 1987)). In the context of maritime law, it is well-established that "when a party . . . is entitled to indemnity, the indemnitor's liability includes the indemnitee's reasonable attorneys' fees." Kreta Shipping, 2000 WL 33249253, at \*1 (citing Peter Fabrics, Inc. v. S.S. "Hermes", 765 F.2d 306, 315-16 (2d Cir. 1985)).

Here, I have already concluded that PPG is 100% at fault for the loss of the HARMONY, and the carriers are 0% at fault. See Harmony IV, 2007 WL 895251, at \*3 ("The Carrier Defendants were 0% at fault for the loss of the Harmony. . . . [T]his Court imposed 100% liability on PPG and, in doing so, this Court necessarily exonerated all other parties."); Harmony VI, 2009 WL 3170301, \*6 ("If PPG had given a proper warning, the carrier would have changed its stowage decision, and the explosion would have been averted."). This is the greatest possible disparity in fault. Plaintiffs booked third-party cargo on the HARMONY. The third-party cargo was lost as a sole result of PPG's tortious conduct. The third parties sued plaintiffs in foreign courts, and plaintiffs settled most of the actions. This is a quintessential indemnity fact-pattern. Accordingly, equity demands that PPG make plaintiffs whole by reimbursing them for the reasonable costs of the foreign litigation and settlements.

PPG's arguments to the contrary are unavailing.

First, PPG argues that I have never explicitly adjudicated the respective liability of Zim, Senator, and Montemar, so it is possible that they are not blameless for the

HARMONY's explosion. The argument is rejected. To the extent that I expressly concluded that PPG is 100% liable for the HARMONY's explosion, I necessarily decided that all others -- including Zim, Senator, and Montemar -- are 0% at fault. See Harmony IV, 2007 WL 895251, at \*3 ; Harmony VI, 2009 WL 3170301, at \*6. In particular, having already concluded that PPG's carrier, Cho Yang, is 0% at fault, there is no basis for imposing liability on the instant plaintiffs -- who were not even involved in stowage decisions relating to the cal-hypo.

Second, PPG argues that plaintiffs have not proven that under Brazilian law plaintiffs were vicariously liable to the third parties for PPG's tort. PPG suggests that there may have been valid defenses available to plaintiffs, and that it was therefore imprudent for plaintiffs to settle the third party claims. This argument is also rejected. To be entitled to indemnity from PPG, plaintiffs need only establish that they faced potential liability as a result of PPG's tort, that PPG had "sufficient notice" of the potential liability and the terms of plaintiffs' settlements, and that the settlements were "reasonable." Atlantic Richfield Co. v. Interstate Oil Transp. Co., 784 F.2d 106, 112 (2d Cir. 1986); see also Manley v. AmBase Corp., 121 F. Supp. 2d 758, 765 (S.D.N.Y. 2000); Compania Sud Americana de Vapores, S.A. v. I.T.O. Corp. of Baltimore, 940 F. Supp. 855, 869 (D. Md. 1996). Plaintiffs have met this threshold.

Here, plaintiffs faced "potential liability" when they were sued in foreign courts by the third party cargo interests.

PPG concedes that under Brazilian law, shipping companies, such as plaintiffs, are "exposed to a species of 'strict' liability or 'no fault' liability for loss or damage to cargo." (Gago Decl. ¶ 27). There are exceptions to this rule, however, "including loss or damage due to fortuitous event, force majeure and inherent vice." (*Id.* at ¶ 28). In litigating the third party claims, it was uncertain whether the foreign courts would find any of the "exceptions" to be applicable. The different outcomes in two cases that were actually litigated to judgment are illustrative of this uncertainty. In one case (the AGF Brasil Seguros claim (Santos)), Senator was "exempted" from responsibility by the Brazilian court based on a finding of a "fortuitous event." (Sammarco Decl. ¶ 14). In another case (the Bradesco Seguros claim), the Brazilian court rejected all of Senator's claimed exemptions, and held Senator liable for the full amount of the claim. (Sammarco Decl. ¶ 10).

Facing potential liability, plaintiffs chose to settle the majority of the third party claims. When considering settlement of a claim, a prospective indemnitee's safest route is to formally tender defense of the action to a prospective indemnitor. This action protects the indemnitor from the costs of an indemnitee's imprudent settlement. Failing a formal tender, however, indemnity is still available so long as the prospective indemnitor was on "actual notice" of the action and settlement, and the settlement is reasonable. See *Burke v. Ripp*, 619 F.2d 354, 356 (Former 5th Cir. 1980). At its core, implied-in-law

indemnity is an equitable remedy, and it is always necessary to balance the equities of the respective parties. See Bainville v. Hess Oil V.I. Corp., 837 F.2d 128, 131 (3d Cir. 1988).

Montemar actually did formally tender defense of the third party actions to PPG, but PPG declined the invitation. (Montemar Ex. 8, 5/11/07 Letter to Stanley McDermott). As for Zim and Senator, PPG was fully on notice of the progression of the foreign suits because they have been an omnipresent aspect of the twelve-year HARMONY litigation in the U.S. courts, and have been thoroughly discussed in status letters, conferences, and decisions along the way. See, e.g., Harmony I, 394 F. Supp. 2d at 653; Harmony III, 2006 WL 3821851 at \*3 (ruling that Montemar, Zim, and Senator may proceed with their indemnity claims).

PPG has already conceded that the amounts of plaintiffs' settlements were "reasonable." (10/23/09 Tr. at 5). See Atlantic Overseas Corp. v. Feder, 452 F. Supp. 347, 353 (S.D.N.Y. 1978) ("reasonableness" of settlement is "measured by the extent of the financial exposure . . . had the settlement not been consummated"). After refusing to assume defense of the foreign litigation, and after conceding that plaintiffs settled that litigation for "reasonable" sums, PPG cannot now argue that the litigation was potentially meritless, and that plaintiffs never faced an actual threat of liability. They faced "potential liability" because of Brazil's strict liability regime, and because the only defenses available were not certain to prevail. Plaintiffs are innocent parties, with the bad luck of having

chartered cargo space aboard the same vessel on which PPG booked its ill-fated shipment of cal-hypo. The balance of equities favors plaintiffs. PPG is liable to plaintiffs for the reasonable costs of their successful, unsuccessful, and settled lawsuits -- including reasonable attorneys fees.<sup>1</sup>

### **III. Award**

PPG has already conceded the "reasonableness" of the amounts of plaintiffs' foreign settlements with the third parties. (10/23/09 Tr. at 5).<sup>2</sup> Because plaintiffs paid the third party settlements in Brazilian currency (reals), however, the parties appear to disagree how to calculate the exchange rate from Brazilian reals into United States dollars.<sup>3</sup> Montemar calculated

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<sup>1</sup> Though PPG argues that it should not be liable for the cost of plaintiffs' successful and unsuccessful litigation, the reason that plaintiffs were forced to defend those suits is still traceable to PPG's tort.

<sup>2</sup> Notwithstanding this concession, PPG now argues that the non-Brazilian claims are "unsubstantiated." (PPG Br. at 7-8, 11-12). All have been adequately substantiated through sworn declarations and exhibits. (DeOrchis Decl. Ex. 4(A) (Zim); Idiarte Decl. Ex. 9, 12, 13 (Zim); Whelman Decl. ¶¶ 4(B)(g), 14(3) (Montemar)).

<sup>3</sup> None of the parties have requested that I enter judgment in Brazilian reals rather than United States currency. Therefore, I need not reach the question of whether I have the authority to do so -- an ambiguous question given that the Second Circuit has noted (some twenty years ago) that it may be time to "reexamine" the "assumption" that "American judgments must be entered in dollars." Competex, S.A. v. Labow, 783 F.2d 333, 337 & n.9 (2d Cir. 1986). While the Second Circuit has not yet ruled on this question, at least two other circuits and one court in the Southern District of New York have endorsed the practice of entering judgments in foreign currency in appropriate circumstances. See In re Oil Spill by the Amoco Cadiz, 954 F.2d 1279, 1328 (7th Cir. 1992) (francs); Sea-Roy Corp. v. Parts R Parts, Inc., 173 F.3d 851, 1999 WL 111281, \*4 (4th Cir. 1999)

the exchange rate as of the day it paid its settlement. Zim calculated the exchange rate as of the day it filed its complaint. Senator argues that the relevant exchange rate is the one that prevails on the date of judgment. PPG urges that the dates that plaintiffs paid their claims are the correct dates for purposes of the exchange rate calculation.

Montemar and PPG are correct. Traditionally, federal courts, sitting in admiralty jurisdiction under the laws of the United States, have applied the currency exchange rate prevailing on the date that the cause of action accrued. This rule is sometimes called the "breach day" rule. See, e.g., Jamaica Nutrition Holdings, Ltd. v. United Shipping Co., Ltd., 643 F.2d 376, 380 (5th Cir. 1981) ("If the cause of action is governed by the law of the forum, . . . the applicable rate is the one prevailing on the date the cause of action arises.") (citations omitted); Seguros Banvenez, S.A. v. S/S Oliver Drescher, 761 F.2d 855, 861 (2d Cir. 1985); The Gylfe v. The Trujillo, 209 F.2d 386, 388 (2d Cir. 1954). The "breach day" rule contrasts with the "judgment day" rule, which American admiralty courts employ when applying the laws of a foreign nation. See e.g., Conte v. Flota Mercante Del Estado, 277 F.2d 664, 670 (2d Cir. 1960) ("The Federal rule . . . is that when an obligation is governed by foreign law, the [currency] conversion . . . is to be made at the rate of exchange prevailing at judgment.") (citations omitted);

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(deutschemarks); Mitsui & Co., Ltd. v. Oceanrawl Corp., 906 F. Supp. 202, 203 (S.D.N.Y. 1995) (Cedarbaum, J.) (yen).

Shaw, Savill, Albion & Co. v. The Fredericksburg, 189 F.2d 952, 955 (2d Cir. 1951); Black Sea & Baltic Gen. Ins. Co. v. S.S. Hellenic Destiny, 575 F. Supp. 685, 693-94 (S.D.N.Y. 1983).

This Court applied U.S. admiralty law to the torts underlying the instant matter. PPG's indemnity obligation to plaintiffs arises from U.S. law. Therefore, the "breach day" rule governs. Plaintiffs' cause of action against PPG matured once the claims were liquidated, that is, once they paid the third party cargo interests. These are the dates on which the currency exchange must be calculated.

As for an award of attorneys fees, PPG argues that plaintiffs' claims are "unsubstantiated." PPG's duty to indemnify plaintiffs, however, undeniably extends to the reasonable cost of attorneys' fees incurred in connection with litigation and settlement of the third party cargo claims. See Kreta Shipping, 2000 WL 33249253, at \*2. Though plaintiffs have provided some invoices from their attorneys, they have not yet submitted full attorneys' fees applications.

In light of the outstanding issues regarding the appropriate amounts to be entered into judgment, I direct as follows:

- (1) The parties shall confer and attempt to agree on the appropriate currency exchange rates for converting plaintiffs' claims from Brazilian reals into U.S. dollars as of the dates the claims were paid;
- (2) The parties shall confer and attempt to agree on the appropriate amount of plaintiffs' attorneys' fees (in connection with defending

the third party claims -- not in connection with the American litigation);


- (3) On or before August 20, 2010, plaintiffs shall submit a proposed judgment to the Court, indicating whether PPG consents to the amounts (reserving its right to appeal on liability). If PPG does not consent, plaintiffs shall set forth arguments in support of their proposed judgment, including a full attorneys' fee application;
- (4) On or before September 3, 2010, if PPG does not consent to the proposed judgment, PPG shall respond to plaintiffs' submissions.

**CONCLUSION**

For the reasons set forth above, plaintiffs' motions for summary judgment are GRANTED.

SO ORDERED.

Dated: New York, New York  
July 29, 2010

  
DENNY CHIN  
United States Circuit Judge  
Sitting by Designation

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