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Vikings on the Mississippi River?

The Second Circuit's Decision in *American Cruise Lines v. Viking USA LLC, River 1 LLC*

US – May 2024

The Second Circuit Court of Appeals decision in *American Cruise Lines v. Viking USA LLC*, River 1 LLC upheld an agency decision that a Swiss-based company could operate a luxury cruise ship on the Mississippi River. The *American Cruise Lines* decision could very well reach beyond the cruise industry and impact how future marine transactions are structured.

The Passenger Vessel Services Act[1] (PVSA) is part of the larger body of US coastwise law, which includes the Jones Act. The PVSA applies to the transportation of passengers between US coastwise points. The coastwise laws have stringent US citizenship requirements. Similarly, the Shipping Act of 1916 requires approval from Maritime Administration (MARAD) before any US company may sell lease, charter, deliver or in any other manner transfer, to a person not a citizen of the US a vessel that is documented in the US.[2]

In *American Cruise Lines* the core issue was vessel control in a proposed arrangement for the charter of a cruise ship between a US company and a Swiss company. The Court addressed the distinction between a vessel time charter, in which the owner of the chartered vessel is in control of the vessel, and a bareboat charter, in which control rests with the charterer. Because the Court found that the agreement at issue was a time charter, the Second Circuit upheld MARAD's determination that the transaction did not violate U.S. shipping law.

The Decision

Viking USA LLC (Viking), a Swiss company, is a global cruise operator. To break into the Mississippi River cruise market, Viking entered into a "unique arrangement" with River 1, LLC (River 1), a US coastwise qualified company, to construct a cruise ship which Viking would charter for cruises on the Mississippi River. River 1 employees would manage the ship's maritime activities, while Viking employees would manage the onboard entertainment operations.

Before building the cruise ship, River 1 and Viking sought confirmation from the MARAD that the charter arrangement was a time charter. Following a notice and comment period, MARAD found that the agreement constituted a permissible time charter under MARAD's blanket approval regulations and would not result in an impermissible transfer of control to a non-citizen corporation. Several months after MARAD's decision, the Viking Mississippi set sail.

American Cruise Lines, Inc. (ACL), challenged MARAD's time charter determination and argued instead that the agreement between River 1 and Viking USA represented a bareboat charter, which impermissibly transferred control of the vessel to a foreign company. The Court affirmed MARAD's decision.

The distinction between a time charter and a bareboat charter lies at the heart of this case. Under a vessel time charter, the owner of the vessel retains control. Under a bareboat charter, the charterer seizes the control. The issue of control comes into play when dealing with foreign entities because maritime law dating back to 1886 prevents vessels owned or controlled by non-US citizen entities from transporting passengers and goods within the US.[3]

MARAD regulations permit time charters between US citizen and non-US citizen entities.[4] Under a time charter, the time charterer directs the vessel's commercial operations while the vessel owner crews and operates the vessel.

By classifying the River 1 arrangement with Viking USA, subsidiary of the Swiss company Viking Cruises (Switzerland) AG, as a time charter, the Viking Mississippi was allowed to transport passengers freely within the US. ACL contested MARAD's decision and argued the agreement between River 1 and Viking USA should be classified as a bareboat charter, which because of the citizenship requirements, would open the arrangement up to MARAD enforcement action.

After determining ACL had standing, the Court found MARAD's classification of the River 1 and Viking agreement as a time charter was reasonable. The Court reasoned that a time charter does not involve the shifting of possession, rather the charterer engages for a fixed period of time a vessel, which remains manned and navigated by the vessel owner, to carry cargo wherever the charterer instructs.

The Court found that the following factors supported MARAD's determination that the arrangement between the parties was a time charter:

- The River 1 and Viking Agreement never granted Viking exclusive possession
- River 1 provided the crew for the Viking Mississippi and oversaw the ship's operations, which is "presumptive evidence that an agreement is a time charter"
- While Viking could request a replacement captain, a replacement was only permitted for unsatisfactory performance and the new captain would be chosen by River 1
- River 1 was responsible for maintaining the ship in a manner sufficient for passenger transport

1 46 U.S.C. § 55103.

2 46 U.S.C. § 56101(a)(i).

3 46 U.S.C. § 55103, § 55102, § 55109

4 46 C.F.R. § 221.13(a)(1).

ACL unsuccessfully argued that the following factors established that the agreement was a bareboat charter:

- Viking was required to absorb standard operating costs and business risks
- Viking was permitted to remove the vessel master
- Viking was involved with the financing of the ship's construction giving it an impermissible equity in the ship itself

As a result, the Court determined MARAD's decision to classify the River 1 and Viking USA arrangement as a time charter was valid.

Conclusion

The requirements for a coastwise compliant vessel have significant impact on what assets may be employed across a variety of industries such as offshore wind, oil and gas and other activities on the Outer Continental Shelf. The interpretation of the coastwise laws and related shipping laws impact whether foreign companies may participate in areas that, under US law are reserved for US citizens.

The contractual model set forth in the *American Cruise Lines* decision could serve as a template for future vessel chartering and financing. To a degree, a variation of the *American Cruise Lines* arrangement has already developed in the offshore wind industry where there are a growing number of joint ventures between US coastwise qualified vessel operators and European companies with extensive offshore wind experience.

Given the potential for civil penalties and litigation, stakeholders in the Jones Act space should ensure that any proposed transaction is vetted by experienced maritime counsel. Our firm's Commodities and Shipping Group and Public Policy team routinely assist clients navigating the potentially treacherous waters of the US coastwise laws.

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