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Atlantic Fertilizer & Chemical Corporation v. Italmare, 117 F.3d 266 (5th Cir. 1997) (Decided July 17, 1997)

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DEMANDS FOR COUNTER-SECURITY

Pending arbitration proceedings do not preclude a court from granting a demand for counter-security.

*Atlantic Fertilizer & Chemical Corporation v. Italmare.*117 F.3d. 266 (5th Cir. 1997)
(Decided July 17, 1997)

Atlantic Fertilizer and Chemical Corporation ("Atlantic") contracted with the MV/CAPRICORN I ("CAPRICORN") to transport bulk diammonium phosphate from Mississippi to India. However, it came to Atlantic's attention that the CAPRICORN was unseaworthy. Atlantic, therefore, terminated the charter agreement and filed an admiralty suit against the owner of the vessel, Aquator Shipping ("Aquator"); the charterer of the vessel, Italmare Corporation ("Italmare"); and the CAPRICORN, alleging multiple breaches under the charter and of maritime laws. Atlantic sought, and received from the court, an *in rem* arrest order for the vessel and an attachment of the vessel, her bunkers, and all property on board.

Aquator and Italmare posted $350,000 in security in favor of Atlantic and all property was released pursuant to a court order. In its answer, Italmare counter-claimed against Atlantic's libel, alleging breach of the charter agreement. Italmare also filed a request for counter-security of $650,000 from Atlantic. The action was stayed pending arbitration. The magistrate denied Italmare's request for counter-security preserving its right to resubmit the request upon completion of arbitration. The district court affirmed the order of the magistrate. Italmare then appealed to the Fifth Circuit Court of Appeals.

Prior to reaching the merits of the appeal, the Court of Appeals addressed Italmare's right to appeal the district court's order. Although the order denying Italmare's request for counter-security is not a final adjudication, the court relied on the "collateral order doctrine" established in *Cohen v Beneficial Industrial Loan Corporation*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), to determine whether it had proper jurisdiction over the appeal. In *Cohen*, the Supreme Court explained that an order denying security may be appealed only when it falls within the narrow class which "determine claims of right separate from, and collateral to, rights alleged in the actions." The Court of Appeals focused on the *Cohen's* carefully crafted definition of the perimeters of its holding that an order for security is appealable only if the appeal addresses the party's right to security rather than reflects the court's exercise of discretion as to the amount of security.

To illustrate this distinction, the court relied on two admiralty cases. In *Incas & Monterey Printing and Packaging, Ltd. v M/V SANG JIN*, 747 F.2d. 958 (5th Cir. 1984), the court found that an order requesting the plaintiff to post counter-security within a specified time frame or lose its security posted by the defendants was reviewable under the doctrine of collateral order. However, in *Shakit v M/V FORUM TRADER*, 14 F.3d. 5 (5th Cir. 1993), the court refused to assert jurisdiction over an appeal for an order setting aside an amount of security considered inadequate. Although both cases focused on orders of security, the distinction expressed in *Cohen* is between an order that addresses a party's right to security versus an order that exemplifies an exercise of discretion in applying that order.

In the present case, the Court of Appeals concluded that it had proper jurisdiction under the collateral order doctrine as a result of an erroneous application of the law and not merely as a result of an exercise of the court's discretion. The court, therefore, applied the facts to the standard.

The Court of Appeals determined from the limited record that the district court believed that the "pending arbitration proceedings stood as an impediment to its authority to order counter-security." The Court of Appeals held that pending arbitration proceedings did not preclude the district court from granting security and that the district court erred by not exercising its discretion over an order requesting counter-security. Thus, the Court of Appeals for the Fifth Circuit remanded the case to the district court for it to consider the request for counter-security "after weighing all competing concerns" and to "exercise its discretion in deciding whether and to what extent, if any, that request should be granted."

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CUSTOMARY FREIGHT UNIT

Determination of the customary freight unit in a shipping contract is a question of fact to be ascertained from the intention of the parties to the contract. Courts will seek evidence of the parties intentions by examining the shipping contract, bills of lading, applicable tariffs or any relevant documents between the parties.

Craddock Intern. Inc. v. W.K.P. Wilson & Son, Inc., 116 F.3d 1095 (5th Cir. 1997)
(Decided June 26, 1997)

Plaintiffs-appellees, foreign vessel and cargo owners "Craddock" and "PMSA" respectively, sued defendant-appellant, marine insurance broker "Wilson," for negligently canceling their protection and indemnity ("P&I") policy after Craddock's ship carrying PMSA's cargo sank. The off-shore supply vessel sank off the Venezuela coast en route to Peru. The cargo, a fish meal processing plant, was valued at $1.7 million dollars. Wilson obtained for Craddock a hull insurance policy for $350,000 which covered the ship and its equipment, and a P&I policy for $1 million dollars which covered Craddock's liability to third parties arising out of the operation of the vessel. Wilson also added PMSA as an assured to Craddock's P&I policy. PMSA never obtained first party insurance coverage. After Craddock's ship sank, Wilson canceled his P&I policy.

One of several issues decided in this case was whether PMSA could recover under Craddock's P&I policy even though Wilson added PMSA as an assured under the same policy in error. The district court held that PMSA would be unable to recover its losses because under this standard P&I policy, the assurer is absolved from paying claims to an assured for its own losses. The court reasoned that since PMSA was listed under Craddock's P&I policy as an assured it could not recover for the loss of its own cargo.

However, the Court of Appeals held that even though PMSA was listed as an assured on Craddock's P&I policy it was still entitled to recover its loses under a claim submitted by