No. 09-455

In the
Supreme Court of the United States

AMPHITRITE SHIPPING COMPANY, S.A.,

Petitioner,

v.

BO HAI NAVIGATION COMPANY, LTD.

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

COMPETITION PACKET FOR THE
SEVENTEENTH ANNUAL JUDGE JOHN R. BROWN
ADMIRALTY MOOT COURT COMPETITION, 2010

QUINN MARTINDALE
Board of Advocates
University of Texas School of Law
727 East Dean Keeton Street
Austin, TX 78705-3299
Tel.: (512) 232 - 3680
fax: (512) 471 - 8585

IAN FURMAN
Moot Court Board
Tulane University School of Law
6329 Freret Street
New Orleans, LA 70118-5670
Tel.: (504) 865 – 5988
fax: (504) 865 – 6748

Competition Directors

DAVID W. ROBERTSON
MICHAEL F. STURLEY
University of Texas School of Law

MARTIN DAVIES
Tulane University School of Law

Competition Committee

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AMPHITRITE SHIPPING COMPANY, S.A., Plaintiff-Appellant,

v.

BO HAI NAVIGATION COMPANY, LTD., Defendant-Appellee.

No. 07-12345

United States Court of Appeals,
Fifth Circuit

July 13, 2009

Appeal from the United States District Court for the Southern District of Texas.

Before JUSTINIAN, SOLOMON, and HAMMURABI, Circuit Judges.

PER CURIAM:

Plaintiff-Appellant Amphitrite Shipping Co., a Greek corporation, appeals an October 9, 2007, order of the United States District Court for the Southern District of Texas (Portia, J.) entered under Rule E(4)(f) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure. This order vacated an order of maritime attachment entered by the district court on August 20, 2007, under Rule B of the Supplemental Rules.

The underlying dispute concerns an alleged breach of a Memorandum of Agreement (the "MOA") for the purchase and sale of an ocean-going vessel, the *M.V. Thetis*, which is registered in Liberia. According to the terms of the MOA, defendant-appellee Bo Hai Navigation Company, a Chinese corporation, agreed to buy the vessel from Amphitrite for the total sum of $23,019,806.00.[1] The *Thetis* was to be delivered in Algeciras, Spain, by January 8, 2007.

[1] All of the relevant financial transactions were conducted not in U.S. dollars but rather in Euros. In this opinion, we have used the dollar equivalents to which the parties have stipulated.

Amphitrite alleges that Bo Hai breached the MOA by failing to pay a deposit of 20% of the purchase price, or $4,603,961, on or before December 11, 2006, as required by clause 8.4 of the MOA. Under clause 12.3 of the MOA, upon Bo Hai's breach Amphitrite was "at liberty (but not bound) to resell the Vessel" and recover losses from Bo Hai. Amphitrite sold the *Thetis* to a Korean buyer (not a party to this litigation) on February 7, 2007, for $19,955,250.00, which is $3,064,556 less than the purchase price under the MOA. Shortly after this substitute sale, Amphitrite commenced an arbitration proceeding in London (under clause 19.5 of the MOA) to recover the damages that it suffered as a result of Bo Hai's alleged breach of the MOA. Although the transaction had no connection with the United States, Amphitrite sought to obtain security in this country for any arbitration award that it might ultimately obtain in London.

Rules B and E govern the attachment of assets in maritime actions. Under Rule B(1), a plaintiff that files a verified complaint and an appropriate affidavit is entitled to an attachment of a defendant's assets up to the amount in dispute. Rule E(4)(f) entitles a defendant whose assets have been attached to a "prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be vacated."

Under this framework, Amphitrite applied to the district court and on August 20, 2007, was granted an *ex parte* order of attachment up to the amount of its alleged losses plus estimated interest and attorneys' fees. Pursuant to that Rule B order, Amphitrite attached another vessel belonging to Bo Hai, the *M.V. Dalian*, when the *Dalian* was towed to Galveston after suffering serious storm damage during a voyage from Altamira, Mexico, bound for Rotterdam, Netherlands. Invoking Rule E(4)(f), Bo Hai moved to vacate the order of attachment and dismiss the action. The district court granted the motion, vacated the order of attachment, and dismissed the action on October 9, 2007. Amphitrite now appeals the Rule E order.

Bo Hai argues here, as it did in the district court, that the order of attachment was invalid for two reasons. First, Rule A(1)(A) provides that a Rule B attachment is unavailable unless the plaintiff has a valid *prima facie* admiralty claim against the defendant. In the absence of admiralty jurisdiction over the underlying claim, a district court has no authority under Rule B. Bo

Hai contends that no admiralty jurisdiction is present here because the underlying dispute concerns a contract for the sale of a vessel. Second, Bo Hai contends that even if admiralty jurisdiction were present here it would violate the Due Process Clause to attach the *M.V. Dalian* under Rule B when the underlying dispute has no connection whatsoever with the United States, the defendant has no connection with the United States, and the vessel attached was involuntarily present in the United States only because of the emergency situation created by the storm that damaged it.

To resolve this case, we need consider only Bo Hai's first argument.[2] Amphitrite seeks an attachment in aid of its London arbitration against Bo Hai to resolve Amphitrite's claim that Bo Hai breached a contract for the purchase and sale of a vessel. Amphitrite must accordingly demonstrate that its breach-of-contract claim would fall within the court's admiralty jurisdiction if that claim had been filed here. In other words, Amphitrite must demonstrate that a contract for the sale of a vessel is "maritime" for the purposes of admiralty jurisdiction. That is a burden that Amphitrite cannot carry, at least not in this court. Binding circuit precedent clearly holds to the contrary. *See, e.g.*, *Lynnhaven v. Dolphin Corp. v. E.L.O. Enterprises*, 776 F.2d 538, 541, 1986 AMC 2659 (5th Cir. 1985); *Jones v. One Fifty Foot Gulfstar Motor Sailing Yacht*, 625 F.2d 44, 47, 1981 AMC 1005 (5th Cir. 1980); *Atlantic Lines, Ltd. v. Narwhal, Ltd.*, 514 F.2d 726, 731, 1976 AMC 642 (5th Cir. 1975); *Richard Bertram & Co. v. The Yacht, Wanda*, 447 F.2d 966, 967, 1971 AMC 1841 (5th Cir. 1971) (per curiam). Like the district court, we are bound by those decisions.

The judgment of the district court vacating its prior order of maritime attachment is accordingly

Affirmed.

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[2] Because it is unnecessary to our decision, we express no opinion on Bo Hai's second (constitutional) ground for vacating the attachment. *Cf.* Judge Hammurabi's concurring opinion. We simply note the long-established judicial preference for avoiding a decision on constitutional grounds when a non-constitutional basis exists for fully resolving the case.

JUSTINIAN, Circuit Judge, concurring:

I agree with the panel's decision to apply our long-established precedent here. In the present context, we can do nothing else. But the traditional rule that contracts for the sale of a vessel are nonmaritime has long been criticized — including by distinguished members of this Court. *See, e.g., Jack Neilson, Inc. v. Tug Peggy*, 428 F.2d 54, 58, 1970 AMC 1490 (5th Cir. 1970) (Wisdom, J.) ("the petrified rule that ship-sale contracts are not within admiralty jurisdiction . . . 'arose as an analogy to a case which is inconsistent with basic principles governing the admiralty jurisdiction of United States courts.'") (quoting Note, *Admiralty Jurisdiction and Ship-Sale Contracts*, 6 STAN. L. REV. 540, 540 (1954)) (footnote omitted). In my view, the time has come to reconsider that traditional rule. I therefore urge my colleagues to grant en banc review in this case if Amphitrite petitions for rehearing.

While it is true that this circuit — like others — has long held that a contract for the sale of a vessel is not "maritime" for purposes of admiralty jurisdiction, the relevant decisions predate the Supreme Court's most recent teaching on the subject. As a district court in New York recently held, the "broad language" of *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 2004 AMC 2705 (2004), and its progeny "support the demise" of the traditional rule denying admiralty jurisdiction over vessel-sale contracts. *Kalafrana Shipping v. Sea Gull Shipping Co.*, 591 F. Supp. 2d 505, 509, 2008 AMC 2409 (S.D.N.Y. 2008). Indeed, the Supreme Court has expanded admiralty contract jurisdiction at virtually every opportunity in recent years. *See also, e.g., Exxon Corp. v. Central Gulf Lines, Inc.*, 500 U.S. 603, 1991 AMC 1817 (1991) (overruling *Minturn v. Maynard*, 58 U.S. 477 (1855), and holding that an agency contract is within the admiralty jurisdiction).

If I were writing on a clean slate, I would hold — as the *Kalafrana* court did — that "a contract for the purchase of a launched ship that has been plying the seas for some time," such as the *Thetis*, "has a distinctly 'salty flavor,'" thus justifying admiralty jurisdiction, because "the sole purpose of a ship is to sail." 591 F. Supp. 2d at 509. Maritime "commerce requires a vessel, sailors, and ship fuel, and there is simply no justification for including contracts for the latter

two requirements in admiralty jurisdiction while excluding contracts for the former." *Id*. (footnote omitted).

I nevertheless agree with those courts that have recognized that *Kirby* does not sufficiently undermine the traditional rule to permit a district court or a three-judge panel to depart from otherwise binding precedent. *See, e.g., Great Eastern Shipping Co. v. Maritime Tankers & Shipping Co. International,* 631 F. Supp. 2d 392, 395 (S.D.N.Y. 2009); *Ocean Benignity Ltd. v. Ocean Maritime Co., Ltd.,* 606 F. Supp. 2d 519, 522 (S.D.N.Y. 2009); *Aggelikos Prostatis Corp. v. Shun Da Shipping Group Ltd.*, 2009 WL 249241, at *3 (S.D.N.Y. 2009). But if we were to hear this case en banc, we would not be so constrained. We could then follow the clear implications of the Supreme Court's recent cases rather than the strict holding of our earlier decisions.

SOLOMON, Circuit Judge, concurring:

I agree with the panel's decision to apply our long-established precedent here. In the present context, we can do nothing else. In my view, however, it would be a mistake for the en banc court to reconsider those decisions.

Professor Charles Black famously criticized the rules for admiralty contract jurisdiction with the observation that they have "about as much principle as there is in a list of irregular verbs." Charles L. Black, Jr., *Admiralty Jurisdiction: Critique and Suggestions,* 50 COLUM. L. REV. 259, 264 (1950). The practical solution, he explained, was that "the contracts involved tend to fall into a not-too-great number of stereotypes, the proper placing of which can be learned, like irregular verbs, and errors in grammar thus avoided." *Id*. The Gilmore and Black treatise accordingly provides a useful list "of causes that might be thought to be included [within the admiralty jurisdiction], but actually are not." GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 1-10, at 26 (2d ed. 1975). The first item on that list is "[s]uits on contracts for the building and sale of vessels." *Id*. (footnotes omitted).

We are considering a jurisdictional rule here, not a substantive rule of law. Jurisdictional rules should be clear and easy to apply. *See, e.g.,* ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF

EQUITY 312 (1950). The one thing worse than having to rely on "a list of irregular verbs" is having irregular verbs without a list on which to rely. If we were to overrule a well-established jurisdictional rule, it would simply create confusion and uncertainty. I fail to see any significant benefit in pursuing that course.

If Amphitrite were to petition for rehearing, I would vote to deny that petition. In the meantime, I concur in the panel's decision without reservation.

HAMMURABI, Circuit Judge, concurring:

I agree with the panel's decision to apply our long-established precedent here. In the present context, we can do nothing else. I write separately, however, to stress an important issue that we have not addressed today.

Under our binding precedent, the court below was undoubtedly correct to hold that it lacked admiralty jurisdiction over a claim arising from the alleged breach of a contract for the sale of a vessel. On that basis, and that basis alone, the district court's judgment must be affirmed. But our failure to address Bo Hai's alternative constitutional argument should not be taken to express any view whatsoever on that difficult issue.

The constitutional validity of applying Rule B against a foreign defendant whose only apparent contact with the United States is the presence — here evidently the wholly inadvertent presence — of property having no connection with the underlying lawsuit is an obviously important question. The First Circuit flagged the question as a wide-open one in *Trans-Asiatic Oil Ltd. v. Apex Oil Co.*, 743 F.2d 956, 959, 1985 AMC 1 (1st Cir. 1984), and to my knowledge it has not since been resolved in any reported case. Some decisions may be read to say[1] that because the constitutionally unique realm of admiralty jurisdiction has always been centrally concerned with the pursuit and capture of highly mobile defendants,[2] there can be no constitu-

[1] It may be significant that in each of these cases the defendant apparently had at least some contacts with the United States in addition to the attached property.

[2] In admiralty circles, there is a great deal of inappropriate talk about peripatetic defendants, but no one has actually been seen to walk on water in quite some time.

tional problem with such an application of Rule B. *See Florens Container v. Cho Yang Shipping*, 245 F. Supp. 2d 1086, 1090, 2002 AMC 2312 (N.D. Cal. 2002); *Day v. Temple Drilling Co.*, 613 F. Supp. 194, 197 (S.D. Miss. 1985); *Grand Bahama Petroleum Co. v. Canadian Transportation Agencies, Ltd.*, 450 F. Supp. 447, 455-456, 1978 AMC 789 (W.D. Wash. 1978). Other cases indicate, at times none too clearly,[3] that Fifth Amendment due process necessarily requires at a minimum that the defendant have at least some advertent contact with the United States. *See Amoco Overseas Oil Co. v Compagnie Nationale Algerienne de Navigation ("C.N.A.N.")*, 605 F.2d 648, 655 & n.7, 1979 AMC 1829 (2d Cir. 1979); *Engineering Equipment Co. v. S.S. Selene*, 446 F. Supp. 706, 709-10, 1978 AMC 809 (S.D.N.Y. 1978).

Because this is such a close and difficult question, we are fortunate that we can postpone it until another day. In the meantime, no one should read more into our decision today than is properly there. When the constitutional issue returns, both this Court and the district court will be free to write on a blank slate.

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[3] In sum, the reported jurisprudence is not very helpful, and some of it is perhaps potentially misleading. For example, in *Winter Storm Shipping, Ltd.*, v. TPI, 310 F.3d 263, 269-272, 2002 AMC 2705 (2d Cir. 2002), the opinion discusses the personal jurisdiction constitutional issue — our concern here — together with a different constitutional issue (the constitutionality of creditors' seizing property without giving the putative debtor notice and an opportunity to be heard). The latter issue, treated in a line of cases stemming from *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), is of course in no way involved in the present case. Bo Hai concedes that it received adequate notice and opportunity to be heard. For decisions making a clear distinction between the personal jurisdiction and *Sniadach* issues, *see Trans-Asiatic*, 743 F.2d at 958; *Parcel Tankers, Inc. v. Formosa Plastics Corp.*, 569 F. Supp. 1459, 1463, 1984 AMC 224 (S.D. Tex. 1983).

United States District Court
for the Southern District of Texas

AMPHITRITE SHIPPING COMPANY, S.A., Plaintiff,

v.

BO HAI NAVIGATION COMPANY, LTD., Defendant.

No. 07-Civ-6838

October 9, 2007

PORTIA, J.:

This matter is before the Court on the motion of defendant Bo Hai Navigation Company to show cause why a vessel attachment should not be vacated and the vessel released. The Court held a hearing on September 14, 2007. Bo Hai and plaintiff Amphitrite Shipping Co. both filed memoranda. After reviewing the motion, memoranda, affidavits, and arguments of counsel at the hearing, the Court concludes that the plaintiff has not satisfied its burden under Rule B to show why the attachment should not be vacated.

I. Factual Background

On December 4, 2006, Amphitrite and Bo Hai entered into a Memorandum of Agreement (the "MOA") for the purchase and sale of Amphitrite's ocean-going vessel, the *M.V. Thetis*. Amphitrite alleges that Bo Hai breached the MOA when it failed to pay a 20% deposit due one week after the execution of that agreement. Exercising its rights under the MOA, Amphitrite sold the *M.V. Thetis* to another purchaser and sought to recover from Bo Hai for the over three million dollars that it lost when it was forced to accept a lower price. As required by the MOA's arbitration clause, Amphitrite sought to recover its loss in London arbitration. That arbitration proceeding is now pending.

In an effort to obtain security for any award that it might receive from the arbitration panel, Amphitrite sought to attach Bo Hai's assets elsewhere in the world. Although the planned sale of the *M.V. Thetis* had no connection with the United States and Bo Hai had previously had no connection with the United States, one of Bo Hai's vessels — the *M.V. Dalian* — was towed to the Port of Galveston by a U.S. salvage tug after suffering storm damage from Tropical Storm Erin.[1] The *M.V. Dalian* had never previously called at a U.S. port.

II. Procedural Background

The *M.V. Dalian* entered the port of Galveston, Texas, on Saturday afternoon, August 18, 2007. On Monday morning, August 20, Amphitrite sought an *ex parte* order of maritime attachment under Rule B of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure. Rule B(1)(a)-(b) provides:

> In an in personam action:
>
> (a) If a defendant is not found within the district when a verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property — up to the amount sued for — in the hands of garnishees named in the process.
>
> (b) The plaintiff or the plaintiff's attorney must sign and file with the complaint an affidavit stating that, to the affiant's knowledge, or on information and belief, the defendant cannot be found within the district. The court must review the complaint and affidavit and, if the conditions of this Rule B appear to exist, enter an order so stating and authorizing process of attachment and garnishment. The clerk may issue supplemental process enforcing the court's order upon application without further court order.

[1] At the time, the *M.V. Dalian* was on a voyage from Altamira, Mexico, to Rotterdam, Netherlands. The storm damage was so serious that the vessel was at serious risk of sinking. Fortunately, a U.S. salvage tug was able to reach the *Dalian* in time to save it. Under the circumstances, however, Bo Hai had no realistic choice but to consent to the salvage. The decision to go to Galveston can hardly be described as voluntary.

Because "the conditions of . . . Rule B appear[ed] to exist," this Court entered the appropriate order later that morning. Amphitrite then arranged for the attachment of the *M.V. Dalian* that afternoon.

When Bo Hai learned of the attachment, it immediately moved to vacate the Rule B order and to dismiss Amphitrite's action. This motion was filed under Rule E(4)(f) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure, which provides in relevant part as follows:

> Whenever property is arrested or attached, any person claiming an interest in it shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be vacated or other relief granted consistent with these rules.

As Rule E(4)(f) makes clear, the burden is on Amphitrite — the plaintiff seeking the attachment — to prove that the attachment was justified.

III. Admiralty Jurisdiction

The parties agree that this Court may exercise authority under Rule B only if it would have had admiralty jurisdiction over the underlying claim. Because the underlying claim here is for the breach of the MOA — a contract for the sale of a vessel — Amphitrite bears the burden of showing that such a contract is "maritime" for admiralty jurisdiction purposes.

Although an ordinary speaker of the English language might have trouble imagining what sort of contract could be more "maritime" than a contract for the sale of an ocean-going vessel, the law is clearly to the contrary (at least in this circuit). The Fifth Circuit has repeatedly held that such contracts are not "maritime," and a district court therefore has no admiralty jurisdiction to resolve disputes arising under such contracts. *See, e.g.*, *Lynnhaven v. Dolphin Corp. v. E.L.O. Enterprises*, 776 F.2d 538, 541, 1986 AMC 2659 (5th Cir. 1985); *Jones v. One Fifty Foot Gulfstar Motor Sailing Yacht*, 625 F.2d 44, 47, 1981 AMC 1005 (5th Cir. 1980); *Atlantic Lines, Ltd.*

v. Narwhal, Ltd., 514 F.2d 726, 731, 1976 AMC 642 (5th Cir. 1975); *Richard Bertram & Co. v. The Yacht, Wanda*, 447 F.2d 966, 967, 1971 AMC 1841 (5th Cir. 1971) (per curiam).

Amphitrite's arguments that the Supreme Court has implicitly overruled those cases is unavailing. *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 2004 AMC 2705 (2004), and *Exxon Corp. v. Central Gulf Lines, Inc.*, 500 U.S. 603, 1991 AMC 1817 (1991), address very different issues. It would exceed the proper authority of this Court to say that those more recent decisions have overruled the Fifth Circuit's directly relevant precedents.

IV. Due Process

Bo Hai argues in the alternative that it would violate the Due Process Clause to apply Rule B to authorize the attachment at issue here. Because Bo Hai prevails on the jurisdictional argument, and thus obtains the full relief that it seeks, there is no need to reach this more difficult constitutional argument.

V. Conclusion

The order of attachment entered on August 20, 2007, is vacated, and the present action is dismissed for lack of admiralty jurisdiction.

It is so ordered.

Selected Chronology of the Case[*]

Dec. 4, 2006	Parties enter into Memorandum of Agreement (the "MOA") for the purchase and sale of the *M.V. Thetis*, a vessel owned by Amphitrite
Dec. 11, 2006	Bo Hai allegedly breaches the MOA by failing to pay 20% deposit to Amphitrite
Feb. 7, 2007	Amphitrite sells the *M.V. Thetis* to another buyer for a purchase price that is over $3 million less than the MOA purchase price
Feb. 14, 2007	Amphitrite commences London arbitration against Bo Hai seeking damages for breach of the MOA
Aug. 18, 2007	*M.V. Dalian*, a vessel owned by Bo Hai that was damaged by Tropical Storm Erin, needing a port of refuge, enters the port of Galveston, Texas
Aug. 20, 2007	District court enters order of maritime attachment under Rule B to aid Amphitrite's London arbitration against Bo Hai; Amphitrite attaches the *M.V. Dalian* in Galveston
Oct. 9, 2007	District court vacates order of maritime attachment under Rule E and dismisses Amphitrite's action with an opinion (reported as *Amphitrite Shipping Co. v. Bo Hai Navigation Co.*, 2007 AMC 3286 (S.D. Tex. 2007); reprinted at Pet. App. 8a)
July 13, 2009	Court of appeals affirms with an opinion (reported as *Amphitrite Shipping Co. v. Bo Hai Navigation Co.*, 575 F.3d 1387, 2009 AMC 3333 (5th Cir. 2009) (per curiam); reprinted at Pet. App. 1a); judgment entered
Oct. 5, 2009	Petition for certiorari filed raising (1) the admiralty jurisdiction issue and (2) the due process issue (docket number 09-455)
Dec. 7, 2009	Petition for certiorari granted

[*] This information is included in the packet for the information of Competition participants. Unlike the preceding pages, it should not be considered part of the APPENDIX TO THE PETITION FOR CERTIORARI filed with the Court.