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No. 7

TRIDENT INTERNATIONAL LIMITED

v.

AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, INC.

United States District Court, Southern District of New York, June 19, 2008
06 Civ. 6136

MARINE INSURANCE — 130. Insureds; Additional Insureds — 297. Particular Clauses — “Misdirected Arrow.”

Although a cruise ship concessionaire was named as an additional insured in shipowner’s P&I policy, its coverage is limited by the “Misdirected Arrow” clause. Under that clause, the P&I Club only covers when claims are mistakenly made against the concessionaire that should have been made against the owner. The coverage is not affected by the concessionaire’s contract with the shipowner requiring the latter to provide insurance since the Club is not party to that contract. Hence, Club has no cover for maintenance and cure or death benefits the concessionaire paid for the death of a worker who is found to be one of its own employees as to which it, not the owner, was the party responsible to pay.

Raymond A. Connell (Maloof, Lebowitz, Connhan & Oleske) *for Trident Intl.*
Lawrence J. Bowles (Nourse & Bowles, LLP) *for Amer. SS Owners Mut. P&I*

PETER K. LEISURE, D.J.:

A cruise-ship concessionaire seeks indemnity from an insurer for the costs it incurred following the death of a seafarer working aboard the ship. The concessionaire, Trident International Limited (“Trident”), was a co-assured under an indemnity insurance policy issued by the defendant, American Steamship Owners Mutual Protection and Indemnity Association, Inc. (the “Club”) to the cruise ship’s owner and operator. The Club has

moved to dismiss Trident's complaint, or in the alternative, for summary judgment, principally contending that the policy unambiguously does not provide coverage to a co-assured like Trident in this factual context. For the reasons set forth below, the Club's motion for summary judgment is granted.

Background

The following overview is derived from the submissions of the parties, and unless otherwise noted, shall constitute the facts not in dispute.¹

Trident is a Bahamian corporation that provides food and beverage ("F&B") services aboard cruise vessels. On May 12, 2000, Trident agreed to provide F&B services aboard *Ocean Breeze*, a vessel owned by Celebration World Cruise Lines, LLC ("Celebration") and operated by Imperial Majesty Cruise Lines, LLC ("Imperial"). Paragraph 10 of the F&B agreement provided, in part:

IMPERIAL as operator of the vessel shall secure from its insurance carrier Risk Insurance insuring TRIDENT against all liability to its own employees or liability to third persons and all other risks normally

1. As noted above, the Club has moved to dismiss the complaint pursuant to Rule 12(b)(6) or, alternatively, for summary judgment under Rule 56. Notwithstanding that there has been no discovery in this case, the Court will treat the Club's motion as a Rule 56 motion. Both parties have submitted documents in connection with the motion which require the Court to consider material outside the four corners of the complaint. *See Kramer v. Time Warner, Inc.*, 937 F.2d 767, 773 (2 Cir. 1991) (Winter, Ct. J.) ("If a district court wishes to consider additional material, Rule 12(b) requires it to treat the motion as one for summary judgment under Rule 56, giving the party opposing the motion notice and an opportunity to conduct necessary discovery and to submit pertinent material.'). Moreover, in opposing the Club's motion, Trident has not indicated that any additional discovery is necessary in order to shed further light on the underlying facts of this action. *See Cramer v. Devon Group, Inc.*, 774 F. Supp. 176, 180 (S.D.N.Y. 1991) (Leisure, D.J.) ("If inadequate discovery prevents presentation of facts necessary to oppose a summary judgment motion, Fed. R. Civ. P. 56(f) allows a court to deny summary judgment or order a continuance until discovery is complete. To obtain Rule 56(f) relief the party seeking additional discovery must file an affidavit explaining what facts are sought, how they will create a factual issue precluding summary judgment, what efforts have been made to obtain these facts and why these efforts have failed.'). As such, the Court need not consider the Club's motion to dismiss and Trident's corresponding request for leave to amend its complaint.

covered under the terms and conditions of a standard Protection and Indemnity policy where said risks are applicable to TRIDENT, and to furnish to TRIDENT a certificate evidencing said Protection and Indemnity Insurance to be in full force and effect making TRIDENT as a co-insured under the coverage.

TRIDENT shall pay to IMPERIAL US \$5.00 per person for personnel employed by Trident aboard the Ship. . . .

If, in the event that IMPERIAL is unable to obtain satisfactory insurance coverages on behalf of Trident and its employees as shall be required under the terms of this Agreement, then TRIDENT shall have the right to obtain or secure such insurance itself.

This agreement was eventually amended to include Celebration, which also agreed to provide Protection and Indemnity (“P&I”) insurance to Trident.

Ocean Breeze was granted a Certificate of Entry on May 19, 2000 by the Club, a member-operated, non-profit, mutual-indemnity insurance association. A Certificate of Entry signifies, *inter alia*, that a Club member, such as Celebration and Imperial, has received P&I insurance for its vessel, subject to the Club’s bylaws and rules. A Club member also may seek to name an additional party as co-assured or additional assured under the Certificate of Entry. To that end, Imperial sent its F&B agreement with Trident to the Club on or about June 1, 2000.² By endorsement dated June 30, 2000, Trident was added as a co-assured. Trident’s F&B agreement with Imperial and Celebration remained in effect until April 2, 2002, at which time Trident entered into another F&B agreement with Imperial with substantially the same terms. During the span of that agreement, *Ocean Breeze* was replaced with the vessel *Regal Empress*, also owned by Celebration and operated by Imperial. Trident continued to provide F&B services aboard *Regal Empress* pursuant to the terms of the 2002 agreement. Further, Trident was a co-assured under *Regal Empress*’s Certificate of Entry.

Vicente Ballaran (“Ballaran”), a citizen of the Philippines, first contracted to work aboard *Regal Empress* on December 29, 2004. The contract was signed by Ballaran, as seafarer, and Leonardo P. Ortega (“Ortega”), the owner of Able Maritime Seafarers, Inc. (“Able”), as agent for Imperial

2. Trident alleges that the Club must review and approve a copy of any contract between a member and a proposed co-assured. The Club claims that in this matter, no Club representative was ever asked to approve the contract between Imperial and Trident. Whether or not the Club approved the contract does not bear on the merits of the Club’s motion.

Ocean Services, Ltd. (“IOS”),³ on a form provided by the Philippine Overseas Employment Administration (“POEA”).⁴ Pursuant to this contract (the “POEA Contract”), Ballaran was to serve as a “Pantryman” aboard *Regal Empress* for ten months with a \$1,000 per month salary. The POEA Contract also included a provision for \$50,000 compensation in the event of a work-related death. In early March 2005, Ballaran and Trident agreed, on a form provided by Trident,⁵ that Ballaran would be a “Buffetman” aboard *Regal Empress* for ten months, earning \$1,200 per month (the “Trident Contract”).⁶

In August 2005, while *Regal Empress* was at the port of Nassau, Bahamas, Ballaran complained of dizziness and had difficulty walking and talking. Despite medical treatment at a hospital in Nassau, his condition worsened, and Ballaran died in September 2005 of a heart attack and/or stroke. Trident incurred two costs stemming from this unfortunate incident. First, it paid \$123,449.25 for Ballaran’s maintenance and cure.⁷ Second, Ballaran’s widow proceeded against Able and IOS in the Philippines for death-compensation benefits under the POEA Contract, the result of which was judgment against the two entities jointly and severally for over \$50,000.⁸

3. IOS is not related to Imperial, but rather is a company owned or controlled by Trident.
4. According to Ortega, “[t]he Philippines has very strict rules regarding the recruitment and hiring of Filipino citizens and residents for overseas employment as seamen on ocean-going vessels.” As such, all contracts for employment must be approved by POEA. Trident and IOS are accredited foreign principals approved by POEA to hire Filipino citizens to serve aboard vessels.
5. The parties provided virtually identical forms as exhibits, though the Court notes that Trident’s form bears the date March 1, 2005 while the Club’s form is dated March 3, 2005.
6. While the interplay between the POEA Contract and the Trident Contract is not entirely clear, it is an ambiguity that is of no consequence to the Court’s ultimate holding. As discussed below, both contracts serve to show that Trident was Ballaran’s employer.
7. “ ‘Maintenance’ is the right of a seaman to food and lodging if he falls ill or becomes injured while in the service of the ship. ‘Cure’ is the right to necessary medical services.” Thomas J. Schoenbaum, *Admiralty and Maritime Law* §4-28, at 303 (4th ed. 2004).
8. The arbiter in that proceeding found that a letter from Ortega committed Able and IOS to pay Ballaran’s widow. Specifically, Ortega had written: “Rest assured that once [the *Regal Empress*’s P&I club in the Philippines] comes up of the final outcome of the said case, the family definitely will receive all the necessary benefits in accordance with the P&I coverage.”

Trident brought this action on August 14, 2006, seeking remuneration from the Club for Ballaran's maintenance and cure and declaratory judgment for coverage in the Philippines proceeding. On November 3, 2006, the Club moved to dismiss the complaint, or in the alternative, for summary judgment. The Club maintains that Trident, as a co-assured, is not entitled to coverage for the costs associated with Ballaran's death because of a clause in the Certificate of Entry called the "Misdirected Arrow" clause. This clause, consistent with Club Rule 1.3.10, states that:

Notwithstanding the fact that Trident International Ltd. are hereby named in their capacity as co-assured in this Certificate of Entry, the cover of the [Club] will only extend insofar as they may be found liable to pay in the first instance for loss or damage which is properly the responsibility of Celebration World Cruise Line LLC, and nothing herein contained shall be construed as extending cover in respect of any amount which would not have been recoverable from the [Club] by Celebration World Cruise Line LLC had the claim in respect of such loss or damage been made or enforced against him. Once the [Club] has made indemnification under such cover, it shall not be under any further liability and shall not make any further payment to any person or company whatsoever, including Celebration World Cruise Line LLC, in respect of that loss or damage.

The Club argues that the plain language of this clause indicates that coverage is appropriate only if a co-assured concessionaire is mistakenly sued for the negligence of a member of the vessel's crew. In other words, "if the 'arrow' is 'misdirected' at the co-assured, coverage is provided by the Club. . . . However, if the co-assured is sued for something for which it is responsible, the 'arrow' clearly is not 'misdirected' and no coverage is provided by any Club."

Trident contends that the Club's construction of the Misdirected Arrow clause "nullifies Trident's status as a 'Member Co-Assured' entitled to the standard P&I protection for such common risks as maintenance and cure." According to R.M. Mairunteregger, Trident's Vice President and Operations Officer, accepting the Club's interpretation of the Misdirected Arrow clause "would mean that from 2000 to date, Trident paid premiums in the aggregate in excess \$1.8 million for *nothing*." (Emphasis in original). The Club counters that Trident's argument distorts the truth:

Mr. Mairunteregger clearly implies that Trident paid the Club for that insurance. In fact, *no* funds whatsoever were ever paid to the Club by Trident. In fact, the Club had *no* dealings whatsoever directly with

Trident. Further, no funds were paid to the Club by [Imperial] or [Celebration] to provide more than misdirected arrow coverage to the co-assureds, including Trident.

(Emphasis in original). Moreover, the Club claims that it would have charged additional premiums if Imperial had sought to provide coverage beyond Misdirected Arrow coverage. In light of this dispute, the Court must determine whether the Misdirected Arrow clause precludes Trident's recovery from the Club as a matter of law.

Discussion

I. Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure allows for the entry of summary judgment where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). The party moving for summary judgment bears the “heavy burden” of demonstrating that no genuine issue as to any material fact exists and that it is therefore entitled to judgment as a matter of law. *Nationwide Life Ins. Co. v. Bankers Leasing Ass’n, Inc.*, 182 F.3d 157, 160 (2 Cir. 1999); *accord Atl. Mut. Ins. Co. v. CSX Lines, L.L.C.*, 2006 AMC 1, 7, 432 F.3d 428, 433 (2 Cir. 2005) (“ ‘The burden of showing that no genuine factual dispute exists rests on the party seeking summary judgment. . . .’ ”) (quoting *Sec. Ins. Co. of Hartford v. Old Dominion Freight Line Inc.*, 391 F.3d 77, 83 (2 Cir. 2004)); *Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 36 (2 Cir. 1994) (Kearse, Ct.J.). Nonetheless, summary judgment “is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Summary judgment is particularly appropriate in resolving insurance coverage disputes, because the interpretation of an insurance policy presents a question of law. *See McGinniss v. Employers Reinsurance Corp.*, 648 F. Supp. 1263, 1266 (S.D.N.Y. 1986) (Sweet, D.J.).

A district court “must resolve all ambiguities and draw all inferences in favor of the non-moving party,” such that “[i]f there is any evidence in the record from which a reasonable inference could be drawn in favor of the non-moving party on a material issue of fact, summary judgment is

improper.” *Westinghouse Credit Corp. v. D’Urso*, 278 F.3d 138, 145 (2 Cir. 2002); accord *Brown v. Cara*, 420 F.3d 148, 152 (2 Cir. 2005) (“We will affirm the District Court’s grant of summary judgment to defendants only if, based on facts not in genuine dispute and drawing all inferences in favor of plaintiffs, defendants are entitled to judgment on the merits as a matter of law.”). Of course, “the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” *Lang v. Ret. Living Publ’g Co.*, 949 F.2d 576, 580 (2 Cir. 1991) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)). “A dispute as to a material fact is ‘genuine,’ and hence summary judgment is not appropriate, under this standard, only ‘if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.’” *Id.* (quoting *Anderson*, 477 U.S. at 248); accord *N.Y. Stock Exch., Inc. v. New York, N.Y. Hotel LLC*, 293 F.3d 550, 554 (2 Cir. 2002). “[T]he law provides no magical talisman or compass that will serve as an unerring guide to determine when a material issue of fact is presented. As is so often true in the law, this is a matter of informed and properly reasoned judgment.” *American Mfrs. Mut. Ins. Co.*, 388 F.2d at 279.

II. *Misdirected Arrow Clause*

Although Trident brings this action under admiralty and maritime jurisdiction, the Court looks to state substantive law because federal admiralty and maritime law is silent with respect to marine insurance. See *Antilles Steamship Co. v. American Hull Insurance Synd.*, 1984 AMC 2444, 2449, 733 F.2d 195, 198 (2 Cir. 1984) (citing *Wilburn Boat Co. v. Fireman’s Fund Ins. Co.*, 348 U.S. 310, 321, 1955 AMC 467, 476 (1955)); *Commercial Union Ins. Co. v. Horne*, 787 F. Supp. 337, 339, 1994 AMC 295 [DRO] (S.D.N.Y. 1992). Here, the parties do not explicitly address choice of law—their respective briefs assume that New York law governs—but the Club’s bylaws and rules contain a choice-of-law provision providing for the application of New York law. Accordingly, the Court will apply New York law.

Under New York law, the interpretation of a contract “is a matter of law for the court to decide.” *Int’l Multifoods Corp. v. Commercial Union Ins. Co.*, 309 F.3d 76, 83 (2 Cir. 2002) (citing *K. Bell & Associates., Inc. v. Lloyd’s Underwriters*, 97 F.3d 632, 637 (2 Cir. 1996)); *Garza v. Marine Transport Lines, Inc.*, 1989 AMC 228, 233, 861 F.2d 23, 27 (2 Cir. 1988). The Court must first determine “whether the contract is unambiguous with

respect to the question disputed by the parties.” *Int’l Multifoods Corp.*, 309 F.3d at 83. “If the language of the insurance contract is unambiguous, [the Court applies] its terms. Where its terms are reasonably susceptible to more than one interpretation, the policy must be regarded as ambiguous.”⁹ *Andy Warhol Found. for the Visual Arts, Inc. v. Fed. Ins. Co.*, 189 F.3d 208, 215 (2 Cir. 1999). Contract language is ambiguous where it could suggest “ ‘more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.’ ” *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 906 (2 Cir. 1997) (McLaughlin, Ct. J.) (quoting *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1192 (2 Cir. 1996)). “The language of a contract is not made ambiguous simply because the parties urge different interpretations.” *Seiden Assocs., Inc. v. ANC Holdings, Inc.*, 959 F.2d 425, 428 (2 Cir. 1992); see *Hugo Boss Fashions Inc. v. Fed. Ins. Co.*, 252 F.3d 608, 616-17 (2 Cir. 2001) (“[U]nder New York law, ambiguity does not exist ‘simply because the parties urge different interpretations.’ Rather, ‘the question of whether an insurance policy is ambiguous is a matter of law to be determined by the court.’ ” (internal citation omitted)); *Garza*, 1989 AMC at 234, 861 F.2d at 27.

The parties dispute whether the Misdirected Arrow clause is triggered where the co-assured is the party properly responsible for the loss or damage. In this respect, the plain language of the clause is unambiguous:

[T]he cover of the [Club] will only extend insofar as they may be found liable to pay in the first instance for loss or damage which is properly the responsibility of [Celebration], and nothing herein contained shall be construed as extending cover in respect of any amount

9. If the language is deemed ambiguous, the Court makes two additional inquiries. First, “the court may accept any available extrinsic evidence to ascertain the meaning intended by the parties during the formation of the contract.” *Morgan Stanley Group, Inc. v. New England Ins. Co.*, 225 F.3d 270, 275-76 (2 Cir. 2000) (internal quotations omitted). Next, “[i]f the extrinsic evidence does not yield a conclusive answer as to the parties’ intent, [the] court may apply other rules of contract construction, including the rule of contra proferentem, which generally provides that where an insurer drafts a policy any ambiguity in [the] . . . policy should be resolved in favor of the insured.” *Id.* at 276 (internal quotations omitted).

which would not have been recoverable from the [Club] by Celebration. . . .

The language of the clause yields just one objectively reasonable meaning, namely that a co-assured, such as Trident, will only be covered to the extent that it is held responsible for loss or damage caused by Celebration. Moreover, the limits of the Misdirected Arrow clause are clear, as denoted by phrases such as “will only extend insofar” and “nothing herein contained shall be construed as extending cover.” Trident, however, urges a different interpretation:

The only sensible meaning to be ascribed to the [Club’s] “Misdirected Arrow Clause”, is that it ensures coverage for Trident is limited to losses and damages for which [Celebration] would have been liable had it, instead of Trident, provided the F&B services, and which would have been covered by the [Club] on the *Regal Empress* entry, had the claim for reimbursement been made by [Celebration] itself.

The Court rejects Trident’s construal of the clause, which places Trident in the exact same position as Celebration under the Certificate of Entry, rendering meaningless the limiting phrases listed above and eliminating the distinction between a member and a co-assured.

Analysis of the entire Certificate of Entry and the customs and practices of the P&I industry does not alter the plain language of the Misdirected Arrow clause. No other portion of the Certificate of Entry or the Club’s bylaws and rules modifies the clause as it pertains to Trident. The clause is conspicuously part of the Certificate of Entry for both *Ocean Breeze* and *Regal Empress* and is the only provision therein that defines the rights of a co-assured. Further, despite the dearth of precedent with respect to the customs, practices, and usage of the Misdirected Arrow clause as it is generally understood in the context of P&I insurance, defendant points the Court to the only source of which the Court is aware that discusses the scope of Misdirected Arrow coverage. In 1993, an arbitral panel in New York determined that a charterer was only entitled to Misdirected Arrow coverage, agreeing with the shipowner that “cover was extended at the request of a member to a time charterer as an accommodation and was intended only to cover the charterer in those situations in which the charterer might be held responsible for liabilities that were the fault of the member.” In *re Stolt Tankers Inc. v. A.P. Moller*, 1993 AMC 1188, 1191 (Arb.N.Y. 1993). Trident’s argument that this interpretation of the Misdirected Arrow clause “reduces coverage for Trident to a nullity” is unpersuasive. See *N.Y. & Long Branch R.R. Co. v. United States*, 1976 AMC 2253, 2257,

1976 U.S. Dist. LEXIS 14774, at *6-7 (S.D.N.Y. 1976) (noting that while there must be an insurable interest in order for a policy to be valid, “[in] the law of marine insurance, insurable interests are multiform and very numerous.”) (quoting *Hooper v. Robinson*, 98 U.S. 528, 538 (1879)). The clause straightforwardly extends coverage to Trident “if Trident was subjected to a suit by a passenger or one of its own employees resulting from the negligence of the vessel’s officers or crew.”

In an attempt to reinforce its own interpretation of the Misdirected Arrow clause, Trident repeatedly imputes subjective knowledge to the Club, stating that the Club “was fully aware” and “knew” that Trident expected full P&I coverage. Further, Trident claims that it would not have paid \$383,838 per year in premiums merely for Misdirected Arrow coverage. Because the meaning of the Misdirected Arrow clause is clear from the words alone, it would be improper to review extrinsic evidence to ascertain its meaning. See *Morgan Stanley Group, Inc.*, 225 F.3d at 275-76; *Caporino v. Travelers Ins. Co.*, 62 N.Y.2d 234, 239, 465 N.E.2d 26, 28 (N.Y. 1984) (“We may not disregard clear provisions which the insurers inserted in the policies and the insured accepted and equitable considerations will not allow an extension of coverage beyond its fair intent and meaning in order to obviate objections which might have been foreseen and guarded against.”) (internal citations omitted). It is worth noting, however, that the extrinsic evidence on which Trident bases its arguments is insubstantial. Trident stops short of claiming that it paid premiums directly to the Club and relies upon provisions of its F&B agreement with Imperial to show that Imperial was to procure full P&I insurance for Trident. Though Trident’s reading of its F&B Agreement with Imperial might be sound, the Club cannot be bound by a contract between its insureds. See *U.S. Liab. Ins. Co. v. Mountain Valley Indem. Co.*, 371 F. Supp. 2d 554, 557-58 (S.D.N.Y. 2005) (collecting New York state cases and concluding that “insurance policy provisions take precedence over conflicting provisions found in contracts between insureds”); *Bovis Lend Lease LMB, Inc. v. Great Am. Ins. Co.*, 855 N.Y.S.2d 459, 464 (1st Dep’t 2008) (“An insurance policy is a contract between the insurer and the insured. Thus, the extent of coverage . . . is controlled by the relevant policy terms, not by the terms of the underlying trade contract that required the named insured to purchase coverage.”).

Enforcing the clear terms of the Misdirected Arrow clause, Trident, as co-assured, cannot recover if it is the party liable for the loss and damage associated with Ballaran’s death. Trident instead must show that Ballaran’s maintenance and cure were “properly the responsibility” of Celebration or Imperial.

III. *Attribution of Liability*

Trident offers two arguments in support of its position that Celebration is properly responsible for Ballaran's maintenance and cure.¹⁰ First, it contends that because Ballaran could have brought an action *in rem* against the vessel *Regal Empress*, Celebration, the vessel's owner, is liable to Ballaran. Trident is correct that a seaman¹¹ may proceed *in personam* against his employer or *in rem* against the vessel. See *Mahramas v. Am. Export Isbrandtsen Lines, Inc.*, 1973 AMC 587, 595, 475 F.2d 165, 170 n.7 (2 Cir. 1973) (noting that a concessionaire aboard a ship could seek indemnification from the shipowner because arguably "the obligation of maintenance and cure should fall upon the ship"); *The Edward Peirce*, 1939 AMC 1260, 1262, 28 F. Supp. 637, 639 (S.D.N.Y. 1939) (finding that a seaman's employment aboard a vessel creates two relationships, namely the employer-employee contractual relationship and "the personal indenture between the seaman and the vessel . . . that would seem to be a basis for [a seaman's] right to libel the vessel herself for his maintenance and cure when he sustains an injury. . . ."). In light of this principle, it seems likely that most shipowners today would choose to shift responsibility for the maintenance and cure of a concessionaire's employee exclusively to the concessionaire. As noted in *Benedict on Admiralty*:

When the employee of a concessionaire develops an injury or illness while in the service of the vessel, he or she generally is entitled to maintenance and cure. The primary liability for those remedies should rest with the concessionaire. However, a seaman does have a right to enforce his/her maintenance and cure claim *in rem* against the vessel, which should prompt most shipowners to require their concessionaires to hold them harmless from such claims.

10-VIII *Benedict on Admiralty* §8.06 (7th ed. 1974, rev. 2007). Indeed, in its contract with Imperial, Trident agreed that in the event of libel brought by third persons "arising out of the operation of Trident's business,"

10. Trident presumably makes these arguments only for maintenance and cure because the Philippines arbitral panel found Able and IOS, not Celebration or Imperial, liable under the POEA contract for death benefits.

11. Ballaran was undoubtedly a seaman entitled to maintenance and cure. See, e.g., *Mahramas v. Am. Export Isbrandtsen Lines, Inc.*, 1973 AMC 587, 595, 475 F.2d 165, 170 (2 Cir. 1973) (collecting cases and deeming Mahramas, a professional hairdresser aboard the vessel, a seaman "because she was engaged in employment on board a ship").

Trident would “defend and save harmless the Owners, Operators and/or the Ship, and/or IMPERIAL.” Assuming, arguendo, that Ballaran had libeled the vessel, Trident would nevertheless be responsible for the loss and damage under its contract with Imperial. As such, Ballaran’s death could not have been “properly the responsibility” of Celebration, and Trident may not invoke the Misdirected Arrow clause for coverage.

Second, Trident claims that Celebration was actually Ballaran’s employer, thereby giving it the responsibility to bear the maintenance and cure expenses. As a threshold matter, “[a]n action for maintenance and cure can . . . be maintained only against the employer because the right arises out of and is implied in the contract of employment.”¹² *Mahramas*, 1973 AMC at 593, 475 F.2d at 170. In *Mahramas*, plaintiff, a professional hairdresser, brought claims under the Jones Act and the general maritime law of unseaworthiness, maintenance and cure, and negligence after she was allegedly injured while working aboard a ship.¹³ 1973 AMC at 588, 475 F.2d at 167. The defendants in the action were the shipowner and a concessionaire, which operated and staffed the barber and beauty shops on the ship. *Id.* Plaintiff was hired and paid by the concessionaire pursuant to a contract, but there was also an informal understanding that the shipowner would provide plaintiff with subsistence and quarters. *Id.* In finding that the concessionaire “was clearly the employer,” the Second Circuit applied “the plain and rational meaning of employment and employer, which means that the right of control is one of the most important factors to consider. . . .” 1973 AMC at 594, 475 F.2d at 171 (internal quotations and citations omitted).

Applying that same standard here, the Court has little trouble finding that Ballaran was Trident’s employee. While the exact nature of Ballaran’s

12. Trident dedicates much of its argument to the point that this Court should not “whittle down” a shipowner’s maintenance and cure obligation, erroneously relying upon a Supreme Court opinion in which it appears that the shipowners were the employers, *see Aguilar v. Standard Oil Co. of N.J.*, 318 U.S. 724, 725-26, 1943 AMC 451, 453-54 (1943), and the dissenting opinion in *Mahramas* that acknowledges a concessionaire’s liability for maintenance and cure, *see Mahramas*, 1973 AMC at 600, 475 F.2d at 175 (Oakes, Ct. J., dissenting).
13. The district court dismissed the claims for unseaworthiness and negligence for failure of proof. *Mahramas*, 1973 AMC at 588, 475 F.2d at 168. For the remaining two claims, the Second Circuit noted that “in determining whether or not a person is a proper party plaintiff or defendant, the Jones Act and maintenance and cure cases may be read interchangeably.” 1973 AMC at 591, 475 F.2d at 169.

work as “Pantryman” or “Buffetman” is unclear, each title alludes to F&B services provided by Trident. Moreover, the three contracts relevant to this action compellingly corroborate an employment relationship between Trident and Ballaran. The Trident Contract bears “Trident International” letterhead, is signed by Ballaran and by Trident (it appears to be signed by R.M. Mairunteregger), and provides for the conditions of the employer-employee relationship. While several of these conditions concern the relationship between the employee, Imperial, and the vessel, it is Trident placing the conditions upon the employee, not Imperial or Celebration. The POEA Contract is signed by Ballaran and Ortega, the owner of Able, as agent for IOS, an entity which Trident does not deny it controls or owns. Further, Trident’s contention that *Regal Empress* is listed on the POEA Contract as the employer strikes the Court as a misconstruction of the contract—Ortega signed for the employer—and as irrelevant—neither Celebration nor Imperial signed the contract and thus could not be bound by its terms. (See Mairunteregger Aff. (stating that Trident is not an agent of the vessel or Imperial)). Finally, Trident’s contract with Imperial explicitly states that:

[E]mployees engaged in food and beverage service operations are *within the discretion and control of TRIDENT*, subject to the ultimate authority of the Master for purposes of safety and navigation of the Vessel, and in no event are to be considered or deemed to be employees, agents or servants of IMPERIAL.

(Emphasis added). As in *Mahramas*, the concessionaire hired and controlled plaintiff while the shipowner had ultimate authority over safety. Thus, Trident was Ballaran’s employer¹⁴ and is the party properly responsible for his maintenance and cure.¹⁵

Conclusion

For the foregoing reasons, the Club’s motion for summary judgment is granted. Pursuant to the Misdirected Arrow clause, Trident is not entitled to coverage from the Club because neither of the Club’s assureds—Celebration and Imperial—are the parties properly responsible for the loss and

14. As the Club points out, Trident’s complaint even states that Ballaran “was employed by Trident for service on board *Regal Empress* as pantry man.”

15. Because Trident is not entitled to Misdirected Arrow coverage, the Court need not reach the issue of whether Trident failed to satisfy a condition precedent to commencing this action.

damage stemming from Ballaran's death. Accordingly, Trident's complaint is hereby dismissed.

