**IN THE HIGH COURT**
**OF THE**
**REPUBLIC OF THE MARSHALL ISLANDS**

LITO MARTINEZ ASIGNACION,

Plaintiff,

vs.

RICKMERS GENOA SCHIFFAHRTGESELLSCHAFT MBH & CIE KG,

Defendant.

Civil Action No. 2016-026

**ORDER GRANTING DEFENDANT'S MOTION TO DISMISS**

TO: Tatyana Cerullo, Counsel for Plaintiff
Melvin Narruhn, Counsel for Plaintiff
Richard Jerald Dodson, Counsel for Plaintiff
Arsima Muller, Counsel for Defendant
David Strauss, Counsel for Defendant
Peter Sloss, Counsel for Defendant

## INTRODUCTION

On September 23, 2016, this Court heard oral arguments on Defendant Rickmers Genoa Schiffahrtsgesellschaft MbH & Cie KG's ("**Rickmers**" or "**Defendant**") Motion to Dismiss filed herein on March 17, 2016 (the "**Motion**"). The Motion seeks dismissal of the Complaint filed February 9, 2016, with prejudice, under Rule 12(b)(6) of the Marshall Islands Rules of Civil Procedure ("**MIRCP**") for failure to state a claim upon which relief can be granted.

At the oral arguments, Rickmers was represented by Arsima A. Muller, Esq., Peter B.

Sloss, Esq., and David M. Strauss, Esq. Plaintiff Lito Martinez Asignacion ("**Asignacion**" or "**Plaintiff**") was represented by Richard Jerald Dodson, Esq., Tatyana Cerullo, Esq., and Melvin Narruhn, Esq.

This Court, having carefully considered Rickmers' Motion, the briefs filed by the parties and the arguments made and the authorities cited therein, the argument of counsel, and being otherwise fully advised, hereby finds, concludes, and orders as follows:

**FINDINGS OF FACT**

All relevant facts are either alleged in the Complaint, contained in the papers attached to and incorporated into the Complaint, or are a matter of public record.

**A. Asignacion's employment by Rickmers**

1. Asignacion is a citizen of full age of majority and resident of the Philippines. Complaint, ¶1.

2. Defendant is the registered owner of the M/V RICKMERS DALIAN. Defendant registered its vessel, the M/V RICKMERS DALIAN, under the laws of the Marshall Islands, and employed Plaintiff on its vessel. The vessel's official number is 90156. Complaint, ¶2.

3. Asignacion was employed by Rickmers as a fitter aboard Rickmers' vessel, the M/V RICKMERS DALIAN, from February 2010 to October 2010. Complaint, ¶2.

4. Asignacion's employment aboard the RICKMERS DALIAN was governed by a Standard Employment Contract mandated by the Philippine Overseas Employment Administration ("POEA"), an agency of the Philippine Department of Labor and Employment. February 15, 2013 Arbitral Decision, attached as Exhibit "A" to the Complaint, at 3,¶1.

5. Asignacion's POEA contract incorporated the Standard Terms Governing the Employment of Filipino Seafarers Onboard Ocean-Going Vessels ("Standard Terms").

Asignacion signed every page of the Standard Terms attached to his POEA contract. Rec. Doc. 8-11, C.A No. 2:13-cv-00607-JCZ-KWR, U.S.D.C., E.D.La.

6. Section 29 of the Standard Terms required arbitration in the Philippines of all disputes arising out of Asignacion's employment aboard the RICKMERS DALIAN. Complaint, ¶17; Fifth Circuit Decision, attached as Exhibit "B" to the Complaint and reported at 783 F.3d 1010, at 1013.[1]

7. Section 31 of the Standard Terms called for the application of Philippine law to all claims and disputes arising out of Asignacion's employment aboard the RICKMERS DALIAN. Complaint, ¶17; Arbitral Decision at 6, ¶1; Fifth Circuit Decision at 1013.

8. The POEA contract and Standard Terms also addressed situations in which the seaman sustained disabling injuries in the course of the employment. In the event of such an injury, the seaman is to be assessed by the company's doctor for the purpose of determining the level of the seaman's disability. The disability scale in the POEA contract and Standard Terms ranges from Grade 14, the least severe disability rating, to Grade 1, which means total disability. POEA Standard Terms, §§20 and 32, Rec. Doc. 8-16, C.A. No. 2:13-cv-00607-JCZ-KWR, U.S.D.C., E.D.La., pp. 378-80 and 384-96.

9. Under §20(B)(3) of the POEA Standard Terms, if a doctor appointed by the seaman disagrees with the company doctor's disability assessment, the company doctor and the seaman's doctor can agree to a third doctor to assess the seaman's disability, in which event the assessment of the third doctor is final and binding. Standard Terms, *supra*, at §20(B)(3), p. 378.

**B. Asignacion's injury and medical treatment**

10. Asignacion alleges that he was injured on October 27, 2010 onboard the M/V

[1] / Cites to the Fifth Circuit Decision throughout are to the relevant page of the reported decision.

RICKMERS DALIAN in New Orleans, LA, USA, while serving as an employee.[2] Asignacion specifically alleges that he sustained severe burn injuries over 35% of his body when scalding water and steam from the vessel's cascade tank overflowed during repairs. Complaint, ¶¶ 1, 2, 6, 29; Arbitral Decision at 3, ¶3; Fifth Circuit Decision at 1013-14.

11. Following the accident, Asignacion was treated at a burn unit in a Louisiana hospital for 30 days before being released and repatriated to the Philippines on or about November 21, 2010. Arbitral Decision at 3, ¶4; Fifth Circuit Decision at 1013-14.

12. Upon returning to the Philippines, Asignacion was admitted for evaluation and treatment at St. Luke's Medical Center in Manila on November 21, 2010. He was released from St. Luke's on November 22, 2010. Arbitral Decision at 3, ¶5.

13. Thereafter, Dr. Natalio Alegre of St. Luke's Medical Center evaluated and treated Asignacion on December 6, 2010 and recommended Jobst pressure dressing. Arbitral Decision at 4, ¶6.

14. Dr. Alegre of St. Luke's Medical Center assessed Asignacion with a Grade 14 disability under the POEA contract. Arbitral Decision at 4, ¶9.

15. On May 7, 2012, Dr. Benjamin Herbosa performed successful plastic surgery on Asignacion at Makati Medical Center to excise scar tissue, and Plaintiff tolerated the procedure well. Arbitral Decision at 4, ¶8.

**C. Asignacion's prior legal proceedings**

16. On November 12, 2010, Asignacion filed a civil action against Rickmers in the 25th Judicial District Court for the Parish of Plaquemines, State of Louisiana, seeking damages for personal injury arising out of his October 27, 2010 accident. Complaint, ¶ 7, Arbitral

[2] / Although the Complaint alleges the accident occurred on October 10, 2010, the Arbitral Decision states that the accident occurred on October 27, 2010.

Decision at 4, ¶ 1. Asignacion alleged claims for negligence under the Jones Act and unseaworthiness under the U.S. general maritime law. State Court Petition, ¶¶4 and 7, Rec. Doc. 8-1, C.A. No. 2:13-cv-00607-JCZ-KWR, U.S.D.C., E.D.La. Asignacion alleged in the alternative that his claims against Rickmers were governed by RMI law, which adopted the non-statutory U.S. general maritime law. State Court Petition, ¶¶5 and 7.

17. On May 16, 2012, the Louisiana state court stayed Asignacion's action and ordered him to arbitrate his claims against Rickmers in the Philippines, as required by his POEA employment contract. Complaint, ¶ 8, Arbitral Decision at 4, ¶2.

18. Asignacion filed an application for a supervisory writ in the Louisiana Fourth Circuit Court of Appeal arguing that the state district court erred in compelling him to arbitrate his claims against Rickmers in the Philippines. Rec. Doc. 8-12, C.A. No. 2:13-00607-JCZ-KWR, U.S.D.C., E.D.La. On August 3, 2012, the Fourth Circuit denied Asignacion's writ application. Arbitral Decision at 5, ¶2.

19. The arbitration then proceeded before the Department of Labor and Employment of the Republic of the Philippines under Philippine law. Complaint, ¶¶ 8-9; Arbitral Decision at 1-2, 5-6, ¶¶ 1-2 and 6-7, ¶¶ 1-2; Fifth Circuit Decision at 1014. Asignacion and Rickmers each appointed one arbitrator, and the two arbitrators chosen by the parties then appointed a third arbitrator. Arbitral Decision at 1.

20. On February 15, 2013, the arbitrators issued their decision. There is no indication from the Arbitral Decision that Asignacion offered any medical evidence disputing Dr. Alegre's Grade 14 disability assessment, or that Asignacion invoked his rights to a third medical opinion under §20(B)(3) of the POEA Standard Terms. Rather, according to the Arbitral Decision, the only argument Asignacion made was that the arbitrators should apply U.S. law or RMI law

instead of Philippine law, and should award him damages of more than US$22 million under U.S. law and/or RMI law. Arbitral Decision at 5, ¶1.

21. The arbitrators, citing §31 of the Standard Terms, held that they were required to apply Philippine law to Asignacion's claims. Arbitral Decision at 6, ¶1. Considering the evidence before them, and in particular Dr. Alegre's Grade 14 disability assessment, the arbitrators awarded Asignacion US$1,870, the compensation provided for a Grade 14 disability under the POEA contract and Philippine law. Complaint, ¶10; Arbitral Decision at 8-9, ¶3; Fifth Circuit Decision at 1014.

22. Asignacion does not allege, nor is there any indication in the pleadings, attachments thereto or public record, that he appealed the arbitrators' decision to any court or other judicial body in the Philippines. At oral argument, Asignacion's counsel confirmed that Asignacion did not appeal or seek relief from the Arbitral Decision in the Philippines.

23. Instead, Asignacion returned to the Louisiana state court and filed a motion seeking to have that court set aside the arbitral award as contrary to United States public policy. Rec. Doc. 1-2, C.A. No. 2:13-cv-00607-JCZ-KWR, U.S.D.C., E.D.La. Rickmers removed the action to federal court (the United States District Court for the Eastern District of Louisiana) and moved to enforce the award. Rec. Docs. 1 and 29, C.A. No. 2:13-cv-00607-JCZ-KWR, U.S.D.C., E.D.La.; Fifth Circuit Decision at 1014.

24. In his pleadings and briefs in the federal district court, Asignacion argued that the Arbitral Decision violated public policy because it denied him his rights as a seaman under U.S. law and/or RMI law. Record Docs. 19-1, 26-1, 30 and 34, C.A. No. 2:13-cv-00607-JCZ-KWR, U.S.D.C., E.D.La. The federal district court agreed with Asignacion and entered an order refusing to enforce the arbitral award. Complaint, ¶ 11, Fifth Circuit Decision at 1014; Rec.

Doc. 63, C.A. No. 2:13-cv-00607-JCZ-KWR, U.S.D.C., E.D.La. The district court concluded that the arbitrators' application of Philippine law deprived plaintiff of his rights as a seaman under RMI law, precluding enforcement of the award. *Id.*; Fifth Circuit Decision at 1014.

25. Rickmers appealed, and on April 16, 2015, the United States Fifth Circuit Court of Appeals reversed the district court and remanded with instructions that the arbitral award be enforced, holding that enforcement of the arbitral award did not violate any public policy. Complaint, ¶12; Fifth Circuit Decision at 1021-22. Among other things, the Fifth Circuit held that applying Philippine law to a Filipino seaman did not violate any public policy, *id.* at 1016, and that there was no evidence substantiating Plaintiff's complaint that enforcement of the award would leave him unable to meet his medical needs. *Id.* at 1020. On June 10, 2015, the Fifth Circuit denied Asignacion's petition for rehearing *en banc*. Case No. 14-30132, U.S. Fifth Circuit, Doc. 00513074449.

26. On June 24, 2015, the federal district court in New Orleans entered a Judgment enforcing the Philippine arbitral award and dismissing Asignacion's claims under the Jones Act and U.S. general maritime law, or alternatively RMI law. Rec. Doc. 68, C.A. No. 2:13-cv-00607-JCZ-JWR, U.S.D.C., E.D.La.

27. On September 8, 2015, Asignacion filed a Petition for a Writ of Certiorari in the United States Supreme Court. On January 11, 2016, the Supreme Court denied Asignacion's Petition. Complaint, ¶13.

28. The U.S. court's judgment enforcing the arbitral award and dismissing Asignacion's claims is now final. Complaint, ¶13.

29. On February 9, 2016, more than five years after his injury onboard the M/V RICKMERS DALIAN, Asignacion filed the present suit seeking damages under RMI law for the injuries he sustained in New Orleans in October 2010.

30. Rickmers now moves to dismiss Asignacion's Complaint under MIRCP Rule 12(b)(6) on two grounds: (1) that this suit is time barred under 47 MIRC 862(2)(c); and (2) that the final judgment of the U.S. courts enforcing the Philippine arbitral award and dismissing Asignacion's claims under, *inter alia*, RMI law, bar this suit based on principles of *res judicata*.

**LEGAL STANDARD FOR A RULE 12(b) (6) MOTION TO DISMISS**

1. On a Rule 12(b)(6) motion, "[a] complaint may be dismissed as a matter of law for two reasons: (1) lack of a cognizable legal theory or (2) insufficient facts under a cognizable legal theory." *Kahawaiolaa v. Norton*, 222 F. Supp. 2d 1213, 1216 (D. Haw. 2002) (citations omitted), *aff'd*, 386 F.3d 1271 (9th Cir. 2004), *cert. denied*, 545 U.S. 1114 (2005). A complaint can also be dismissed pursuant to Rule 12(b)(6) "if the face of the complaint presents an insurmountable bar to relief." *Sam Han v. University of Dayton*, 541 Fed. Appx. 622, 625 (6th Cir. 2013).

2. In a Rule 12(b)(6) motion, the court accepts all well-pleaded facts as true and views those facts in the light most favorable to the plaintiff. *See Gonzales v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009); *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008). However, the court "need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations." *Bureerong v. Uvawas*, 922 F. Supp. 1450, 1462 (C.D. Cal. 1996) (citing *Western Miller Council v. Watt*, 643 F.2d 618, 624 (9th Cir.), *cert denied*, 454 U.S. 1031 (1981)).

3. In addition to the Complaint and matters incorporated into the Complaint, a court "may look to matters of public record in deciding a Rule 12(b)(6) motion." *In re Colonial Mortgage Bankers Corp.*, 324 F.3d 12, 15-16 (1st Cir. 2003)(quoting *Boateng v. InterAmerican Univ.*, 210 F.3d 56, 60 (1st Cir.2000)).

4. In an appropriate case, an affirmative defense may be adjudicated on a Rule 12(b)(6) motion to dismiss for failure to state a claim. *Jones v. Bock,* 549 U.S. 199, 215 (2007); *In re Colonial Mortgage, supra.* Such a dismissal is appropriate when (1) the facts that establish the defense are ascertainable from the allegations of the Complaint and the other matters the court may consider, and (2) "the facts so gleaned conclusively establish the affirmative defense." *In re Colonial Mortgage, supra.*

5. "A statute of limitations may support dismissal under Rule 12(b)(6) where it is evident from the plaintiff's pleadings that the action is barred and the pleadings fail to raise some basis for tolling or the like." *King-White v. Humble Independent School District,* 803 F.3d 754, 758 (5th Cir. 2015)(quoting *Jones v. Alcoa, Inc.*, 339 F.3d 359, 366 (5th Cir. 2003)); *see also, Jones v. Bock, supra*; *Lopez-Gonzalez v. Municipality of Comerio*, 404 F.3d 548, 551 (1st Cir. 2005).

6. Whether an untimely complaint should be allowed based on principles of equitable tolling presents an issue of law that is properly decided on a motion to dismiss under Rule 12(b)(6). *Wilson v. Zapata Off-Shore Co.,* 939 F.2d 260, 266 (5th Cir. 1991).

7. The affirmative defense of *res judicata* may also support dismissal on a Rule 12(b)(6) motion. *Muhammed v. Oliver*, 547 F.3d 874, 878 (7th Cir. 2008)(citing, *inter alia, In re Colonial Mortgage, supra*).

## ANALYSIS

### A. Asignacion's RMI Complaint is time-barred.

1. The allegations of ¶¶ 27-29 of the Complaint acknowledge that Asignacion was injured in October 2010. As a result, under 47 MIRC §862(2)(c), he had to file this suit for damages within two years of the accident, or no later than October 27, 2012. Plaintiff missed that deadline by more than three years. It is therefore plain on the face of the Complaint that it is time barred under 47 MIRC §862(2)(c).

2. Asignacion acknowledges the two-year limitation period under 47 MIRC §862(2)(c) but contends in ¶¶ 30-32 of the Complaint that the running of the statute of limitations was equitably tolled, or suspended, by the filing and pursuit of his lawsuit in Louisiana. This contention has no merit.

3. Courts have recognized a very limited doctrine of equitable tolling of a statute of limitations. In *Burnett v. New York Cent. R. Co.*, 380 U.S. 424 (1965), the Court held that the statute of limitations under the Federal Employers' Liability Act ("**FELA**") was tolled by the filing of a timely personal injury action in a state court that was not a proper statutory venue.[3] The Court stated that:

> [B]oth Congress and the States have made clear, through various procedural statutes, their desire to prevent timely actions brought in courts with improper venue from being time-barred merely because the limitation period expired while the action was in the improper court.

*Id.*, 380 U.S. at 434. Noting that an action filed in an improper venue within the federal court system would not be dismissed, but would be transferred to the correct venue under a federal statute, the Court observed:

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[3] / The FELA statute of limitations, 45 U.S.C. §56, is applicable to seamen's actions for personal injury under the Jones Act, 46 U.S.C. §30104 (formerly 46 U.S.C. §688). *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958).

> Numerous cases hold that when dismissal of an action for improper venue would terminate rights without a hearing on the merits because plaintiff's action would be barred by a statute of limitations, 'the interest of justice' requires that the cause be transferred.

*Id.* at 430 n.7 (additional citations omitted).

4. Maritime caselaw in the United States has followed *Burnett,* and some courts have extended its holding to actions dismissed for lack of personal jurisdiction. *See e.g., Burgeois v. Weber Marine, LLC*, 80 F.Supp.3d 721 (M.D.La. 2015) (improper venue, statute tolled); *Walck v. Discavage*, 741 F.Supp. 88 (E.D.Pa. 1990) (personal jurisdiction lacking, statute tolled); *Flores v. Pedco Services Corp.*, 2011 WL 883640 (D.N.J. March 11, 2011), on reconsideration, 2011 WL 3273573 (D.N.J. July 29, 2011) (same).

5. However, equitable tolling of a statute of limitations is permitted only in very limited circumstances. "Given the policies favoring limitation periods, federal courts have typically extended equitable relief only sparingly." W*ilson v. Zapata Off-Shore*, 939 F.2d at 267. *See also, Kocian v. Getty Refining & Marketing Co.,* 707 F.2d 748, 753 (3d Cir.), *cert. denied,* 464 U.S. 852 (1983)(noting that "restrictions on equitable tolling ... must be scrupulously observed.")(citations omitted). As one court observed in refusing to allow an untimely suit based on equitable tolling, "experience teaches us that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Kocian, supra,* at 755 (quoting *Mohasco Corp. v. Silver,* 447 U.S. 807, 826 (1980)).

6. Courts have held that equitable tolling is only appropriate when (1) the defendant has actively misled the plaintiff, (2) the plaintiff has, in some extraordinary way, been prevented from asserting his rights, or (3) the plaintiff has mistakenly asserted his rights in the wrong forum. *Schafer v. Board of Public Education of the School District of Pittsburgh, PA*, 903 F.2d 243, 251 (3d Cir. 1990)(citing *Kocian*, 707 F.2d 748, 753). But courts have refused to apply

equitable tolling when the plaintiff has not been diligent and has slept on his rights. *See e.g.*, *Weathers v. Bean Dredging Corp.*, 26 F.3d 70, 72 (8th Cir. 1994)(denying equitable tolling where plaintiff failed to file protective suit after defendant challenged jurisdiction in his chosen forum); *Valentin v. Ocean Ships, Inc.*, 38 F.Supp.2d 511, 513-14 (S.D.Tex. 1999)(same).

7. Asignacion does not qualify for equitable tolling of the present suit, because none of the limited bases on which courts have applied equitable tolling are present here.

8. First, Rickmers did not misled the Plaintiff regarding his right to file suit in the RMI within the two-year limitation period imposed by 47 MIRC §862(2)(c). Rickmers did not by registering its vessel under the laws of the Republic of the Marshall Islands mislead the Plaintiff regarding the application of the POEA and need for Plaintiff to file suit within the two-year statute of limitation.

9. Second, Plaintiff does not allege that he was prevented in some extraordinary way from filing suit in the RMI within the two-year limitation period. Rather, it is clear from the Complaint, the attachments thereto, the public record, and Plaintiff's counsel's confirmation at oral argument, that Plaintiff made the deliberate and strategic choice to pursue his remedies in the United States rather than the RMI. Plaintiff was clearly aware of his rights under RMI law – he advocated those rights in the Louisiana courts and the Philippine arbitration – and nothing prevented him from filing suit in this Court to vindicate those rights before the two-year limitation period under 47 MIRC §862(2)(c) expired. He simply chose to pursue his claims elsewhere. He was not prevented in some extraordinary way from filing suit in the RMI within the two-year limitation period.

10. Third, Plaintiff did not mistakenly file his suit in a procedurally improper venue. The Louisiana courts had jurisdiction and were a proper venue, and Plaintiff vigorously litigated

his claims there for more than five years, all the way to the United States Supreme Court.

11. Plaintiff asserts that equitable tolling is appropriate because he filed a timely legal action on these same claims in another forum. But that is not the law. In *Johnson v. Railway Exp. Agency, Inc.*, 421 U.S. 454 (1975), the Court refused to equitably toll the statute of limitations on the plaintiff's race discrimination claims under 42 U.S.C. §1981 based on the plaintiff's timely filing and pursuit of an administrative remedy for the same offenses under Title VII. Noting that the plaintiff could easily have preserved his rights under §1981 while he pursued his administrative remedy under Title VII, the Court found "no policy reason that excuses petitioner's failure to take the minimal steps necessary to preserve each claim separately." *Id.* at 466.

12. Similarly, in *Wilson v. Zapata Off-Shore, supra*, the court refused to equitably toll a seaman's suit under the Jones Act alleging discrimination and sexual harassment based on her prior suits asserting claims for the same injuries under 42 U.S.C. §1981 and the Longshore and Harbor Workers' Compensation Act. Noting that the plaintiff in that case could have filed a timely Jones Act suit to protect her rights, the Court held: "At some point, the right to be free of stale claims comes to prevail over the right to prosecute them." *Id.* at 268 (citing *American Pipe and Construction Co. v. Utah,* 414 U.S. 538 (1974)). *See also, Weathers v. Bean Dredging, supra*; *Valentin v. Ocean Ships, supra.*

13. The same logic applies to the present suit. Asignacion could easily have filed a timely suit in the RMI to protect his remedies here while he pursued his claims in the U.S. courts. His "failure to take the minimal steps necessary to preserve" his right to proceed in the RMI precludes this Court from tolling the two-year statute of limitations, 47 MIRC §862(2)(c).

14. Moreover, to accept Plaintiff's equitable tolling argument under the circumstances

presented here would make the statute of limitations meaningless. A plaintiff could choose to litigate his claims to conclusion in one forum and, if dissatisfied with the outcome there, could then assert the same claims in a different forum in which the defendant is subject to jurisdiction, arguing that the first action equitably tolled any time bar to the second action. By that logic, a global enterprise subject to suit in multiple jurisdictions could be sued on the same claims again and again until the plaintiff obtained a result to his liking. The Court fails to see how equity could sanction such an outcome.

15. Plaintiff's reliance on *Abbott v. State,* 979 P.2d 994 (Ak. 1990), is misplaced. *Abbott* involved unique facts that have no parallel to the captioned case. In *Abbott,* a seaman employed by the State of Alaska was limited to a worker's compensation remedy by a collective bargaining agreement, and she duly pursued that remedy. However, after the three-year time bar on Jones Act suits had elapsed, the plaintiff learned that the Alaska Supreme Court declared the collective bargaining agreement null and void, giving her a right to sue her employer under the Jones Act that previously did not exist. Because the Alaska Supreme Court created her right to sue under the Jones Act only after the statute of limitations on Jones Act suits had passed, the court applied equitable tolling to allow that plaintiff to file her Jones Act suit after the statute of limitations had run.

16. In the present case, unlike *Abbott*, Asignacion was not legally denied a remedy under RMI law before the two-year limitation period imposed by 47 MIRC §862(2)(c) elapsed. He could have sought the same remedy then that he seeks now. In fact, he did assert claims for damages under RMI law when he filed his suit in Louisiana state court less than three weeks after his injury. *Abbott* clearly has no application here.

17. Plaintiff asserts that the judgment of the U.S. courts was based on purely

procedural grounds similar to the dismissal for improper venue that permitted equitable tolling in *Burnett v. New York Central, supra.* That contention is meritless. The U.S. courts indisputably had jurisdiction over Plaintiff's claims and were a proper venue. Their decision ordering Plaintiff to arbitrate his claims in the Philippines was a substantive decision enforcing the terms of Plaintiff's POEA employment contract, while their decision to enforce the arbitral award was also substantive, not procedural. The decision of the Fifth Circuit was not based on a belief that the U.S. courts were a procedurally improper forum, as in *Burnett,* but on the court's substantive determination that Plaintiff's rights were, under his POEA contract and the applicable substantive law, properly resolved in Philippine arbitration applying Philippine law.

18. Plaintiff also contends that the RMI statute of limitations should be equitably tolled because he supposedly never received a hearing on the merits of his claims. The Court disagrees. Plaintiff made the deliberate choice to pursue his claims in the Louisiana courts with knowledge that the applicable law in that jurisdiction required enforcement of the arbitration clause incorporated into Plaintiff's POEA contract. Plaintiff was referred to arbitration in the Philippines, and the arbitrators resolved his claims based on the evidence presented. It is the arbitrators' *substantive* resolution of his claims with which Plaintiff now takes issue. That Plaintiff does not agree with, or like, how the arbitrators resolved his claims does not alter the fact that he received a full and fair hearing in the forum and under the law he specifically agreed to in his POEA employment contract.[4] *Burnett* and its progeny are, therefore, inapplicable to this case.

19. Finally, Plaintiff asserts that equitable tolling is appropriate here because Rickmers had notice of his claims since shortly after the accident and, therefore, would not be

[4] / The Arbitral Decision establishes that Plaintiff was afforded due process in the arbitration, and Plaintiff did not allege otherwise in this Court or in the Louisiana courts.

prejudiced if he is allowed to proceed with the present suit. The Court disagrees. The public record of the U.S. proceedings demonstrates that Rickmers has defended this suit for more than five years in the Louisiana state and federal district courts, the Louisiana Fourth Circuit Court of Appeal, the U.S. Fifth Circuit Court of Appeals, and the U.S. Supreme Court, as well as the Philippine arbitration. To allow Plaintiff to now assert his claims in this forum would make Rickmers' expenditure of the time, effort and expense of the Louisiana litigation a meaningless waste, which would, in the Court's view, be highly prejudicial.

20. Moreover, the witnesses to Plaintiff's accident were foreign seamen like Plaintiff. Even if Rickmers can find those witnesses, their memory of the relevant events would almost certainly be diminished by the passage of now six years since the accident. This case illustrates the very purpose of statutes of limitations, "to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Wilson v. Zapata,* 939 F.2d at 267 (quoting *American Pipe v. Utah, supra*).

21. In sum, Asignacion was fully aware of his rights under RMI law well within the two-year limitation period under 47 MIRC §862(2)(c), and nothing prevented him from bringing suit in the RMI to vindicate those rights within the statutory limitation period. But instead of filing a timely lawsuit in the RMI, he made the deliberate and strategic choice to pursue his claims in the Louisiana courts. That Asignacion is now dissatisfied with the outcome of the proceedings in his chosen forum does not allow him to refile his claims in this Court more than three years after the applicable RMI statute of limitations has run.

22. For the foregoing reasons, the Court holds that the equitable tolling doctrine has no application to this case. Asignacion's claims are time barred under 47 MIRC §862(2)(c), and

the Complaint must be dismissed under MIRCP Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

**B. The Complaint is also barred by *res judicata.***

23. The Supreme Court of the RMI has explicitly recognized that the doctrine of *res judicata* precludes the relitigation of claims that have previously been litigated to conclusion:

> Claim preclusion "treats a judgment, once rendered, as the full measure of relief to be accorded between the same parties on the same 'claim' or 'cause of action.'" *Id., quoting Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., Inc.*, 575 F.2d 530, 535 (5th Cir. 1978). Thus, claim preclusion prevents parties from relitigating the same claim including 'all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." *Fischel v. Equitable Life Assur. Soc'y of the United States*, 307 F.3d 997, 1005 n.5 (9th Cir. 2002), quoting *Robi*, 838 F.2d at 321-22.

*Jalley v. Mojilong*, 3 MILR 106, 109 (2009). *See also, Gushi Bros. Co. v. Kios,* 2 MILR 120 (1998).

24. "A party seeking to rely on the doctrine of *res judicata*, or claim preclusion, must prove that: 1) there has been a final judgment on the merits in a prior suit; 2) the prior suit involved the same parties or their privies; and 3) the causes of action are the same as in the prior suit." *Gushi Bros., supra*, at 123. In the present matter, there is no dispute that the second and third requirements for *res judicata* are met; the present suit involves the same parties as plaintiff's Louisiana lawsuit, and the causes of action asserted here are the same causes of action as in that prior suit. But Plaintiff asserts there was no final judgment on the merits in the prior suit that would bar his pursuit of the present suit. For the following reasons, the Court disagrees, and finds that *res judicata* applies to bar relitigation of plaintiff's claims in the present suit.

25. The doctrine of *res judicata* bars relitigation of a dispute that has been resolved on the merits in a different jurisdiction:

> The Court has considered and understands Plaintiff's argument that the proceedings approximately 20 years ago in Alabama were not fair or complete, but this Court does not have jurisdiction to reopen a closed Alabama proceeding and cannot simply retry the proceedings ignoring the Alabama proceedings. The judicial system is not set up to allow parties to relitigate their claims in another jurisdiction if the outcome in the first jurisdiction is not to their liking.

*Tonsmeire v. Am South Bank*, No. 1:12-CV-00288-EJL, 2013 WL 618138, at *1 (D. Idaho 2013).

26. When the prior judgment is from a foreign jurisdiction, *res judicata* is intertwined with issues of comity. "Neither a matter of legal obligation nor of mere courtesy, comity has long counseled courts to give effect, whenever possible, to the executive, legislative and judicial acts of a foreign sovereign so as to strengthen international cooperation." *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 371 (5th Cir. 2003)("*Karaha Bodas I*")(citing *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895)). Comity is important in cases implicating public international issues "when prior steps in resolving a dispute have taken place in international fora." *Id.*

27. In this instance, *res judicata* in the form of claim preclusion applies and bars Plaintiff from relitigating his claims against Rickmers in this Court. The Complaint, the exhibits thereto and the public record of the U.S. proceedings clearly establish that Asignacion's claims against Rickmers for the injuries he sustained aboard the M/V RICKMERS DALIAN in October 2010 were fully litigated and have been finally adjudicated before the Louisiana state and federal courts and the Philippine arbitration panel. It is undisputed that all tribunals were duly vested with jurisdiction over the dispute, and that Asignacion raised before those tribunals the same argument he would like to rehash before this Court, *i.e.*, that his claims must be resolved under RMI law (and U.S. general maritime law as adopted RMI law), and not under Philippine law.

"This Court simply cannot re-try issues and claims already adjudicated." *Tonsmeire, supra.* The doctrine of *res judicata* precludes Asignacion from relitigating in this Court what he has already litigated in two other forums.

28. Several courts have held that a decision in one jurisdiction enforcing an arbitral award can bar a subsequent suit seeking to undermine that award based on *res judicata. See e.g., Gulf Petro Trading Co., Inc. v. Nigerian National Petroleum Corp.*, 288 F.Supp.2d 783, 793-95, (N.D.Tex. 2003), *aff'd*, 115 Fed. Appx. 201 (5th Cir. 2004); *Belmont Partners, LLC v. Mina Mar Group, Inc.*, 741 F.Supp.2d 743, 746-53 (W.D.Va. 2010).

29. *Gulf Petro* held that principles of international comity and *res judicata* barred a plaintiff from contesting the validity of an arbitral award in the United States after the plaintiff's challenge to the award was duly and finally rejected by a Swiss court. *Id.* at 793-794. Noting that the plaintiff had invoked the Swiss court's jurisdiction to challenge the award, the court held that "the Swiss court's determination that the Final Award is enforceable ... must be recognized by this court as a matter of *res judicata* and international comity." 288 F.Supp.2d at 795. The court further observed that the "utility of the Convention in promoting the process of international commercial arbitration depends upon the willingness of national courts to let go of matters they normally would think of as their own." *Id.* at 795 n. 20.[5]

30. Like the plaintiff in *Gulf Petro,* Asignacion chose to challenge the enforceability of the arbitral award in the Louisiana courts. Thus, as in *Gulf Petro,* "the [Louisiana] court's determination that the Final Award is enforceable ... must be recognized by this court as a matter of *res judicata* and international comity." *Id.*; *see also, Belmont Partners v. Mina Mar,* 741 F.Supp.2d at 750-53 (after Canadian court enforced arbitral award rendered in Virginia without

[5] / Referring to the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (hereafter, "the Convention"). The RMI is a signatory of the Convention.

modification, Virginia federal court refused to modify award based on *res judicata* and principles of comity).

31. Asignacion asserts that *res judicata* is inapplicable in the instant matter because he has supposedly never had a hearing on the merits of his negligence and unseaworthiness claims. The Court rejects this argument for several reasons.

32. First, a hearing on the merits is not a prerequisite to the application of *res judicata* under RMI law. In *Gushi Bros. v. Kios, supra*, the RMI Supreme Court held that a stipulation of dismissal with prejudice of an earlier action, without court involvement, barred a subsequent action presenting the same claim based on *res judicata. Id.* at 123-24. In the present case, the Louisiana federal district court's June 24, 2015 Judgment specifically dismissed Asignacion's claims, which sought damages based on negligence and unseaworthiness under U. S. law and/or RMI law. As Asignacion himself acknowledged at ¶13 of the Complaint, that Judgment is now final. Thus, even if the Court were to accept Plaintiff's contention that he has never had a hearing on the merits of his claims, *res judicata* would still apply to the present suit under *Gushi Bros., supra.*

33. In any event, the Court rejects Plaintiff's contention that he did not have a hearing on the merits of his claims against Rickmers. The Louisiana state and federal courts have a long history of directing Filipino seamen to Philippine forums for resolution of personal injury claims and other disputes arising out of their employment aboard foreign flag vessels. *See e.g., Lim v. Offshore Specialty Fabricators, Inc.,* 404 F.3d 898 (5th Cir. 2005); *Francisco v. STOLT ACHIEVEMENT MV,* 293 F.3d 270 (5th Cir 2002); *Marinechance Shipping, Ltd. v. Sebastian,* 143 F.3d 216 (5th Cir. 1998); *Lejano v. KS Bandak,* 705 So.2d 158 (La. 1997); *Barcelona v. Sea Victory Maritime,* 619 So.2d 741 (La.App. 4th Cir. 1993); *Prado v. Sloman Neptune*

*Schiffahrtsgesellschaft GmbH*, 611 So.2d 691 (La.App. 4th Cir. 1992); *Quintero v. Klaveness Ship Lines*, 914 F.2d 717 (5th Cir. 1990). The most recent of those decisions had ordered the Filipino seamen plaintiffs to arbitrate their disputes in the Philippines pursuant to the same POEA Standard Employment Contract that governed Asignacion's employment aboard the RICKMERS DALIAN. *Lim, supra; Francisco, supra.*[6] Plaintiff's Louisiana counsel acknowledged at oral argument before this Court that he was aware of this jurisprudential history; he was, in fact, involved in many of those cases. Having chosen to file suit in a forum with a history of compelling Filipino seamen to arbitrate similar claims in the Philippines, Plaintiff cannot complain that his hearing on the merits was before a Philippine arbitration panel.

34. Plaintiff also asserts that the U.S. Fifth Circuit's decision enforcing the Philippine arbitral award is not binding on this Court under the Convention. According to Plaintiff, both the United States and the RMI are "secondary jurisdictions" under the Convention since the arbitration was conducted in the Philippines under Philippine law. Plaintiff further argues that the Convention envisions multiple litigations in multiple secondary jurisdictions, such that one such jurisdiction's decision to enforce an arbitral award does not bind other secondary jurisdictions. For this proposition, Plaintiff relies on the Fifth Circuit's decision in *Karaha Bodas I, supra.*

35. This Court finds *Karaha Bodas I* distinguishable from the present matter. The question in *Karaha Bodas I* was not whether a second suit was barred by *res judicata*, but whether the court in a secondary jurisdiction should enjoin a party from seeking to vacate the award in an alleged primary jurisdiction under the Convention. The decision was based on the requirements for a foreign anti-suit injunction, not the requirements for *res judicata*. 335 F.3d at

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[6]/ A number of other courts have also enforced the arbitration clause in the POEA Standard Contract applicable to Filipino seamen. *See e.g., Aggarao v. Mitsui OSK Lines, Ltd.*, 675 F.3d 355 (4th Cir. 2012); *Balen v. Holland America Line Inc.*, 583 F.3d 647, 654 (9th Cir. 2009); *Bautista v. Star Cruises*, 396 F.3d 1289 (11th Cir. 2005).

363-64. Moreover, the *Karaha Bodas I* decision necessarily turned on the distinct powers granted primary jurisdictions and secondary jurisdictions over arbitral awards under the Convention. These significant distinctions make *Karaha Bodas I* inapposite to the present case.

36. This Court finds that a subsequent decision by another federal appellate court in the same ongoing dispute is more relevant to the present matter. In *Karaha Bodas Co., LLC v. Perusahaan Pertambangan,* 500 F.3d 111, 122 (2d Cir. 2007)("*Karaha Bodas II*"), the court affirmed an injunction enjoining the defendant, Pertamina, from contesting in the Cayman Islands "the ***preclusive effect*** of several federal court decisions that ... the Award should be enforced." (emphasis added). Distinguishing the Fifth Circuit's earlier opinion in *Karaha Bodas I,* the court in *Karaha Bodas II* held that an anti-suit injunction was appropriate because the Cayman Islands suit was an effort to evade an arbitral award, which would undermine the objectives of the Convention:

> We have noted the strong public policy in favor of international arbitration, and the need for proceedings under the New York Convention to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation. These important objectives would be undermined were we to permit Pertamina to proceed with protracted and expensive litigation that is intended to vitiate an international arbitral award that federal courts have confirmed and enforced.

*Id.* at 126 (citation and quotation marks omitted).

37. There can be little doubt that the objectives of the Convention to promote "settling disputes efficiently and avoiding long and expensive litigation," *id.,* would be significantly undermined if a party who is dissatisfied with the outcome of an arbitration can file suit in one secondary jurisdiction after another looking to escape the award. This was implicit in the decisions in *Gulf Petro* and *Belmont Partners, supra.* Asignacion challenged the enforceability of the award in the United States all the way to the U.S. Supreme Court. The U.S.

courts entered a Final Judgment enforcing the award and dismissing his claims. That he is dissatisfied with the result in the U.S. courts does not allow Asignacion "to proceed with protracted and expensive litigation [in the RMI] that is intended to vitiate an international arbitral award that federal courts have confirmed and enforced." *Karaha Bodas II,* 500 F.3d at 126.

38. At oral argument, Plaintiff's counsel conceded that he made all the same arguments that he is now making to this Court in the Louisiana courts. He further admitted that he filed the present suit because he believes the Louisiana courts failed to properly apply RMI law. However, it is not this Court's role to provide dissatisfied parties who have fully litigated their claims elsewhere with a further level of appellate review on issues of RMI law. To the contrary, that is precisely what the doctrines of comity and *res judicata* are intended to prevent.

39. Accordingly, this Court holds that Asignacion is now barred from relitigating his claims in this Court based on principles of comity and *res judicata.* For this additional reason, the Complaint fails to state a claim upon which relief can be granted and must be dismissed in its entirety under MIRCP Rule 12(b)(6).

**C. Conflict with RMI Law**

The Court understands Asignacion's argument that the POEA's choice of law and forum provisions are contrary to RMI law. However, this is not the issue before the Court. The issue is "are Asignacion's claims barred by the statute of limitations and the doctrine of *res judiciata.*" As explained above, the answer is yes. Asignacion's claims are barred by both.

**LABELING OF FINDINGS OF FACT AND CONCLUSIONS OF LAW**

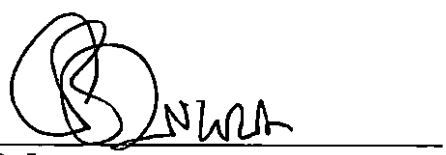
To the extent that any of the foregoing Findings of Fact are more properly deemed to be Conclusions of Law, they are incorporated as Conclusions of Law. Should any of the foregoing Conclusions of Law be more properly deemed Findings of Fact, they are incorporated herein as

Findings of Fact.

**DECISION AND ORDER**

IT IS HEREBY ORDERED, ADJUDGED AND DECREED for the foregoing reasons as follows: (1) Rickmers' Motion to Dismiss is hereby GRANTED; and (2) this case is DISMISSED with each party to bear its own costs and expenses.

Entered: November 10, 2016.



Carl B. Ingram
Chief Justice, High Court