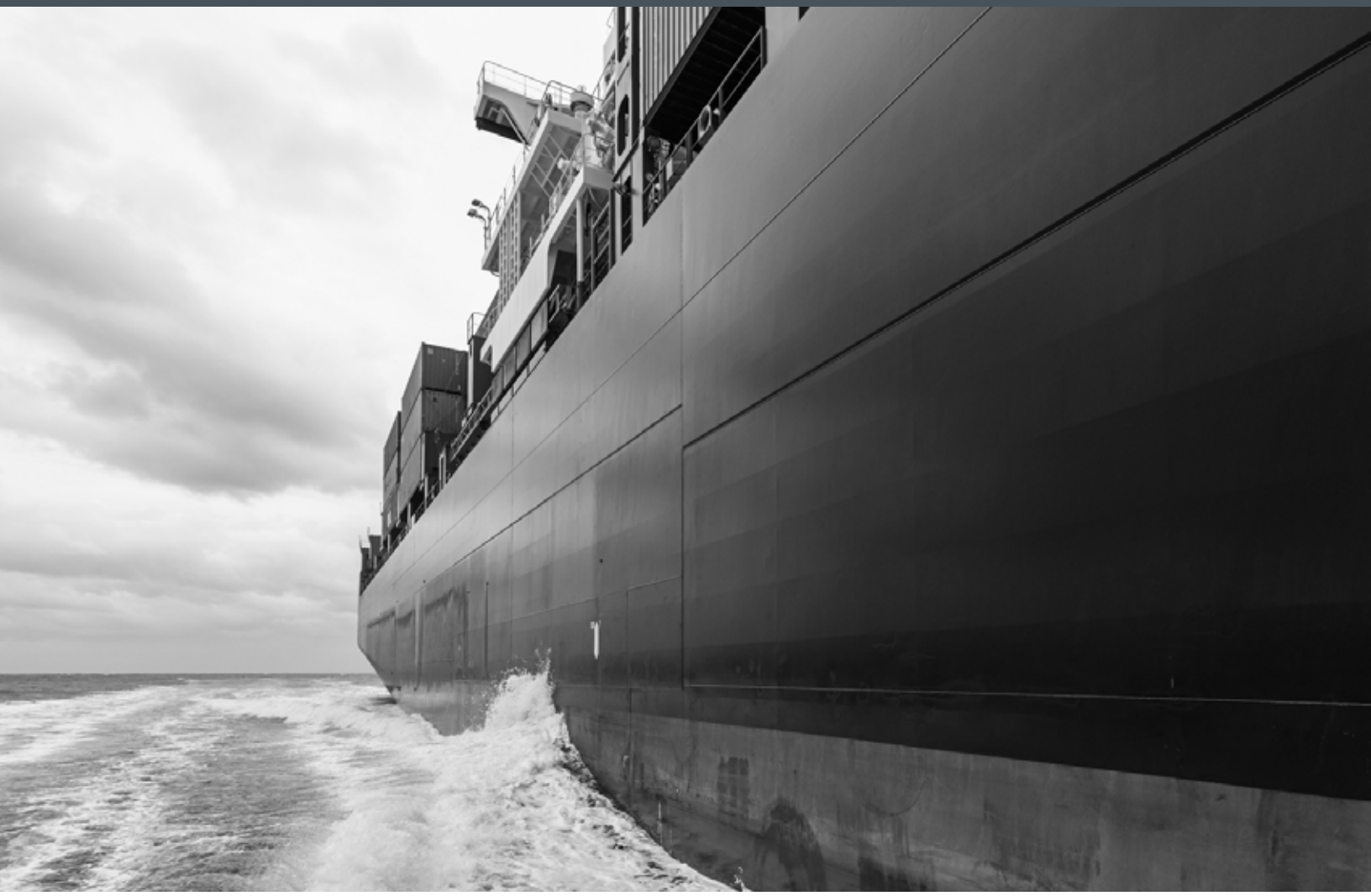


TO BE MARITIME OR NOT TO BE MARITIME – THAT IS THE QUESTION

In *Barrios v. Centaur, LLC*, the United States Court of Appeals for the Fifth Circuit expands the application of the In *re Larry Doiron* test to Mixed-Services Contracts

For marine projects, whether a contract is maritime or non-maritime is critical to the application of contractual indemnity and insurance provisions. In the United States Court of Appeals decision *In re Larry Doiron*, the Fifth Circuit adopted what it believed to be a simplified test to determine whether a contract is a maritime contract.

"The Fifth Circuit in Barrios broadened the application of the two-part Doiron test to potentially all mixed-services contracts."

Recently, the Fifth Circuit in *Barrios v. Centaur, LLC*[1] gave further guidance on how to apply *Doiron's* two-part test to determine if a contract is maritime in the context of a mixed-services contract. The Fifth Circuit found that although the mixed-services contract called for the application of Louisiana law, which has strict anti-indemnity statutes, the indemnity provisions were ultimately enforceable because the mixed contract was "*maritime*" in nature, and therefore governed by federal maritime law.

Background

Barrios v. Centaur, L.L.C. arose from a project at a dock on the Mississippi River. Barrios, an employee of Centaur, L.L.C. ("Centaur"), was injured while offloading a generator from a crew boat to a barge after the crew boat separated from the barge and he fell into the river, followed by the 100 pound generator. The crew boat was owned and operated by River Ventures, L.L.C. ("River Ventures"), and the barge was leased by Centaur. Barrios sued both River Ventures and Centaur for vessel negligence under general maritime law and the Jones Act. River Ventures cross-claimed against Centaur for contractual indemnity, however, the district court granted summary judgment to Centaur, and River Ventures subsequently appealed.

Defendant Centaur disputed River Venture's entitlement to indemnity and insurance pursuant to the Master Service Agreement (MSA) between the non-party dock owners, United Bulk Terminals Davant, L.L.C. ("UBT"), and Centaur. According to the MSA, Centaur maintained an obligation to indemnify UBT and its contractors, as well as to obtain insurance covering those parties. However, Louisiana law governed the MSA, which has an express anti-indemnity statute applicable to construction projects. Therefore, if the contract was considered "*non-maritime*" in nature, state law prevails and the indemnity provision would be voided by the by the Louisiana Construction Anti-Indemnity Statute. Conversely, if the contract was essentially "maritime" in nature, the indemnity prevails since admiralty and maritime law have no anti-indemnity restrictions.

Maritime vs. Non-Maritime Contracts

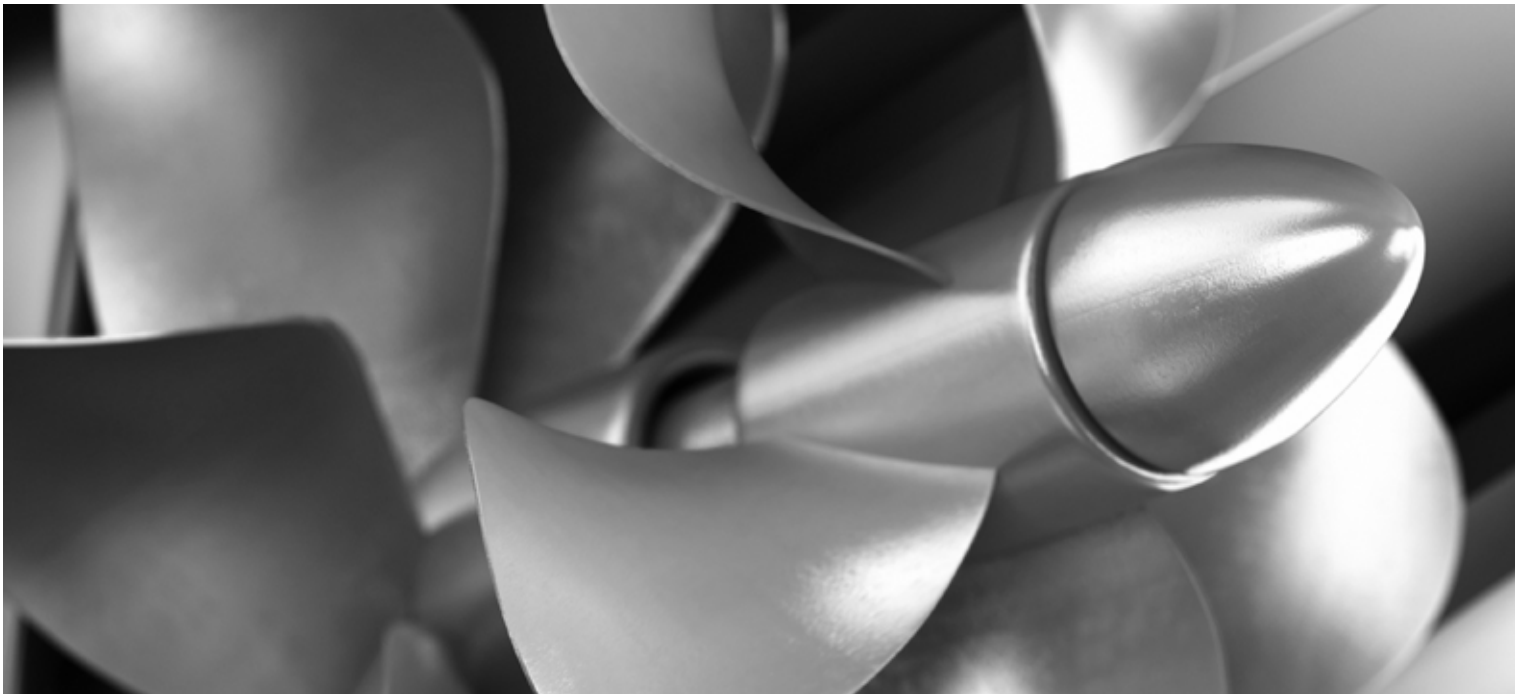
Accordingly, whether a contract's indemnity clause is enforceable is contingent on whether a contract is maritime or non-maritime. Thus, an indemnity clause that is invalid under a state's anti-indemnity statute might be enforceable under federal maritime law if the contract is a maritime contract.

The Fifth Circuit held that whether a mixed contract, such as the *Barrios* MSA, is a maritime contract, requires application of the *Doiron* maritime contract test. Where *Doiron* was intended to simplify the maritime contract inquiry, it was limited in application and addressed only those contracts arising from the oil and gas context.

The Fifth Circuit in *Doiron* adopted a two-question test to determine whether a contract was maritime, which focused the inquiry "*on the contract and the expectations of the parties*." Expanding the *Doiron* analysis beyond the scope of just oil and gas contracts, the Barrios decision provided further guidance and explicitly held that *Doiron* also applied to mixed-services contracts. The court noted:

> *In short, Doiron's two-part test applies as written to all mixed-services contracts. To be maritime, a contract (1) must be for services to facilitate activity on navigable waters and (2) must provide, or the parties must expect, that a vessel will play a substantial role in the completion of the contract.*

1 Barrios v. Centaur, L.L.C., 942 F.3d 670 (5th Cir. 2019).



While the district court in *Barrios* found that the contract was a "*land based construction contract*," and therefore governed by Louisiana law, the Fifth Circuit held otherwise. The Fifth Circuit established that *Doiron* applied outside of just the oil and gas sector, and expanded the meaning of maritime contracts to all "*activity*" that contributed to the facilitation of offshore services. *Barrios* held that this first element was satisfied when it called for Centaur to construct a concrete containment rail necessary to prevent coal and petroleum coke from spilling onto the dock or into the river. Likewise, the second element requiring a party's expectation of vessel contribution was also satisfied when the parties "*recognized that [the vessel] provided a necessary work platform, an essential storage space for equipment and tools, and a flexible area for other endeavors related to the construction work*." Because these two elements were satisfied, the Fifth Circuit found that the contract was maritime and the indemnity obligations were fully enforceable.

Over the decades, the Fifth Circuit has worked toward a bright-line maritime contract test. The *Barrios* decision is the first opinion from the Fifth Circuit since the new *Doiron* test was proclaimed. The Fifth Circuit's *Barrios* opinion indicates that the *Doiron* test will apply across a wide spectrum of contracts. It will act as important precedent as conflicts inevitably arise regarding the classification of mixed-services agreements, which significantly impacts contractual indemnity and insuring provisions.

Conclusion / Recommendations

The Fifth Circuit in *Barrios* broadened the application of the two-part *Doiron* test to potentially all mixed-services contracts. This expanded application of the *Doiron* test has a potentially significant impact on the enforceability of indemnity and insuring provisions in contracts outside the traditional oil and gas context.

When a mixed-services contract involving marine assets is negotiated, the parties should consider whether or not the *Barrios/Doiron* test calls for the application of general maritime law notwithstanding the parties' contractual choice of law clause. In the contracting documents, parties should specifically clarify whether a vessel will play a substantial role in the performance of the contract. Specific wording reflecting the parties' intent would facilitate a court's finding that the agreed-upon choice of law provision is legally valid, which would ensure that the risk allocation clauses work as intended.

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