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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

GREG J. LANNES, III	**CIVIL ACTION**
VERSUS	**No. 04-584**
OPERATORS INTERNATIONAL, ET AL.	**SECTION: I/3**

ORDER AND REASONS

Pending before the Court are motions, filed on behalf of plaintiff, Greg J. Lannes, and defendant, T.T.C. Illinois, Inc. (T.T.C.)(collectively, "movants"), to remand this action to state court.[1] The Court concludes that the cross-claim filed by Operators International, Inc. ("Operators") against West of England Ship Owners Mutual Insurance Association (Luxembourg)(herinafter "West of England"), "relates to" an arbitration agreement falling under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201, *et seq.* (the "Convention"), and that such cross-claim is a "separate and independent" federal question claim which permits West of England to remove the entire state court action pursuant to 28 U.S.C. § 1441(c). Accordingly, the motions to remand are **DENIED.**

[1]Rec. Doc. Nos. 7, 10.

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BACKGROUND

I. *State Court Proceedings*

On April 26, 1995, plaintiff filed this lawsuit in the 34th Judicial District Court alleging claims pursuant to the Jones Act, 46 App. U.S.C. § 688, and general maritime law arising from injuries he allegedly sustained aboard the D/B FRANK L while he was employed by Operators.[2] In July 1998, after plaintiff's lawsuit was transferred to the 24th Judicial District Court, plaintiff filed a first supplemental and amended complaint alleging the same claims against Ryan Walsh, Inc. ("Ryan Walsh") and T.T.C.. T.T.C. answered plaintiff's complaint and asserted a cross-claim for contractual indemnity against Operators. On or about September 10, 1998, Ryan Walsh filed an answer to plaintiff's complaint and asserted, *inter alia*, an exception of prescription arguing that plaintiff's claims against it were untimely. On March 19, 2001, T.T.C. filed an amended cross-claim alleging that it was entitled to contribution and/or indemnity from both Ryan Walsh and Operators. In response, Ryan Walsh filed an exception of prescription with respect to T.T.C.'s cross-claim. On September 12, 2003, plaintiff filed a second supplemental and amended complaint asserting a direct claim against West of England, in its capacity as the insurer of Ryan Walsh, with respect to his personal injury claims.[3]

During the course of the state court litigation, the parties filed motions for partial summary judgment with respect to issues pertaining to plaintiff's Jones Act seaman status and Ryan Walsh's status as plaintiff's Jones Act employer. On May 28, 2002, the state court granted plaintiff's motions

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[2]Rec. Doc. No. 1, plaintiff's seaman's complaint.

[3]There is no dispute that Ryan Walsh is insured pursuant to the West of England insurance policy.

for partial summary judgment, thereby finding that plaintiff was a Jones Act seaman and that Ryan Walsh was plaintiff's Jones Act employer. Thereafter, the state court set the hearing for Ryan Walsh's exceptions of prescription for February 5, 2003.

In connection with Ryan Walsh's exception of prescription with respect to plaintiff's maritime tort claims, plaintiff asserted that his claims against Ryan Walsh were not prescribed because Ryan Walsh and Operators were engaged in a joint venture and that Ryan Walsh and Operators had an identity of interest such that when plaintiff sued Operators, the relationship between Ryan Walsh and Operators was sufficient to put Ryan Walsh on notice of plaintiff's claims.[4] On June 17, 2003, the state court denied Ryan Walsh's exceptions of prescription without providing any reasons for the denial. Thereafter, Ryan Walsh applied for a supervisory writ to the Louisiana Fifth Circuit Court of Appeal which was denied. In denying Ryan Walsh's application for a supervisory writ, the Court of Appeal noted that plaintiff and T.T.C. had argued that prescription was interrupted because Operators and Ryan Walsh were in a joint venture and that Ryan Walsh had notice of plaintiff's claims by virtue of its relationship with Operators. The court stated that, "[t]he trial court, after considering the pleadings, memoranda, evidence and argument, obviously was of the view that the law and facts predominated in favor of Lannes in denying the prescription exception in Plaintiff's favor."[5] The Court of Appeal summarily concluded that there was no error in the trial court's denial of the exception of prescription and that there was no need to further review the matter pursuant to

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[4]With respect to its cross-claim, T.T.C. made similar arguments in connection with the exception of prescription filed by Ryan Walsh. Ryan Walsh's exception of prescription also claimed that plaintiff's maintenance and cure claims were prescribed. That aspect of the exception is not relevant to the issues presented to this Court.

[5]Rec. Doc. No. 1, state court record, denial of application for supervisory writ dated August 18, 2003.

its supervisory jurisdiction because the matter could, after all of the facts were presented at trial, be fully reviewed on appeal with a complete record.[6] Ryan Walsh then filed a writ of certiorari to the Louisiana Supreme Court which was denied on December 19, 2003. *Lannes v. Operators Intern., Inc.*, 861 So.2d 572 (La. 2003).

On January 26, 2004, plaintiff filed a third supplemental and amended complaint, asserting a cause of action directly against West of England, alleging that West of England provided protection and indemnity insurance coverage not only to Ryan Walsh, but also to Operators, for their alleged liability to plaintiff.[7] On February 25, 2004, Operators filed a cross-claim against West of England alleging that at the time plaintiff was injured, West of England "had in full force and effect a policy of insurance providing coverage" to Operators. In its cross-claim, Operators claimed that West of England was required to provide a defense for Operators and to indemnify Operators for any judgment entered against it in plaintiff's favor. Operators also asserted a claim for attorneys' fees pursuant to the Louisiana Insurance Code for any failure of West of England to provide such defense and indemnity.[8] On that same date, West of England notified Operators that it declined coverage to Operators with respect to its cross-claim for defense and indemnity.[9]

II. *West of England's Removal*

West of England provides protection and indemnity insurance to certain named assureds,

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[6]*See id.*

[7]Rec. Doc. No. 1, plaintiff's third supplemental and amended seaman's complaint.

[8]Rec. Doc. No. 1, Operators' answer to third supplemental and amended seaman's complaint and cross-claim, ¶ II.

[9]Rec. Doc. No. 7, Ex. 1, notice of declination of coverage dated February 25, 2004.

including Ryan Walsh, which covers various vessels, including the D/B FRANK L. The terms and conditions of the West of England policy are set forth in the Class I Rules of the Association and the Certificate of Entry (collectively, the "policy").[10] Pursuant to Rule 62 of the Class I Rules:

> If any difference or dispute shall arise between a Member, former Member or Co-Assured or any other person claiming under these Rules . . . or arising out of any contract between the Member, former Member or Co-Assured and the Association or as to the rights or obligations of the Association. . . or in connection therewith or as to any other matter whatsoever, such difference or dispute shall be referred to the Arbitration in London of a sole legal Arbitrator.[11]

Based upon this provision, West of England removed this action alleging Operators' cross-claim fell within the arbitration clause and, therefore, this action was removable pursuant to the Convention and the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-8, to the extent the FAA is made applicable by the Convention. In its notice of removal, West of England asserts that the insurance agreement, upon which plaintiff's direct claim against it and Operators' cross-claim is based, is governed by the Convention, that this Court has federal question jurisdiction based upon 9 U.S.C. § 203 and 28 U.S.C. § 1331, and that removal of this case was proper pursuant to 9 U.S.C. § 205. Additionally, West of England asserts that plaintiff's third supplemental and amended complaint and Operators' cross-claim set forth "separate and independent" federal question claims permitting removal of the entire case pursuant to 28 U.S.C. § 1441(c).[12]

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[10]Rec. Doc. No. 1, Ex. A, 1994 Class I Rules ("Rules"); Ex. B, certificate of entry, No. 00-O/7587L-1-20/02/94, issued October 6, 2003.

[11]Rules, rule 62.

[12]T.T.C., a named defendant, has not joined in the removal of this action. However, "if one defendant's removal petition is premised on removable claims 'separate and independent' from the claims brought against the other defendants, consent of the other defendants is not required." *Henry v. Indep. Am. Sav. Ass'n*, 857 F.2d 995, 999 (5th Cir. 1988).

LAW AND ANALYSIS

A party may remove an action from state court to federal court if the action is one over which the federal court possesses subject matter jurisdiction. *Manguno v. Prudential Property and Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002) (citation omitted). The removing party bears the burden of showing that federal jurisdiction exists and that removal was proper. *Id.* (citations omitted). In order to determine whether jurisdiction exists, a court will consider the claims in the state court pleadings as they existed at the time of removal. *See id.*; *Cavallini v. State Farm Mut. Auto Ins. Co.*, 44 F.3d 256, 264 (5th Cir. 1995). Any ambiguities are construed against removal because removal statutes should be strictly construed in favor of remand. *See id.*; *Acuna v. Brown & Root, Inc.*, 200 F.3d 335, 339 (5th Cir. 2000).

I. *The Convention*

In *McDermott Intern., Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199, 1207 -1208 (5th Cir. 1991), the Fifth Circuit set forth the background of the Convention:

> In 1970, Congress ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards [] to secure for United States citizens predictable enforcement by foreign governments of certain arbitral contracts and awards made in this and other signatory nations. . . . To gain rights under the Convention, though, Congress had to guarantee enforcement of arbitral contracts and awards made pursuant to the Convention in United States courts. . . . So Congress promulgated the Convention Act in 1970 to establish procedures for our courts to implement the Convention.

Id. (citations omitted). In enacting the removal provision of the Convention, 9 U.S.C. § 205, Congress sought unity in the application of the Convention "by channeling Convention Act cases into federal courts." *Id.* at 1213.

The removal provision of the Convention, 9 U.S.C. § 205, provides in pertinent part:

> Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal.

9 U.S.C. § 202 defines an "agreement or award falling under the Convention." That section provides in pertinent part:

> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention.[13]

9 U.S.C. § 203 provides that, "[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States" and it vests the federal district courts with original jurisdiction over such action or proceeding regardless of the amount in controversy. *Id.* Therefore, such an action or proceeding presents a federal question within the jurisdictional grant of 28 U.S.C. § 1331.[14] *See Sembawang Shipyard, Ltd. v. Charger, Inc.*, 955 F.2d

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[13] 9 U.S.C. § 2 provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

[14] 28 U.S.C. § 1331 provides that, "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

983, 987 (5th Cir. 1992)(noting that 9 U.S.C. § 203 confers federal question jurisdiction); *Roser, III v. Belle of New Orleans, L.L.C.*, 2003 WL 22174282, *3 (E.D.La. September 12, 2003); *see also Acme Brick Co. v. Agrupacion Exportadora De Maquinaria Ceramica*, 855 F. Supp. 163, 165 n.2 (N.D.Tex. 1994)(noting that a cross-claim for contractual indemnity pursuant to a contract containing an arbitration agreement falling under the Convention constitutes a federal question within the meaning of 28 U.S.C. § 1331).

II. *Operators' Cross-claim for Defense and Indemnity "Relates to an Arbitration Agreement Falling Under the Convention"*

The parties dispute whether either Operators' cross-claim or plaintiff's direct action against West of England "relates to" an arbitration agreement "falling under the Convention." In *Beiser v. Weyler*, 284 F.3d 665 (5th Cir. 2002), the Fifth Circuit explained the standard for analyzing whether a claim "relates to" an agreement falling under the Convention such that it may be removed pursuant to § 205:

> [W]henever an arbitration agreement falling under the Convention could *conceivably* affect the outcome of the plaintiff's case, the agreement "relates to" the plaintiff's suit. Thus, the district court will have jurisdiction under § 205 over just about any suit in which a defendant contends that an arbitration clause falling under the Convention provides a defense. As long as the defendant's assertion is not completely absurd or impossible, it is at least conceivable that the arbitration clause will impact the disposition of the case. That is all that is required to meet the low bar of "relates to."

Id. at 669.[15] The *Beiser* court clarified that for purposes of a federal court's jurisdictional analysis, the question of whether a particular arbitration provision may ultimately be enforced or the question

[15]Section 205, unlike other removal provisions, explicitly abrogates the well-pleaded complaint rule in the context of cases falling under the Convention and permits a defense based upon an arbitration clause to serve as a ground for removal. *Beiser*, 284 F.3d at 671; *Roser*, 2003 WL 22174282 at *4.

of whether a particular party may be compelled to arbitrate does not control the jurisdictional analysis because it "has the disadvantage of frontloading a merits inquiry into the district court's examination of its jurisdiction." *Id.* at 670. The Fifth Circuit emphasized that "[c]onceptually, whether a federal court has jurisdiction to decide an issue is a distinct question from how to decide that issue correctly." *Id.* That is because jurisdiction is simply "'the power to decide the case either way.'" *Id.* (quoting *the Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25, 33 S. Ct. 410, 57 L. Ed. 716 (1913)).[16] Addressing the question of how federal courts should assess their jurisdiction, the Fifth Circuit stated that the language of § 205 "strongly suggests that Congress intended that district courts continue to be able to assess their jurisdiction from the pleadings alone." *Id.* at 671. The Fifth Circuit concluded:

> The definition of "relates to" we have adopted allows the district court to determine its jurisdiction from the "petition for removal" itself, and keeps the jurisdictional and merits inquiries separate. . . . As a result, absent the rare frivolous petition for removal, as long as the defendant claims in its petition that an arbitration clause provides a defense, the district court will have jurisdiction to decide the merits of that claim. This approach honors the statute's command that we treat defenses based on arbitration clauses under the Convention in the same way that we treat removal generally. It allows the district court to determine its jurisdiction from the petition for removal, without taking evidence and without a merits-like inquiry.

Id. at 671-72.[17]

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[16]The Fifth Circuit's reasoning is consistent with Supreme Court precedent stating that, "the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i e*, the courts' statutory or constitutional *power* to adjudicate the case." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89, 118 S.Ct. 1003, 1010, 140 L. Ed.2d 210 (1998). Ordinarily, jurisdiction is not defeated by the possibility that the allegations in a pleading fail to state a claim upon which a party could actually prevail. *See id.*

[17]T.T.C. relies on *Marathon Oil Co. v. Ruhrgas, A.G.*, 115 F.3d 315 (5th Cir. 1997) and *In re Conoco EDC Litig.*, 123 F. Supp.2d 340 (W.D.La.), to argue that none of the claims present in this action relate to an arbitration agreement falling under the Convention. T.T.C.'s reliance on these cases is misplaced. The *Beiser* court explicitly

In general, the Convention applies to an arbitration agreement if: (1) there is a written agreement to arbitrate the dispute; (2) the agreement provides for arbitration in the territory of a signatory to the convention; (3) the agreement arises out of a commercial legal relationship; and (4) the agreement is not solely between citizens of the United States. *See In re Sedco, Inc.*, 767 F.2d 1140, 1144-45 (5th Cir. 1985); *Roser*, 2003 WL 22174282 at *3; *Acosta v. Master Maintenance & Construction, Inc.*, 52 F. Supp.2d 699, 704 (M.D.La. 1999); *see also* 9 U.S.C. § 202.

The second, third, and fourth requirements are clearly met in this case. The West of England policy requires arbitration in the United Kingdom which is a signatory to the Convention. *See* Convention, Listing of "Contracting States"; *see Roser*, 2003 WL 22174282, at *4. The West of England policy arises out of a commercial legal relationship. *Roser*, 2003 WL 22174282, at *4 (a marine protection and indemnity insurance agreement is "part of a commercial legal relationship").[18] Additionally, West of England is not a citizen of the United States and, therefore, the insurance contract containing the arbitration clause is not solely between citizens of the United States.

With respect to the first requirement, movants contend that the Convention cannot apply to Operators' cross-claim because there is no "agreement in writing" in which Operators agreed to submit its claim for coverage to arbitration. Movants argue that neither the plaintiffs nor Operators

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rejected the *Marathon Oil* analytical framework for determining removal jurisdiction pursuant to 9 U.S.C. § 205. *Beiser*, 284 F.3d at 669. Additionally, because the district court's decision in *In re Conoco* preceded *Beiser*'s explicit iteration of the proper jurisdictional analysis, the *In re Conoco* case is not persuasive.

[18]T.T.C. questions whether Operators' cross-claim is predicated upon a "commercial relationship" based upon its argument, outlined below, that Operators' cross-claim and the alleged insurance coverage provided by the West of England policy arise not from any relationship between Operators and West of England, but from the state court's judicial determination that Operators and Ryan Walsh were engaged in a joint venture. The Court rejects this argument. T.T.C. has provided no support for the proposition that the relationship between a marine protection and indemnity insurer and an alleged corporate insured is not "commercial." In any event, even if there was doubt as to whether the West of England policy arose out of a commercial legal relationship, any doubt would have to be resolved in favor of finding that the Convention applied. *See Francisco v. Stolt Achievement MT*, 293 F.3d 270, 274-75 (5th Cir. 2002).

signed any agreement to arbitrate nor did they agree to arbitration and, therefore, the Convention does not apply.

The Convention applies if there is "an agreement in writing" in which the parties undertake to submit their differences to arbitration. Convention, art. II § 1; *Sphere Drake Ins. Co. v. Marine Towing, Inc.*, 16 F.3d 666, 669 (5th Cir. 1994). As a general rule, "arbitration is a matter of contract and a party cannot be required to sumit to arbitration any dispute which he has not agreed so to submit." *AT & T Technologies, Inc. v. Communications worker of America*, 475 U.S. 643, 647, 106 S. Ct. 1415, 1418, 89 L. Ed.2d 648 (1986); *see also Beiser*, 284 F.3d at 667 n.4 (citing *Equal Employment Opportunity Commission v. Waffle House*, 534 U.S. 279, 122 S. Ct. 754, 151 L. Ed.2d 755 (2002)). However, in a strikingly similar case, the Sixth Circuit held that, "'[w]hen a plaintiff bases its right to sue on the contract itself, not upon a statute or some other basis outside the contract, the provision requiring arbitration as a condition precedent to recovery must be observed.'" *Aasma v. Am. Steamship Owners Mutual Protection and Indemnity Assoc.*, 95 F.3d 400, 405 (6th Cir. 1996)(quoting *Cheshire Place Associates v. West of England Ship Owners Mut. Ins. Assoc.*, 815 F. Supp. 593, 597 (E.D.N.Y. 1993)). That rule applies whether a party "acquired rights under the contract as agent, third-party beneficiary, or assignee." *Cheshire Place Associates*, 815 F. Supp. at 597.

Contrary to T.T.C.'s argument, the Fifth Circuit has explicitly held that an arbitral clause in a foreign insurer's insurance contract does not have to be signed by the parties to constitute an

"agreement in writing" pursuant to the Convention. *Sphere Drake*, 16 F.3d at 669.[19] Furthermore, based upon the reasoning in *Aasma*, this Court cannot conclude that West of England does not have a viable defense to Operators' cross-claim for defense and indemnity based on the arbitration clause even though Operators was not a party to the West of England insurance contract. As the Sixth Circuit noted, "[a]lthough plaintiffs were not parties to the contract between [the named insured] and West [of England], if they are going to try to enforce it, they are subject to its terms and to the international law governing its terms." *Aasma*, 95 F.3d at 405. At a minimum, this Court cannot conclude that West of England's defense based upon the arbitration clause is frivolous.

Movants contend that Operators' cross-claim does not seek coverage pursuant to the West of England insurance policy covering Ryan Walsh. Instead, they argue that because the state courts determined that Ryan Walsh and Operators were engaged in a joint venture, that finding alone establishes Operators' right to be indemnified by West of England for any judgment entered in favor of plaintiff. They contend not only that Operators cannot be compelled to arbitrate, but also that coverage pursuant to the West of England policy has already been "judicially" established. Therefore, they contend that any coverage issues are moot because the alleged determination of insurance coverage in state court is now the binding law of this case. Based upon this argument, movants contend that the arbitration clause could not conceivably affect the claims in this case because the issue of coverage pursuant to the West of England policy is settled. Movants' contention

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[19]On this point, T.T.C. also cites *Bergeron v. TransOcean Terminal Operations, Inc*, 1999 WL 397963 (E.D.La. June 11, 1999), in which the court held that the plaintiffs' claims could not be removed pursuant to § 205 because the injured plaintiff was not a party to the agreement containing the arbitration clause and such clause was found in an agreement between co-defendants. *Id.* at *1. *Bergeron* is distinguishable. In that case, neither co-defendant brought any type of cross-claim seeking any benefits pursuant to the contract containing the arbitration clause. In this case, unlike *Bergeron*, Operators has, in its cross-claim, specifically invoked the West of England policy as a basis for its defense and indemnity claim. It is that claim that brings this case within the Convention.

is meritless.

Neither the state trial court nor the Louisiana Fifth Circuit Court of Appeal explicitly determined that Ryan Walsh and Operators were joint venturers. Moreover, even assuming the state courts' rulings could be broadly read to support such a finding, Operators joint venturer status would not alone entitle Operators to the benefits of the West of England policy. The West of England policy provides protection and indemnity insurance to, *inter alia*, Ryan Walsh "and/or all subsidiaries and/or affiliated and/or inter-related companies as now or as may hereafter be constituted."[20] It is without question that no Louisiana court has considered whether Operators, even if it is a joint venturer with Ryan Walsh, is a subsidiary, affiliated, or inter-related company within the meaning of the West of England policy. The state court rulings do not foreclose West of England's arbitration defense.

More importantly, movants' contention is belied by the fact that Operators' cross-claim, attached to West of England's notice of removal, alleges that "defendant, [West of England] had in full force and effect *a policy of insurance providing coverage* to . . . defendant/cross-claimant Operators, International, Inc."[21] Furthermore, Operators' cross-claim states that West of England "is obligated *under its policy* to provide a defense to [Operators] and is furthermore obligated to indemnify [Operators] for any judgment entered against [Operators] in favor of plaintiff . . . ."[22] Given these allegations and the broad language in the arbitration clause requiring arbitration "[i]f any

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[20]Rec. Doc. No. 15, West of England's opposition memorandum, Ex. A., at 4.

[21]Rec. Doc. No. 1, Operators' answer to third supplemental and amended seaman's complaint and cross-claim, ¶ II (emphasis supplied).

[22]*Id.*, ¶ III (emphasis supplied).

difference or dispute shall arise . . . as to the rights and obligations of the Association [West of England]," the subject matter of Operators' cross-claim clearly relates to the insurance contract containing the arbitration provision.[23]

Movants also contend that the arbitration agreement could not conceivably affect the claims in this case because plaintiff's direct action against West of England cannot be stayed. Therefore, they argue that in any event the coverage issues present in Operators' cross-claim will ultimately be decided by this Court and any arbitration between Operators and West of England would be meaningless. The Court is unconvinced. In *In re Talbott Big Foot, Inc.*, 887 F.2d 611 (5th Cir. 1989) and *Zimmerman v. Int'l Cos. & Consulting, Inc.*, 107 F.3d 344 (5th Cir. 1997), the Fifth Circuit held that the mandatory stay provision of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 3, did not apply to a personal injury claimant's direct action against an insurer brought pursuant to the Louisiana Direct Action statute, La. Rev. Stat. § 22:655(B). *Zimmerman*, 107 F.3d at 346; *Big Foot*, 887 F.2d at 614.[24] However, the *Big Foot* court specifically held that even though the FAA's

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[23]Movants also raise a number of arguments not relevant to this Court's jurisdictional analysis. Plaintiff devotes a substantial part of his brief to the issue of whether he can be compelled to arbitrate his direct action against West of England. However, there is no motion to compel arbitration before the Court . As the *Beiser* court made clear, the jurisdictional analysis does not include the question of whether an arbitration agreement may ultimately be enforced. *See Beiser*, 284 F.3d at 673-74 (explicitly disapproving conflating the jurisdictional analysis with the merits of whether an arbitration agreement can be enforced).

Likewise, T.T.C. raises a number of arguments not relevant to whether this Court has jurisdiction over this case. For instance, T.T.C. argues that pursuant to 9 U.S.C. § 201, Convention, Article II, § 3, the party seeking arbitration must demonstrate that the arbitration agreement is capable of being performed. Additionally, T.T.C. argues that pursuant to 9 U.S.C. § 201, Convention, Article IV, § 1(b), the party seeking recognition and enforcement of an arbitration agreement must submit to the Court a certified copy of the agreement. Additionally, T.T.C. argues that the arbitration provision is null and void pursuant to Louisiana law. All of these arguments bear on the ultimate merits of whether the arbitration agreement can be enforced. As such, these arguments need not be resolved to determine whether this Court has jurisdiction.

[24]In its pleadings, plaintiff has not specifically invoked the Louisiana Direct Action statute, La. Rev. Stat. § 22:655(B). However, the parties do not dispute that plaintiff's direct action against West of England is predicated on that statute.

mandatory stay provision did not require such a personal injury claimant to await the outcome of the arbitration of a coverage dispute between an insured and an insurer before filing a direct action, the insurer may nevertheless be entitled to a discretionary stay. *Big Foot*, 887 F.2d at 614; *see also Moses H. Cone mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 20 n.23, 103 S. Ct. 927, 939 n.23, 74 L. Ed.2d 765 (1983)(noting that the decision to stay proceedings with regard to nonparties to the arbitration "is one left to the district court . . . as a matter of discretion" rather than being required by the FAA); *cf. Adams v. Georgia Gulf Corp.*, 237 F.3d 538, 541 (5th Cir. 2001)(noting that if the issues to be litigated by the non-party to the arbitration agreement are identical to the issues to be arbitrated, such circumstances can constitute "exceptional circumstances" warranting the application of a stay pursuant to the FAA). Based upon those cases, this Court cannot conclude, at this stage of the litigation, that a stay of the plaintiff's direct action is necessarily foreclosed if ultimately the issues raised by Operators cross-claim are arbitrable. Moreover, even absent a stay, it is conceivable that "whatever liability the insurer and insured will be found to have to plaintiffs at trial will not render the arbitration duplicative as it will not resolve the coverage dispute between [Operators and West of England]." *Georgia Gulf*, 237 F.3d at 541 (citing *Zimmerman*, 107 F.3d at 345).

Movants acknowledge that both Operators and its insurer are defunct. Given this fact, arbitration could conceivably impact plaintiff's claims in this case. Unquestionably, the arbitration provision could conceivably affect Operators' cross-claim for coverage. Movants contend that West of England's exposure for plaintiff's injuries could not conceivably be affected by any arbitration because West of England insures Ryan Walsh and the parties have alleged that Ryan Walsh and Operators are jointly and solidarily liable to plaintiff. The Court rejects this argument because it

ignores the possibility that *only* Operators is ultimately found to be liable to plaintiff. In such a case, the availability of insurance coverage pursuant to the West of England policy would necessarily impact plaintiff's ability to recover any damages.

In sum, Operators' cross-claim for defense and indemnity involves subject matter that "relates to" an arbitration agreement falling under the Convention within the meaning of 9 U.S.C. § 205. *See Acme Brick Co.*, 855 F.Supp. at 166 (holding that a cross-claim for indemnity against a foreign insurer based upon an indemnity agreement relates to an arbitration clause in the indemnity agreement for purposes of removal pursuant to § 205).[25]

III. *Removal of the Entire Case Pursuant to 28 U.S.C. § 1441(c)*

West of England contends that Operators' cross-claim is a "separate and independent" federal question claim, the existence of which permits the removal of the entire case even if plaintiff's claims are not independently removable. For the following reasons, the Court agrees.

28 U.S.C. § 1441 (c) provides:

> Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which

[25]T.T.C. also asserts that West of England cannot remove this action because, pursuant to § 205, only "the defendant or the defendants" may remove an action or proceeding that relates to an arbitration agreement falling under the Convention. T.T.C. argues that because Operators' cross-claim is a claim against West of England for defense and indemnity, West of England should be considered a third-party defendant. In *Carnigal v. Karteria Shipping, Ltd.*, 108 F. Supp.2d 651, 654-55 (E.D.La. 2000), the court held that a third-party defendant could not remove a case pursuant to § 205 when the third-party claim did not constitute a "separate and independent" claim within the meaning of 28 U.S.C. § 1441(c). *Id. Carnigal* is inapposite. West of England is a direct defendant by virtue of plaintiff's direct actions against it. Moreover, as explained below, Operators' cross-claim against West of England is a "separate and independent" claim within § 1441(c), and, therefore, even if West of England was considered a third-party defendant, West of England properly removed this action. *See id* at 655 (noting that Fifth Circuit law permits a third-party defendant to remove an entire case pursuant to § 1441(c) when the third-party claim is based upon separate contractual obligation found in an independent agreement).

State law predominates.

As noted above, an action or proceeding falling under the convention is deemed to arise under the laws and treaties of the United States. 9 U.S.C. § 203. By virtue of § 203, such a proceeding is also within the original jurisdiction conferred by § 1331. *Roser,* 2003 WL 22174282, at *3. Therefore, if Operators' cross-claim were sued upon alone, original federal jurisdiction over that claim would exist.

A. *Removal of Plaintiff's Jones Act Claim*

Plaintiff's first argument is that because his Jones Act claim was brought in state court pursuant to the "savings to suitors" clause, 28 U.S.C. § 1333, that claim is not removable pursuant to § 1441(c) because such removal is prohibited by 28 U.S.C. § 1445(a).[26] It is settled that as a general rule, Jones Act cases are not removable. *E.g.*, *Fields v. Pool Offshore, Inc.*, 182 F.3d 353, 356 (5th Cir. 1999); *Burchett v. Cargill,* 48 F.3d 173, 175 (5th Cir.1995). "The Jones Act, 46 U.S.C. App. § 688, incorporates general provisions of the Federal Employers' Liability Act, and the latter expressly bars removal of suits thereunder." *Id.*; *see* 28 U.S.C. § 1445(a).

Notwithstanding the general rule, West of England argues that pursuant to § 1441(c), Operators' cross-claim provides a basis upon which to remove plaintiff's otherwise non-removable Jones Act claim. This precise question was addressed in *Roser*, 2003 WL 22174282, at *2. The *Roser* court concluded that a plaintiff's non-removable Jones Act claim could be removed when it

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[26]28 U.S.C. § 1333(1) provides that "[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

28 U.S.C. § 1445(a) provides, "[a] civil action in any State court . . .arising under [the Federal Employer's Liability Act] . . . may not be removed . . . ."

was joined with a "separate and independent" claim within the meaning of § 1441(c). *Id.*, at *3. The court based its decision on four reasons. First, the court noted that the Fifth Circuit has held that the statutory bar to removal in § 1445(a) could be waived because it is not strictly jurisdictional. *See id.* at *2 (citing *Lirette v. N.L. Sperry*, 820 F.2d 116, 117-18 (5th Cir. 1987)). Second, while noting that the question has not been definitively resolved in this circuit, the court cited authorities suggesting that the existence of a separate and independent federal question claim within § 1441(c) may permit the removal of claims not independently removable because of § 1445(a). *Id.*[27] Third, the court noted that the statutory language of § 1441(c) explicitly permits removal of "otherwise non-removable claims" when joined with a "separate and independent" federal question claim. *See id.* at *3. Fourth, the court reasoned that the language of § 1441(c), unlike the language of § 1441(a), did not contain any limiting language suggesting that removal pursuant to § 1441(c) was subject to removal restrictions contained in other statutes. *See id.*[28] The Court finds the *Roser* court's analysis and reasoning persuasive and concludes, as in *Roser*, that "if the prerequisites to § 1441(c)'s application are met, § 1445(a) [does] not bar removal of this action." *Id.*

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[27]The court cited the following authorities: *Albarado v. Southern Pacific Transp. Co.*, 199 F.3d 762, 765 (5th Cir.1999) (stating, in dicta, "a FELA claim ... may not be removed unless it is joined with separate and independent claims over which the federal courts exercise exclusive jurisdiction"); *Hopkins v. Dolphin Titan Int'l, Inc.*, 976 F.2d 924, 926 n. 14 (5th Cir.1992) (pretermitting consideration of the potential conflict between § 1445(a) and § 1441(c) because the court was without appellate jurisdiction); *In re Dutile,* 935 F.2d 61, 62 (5th Cir.1991) (concluding the court "need not resolve the potential conflict between § 1445(a) and § 1441(c) because of lack of jurisdiction"); *Addison v. Gulf Coast Contracting Servs.*, 744 F.2d 494, 498-501 (5th Cir.1984) (summary calendar) (suggesting that some claims joined with a Jones Act claim may be sufficiently "separate and independent" to warrant removal under § 1441(c)); *Pouchie v. Black Hawk Shipping Enters.*, 1995 WL 520044, *1 (E.D.La.) (a "Jones Act claim might be removable when joined with a separate and independent claim" under § 1441(c)); *Iwag v. Geisel Compania Maritima, S.A.*, 882 F.Supp. 597, 604-05 (S.D.Tex.1995) (joinder of nonremovable claim, such as a Jones Act claim, with a removable federal claim subjects entire action to removal under § 1441(c)). *Roser*, 2003 WL 22174282, at *2.

[28]The *Roser* court noted that § 1441(a), which permits removal generally, contains the phrase, "[e]xcept as otherwise expressly provided by Act of Congress." *See* 2003 WL 22174282, at *3.

B. *Separate and Independent*

The Fifth Circuit has explained that "a federal claim is separate and independent if it involves an obligation distinct from the nonremovable claims in the case." *State of Texas v. Walker*, 142 F.3d 813, 817 (5th Cir. 1998). In the context of third party-claims, the Fifth Circuit has held that "where the third-party complaint seeks indemnity based on a separate obligation owed to the defendant (such as a contractual indemnity obligation), there is a separate and independent claim." *Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061, 1066 (5th Cir. 1992); *In re Wilson*, 886 F.2d 93, 96 (5th Cir. 1989); *Carl Heck Engineers v. LaFourche Parish Police Jury*, 622 F.2d 133, 136 (5th Cir. 1980). In contrast, the Fifth Circuit has held that a third-party claim is *not* separate and independent when it is premised on an allegation that the third-party defendant's conduct was a contributing cause of plaintiff's injuries. *See In re Wilson*, 886 F.2d at 96 (citations omitted); *see also Walker*, 142 F.3d at 817 ("[A] case involving the violation of a single primary right or wherein a party seeks redress for one legal wrong cannot contain separate and independent claims, despite multiple theories of liability against multiple defendants.")(citing *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 13-15, 71 S. Ct. 534, 540, 95 L. Ed. 702 (1951)); *Roser*, 22174282, at *5.[29] In addition, the Fifth Circuit has held that "a claim is not independent if it 'involve[s] substantially the same facts.'" *Eastus v. Blue Bell Creameries, L.P.*, 97 F.3d 100, 104 (5th Cir. 1996) (quoting *Addison v. Gulf Coast Contracting Servs.*, 744 F.2d 494, 500 (5th Cir.1984))(internal quotation and citation omitted);

[29]Although the bulk of Fifth Circuit cases pertaining to removal based upon a "separate and independent" claim involve third-party claims, the Fifth Circuit has not restricted the application of § 1441(c) to third-party claims. *See Walker*, 142 F.3d at 816-818 (holding that impleaded counter-defendants could remove a case based upon a "separate and independent" counterclaim filed against them by the defendant). In *Acme Brick Co.*, the district court stated that based upon the rationale of Fifth Circuit jurisprudence, "there is no reason to distinguish between a third-party claim and a cross-claim" and it held that although the cross-claimant's "cross-claim for indemnity is related to [the plaintiff's] claims, it constitutes a separate and independent claim under applicable Fifth Circuit authority." 855 F.Supp. at 165.

see Walker, 142 F.2d at 817 (analyzing the proof required to sustain claims in order to assess whether claims are separate and independent).

West of England argues that Operators' cross-claim for defense and indemnity pursuant to the West of England policy is a "separate and independent" claim within the meaning of § 1441(c) and Fifth Circuit authority. The Court agrees. Operators' cross-claim for defense and indemnity is premised on coverage pursuant to the West of England insurance policy and the obligations existing thereunder. In contrast, plaintiff's claims against the co-defendants in this case, Ryan Walsh and Operators, are based upon their negligence and/or the unseaworthy condition of the D/B FRANK L which allegedly caused plaintiff's injuries. Neither plaintiff nor any of the co-defendants allege that West of England's conduct caused plaintiff's injuries. Therefore, contrary to movants' contentions, this case involves more than the violation of a "single primary right" or "redress for one legal wrong." *Finn*, 341 U.S. at 13, 71 S. Ct. at 539-40. Instead, whereas plaintiff's personal injury claims are premised on the violation of a primary right of the plaintiff, "namely, the right of bodily safety," *id.*, Operators' cross-claim seeks redress for a second and distinct legal wrong allegedly done to Operators, namely West of England's failure to provide Operators with defense and indemnity pursuant to the insurance policy.

Movants also argue that all of the claims in this case arise because of the alleged injuries suffered by plaintiff because of Operators' and Ryan Walsh's alleged negligence and, therefore, Operators' cross-claim cannot be "separate and independent" from plaintiff's claims. Addressing a similar point, the Fifth Circuit explained:

> Here, the claim for indemnity by Lafourche against Maryland presents a real controversy, not unrelated to the main claim, but sufficiently

> independent of it that a judgment in an action between those two parties alone can be properly rendered. Such actions can be and often are brought in a separate suit from that filed by the original plaintiff in the main claim. If filed in the original suit, therefore, a claim essentially seeking indemnity should be considered separate and independent.

Carl Heck, 622 F.2d at 136.[30] In the present case, Operators' cross-claim, inasmuch as it seeks defense and indemnity with respect to its potential liability to plaintiff, is not wholly unrelated to plaintiff's claims. However, it is sufficiently independent from plaintiff's Jones Act and general maritime negligence claims to permit the removal of the entire action pursuant to § 1441(c) and Fifth Circuit authority holding that contractual indemnity claims are "separate and independent."[31]

Contrary to movants' contention, plaintiff's claims against Ryan Walsh and Operators do not involve substantially the same facts as Operators' cross-claim against West of England. If plaintiff is to prevail on his claim pursuant to the Jones Act, plaintiff will initially have to show that "his

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[30]Addressing a similar point, the *Roser* court reasoned

> By their very nature, third party indemnity claims necessarily are dependent on liability being established on the underlying claim. Although this fact might seem to suggest that third party indemnity claims never can be "separate and independent" for purposes of § 1441(c), *see, e.g., Moore v. United Servs. Auto Ass'n.*, 819 F.2d 101, 104 (5th Cir.1987) (bad faith claim was not "independent" because it was contingent on establishing liability under the insurance policy), the Fifth Circuit has confirmed the contrary to be true.

Roser, 2003 WL 22174282, at *5; *see also Walker*, 142 F.3d at 817 (reasoning that plaintiff's claim against the defendant seeking redress for alleged failure to remit professional fees to plaintiff implicates a distinct legal wrong from defendant's counterclaim against impleaded counter-defendants for alleged wrongful termination notwithstanding that the alleged wrongs had a factual connection). Based upon the reasoning in *Heck* and *Roser*, T.T.C.'s related argument that a cross-claim asserted pursuant to Fed. R. Civ. P. 13(g) that arises out of the same transaction or occurrence as the plaintiff's claim cannot be "separate and independent" for purposes of § 1441(c) is unpersuasive.

[31]Movants reliance on *Bender v. Alfa Ins. Corp* , 754 F.Supp. 95, 97 (S.D.Miss. 1990) and *Anderson v. Transamerica Specialty Ins Co.*, 804 F.Supp. 903, 905 (S.D.Tex. 1992), is misplaced. In *Bender*, the court held that a third-party claim did not permit removal of the entire case pursuant to § 1441(c) because "[t]he third-party complaint in the case at bar does not aver a contractual basis for indemnity. Rather, it alleges only that the third-party defendant's acts, and not the acts of the defendant/third-party plaintiff, are the true cause of the plaintiffs' injuries." 754 F. Supp. at 97. Likewise, the *Anderson* court held that a third-party claim was not separate and independent because, "[i]n short, Defendants' third-party claim is that [the third-party defendant's] actions caused Plaintiff's injuries." 804 F. Supp. at 905.

employer's negligence is the cause, in whole or in party, of his injury." *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 335 (5th Cir. 1997). To prevail on his unseaworthiness claim pursuant to the general maritime law, he will have to prove, *inter alia*, "that the owner has failed to provide a vessel, including her equipment and crew, which is reasonably fit and safe for the purposes for which it is to be used" and prove a "causal connection between his injury and the breach of duty that rendered the vessel unseaworthy." *Jackson v. OMI Corp.*, 245 F.3d 525, 528-29 (5th Cir. 2001)(citations omitted). In contrast, for Operators to prevail on its cross-claim for defense and indemnity against West of England, Operators will have to show that it comes within the terms of the policy, *i.e.*, that it is a subsidiary, affiliated, or interrelated company of Ryan Walsh, a named insured pursuant to the West of England policy. Plaintiff's and Operators' claims "would not require proof of substantially the same facts," *Walker*, 142 F.3d at 818, and consequently, Operators' cross-claim is "separate and independent" from plaintiff's personal injury claims. *See id.*

Movants also suggest that the presence of plaintiff's direct actions against West of England, brought pursuant to the Louisiana Direct Action statute, La. Rev. Stat. § 22:655(B), should alter the result in this case. Movants suggest that plaintiff's direct action and Operators' cross-claim involve the same issues and, therefore, they cannot be separate and independent.[32] The Court disagrees. As noted by the Louisiana Supreme Court, "[t]he direct action statute does not create an independent cause of action against the insurer, it merely grants a procedural right of action against the insurer where the plaintiff has a substantive cause of action against the insured." *Descant v. Administrators*

[32]The Court emphasizes that the question of whether plaintiff's direct action against West of England is separate and independent from Operators' cross-claim is a different question from whether plaintiff's direct action is separate and independent from plaintiff's claims against Ryan Walsh and Operators. Because the Court concludes that Operators' cross-claim is separate and independent, thereby permitting the removal of the entire case, the Court does not reach the question of whether plaintiff's direct action is separate and independent from his personal injury claims.

of the Tulane Educ. Fund, 639 So.2d 246, 249 (La. 1994). The basis of a direct action is the legal liability of the insured. *See id.* Therefore, notwithstanding plaintiff's direct action against West, the proper focus for this Court's analysis remains whether the federal claim upon which removal is predicated, here Operators' cross-claim for insurance coverage, is "separate and independent" from plaintiff's personal injury claims against the original defendants, *i.e.*, Ryan Walsh and Operators. *See Walker*, 142 F.3d at 817; *Roser*, 2003 WL 22174282, at * 5.

For all of the reasons stated above, the Court concludes that Operators' cross-claim is sufficiently independent of plaintiff's personal injury claims to constitute a "separate and independent" federal claim which permits the removal of the entire case pursuant to § 1441(c).

C. *Timeliness of Removal*

Movants contend that West of England's removal was untimely. Pursuant to § 205, an action or proceeding that relates to an arbitration clause falling under the Convention may be removed by the defendant or defendants "at any time before the trial thereof . . . ." Discussing § 205, the Fifth Circuit has distinguished the time limitation in § 205 from other removal provisions:

> Under section 1441(d), a defendant may remove "at any time for cause shown," and under section 205, a defendant may remove "at any time before the trial." Other cases may be removed only within 30 days after the defendant receives a pleading. *See* 28 U.S.C. § 1446(b).

McDermott Intern., 944 F.2d at 1212.

Movants contend, without citation to any legal authority, that West of England's removal is untimely because there was extensive litigation in state court, including the litigation of the exceptions of prescription and the partial summary judgment motions, prior to removal. They

contend that, given the litigation involved in this case since 1994, this action has been "substantially" tried in state court.

In *Acosta*, the plaintiffs argued that the phrase, "at any time before trial" meant any time "before the resolution of any substantive issues of law or fact by the state court or even the argument of such issues." 52 F. Supp.2d at 705. The *Acosta* court rejected that argument holding that "'any time before trial', as used in 9 U.S.C. § 205, means that removal may occur at any time before an adjudication on the merits." *Id.* The court concluded that the removal was timely because there was "no ruling in the state court which has resulted in a final determination of the plaintiffs' claims." *Id.* Similarly, the Second Circuit has noted in dicta that a removal will be untimely pursuant to § 205 when the proceedings in state court "result[] in an adjudication of the entirety of the claim that the plaintiffs tendered for decision." *LaFarge Coppee v. Venezolana De Cementos, S.A.C.A., C.A.*, 31 F.3d 70, 72 (2d Cir. 1994).

The Court agrees with the *Acosta* court's formulation of the timing requirement in § 205. As noted by another court, "'[n]othing could be plainer than the language of 9 U.S.C. § 205.'" *Acme Brick Co.*, 855 F. Supp. at 166 (quoting *Dale Metals Corp. v. Kiwa Chem. Indus. Co., Ltd.*, 442 F. Supp. 78, 81 n.1 (S.D.N.Y. 1977)). Although certain legal issues have been resolved in state court, movants have not identified any "ruling in the state court which has resulted in a final determination of the plaintiffs' claims." *Acosta*, 52 F. Supp.2d at 705. Accordingly, West of England's removal was timely pursuant to § 205.

D. *Waiver of the Right to Remove*

T.T.C. argues that West of England has waived its right to remove this action pursuant to the

Convention by not invoking the arbitration clause with respect to its insurance coverage of Ryan Walsh. The Court rejects this argument. The Fifth Circuit has held that a waiver of a party's right to remove an action pursuant to the Convention requires an unambiguous, explicit, and express waiver. *McDermott Intern.*, 944 F.2d at 1209. T.T.C. does not point to any such waiver by West of England. T.T.C. has utterly failed to provide any legal support demonstrating how West of England's conduct with respect to Ryan Walsh, an undisputed insured pursuant to the policy, could constitute an express waiver of its right to remove this Convention Act case with respect to Operators' cross-claim. Accordingly, the Court finds that West of England has not waived its right to remove this action.

IV. *Remand of Plaintiff's Claims*

Citing *Acme Brick Co.*, 855 F. Supp. at 167, T.T.C. argues that should the Court find that Operators' cross-claim was properly removable, this Court should remand the remaining claims to state court. After asserting jurisdiction pursuant to the Convention and compelling arbitration with respect to the cross-claim involved in that case, the *Acme Brick Co.* court remanded the remaining state law claims pursuant to 28 U.S.C. § 1367(c)(3). *Id.* Section 1367(c)(3) permits a district court to remand claims over which it is exercising supplemental jurisdiction when the court "has dismissed all claims over which it has original jurisdiction." § 1367. T.T.C. urges the Court to follow the outcome in *Acme Brick Co.*

T.T.C.'s argument is unavailing because § 1367(c) is inapplicable in this case. This Court has original jurisdiction over plaintiff's Jones Act and general maritime claims, 28 U.S.C. § 1333, and it also has original jurisdiction over Operators' cross-claim against West of England. 9 U.S.C.

§ 203; 28 U.S.C. § 1331. None of those claims have been dismissed. Accordingly, *Acme Brick Co.* is inapposite.

Accordingly, for the above and foregoing reasons,

IT IS ORDERED that the motions to remand filed on behalf of plaintiff and T.T.C. are **DENIED.**

New Orleans, Louisiana, December 19, 2004.

LANCE M. AFRICK
UNITED STATES DISTRICT JUDGE