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DAILY BUSINESS REVIEW

NO. 1

Cruise line: Defendants misrepresented motors' reliability

AMOUNT: \$158,750,000.00

VENUE: Miami-Dade County

JUDGE: Alan S. Fine

CASE NAME: *NCL (Bahamas) Ltd. v. ABB Oy, ABB Inc. and ABB Ltd.*, No. 2020-000745-CA-01

DATE: October 20, 2022

PLAINTIFF ATTORNEY(S):

- Alex M. Gonzalez; Holland & Knight LLP for NCL (Bahamas) Ltd.
- Israel J. Encinosa; Holland & Knight LLP for NCL (Bahamas) Ltd.
- Cary Aronovitz; Holland & Knight LLP for NCL (Bahamas) Ltd.
- Kayla Leland Pragid; Holland & Knight LLP for NCL (Bahamas) Ltd.
- Vanessa Lopez; Holland & Knight LLP for NCL (Bahamas) Ltd.
- Anthony J. Sirven; Holland & Knight LLP for NCL (Bahamas) Ltd.

DEFENSE ATTORNEY(S):

- Eva M. Spahn; Greenberg Traurig, LLP; Miami, FL for ABB Oy, ABB Inc.
- David A. Coulson; Winston & Strawn LLP; Miami, FL for ABB Oy, ABB Inc.

FACTS: Starting in 2010, plaintiff NCL (Bahamas) Ltd, a cruise ship company that operates several premium vessels, was allegedly subjected to fraudulent misrepresentations and omissions by affiliated companies ABB Oy and ABB Inc. ABB produces podded propulsion systems called Azipods that are installed in various ships, including those owned by the plaintiff. There is at least one Azipod on a ship's starboard side, and another on the port side. The Azipods contain excitation machines, also called exciters. If an Azipod's exciter fails, then the Azipod cannot function, which affects propulsion and steering. In 2010 and 2015, exciter failures caused the Azipods on non-NCL ships to malfunction.

Then, on Dec. 11, 2016, the starboard Azipod's exciter on NCL's Norwegian Star also failed. The ship was outside Singapore and in the middle of a cruise at the time. ABB then told NCL that it could operate the ship using solely the port-side Azipod. However, this affected the speed and maneuverability of the ship, leading NCL to cancel or modify some cruises.

ABB ultimately installed an emergency exciter kit on the starboard side of the Star in mid-January 2017. On Jan. 24 of that year, the exciter within the Star's portside Azipod also failed. On Feb. 9, 2017, before the emergency exciter kit could be installed on the Star's portside, the emergency exciter kit in the Star's starboard Azipod failed. The Star then had no form of propulsion and was left stranded off the coast of Australia with thousands of cruise-goers and crew members on board. The ship ultimately had to be towed to Melbourne. On Nov. 6, 2017, another NCL ship, the Norwegian Gem, suffered an exciter-related failure to the starboard Azipod. A similar exciter failure occurred on the Norwegian Jade on Nov. 18, 2018, and on the Norwegian Pearl on July 1, 2019. These failures also caused the cancelations and/or modifications of scheduled cruises.

NCL alleged that ABB misrepresented and omitted key details about the reliability of exciters in Azipods. NCL sued ABB Oy and ABB Inc. for fraudulent affirmative misrepresentation, negligent affirmative misrepresentation, fraudulent omission and negligent omission. The plaintiff also initially sued the defendants' parent company, ABB Ltd., for conspiracy. This defendant was dropped prior to trial. The lawsuit alleged that ABB knew about potential problems with the exciters after the 2010 and 2015 Azipod failures on non-NCL vessels, and that ABB failed to notify NCL about these issues. Plaintiff's counsel noted that ABB inspected the exciter involved in the 2010 failure and sent the exciter to an ABB laboratory for analysis. The head of that lab issued a report the following year. The report recommended an inspection of Azipod exciters. Per plaintiff's counsel, the report stated that any exciters with cracks similar to those in the failed exciter should be replaced. Plaintiff's counsel maintained that ABB only told one customer about this report -- the customer that owned the ship with the exciter that failed in 2010. According to plaintiff's counsel, ABB did not notify any of its other customers, including NCL.

In 2012, ABB issued an internal Frequently Asked Questions document to its employees. Workers were supposed to use the document as a guide when talking to customers on the phone. Per plaintiff's counsel, the FAQ document omitted the lab's recommendation to replace any exciters with cracks. Instead, NCL's counsel argued, the document recommended repairing the cracks or reporting exposed wires to ABB. Plaintiff's counsel noted there was no evidence that simply repairing the cracked exciters would have prevented them from failing in the future. NCL's counsel claimed that ABB similarly failed to disclose important information after the 2015 Azipod failure. Counsel claimed that ABB made it appear that

the issue with that exciter was related to the ship's recent dry dock. Per plaintiff's counsel, ABB omitted that the exciter on that ship also had cracks, that an internal ABB report had associated the failure with the cracks and accelerated aging, and that the 2015 Azipod failure was similar to the one in 2010. The following year, ABB started developing emergency exciter kits for its Azipods. Plaintiff's counsel presented internal emails indicating that ABB began making these kits because it was "waiting for the next failure." NCL also presented an ABB email from 2010 that supposedly referenced how ABB expected more exciter failures in the future. NCL's counsel argued that ABB did not tell its customers that it was anticipating exciter failures and, if NCL had known about the kits prior to 2016, the company could have used them to prevent future exciter failures.

Plaintiff's counsel argued that these omissions continued after the December 2016 and January 2017 exciter failures. There were also new alleged misrepresentations and omissions that took place after the first two exciter failures on the Star, plaintiff's counsel claimed. ABB representatives met with NCL in February and March of 2017. Per NCL's counsel, ABB representatives said during those meetings that the exciters were reliable, and that NCL did not need to do anything to avoid future failures. Plaintiff's counsel alleged that ABB told NCL at the February meeting that the exciters fail once every 500 years. ABB then allegedly told NCL at the March meeting that the exciters fail once every 1500 years and the likelihood of even a single exciter failure was very low.

Plaintiff's counsel contended that, during these meetings, ABB omitted information about the exciter failures on the non-NCL ships in 2010 and 2015. ABB also allegedly failed to disclose internal reports and discussions about those failures and the problems with the exciters. According to plaintiff's counsel, ABB also did not recommend any future actions that could have helped NCL avoid additional failures.

According to plaintiff's counsel, ABB told NCL during the two meetings that the defendants had analyzed the exciters and ruled out certain causes of the failures. Plaintiff's counsel maintained that ABB made these statements before it had completed its investigation of the exciter issue.

NCL's counsel further alleged that ABB had told the plaintiff that 10,000 similar machines used the subject exciters without issue. Counsel claimed that ABB had no way to track any malfunctions by those machines, many of which did not even have exciters. NCL ultimately hired third parties to investigate the exciter issue after the November 2017 failure. Per plaintiff's counsel, ABB rejected the investigation's findings. The two sides then agreed to hire a marine investigation firm to do a root cause analysis. There were several meetings involving ABB, NCL and the marine investigation firm. During those meetings, ABB allegedly claimed it had never suffered an exciter failure on a ship the size of the ones that suffered failures in 2010 and 2015. ABB also allegedly downplayed the

significance of cracks on the exciters. Per plaintiff's counsel, ABB additionally did not tell the firm about the 2011 report generated by the defendant companies' lab, and the 2010 and 2015 failures were not mentioned in the marine investigation firm's final report.

Plaintiff's counsel also pointed to an internal ABB report following the dry docking of the Pearl in 2017. ABB is the only company that works on the Azipods during these dry dockings. ABB's 2017 report noted severe cracks in the Azipod's exciter. However, plaintiff's counsel argued, ABB did not tell NCL that this report addressed a "severe crack," and that exciter then failed two years later.

The defense contended that ABB did not tell NCL the identities of the owners and the names of the vessels involved in the 2010 and 2015 exciter failures because it did not want to disclose confidential information about its other clients. Plaintiff's counsel countered that ABB could have simply notified NCL of the failures without identifying the specific ships involved. Defense counsel further maintained that ABB's presentations to NCL were accurate and did not contain misrepresentations. Defense counsel argued that any information ABB omitted was not important or significant. The defense also claimed that ABB could not tell NCL about the exciter failures or how to avoid them because the defendant had not yet completed a root cause analysis of the problem.

Plaintiff's counsel noted that ABB did do a root cause analysis following the 2010 exciter failure and had recommended replacing exciters with similar levels of cracking despite not reaching a conclusion regarding the cause of the failure. NCL's counsel further maintained that ABB had previously issued bulletins to its clients about different problems with unknown causes.

Defense counsel maintained that ABB had no reason to hide the details regarding its exciter failures. The defense said that there was no financial incentive to engage in any omissions/misrepresentations of these failures because ABB would have made money on its repair kits if it had advised customers that failures were likely. The defense asserted that ABB did not take advantage of that opportunity because it did not believe such failures would occur.

Plaintiff's counsel countered this argument by presenting internal ABB documents. Per plaintiff's counsel, the documents showed that ABB was more concerned about its long-term success than its short-term earnings. NCL's counsel thus contended that ABB cared more about the money it could earn installing and maintaining the Azipods over the next several decades than the money it would get in the short term from selling repair kits. Plaintiff's counsel argued that this gave ABB incentive to allegedly misrepresent the effectiveness of the Azipods and downplay its concerns over the exciters.

INJURY:

- NCL's counsel argued that the exciter failures slowed down the various cruise ships and affected their itineraries. Cruises were canceled or modified, leading NCL to refund and

credit the affected passengers. NCL also had to pay for passengers' return flights home and for any hotel accommodations.

- Plaintiff's counsel specifically alleged that the reduction in speed following the December 2016 Azipod failure forced the Star to miss multiple ports over its next three cruises. Counsel argued that this failure affected the cruises of more than 6,000 passengers. Those passengers then received reimbursements, refunds and credits toward future cruises.
- NCL's counsel claimed that the emergency repairs, mitigation costs and lost revenue stemming from this exciter failure alone totaled over \$9.9 million. Plaintiff's counsel specifically noted that the Star's emergency exciter kit cost \$1.65 million to install and was more expensive to maintain than the original exciter was.
- Plaintiff's counsel also contended that the February 2017 exciter failure stranded 2,113 passengers and 1,017 crew members near Australia. The ship was adrift for 24 hours until it reached a tugboat. It then took another 24 hours for the tugboat to bring the Star to port in Melbourne. NCL's counsel argued that the Star's additional exciter failures cost the company more than \$17.5 million in emergency repairs, mitigation, lost revenue and additional port costs.
- NCL's counsel claimed that the November 2017 exciter failure affected the vacations of nearly 2,100 passengers. NCL noted that this cruise ended early in Barbados instead of returning to its home port, and NCL had to fly passengers home from Barbados. Another subsequent cruise was also canceled while the Gem was being repaired. NCL's counsel estimated that this failure cost the company at least \$8.8 million in mitigation, refunds, reimbursements, lost revenue and emergency repairs.
- Plaintiff's counsel claimed that the exciter failure on the Jade in November 28 forced the cancellation of a planned 10-day cruise. Passengers had to disembark and end the cruise in Puerto Rico, and NCL again had to pay to fly these passengers home. Passengers were compensated with refunds, credits and money for potential flight changes. NCL's counsel noted that it was particularly difficult for these passengers to find trips home because the exciter failure had occurred shortly before Thanksgiving. NCL's counsel argued that the Jade's Azipod failure cost NCL at least \$10.8 million in lost revenue, mitigation costs and passenger compensation.
- NCL's counsel further maintained that the Pearl's exciter failure in July 2019 forced a 13-night Amsterdam cruise to end early. The ship was expected to begin another 10-day cruise from Barcelona following the Amsterdam trip. However, the Barcelona cruise was canceled, and customers who had traveled to Spain for boarding had to be reimbursed for their trips home. NCL's counsel contended that

this exciter failure cost the cruise line at least \$21.3 million in lost revenue and mitigation expenses.

- Plaintiff's counsel ultimately asked the jury to award \$69 million in compensatory damages for the full time period alleged or, alternatively, \$31.75 million in compensatory damages stemming from the misrepresentations and omissions that occurred after the first Star exciter failure in December 2016. NCL's counsel retained a damages expert to support this request.
- The defense disputed the calculations of the plaintiff's expert, but did not call a damages expert or suggest an alternative damages number.
- The plaintiff also sought punitive damages. Prior to trial, the plaintiff agreed to not pursue punitive discovery in exchange for the defendants each admitting they could individually pay up to three times any compensatory damages award without going bankrupt. The defense stipulated to its revenue and net profits.
- During the punitive damages phase, the plaintiff's expert analyzed the net worth and financial condition of ABB. NCL's counsel noted that ABB Inc. had over \$1 billion in cash on hand at the end of 2021, and that ABB Oy had several hundred million in cash on hand at the same time.
- The defense maintained that the compensatory damages award sent enough of a message and requested a punitive damages award of \$1.

RESULT: The jury found for the defense on NCL's claims for fraudulent and negligent omission prior to December 2016. However, the jury found that the plaintiff did prove its claims for fraudulent affirmative misrepresentation, negligent affirmative misrepresentation, fraudulent omission and negligent omission following the 2016 and 2017 exciter failures. The jury awarded \$31.75 million in compensatory damages. The jury also found that the defendants committed intentional misconduct and gross negligence, and determined that punitive damages were warranted. It awarded an additional \$127 million in punitives, for a total verdict of \$158.75 million.

POST TRIAL: Defense counsel was given an opportunity to provide input to this report. Although they did clarify two statements attributed to them, which were corrected, they otherwise declined to comment. Instead, they conveyed that the case presented to the jury was too lengthy and complex to be adequately summarized in a short article. Defense counsel also conveyed that they strongly disagreed with the outcome and will challenge the decision, possibly by appealing to a higher state court.

EDITOR'S COMMENT: This report is based on information that was provided by plaintiff's counsel. Defense counsel also contributed to the report. (See Post-Trial Status for comments submitted by the defense.) Additional information was gleaned from court documents.