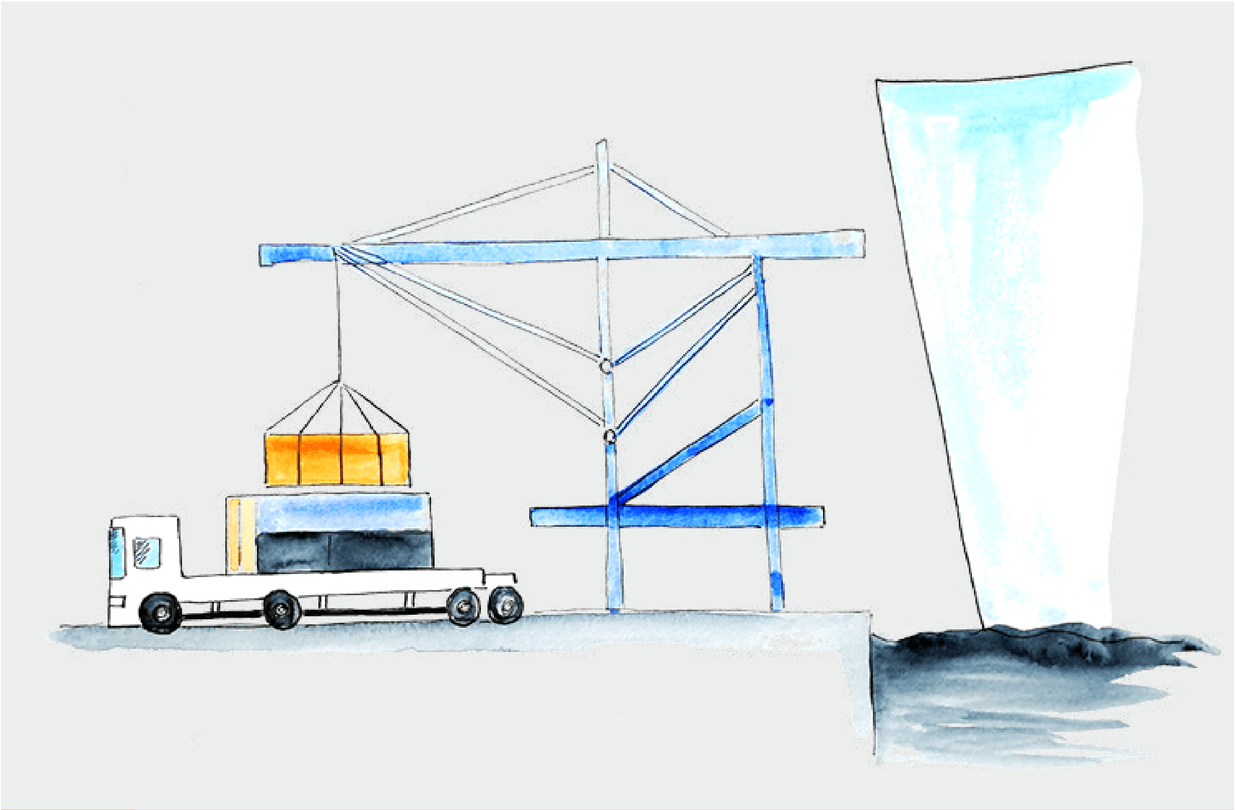
ZFZ | ZEILER FLOYD ZADKOVICH

SHIPPING, LOGISTICS & TRANSPORT BULLETIN

SUMMER EDITION | JUNE 2021



Update on Personal Jurisdiction in the USA

Zach Barger

PAGE 2

FOLLOW US ON SOCIAL MEDIA:

ONE GLOBAL TEAM.
FOCUSED ON WHAT YOU DO.

zeilerfloydzad.com

CONTENTS

Welcome to our summer shipping, logistics and transport bulletin. For this edition, we've gathered some of the most interesting cases and decisions from the past few months across our jurisdictions, and our team gave their two cents on the specifics and what future implications may entail.

Have a read through the articles in this bulletin for coverage on personal jurisdiction in the U.S., a detailed analysis of the UK *M/V Smart* case, Austrian court's reading into damage allocation in multimodal transport, Singaporean cases following the Hin Leong bankruptcy filing, the English Court of Appeal highlights a new focus for contractual interpretation, and a breakdown of maritime liens under Mexican Law.

We hope you enjoy this edition, and if you have any questions, suggestions or topics you'd like us to cover next time around, please feel free to reach out to us at insights@zeilerfloydzad.com.

UPDATE ON PERSONAL JURISDICTION IN THE USA

Written by Zach Barger

On April 30, 2021, the United States Court of Appeals for the Fifth Circuit in *Stephen Douglass, et al. v. Nippon Yusen Kabushiki Kaisha* unanimously affirmed the decision of the U.S. District Court for the Eastern District of Louisiana to dismiss two lawsuits against Nippon Yusen Kabushiki Kaisha ("NYK Line") for lack of personal jurisdiction under Federal Rule of Civil Procedure 4(k)(2). Yet, less than a week prior, on March 25, 2021, the Supreme Court of the United States affirmed decisions of the Supreme Courts of Minnesota and Montana in *Ford Motor Co. v. Montana Eighth Judicial District Court et al.* which held that Ford Motor Company's activities in the forum States were significant enough to support specific personal jurisdiction in two separate products-liability suits.

The interplay between these two decisions, and the ramifications across the shipping, logistics, and transport industry as a whole, are the topics of discussion in this article.

BACKGROUND FACTS – *DOUGLASS V. NYK LINE*

On June 17, 2017, the ACX Crystal, chartered by NYK Line, was involved in a collision in Japanese waters with the U.S.S. Fitzgerald, a U.S. Navy destroyer. NYK Line, as a foreign corporate entity incorporated and headquartered in Japan, was sued by two sets of plaintiffs in Louisiana federal court: one set as personal representatives of the seven U.S. sailors that were killed; and the other set as the U.S. sailors who were injured along with many of their family members bringing consortium claims. Both sets of plaintiffs argued that NYK Line's substantial, systematic, and continuous contacts in and with the United States subjected NYK Line to the jurisdiction of the federal courts of the United States for maritime law claims under Fed. R. Civ. P. 4(k)(2).

PERSONAL JURISDICTION OVER NYK LINE PURSUANT TO FED. R. CIV. P. 4(K)(2)

Rule 4(k)(2) of the Federal Rules of Civil Procedure establishes a federal court's jurisdiction over a defendant when (A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction, and (B) exercising jurisdiction is consistent with the United States Constitution and laws. More specifically, this rule has been interpreted as a three-prong test in establishing long-arm jurisdiction:

(1) whether a plaintiff's claims arise under federal law;
(2) whether the defendant is amenable to suit in any state court of general jurisdiction; and
(3) whether the plaintiff can show that the exercise of jurisdiction comports with due process.

Because the parties in *NYK Line* agreed that the plaintiffs' claims all arose under federal law (as being civil cases of admiralty and maritime jurisdiction under 28 U.S.C. § 1333) and that NYK Line was not amenable to any state court's jurisdiction, the dispute centered around the constitutionality of a federal court exercising personal jurisdiction over NYK Line.

Both the Eastern District of Louisiana and the Fifth Circuit Court of Appeals found the fact that NYK Line operated air-cargo service at six U.S. airports and twenty-seven shipping terminals at U.S. ports, regularly called on at least thirty U.S.

CONTENTS

ports, and dedicated seven of its vessels exclusively for delivery of automobiles to the U.S. as insufficient in establishing personal jurisdiction. Nor were they persuaded by NYK Line's license from the Federal Maritime Commission, shares of its stock being deposited at the Bank of New York Mellon and available for purchase by U.S. investors, or the fact that it engaged in "vast amounts of shipping business in the United States, directly and through at least eleven wholly owned U.S. subsidiaries."

Instead, both courts focused on the facts that all high-level decision making for NYK Line took place in Japan, that port calls to the U.S. made up just 6-8% of its worldwide port calls, and that its U.S. employees made up less than 1.5% of its total employee pool. Because these contacts with the U.S., despite being "considerable," neither rendered NYK Line home in the United States, nor did they make the U.S. the "center of NYK Line's activities" or a "surrogate for NYK Line's place of incorporation or head office."

BACKGROUND FACTS – *FORD MOTOR CO. V. MONTANA EIGHTH JUDICIAL DISTRICT COURT ET AL.*

Ford Motor Company was sued in two separate products-liability suits stemming from car accidents. In Montana, the plaintiff, representative of the estate of Markkaya Gullett, alleged that a 1996 Ford Explorer malfunctioned and killed Ms. Gullett. In the other, a plaintiff claimed he was injured in a collision on a Minnesota road involving a 1994 Crown Victoria. In each suit, the vehicles in question were designed, manufactured, and originally sold in states other than the ones where the suits were brought. Because only later resales or relocations by consumers had brought the vehicles to the forum states, Ford Motor Company moved for dismissal for lack of personal jurisdiction. Each state's Supreme Court rejected Ford's argument, as did SCOTUS.

PERSONAL JURISDICTION OVER FORD MOTOR COMPANY

Ford acknowledged that it did, in fact, conduct activities in the forum states, but argued that those activities were not sufficiently connected to the incidents that brought about the suits. SCOTUS found Ford's causation-only approach to personal jurisdiction unpersuasive, citing precedent establishing that when an automobile manufacturer systematically serves a market for the very vehicle that a plaintiff alleges malfunctioned and caused injury, there is a strong relationship between defendant, forum, and the litigation itself, thus forming the essential foundation of specific jurisdiction.

KEY TAKEAWAYS FROM THE DECISIONS

When analyzing these two decisions, it is important to keep in mind that one (*NYK Line*) was answering a question of *federal* jurisdiction, while the other (*Ford Motor Co.*) dealt with whether a *state* court may assert jurisdiction over an out of state defendant. The Fifth Circuit Court in *NYK Line* briefly recited the history of Fed. R. Civ. P. 4(k)(2), noting that it was drafted in response to a "peculiar hiatus" in the previous rules that would have prevented private litigants from bringing an action under federal law against a foreign defendant outside the reach of a state's long-arm statute.

In ultimately finding that it could not establish the requisite jurisdiction under the U.S. Constitution (5th Amendment) and prior SCOTUS precedent (*Daimler AG v. Bauman (2014)*), the Fifth Circuit relied upon the "rule of orderliness," a concept that prevents one panel of the court from overturning another panel's decision without intervening change in the law. The court went as far as to hint at conceiving "error in the examined precedent," but nonetheless relied on the rule of orderliness to cite the striking similarities between *NYK Line* and *Patterson v. Aker Solutions, Inc.*, decided by a prior panel of the Fifth Circuit in 2016. And because the *Patterson* court found that it lacked personal jurisdiction over a Luxembourg- flagged vessel involved in a collision off the coast of Russia whose principal place of business and place of incorporation was foreign (Norway), the court ruled accordingly in *NYK Line*.

Contrastingly, in delivering the opinion for SCOTUS, Justice Elena Kagan delved deeply into the extent to which Ford Motor Company conducted business in the forum states. From advertising and selling new vehicles, to company dealers maintaining and repairing vehicles there whose warranties had long since expired, to distributing replacement parts to dealers and independent auto shops directly. She wrote that Ford "systematically served a market in Montana and Minnesota for the very vehicles that the plaintiffs alleged malfunctioned and injured them in those states."

CONCLUSION

Although each case will turn on its own particular facts and merits, these cases highlight some of the key differences between state and federal personal jurisdiction requirements. The hesitancy by which the Fifth Circuit followed the rule of orderliness and held that it lacked jurisdiction based on the interpretation of *Daimler* in *Patterson* may open the door for an appeal to the Supreme Court of the United States. But for now, it stands to reason that when a foreign entity who does not otherwise utilize the U.S. as its centerline of activity commits a tortious act outside of U.S. territories, it will not be subject to personal jurisdiction in U.S. federal courts, even if its contacts with the U.S. are considerable.

For additional information and queries, please contact zach.barger@zeilerfloydzad.com.

CONTENTS

THE UNANSWERED QUESTIONS OF THE M/V SMART

Written by Calum Cheyne & Philip Vagin

INTRODUCTION

In its recent decision in *Alpha Marine Corp v Minmetals Logistics Zhejiang Co. Ltd (M/V Smart)* [2021] EWHC 1157 (Comm), the English High Court held that owners had a broad right to demand payment of bill of lading freight to themselves (bypassing the normal payment of freight from shippers to disponent owners under a voyage charterparty).

Alpha Marine (Owners) time chartered M/V Smart to Minmetals (Charterers) on an amended New York Produce Exchange ("NYPE") form. In turn, the vessel was voyage chartered to General Nice Resources (Hong Kong) Ltd ("GNR").

M/V Smart ran aground and there were significant losses. Owners argued that the grounding was due to Charterers' breach of the safe port warranty. Shortly after the incident, Owners issued invoices demanding payment of freight directly from shippers. Shippers stalled, before ultimately making a small part-payment into escrow and going insolvent.

The tribunal found against Owners for their unsafe port claim. Charterers had counter-claimed, on the basis that Owners had not been entitled to demand direct payment of freight and that in doing so they had unlawfully interfered with the contractual relationship between Charterers and Shippers. The Tribunal found for Charterers, finding that (as between Owners and Charterers under the time charterparty) Charterers had a right to collect freight and that there was an implied term that Owners would not revoke that right unless Charterers owed sums to Owners.

Owners appealed under s 69 of the Arbitration Act 1996, arguing that no such term could be implied.

The High Court agreed with Owners. In short, the High Court held that Owners had a right under the bill of lading to receive payment of freight. When entering into the time charter, Owners delegated this authority to collect freight to Charterers as agents. It followed that Owners could revoke this authority, and there was no implied term to the contrary. Owners could revoke the right at any time, whether or not sums were owed from Charterers to Owners under the time charter.

Critical to the judge's reasoning was that Owners must account to Charterers for any surplus freight over and above what Charterers owed to Owners. That being the case, there was nothing uncommercial about the arrangement.

The commercial importance of this judgment, which confirms Owners' unfettered right to demand payment of freight, is significant. Nevertheless, the decision does leave several important questions unanswered and does provide for some interesting practical questions.

NATURE OF THE OWNERS' DUTY TO ACCOUNT TO CHARTERERS

The first question left open concerns the exact nature of Owners' obligation to account Charterers for surplus freight. The judgment in *M/V Smart* and several prior decisions, such as *The Bulk Chile* [2013] [2013] 2 Lloyd's Rep 38 and *Wehner v Dene* [1905] 2 KB 92, all recognise that owners must account to charterers for any such surplus. It is clear from the judgment in the *M/V SMART* that the obligation to account is not a contractual obligation – Charterers do not have a right in damages to the surplus freight.

Usually, a duty to account presupposes the existence of a trust or a fiduciary relationship between the parties. If so, what kind of trust? Given that the courts came up with the owners' duty to account solely to provide a remedy to charterers in a purely commercial dispute, this should probably be a constructive trust, which arises by operation of law. Generally, constructive trusts are inferred by courts where equity requires the holder of certain property in good conscience not to retain it and not deny potential beneficiaries (here, Charterers) an interest in that property.

The duty to account, and thus, any "trust" is imposed on owners exclusively to facilitate recovery of surplus freight.

DUTY TO ACCOUNT AND SECURITY ACTIONS

A related issue, which also turns on the proper characterization of Owners' duty to account to Charterers, concerns security actions in maritime disputes, such as arrest of ships and "Rule B" attachments of property in the United States.

The rules on arrest of ships, applied in most countries, are based on either of the two Arrest Conventions, enacted in 1952 and 1999, respectively. Both Conventions contain a closed list of claims which are considered "maritime". Ordinarily, arrest is only permitted in respect of maritime claims (e.g., breach of a charterparty) and not any others. Similarly, in the United States a Rule B attachment of a ship or other property may be granted if the underlying claim falls within

CONTENTS

the admiralty and maritime jurisdiction (e.g., arises out of a contract related to maritime transportation).

Interestingly, the judgment in *M/V Smart* seems to underline that the owners' duty to account is not based on a breach of contract. At para. 54 of the judgment, Butcher J stated:

> *"[T]here is no suggestion in any case or text book to which I was referred that the duty to account is effectively an obligation to pay damages in the amount of the surplus, or that the owner must be in breach of contract in finding itself in a position in which it has to make an account".*

While this is most likely a true statement as a matter of trust law, it may create difficulty for charterers seeking to arrest owners' ships in support of their claim for surplus freight. If the duty to account is not contractual, then it is arguable that Charterers' claim for the surplus does not arise out of the charterparty and thus, is not "maritime". Therefore, arrest is not possible – or so Owners might argue.

Of course, this argument may be dismissed by saying that the parties are in privity and the claim for the surplus still could not have arisen "but for" the existence of the charterparty (which represents the original agreement between owners and charterers, that the former would allow the latter to collect freight from cargo interests). Accordingly, the claim could still "arise out of" the charterparty.

However, the issue becomes more complicated when one considers a scenario where *sub*-time-charterers (and not head charterers) sue Owners for an account. That such a claim is possible was first recognised by Channell J in *Wehner v Dene* [1905] 2 KB 92, at 99 ("if the owner were himself to demand and receive the bills of lading freight, as he might do if he chose, he would still have to account to the charterer or the *sub-charterer*, as the case might be, for the surplus").

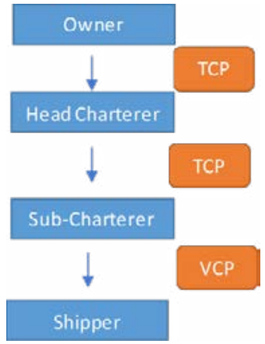
In this scenario, there is no longer privity between the parties, and it is more difficult to point to a particular charterparty out of which the claim for an account would likely arise. Therefore, Owners' argument that the relevant claim is not "maritime" in nature would be better justified.

The point appears to be untested in both English and U.S. law.

CAN HEAD TIME CHARTERERS INTERCEPT FREIGHT?

The Owners' right to intercept freight is clear from the judgment in *M/V SMART*. But does the judgment additionally confer on the Head Charterer the same right to do so?

This question arises in longer charterparty chains, as follows:



In such a chain, can the "Head Charterer" intercept freight, normally payable by Shipper to Sub-Charterer?

Certainly, one reading of the decision in *M/V SMART* suggests that it is possible. Owners' right to direct payment of freight by the Shipper is clear from the judgment in *M/V SMART*. The judgment also states that this right to collect freight is delegated to the Head Charterer (in the above example) under the head time charterparty.

The decision in the SMART refers to *The Bulk Chile,* which states (in a different context) that "*the shipowner has, by reason of clause 8 of the NYPE form, or a similar employment clause, agreed to delegate collection of freight to the charterer*." In normal circumstances, therefore, the right to collect freight is delegated from the Owner to the Head Charterer, and then from the Head Charterer to the Sub-Charterer. The Sub-Charterer then exercises that right as against the Shipper, by demanding payment of the freight.

There is no suggestion that the Owner delegates anything other than the entirety of the Owners' right to collect freight. Indeed, that is expressly stated by Rix LJ in *The Spiros C* at para. 39 of that judgment (repeated in the judgment in *M/V SMART)*:

> *In my judgment, when a shipowner contracts that his freight should be payable as per a charterparty, he intends, and it is common ground with his shipper that he does so, that… the whole manner or mode of the collection of the freight should be delegated to the time charterer.*

We know from the judgment in *M/V SMART* the broad extent of the Owner's right to collect freight. If that entire right to collect is indeed delegated to the Head Charterer, then there is no reason that the Head Charterer would not be entitled to intercept freight in a longer chain (provided that the Owner has not revoked the Head Charterer's right to do so).

The decision in *M/V SMART* then becomes a weapon for a Head Charterer to wield over a non-performing intermedia-

CONTENTS

ry charterer. Unlike most lien clauses, that right does not require any sums to be crystallised and "*due and owing*". The same rights that the Owner benefits from under *M/V SMART* decision are passed to the Head Charterer, who appears to benefit from the same in turn against the downstream parties.

In any event, even if such an approach appears uncertain, the Head Charterer may also be able to take assistance from the Owner. If the problem lies with the "Sub-Charterer" in the above example, and the Head Charterer is fully paid up under the Head Time Charterparty, then the Head Charterer may be able to request or direct the Owner to intercept hire. The Owner would then account the entirety of the hire to the Head Charterer (having no deductions to make, there would be an obligation to account 100% of the freight) and the Head Charterer would then account in turn down the chain – but crucially having made the deduction owed to it by the non-performing Sub-Charterer.

The decision certainly opens a number of doors and while at first blush it appears like a difficult decision for operators who charter in and charter out, there are potentially a number of ways that this decision may come to benefit an intermediary charterer.

FINAL THOUGHTS

The decision in the *M/V SMART* is multi-faceted and throws up a fascinating array of issues, going to the heart of the interaction between harterparties and bills of Lading.

For Owners, it is clearly a beneficial judgment, increasing Owner's power to intercept freight and retain what they see as due to them.

For Charterers the position is more complex. While they may face the prospect of having the rug pulled out from under them, they may also benefit in turn from the ability to wield increased delegated powers from Owners. And in any event, should Owners intercept the freight, Charterers may be able to recover what is due to them in the final analysis – even if Owners become insolvent in the meantime.

For additional information and queries, please contact calum.cheyne@zeilerfloydzad.com or philip.vagin@zeilerfloydzad.com

Additional content on this topic:

AUSTRIAN SUPREME COURT ON DAMAGES IN MULTIMODAL TRANSPORT

Written by Lukas Wieser & Gaudenz Küenburg

When international cargoes move from shipper to end receiver, various relevant legal regimes apply for damages incurred during the transport. In a recent ruling by the Austrian Supreme Court, the Court determined the legal framework applicable during the interchange of cargo between two different modes of transportation (7 Ob 32/20m).

FACTS

The claimant engaged the respondent to transport a DVD manufacturing machine from Bulgaria to Korea. The first leg of the transport involved road carriage between Sofia, Bulgaria and Vienna, Austria. The second leg of the transport involved air carriage from Vienna to Korea. The respondent transported the machine by road to its warehouse at the Vienna airport. While moving the cargo from the truck at the airport, the cargo suffered damage when the machine fell from a forklift.

The issue before the court was whether the road carrier regime or the air carrier regime applied to the damage. In other words, whether the damage occurred during the road carriage section or the air carriage section of the multimodal transport.

CONTENTS

RELEVANT LEGAL REGIMES

Two commonly used legal regimes governing road and air carriage respectively, were invoked and considered applicable in the case at hand. The claimant argued that the Convention for the Unification of Certain Rules for International Carriage by Air ("Montreal Convention") applied. The Montreal Convention is an international treaty with the status of law in Austria. The purpose of the convention is to establish uniformity within the rules relating to the international carriage of passengers, baggage and cargo. It applies to all international carriage of persons, baggage or cargo performed by aircraft (Article 1 Montreal Convention). The claimant argued that respondent (air carrier) had assumed responsibility for the goods by unloading them from the road truck.

The respondent, however, argued that the Convention on the Contract for the International Carriage of Goods by Road ("CMR Convention") applied. The CMR Convention is an international treaty that also has the status of law in Austria. Its purpose is to regulate international transport by road in a uniform manner, in order to create legal certainty for the transport industry. It applies to contracts for the carriage of goods by road, when the place of taking over of the goods and the place designated for delivery are situated in two different countries, of which at least one is a contracting country, irrespective of the place of residence and the nationality of the parties (Article 1 CMR Convention). The respondent argued that even though the goods had arrived at its warehouse, they had not yet been in its custody, because it had to weigh, measure and test the goods for explosives before transferring them to the freight terminal and assigning them to the respective airline.

ASSESSMENT BY THE SUPREME COURT

The Court began its analysis of whether the liability regime of the CMR Convention or the Montreal Convention applied to the matter by referring to the so called "network-system" – also known as "network principle". The "network-system" assigns the applicable liability regime to the respective section in the case of multimodal transport. In principle, and not surprisingly, the section of the transport in which the damage occurred is to be taken into account in order to determine the liability, if the place of damage is known.

Thus, the Supreme Court continued to evaluate whether the damage in question occurred during the road section or the air section of the transport. It resorted to Article 17 of the CMR Convention and Article 18 of the Montreal Convention, which both refer to the carrier's custody for the purpose of liability.

Article 18 (3) of the Montreal Convention determines that carriage by air comprises the period during which the cargo is in the charge of the carrier. According to Article 18 (4), if carriage by land outside the airport takes place within performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment, any damage is presumed to have taken place during the carriage by air. The Court explained that the Montreal Convention thus extends the period of liability of the air carrier to its period of charge. According to the prevailing view, this entails even an intermediate storage in the air carrier's warehouse outside the premises of the airport. The responsibility of the air carrier thus remains if its legal and factual powers of influence are maintained such that it is at all times in a position to protect the goods from loss or damage in accordance with its duty of care.

Here, since the damage occurred in the warehouse of the air carrier, on airport grounds, and due to a mishandling of a forklift by an employee attributable to the air carrier, the charge over the goods had already been transferred to the air carrier. The Supreme Court rejected the air carrier's arguments that the air carriage had not begun before the measurement and weighing of the goods. the Court noted that these activities served to prepare the goods for subsequent air transport and were thus no longer attributable to the preceding transport section.

To support its decision, the Supreme Court referenced a recent ruling concerning multimodal transport with a road and train section (7 Ob 45/20y). In that case, the Supreme Court held that the first section of the multimodal transport was terminated as soon as the freight arrived at the terminal of the carrier for the second section. The charge over the goods was considered to have been transferred to the second carrier. Therefore, the damage, which had occurred during the handling in the terminal of the second carrier, was attributed to the second carrier. Also, the activities at the terminal were considered preparatory activities, which no longer pertained to the preceding transport section.

COMMENT

In its unambiguous ruling, the Supreme Court confirmed and cemented its stance on damage that occurs during the intersection of a multimodal transport of goods. If a carrier receives goods for the next leg of multimodal transport, then the carrier clearly assumes the liability associated with that next mode of transportation.

For additional information and queries, please contact lukas.wieser@zeilerfloydzad.com or gaudenz.kuenburg@zeilerfloydzad.com

CONTENTS

HIN LEONG, ONE YEAR ON

Written by Richard Murray

On 10 June 2021, the Singapore High Court was scheduled to hear pre-trial conferences in two claims brought by Maersk Tankers Singapore Pte Ltd and Scorpio LR2 Pool Ltd respectively against Winson Oil Trading Pte Ltd.

The claims are the latest in the continuing fall out from the collapse of Hin Leong after it filed for bankruptcy on 17 April 2020. Marking the decline of one of Asia's largest oil trading houses, which had amassed debts of US$3.6bn owed collectively to 23 banks.

The collapse reverberated through the shipping markets, triggering competing claims for cargoes being carried or stored on vessels and quaysides as Hin Leong's position began to deteriorate.

Winson had chartered one oil tanker each from Maersk and Scorpio to load gasoil cargoes from Taiwan in February 2020, then ordering them to transfer the cargo to facilities held by Hin Leong. However, apparently no original bills of lading were issued.

Both shipowners submit Winson issued them letters of indemnity against the discharge of their respective cargoes and which Maersk said it was obligated to accept under the terms of their vessel's charter.

According to court documents obtained by the media (Reuters, 2021), the letters of indemnity guaranteed that Winson would provide sufficient funds to cover any claims, or avoid vessel arrest /detentions, resulting from delivering the cargoes without the requisite original bills of lading.

Maersk and Scorpio now face claims and possible vessel arrests from parties claiming an interest in the cargoes transported on board the tankers that Winson chartered.

After issuing the letters of indemnity, Winson apparently ordered Maersk to discharge the cargo it was carrying at Hin Leong's Universal Terminal in Singapore. Meanwhile it further instructed the Scorpio vessel to discharge part of its cargo into a Hin Leong tanker offshore Malaysia by ship-to-ship transfer, according to the same court documents.

Separately, the United Overseas Bank Limited (UOB) and Overseas-Chinese Banking Corporation Limited (OCBC) issued demands to Maersk and Scorpio respectively claiming to be the lawful owners of the subject cargoes.

Maersk Tankers is now demanding Winson put up approx. $41 million in security to UOB to prevent the arrest or detention of its vessel, while Scorpio is seeking security of $16.9 million to satisfy the OCBC claim. The latter bank also obtained an order from the Admiralty Court permitting it to arrest the Scopio vessel, STI Orchard.

The proceedings will be followed with interest, and have prompted recollections of the competing multi-jurisdictional claims arising from similar supply chain disruptions caused by the Hanjin bankruptcy (2017) and the Qingdao commodities repro-financing fraud (2014).

Such events should renew efforts to adopt safer means to execute trade finance contracts and verify the title in underlying cargoes. Therefore, much is expected of the potential of blockchain platforms.

For additional information and queries, please contact richard.murray@zeilerfloydzad.com

THE COURT OF APPEAL RULES ON A NEW FOCUS FOR CONTRACTUAL INTERPRETATION

Written by Lucy Noble & Luke Zadkovich

In the familiar scenario, a charterparty, an international sales contract or another 'like' contractual document will be concluded with the terms of a specifically drafted recap which, in turn, incorporates a body of general terms. The incorporated terms are ordinarily drawn from standard form charterparties (often with previously drafted amendments), or industry-developed terms and conditions. While established principle prescribes that in the event of inconsistency, specifically-agreed terms will prevail over the incorporated terms, a string of precedent confirms that the contemporary approach to interpretation is the courts' preference to find a construction that gives effect to both potentially incompatible clauses.

The recent Court of Appeal decision in *Septo Trading Inc. v Tintrade Ltd* [2021] EWCA Civ 718 ('Septo') is the latest in this string of precedent, confirming that the correct approach on matters of construction is to ascertain the intention of the contracting parties. This question of intention is to be resolved on the application of commercial common sense, considering the contractual document as a whole.

BACKGROUND

In June of 2018, Tintrade Ltd (the 'Seller') and Septo Trading

CONTENTS

(the 'Buyer') entered into an international sales contract for a heavy-sulphur fuel oil consignment. Quality certificates in respect of the consignment were issued at the load port. The certificates identified that the oil was within the contractual specification. After the consignment was shipped and the purchase price advanced, later sampling and investigations established that the load port quality certificates were incorrect, and the oil was in fact loaded off-specification.

The sales contract was concluded by recap. The terms of the recap confirmed that the load port certificates were '*to be binding on parties save fraud or manifest error*.' The recap additionally provided that, '*BP 2007 General Terms and Conditions for fob sales to apply.*' The incorporated BP Terms stipulated that the quality certificates issued at the load port were '*except in cases of manifest error or fraud, be conclusive and binding on both parties for invoicing purposes*'.

The task for the court was to determine whether the recap clause and the BP term were inconsistent or whether an appropriate construction could be determined to read the clauses together.

JUDGMENT

On the application of precedent, the court allowed the appeal, finding that the subject clauses could not be reconciled. The BP term did not simply modify or qualify the recap term, the incompatibility was such that effect could not fairly be given to both clauses.

In this finding, the judgment helpfully confirmed a three-stage approach to be adopted in the face of contractual ambiguity. The three-stage approach provides that parties must:

1. Ascertain the meaning of the recap (or specifically drafted) term;
2. Consider the effect of the incorporated term; and
3. Inquire as to the inconsistency of the above determinations.

Applying these steps, the recap term plainly meant that the load port quality certificates were to be binding on both parties for all purposes. Turning their attention to the BP term, the court considered that in light of the agreed financing structure within which the oil was invoiced and the purchase price advanced, the BP term did not qualify the recap, but practically subverted the binding effect of the certificates. Therefore, on inconsistency, the BP term deprived the recap clause of all practical effect and on that basis, was fundamentally inconsistent.

Further, on an objective analysis, the BP term lacked commercial common sense. Within the commercial regime of the sales agreement, a determination of quality was an integral factor. The contracting parties resolved this issue by specifically drafting the recap to indicate that the load port certificates were to be binding. On a construction which read the recap and the BP clause together, the quality certificates would have no binding effect. The BP term, in subverting the binding effect, was therefore incompatible with the commercial objective of the parties.

COMMENTS

Contracting parties can no longer rely on the carefully negotiated terms of the recap to reliably prevail over incorporated terms in disagreements over apparent inconsistency. Where possible, the courts will favour a construction that gives effect to the commercial intention of the parties and to the entire body of terms to which they have agreed to be bound. Thus, it is essential that in the drafting stage of charterparty (or sales contract) development, close attention is given to identifying and resolving ambiguity throughout the entire agreement.

A carefully drafted recap which incorporates a body of terms which are not properly considered will not provide appropriate clarity and protection to safeguard a contracting parties' commercial interests. Absent a finding of direct inconsistency, the incorporated terms will be considered with as much contractual force as the specifically concluded recap.

A NEW APPROACH?

The reasoning adopted in the *Septo* case marks a shift in the court's preference when determining matters of contractual construction. While the approach taken cannot be said to be indicative of an entirely new approach, it fuses a purely commercial focus with a renewed emphasis on the entire contractual document as agreed between the parties.

Under the earlier commercial common-sense approach, when the court was presented with two possible constructions, the endorsing authority of *Rainy Sky v Kookmin Bank* [2011] UKSC 50 confirmed that the alternative consistent with business common sense was to be favoured. The concern of such a construction however, was that the clear intention of the words could effectively be re-written so as to support a more preferrable commercial alternative. This concern was reflected in the conflicting approach taken in *Arnold v Britton & Ors* [2015] UKSC 36 where it was considered that the court will not intervene where the natural meaning of the contractual terms is clear.

While *Septo* appears to go some way in resolving the previous tension between approaches, the task for the court in determining the intention of the contracting parties in light of the entire agreement will not always be straightforward.

CONTENTS

On the one hand, the court considers the parties' contractual intention in the context of the dispute. This is likely to be substantively different from the intention of the parties at the time of concluding the contract. In addition, given the prevalence of incorporated standard form or amended standard form charterparties, often in a back-to-back context, it is probable that the contracting parties themselves do not understand or have not fully appreciated the extent of the incorporated clauses concluded.

In practice, resolving these issues require close analysis of the specific terms and the printed terms. That includes an assessment of any inconsistency between those terms. Is there true conflict or is the specific term merely a qualification of the printed term? Look beyond the words themselves and to the effect of the differing terms. That is key.

At first glance, a specific term can look like a qualification, but in reality it is outright contrary to the printed terms. Whereas sometimes a specific term looks to be in conflict, but it is only a qualification. However, in our experience, when one assesses the effect of such clauses the nature and extent of the inconsistency often becomes clearer

For additional information and queries, please contact lucy.noble@zeilerfloydzad.com or luke.zadkovich@zeilerfloydzad.com

Additional content on this topic:

MARITIME LIENS UNDER MEXICAN LAW

Written by Andrea de la Brena

Maritime liens are statutory, privileged claims over any other creditor arising out of a breach of contract, an injury or a collision caused by a vessel. The rules regulating the priorities of maritime liens are complicated and vary from jurisdiction to jurisdiction. In an attempt to reach uniformity, the United Nations created international conventions, including the most recent International Convention on Maritime Liens and Mortgages of 1993 which entered into force in September 2004 (the "Convention"). However, this uniformity has not been reached, in part, because not all UN member-states have adhered to the Convention. Mexico, for example, is not a contracting party.

TYPES OF MARITIME LIENS

Mexico codified a regulation on maritime liens (*privilegios marítimos*) in the Federal Law on Navigation and Maritime Commerce (*Ley de Navegación y Comercio Marítimos*). The liens contained therein refer to claims related to the vessel and the cargo.

The first group of liens is almost identical to the list set forth in the Convention. It is not surprising, given that Mexico participated as a member of the drafting committee for the Convention. The first group of liens is as follows:

I. Claims for wages and other sums due to crew members of the vessel, including costs of repatriation and social insurance contributions payable on their behalf;
II. Claims in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel;
III. Claims for reward for the salvage of the vessel;
IV. Claims for port, canal, and other waterway dues and pilotage dues; and,
V. Claims based on extra contractual liability arising out of physical loss or damage caused by the operation of the vessel other than loss of or damage to cargo, containers and passenger effects carried on the vessel.

The second group of liens is those related to the vessel under construction or repair:

I. Claims for wages of the workers engaged in the construction of the vessel, as well as the social security contributions payable on their behalf;
II. Claims of the builder or repairer of the vessel, directly related to its construction or repair; and,
III. The tax claims derived directly from the construction of the vessel.

The third group of liens is those against cargo derived from claims related to:

I. Freight and its accessories, loading, unloading and storage expenses;
II. Removal of shipwrecked merchandise; and,
III. Reimbursement of expenses and remunerations for salvage at sea, in the payment of which the cargo must participate, as well as general average contributions.

Notably, the second and third groups are not contemplated

CONTENTS

in the Convention.

Maritime liens derived from the last voyage are preferred over those arising from previous voyages.

The maritime liens of the first group extinguish after a period of one year following the date when they became enforceable, unless prior to the expiry of such period, an action requesting the seizure of the vessel has been initiated. The maritime liens of the builder or repairer extinguish upon delivery of the vessel. Liens against cargo expire one month following the date when the cargo was unloaded. The expiration of the lien does not extinguish the right to pursue the underlying claim.

Furthermore, a Mexican maritime lien does not need to be registered in order to be valid.

Having different regulation on maritime liens across jurisdictions could give rise to a complex law dispute. Mexican law is not clear regarding whether maritime liens are substantive or procedural rights. If a judge or court identify the lien as a substantive right, then it is more likely that foreign law could be applied. However, if the judge or court characterize the lien as a procedural preferential right, they would likely apply Mexican law, regardless of the law applicable to the underlying claim.

ENFORCEABILITY OF MARITIME LIENS

In Mexico, federal courts adjudicate maritime disputes. To determine which federal court a plaintiff must submit their claim, a case-by-case analysis is needed. For instance, proceedings regulated in the Federal Law on Navigation and Maritime Commerce (e.g., preventive seizure, enforcement of mortgages, salvage remuneration, limitation of liability) mandate that the competent district court is the one located at the place where the vessel or the port of unloading is located. For proceedings where the underlying dispute involves breach of contract, such cases are usually governed by the Code of Commerce. Therefore, the competent court is likely the one located at the domicile of the debtor, the place where the services were rendered, or the one explicitly chosen by the parties in the respective contract.

The enforcement of a maritime lien in any maritime judicial proceeding must be requested by the plaintiff with the filing of the initial submission. The plaintiff, in general terms, must indicate the type of lien they are entitled to and the documentation that proves said right.

In particular, when the plaintiff requests a preventive seizure of the vessel or the cargo, they must: (i) attach to their submission the original documentation where their claims are set forth; (ii) indicate the amount of their claim; (iii) describe the assets upon which the seizure shall be applied; and (iv) explain the reasons that justify the seizure's request.

In the event of seizure, at the request of the plaintiff, the court may authorize the immediate judicial sale of the assets when they cannot be kept without deterioration, or when their conservation is too costly in comparison with their value. Otherwise, a judicial sale will take place if the court upholds the plaintiff's claims, and the respondent fails to pay with other means.

For additional information and queries, please contact andrea.delabrena@zeilerfloydzad.com

Additional content on this topic:

VIDEO **Length 23 Min.**

Shipowner's Lien over Cargo

CLICK TO WATCH

GUIDE **24 Pages**

Asset Related Protection Guide

CLICK TO READ

CONTENTS

NEWS & EVENTS

TEAM

| LONDON

Our London office had a busy Spring, with three new joiners - two senior associates and one associate.

First to join is Howard Quinlivan, an England & Wales qualified Solicitor Advocate, with a practice covering all aspects of the marine world from loss of life and personal injury in the shipping, yachting and fishing communities to other contractual disputes, collisions and liabilities in the leisure craft and commercial sector.

Second is Richard Murray, also an England & Wales qualified Solicitor Advocate, with a broad international litigation practice focused on marine insurance, major casualty handling, commercial shipping, and extensive experience of running high value claims before the English Courts, London Maritime Arbitration (LMAA) tribunals and other specialist proceedings.

Third to join is Lucy Noble. We first met Lucy at our 2020 Vacation Scheme student traineeship program. She participated as a Law and International Studies undergrad student at the University of Wollongong. Following Lucy's excellent performance, she joined us as a paralegal while finishing her coursework. Lucy has now joined our London office full time as an associate, focusing her practice on maritime law and commodity disputes.

EVENTS

| JUNE

Disputes for Tea | Shipping
"Presenting expert evidence in US and English maritime arbitration"
With Charles Anderson, James Clanchy, John Walker & Ian Hodges, moderated by our Luke Zadkovich & Eva-Maria Mayer.
Monday, 28 June 2021
10:00 Eastern Standard Time | 15:00 British Summer Time | 16:00 Central European Time
Register here

| SEPTEMBER

Disputes for Tea | Energy
"Energy Disputes: Spotlight on LNG"
Hosted by Damon Thompson and Lisa Beisteiner.
Thursday, 23 September 2021

| NOVEMBER

Disputes for Breakfast | Intellectual Property
"The Human Factor – Creation, Ownership and Infringement of IP Rights in the Age of AI"
With Alexander Zojer and Lukas Hutter.
Thursday, 18 November 2021

| DECEMBER

Disputes for Tea | Litigation
"US Class Action and European Representative Action compared"
With Edward Floyd and Alfred Siwy.
Thursday, 9 December 2021

OUR SHIPPING, LOGISTICS & TRANSPORT TEAM

Edward W. Floyd

Partner | Attorney at Law (New York)

T +1 332 213 0670
M +1 917 999 6914
E ed.floyd@zeilerfloydzad.com

Luke Zadkovich

Partner | Attorney at Law (New York) | Solicitor (England and Wales)

M +1 917 868 1245
+44 75 0008 0228
E luke.zadkovich@zeilerfloydzad.com

Gerold Zeiler

Partner | Attorney at Law (Vienna, California)

M +43 664 889 287 80
+1 646 764 3070
E gerold.zeiler@zeilerfloydzad.com

Timothy S. McGovern

Partner | Attorney at Law (Illinois)

T +1 708 320 0010
M +1 312 545 4994
E tim.mcgovern@zeilerfloydzad.com

Damon Thompson

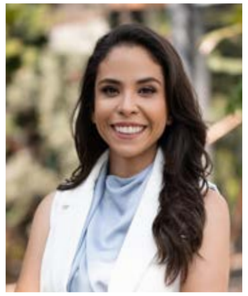
Partner | Solicitor (England and Wales)

T +44 203 740 2576
M +44 792 051 92 33
E damon.thompson@zeilerfloydzad.com

Alfred Siwy

Partner | Attorney at Law (Vienna) | Solicitor (England & Wales)

T +43 664 889 287 84
M +44 203 740 2576
E alfred.siwy@zeilerfloydzad.com



Andrea de la Brena

Partner | Attorney at Law (Mexico)

T +52 5081 8457
M +52 1 55 7854 3920
E andrea.delabrena@zeilerfloydzad.com

Lukas Wieser

Counsel | Attorney at Law (Vienna)

T +43 1 890 10 87 - 72
M +43 664 889 287 72
E lukas.wieser@zeilerfloydzad.com

Nicholas Paine

Of Counsel | Attorney at Law (New York, Texas)

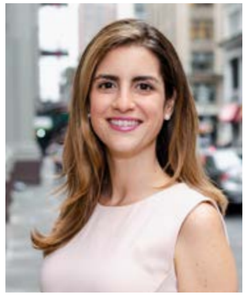
T +1 332 213 0670
M +1 917 882 4566
E nicholas.paine@zeilerfloydzad.com

FOLLOW US ON SOCIAL MEDIA:

ONE GLOBAL TEAM.
FOCUSED ON WHAT YOU DO.

zeilerfloydzad.com

OUR SHIPPING, LOGISTICS & TRANSPORT TEAM



Carolina Palacios

Senior Associate | Attorney at Law (Panama)

T +44 203 740 2576
M +44 776 572 83 39
E carolina.palacios@zeilerfloydzad.com

Calum Cheyne

Senior Associate | Solicitor Advocate (England and Wales)

T +44 203 740 2576
M +44 7872 111 051
E calum.cheyne@zeilerfloydzad.com

Howard Quinlivan

Senior Associate | Solicitor Advocate (England and Wales)

T +44 203 740 2576
M +44 7736326121
E howard.quinlivan@zeilerfloydzad.com

Ondrej Cech

Senior Associate | Attorney at Law (Czech Republic) | European Attorney (Austria)

T +43 1 890 10 87 - 87
M +43 664 187 80 04
E ondrej.cech@zeilerfloydzad.com

Richard Murray

Senior Associate | Solicitor Advocate (England and Wales)

T +44 203 740 2576
M +44 7770 747043
E richard.murray@zeilerfloydzad.com

Thomas Herbst

Senior Associate | Attorney at Law (Vienna)

T +43 1 890 10 87 - 94
M +43 664 187 80 06
E thomas.herbst@zeilerfloydzad.com

Zach Barger

Senior Associate | Attorney at Law (Ohio)

T +1 708 320 0010
M +1 567 208 9890
E zach.barger@zeilerfloydzad.com

Aiden Lerch

Associate | Attorney at Law (NSW, Australia)

T +44 203 740 2576
M +44 7933 703 457
E aiden.lerch@zeilerfloydzad.com

Eva-Maria Mayer

Associate | Attorney at Law (New York)

T +1 332 213 0670
M +1 617 943 7957
E eva.mayer@zeilerfloydzad.com

FOLLOW US ON SOCIAL MEDIA:

OUR SHIPPING, LOGISTICS & TRANSPORT TEAM

Innhwa Kwon

Associate | Attorney at Law (Republic of Korea)

T +43 1 890 10 87
M +43 664 388 19 73
E innhwa.kwon@zeilerfloydzad.com

Jonas S. Patzwall

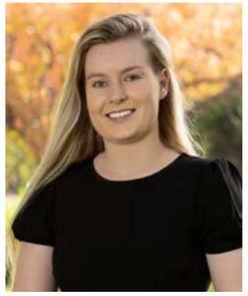
Associate | Attorney at Law (New York, Texas)

T +1 332 213 0670
M +1 251 414 6317
E jonas.patzwall@zeilerfloydzad.com

Katherine Georginis

Associate | Attorney at Law (Chicago)

T +1 708 320 0010
M +1 630 290 62 43
E katherine.georginis@zeilerfloydzad.com



Lucy Noble

Associate | Candidate for admission as Solicitor (NSW, Australia) in July 2021

T +44 203 740 2576
M +61 459 475 160
E lucy.noble@zeilerfloydzad.com

Philip Vagin

Associate | Attorney at Law (Russia)

T +1 332 213 0670
M +1 504 509 3089
E philip.vagin@zeilerfloydzad.com

Gaudenz Küenburg

Junior Associate

T +43 1 890 10 87-23
E gaudenz.kuenburg@zeilerfloydzad.com

Shannen Trout

Trainee Solicitor

T + 44 203 740 2576
M +44 79 7465 7708
E shannen.trout@zeilerfloydzad.com

FOLLOW US ON SOCIAL MEDIA:

ONE GLOBAL TEAM.
FOCUSED ON WHAT YOU DO.

zeilerfloydzad.com

ZFZ | ZEILER FLOYD ZADKOVICH

For more information visit our **website zeilerfloydzad.com**

Subscribe to our **newsletter** for the latest updates, articles and ZFZ news.

SUBSCRIBE

Follow us on Social Media:

NEW YORK | VIENNA | LONDON | MEXICO CITY | CHICAGO | HOUSTON | SYDNEY