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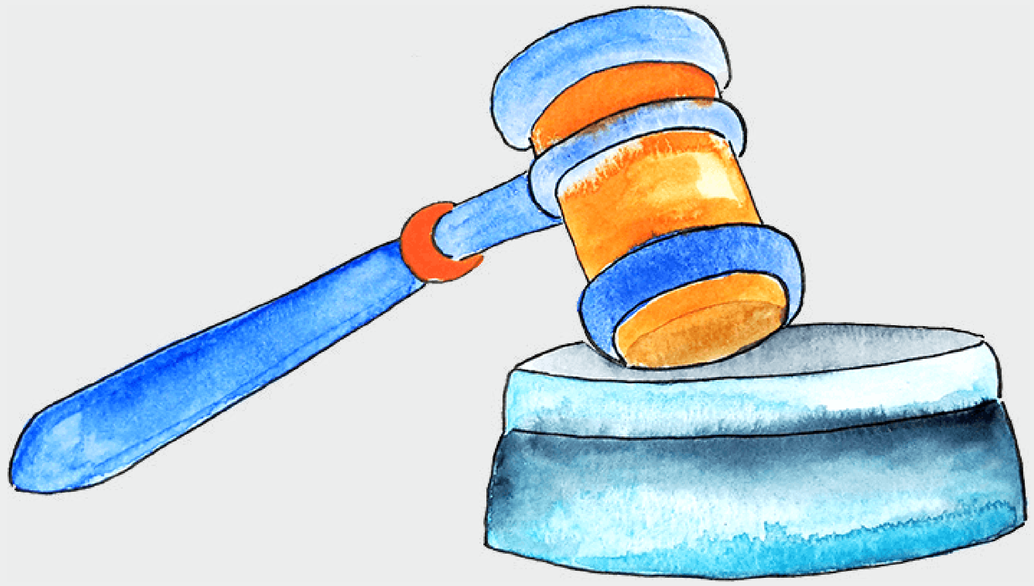

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URAL TRANSPORT V PESA – RUSSIAN SUPREME COURT SAYS BEING ON A SANCTIONS LIST MEANS NO ACCESS TO JUSTICE ABROAD

Written by Philip Vagin

In the Spring 2021 Arbitration bulletin, we discussed *Tsargrad v Google*, the first case in which the new Russian sanctions legislation has been applied. To recap, in June 2020 Russia amended its Commercial Procedure Code to allow sanctioned Russian persons and foreign legal entities targeted as part of anti-Russian sanctions programmes to avoid arbitration and jurisdiction clauses in their contracts with foreign counterparties and sue in Russian commercial courts instead. In addition, the new law entitles sanctioned persons to apply for an anti-suit injunction against parallel proceedings outside Russia (backed by substantial fines for contempt) – a remedy which was up to this point consistently rejected by Russian courts.

One of the interesting features of these amendments as drafted is the requirement that an arbitration or jurisdiction agreement must be "incapable of being performed" due to "obstacles in access to justice" caused by sanctions against the affected party. Until very recently, it remained unclear whether a sanctioned party must provide affirmative proof that its access to qualified legal representation in a foreign arbitration or court proceedings was in fact restricted, or whether it was enough by itself that the party was included in the sanctions list.

In *Ural Transport Machinery v PESA Bydgoszcz* (case A60-36897/2020), the Russian Supreme Court provided clarity on the matter, even though it would hardly be welcomed by most commercial parties contracting with sanctioned Russian entities.

FACTS

In 2013, the Russian Ural Transport (aka Uralvagonzavod) agreed to purchase several railcars from PESA, a Polish manufacturer. The relevant contract provided for SCC arbitration in Stockholm. In 2014, Ural was targeted by EU financial sanctions, which effectively prohibited it from receiving loans with maturity exceeding 30 days (see Council Regulation (EU) No 833/2014, Annex V). In the same year, Ural was also listed as a specifically designated national (SDN) as part of the US sanctions, which meant that US persons, including banks, could not deal with Ural (see 3 CFR 13661 - Executive Order 13661 of March 16, 2014. Blocking Property of Additional Persons Contributing to the Situation in Ukraine) (subject to obtaining an exemption called a "specific license").

After Ural went in arrears for the railcars, in 2018 PESA commenced arbitration demanding more than EUR 55 million (including liquidated damages and interest). Two years into the proceedings, Ural applied to the Sverdlovsk Commercial Court in Russia for an anti-suit injunction against PESA, seeking an order that PESA must withdraw the claim or pay a contempt fine in the amount of a final SCC award. Ural argued that it the arbitration agreement automatically became unenforceable by virtue of Ural being sanctioned, and accordingly it was not required to affirmatively prove it experienced "obstacles in access to justice". In any event, Ural claimed it could not transfer fees to its counsel in the arbitration and most firms approached by Ural declined to represent it due to the risk of exposure to US sanctions.

Both the Commercial Court and the Circuit Court for the Ural Region disagreed and denied the application, primarily on the basis that Ural failed to prove its access to qualified legal representation was hindered. The Courts noted that despite the sanctions, Ural was represented by a large Russian firm, appeared in the SCC arbitration, appointed an arbitrator, filed several submissions and engaged experts on points of Polish law. The Circuit Court specifically mentioned that allowing Ural's arguments would significantly destabilise international commerce.

THE SUPREME COURT JUDGMENT

In a sudden turn of events, a three-judge panel of the Russian Supreme Court disapproved this part of the lower courts' reasoning. It held that the mere existence of foreign sanctions means that a sanctioned entity's access to justice is restricted and that an unsworn declaration that the entity is targeted by such sanctions is sufficient to invalidate an otherwise binding arbitration or jurisdiction clause. As a result, the sanctioned entity may at its option commence parallel court proceedings in Russia and even seek an anti-suit injunction against foreign proceedings started pursuant to the clause.

The Supreme Court relied on explanatory notes to the relevant Russian legislation, which stated that sanctions against Russia *de facto* deprive the targeted entities of the right to be adequately represented in foreign court and arbitration proceedings. The Court went on to state that the introduction of sanctions by itself causes reputational damage to the affected persons and puts them in an unequal position compared to their foreign contractual counterparts. As a result, the Court doubted that the courts or arbitral tribunals seated in a country which has imposed sanctions will remain impartial to the sanctioned party.

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In an extra twist, the Supreme Court noted that PESA's compliance with a Russian anti-suit injunction (i.e., withdrawal of the SCC arbitration claim with prejudice) would not significantly impair PESA's rights, as it would still be entitled to participate in the Russian court proceedings on the merits.

Luckily for PESA, by the time the Supreme Court issued its judgment, the SCC tribunal had already produced a final award, rendering Ural's application for an anti-suit injunction moot. The Supreme Court therefore dismissed Ural's appeal, but only on these narrow grounds.

COMMENTS

Even though Ural's appeal was dismissed, the judgment in *PESA* may set an alarming precedent for disputes involving sanctioned Russian persons. Technically, the Supreme Court judgment does not make for binding precedent, and it is possible that a differently constituted panel may take an opposite view later.

That said, the judgment expressly recognises that a sanctioned person may ignore a binding arbitration or jurisdiction clause and proceed to sue in Russia, in spite of ongoing proceedings abroad. It is expected that the judgment will prompt commercial parties dealing with Russian industrial companies to renegotiate their contracts.

One solution which has been put forward is to choose an arbitral institution licenced to administer disputes in Russia (e.g. HKIAC, VIAC, SIAC, or perhaps the ICC) with the seat of arbitration in Russia, or to select the Swiss Arbitration Centre. A potential downside to choosing Russia as the seat would be the relative frequency with which awards are set aside there. On the balance, the Russian judicial system still remains less arbitration-friendly than could be desired, and quality support from the courts is less readily available.

A more technical question which was not addressed in the *PESA* dispute concerns counterclaims and equality of arms. While a sanctioned Russian entity may obtain an anti-suit injunction compelling the other side to withdraw its foreign claims with prejudice, it is by no means clear that any counterclaims advanced by the sanctioned party will have to be withdrawn too.

While the new Russian law and the *PESA* judgment sought to address the arguable inequality which sanctioned parties might face in foreign proceedings, these measures may produce an even greater inequality where the sanctioned person can freely enjoy the benefits of arbitration for its own claims or counterclaims if it so wishes (with the relative ease of enforcing the resulting award under the New York Convention). Meanwhile, the other side would technically be ordered (with the threat of fines for contempt in Russia) to relocate its claims against the sanctioned party to Russian commercial courts.

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

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BIMCO Sanctions Clause 2020

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NO MORE NOTICE PLEADING MARITIME CLAIMS IN THE SECOND CIRCUIT

An Overview of the *In re Bensch* Decision

Written by Nicholas Paine

In its *In re Bensch* decision, Docket No. 20-2267-cv (2d Cir., June 23, 2021), the United States Court of Appeals for the Second Circuit addressed whether the plausibility standard for assessing the sufficiency of civil complaints under Rule 8(a) of the Federal Rules of Civil Procedure ("Federal Rules") applies to maritime complaints for exoneration from or limitation of liability ("exoneration or limitation") under 46 USC § 30511. This question of first impression in the circuit was taken up due to its general importance to the admiralty bar and district courts. The court held that pleadings for exoneration and limitation are subject to Rule 8(a) plausibility pleading standards, in addition to requirements provided by Rule F of the Supplemental Rules for Admiralty or Maritime Claims of the Federal Rules ("Supplemental Rules"). It then extended its holding to all maritime claims listed in Supplemental Rule A (e.g., vessel arrest, attachment). Thus, for pleadings in the Second Circuit that include the maritime remedies listed in the Supplemental Rules, these filings must not only satisfy the specific pleading requirements listed in the applicable Supplemental Rule, but must also meet the Rule 8(a) pleading requirements. Specifically, these maritime and admiralty claims must plead more than mere legal conclusions, but also factual content that allows a court to reasonably infer entitlement to prevail on the claim.

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As such, parties who anticipate filing maritime and admiralty claims under the Supplemental Rules in the Second Circuit, which most relevantly covers federal district courts in New York and Connecticut, as well as Vermont, should carefully consider what information to provide in an initial filing to meet the updated pleading requirements. Practically speaking, this means parties and their counsel should ensure that sufficient information is preserved following an event giving rise to a maritime claim and is included in the pleading to meet both the plausibility standard as well as specific pleading requirements included in the applicable Supplemental Rule. It is also worth noting that the federal plausibility standard remains somewhat more relaxed than the pleading standards applied in other jurisdictions, which may require pleading of particular or ultimate facts, or additional evidentiary support. Nevertheless, in the rush to the federal courthouse often involved in federal maritime claims, ensuring a plausible claim has been properly presented in the first submission is now clearly of paramount importance.

RULE 8'S PLAUSIBILITY STANDARD FOR PLEADINGS

Rule 8(a) of the Federal Rules states:

> A pleading that states a claim for relief must contain:
> (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
> (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
> (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

In the early 2000s, the U.S. Supreme Court expressly disavowed previously existing "notice pleading" standards, whereby plaintiffs were not required to set out detailed facts but only had to provide fair notice of the grounds for the claims, and instead adopted a "plausibility" standard that required more than mere legal conclusions but factual content that would allow a court to reasonably infer entitlement to prevail on the claim. *See Bell Atlantic v. Twombly*, 550 U.S. 544, 560-63 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). As a result of this change, civil complaints in federal courts could no longer merely put defendants on notice of the claims against them, but had to include sufficient facts supporting the claims such that the factual basis of the claims could be reasonably understood from the contents of the complaint.

RELEVANT PROCEDURAL HISTORY OF *IN RE BENSCH*

At the trial level, the district court (adopting a magistrate judge's recommendation) dismissed a maritime complaint seeking exoneration or limitation under 46 USC § 30511. It also denied a motion for leave to amend the pleadings. The district court found that the initial complaint failed to allege sufficient factual matters to support a plausible limitation or exoneration claim. Dismissal of that initial complaint was ultimately upheld by the Second Circuit, as the appellate panel found that the district court had properly applied the plausibility standard for pleadings to the initial complaint under Rule 8(a) of the Federal Rules. The Second Circuit went on to find the petitioner's amended complaint, provided as an exhibit to a motion for leave to amend that had been denied by the lower court, met the applicable pleading standards as imposed by its decision and allowed for the amended complaint to be filed on remand.

Relevant to the pleading standard issue the district court had applied the Rule 8(a) plausibility pleading standards of *Iqbal*, as interpreted by civil cases outside the admiralty context, and found that the legal conclusions couched as factual allegation in the initial complaint failed to plausibly allege a basis for limiting liability as required under that standard. The Second Circuit held that the plausibility standard of Rule 8(a) of the Federal Rules as laid out in both the *Twombly* and *Iqbal* decisions had been correctly applied by the district court. The Second Circuit went on to apply the plausibility standard to the amended complaint and found the petitioner had rectified the deficiencies contained in his initial filing.

The petitioner's initial complaint was deficient because it only described the vessel and its value, the negligence claim filed against the petitioner in state court, and asserted that the state court negligence claims would exceed the value of the vessel. Importantly, it included only two paragraphs about the accident itself – one stating that the decedent in the negligence claim had been recklessly operating his own watercraft, disregarding navigational rules, and the other that the petitioner was not at fault and any damages were without his privity or knowledge. On the other hand, the amended complaint contained several additional factual details about the petitioner, his boat, and his behavior on the day of the accident. It also made a significant material addition to meet one of Supplemental Rule F(2)'s specific pleading requirements applicable to the limitation or exoneration claim – stating that the voyage was a recreational voyage. Rule F(2) specifically requires that a complaint in exoneration or limitation must include details about the voyage on which the vessel was engaged at the time of the accident. Thus, the Second Circuit found that while dismissal of the initial complaint was proper, the district court should not have denied the motion for leave to file an amended complaint that otherwise complied with all the applicable pleading requirements.

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THE SECOND CIRCUIT'S ANALYSIS OF MARITIME AND CIVIL PLEADING STANDARDS AND APPLICATION OF RULE 8(A)

The Second Circuit began its discussion by analyzing the evolution and history of pleadings under the Federal Rules as they relate to maritime claims, more specifically to maritime exoneration or limitation claims. In 1966 the Federal Rules were amended and the existing civil procedural rules were merged with previously distinct Admiralty Rules governing pleading requirements for maritime and admiralty claims. As explained by the court, following the 1966 amendment the Federal Rules clearly also applied to maritime and admiralty claims, in addition to cases in law and equity. Nevertheless, as part of the 1966 amendments specific rules for distinctly maritime claims had been preserved in the updated Federal Rules by the newly added Supplemental Rules. Rule A of the Supplemental Rules provided that the Federal Rules "also apply to the [maritime and admiralty] proceedings except to the extent that they are inconsistent with these Supplemental Rules." Rule F of the Supplemental Rule specifically applies to exoneration or limitation actions, and contains provisions governing the contents of a complaint seeking that maritime remedy. Specifically, the Second Circuit noted Rule F(2) requires a complaint seeking exoneration or limitation to "set forth the facts on the basis of which the right to limit liability is asserted," among other pleading requirements that were irrelevant, or of minimal relevance, to the case at hand.

Prior to the changes to Federal Rules in 1966, under Second Circuit precedent district courts applied the then-existing general "notice pleading" standards of the Federal Rules to the maritime claims governed by the then-distinct Admiralty Rules. The precedential Second Circuit opinion on such pleadings, *Colonial Sand & Stone Co. v. Muscelli*, 151 F.2d 884 (2d. Cir. 1945), authored by the renowned Judge Learned Hand, had never been revisited following the 1966 changes to the Federal Rules and the *Iqbal* and *Twombly* decisions. In the *Colonial Sand & Stone* case, Judge Hand found no reason to mandate that a maritime complaint contain more facts than what was required under the pleading standards of Rule 8 of the Federal Rules as the rule existed at the time. Therefore, the pleading standard for maritime claims was the then-applicable notice pleading standard, in addition to pleading requirements of the then-distinct Admiralty Rules.

The Second Circuit panel in *In re Bensch*, adopted Judge Hand's reasoning, and found no reason to permit a complaint for exoneration or limitation under Rule F(2) of the Supplemental Rules to contain fewer allegations than were required in a civil complaint under Rule 8 under the current versions of the Federal Rules. Since the plausibility pleading standard became the requirement for civil complaints under Rule 8, that standard should likewise apply to exoneration and limitation claims governed by the applicable Supplemental Rule.

The court reasoned further, explaining that since the pleading requirements of Rule F(2) were fully compatible with the plausibility standards required by Rule 8(a) as determined by the *Twombly* and *Iqbal* decisions, the district court's decision to apply the plausibility standard complied with Supplemental Rule A's consistency requirement. Thus the district court was correct in holding that the petitioner was required to set forth sufficient facts to plausibly support his exoneration and limitation claim, in addition to the Rule F(2) requirements for that claim. In finding that this conjunctive standard was correct, the Second Circuit determined that the petitioner's proposed amended complaint had met both Rule 8(a) and Rule F(2)'s requirements, and the district court had erred in disallowing the amended complaint to be filed.

Notably, specifically referencing the importance of the pleading standard issue to the admiralty bar and district courts, the Second Circuit expressly stated that Rule 8(a) as interpreted by *Twombly* and *Iqbal* applied in all maritime cases listed in Supplemental Rule A(2), not just exoneration or limitation claims. Rule A(2), by reference, applies to maritime claims for attachment and garnishment, actions in rem, possessory, petitory, and partition actions, and actions for exoneration or limitation.

THE EFFECT OF THE PLAUSIBILITY STANDARD APPLYING IN MARITIME CLAIMS: PROVIDE SUFFICIENT FACTUAL INFORMATION SUPPORTING MARITIME CLAIMS IN THE INITIAL FILING

This clarification as to the applicable pleading standard brings some uniformity to federal pleading requirements, such that parties and their maritime legal counsel have a clearer understanding of what is required in the contents of initial filings in the Second Circuit. As is often the case in other civil proceedings, certain underlying circumstances will continue to require use of the discovery process to develop factual support for maritime claims, but as a result of this ruling it will often be preferable to err on the side of including factual information in an initial filing for a maritime claim, rather than risk dismissal of the claim, or at the very least, the need to amend the complaint.

As a result of this decision, parties with potential maritime claims may want to ensure they have more thoroughly investigated the circumstances giving rise to their claims than in the past. This may entail collecting relevant documents and information and providing the same to their counsel in anticipation of proceeding with the filing. While the nature of the maritime claims listed in Supplemental Rule A often necessitate hasty transmittal of documents and information, drafting, and filing, this ruling further necessitates providing as much supporting evidence as possible at the outset of a

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claim. Implementing procedures for preserving documents, preserving communications, and commencing pre-litigation investigations will be of increased importance. While these practices may be familiar to those in jurisdictions with more burdensome pleading requirements, for those accustomed to filing maritime claims with minimally supported allegations, in the Second Circuit at least, relying on a hastily-filed, factually-sparse complaint that only meets the outdated notice pleading standard will no longer suffice.

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UK NATIONAL SECURITY & INVESTMENT ACT 2021: THE IMPACT ON MARITIME

Written by Richard Murray

1. Following a lengthy parliamentary process, the National Security and Investment Act 2021 (the "Act") received Royal Assent on 29 April 2021, with wide-spread support across all political colours. But there had been a sense of anxiety within the City.

2. This latest reform in corporate governance law provides the UK Government new powers to scrutinise investments on national security grounds. On 20 July 2021, the government announced that the Act would come into force on 4 January 2022. The new Investment Security Unit (ISU) - operating out of the Department for Business, Energy and Industrial Strategy – is not yet formally up and running. However, businesses are invited to contact the Unit prior to its formal inception. It is anticipated that the ISU will enable the government to screen investments more quickly than is currently possible, with timelines set out in law rather than by the government.

3. The requirements of the Act are unlikely to have much material impact on day-to-day shipping operations. But more deals involving investment in strategic maritime assets and the development of certain materials and technologies may come under the umbrella of the Act.

THE CASE FOR REFORM

4. The UK has traditionally been one of the world's most permissive markets for foreign direct investment. A reputation which the Government seeks to maintain now more than ever as the "Global Britain" platform becomes the flagship mantra of the country's post-European Union era.

5. This is partly sustained through an independent system of common law that has enjoyed a prominent role within international trade. With a cadre of market-driven lawyers and judges binding parties to the terms of their commercial agreements, and upholding freedom to contract while keeping state interference in check.

6. However, among the alliance of Western democracies, the UK was slow to adopt stand-alone foreign investment legislation. The Act now brings the jurisdiction further into line with other states sharing a mutual suspicion of malign actors and hostile states seeking to gain control, influence or otherwise exploit industrial sectors that are fundamental to national life and prosperity.

7. The National Security Risk Assessment (2015) concluded that the threat environment was increasing in scale and complexity. Foreign intelligence agencies continue to engage in hostile human, technical and cyber operations; compromising Government information and assets, disrupting critical national infrastructure and stealing commercially sensitive technology, research and data.

8. The UK Government believed it lacked the requisite statutory powers to intervene in the ownership and control of businesses and other entities that were vulnerable to three types of risk to national security:

(1) *disruption* or *destruction*, being the ability to cor-

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rupt processes or systems;
(2) *espionage*, invoking unauthorised access to sensitive information; and
(3) *inappropriate leverage*, the capability to exploit an investment, or to dictate or alter services or investment decisions, and diplomatic or commercial negotiations.

WHAT'S NEW?

9. The Act substantially enhances the existing ‚light-touch' regime under the Enterprise Act 2002. It also applies to both UK and foreign investors.

10. The cost to business remains highly uncertain, but the Government's Impact Assessment of the new legislation estimated costs to range from £22.6m to £62.7m per year. It is expected that between 1,000–1,800 transactions will be notified each year - a dramatic increase from the 13 deals reviewed on national security grounds since the current 2002 Act came in force.

WHAT IS *MANDATORY* AND *VOLUNTARY* NOTIFICATION?

11. Certain aspects of implementing the Act will be addressed through future secondary legislation. However, the Act is broadly structured around a *mandatory regime* and a *voluntary regime.* The mandatory regime will require qualifying transactions to be notified to the Secretary of State for approval before they take place. The voluntary regime allows parties to submit transactions for approval under a separate procedure subject to different criteria.

WHAT CONDITIONS WILL TRIGGER MANDATORY NOTIFICATION TO THE UK GOVERNMENT OF A BUSINESS ACQUISITION?

12. Pursuant to s. 6(2) of the Act, a notifiable acquisition "takes place when a person gains control, by virtue of one or more of the cases described in subsection (2), (5) or (6) of section 8 [of the Act], of a *qualifying entity of a specified description*."

13. The structures of "qualifying entities" may include a company, a limited liability partnership, any other body corporate, a partnership, an unincorporated association and a trust. Mandatory notification is triggered when :

- the percentage of shares or voting rights that a person holds in a "qualifying entity" increases
  (a) from 25% or less to more than 25%,
  (b) from 50% or less to more than 50%, or
  (c) from less than 75% to 75% or more.
- The acquisition of voting rights enables or prevents the passage of any class of resolution governing the affairs of the "qualifying entity".

14. The concept of "specified description" for the purposes of section 8 of the Act is more fluid. In March 2021, the UK Government published "*National Security and Investment: Sectors in Scope of the Mandatory Regime*"– its response to the consultation with industry on which sectors would be treated as „specified" for the purposes of the Act. Further detail and definitions will likely come in the form of secondary legislation.

15. In total, 17 sectors were identified in the government's response. Those such as "Civil Nuclear" and "Defence" will come as no surprise. However, "Transport" is also listed and there is notable mention of technology; including "Advanced Materials", "Computing Hardware" and "Quantum Technologies".

WHAT ARE IMPLICATIONS OF FAILING TO NOTIFY UNDER THE MANDATORY REGIME?

16. Pursuant to s. 13(1) of the Act, a notifiable acquisition that is completed without the approval of the Secretary of State is void. The Act lists numerous civil and criminal penalties, including potential daily penalties for ongoing breaches. For a business, completing a transaction that is subject to mandatory notification without government approval will risk a penalty of up to 5 per cent of group worldwide turnover or £10 million (whichever is higher).

IS THERE MENTION OF MARITIME AND SHIPPING IN THE GOVERNMENT'S RESPONSE?

17. The consultation response states that "The Government remains committed to capturing all 51 major UK] ports. This is due to the ability of these ports to handle a variety of goods. The scope therefore remains expansive to reflect the flexibility of usage and choice within this sector. We would not wish to list 'key' ports, as it would be simple to circumnavigate this requirement." There is also residual power with the call-in provisions of the Act to deal with smaller facilities.

18. The draft definition of qualifying maritime entities outlined in the consultation response is as follows:

Ports and Harbours
1. A qualifying entity carrying on activities that consist of —

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(a) owning or operating a port or harbour situated in the United Kingdom that handled 1 million tonnes or more of cargo in the year preceding the year in which notification is given under section 14 (Mandatory notification procedure) of the Act, as recorded in the Port Freight Annual Statistics published by the Department for Transport; or
(b) owning and operating terminals, wharves or other infrastructure situated in a port or harbour described in sub-paragraph (a).

2. In paragraph 1—
"harbour" has the same meaning as in set out in section 313 (1) of the Merchant Shipping Act 1995;
"infrastructure" means the infrastructure, facilities and equipment within a port or harbour which enable the effective operations directly related to the movement of freight, passengers or seafarers;
"operating" means controlling the functioning of the port, harbour, terminal, wharf or other infrastructure situated in a port or harbour; and
"port" means an area of land and water made up of such infrastructure, facilities and equipment so as to permit—
(i) the receiving and departing of ships;
(ii) the loading and unloading of ships;
(iii) the storage of cargo;
(iv) the receipt and delivery of cargo; or
(v) the embarkation and disembarkation of passengers, crew and other persons; and
"ship" has the meaning set out in section 313 (1) of the Merchant Shipping Act 1995.

19. The Government also noted that certain developments in Advanced Robotics have dual civil-military potential, including in the production of remote-control and autonomous land, air and surface vessels, underwater vehicles and space satellites. Some designers and manufacturers operating at the forefront of developing niche technologies – which could be deployed in commercial shipping, vessel construction and offshore activities - could see discrete aspects of their work subject to the Act.

DOES THE ACT HAVE RETROSPECTIVE EFFECT?

20. Yes. The Secretary of State may issue a "*call-in*" notice to intervene in relation to a "*trigger event*" (i.e. a person gaining control of a qualifying entity) where there may be a risk to national security, if that "*trigger event*" has taken place in the last five years. This is reduced to six months from the day that the Secretary of State becomes aware of the trigger event. Any relevant transactions completed between 12 November 2020 and 3 January 2022 (the day before the commencement date of s. 2 of the Act) can be subject to a "*call-in*" within six months from that commencement.

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PURSUING SIMPLICITY: THE REFORM OF AUSTRIAN ENFORCEMENT LAW

Written by Alexander Zojer

Obtaining an enforceable judgment can often merely be a good start to a long-lasting race through the avenues of enforcement proceedings. Aiming to simplify the enforcement of payment claims, the Austrian legislator has enacted a variety of amendments to the Austrian Enforcement Act, which collectively entered into force on 1 July 2021 (general enforcement law reform, "*Gesamtreform des Exekutionsrechts*"). The reform's overarching objective is to promote efficient and easy enforcement of claims against a debtor's assets. Among other things, this has resulted in the creation of so-called "enforcement bundles", containing several means of enforcement by default, and the introduction of an enforcement administrator.

Below is a brief summary of some of the main innovations introduced by the enforcement law reform:

JURISDICTION

Under the old enforcement law, enforcement against individual moveable assets could result in the jurisdiction of different courts. Under the new enforcement law, jurisdiction for all proceedings regarding the enforcement of payment claims directed against the debtor's movable assets lies with the district court at the debtor's seat.

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Moreover, the creditor is no longer required to file a new application for enforcement in the event of an unsuccessful enforcement against a claim. Instead, the enforcement court must continue the enforcement proceedings *ex officio* until the claim has been successfully collected.

ENFORCEMENT BUNDLES

Prior to the entry into force of the new enforcement law, the creditor had to (more or less exactly) specify the debtor's assets against which it was seeking enforcement in the enforcement application. This task often constituted the first main obstacle for creditors seeking enforcement since they regularly lack information about the specific assets owned by the debtor.

Under the new enforcement law, the creditor's initial challenge has become considerably easier: the creditor can enforce payment claims against movable assets of the debtor by choosing between two "enforcement bundles" ("*Exekutionspakete*"). The creditor is of course still entitled to limit its enforcement application to specific means of enforcement, but in case the creditor applies for enforcement without specifying the means of enforcement, the „basic enforcement bundle" automatically applies. This default solution includes enforcement against the debtor's goods and chattel and against the debtor's salary as well as the drawing up of a list of assets. As a result, the creditor does not have to determine any means of enforcement and the court can apply a standardized procedure without having to request the creditor to remedy potential defects in the enforcement application.

However, if the payment claim exceeds EUR 10.000,- (or if the measures taken under the basic enforcement bundle were not successful), the creditor can also opt for an "extended enforcement bundle", which, in addition to the means of enforcement contained in the basic package, also includes all other means of enforcement against moveable property (including against company shares and claims against third parties). In addition, when applying the "extended enforcement bundle", the court will appoint an enforcement administrator.

ENFORCEMENT ADMINISTRATOR

The enforcement administrator takes over a large burden previously carried by the creditor: The enforcement administrator's task is to determine the debtor's attachable assets - and to subsequently attach and dispose of them. This means that the creditor does not anymore need to specify the debtor's assets against which enforcement is sought.

To fulfill his task, the administrator is entitled to enter properties, business premises and apartments of the debtor and to make inquiries there. He may also conclude installment agreements with the debtor (unless the creditor excludes this option in the enforcement application) and decide on the type of realization of property rights.

The court may appoint as administrator any person of good reputation, reliability and business knowledge who has the necessary skills to ensure expeditious enforcement proceedings. In practice, the court will most likely appoint practicing attorneys as enforcement administrators.

The administrator is entitled to a percentage of the amounts generated by realization of assets, but not less than EUR 500. The costs incurred are to be advanced by the creditor pursuant to Sec. 79 (1) EO. The creditor must pay an advance on costs of the minimum remuneration of EUR 500 to cover the of the administrator. The final fees of the administrator will be determined on the basis of the gross proceeds obtained from disposal of assets.

However, the creditor is not bound to request the application of one of the two enforcement bundles but can also request specific means of enforcement without the assistance of an administrator.

CONCLUSION

Enforcement of payment claims has become easier: The introduction of enforcement bundles and the creation of the role of an enforcement administrator are useful instruments for simplifying enforcement proceedings for creditors - especially since it relieves them of the burden of listing specific assets against which enforcement is sought. While the new system will still need to prove its value in practice, the newly implemented rules constitute a promising step towards simplifying enforcement proceedings in Austria.

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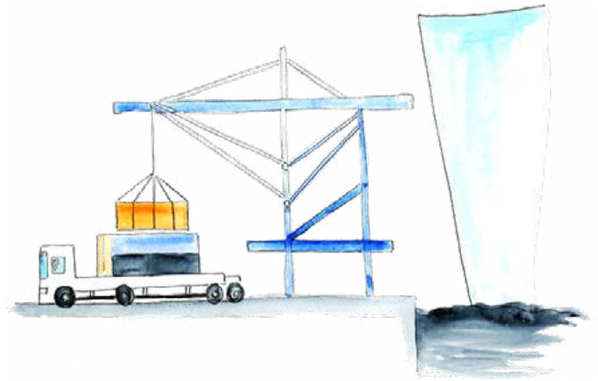
FEDERAL PREEMPTION OF STATE LAW CLAIMS FOR NEGLIGENT HIRING AGAINST TRANSPORTATION BROKERS

Written by Timothy S. McGovern

Transportation brokers are becoming frequent targets in claims for personal injury resulting from trucking accidents throughout the United States. Personal injury attorneys often argue that a broker's negligent selection of a carrier resulted in the injury to plaintiff. Generally, these causes of action allege that a driver was "unfit for the required contracted job so as to create a danger of harm to other third parties." *Hayward v. C.H. Robinson Co.*, 24 N.E.3d 48, 55 (Ill. App. 3d 2014). These "negligent hiring" claims can lead to runaway verdicts and significant defense costs for brokers and their insurers.

In response, brokers have turned to federal law, and more specifically the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), arguing that state law negligence claims are preempted. The FAAAA provides that a state "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . or any motor private carrier, broker, or freight forwarder with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). As a broker, hiring of truckers and drivers forms the core of the business. These truckers transport property, as cited by the FAAAA. Brokers have successfully argued that a state law negligent hiring claim directly implicates the central function of transportation brokerage and would have a significant impact on the business. Therefore, such claims are preempted under the FAAAA.

Plaintiff's attorneys have sought a very narrow interpretation of the FAAAA to allow negligent hiring claims to proceed. In response to FAAAA preemption arguments, plaintiff lawyers have argued that personal injury claims do not involve damage to property and therefore such claims do not fall under FAAAA's prohibition on enforcement of state laws relating to transportation of property.



Courts have not decided the preemption issue uniformly, often analyzing the facts of each case to determine whether preemption is appropriate. Generally, the U.S. Supreme Court requires that a court implement a definitive preemption analysis. *See Dan's City Used Cars, Inc. v. Pelkey,* 569 U.S. 251 (2013). This analysis includes identifying the field that is preempted by examining the statutory language.

Under federal law, the term "transportation" expressly includes "services related to that movement, including arranging for … delivery … storage, handling, packing, unpacking, and interchange of passengers and property." 49 U.S.C. § 13102(23). Note that the U.S. Supreme Court interprets the phrase "related to" to embrace state laws "having a connection with or reference to carrier rates, routes, or services, whether directly or indirectly." (internal quotes omitted) Dan's City. As a federal court in Illinois recognized:

> The Court must examine the underlying facts of each case to determine whether the particular claims at issue relate to the broker's rates, routes or services. The state law must relate to carrier rates, routes, or services either by expressly referring to them, or by having a significant economic effect on them. Moreover, it is not sufficient that a state law relates to the price, route, or service of a broker in any capacity; the law must also concern a broker's transportation of property.

(internal citations and quotations omitted) *Volkova v. C.H. Robinson,* 2018 WL 741441 (N.D. Ill. 2018). That court held that plaintiff's personal injury claims went to the core business of the broker defendant in hiring motor carriers. The court found that "in alleging that Robinson has failed to adequately and properly perform its primary service, the negligent hiring claim directly implicates how Robinson performs its central function of hiring motor carriers, which involves the transportation of property. Therefore, because enforcement of the claim would have a significant economic impact on the services Robinson provides, it is preempted." *Id*. That court further noted that plaintiff had direct claims against the carrier and driver and was therefore not left without a remedy.

Personal injury claims for negligent selection or negligent hiring will continue, as plaintiffs will seek additional parties from which to recover. By seeking preemption under federal

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law, brokers may have a strong defense against causes of action that threaten their core business.

For additional information and queries, please contact tim.mcgovern@zeilerfloydzad.com.

NEWS & EVENTS

TEAM

| NEW YORK

Our New York practice had a busy season, with the recent admissions of our Zach Barger (Chicago-based) and Philip Vagin (London-based) to the New York bar! These New York admissions add to Zach's previous Ohio and various US District Court admissions and to Philip's previous Russia admission.

| HOUSTON

Our Houston practice celebrated not only the admission of Nicholas Paine to the District Court for the Northern District of Texas, but also his appointment as Vice-Chair of the the Maritime Law Association of the United States Marine Financing: Coast Guard Documentation, US Citizenship and Related Matters Subcommittee!

EVENTS

| MARCH

Disputes for Breakfast | Dispute Resolution
"Dispute Resolution in Austria" Study Discussion
With Prof. Christian Koller and Lisa Beisteiner.
Thursday, 10 March 2022

| APRIL

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.
Monday, 4 April 2022

| JUNE

Disputes for Tea | Shipping, Logistics & Transport
Save the date - more info coming soon!
Tuesday, 14 June 2022

Click here for our full event schedule for 2022.

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