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FOR WHOM THE BELL TOLLS? NOT THE MONTREAL CONVENTION…

"Apparently" sometime in 2015 plaintiff hired defendant to transport 500 units of electronic scooters and hoverboards from China to John F. Kennedy Airport in New York. The goods were to arrive on a cargo flight by December 14, 2015. Unfortunately, the goods ended up in Dallas, Texas, where they were held by U.S. Customs officials and released to plaintiff in May, 2017. At that time, only 341 units were delivered to plaintiff.

Plaintiff, alleging damages in the amount of $121,782 for the missing159 units, filed an action in New York State Supreme Court, Kings County, on May 30, 2018.

On June 29, 2018, defendant removed the action to the Federal Court, and then on July 6, 2018, moved to dismiss the complaint for failure to state a claim.

The Court applied the Montreal Convention which contains a provision providing that any claim should be brought within a two-year period computed from the date of arrival, the date of intended arrival, or the date the carriage ceased. "Questions as to the calculation of the period are left to the court of the forum."

Plaintiff argued that the statute of limitations should be tolled or that New York's three-year statute of limitations should apply, however, the Court noted the Second Circuit found the statute of limitations of the Montreal Convention was not subject to tolling.

The Court also referred to several cases which found that the Montreal Convention's time

limitation "is not subject to tolling" (citing cases).

"Here, plaintiff alleges that United was to transport the goods to JFK Airport by December 14, 2015, but the Complaint was not filed until May 20, 2018, well over two years later. The Complaint, therefore, is time-barred."

The action was dismissed with prejudice.

LAM WHOLESALE, LLC v. UNITED AIRLINES, INC., U.S.D.C., E.D.N.Y.; Docket No. 18-cv-3794 (D.L.I.) (LB); Decision of Chief Judge Dora Irizarry, dated March 31, 2019.

CHOPPER DOWN; $500.00…

Plaintiff contracted with defendant to transport a helicopter and accessories from Savannah, Georgia to Melbourne, Australia. Defendant was responsible for loading the helicopter and accessories onto the ship and for its custody before, during, and after ocean transit.

When defendant's subcontractors attempted to load the helicopter body onto the ship by pushing it up the Ro-Ro ramp of the vessel, using a tow bar provided by the plaintiff, the helicopter body was damaged. Plaintiff filed suit.

After an initial pretrial conference, the parties filed a Joint Statement of Stipulated Facts, and defendant filed a Motion for Partial Summary Judgment.

The Court found COGSA applied and considered the issue of whether the helicopter should be considered a "package" under COGSA or, alternatively, a single Customary Freight Unit.

As to whether the helicopter constituted a "package," the Court stated:

> When the parties have contractually defined the goods shipped as "package(s)"…as often occurs on the bill of lading, there is the presumption that those goods constitute "package(s)" for purposes of COGSA." (Citation omitted).

The Court considered argument as to whether the towing equipment should make the

helicopter equivalent to a package as analogous to cases involving yachts on cradles. While the Court stated its assessment that the helicopter was best viewed as a "package", it was not however decisive in the case before it. Even if the Court had found that the proper measure was the "CFU," the Court would have found the helicopter constituted only one unit.

Under the heading "No. of Units or Packages" and alongside the goods described as one helicopter was recited "the number 1." It then listed three other units or packages, two of which consisted of helicopter rotor blades and the last of which constituted a horizontal stabilizer crate. It then recited "Total No. of Containers or Packages Received by the Carrier" in words and listed "4 Unit(s)." "This makes clear that the helicopter is a single unit."

The Court went on to note a bill of lading provision also stated "each unpackaged vehicle or other piece of unpackaged cargo on which freight is calculated constitutes one customary freight unit." It remarked that plaintiff had had a fair and reasonable opportunity to declare a higher value and pay a higher freight in order to opt out of the COGSA limitation. Plaintiff did not do so.

The Court also considered the provision undermined plaintiff's argument that the applicable CFU is the unit "used to calculate the freight for the unpackaged helicopter," or the "revenue ton." This argument could not be squared with the plain language of the bill of lading that a CFU was the piece of cargo *on which freight is calculated.*

> "…regardless whether the helicopter with tow bar is viewed as a "package" or as a CFU, the Court holds the bill of lading limits [defendant's] liability under COGSA to $500. Future shippers seeking to avoid such a limitation for a singular, valuable unit such as a helicopter or a yacht will do well to consider opting out of the limitation, declaring a higher value, and paying a correspondingly higher freight."

The Court granted defendant's motion for partial summary judgment.

BRISTOW U.S. LLC v. WALLENIUS WILHELMSEN LOGISTICS, AS; U.S.D.C., S.D.N.Y.; Docket No. 18-cv-3504 (PAE); Decision of Judge Paul A. Engelmayer, dated February 28, 2019.

PLANTAIN PLAINTIFF PREVAILS…

Seventy five containers of plantains were transported from Guayaquil, Ecuador, to Brooklyn, New York, between April 2015 and April 2016. The total shipment was seventy five containers, of which sixty two were received in good condition. Plaintiff brought suit for damages with respect to the remaining thirteen containers.

After a trial, the Court made extensive findings of fact and conclusions of law. The findings of fact comprise some 19 pages and were based upon the testimony of eight witnesses.

The Court stated "a shipper establishes a *prima facie* case under COGSA by proving that the carrier received the cargo in good condition but unloaded it in a damaged condition" (citation omitted).

A carrier may rebut a shipper's *prima facie* case by establishing either that it exercised due diligence to prevent the damage to the cargo by properly handling, stowing, and caring for it in a seaworthy ship, or that harm resulted from one of the excepting causes listed in Section 1304(2) of COGSA. The excepting cause invoked by the defendant carrier was inherent defect, quality or vice of the goods.

"If the carrier is able to rebut the shipper's *prima facie* case, the burden then shifts back to the shipper to show that the carrier's negligence was, at the least, a concurrent cause of the loss."

If the shipper establishes that the carrier's negligence was at least a concurrent cause of the loss of damage, the burden shifts again to the carrier which must establish which portion of the loss was caused by other factors; and if the carrier cannot prove the appropriate apportionment of fault, it becomes liable for the full extent of the shipper's loss.

The Court found the plaintiff had established a *prima facie* case, also buttressed by the fact that there were no issues over 60-some-odd contemporaneous shipments of plantains sent by

the shipper.

As to the carrier's defense of inherent vice, the Court found in favor of the shipper.

The Court found that the carrier had not carried its burden of rebutting the plaintiff's *prima facie* case. Even if it had by showing inherent vice in the cargo, the plaintiff had sufficiently shown that there was negligence, in the form of temperature spikes caused by power-off events that were at least a concurrent cause of the loss.

As to any apportionment, the carrier offered no proof in this regard, and thus, was held fully liable for the damages found.

The Court entered judgment in favor of plaintiff which included dumping fees paid, as well as survey charges.

CIRCUS FRUITS WHOLESALE CORP. v. SEABOARD MARINE LTD; U.S.D.C. S.D.Fla.; Case No. 16-25103-CIV OTAZO-REYES; Decision of Judge Alicia M. Otazo-Reyes, dated February 5, 2019.

CHEESE GETS SPIKED…

"Trader Joe's, a national grocery chain, rejected a shipment of its private-label cheese based on high temperature readings during transit." The shipment was governed by a Master Vendor Agreement between Trader Joe's and the manufacturer, Singleton's Dairy. The Agreement provided that refrigerated products were to be shipped and received at 40 degrees Fahrenheit or less and to be monitored by a temperature monitoring device during transit. The manufacturer retained the plaintiff to handle the shipment, and the plaintiff in turn, retained the defendant to carry the shipment from Bayonne, New Jersey, to Fontana, California, with the email instruction that it be "chilled 40 degrees."

When the shipment arrived in Fontana, the shipment monitoring devices on some pallets evidenced reefer temperatures above 40 degrees for prolonged periods during transit, including some readings above 60 degrees.

Based upon these readings, Trader Joe's representatives rejected part of the shipment "due to warm temp."

Plaintiff arranged for the rejected cheese to be transported to a cold storage facility, where it was re-tested by defendant's expert and eventually destroyed. Plaintiff then paid the manufacturer damages in the amount of $73,581.16, the value of the lost shipment.

Plaintiff then sought recovery from defendant for that amount plus $7,600 in additional costs under the Carmack Amendment. Defendant denied the claim and asserted a cross-claim against Trader Joe's for wrongful rejection of the cheese.

The District Court granted summary judgment in favor of the plaintiff on its Carmack Amendment claim plus damages and granted summary judgment in favor of defendants on additional claims of negligence and indemnification (as preempted by the Carmack Amendment). It also rejected the claim of defendant against Trader Joe's for wrongful rejection.

Defendant appealed the District Court's decision.

Initially, the Court addressed defendant's argument that plaintiff, a broker, lacked standing to recover loss under the Carmack Amendment. While defendant was correct in noting that the Carmack Amendment does not grant brokers a right to sue, plaintiff could still avail itself of the provision granting a right of action to a "person entitled to recover under the receipt or bill of lading."

The Court found that defendant had failed to demonstrate that plaintiff was not a person entitled to recover any losses under this provision.

The Court noted that carriers are "strictly liable for damages" (citation omitted) up to the "actual loss or injury to the property caused by (A) the receiving carrier, (B) delivering carrier, or (C) [certain intermediary carriers]" (citation omitted).

The Court stated that the manufacturer (and eventually, the plaintiff) " …suffered an

actual loss of property when the cheese product was subjected to conditions that violated the transportation requirements set out in the Master Vendor Agreement… and communicated to [defendant] via email".

The Court further found plaintiff had satisfactorily proven damages.

As to the additional costs of transporting, storing, and destroying the rejected cheese ($7,600), the Court noted that these costs were foreseeable by a reasonable person.

The Court noted that once a plaintiff is able to establish a *prima facie* case, the burden shifts to the carrier to prove it was free from negligence or that the damage was caused solely by act of God, public enemy, the act of the shipper himself, public authority, or inherent vice.

It found defendant had not presented persuasive evidence in support of any of these and thus had failed to meet its burden. It found the defendant liable to the plaintiff under the Carmack Amendment for the loss incurred by the rejected cheese.

As to defendant's claim against Trader Joe's for wrongful rejection, the Court stated the temperature requirement remained in place at all times and Trader Joe's was within its rights to reject any portion of the shipment that had not been chilled at 40 degrees.

The Court affirmed the judgment of the District Court.

MECCA & SONS TRUCKING CORP. v. WHITE ARROW, LLC et al.; U.S.C.A 3d Cir.; Docket No. 17-3121; Decision filed March 25, 2019.

[**Editor's Note:** The decision of the Third Circuit is marked "**NOT PRECEDENTIAL"]**

TWO YEARS; TOO LONG; TOO BAD…

Plaintiff and defendant entered into a shipping contract to transport olivine sand from New Orleans, La., to plaintiff's facility in Wurtland, Kentucky, by river barge. In January of 2015, a shipment arrived at the discharge port and, on inspection by plaintiff's employees, the cargo was found to be damaged by excessive moisture. They notified defendant and a survey was

arranged for. The surveyor found no structural defect in the barge, and concluded the sand was wet when loaded and, in transit, some of that water evaporated, condensed on the overhead portion of the barge cargo space, and dripped back onto the sand. The defendant promptly contacted the plaintiff to disclaim any liability.

The matter sat for two years. However, in February of 2017, the plaintiff filed suit to recover damages for its alleged loss.

The defendant, on the basis of a provision in the contract calling for "all disputes under this Contract…must be brought within four (4) months of the act or occurrence giving rise to the claim," moved to dismiss.

The District Court, on the basis of that provision, determined the action as untimely and granted dismissal. Plaintiff appealed.

The Appellate Court held it was dealing with a matter involving an alleged breach on navigable waters, and thus it had admiralty jurisdiction.

The case turned on the interpretation of the limitations provisions of the contract, and in particular, the meaning of the word "disputes." Plaintiff argued the phrase was a notification requirement and not applicable to the commencement of suit. Defendant argued that, while the phrase might appear ambiguous on its own, other language in the contract provided a context and demonstrated the parties intended to contract for a short limitation period.

The Court stated that terms are not ambiguous merely because the parties disagree as to the proper interpretation of those terms, and, under Indiana law, it must construe the contract as a whole and consider all provisions of the contract, not just the individual words, phrases, or paragraphs. (Citation omitted.)

The Court also noted that another provision of the contract specifically covered notification.

Standing on its own, the limitation provision of the contract might be ambiguous, but read in context with the rest of the contract, the Court found no question that plaintiff was required to file suit no later than four months after it discovered the damage.

The Court affirmed the judgment of the District Court dismissing the action.

VESUVIUS USA CORPORATION v. AMERICAN COMMERCIAL LINES LLC; U.S.C.A. 7th Cir.; Case No. 18-1881, 910 F.3d 331; decided December 6, 2018.

THE BEST LAID PLANS OF MATES AND MEN…

On May 18, 2011, the CMA CGM LIBRA, while leaving the Port of Xiamen, China, ran aground. The vessel and her cargo were salvaged at a cost of some $9.5 million. The owner declared General Average, and the General Average claim against cargo interests was some $13 million.

Ninety-two (92%) percent of the cargo interests paid their contribution to GA, but some 8% refused to do so. The sum payable by those interests was approximately $800,000.

Owners brought suit and after some 6 days of hearings and further written submissions, Mr. Justice Teare rendered a detailed decision on March 8, 2019 (comprising some 129 paragraphs). It covers the issues of unseaworthiness, due diligence, negligent navigation, and causation.

Mr. Justice Teare found for the claimants.

Although navigation by the master outside the marked channel was found to be negligent navigation, the Judge found preparation of the voyage plan failed to properly show information concerning marked/unmarked shoals. The lack of a proper voyage plan evidenced a lack of due diligence to make the vessel seaworthy before the vessel sailed and was causative of the grounding.

[The Editors urge the Reader to study the full decision of Mr. Justice Teare which

sets forth in some detail the points of various evidence presented to him and his evaluation of such. Also note the first line of the decision states the grounding occurred on "May 17". The grounding occurred on May 18.]

ALIZE 1954 and CMA CGM SA vs. ALLIANZ ELEMENTARVERSICHERUNGS AND OTHERS; High Court of Justice (Admiralty Court); [2019] EWHC 481 (Admlty); Decision of Mr. Justice Teare dated March 8, 2019.

FIRE DEFENSE SURVIVES CHIEF'S FIRE…

In the early hours of 14 May 2015, while the vessel was on a voyage from Taman, Russia, to Houston, Texas, a fire started in its engine room. As a result, salvage was arranged for and the vessel was towed to Las Palmas, where general average was declared.

Appellants brought proceedings in the Commercial Court as owners of a cargo of fuel oil carried on board the vessel for sums it had paid to the salvors, as well as the cost of defending the salvage arbitration proceedings. Its claim was based on alleged breaches of four bill of lading contracts, and alternatively, in bailment.

The Court ordered a hearing on two preliminary issues on the basis of agreed and assumed facts.

On the basis of these facts, two preliminary issues were identified: (1) whether the actions of the chief engineer constituted barratry; and (2) whether the owners were precluded from relying upon the fire defense and the general negligence defense in Articles IV(2)(b) or (2)(q) of the Hague-Visby Rules.

After "a full and careful analysis", the Judge concluded that whether the conduct of the chief engineer constituted barratry depended on further facts which would need to be found as to his state of mind; however, the issue was not determinative of whether the owner was exempt from liability for the fire.

So far as the second question was concerned, he found that Article IV(2)(b) was capable

of exempting the owners from liability even if the fire was caused deliberately or via barratry.

He also held the owners were not exempt from liability under Article IV(2)(q).

Cargo Interests appealed with respect to questions One and Two.

The Court of Appeal, in an opinion of 131 paragraphs, which covered the history, development and treatment of the fire defense, essentially found that "fire" included all fires (except one which was due to the actual fault or privity of the carrier) and it made no difference whether the Chief Engineer's actions constituted barratry.

[**EDITORS' NOTE**: AGAIN, THE READER IS URGED TO READ THE FULL DECISION FOR ITS FULL TREATMENT OF THE FIRE DEFENSE]

GLENCORE ENERGY UK LTD ET ANO VS. FREEPORT HOLDINGS LTD; Court of Appeal (Civil Division); [2019] EWCA CIV 388; Decision dated 14/03/2019.

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