A BIT OF THE QUIZZICAL

[Ponderments]

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Halloween is upon us, but this paper will not consider Ghosts or Goblins nor Witches or Warlocks. It will deal with some situations where the decision of a Court contains statements which seem logically wrong or straight out contrary to fact.

Generally speaking, after a decision comes down, you either like it or are not pleased with it. The question is, if you don't like it, do you want to consider Re-argument or skip Re-argument and go to Appeal? On the other hand, perhaps you can't do anything about it.

The question of going forward is really a matter of practicalities or pragmatics and include whether the client wants to keep spending money. Therefore, it should involve an evaluation process as to whether it would be worthwhile to continue putting time on the matter.

Obviously, there may be some "errors" which, while inaccurate, correcting them would very likely not change the merits of the matter. One might consider advising the Court as to such, as a matter of manners or respect, but it is submitted that Re-argument or Appeal as to the merits on such basis might well approach the status of being deemed frivolous.

Following are three cases which, it is submitted, contain samples of what one might consider Ponderments or points which raise some question.

***Del Monte Fresh Produce N.A. v. M/V Lombok Strait,* 2015 AMC 1041, 2015 WL 1190113 (May 16, 2015 S.D.N.Y.)**

Plaintiff sued for damage to bananas shipped from Santo Tomas, Guatemala to Gloucester, New Jersey.

The vessel had been chartered since 2005 and was directed by Network Shipping Ltd., the plaintiff's "transportation arm", to perform biweekly round-trip services from Central

America to the United States. The vessel loaded cargo in Costa Rica and then went on to Santo Tomas, Guatemala to load fruit at that port. The voyage thence north to New Jersey took about 3 ½ days. On the second day of discharge at Gloucester, over-ripe bananas were noted with respect to the Guatemala bananas stowed in holds 3 and 4.

Plaintiff Del Monte sued for damages and, in a detailed 29 page Decision, the Court held For the Plaintiff. However, it is submitted the Decision, in spite of its detail, contains several statements which raise some question The following are some examples:

CORROSION:

"Decks A and B and Decks C and D share a ventilation system..."

> "Fresh air enters the holds through a common supply and a single fan at the top of the mast house that blows air down into a distribution manifold inside the mast house."
>
> "…the fresh air supply inlet ducts and dampers in each mast house and cargo hold were in poor condition due to corrosion…," thus, "…the fresh air vents could not be shut off, and were continuously allowing fresh air from outside the ship to enter and circulate in the ship's holds," (All quotations are from Decision)

In effect, all of the holds were subjected to the same conditions, yet, overripe bananas were only found in Holds 3a - c and 4a - c. At the same time bananas stowed in Holds 3c and 3d and 4d, which had been loaded at Costa Rica some two and a half days before, outturned sound.

QUERY: Why?

COGSA: The Decision defines "carrier" as the "owner, manager, charterer, agent, or master of a vessel," referring to 46 U.S.C. §30701. The decision also refers to §§30704 and 30705 as setting forth duties of a carrier under COGSA.

These references are to the re-codified Harter Act. COGSA appears verbatim as a note to §30701. It was neither repealed nor modified.

[It is submitted that correction of the Citations would not address the merits]

COMMON CARRIAGE:

The Decision states:

> "…Voyage 4 very clearly was a common carriage. This is true because, although Network chartered the full reach of the Vessel from Defendants, the fruit that was shipped was owned by the various farms it was sourced from in Guatemala and Costa Rica."

The Decision also states:

> "…The packing shed is staffed by several Del Monte personnel tasked with monitoring the inspection, cleaning, packing and transport of the bananas."
>
> "Upon arrival, Del Monte either unloads the bananas into the cold storage warehouse in Santo Tomas or keeps fruit in the container and sends it to the Port area where it can be stored in a reefer banking…."
>
> "Del Monte personnel monitor and log the temperature every four hours."
>
> "If a container is stored in the warehouse, Del Monte assigns the fruit to a cool room and its employees discharge the pallets after obtaining the transport temperature data and taking pulp temperatures of the fruit. Every six hours, Del Monte quality inspectors measure ethylene in the cool rooms..."
>
> "The inspectors also check ambient air and pulp temperatures of the bananas."
>
> "Del Monte starts loading bananas into containers at the warehouse for transport at the port once the vessel has arrived at the berth."
>
> "Like most other banana shippers, Del Monte provides instructions to the Chief Engineer for proper cooling and other care of the cargo during the ocean voyage..."

The bills of lading which were issued were not given to the farmers, and, from the activity described in the Decision, it is apparent that Del Monte was in control of essentially all pre-shipment activity.

QUERY: Given the Activity of Del Monte in Costa Rica and Guatemala regarding the fruit prior to shipment, does such not indicate that Del Monte was the Owner and de facto Shipper of such prior to loading?

***Mapfre Atlas Compania de Seguros S.A. v. M/V Loa*, 2017 AMC 2379, 2017 WL 333234 (S.D.N.Y. 2017)**

A containerized shipment of computer parts were carried from Port Everglades, Florida to Guayaquil, Ecuador. At the time of discharge, it was discovered 491 cartons of goods were missing.

The bill of lading listed the number "1" under the heading "NO OF PKGS" and described the shipment as "1x40' HC Container S.T.C. 989 PIECES COMPUTER PARTS".

Both parties moved for partial summary judgment on the issue of what was a package and did a $500. Limitation apply.

The bill of lading had a provision entitled "Package Limitation" which contained a definition of limitation of "package" where containerized shipments were involved. The Court did not give this much attention as the bill of lading (in Clause 21) referred to the application of COGSA. It considered the provisions of Clause 19 to be "immaterial."

COGSA allows the parties to agree to a higher limitation than the $500 package limitation contained in it, and the Court quoted Section 4(5) of COGSA in its decision.

QUERY: If COGSA allows the parties to agree to a higher limitation than $500. Can this be accomplished by reference to the Hague-Visby limitation of SDRs per package or weight, whichever is higher? If so, would reference to such a definition of package in the bill of lading be effective? [Cf. Kyokuyo Co Ltd vs A.P. Moller-Maersk A/S: High Court of Justice, Queen's Bench Division, Commercial Court [2017] EW HC 654 (Comm).]

***Great American Insurance v. Seaboard Marine, Ltd., Inc.*, U.S.D.C., S.D. Fla. (Miami Div.); 1:18-cv-21346-JLK (June 2019)**

According to bills of lading issued for a shipment of seafood, the cargo was picked up at Rama, Nicaragua and brought to the port of loading, Puerto Limon, Costa Rica. Then it was to go by vessel to the port of discharge (Brooklyn, New York), and finally to the place of delivery, which was Elizabeth, New Jersey.

The container was transported to the Costa Rican border and thence to defendant's container yard which was located a few miles outside of Puerto Limon. The next day, the container departed the container yard for the port where it was to be loaded on the vessel.

On its way from the container yard to the port, it was "intercepted by armed hijackers who stole the container." This statement was from a deposition testimony of plaintiff's corporate representative.

The relevant bill of lading provided: "The Carrier shall not be liable in any capacity whatsoever for…acts of thieves, hijacking…or any other loss or damage to or in connection with the Goods or Containers or other packages occurring at any time contemplated under subdivision a) of this Clause."

The Plaintiff took the position that the Harter Act applied to the action and the clause would be void.

In a footnote, the Court referred to various cases which recognize the extension of COGSA to before loading and after discharge and noted several cases which upheld contractual extensions, but only to the extent that COGSA did not conflict with the Harter Act.

Defendant cited a string of cases from around the Federal judiciary for the position that the Harter Act did not apply to a loss incurred during the inland phase of a multimodal carriage. The Court, noting that these cases were outside the Eleventh Circuit and involved cargo lost *after* it was unloaded from a vessel, declined to "cabin" the Harter Act and considered Clause 4(b) of the bill of lading as void and not exculpating the carrier from liability for loss of cargo in its possession prior to loading on board the vessel.

QUERY: Both the Harter Act and COGSA provide for a defense against loss resulting from acts of "public enemies." Wikipedia notes that the phrase, "public enemy," has been used for centuries to describe "pirates, vikings, highwaymen, bandits, mobsters, and similar outlaws." Can a hijacker be a "public enemy"? If so, does this represent a contradiction in the Decision?

The above represent a few instances where Courts' Decisions contain what might be termed "klangers." It is submitted that there may well be others; Judges (and their Clerks) are only human after all. A thorough knowledge of the facts and issues involved can only help in deciding how to proceed, or not.