# MARITIME LAW ASSOCIATION OF THE UNITED STATES
## Committee on Carriage of Goods

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**SILENCE ISN'T NECESSARILY GOLDEN……**

In 2017, plaintiff (an NVOCC) began providing its shipping service to defendant. It conducted business with respect to some eight overseas shipments for defendant before the shipment at issue was involved.

In late May of 2018, defendant enlisted plaintiff to ship seven sealed containers of plastic scrap from Houston and Jacksonville to Thailand. Plaintiff then secured the services of the actual carrier (MSC) to transport the cargo from the United States to Thailand.

As the vessel was en route to Thailand, the Thai port authority issued a notice suspending discharge of plastics until further notice. Plaintiff asked the defendant for instructions; however, defendant did not provide an alternative recipient or destination, instead instructed the cargo should be delivered to its original destination. Because of the suspension notice, plaintiff eventually offloaded the cargo in Singapore, where it was ultimately sold, defendant having refused to accept delivery or retrieve the cargo. As a result, the actual carrier incurred import charges and expenses associated with storage and ultimate destruction of the cargo.

Plaintiff paid the actual carrier for demurrage and detention charges totaling $27,327.00 and brought an action against defendant for those expenses and attorneys' fees. Both plaintiff's House Bill of Lading and the actual carrier's Bill of Lading contained a forum selection clause calling for suit to be commenced in the District Court for the Southern District of New York.

Defendant moved to dismiss the complaint, arguing that the forum selection clause in the plaintiff's House Bill of Lading was not enforceable because the clause was not communicated to it. Defendant stated that the plaintiff did not provide a copy of its House Bill of Lading in the eight prior transactions or in the transaction at issue and, in fact, it did not communicate the terms and conditions of that Bill of Lading to it until the lawsuit. The plaintiff did not contend otherwise, but instead argued that, while it may not have issued or delivered its Bill of Lading to the defendant, such did not preclude application of that instrument to the carriage.

The Court did not accept this argument but referred to authority in the Second Circuit that the test for what constitutes "reasonable communication" was whether the carrier had done "*all it reasonably could* to warn the passenger that the terms and conditions were important matters of contract affecting his legal rights." (Citation omitted)

The Court rejected the argument that the defendant could have checked plaintiff's website, which contained a copy of its Bill of Lading terms, as the plaintiff's website was referred to in email discussions.

The Court considered the email references were insufficient to show defendant's awareness of the plaintiff's House Bill of Lading. The Court, after considering various case authority, found that the plaintiff's House Bill of Lading's forum selection clause was not reasonably communicated to defendant and could not serve as the basis for personal jurisdiction.

The Court also rejected plaintiff's argument that it could rely on the actual carrier's forum selection clause. It went on to consider whether it had general or specific jurisdiction and found that it did not. The Court granted the motion to dismiss on the basis of lack of personal jurisdiction but without prejudice to plaintiff's ability to file suit in a court of competent jurisdiction.

**MTS LOGISTICS, INC. v. INNOVATIVE COMMODITIES GROUP LLC; U.S.D.C., S.D.N.Y.; 19 Civ. 4216 (PAE); Decision of Judge Paul A. Engelmayer, dated February 26, 2020.**

**COURT READS CP AND BL TOGETHER……**

A cargo of steel beams was transported by defendant from Taiwan to Los Angeles, California, pursuant to a charter party entered into between defendant and plaintiff's assignor.

Seventeen separate bills of lading reflected the transfer of cargo from "Tung Ho" to plaintiff. The bills of lading listed plaintiff as consignee and Tung Ho as shipper.

Each bill of lading contained a provision stating that all disputes arising under and in connection with this bill of lading "…shall be settled in the flag state of the ship, or otherwise in the place mutually agreed upon between the Carrier and the Merchant…"

The charter party contained a provision calling for claims to be brought in the District Court for the Southern District of New York

The cargo was damaged. After realizing this, the plaintiff obtained an assignment of the charter party from Tung Ho. Plaintiff then filed suit against defendant and the vessel alleging maritime jurisdiction and federal question jurisdiction. Defendant moved to dismiss the complaint. Plaintiff relied on the forum-selection clause of the charter party and the assignment as bases for the Court to assert personal jurisdiction over defendant.

Defendant took the position that the forum-selection clause in the charter party was applicable only between it and Tung Ho, not the plaintiff, and that the relevant forum-selection provision was the one contained in the bills of lading.

The plaintiff took the position that it could rely on the charter party's forum-selection provision even though it was not a signatory to that agreement, relying on *Asoma Corp. v SK Shipping Co., Ltd.*, 467 F.3d 817 (2d Cir. 2006). In that case, the Charter Party identified the charterer as "MUR London or nominee." The Court distinguished *Asoma*:

> "… unlike in *Asoma*, where the text of the charter party made clear that Asoma could become a party to the agreement as MUR London's "nominee", nothing in the text of the Charter Party indicates that (Plaintiff) was a party to the Charter Party, a third-party beneficiary of the Charter Party, or an agent

for Tung Ho."

The Court found that plaintiff was neither a signatory of nor a party to the charter party. The bills of lading, and not the charter party, were the relevant contracts of carriage between plaintiff and defendant.

The Court then looked at the forum clause in the bills of lading, with defendant asserting that the forum for this suit must be the "flag-state of the ship."

The Court noted that the jurisdictional clause found in the Bills of Lading was not as limited as argued by defendant. It stated that disputes arising in connection with the Bills of Lading should be settled in either the flag-state of the ship or "otherwise in the place mutually agreed between the carrier and the merchant."

The Court further noted that the charter party between the defendant and Tung Ho contained an agreement to settle disputes in the Southern District of New York. "They agreed that any claims for cargo damage would be brought in the Southern District of New York, notwithstanding any contrary provision in the Bills of Lading."

While the Court commented that the incorporation clause could be clearer, it noted a charter party and a bill of lading may be read together to form the complete contract of carriage between the parties.

> "(Defendant) signed a Charter Party agreeing that *any* claims for cargo damage could be brought in the Southern District of New York. It did not specify that such claims could only be brought by Tung Ho" (Citation omitted).

The Court found defendant consented to jurisdiction in the Southern District of New York in the charter party and would not be allowed to avoid the enforceability of its own agreement by pointing to a purportedly inconsistent term in the Bills of Lading.

**BST CORPORATION v. M/V ELLIOTT BAY et al.; U.S.D.C., S.D.N.Y.; 19 Civ. 2063 (KPF); Decision of Judge Katherine Polk Failla, dated March 6, 2020.**

**AS TIME GOES BY……**

A shipment of glass windows was transported from Brooklyn, New York, to Louisville, Kentucky. The shipment was pursuant to defendant's Internet Straight Bill of Lading, which incorporated its tariff.

The tariff provided, "Carrier must receive all claims for cargo loss or damage including all supporting documentation within nine (9) months of the date of delivery…."

Upon arrival, the windows were found to be damaged. On that same day, the plaintiff's assured sent an email to defendant stating that the shipment had arrived with some damage: "…We are documenting the damage with pictures. Please advise as to the insurance liability, and the process required when making a claim." The defendant replied that it was not liable for any damage as the shipment was "shipper load and offload."

Thereafter, the plaintiff's assured filed an insurance claim with plaintiff who paid $21,076.83 pursuant to its insurance policy.

Thirteen months after the assured's notice to defendant, plaintiff's counsel sent a letter to defendant demanding reimbursement.

Defendant denied the plaintiff's claim as untimely as its insurance counsel's letter was received after the nine-month window required by defendant's tariff.

Plaintiff filed a lawsuit and then moved for summary judgment.

The July 19, 2017 email from plaintiff's assured was the only contact with defendant prior to the August 21, 2018 letter from the plaintiff's counsel.

49 C.F.R. §370.3(b) provides, in relevant part, that a written communication from a claimant must be filed within the time limits specified in the bill of lading or contract of carriage and must specify in a claim for damages a specified or determinable amount of money.

The Court found that even viewing the facts in the light most favorable to the plaintiff, the email did not substantially comply with the requirements of 49 C.F.R. §370.3(b): "The email

does not include a specified or determinable amount of money…."; and thus did not comply with the requirements of 49 C.F.R. §370.3(b), "even under the most lenient substantial compliance standard articulated by the Sixth Circuit."

The Court did not accept plaintiff's argument that the initial denial of the claim by defendant to plaintiff's assured excused the claimant from compliance with §370.3(b).

The Court found that neither plaintiff's assured nor it filed a valid claim under the Carmack Amendment for the damage sustained to the glass windows and granted defendant's motion for summary judgment.

**SECURA INSURANCE v. OLD DOMINION FREIGHT LINE, INC.; U.S.D.C., W.D.Ky. at Louisville; Civil Action 3:18-cv-00780-CRS; Decision of Judge Charles R. Simpson III, dated March 20, 2020.**

**CLAUSE LETS SUBCONTRACTOR OUT; CARRIER'S CLOCK KEPT TICKING……**

Marble tiles were transported from China to New York. The ocean carrier handled the journey across the Pacific Ocean and then subcontracted with the railroad to bring the tiles across the United States. When plaintiff received the tiles, they were allegedly damaged beyond repair.

After going through the ocean carrier's claims process, and being denied, plaintiff brought suit against the ocean carrier in a New Jersey state court. The case was removed to federal court in New Jersey and later transferred to the Southern District of New York.

Plaintiff filed an amended complaint asserting claims against the ocean carrier and the railroad. Both defendants moved to dismiss the complaint.

The Sea Waybill contained a provision that no claim would be brought against any servant, agent, or subcontractor of the carrier, requiring that any suits for damage to cargo be brought against the ocean carrier.

Plaintiff's claims processing agent contacted the ocean carrier to file a claim, and in an email in response, the ocean carrier's claims agent acknowledged receipt of the claim and

requested supporting documents, including a "formal statement of claim, stating the amount claimed and its breakdown."

Various documents were submitted to the ocean carrier's claims agent and inquiries made as to the status of the claim. The carrier's claims agent stated that a formal claims statement was needed, as a "formality."

During the time emails and telephone discussions were exchanged, the one-year time to sue ran out.

The Court first dealt with the motion of the railroad that it lacked jurisdiction over it. The Court first considered the railroad's allegations as to general and personal jurisdiction. It found the railroad was not subject to general jurisdiction in New York State.

As to personal jurisdiction, the evidence and allegations before the Court showed that the railroad undertook to deliver the marble tiles to New York, and consequently was subject to personal jurisdiction.

> "A carrier's agreement to deliver goods in New York is obviously a contract to perform services in the state and involves a clear submission to the laws of the state." (Citation omitted)

The Court concluded it had personal jurisdiction over the railroad and denied the railroad's motion to dismiss.

The Court considered the motion by defendant Ocean Carrier under Rule 12(b)(6) to be treated as one for summary judgment as both parties had submitted and considered evidence outside the pleadings. The Court then found the matter to be governed by Admiralty law, as previously held by a former judge in the matter:

> "Because the Sea Waybill 'requires substantial carriage of goods by sea…it is a maritime contract. Its character as a maritime contract is not defeated simply because it also provides for some land carriage." (Citing *Kirby*)

The Court also considered what it termed an "Exoneration Clause," which provided that no claims or allegations should be made against servants or subcontractors of the carrier. It

referred to the Second Circuit decision in *Sompo Japan Ins. Co. of Am. Vs Norfolk S. Ry. Co.*, 762 F.3d 165 (2d Cir. 2014):

> "The Court held that such a clause relieved subcontractor railroads from any liability, and instead required suit to be brought only against the carrier that entered into the bill of lading."

The Court went on to state the clause relied on by the railroad was not identical to the one in *Sompo*, but was substantially similar and had the same effect. The plain language of the clause barred plaintiff's action against the railroad.

The Court then considered the ocean carrier's defenses of time limitation (or time bar) and package limitation.

As to the claim of time bar, the Court acknowledged that a COGSA defendant can be equitably estopped from asserting a time bar defense; "…but, on the other hand, mere delay by MSC is not enough" (Citation omitted).

The record showed that the Ocean Carrier's Claims agent continuously requested the presentation of a formal claim document; however, one was never produced. While the ocean carrier defendant "undoubtedly could have been more forthcoming and proactive in responding to [plaintiff's] demands…," "…such proactivity is not required by law under COGSA" (Citation omitted).

The Court found plaintiff had failed to show that its failure to file suit within the one year of delivery was a result of inequitable conduct. Accordingly, the Court granted defendant ocean carrier's motion for summary judgment.

As to the application of the package limitation defense, the Court found no need to consider such as the time limitation defense barred plaintiff's claims.

**HEROD'S STONE DESIGN v. MEDITERRANEAN SHIPPING CO. S.A. et ano.; U.S.D.C., S.D.N.Y.; 18 Civ. 5720 (AT); Decision of Judge Analisa Torres, dated January 22, 2020.**

**CARMACK SETS THE VENUE……**

Plaintiff, a New York limited liability company, entered into a contract with defendant railroads to transport stone product and return the empty railcars to it. The contract required plaintiff's commitment to ship a minimum volume of 1500 railcars of product. The contract expired by its own terms, and a few months later plaintiff filed a petition for relief under Chapter 11 in the Bankruptcy Court of New Jersey.

Some five months later, plaintiff commenced an action against defendants alleging they failed to transport and delayed transporting railcars carrying its product over two-and-a-half years resulting in substantial losses to plaintiff.

Defendants later moved to dismiss the claims premised on the Carmack Amendment.

The defendants argued that the appropriate venue for claims under the Carmack Amendment was dictated by the statute which contained special venue provisions and restricted where a civil action may be brought.

The Court found that the Carmack Amendment's special venue provision was restrictive and, thus, controlled the question of venue.

The Court treated in detail the provisions of 49 U.S.C. §11706(d)(2)(A) of the Carmack Amendment which covered actions against the originating rail carrier, the delivering rail carrier, and against the carrier alleged to have caused the loss or damage.

It found in each instance proper venue was in New York and not New Jersey.

It also found that the "loss or damage" referenced in subsection (iii) of the special venue provisions of the Carmack Amendment refers to loss or damage of the goods being shipped and did not include alleged economic losses sustained at the plaintiff's administrative office which was located in New Jersey.

The Court went on to consider the aspects of dismissal or transfer.

The Court found that plaintiff failed to provide a sufficient recitation of the elements of a cause of action under the Carmack Amendment, thus, it questioned whether a court addressing a motion to dismiss would be able to draw the reasonable inference that defendants were liable necessary to provide a motion under Rule 12(b)(6).

The Court also noted that under the Carmack Amendment, proper notice must:

> "…be communicated in writing or, where agreed to by the parties, electronically; contain facts sufficient to identify the damaged or lost shipment; assert liability for alleged loss, damage, injury, or delay; and demand payment of a specified or determinable amount of money."

The Court noted that while the Third Circuit construes the written claim requirement liberally, and may require substantial performance rather than strict compliance; nevertheless, "…the allegations of the amended complaint and the allegation that plaintiff attempted mediation are likely insufficient to satisfy the notice requirement (Citation omitted)."

Finally, the Court considered the plaintiff's claim of fraudulent inducement against one of the defendants. It noted the claim was subject to or involved a not-unreasonable forum selection clause which called for New York venue. The Court decided to exercise its power to dismiss this count rather than direct a transfer.

> "As with the Carmack Amendment claims…transfer is not a viable option given this Court's serious concerns regarding the sufficiency of plaintiff's fraud claim, as pleaded."

The Court dismissed without prejudice all claims asserted.

**AZZIL GRANITE MATERIALS, LLC v. CANADIAN PACIFIC RAILWAY CORP., DELAWARE & HUDSON RAILWAY CO., AND NEW YORK & ATLANTIC RAILWAY; U.S. Bankruptcy Court, Dist. of N.J.; Case No. 19-21763 (MBK); Decision of Judge Michael B. Kaplan; dated May 12, 2020.**

**“BE CAREFUL OUT THERE”……**

On April 3, 2002, the Court of Appeals (Civil Division) rendered its judgment affirming the decision of Mr. Justice Teare of the High Court of Justice, dated 8 March 2019. The Panel consisted of the Lords Justice Flaux, Haddon-Cave, and Males.

The decision arose out of the grounding of the vessel CMA CGM LIBRA on leaving the Port of Xiamen, China. Salvage efforts and expenses were incurred, the vessel was released and general average declared. Ninety-two percent of the cargo interests contributed; however, the remaining cargo interests refused, and the vessel owner instituted an action to recover their contributions in general average. (See Cargo Newsletter No. 73)

Justice Teare found for the cargo interests on the basis that the vessel was in an unseaworthy condition prior to sailing because of an inadequate passage plan and working chart which did not “properly” include a warning issued in a Note to Mariners the previous December 10, 2010. That Note advised that the fairway had a depth of 14 meters and also stated:

> “numerous depths less than charted exist within, and in the approaches to Xiamen Gang.”

The working chart referred to the Note; however, was not specific as to the warning.

The Court found the passage plan and working chart to be inadequate; thus rendering the vessel unseaworthy before the commencement of the voyage and causative of the vessel leaving the buoyed fairway.

The Court found this was a violation of Article III rule 1 of the Hague/Hague-Visby Rules, which set a duty which was non-delegable; even though the Court also found that the master’s leaving the buoyed fairway was an error in navigation.

On Appeal, Lord Justice Flaux first rendered his opinion (which covered 19 pages and 76 sections) affirming the decision below.

His opinion covered the factual background and summarized the decision of Judge Teare.

It went on to summarize the parties' submissions in detail and the authorities cited.

Lord Justice Flaux found:

> "The Judge was right to find that the defect in the passage plan (which included the working chart), that it did not contain the warning about the unreliability of charted depths outside the fairway contained in NM274(P)10, rendered the vessel unseaworthy."

Additionally,

> "…once the Owners assumed responsibility for the cargo as carriers, all the acts of the master and crew in preparing the vessel for the voyage are performed *qua* carrier, even if they are acts of navigation before and at the commencement of the voyage. The Owners are responsible for all such acts as a consequence of the non-delegable duty under Article III, rule 1."

Lord Justice Males agreed the appeal should be dismissed for the reasons given by Flaux LJ.

He added that the passage plan/working chart should have contained the warning of the Notice to Mariners of December 2010. It did not; and this rendered the vessel unseaworthy before and at the beginning of the voyage.

> "Accordingly, as the duty is non-delegable, the ship owner cannot avoid liability by delegating responsibility for making the vessel seaworthy to the master and officers."

Lord Justice Haddon-Cave also agreed for the reasons given by Flaux LJ and Males LJ

He added that Article III, Rule 1, imposed a non-delegable duty on carriers to exercise their due diligence to make the ship seaworthy "*before and at the beginning of the voyage*" and "Article IV, Rule 2(a) excused carriers from liability from damage caused by errors of crew or servants in the navigation or in the management of the ship *thereafter*, i.e., during the voyage."

**ALIZE 1954 and CMA CGM S.A. and ALLIANZE ELEMENTAR VERSICHERUNGS A.G. and 16ORS; In the Court Of Appeal (Civil Div.); Neutral Citation No.: [2020] EWCA Civ. 293; Decision of Lord Justices Flaux, Haddon-Cave, Males; Dated April 3, 2020.**

**[Editor's Note:**

1. **The reader is urged to read both the appellate decision as well as the original decision. The original decision consists of 26 pages and 129 sections. The appellate**

**decision consists of 25 pages and 103 sections.**

2. **The incident involved occurred in May, 2011. Paper charts were permitted at that time. After 2016, vessels on international voyages are required to use electronic charts.**

3. **Lord Justice Flaux considered the decision of Justice Teare to be "meticulous and pellucid."**

   **There is little doubt that Justice Teare's decision is very detailed; however, it is respectfully submitted that there are several instances which should or could call for more clarity. As examples:**

   - **Section 120 of that decision states "It is possible that, as indicated by certain passages of the master's evidence, that he was placing exclusive reliance on the ECDIS during the departure from Xiamen, rather than on the paper chart but if he did so that was negligent navigation for which the Owners are not liable."**

     **This possibility does not appear to have been further mentioned or developed.**

   - **The chart extract appended to Justice Teare's decision contains a legend in the upper-center portion which states:**

     **"NAVIGATION RESTRICTIONS**

     **(see Note)"**

     **It appears no mention is made in the decision as to this legend: whether this legend was already on the chart when received, or, if not, when this legend was put on the chart, who put it on, or what the "Note" referred to contained.]**

**COURT SAYS IT'S OK TO BE "LEFT IN THE DARK"……**

Defendant A was the owner of a set of used commercial airplane landing gears. It hired Broker #1 who then engaged Broker #2 who hired Broker #3 who hired Broker #4 who engaged the plaintiff (Carrier) to transport the landing gear from Marana, Arizona to Medley, Florida.

Broker #4 and plaintiff had an agreement that covered transportation services. That agreement provided for a limitation of liability to $1 per pound unless otherwise provide in a special service addendum for a given shipment. No special service addendum was issued for the

shipment in question.

The shipment was damaged in transit. The shipment was inspected and a claim was subsequently filed with plaintiff. Plaintiff then filed an action seeking declaratory judgment that its damages, if any, were limited to $3140.00 based on the weight of the shipment. Plaintiff then filed a motion for partial summary judgment requesting limitation for $3140.00.

> "…When an intermediary contracts with a carrier to transport goods," as is the case here, "the cargo owners' [i.e., the shipper's] recovery against the carrier is limited by the liability limitation to which the intermediary and carrier agreed." (Citing *Kirby, 543 U.S. 14, 33*)
>
> "…thus, the default rule in the absence of a contrary agreement between the parties is that an intermediary…is deemed to have the limited authority as the shipper's agent to negotiate a liability limitation with a downstream carrier in exchange for a lower shipping rate (Citation omitted)" …"This is true even if the shipper is "left in the dark (Citation omitted)."
>
> "…The (owner of the landing gear) chose to ship it in a manner which permitted use of an extended chain of parties and agreements. "Plaintiff was "allowed to presume" that (Forwarder #4) as (cargo owner's) agent, had the authority to negotiate the terms under which Plaintiff would transport the landing gear, even if the (cargo owner) had 'no knowledge of such a negotiation.'"

The Court went on to find that the contract contained an express waiver of the Carmack Amendment (49 U.S.C. §14101(b)(1)).

The Court found the Cargo owner (shipper) could not complain that it did not have actual notice of a provision incorporated by reference in a shipping document prepared by the shipper's own agent.

The Court found the carrier trucker entitled to the limitation prayed for.

**CENTRAL TRANSPORT, LLC v. GLOBAL AERO LEASING, LLC et al.; U.S.D.C. S.D.Fla.; Case No.: 1:17-cv-23788-Gayles/Otazo-Reyes; Decision of Judge Darrin P. Gayles; dated May 25, 2020.**

**QUO VADIS……**

The plaintiff sought entry of a default judgment against the defendant for damages to a shipment originating in Africa and destined for the United States. According to the Complaint, the cargo consisted of cartons of pieces of clothing and were placed inside of a 40-foot container for transportation from Mombasa, Kenya, to the port of discharge in Newark, New Jersey. The Bill of Lading issued by the defendant further indicated that after discharge at Newark, New Jersey, the container was to be on-carried and delivered to a location in Bentonville, Arkansas. The containerized shipment was consigned to a bank which endorsed the Bill of Lading in blank on the reverse side. The bill of Lading was issued "Clean" with no exceptions.

On July 10, 2018, the container was discharged at Newark, New Jersey and delivered to a warehouse in Linden, New Jersey. At the warehouse, "a waterline was observed throughout the bottom of the container," and it was later determined that all of the cartons stored on the floor of the container suffered extensive water damage.

Further investigation revealed that the container had been "subject to standing water immediately prior to loading in Mombasa and while it remained in the "exclusive possession, custody, and control" of the defendant.

The Bill of Lading also contained a "jurisdiction" clause stating that any disputes arising under the Bill of Lading should be decided in the country where the carrier had his principal place of business, and the law of such country would apply except as provided elsewhere. Defendant was a business entity organized and existing under the laws of the Republic of Kenya with its principal place of business in Mombasa, Kenya.

A complaint was filed in the United States District Court in Newark, New Jersey by plaintiff, and arrangements were made for service of process on the defendant in Mombasa, Kenya. The Return of Process indicated it was served on defendant on March 10, 2019 in Mombasa, Kenya.

The defendant neither appeared nor answered, and at the request of plaintiff's counsel, the Clerk of Court noted the default of defendant on December 5, 2019.

Subsequently, on April 3, 2020, plaintiff moved for the entry of a default judgment against defendant.

The Court noted that:

> "As a threshold matter, the Court must first satisfy itself that it has personal jurisdiction over the party against whom default judgment is requested (citation omitted)", and
>
> "…entry of a default judgment is left primarily to the discretion of the district court (citation omitted)."

The Court stated that plaintiff had failed to provide sufficient facts to establish that the Court had either general jurisdiction or specific jurisdiction over the defendant.

The Court denied plaintiff's request for the entry of default judgment without prejudice, allowing the plaintiff to re-file the motion "…with facts establishing how and why the Court has personal jurisdiction over defendant."

The Court also referred to the "jurisdiction" provision of the Bill of Lading and stated that the plaintiff would have to explain why venue would be appropriate in the District. It noted the allegations that the container was exposed to standing water in Mombasa, Kenya and the damage to the cargo was discovered after the shipment arrived at the port of discharge:

> "The Court is unaware of any authority that designates venue as the place wherein damages are discovered."

Finally, the Court reviewed the "Return of Service" and noted it failed to indicate the specific method of service used.

Most importantly, the documents provided failed to show that the method of service was in compliance with international conventions and requirements pertaining to service abroad.

The Court stated:

> "If Defendant (sic) files an additional motion for summary judgment, Defendant (sic) must show that service was in compliance with appropriate statutes and international service requirements."
>
> **(Note: "Defendant" should be "Plaintiff")**

**MAHCO, INC. v. SOVEREIGN LOGISTICS LTD.; U.S.D.C. N.J.; Civ. Action No. 19-14742 (SRC); Decision of Judge Stanley R. Chesler, dated June 16, 2020.**

**[Editor's Note:**

1. **The decision is marked "NOT FOR PUBLICATION." It thus should not be cited nor used as precedent.**

2. **The Court emphasized the damage complained of occurred prior to loading at Mombasa, Kenya and questioned whether it had personal jurisdiction over defendant.**

   **The named defendant issued a clean bill of lading calling for transportation to Newark, New Jersey and providing for on carriage to Arkansas. Would not discharge in Newark, New Jersey, delivery to a warehouse in Linden, New Jersey, and making arrangements for on-carriage from New Jersey to Arkansas constitute "performing services" by the defendant in New Jersey?**

   **See *Herod's Stone* case, p. 7 (supra).**

3. **Usually, a Jurisdiction Clause in a bill of lading is a basis for an affirmative defense by way of answer with affirmative defense(s).**

   **Apparently, the bill of lading was issued "Clean" without any notation of potential damage or the incident occurring at Mombasa prior to loading. Was the waterline noted at Linden, N.J. noticeable at Mombasa? If so, what effect, if any, should this have on the potential contractual defense set forth in the Jurisdiction Clause?**

4. **The Court questioned the effectiveness of Service of Process. It is "most important" to review and check that the service executed has been proper and in accordance with required conventions.]**

**[Additional copies of this Newsletter may be requested from: mryan@hillbetts.com, ecradzik@mdwcg.com, or dlm@mazarolilaw.com]**