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CONTRACT FOR LAND USE OF CHASSIS NOT SALTY ENOUGH…

Plaintiff brought suit alleging that defendants breached a maritime contract by utilizing plaintiff's equipment (chassis) to move maritime cargo without compensating plaintiff.

On defendants' failure to timely respond, plaintiff moved for entry of default and entry of judgment by default. The Court exercised its obligation to satisfy itself that it had subject matter jurisdiction over the action and ordered plaintiff to show cause why the action should not be dismissed for lack of subject matter jurisdiction.

It also invited plaintiff to assert an alternative basis for jurisdiction to prevent the action from being dismissed if the Court were to find admiralty jurisdiction lacking. Plaintiff responded, arguing that the Court had both admiralty jurisdiction and diversity jurisdiction.

The Court noted the plaintiff was in the business of leasing maritime equipment, namely chassis, for the movement of cargo. Defendants took the chassis from chassis pools in certain marine ports for delivery of marine cargo to consignees to and from ports of the United States, including, *inter alia*, the Port of Chicago, and have refused to compensate the plaintiff.

The plaintiff asserted that the containers transported by defendants were carried pursuant to bills of lading, which provided for the landing of the ocean import cargo and continuous on-carriage by train to the railhead and then on plaintiff's chassis to the ultimate consignee (i.e.,

defendants took the chassis so that they could transport ocean import cargo pursuant to the final land portion of a "through" bill of lading.

The Court noted initially that it had an obligation to satisfy itself that it had subject matter jurisdiction over a case and then addressed the issue *sua sponte*. The burden of establishing subject matter jurisdiction is on the plaintiff. As to admiralty jurisdiction, the Court initially referred to the Supreme Court decision of *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14 (2004) and the criteria set forth in that case designated as a conceptual approach:

> To ascertain whether a contract is a maritime one…[t]he answer depends upon the nature and character of the contract, and the true criterion is whether it has reference to maritime service or maritime transactions.

It noted the contract involved in this case was not a bill of lading that includes both land and sea components.

> Rather, it is a contract to use chassis for the movement of cargo that takes place exclusively on land (i.e., from railhead to consignee). Its primary objective is to provide equipment so that a carrier can accomplish land based transportation. The fact that the Defendants were transporting international cargo pursuant to a "through" bill of lading does not change the nature and character of the separate and distinct contract they had with Plaintiff.

The Court also referred to *Mediterranean Shipping Co. (USA) v. Rose*, 2008 WL 4694758 (S.D.N.Y. 2008). In that case, the court ultimately found that the agreement involved was "essentially a leasing arrangement allowing defendants to lease transportation equipment, including containers, in order to carry out land-based deliveries pursuant to other contracts for the carriage of goods." Thus, the court did not have admiralty jurisdiction "[b]ecause the primary objective of the contract is leasing equipment for land transportation, and not maritime commerce."

The Court distinguished cases offered by Plaintiff and found, based on Plaintiffs' pleadings and submissions, that the equipment at issue was used exclusively for land transportation. The contract between the parties was not a maritime contract and therefore, the

Court did not have Admiralty jurisdiction over the matter.

As to a Rule B attachment, which plaintiff sought, the court found a party may only seek Rule B attachment if the underlying claim satisfies Admiralty jurisdiction.

> Because the contract underlying Plaintiffs' breach of contract claim is not a maritime contract, there is no jurisdictional basis for the Court's May 17, 2016 orders, granting Plaintiff's motion for writ of garnishment and for Appointment to Serve Process of Maritime Attachment.

Dealing with the issue of diversity jurisdiction, the Court was satisfied that it had subject matter jurisdiction by virtue of diversity jurisdiction because plaintiff and defendants were citizens of different states and there was an amount in controversy exceeding $75,000.

> However, the complaint and additional submissions of the Plaintiff failed to include any allegations regarding or relating to the Defendants' contacts or activities with relation to the forum state, New Jersey. Because the complaint did not establish a *prima facie* case of personal jurisdiction, the Court will issue a second order to show cause why the Court should not deny Plaintiff's motion for entry of judgment by default for lack of personal jurisdiction and dismiss this action.

INTERPOOL, INC. v. d/b/a TRAC INTERMODAL v. FOUR HORSEMAN, INC. et al., U.S.D.C. N.J., Civil Action No. 16-2490, Decision of Judge Mary L. Cooper, dated February 8, 2017.

PURSUIT IN PERU OVERRIDDEN BY EXCLUSIVE FORUM CLAUSE…

Defendant received a cargo of computer equipment for transportation from Miami, Florida to Callao, Peru. The plaintiff was the consignee on the bill of lading. The ocean carrier, pursuant to plaintiff's instructions, delivered the cargo to a terminal at the Port of Callao where it was then lost or stolen, purportedly by a third party, before receipt by the consignee.

The consignee filed an action in the Southern District of Florida pursuant to a forum-selection clause in the carrier's bill of lading which provided for suit in that District:

> …to the exclusion of the jurisdiction of any other courts or tribunals in the United States or any other country. The laws of the United States of America shall

govern any such pleading.

Defendant moved to dismiss the action on the basis of *forum non conveniens*, arguing that Peru is a more convenient forum for the litigation.

The court initially considered that a *forum non conveniens* motion is usually evaluated by considering whether (1) an adequate alternative forum is available; (2) private interest factors favor the alternative forum with a strong presumption in favor plaintiff's initial choice of forum; (3) public interest factors favor the alternate forum; and (4) plaintiff can reinstate their suit in the alternative forum without undue inconvenience or prejudice. Where there is a valid forum-selection clause, the Court no longer considers the private interest factors. It may consider arguments about public-interest factors only. "Because the public interest factors will 'rarely defeat' a *forum non conveniens* motion, 'the practical result is that forum-selection clauses should control except in unusual cases.'"

The Court noted forum-selection clauses are presumptively valid and enforceable unless the plaintiff makes a "strong showing" that enforcement would be unfair or unreasonable under the circumstances (citing cases).

> It will be invalidated when (1) its formation was induced by fraud or overreaching; (2) the plaintiff would be deprived of its day in court because of inconvenience or fairness; (3) the chosen law would deprive the plaintiff of a remedy; or (4) enforcement of the clause would contravene public policy.

The Court found defendant's argument that the bill of lading contained conflicting forum-selection clauses, one mandating the Southern District of Florida and one permitting arbitration in New York, to be without merit, noting the bill of lading specifically acknowledged that any claim under the bill of lading must be brought exclusively in Florida.

The Court went on to find the alternative forum adequate and available, noting that a forum is considered adequate if it can provide relief to the plaintiff and the subsequent law of the foreign forum does not need to be as favorable to the plaintiff as the law of the plaintiff's chosen

forum. Rather, the plaintiff need only have an opportunity to obtain some relief.

As to public interest factors, while noting public interest factors "rarely defeat" a *forum non conveniens* motion, the court considered public interest factors which it found to weight in favor of litigating in Peru. There was little connection between the alleged loss of the cargo and Florida aside from both parties doing business there. On the other hand, Peru would likely have an interest in having the controversy involving its own ports and port employees decided in its own courts. While there would potentially be a parallel action in Peru against third parties for the loss, however, the possibility of parallel action "is not in itself sufficient to merit *forum non conveniens* dismissal (citation omitted)."

Despite the public interest factors "weighing in favor of Peru," the court did not find that the facts were so unusual "… that the forum-selection clause should not be enforced."

> The clause is clear, the parties agreed to litigate this action in the Southern District of Florida and United States law applies. Accordingly, the court does not find good cause to dismiss this action.

MAXIMA INTERNACIONAL, S.A. v. INTEROCEAN LINES INC.; U.S.D.C. S.D.Fla; 16-CV-21233—Gayles/Turnoff; Decision of Judge Darrin P. Gayles, dated January 24, 2017.

DOES HAGUE-VISBY PROVIDE *IN REM* JURISDICTION?

A shipment of steel pipe was carried from Subric, Philippines to Houston, Texas. Two bills were issued for the cargo which contained a forum selection clause providing that any dispute should be decided in a country "where the Carrier has his principal place of business, and the law of such country shall apply except as provided elsewhere herein."

The plaintiff filed an *in rem* action against the vessel and *in personam* actions against its owner and manager for loss and damage to the steel pipes.

Defendants filed a motion to dismiss for *forum non conveniens* pursuant to Rule 12(c).

The Court, in deciding a 12(c) motion, may consider "the complaint, the answer, any

written documents attached to them, and any matter of which the court can take judicial notice for the factual background of the case" (citation omitted). It may also "consider documents incorporated into the complaint by reference or integral to the complaint, provided there is no dispute regarding their authenticity, accuracy, or relevance" (citation omitted).

The Court stated:

> In the Second Circuit, a forum selection clause is presumptively valid if it was reasonably communicated to the party resisting enforcement, is mandatory and not merely permissive, and covers the claims and parties involved in the suit.(Citation omitted)

To overcome this presumption of enforceability, the Plaintiff has the burden to make a "sufficiently strong showing that 'enforcement would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching.'" The Court also noted, where COGSA applied, a forum selection clause would be unenforceable if "the substantive law to be applied will reduce the carrier's obligations to the cargo owner below what COGSA guarantees."

The plaintiff did not dispute the clause was reasonably communicated, mandatory, and the claims involved were subject to the clause. However, the plaintiff argued that the Court should deny the motion because Greek law does not recognize an *in rem* action against a vessel ort the *in personam* action against the manager. The plaintiff also requested the Court to stay the instant action and retain jurisdiction to ensure that the Greek litigation complied with applicable U.S. law.

The Court found the plaintiff failed to show it will lose its *in rem* action because Greek law does not recognize *in rem* actions. The Court held that the weight of authority in the Southern District of New York is that the inability to proceed *in rem* in the chosen forum was not sufficient by itself to defeat the presumed enforceability of a forum selection clause (citations omitted).

The majority view is that in rem actions are generally "duplicative of the *in personam*

claims against the carrier(s)" and "do not confer any further benefit other than providing an additional mechanism for enforcement" (citation omitted). The Court found plaintiff had not demonstrated an *in rem* action against the vessel would confer on the vessel any substantive benefits in addition to those in its *in personam* action against the owner.

Secondly, as to the argument that Greek domestic law did not recognize *in rem* actions, such failed to account for the application of the Hague-Visby Rules. The Court referred to the Hague-Visby Rules as containing a provision similar to section 3(8) of COGSA, "which appears to keep *in rem* actions intact by stating, '[a]ny clause…in a contract of carriage relieving the carrier *or the ship* from liability…or lessening such liability…shall be null and void.'"

The Court found the Rule would serve to ensure that Plaintiff is not deprived of its *in rem* cause of action because it is being made to litigate in a foreign forum. The bills of lading required application of the Hague-Visby Rules. The Court noted Greece had ratified the Hague-Visby Rules, and Plaintiff's own Greek law expert conceded that international conventions are "rules of superior legal power" that would prevail over domestic Greek legislation.

The Court also referred to *Reed & Barton Corp. v. M.V. Tokio Exp.*, 1999 WL 92608 (S.D.N.Y. Feb. 22, 1999) where the Court found because German law applied the Hague-Visby Rules, the "fraternal equivalent" of COGSA, the carrier's obligations would not be reduced below that which COGSA guarantees. In light of this, the Court found plaintiff had failed to meet its burden to show that its substantive rights would be reduced if the matter was litigated in Greece.

As to plaintiff's argument that it would lose its *in personam* action against the vessel's manager, the Court found the bills of lading already prevented Plaintiff from bringing an action against the manager. Specifically, the bills of lading contained a clause that channeled all liability to the owner, stating that the contract was between the Merchant and the carrier of the

vessel and that "*said ship owner only shall be liable* for any damage or loss." The clause thus prevented the instant action from being brought against anyone except the ship owner. The Court found the manager was not a ship owner or a carrier under the bills of lading.

The Court noted the Second Circuit has held such "so-called exoneration clauses" in bills of lading that channel claims to one entity are enforceable (citations omitted).

> The Second Circuit noted that the exoneration clause was simply an ordering mechanism that regulates who will be responsible to whom rather than lessening any substantive rights. The plaintiff may bring an action against the common carrier for damage to the cargo, and the common carrier may then sue the underlying carriers (referring to *Sompo Japan Ins. Co. of Am. V. Norfolk S. Ry. Co.*, 762 F.3d 165, 181-82 (2014).

As to plaintiff's argument that such clause would violate the Harter Act, the Court noted that the Harter Act, while voiding provisions *absolving* liability, does not void provisions *limiting* a carrier's liability (citations omitted).

The Court found the plaintiff did not meet its burden of establishing that enforcement of the forum selection clause would be unreasonable or unjust. Nor did it point to any public interest factors that would counsel against enforcing the clause in this case.

> Plaintiff may assert its *in rem* action in Greece, and while it may not assert its *in personam* action against Technomar there, neither could it do so in this Court. Accordingly, this Court finds that the forum selection clause is valid and enforceable.

As to retaining jurisdiction, the Court rejected this request because the facts involved in the *Sky Reefer* decision did not exist in the instant case. In *Sky Reefer*, the Supreme Court enforced the choice of forum and choice of law clauses because it was too early to know what set of law the arbitrators would apply, and because the District Court had retained jurisdiction to review at the award enforcement stage. The Supreme Court noted that they would not have enforced the clause if there was no subsequent opportunity for review by the District Court. This decision was driven largely by uncertainty regarding which law the arbitrators would apply.

"There is no such uncertainty here as the Court is persuaded that the Hague-Visby Rules would be required to apply. Thus, Plaintiff's substantive rights will not be impaired or diminished. Accordingly, this Court will not retain jurisdiction".

THYSSENKRUPP MATERIALS NA, INC. v M/V KACEY et al.; U.S.D.C. S.D.N.Y., 15 Civ. 3800 (ER); Decision of Judge Edgardo Ramos, dated February 16, 2017.

SHIPPER STUCK BY FAILURE TO SPEAK UP…

Forty containers of scrap tires were shipped from San Juan, Puerto Rico to Vietnam. When the cargo arrived at its destination in Vietnam, the consignee refused to accept delivery, apparently because the shipments arrived late. As a result, the carrier stored them. The stored cargo incurred demurrage charges totaling $353,083.50, port-storage charges totaling $36,780, and an administrative fee totaling $300. Moreover, the carrier asserted that $69,889.54 of the cost to ship the freight remained unpaid.

The appellant was named as shipper in all bills of lading involved; and the bills of lading provided that every person defined as a "Merchant" was jointly and severally liable for all of the various undertakings, responsibilities, and liability of the Merchant. "Merchant" was defined as including the shipper, and "Freight" was defined to include the freight and all charges, costs and expenses in accordance with the applicable tariff and the bill of lading, including storage, per diem and demurrage.

The ocean carrier filed suit against the shipper, and the District Court granted summary judgment in favor of the carrier, holding that the defendant/appellant was a party to the contract and as such was liable to the carrier for unpaid ocean freight charges, shipping container demurrage, port storage and related administrative fees.

On appeal, the Circuit Court noted that it was uncontested that the defendant/appellant

was designated as the "shipper" on all of the bills of lading. The "shipper" did not argue that the presumption this creates was overcome by a statute or a contractual provision, but rather argued that the parties' course of conduct overcomes the pattern and presumption that the defendant/appellant should be liable. The Circuit Court found that it does not.

The Circuit Court found that the defendant/appellant was jointly and severally liable as the shipper of the cargo. It noted the defendant/appellant was given notice that it was named as a shipper, having received two email messages notifying that it would be the shipper. It admitted that it "could have refused being named as a shipper by replying to those messages." The Court also noted that the six bills of lading were received by the defendant/appellant and defendant/appellant was designated as the shipper on all these bills of lading received between April 24, 2012 and June 28, 2012. However, while it was designated as a shipper on all the bills of lading, the defendant/appellant made no objection until over a year later, when it received invoices for demurrage and other charges.

The Circuit Court also addressed two additional issues raised in the appellant's brief; however, the Circuit Court noted these issues were being raised for the first time on appeal and never clearly raised or argued before the District Court. Both of the arguments were therefore waived. The decision of the District Court was affirmed.

MEDITERRANEAN SHIPPING CO., S.A. v. BEST TIRE RECYCLING, INC. v ARMSTRONG INT'L, INC. et ano.; UNITED STATES COURT OF APPEAL, FIRST CIRCUIT, Decision Dated February 6, 2017

CALIFORNIA KICKS CARGO SUIT TO CHOSEN FORUM…

A shipment of solar energy equipment was shipped from Hong Kong to Rotterdam under contracts of carriage and a bill of lading. The cargo was not delivered at Rotterdam.

Suit was brought in the Federal Court in California by the plaintiff and its underwriter for a total loss of the shipment valued at $95,183.55.

The defendant maintained that venue was improper and the bill of lading contained a forum selection clause requiring all disputes to be litigated in the United States District Court in the State of Georgia to the exclusion of any other courts. The defendant moved to dismiss or, alternatively, transfer the matter to a Georgia District Court.

The Court dealt with the bill of lading initially on the basis that the contract of carriage between shipper and carrier should have familiar principles of contract interpretation govern its instruction and that contract terms are to be given their ordinary meaning, and, whenever possible, the plain language of the contract should be considered first (citing cases).

Considering an argument that the bill of lading was ambiguous because a provision on the front said any proceedings against the Carrier "must be brought in the Courts of the United States of America and no other Court" and a provision on the back provided that all disputes should be determined by the District Court in the State of Georgia. The Court found no ambiguity.

The front provision incorporated the reverse where it says that "…the goods would be transported in accordance with all of the items printed, written or stamped in or on the front and back pages of this bill of lading." The specific language on page two gives meaning to and carries more weight than the broad language on page one. The Court found "by the plain language of the agreement," the parties agreed to litigate their disputes in a Georgia District Court.

The Court next considered whether venue was improper. The only defendant was a Georgia corporation and plaintiffs offered no indication that it resided in the district for the purposes of venue. None of the events relating to the dispute occurred in the district, nor was it alleged that the defendant was subject to personal jurisdiction. The Court found venue improper in the Northern District of California.

As to transfer or dismissal, the Court found plaintiffs could have filed the case in the federal Georgia District Court. As to dismissal, defendant argued that courts have consistently dismissed, rather than transfer, maritime cargo claims which were brought by "sophisticated, represented plaintiffs in improper fora." The Court noted that the citations offered by defendant pointed to foreign forums, and federal courts cannot transfer a case to a foreign tribunal. The Court considered the case involved did not present the same obstacle. On the basis of judicial economy, the Court ordered a transfer of the case rather than a dismissal.

GOAL ZERO, LLC et al. v. CARGO FREIGHT SERVICES, LTD., U.S.D.C. Northern District of California, Case No. 16-cv-04055-LB; Decision of Judge Laurel Beeler, dated December 22, 2016.

UPSTREAM PARTY BOUND BY DOWNSTREAM AGREEMENT…

Shipments of wine were to be transported by rail from Napa, California to Little Rock, Arkansas and Memphis, Tennessee. While defendant's train was transiting Texas, it derailed and the shipments of wine were destroyed.

The plaintiff somehow became involved with the arrangements for the shipment; however, another party, who apparently had a custom rate arrangement with the railroad, was tasked with submitting bill of lading shipping orders. These triggered computer-generated waybills for the respective shipments. The plaintiff, after a series of assignments of rights, asserted three claims against the railroad under the Carmack Amendment. The railroad moved for summary judgment.

The Court noted the Carmack Amendment is an absolute-liability regime designed to compensate shippers for goods that are damaged or lost during interstate shipping. The railroad asserted that the plaintiff could not sue it because the plaintiff was not a party entitled to recover under the Carmack Amendment.

The waybills contained a "Direct Suit Prohibition" clause which provided that only the

shipper may initiate and maintain a claim for cargo loss and damage in a suit against the railroad. In the parlance of the shipping industry, the plaintiff was located "upstream" from the waybills, and the issue was whether the plaintiff is bound by a Direct Suit Prohibition clause located in a downstream agreement.

The Court found that the Direct Suit Prohibition was an alternative term authorized by Section 10502(e) of Carmack and plaintiff was bound by the liability limitations negotiated by the intermediary with the downstream carrier. The Court, referring to the Supreme Court's decision in *Kirby*, 543 U.S. 14 (2004), held the limited agency rule allowed the railroad to enforce the Direct Suit Prohibition against the plaintiff.

[The Court went on to deny a motion by plaintiff to amend the complaint to name the intermediary as a defendant. Plaintiff did not comply with Rule 16 F.R.C.P. which plaintiff never addressed. Not having made a showing under Rule 16, plaintiff's motion was denied.]

CELTIC INTERNATIONAL, LLC v. BNSF RAILWAY COMPANY, USDC Eastern District of California, Docket No. 2:14-cv-02158-TLN-DB; Judge Troy L. Nunley, dated February 22, 2017.

COURT FINDS 50 CENTS PER POUND IS ENOUGH…

A reconditioned aircraft engine was shipped from Terre Haute, Indiana to Ft. Lauderdale, Florida using FedEx as the carrier. When the engine was delivered, no damage or exceptions were noted on the delivery receipt; however, after the FedEx driver left, plaintiff noticed damage to the engine's shipping container and to the engine itself.

Plaintiffs made claim and recovered $245 for damages to the engine at $0.50 per pound (the engine weighing 490 lbs.) and $305.43 in refunded freight charges.

Plaintiffs instituted suit to recover for additional damages based upon the Carmack Amendment.

The defendant moved for summary judgment and also raised the issue of its entitlement

to limited liability.

[The Court found the defendant was not entitled to summary judgment because there was a triable issue of fact concerning the engine's condition at the time defendant picked up the package for transport.]

As to the issue of limitation of liability, the Court noted the Eleventh Circuit used a four-prong test to determine such:

> The Carrier must: (1) maintain a tariff within the prescribed guidelines of the Interstate Commerce Commission; (2) obtain the shipper's agreement as to his choice of liability; (3) give the shipper a reasonable opportunity to choose between two or more levels of liability; and (4) issue a receipt or bill of lading prior to moving the shipment.

The Court found the issue of the tariff had been largely eliminated due to statutory changes and began its analysis as to prong 2. The Court found the plaintiffs were bound by the terms of the Carrier Contract Agreement entered into which contained the provision with respect to limited liability.

Plaintiffs also argued the tariff of 50 cents per pound was not "reasonable"; however, the Court found this argument unpersuasive. The Court found plaintiffs were bound to the contract their agent prepared.

[As plaintiffs had already been paid based upon the limited liability provision, the Court ordered judgment to be entered in favor of the defendant with plaintiffs recovering nothing.]

EASTERN AIR EXPRESS, INC. v. FEDEX FREIGHT, INC.; U.S.D.C., Southern District of Florida, Case No. 16-cv 60367-WPD; Decision of Judge William P. Dimitrouleas, dated February 27, 2017.

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