IMLS Newsletter

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Dear Clients, Friends and Industry Members,

Another anxious year of COVID has passed, and our lives, including business, are not yet back to normal. Unfortunately, that includes the IMLS Maritime Law Seminar that was initially scheduled to take place in London last month. While we regret that the event had to be postponed until next year, we wish to provide the utmost respect for the safety and health of our members, clients and friends. The seminar in **London will take place on 6 October 2022 at Merchant Taylor's Hall**. And as long as you are making entries in your calendar, be aware that the IMLS Seminar in **Singapore has been firmly scheduled to take place on 2 June 2022**. We will, of course, send further reminders as next year rolls along, or check our website at **www.internationallawseminar.com**

As proof that IMLS Group is working hard and continuing to assist their clients, we offer out latest edition of our *Newsletter.* We believe you will find the articles of interest and informative. They prove that legal issues and changes in the maritime law continue in spite of the epidemic.

We welcome your comments about our *Newsletter,* and any suggestions that may help our Group serve the maritime legal community more effectively.

Best Wishes from the **IMLS Group**

Contents

Arnecke Sibeth Dabelstein

Dr. Felix Goebel, LL.M. (Oslo) | Senior Associate
Dr. Jan Dreyer | Partner

Carrier's practice of releasing cargo to the (un-) rightful holder of a bill of lading – new German case law

German Maritime Law is based on the Hague Visby Rules In practice, cargo interests often face the problem that the (allegedly) rightful holder of the bill of lading (consignee) is not yet in possession of the bill of lading, but the carrier is ready for delivery. Carriers then often release the cargo without seeing the bill of lading and cargo interests sign a letter of indemnity in the event that the rightful holder of the bill of lading claims the carrier liable.

German maritime law provides for the situation in regard to the delivery in exchange for the bill of lading in section 521, para 1, 2 and 4, German Commercial Code (HGB):

Upon the goods' arrival at the discharging wharf, the rightful holder of the bill of lading shall be entitled to demand that the carrier make delivery of the goods [...] The carrier shall be obliged to deliver the goods only in exchange for a bill of lading in which delivery has been confirmed [...]. If the carrier makes delivery of the goods to any other party than the rightful holder of the bill of lading [...] then the carrier shall be liable for the resulting damages the person entitled by virtue of the bill of lading may suffer [...].

In this context, the question arises to what extent a letter of indemnity can secure recourse for the carrier if the consignee was not the rightful holder of the bill of lading. This was the subject of a recent case and basis of a judgment decided by the Higher Regional Court Frankfurt on 09 October 2020 (13 U 197/18).

The court ruled that such letter of indemnity is invalid under German law and that the carrier cannot take recourse from the (un-) rightful holder of the bill of lading if he was held liable. This may significantly change carriers' practice of releasing cargo.

In more detail:

In the case in question, the carrier who issued the bill of lading, compensated the consignor (seller) because the carrier released the cargo without the consignee presented the bill of lading. The consignee (buyer) was not in possession of the bill of lading because he had not paid the purchase price, as the consignee (buyer) has set off with alleged counterclaims, which, however, have been disputed by the seller. The bill of lading was therefore withheld at the letter of credit level. The carrier then took recourse against the contractual carrier under provisions of the letter of indemnity. The contractual carrier compensated the carrier, and then sought recourse from the consignee (buyer) under a further letter of indemnity that was subject to German law. However, the consignee was not willing to pay the damage towards the contractual carrier and disputed that the contractual carrier's was entitled to take recourse under the letter of indemnity.

The Higher Regional Court supported consignee's view and ruled that the letter of indemnity is an abstract acknowledgement of debt (abstraktes Schuldanerkenntnis) according to section 780 German Civil Code (BGB), which is independent of the underlying legal relationship. The court bases this assumption on the fact that the letter of indemnity was exclusively intended to be the basis for indemnifying the contractual carrier against third-party claims, thus relieving him of the economic risk of releasing the goods.

However, this acknowledgement of debt was to be reclaimed on the principle of unjust enrichment, as it had been issued without legal grounds and was therefore void. A legal ground would only exist if the contractual carrier had breached a statutory provision. However, the court ruled that the contractual carrier was not to be held liable for the release of the cargo to the consignee. This is because section 521 para 4 HGB is only addressed to the carrier who issued the bill of lading. Furthermore, the court did not derive any liability under the contract of carriage because the bill of lading creates an independent legal relationship and prevents liability from other contractual delivery claims to arise (so called blocking effect of the bill of lading according to section 519 para 1 HGB).

Consequently, the contractual carrier was not entitled to seek recourse against the consignee under the letter of indemnity.

Conclusion

It remains questionable whether this dogmatic ruling of the Higher Regional Court of Frankfurt adequately reflects the practical needs of today's shipping industry. It is also contradictory that the contractual carrier who released the cargo in good faith cannot hold the consignee (buyer) liable under a separate contract if the consignee indeed breached the purchase contract – depending of the off-setting with alleged counterclaims against the seller –, and thus caused this chaos at the transport law level. However, the court has consistently applied the intricately balanced maritime trade law and retained the core concept that the bill of lading is a tradable security.

The message of the court is clear: the carrier may only release the cargo to the rightful owner of the bill of lading, so that the relevance of the bill of lading as a security is retained.

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COVID 19: Reflections from Denmark

On 3 February 2020, the undersigned were featured in a leading Danish shipping newspaper SØFART about the potential impact on shipping of this new virus spreading from Wuhan in China – at that time known as 2019 nCoV or Corona virus, something every man or woman on earth has since got to known as COVID 19.

Looking back at the article which spread two whole pages it is interesting to see what we com-mented on. The main topics were force majeure and safe port discussions and whether a vessel could enter the port, use the port and leave without the vessel being in danger. Also, topics as stowaways were touched on, and we commented on how shipowners should deal with that issue and we compared it to previous examples during SARS and Ebola outbreaks. Also referring to such earlier examples, we discussed charter parties, trading limits and who would ultimately have to cover if the vessel became off hire after having visited a Chinese, infected port.

Little did we know what was looming.

On 12 March 2020 it was announced by the Danish prime minister that the country would go on lockdown – second in Europe to Italy. On the same day Bech-Bruun, as most of the other Danish firms, switched to working from home.

While Denmark's approach, in hindsight, was not particularly different from many other countries, Denmark was perhaps early to shot down and has overall done quite well during the pandemic. The first lock down lasted only five weeks and already in the beginning of May 2020 the courts had reopened and in person hearings were back on track although with plexiglass between the judges.

During the second lockdown in the winter of 2021, the country had invested in massive testing facilities and introduced a corona passport based on tests that could never be more than 72 hours old and most of the working population as well as school children were then tested twice a week and the virus kept "under control" that way.

Force Majeure

Looking back at the article mentioned in the beginning, we did get something right although the majority was certainly off target. Stowaways have not really been high on the agenda legally dur-ing the pandemic, but force majeure was spot on.

We, and other Danish maritime law firms, were hit by a wave of instructions from mid-March 2020 that all had to do with force majeure. But it was no longer confined to vessel owners who did not want their vessels to call at a Chinese port. It was also crew change problems, technicians who could not service vessels around the World and shot down of factories around the World that af-fected clients.

With force majeure it is important to invoke it sooner rather than later and after some weeks it would be a hard argument to invoke force majeure as COVID 19 – or the rapid spread of it – was no longer a new thing.

Mink

But – about 420 years after Shakespeare wrote Hamlet - something rotten did happen in the state of Denmark in the fall of 2021. A cluster-5 mutation had been discovered spreading between mink on Danish mink farms in Northern Jutland. On 4 November 2021, the Danish prime minister or-dered Northern Jutland sealed from the rest of the country and all mink in Denmark put down. A highly controversial decision that ultimately resulted in the Parliament establishing the so-called Mink Commission that shall establish if the order was legal or not.

This was in the times before other now famous mutations, and later studies have found out that the Danish cluster 5 mutation was nothing out of the ordinary. It soon disappeared and was never nearly as important as later mutations as the delta – but the loses of the Danish mink industry is believed to be about DKK 20b.

The so-called Danish mink scandal was interesting from a force majeure point of view. While COVID 19 was no longer new in November 2020, it was probably not foreseeable that a potential-ly dangerous mutation would happen in tiny Denmark and for a short while vessels having called Danish ports recently were banned from entering ports in many other countries and we had the force majeure ghost back. While this only lasted a relatively short period of time, it shows that force majeure was not confined to the beginning of the pandemic.

The Container Market

Another thing we certainly did not foresee in the article of 4 February 2020 was the spike in the container market. Who would have guessed that the pandemic and lock downs around the World ultimately resulted in consumers, especially the Americans, changing their consumption and shop-ping patterns so much that it materially increased import demands for manufactured consumer goods, a large part of which is moved in shipping containers?

The impact was so great nobody had foreseen it and carriers, ports and shippers were all taken by surprise which resulted in empty containers not being relocated on time and huge congestions, ultimately resulting in the spike in container rates we now see. Add to that the EVER GIVEN inci-dent which blocked the Suez canal for six days which resulted in even higher rates.

Hopefully the pandemic will be over soon, the container rates and consumer patterns be back to normal and the IMLS be resumed in person. We hope to see you all in 2022 at the very latest.

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Indian Court Determines Priority in Favor of the Mortgagee Bank Upon Consideration of Section 10(1) of the Admiralty Act, 2017

The Single Judge of the Gujrat High Court in a landmark pronouncement in the case of *Credit Suisse AG v. MV Sam Hawk* (Misc. Civil Application No. 2 of 2021, in Admiralty Suit No. 17 of 2021, judgment dated 22nd September 2021), issued an order/judgment on determination of priorities in favor of the mortgagee bank under Section 10 of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017 ("**Admiralty Act**").

The authors had represented the mortgagee bank in this reported proceedings.

Brief Facts

Credit Suisse AG ("**CS**") invoked the terms of its loan agreement with the owners of the vessel MV Sam Hawk ("**Vessel**") and initiated an action enforcing its first priority registered mortgage over the Vessel for the sums which fell due to CS from the owners of the Vessel before the Gujarat High Court in its admiralty jurisdiction in May 2020. After the action was initiated, the Court issued an order of arrest against the Vessel. Other maritime claimants also initiated their actions against the Vessel. Since security was not furnished by the owners of the Vessel, the Court on CS's application, passed orders for auction and sale of the Vessel (pursuant to which the sale proceeds came to be deposited with the Court Registry), as well as an order for repatriation on crew on board the ship. Subsequently, CS took out an application seeking a summary judgment/decree under the provisions of the Commercial Courts Act, 2015. Before a ruling on the said application could be passed, one of the maritime claimants introduced an application praying for intervention in CS's suit. The Court rejected the application. CS's application was allowed by the Court by its judgment of 4th February 2021 *inter alia* on the ground of there being no reasonable prospect for the owners of the Vessel to succeed in their defense. The Court passed a decree for the sums outstanding from the owners of the Vessel as well as a declaration that CS's claim was secured by a valid and subsisting first mortgage over the Vessel.

Subsequently, CS filed an application *inter alia* for determination of priorities as well as disbursement of the sale proceeds to it. Pertinently, all the other claimants against the sale proceeds of the Vessel were made party to the said application as well as heard by the Court before passing its orders.

Court's ruling

The Court took note of prayers made by CS in its application as well as the decree received by it. Thereafter, the Court took note of Section 10 (1) of the Admiralty Act, 2017 which provides for the following inter se order of priority of maritime claims in an admiralty proceeding:

a. a claim on the vessel where there is a maritime lien;

b. registered mortgages and charges of same nature on the vessel; and

c. all other claims.

The Court rejected the argument mounted by the other claimants against disbursement of the sale proceeds from the sale of the Vessel as well the arguments in relation to providing an undertaking by the CS. The Court observed that CS's claim would fall under the head of a "registered mortgage" under Section 10(1) of the Admiralty Act. As a consequence, the Court determined priority in favor of CS.

Analysis

Section 9 of the Admiralty Act provides for the following *inter se* priority of maritime liens:

a. crew wages;

b. loss of life or personal injury;

c. salvage services;

d. port dues; and

e. tort (arising out of loss or damage caused by the operation of the vessel)

The Court appears to have conducted an analysis of Section 10 of the Admiralty Act and came to a finding that none of the other claims before it would have trumped CS's priority given that CS's claim pertained to a registered mortgagee. It would appear that no maritime lien holders were present before the Court. The Court seems to have passed a balanced order as it provides recourse to any claim of maritime lien by directing CS to pay the amount due to the satisfaction of the Court.

Ramifications

The Court seems to have taken a pragmatic approach which not only furthers the case of the claimant, but takes care of the inherent issues of delays plaguing the Indian judiciary. The Court sifted through hay to rule out the objections taken out by the other claimants whose claims were not a maritime lien.

Pertinently, the instant case is a classic case study on how the provisions of the Commercial Courts Act, 2017 and the Admiralty Act, 2017 can effectively come to the aid of a litigant for enforcing its rights in the admiralty jurisdiction of the Court. An order of arrest was granted

against the Vessel in May 2020 in CS's suit and a decree to it in February 2021. In between an attempt by a maritime claimant to intervene in CS's suit was thwarted by the Court in January 2021. Subsequently, the order determining priorities and disbursement of sale proceeds was issued in September 2021. As can be seen, the entire suit proceedings with disbursement came to be adjudicated and disposed of by the Court within a period of about 16 months. Significantly, the proceedings took place in the midst of two waves of COVID-19 in India and a bulk of the hearings were arranged by video conferencing.

This appears to be one of the first rulings under the provisions of the Admiralty Act, 2017 wherein the Court after going through Section 10 therein and considering arguments from all parties concerned, has determined priority in favor of a single party. A ruling like the present one is likely to go on a long way in reinforcing the faith of the litigants who often fall prey to the dilatory tactics of the adverse parties in prolonging the litigation.

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Polish Supreme Court on Interpretation of Definition of "Urgent Case" in Warrantee Claims Under a Shipbuidling Contract

Facts

A shipbuilding contract on the Polish shipyard [**Yard**] form [**SBC**] was concluded between a Polish sea-pilots company [**Owner**] rendering compulsory pilot services in the area of the Ports of Szczecin and Swinoujscie (Poland) [**Ports**] and the Yard. The SBC provided for the design and construction of a sea-going pilot boat, which would operate on the western part of the Baltic Sea [**Pilot Boat**].

The Pilot Boat was the first hull built under the new design provided by the Yard.

The SBC provided for Polish law and jurisdiction. Furthermore, the SBC provided a 2 years warranty covering any defects of the Pilot Boat [**Warranty**].

Shortly before the end of the Warranty period a defect occurred, which allowed water to slowly enter the hull of the Pilot Boat due to cracks in the hull [**Defects**]. The Owner notified the Yard about the Defects and requested proper repairs in order to get rid of the Defects.

The Yard rejected any liability for the Defects, including the one under the Warranty.

Under the circumstances the Owner, due to the non-performance by the Yard under the Warranty, commenced the repairs of the Defects by securing services of another ship repair yard [**Repairs**] and claimed the costs of the repairs from the Yard, which the latter rejected. The Owner's relied on an exception provided in Art. 480 § 3 of the Polish Civil Code [**PCC**], allowing them to conduct the Repairs at the Yard cost, without the prior consent of the court – in an *"urgent case"* situation.

A dispute arose between the Owner and the Yard [**Parties**] under the SBC concerning, inter alia, the proper interpretation of the term *"urgent case"*.

Dispute and submissions

Because of the dispute, the Owner's submitted points of claim to a court (a common/ordinary one) in Szczecin (Poland).

The Yard, defined *"urgent cases"* as accidents that endanger life or health (*"It is undisputed that the Pilot boat malfunction was not an emergency and did not endanger life or health"*).

The Owners argued, that an *"urgent case"* is not limited to the possibility of loss of life or health, but also scopes the occurrence of damage in its wider meaning. Continuous breakdown of the Pilot Boat could lead to significant losses, not only to the Owners, but also to the overall operations of the Ports, as the Owners are maintaining and managing the Pilot Station in the Ports. Especially, that pursuant to Art. 220 of the Polish Maritime Code and Art. 107b(4) of the Polish Maritime Safety Act the Director of the Maritime Office in Szczecin [**DUMS**] introduced compulsory pilotage in the Ports area. Hence, DUMS decision, that due to maritime safety conditions and specific character of Ports, it is necessary to introduce compulsory pilotage - the exclusion from service of the Pilot Boat would result in the disability of providing sea-pilotage services on a continuous basis in the Ports. The Owner's do not have "excess" pilot boats at their disposal and cannot afford to put out-of-service the Pilot Boat for the duration of a long-lasting court proceedings. In the circumstances an *"urgent case"* did occur and the Owners are entitled to immediately conduct substitute performance under Art. 480(3) PCC – without the prior authorization by the court.

First instance court

The first instance court confirmed the Owner's claim in full.

The first instance court shared the Owner's position that the Warranty claim was an *"urgent case"*, thus the Owner's didn't require the prior consent of the court in order to commence repairs of the Pilot Boat, which were refused to be performed by the Yard.

The Yard appealed to the second instance (appeal) court in Szczecin.

Second instance court

The second instance court did not agree with the court of first instance, and overruled the latter's decision.

The second instance court concluded that: (i) no *"urgent case"* occurred due to the "length" (time used) of the Repairs and (ii) the fact that the Repairs where performed under the supervision of a classification society and the Owner's followed all its recommendations proves that there was no "urgency" in the case, thus the Owner's where not entitled to the benefit of Art. 480(3) PCC, e.g. execution of the Repairs without the prior consent of the court.

The Owners submitted an extraordinary appeal (cassation) to the Polish Supreme Court [**Cassation**]. The Cassation passed the initial test (which less then 10% of cassations pass) of being suitable for an on-merits decision by the Polish Supreme Court.

Supreme Court

The Cassation was successful and the Supreme Court ruled in the Owner's favour overturning the second instance court judgement.

The Supreme Court confirmed, that the Owner may take advantage of Art. 480 § 3 PCC when performance with the court's authorisation would no longer be relevant to him, either due to the nature of the obligation, or due to the impossibility of achieving the purpose for which the SBC was concluded, or it would threaten the Owner with a considerable loss, which would be difficult to pursue from the Yard. *"Urgent case"* should be understood as an "emergency situation" and assessed in the circumstances of each individual case.

The Supreme Court continued, that evidencing an "emergency" does not require proof of the amount of loss or lost profits suffered by the Owner. On the other hand, other circumstances established in the case result in a factual presumption, that if the Owner purchased the Pilot Boat from the Yard in order to perform the tasks of the Pilot Station related to ensuring the safety of maritime traffic in the Ports, the Pilot Boat was needed to perform the said statutory tasks and its withdrawal after two years of operation (as a result of Defects) must have caused problems to the Owner with performance of the pilot services in the Ports area. These circumstances forced the Owner to conduct the Repairs aimed at enabling the normal operation of the Pilot Boat as soon as possible (obviously in compliance with technological requirements and after making attempts to persuade the Yard to remove the Defects under the Warranty).

Interestingly, the Supreme Court made a very practical remark stating, that the Court of Appeal wrongly assumed, that the decision authorising the Owner to perform Repairs would have been issued immediately by the court. It ignored not only the waiting time for the appointment of the hearing, but also the duration of the proceedings themselves, which could have been significantly prolonged due to the existing dispute between the parties. Meanwhile, the many years of litigation would most likely result in the deterioration of the Pilot Boat.

Comments

The Supreme Court's decision is highly appreciated as it confirms the practical view that in a situation where the guarantor refuses to perform warranty repair, i.e. refuses to fulfil its obligations under the warranty agreement, the holder of the warranty cannot be denied the right under Art. 480 § 3 PCC to repair of the guaranteed object at the guarantor's expense in the form of substitute performance.

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Goin' to "Surf City" Gonna Clean Some Oil

In 1963 the band Jan & Dean recorded the hit song "Surf City" describing the culture of driving a "Woody" wagon to Huntington Beach, California to party and surf the "curl."

"And when I get to Surf City
I'll be shootin' the curl

And checkin' out the parties
for a surfer girl"

Huntington Beach hasn't always been known as "Surf City" and the culture of environmental protectionism so prevalent in California today is, in relative terms, a recent phenomenon. Huntington Beach actually began life as "Oil City" and its skyline was once filled with oil rigs instead of luxury resorts and condominiums. Today you are more likely to pay attention to the oil tankers and cargo vessels at anchor waiting for a berth in the Ports of Long Beach or Los Angeles than the few remaining rigs. But the oil industry legacy still reveals itself in the few remaining working offshore oil rigs, on shore oil derricks and nearby refineries. Today you may also catch sight of yellow safety vested oil cleanup workers combing the shore for tar balls, oiled birds and dead fish.

Over the oil producing years there were of course occasional spills from and around those production facilities. Then in 1990 the oil tanker American Trader ran over its anchor off Huntington Beach spilling an estimated 417,000 gallons of oil into the coastal waters. Most recently on October 2, 2021, a pipeline running from the "Elly" offshore platform to the Port of Long Beach ruptured releasing an estimated 25,000 to 144,000 gallons of oil into the coastal waters. Oil from the leaking pipe has been reported as far South as San Diego County and beaches have been oiled in Huntington Beach, Newport Beach and Laguna Beach. Wildlife including fish and seabirds have been reported oiled. Local beaches were closed and both commercial and recreational fishing in the area have been prohibited. A class action lawsuit alleging damages on behalf of individuals and businesses suffering physical or economic harm from the spill has already been filed.

Divers investigating the cause of the spill have reportedly discovered a small section of the pipeline ruptured. Prior ruptures in other pipelines have reportedly been caused by corrosion within the pipeline itself. However the company that operates the pipeline, Amplify Energy Corp., has reported that the sixteen inch pipeline which is encased in concrete has been pulled out of its normal position by as much as 105 feet or 32 meters and that this alleged movement of the pipeline may be the cause of the rupture. To the pipeline operators and the investigating agencies the most likely cause of this movement is a vessel's anchor catching the pipeline. There has even been speculation that multiple vessels could have caught the pipeline over a period of time slowly moving it out of position. The USCG initially identified several vessels as being possibly involved but so far no vessel has been charged.

If Jan & Dean were writing their lyrics today they might plan the trip for another destination or plan on signing up to clean the beaches rather than surfing the curl. The lyrics might also be changed:

"When I get to surf city I'll
be walkin' the beach

And checkin' out the waves
for the oil's reach"

Readers of this article will already be familiar with various State and Federal environmental laws relating to marine pollution. Lesser known is the passage in January of legislation increasing the potential fines resulting from an oil spill. Under California Government Code §8670.64 the minimum fine upon conviction is $10,000 and the maximum is $1million *per day per violation* for the following violations:

(1) knowingly failing to follow the direction or orders of the administrator in connection with an oil spill.

(2) Knowingly failing to notify the Coast Guard that a vessel is disabled within one hour of the disability and the vessel, while disabled, causes a discharge of oil that enters marine waters.

(3) Knowingly engaging in or causing the discharge or spill of oil into waters of the state, or a person who reasonably should have known that the person was engaging in or causing the discharge or spill of oil into waters of the state unless the discharge is authorized by the United States, the state, or another agency with appropriate jurisdiction.

(4) Knowingly failing to begin cleanup, abatement, or removal of spilled oil as required in Section 8670.25.

The new legislation also allows a Court to impose a fine up to $1,000 per gallon of oil spilled. These fines are in addition to the costs of cleanup and civil liabilities that can be (and no doubt will be) in the millions of dollars or the damages for damage to the environment (Natural Resource Damages) which will also be very substantial.

While these new fines, criminal liabilities and civil liabilities are potentially huge, there are valid arguments that none of these provisions would apply in the scenario of a pipeline movement caused by a dragging anchor under the factual scenario being investigated as, so far, it does not appear that any one movement caused the rupture. If the pipeline was indeed moved out of place by multiple vessels over time then it will be difficult for

authorities to prove that the operator of the vessel had the requisite "knowing" violation if the pipeline was not where it was supposed to be. Still, the USCG and other authorities investigating the spill are attempting to identify any vessels that anchored in the area over the past months since the pipeline was last surveyed. Several vessels have been identified by the USCG and some have been boarded. As of this writing, however, no "culprit" vessel or vessels have been positively identified.

Where does this leave a vessel owner / operator whose vessel anchored around Hunting Beach in approximately the past year? Vessel owners / operators who have had vessel(s) anchor around Huntington Beach would be well advised to review vessel records to identify the dates, times and specific locations of anchorage. Engine, deck logs and AIS data should also be reviewed to determine if the vessel moved during the anchorage time(s) sufficiently to have drug its anchor to any degree. If there is any possibility that the vessel was involved a plan should be implemented to gather in one place all relevant documentation including identifying crew members that might have some knowledge of the circumstances. An owner / operator that thinks there is even a remote possibility that its vessel's anchor may have come in contact with the pipeline should immediately contact their P&I Club and / or Club Correspondent for advice on whether and how to approach authorities with this information. Also the owner / operator should implement a special document gathering and retention plan to pull together and maintain all records related to the vessel's call where it anchored in that area. Given the severity of the potential fines an owner / operator will not want to risk being charged with destruction of evidence, false statements or interference with an investigation by unwittingly providing wrong information and / or destroying documents that might later prove relevant to the investigation.

Any vessel or vessels that are found to have been involved in the movement of the pipeline will no doubt be subject to both civil and criminal investigations and potential liability. Given the facts as presently known it is likely that any such liability will be shared with, at the least, the pipeline operator and potentially other vessels. The prudent vessel owner / operator will be best served by conducting its own investigation now and working with experienced counsel to mitigate any exposure. Waiting for the USCG and other investigating agencies to "drop the anchor" on your vessel is the least attractive option.

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DABINOVIC – Abogados

Adrián J. Dabinovic

Hidrovia Parana New Estate Control – End of the Bilateral relationship with Brazil

Hidrovia S.A.:

The company Hidrovia S.A., that managed the dredging of the Parana River for many years, has now concluded its commercial relationship with the Port Administration under the new instructions of the current Government. The purpose of such Political decision is to provide for the Argentine government to have Full control on the international trade of all the commodities that enter and leave our country.

By publishing the official Decree Nº 427/2021 during last July, the contract signed between the Transportation Ministry and the Port Administration, that grants the authority to fully administrate the channel and collect the toll on all transit on the Parana River for 12 months, became effective and a new era has begun. As of September 11th,2021, our government has concluded phase one, the termination of private administration of the channel and tolls, and has started a new phase in which there will be public administration.

The new organisation, ´´Ente de Control y Gestion de la Via Navegable´´ (Control Entity and Management of the Water Way), will be responsible for the long term biddings and will award future dredging contracts, the buoying of the channel, and the collection of the tolls of the waterway. This change of Administration is of major importance to our economy given the fact that approximately 80% of the volume of all Argentine foreign trade of commodities navigates through this waterway (Parana River).

Under a different Decree, Nº 556/2021, the Federal Council of the Waterway was created and formed by the seven Provinces that share the waterway. This Federal Council´s main purposes are to monitor the biddings for various capital improvement tasks along the river, oversee the environmental care of the tributary, to protect all users of the navigable river, provide for the safeguard of the public and private domains of the National State, and oversee compliance with the laws, the concession of Public works for the development of modernization, expansion, operation and maintenance of the main waterway of Argentina.

The new organization will replace the current activities of the Ports Sub Secretary of the Merchants Marine waterways, but until the new organization is up and running, the Ports Sub Secretary will continue to remain responsible for the task in the river.

So, the above-mentioned changes on the management of our main waterway will be directly handled by the Government through the different created organizations. The major responsibility of this change should be to improve our waterway, and not to alter or interfere with the opening or closing of the doors to our commercial relationship with the world based on politics, which was a problem Argentina experienced in our past.

Bolsonaro´s Decree:

In my previous article regarding the Mercosur, I made mention of the potential termination of the bilateral relationship between Argentian and Brazil. Now it is a fact.

Brazilian President, Jair Bolsonaro, has formally concluded the bilateral relationship with Uruguay and Argentina. This, through the Presidential Decree Nº 10.786 officially published last 6 of September, ends 30 years of a bilateral relationship with Brazil that started in 1985.- This decision has been criticized by the Shipping industry of Brazil with no success. Unfortunately, the Decree has formally ended a fruitful common relationship that eased the bilateral trade with Brazil.

As mentioned in my previous article in the IMLS Newsletter, Argentina will now have to seriously focus on how to find more competitive commercial terms between the two Governments, in the absence of the bilateral agreement.

In fact, the termination of the bilateral trade agreement with Brazil means that Argentina is also confronted with new challenges in respect to our country's international commercial trade. It is going to be a difficult and demanding task to make any changes to our government's strategy in respect to international trade. It is important that Argentina always seek to open its arms to more and better commercial relationships with the world so that our commerce and maritime industry continue to grow and compete in the world.

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Protecting the Rights of the Defence in Customs investigations

With the surge in international trade, Customs authorities are given ever increasing powers of investigation and sanction. French Customs will coordinate with the customs authorities of other EU Member States in the fight against the evasion of antidumping duties, with the assistance of OLAF (the European Anti-Fraud Unit).

In a recent case (Com., 23 June 2021, n°19-14472), the French Supreme Court was asked to rule on the conditions under which such investigations could exist, and the resulting penalties inflicted on economic operators, respected the fundamental rights of each operator.

These economic operators were involved in the importation of television sets. These sets had been declared as originating from Turkey but investigations from OLAF showed that the cathodic tubes in these sets had been manufactured in China or Korea. The entire television sets should therefore have been declared as originating from these countries and subject to antidumping duties.

The importer and the freight forwarder received an initial notice of offenses for a false declaration of origin, setting out the reasons for which the French customs authorities considered that they had infringed the EU and national legislation on declarations of origin.

Thirty days later, the same parties received a notice of recovery, which is a legal and enforceable title issued by the authorities claiming the payment of the eluded taxes.

The operators filed a claim in Court arguing that the procedure implemented by the French customs had breached their fundamental rights.

The French Supreme Court did not welcome the first arguments presented by the operators.

The operators claimed that confidential information which they had disclosed to OLAF in the course of its investigations had been made public in OLAF's report. The Court dismissed this argument by ruling that the parties had not specifically asked for the protection afforded by Article 19 of EU Regulation 384/96 covering the treatment of information received in the course of an antidumping investigation. This article allows persons involved in an investigation to earmark confidential information which is then excluded from the final findings. The operators could not argue that confidential information had been disclosed in breach of this article if they had not isolated such confidential information in the first place.

The parties also claimed that some of the information collected by the Customs authorities was confidential by nature, and notably correspondence with their legal counsel which was covered by legal privilege. The Court considered that the customs authorities needed to set aside these documents and could not rely on their contents in their findings, but that this did not affect the validity of the investigation as a whole.

However, two arguments did catch the attention of the Court.

The first argument concerned a breach of the "right to be heard", which is the possibility given to any person to present its objections on grievances from customs authorities before any adverse decision is taken against that person.

In a landmark case (ECJ – Kamino, 3 July 2014, C-129/13 and C-130/13), the European Court of Justice had ruled that the *"right of every person to be heard before the adoption of any decision liable to adversely affect his interests"* was inherently part of the principle of respect for the rights of the defence.

To paraphrase, the ECJ considered that the rights of the addressee of a customs recovery notice are to be considered as breached whenever he has not been heard by the authorities before the decision was made, even if the national legislation allows that person to present his objections at a later stage.

This fundamental protection was introduced, albeit reluctantly, in Articles 67 et seq. of the French Customs Code which sets out a clear process whereby the administration must grant at least 30 days to any person to present its objections..

This reluctance to allow persons to voice their objections before the notification of the adverse decision was evident in this case.

The French customs authorities had argued that even though they had not given the operators the opportunity to present their objections before the offense had been formally notified to them, the defendants had benefitted from the fact that 30 days had elapsed before the notice of recovery had been issued, which was sufficient time to present any objections. This reasoning had been applied by the Court of Appeal.

The French Supreme Court overturned the decision and insisted that the *"right to be heard"* procedure must be implemented before the offense is notified, regardless of the fact that the operators are subsequently given time to present their objections before the tax notice is issued.

This solution from the Supreme Court is in line with the principles laid out in *Kamino* above. It was also the only logical outcome. Indeed, once the offense has been notified, the issuance of the notice of recovery is automatic. Therefore, even if the operators have the theoretical right to present objections between the moment when the notice of offenses is issued, and the notice of recovery is issued, in practice, the objections

presented would not have been taken into account. This was considered as unacceptable by the Supreme Court.

The second argument presented by the operators related to another breach of their fundamental rights, which is that they were not given the details of the customs duties claimed by the administration in the initial notice of offenses. The Court of Appeal had relied on the customs administration's defence which was that the duties were formally explained in the notice of recovery, and therefore the rights of the defence had been protected.

Accordingly, the Supreme Court overturned this ruling by clearly stating that the operators should have been made aware of the exact amount of customs duties for which they may be liable before they receive notification of the offense.

Here again, the solution is logical. Indeed, it would not be possible for the operators to present their objections at the initial stage, before the notice of offenses, if they are only given the details of the customs claim when the notice of recovery is issued.

This ruling is a perfect example of the position taken by the Supreme Court of France in protecting the rights of the defence in customs investigations. Although customs have almost unlimited power in carrying out their investigations, they still need to respect the basic rights of the operators and ensure that they are given due process before an offense is notified.

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Chilean Senate Chamber approves Annex VI of Protocol on Environmental Protection to the Antarctic Treaty

Introduction

On 20 January 2021 the Chilean president sent the draft bill approving Annex VI of the Protocol on Environmental Protection to the Antarctic Treaty to the Chamber of Deputies. The draft bill was unanimously approved by the Senate Chamber on 25 May 2021 and is now ready to become law (pending its publication in the *Official Gazette*).

Annex VI of the protocol aims to establish obligations for Antarctic operators to adopt preventive measures, plans and actions in the face of environmental emergencies, as well as mechanisms to determine responsibility in cases of failure to adopt such actions.

This article focuses on what shipping operators should be aware of ahead of Annex VI coming into force.

Background

The Antarctic Treaty was signed on 1 December 1959 by the 12 countries whose scientists had been active in and around Antarctica during the international geophysical year of 1957 to 1958.[1] It entered into force in 1961 and many other nations have since acceded to it; the total number of parties to the treaty is now 54.

The protocol was signed on 4 October 1991 and entered into force in 1998.[2] It was ratified by Chile in 1995. The protocol completed and developed the provisions of the Antarctic Treaty for the Protection of the Antarctic Environment in a comprehensive manner, covering dependent and associated ecosystems. It has five annexes currently in force – namely:

- Annex I – Environmental Impact Assessment;
- Annex II – Conservation of Antarctic Fauna and Flora;
- Annex III – Waste Disposal;
- Annex IV – Prevention of Marine Pollution; and
- Annex V – Area Protection and Management.

Chile has ratified all of these annexes.

Annex VI on Liability Arising from Environmental Emergencies was adopted by the 28th Antarctic Treaty Consultive Meeting in Stockholm in 2005 and will enter into force once approved by all consultative parties.[3]

Main provisions of Annex VI

Shipping operators should be aware of the following provisions of Annex VI.

Definitions

Annex VI contains several definitions, including:

- operator – "any natural or juridical person, whether governmental or non-governmental, which organises activities to be carried out in the Antarctic Treaty area"; and
- ship – "a vessel of any type whatsoever operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and fixed or floating platforms".

Preventative measures

Operators should undertake reasonable preventative measures that are designed to reduce the risk of environmental emergencies and their potential adverse impact. Preventative measures may include:

- specialised structures or equipment incorporated into the design and construction of facilities and means of transport;
- specialised procedures incorporated into the operation or maintenance of facilities and means of transport; and
- specialised training of personnel.

Response action

Operators must take prompt and effective response action to environmental emergencies arising from their activities.

Liability

An operator that fails to take prompt and effective response action to environmental emergencies arising from its activities will be liable to pay the costs of the response action taken by parties of the Antarctic Treaty. When a state operator should have taken prompt and effective response action but did not, and no response action was taken by any party, the state operator will be liable to pay the costs of the response action that should have been undertaken into the fund referred to in article 12 of Annex VI. When a non-state operator should have taken prompt and effective response action but did not, and no response action was taken by any party, the non-state operator will be liable to pay an amount that reflects as much as possible the costs of the response action that should have been taken. Such money is to be paid directly to the fund referred to in article 12 of Annex VI which is used to pay:

- the party of that operator; or
- the party that enforces the mechanism referred to in article 7(3) of Annex VI.

A party receiving such money must make the best effort possible to contribute to the fund referred to in article 12 of Annex VI, which should at least equal the money received from the operator.

The liability will be strict.

When an environmental emergency arises from the activities of two or more operators, they will be jointly and severally liable, except when an operator can establish that only part of the environmental emergency resulted from its activities, in which case they are liable only for said part.

Exemptions from liability

An operator will not be liable if it proves that the environmental emergency was caused by:

- an act or omission necessary to protect human life or safety;
- an event constituting – within the context of Antarctica – a natural disaster of an exceptional character that could not have been reasonably foreseen, either generally or in the particular case, provided that all reasonable preventative measures were taken to reduce the risk of environmental emergencies and their potential adverse impact;
- an act of terrorism; or
- an act of belligerency against the operator's activities.

Limits of liability

The maximum amount for which each operator may be liable in respect of each environmental emergency arising from an event involving a ship will be as follows:

- 1 million special drawing rights (SDR) for a ship with a maximum tonnage of no more than 2,000 tons;[4]
- for a ship with a maximum tonnage of more than 2,000 tons, the following amounts will be added in addition to 1 million SDR:
    - 400 SDR for each ton from 2,001 to 30,000 tons;
    - 300 SDR for each ton from 30,001 to 70,000 tons; and
    - 200 SDR for each ton in excess of 70,000 tons.

Notwithstanding the above, Annex VI will not affect:

- the liability or right to limit liability under any applicable international limitation of liability treaty; or
- the application of a reservation made under any such treaty to exclude the application of the limits therein for certain claims.

Liability will not be limited if it is proven that the environmental emergency resulted from the operator's actions or omissions and that such actions or omissions were committed either with the intent to cause such an emergency or recklessly and with the knowledge that such emergency would probably result.

Insurance and other financial security

Operators must maintain adequate insurance or other financial security, such as the guarantee of a bank or similar financial institution, to cover liability up to the applicable limits set out in Annex VI.[5]

Fund

The Secretariat of the Antarctic Treaty will maintain and administer a fund, in accordance with agreed decisions, including the terms of reference to be adopted by the parties, which will provide, among other things, for the reimbursement of the reasonable and justified costs incurred by a party or parties in taking response action.

Comment

Notwithstanding that Annex VI was finalised in June 2005 and will enter into force once approved by all consultative state parties, it places a proactive approach on operators in the Antarctic Treaty area, including tourist and cruise operators, to prevent and minimise any environmental issues under strict liability, subject to the limits outlined above and the requirement of adequate insurance to cover liability.

Therefore, owners and charterers that operate in the region, their protection and indemnity clubs and other insurers should monitor the implementation of Annex VI, other domestic laws and related regulations in the consultative state parties to ensure that they are in compliance with current applicable regulations and are ready for Annex VI.

For further information on this topic please contact Ricardo Rozas or Mayra Reyes at JJR Abogados by email (rrozas@jjr.cl or mreyes@jjr.cl). The JJR Abogados website can be accessed at www.jjr.cl.

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[1] Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, United Kingdom, United States and Russia (the Soviet Union at the time of signing).

[2] Supreme Decree 396 of 3 April 1995 of the Foreign Affairs and published in the *Official Gazette* on 18 February 1998. This protocol is one of the instruments that are part of the Antarctic Treaty System, as is the 1972 Convention for the Conservation of Antarctic Seals and the 1980 Convention for the Conservation of Antarctic Marine Living Resources, to which Chile is also a party.

[3] The consultative parties comprise the original parties and other states that have become consultative parties by acceding to the treaty and demonstrating their interest in Antarctica by carrying out substantial scientific activity in the region.

[4] The ship's tonnage is the gross tonnage calculated in accordance with the tonnage measurement rules contained in Annex I of the International Convention on Tonnage Measurement of Ships 1969.

[5] Article 9(1) and Article 9(2) thereof.

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Brazil's need to increase the adoption of International Maritime Law Conventions: legal certainty and attraction of foreign investments

Brazilian current position on maritime conventions

Back in 2018, the Maritime Law Committee of the Brazilian Bar Association – Rio de Janeiro Section conducted a research on the existing International Conventions related to International Maritime Law and Law of the Sea, aiming to update their status in Brazilian legal framework.

The conclusion of such study was that amongst the 165 main maritime conventions currently in force, Brazil has enacted only 65 conventions. By contrast, 84 Conventions were not even signed; 9 were signed but not ratified or adhered to; and 7 were signed, ratified or adhered to, but not enacted and, therefore, were not integrated to the Brazilian legal framework.

The Committee has also listed some of the conventions that were not enacted and that based on their understandings should be prioritized and necessary to enable the insertion of the country in the current international legislative framework in matters related to Maritime Law. The specific subjects of such conventions vary from international jurisdiction, protection of environment, safety, property of vessels, liability regimes for shipowners, but all of them have called the attention of several nations due to their relevance on a global perspective, or even due to the discrepancy of treatment between the States. In any case, the ratifying parties of such conventions deemed necessary to establish common provisions to be respected and complied with by all of them.

The adoption of maritime conventions by the Brazilian government is of utmost importance and will bring benefits to a country with one of the largest coastlines in the world and a key player in the international trade, mainly in connection with the large scale of commodities exported every year.[1]

The position of superior courts in respect with international treaties

Important aspect of the adoption of International Conventions is that Brazil has well settled a regime for incorporation of such treaties. As stated in a decision rendered by the Brazilian Superior Court of Justice[2], *"international treaties or conventions, once regularly incorporated into domestic law, are situated, in the Brazilian legal system, on the same planes of validity, effectiveness and authority of ordinary laws, resulting in normative parity relationship between such international treaties and Brazilian ordinary law".*

With respect to international transport rules, in accordance with Brazilian Constitution (Section 178), if there is some divergence between an international treaty or convention and a domestic law, the provisions of the treaty or convention prevails instead of the internal ruling, provided that the reciprocity and national sovereignty is respected.

This mechanism brings more certainty to legal relationships, especially when involving rights of parties and assets from different countries and cross border litigation. The legal certainty, as a result, places the country in a more competitive position in relation to other nations and attracts foreign investments. Potential investors expect to have stability and clarity in relation to their rights and duties when expand their business to a new country.

In this sense, when analyzing the validity in Brazil of a foreign maritime mortgage registered with the country of the vessel's flag, the Superior Court of Justice has validated the importance of international treaties and conventions as a crucial element to guarantee legal certainty:

"(...) there is a clear caution by the legislator in not establishing a provision that contravenes international conventions that the State has adhered to, respecting the sovereignty of the countries where the vessel and respective mortgages are registered, in order to provide legal certainty to owners and holders of rights over vessels. (...) in Brazilian law, as in other legal systems, there is economic convenience in admitting the mortgage, in view of the need to offer security to those who finance the builder or the owner who operates the vessel. (...) ***When denying the effectiveness of the mortgage, data maxima venia, the local Court does not comply with several international conventions and causes legal uncertainty, with possible restrictions and increased costs for chartering vessels used in Brazil."***[3]

If the adoption of International Conventions and Treaties related to Maritime Law and Law of the Sea were already important back in 2018, the relevance of this measure is even greater nowadays, as Brazil is facing economic and institutional challenges and, for this reason, is taking steps to attract investments to boost the country's growth again.

The new bill for cabotage trade

As an example of the recent initiatives in the maritime sector, one of the most significant actions that is being taken by the Federal Government is the Bill 4.199/2020, which is currently under discussion at the Federal Senate. This new program is called "BR do MAR" and aims to promote competitiveness in the cabotage sector.

With this legislative measure, the Brazilian government expects to increase the cabotage offer, encourage competition, create new routes and reduce costs. In this sense, the Ministry of Infrastructure intends to increase the volume of transported containers, per year, in addition to increase in 40% the capacity of the maritime fleet dedicated to cabotage over the next three years.

Although the current domestic legislation on the waterway transportation imposes a market restriction, since only authorized Brazilian Shipping Companies may perform the cabotage navigation with preference to Brazilian vessels over foreign vessels, some of the main points of BR do Mar have the purpose to facilitate the chartering of foreign vessels by Brazilian Shipping Companies and to guarantee the possibility of foreign companies to use the Merchant Marine Fund resources to finance the docking of their vessels in Brazilian Shipyards, in order to stimulate the Brazilian shipbuilding industry and make it competitive again in a global perspective.

Conclusion

Therefore, as the BR do Mar program shall increase the number of foreign flag vessels operating in the Brazilian cabotage trade and with the expected growth of the economy, the adoption of International Conventions and Treaties will enable a more favorable legal environment as companies from ratifying States operating in Brazil would no longer be subject to Brazilian law provisions that differ from the treatment imposed by an international convention or treaty to which such companies and States are used to. This seems to be an urgent public policy to be prioritized not only by the Federal Government, but also by the Brazilian lawmakers.

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[1] According to the data obtained by the Brazilian Agricultural Research Company – EMBRAPA , from 2000 to 2020, Brazil was consolidated as the fourth largest producer of grains (rice, barley, soybeans, corn and wheat) in the world, responsible for 7.8% of world production, and the second largest exporter, corresponding to 19% of the international market. Only in 2020, the country has produced 239 million and exported 123 million tons of grain.

[2] STJ - Special Appeal No. 1705222/SP, Reporting Justice Luis Felipe Salomão, 4th Panel of the Superior Court of Justice. Decision rendered on November 16, 2017.

[3] STJ - Special Appeal No. 1705222/SP, Reporting Justice Luis Felipe Salomão, 4th Panel of the Superior Court of Justice. Decision rendered on November 16, 2017.

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Taking Advantage of Discovery Rules in the United States to get Documents and Information for Foreign Proceedings - Finally, the U.S. has something to offer Foreign Courts

Much has been written over the past year about whether a U.S. statute, 28 U.S.C. Sec. 1782 (or just "1782") allows parties to a foreign arbitration proceeding, in say London or Singapore, to obtain documentation and information, including testimony of witnesses, that may otherwise not be accessible through the rules of the governing arbitration rules. The courts in the U.S. were split on whether the language of "1782" allowed parties to a foreign arbitration to take advantage of the statute. While 1782 uses the language that it is applicable to a proceeding "in a foreign or international tribunal," some courts have ruled that the intent of Congress was not to extend the U.S. law to private commercial arbitral proceedings. There was great expectation that the split in the Circuit Courts in the U.S. would be resolved by the Supreme Court when they accepted to hear a case titled *Servotronics Inc., v. Rolls-Royce PLC*. However, only weeks before oral argument was scheduled for October 5, the case was settled by the parties. The Supreme Court has now accepted a similar case for review of the issue, *ZF Automotive,* but it is not known how long it will take that case to work its way up the chain for a decision by the Court.

At this point in time, the Second, Fifth and Seventh Circuits have held that 1782 does not allow for discovery in aid of foreign commercial arbitrations. That covers the ports in New York, Connecticut, Louisiana, Mississippi, Texas, New Orleans, Illinois, and Wisconsin.

On the other hand, courts in the ports for the states of Michigan, Ohio, Maryland, North Carolina, South Carolina and Virginia do recognize the application of 1782 to foreign commercial arbitration proceedings. Other Circuit courts, including those in California , are waiting for the Supreme Court to decide the issue.

However, we wish to remind clients that 1782 is still available when a shipowner or charterer is confronted with civil lawsuits abroad where the information may lie with a party in the US or a non-party to the litigation. We have seen 1782 used successfully in situations where there have been casualties at sea, including containers damaged or lost overboard due to heavy weather. Cargo interests are often located abroad and may bring suits in their home courts. For Forwarders, NVOs, slot charterers and even time charterers, getting information about what happened aboard the ship, the efforts to exercise due diligence, and the existence of any viable defenses, is out of reach if the shipowner or operator is not a party in the same lawsuit. It is nearly impossible to argue "peril of the sea", "error in navigation", "latent defect" or even clause Q without access to the relevant information aboard the ship.

To the extent that the information or the documents or witnesses involved with the vessel are in the U.S., 1782 allows a party to a foreign court proceeding to obtain access to that discovery in the United States. That would include access to the vessel itself if it calls at a U.S. port, or to the offices of agents, repair facilities, engineers or managers if they are located in the United States. Discovery includes not only access to the documents controlled by an American entity, but the right to take their testimony as well.

We should equally note that shipowners or operators may want access to discovery under 1782 in order to obtain information about cargo weights, securing, cargo value, insurance, and sales terms, if that information is held by a shipper, receiver or agent in the United States, and not available outside the US. They might also seek discovery of financial information about insolvent counterparties like charterers. We are currently involved in a personal injury claim by a foreign seaman onboard a foreign vessel before a foreign court that arose out of an accident in an American port. 1782 will certainly help with obtaining information from the terminal operator and stevedores, and perhaps even with the hospitals and doctors, to determine the cause of the accident and its severity.

In sum, 1782 provides a unique access to American discovery procedures, which are very broad and often intrusive, when foreign courts are unable to provide access to that evidence which is located in the U.S., or within the control of U.S. entities.

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Marine Accidents in Panama Canal Waters

Vessels having a Panama Canal pilot aboard while involved in a marine accident, such as a collision, allision or grounding, may be able to recover their losses from the Panama Canal Authority ("PCA"). In order to do so, the vessel's interest must follow the procedures established in the PCA's Organic Law and Regulations, and, if necessary, may also seek remedies through the Maritime Courts of Panama.

The initial recovery procedure against the PCA is an administrative one and entails, as a prerequisite, a hearing and investigation conducted by its Board of Inspectors ("BI"). Depending on the type of incident involved, the BI investigation and hearing can be requested at the discretion of the PCA, or by the master or agent of the vessel involved. Therefore, in case of an accident which causes damages to the vessel's hull, the vessel should request a BI investigation before departing Canal waters, to safeguard its right of recovering damages. BI investigations are promptly conducted and completed, so the vessel can continue its voyage.

The BI must investigate the conditions and circumstances surrounding any serious marine accident that occurs in canal waters and involves PCA personnel or equipment. Serious marine accidents can include any accident that causes substantial damage to any structure or equipment of the PCA or any accident involving death or resulting in serious personal injury. Also any accident resulting in damages to a vessel which require repairs prior to its departure, provided that the PCA has reason to believe that at the time of the incident (i) there was PCA personnel or equipment aboard; or (ii) PCA personnel or equipment was assisting the vessel involved in the accident; or (iii) PCA personnel or equipment were situated aboard the vessel, ashore or otherwise, so as to have been a factor in the accident.

The PCA is represented by counsel (lawyers) from Legal Department. The vessel is also normally represented by legal counsel at the BI hearing. BI hearings are completed in a matter of hours, so that the vessel, if not disabled, may continue its voyage. Later, usually within a month, the BI issues a report, which includes its Findings of Fact and Opinion into the causes of the accident.

The PCA may take into consideration the following factors when determining the amount of the damages payable for damages to a vessel:

1. The actual or estimated cost of repairs;
2. Charter hire actually lost by the owner or charter hire actually paid during the time the vessel is undergoing repairs. In the event that the vessel is not operated under charter but directly by the owner, evidence shall be secures as to the sum for which vessels of the same size and class can be chartered in the market;
3. Maintenance of the vessel and crew wages, if they are found to be actual additional expenses or losses incurred outside of the charter hire;
4. Other expenses which are definitely and accurately shown to have been incurred by reason of the accident or injuries

The PCA administrative process follows a comparative fault scheme. Thus, if the fault or negligence of the ship operator or shipowner, the master, crew or passengers contributed to the injury, the award for damages shall be reduced in proportion to the degree of negligence or fault attributable to the ship owner or ship operator, vessel, its master, crew or passengers. In addition, the PCA does not allow recovery for agent fees or commissions, undefined or undetermined items subject to speculation or conjecture, or damages that may result from any excessive time, demurrage, or delays while the vessel is in transit in the Canal.

The administrative procedure before the PCA starts with the filing of an administrative complaint by the vessel's legal counsel, which must be filed within two (2) years from the date of the accident. Such complaint should include evidence of all damages suffered by the vessel. The PCA may request any additional evidence it deems necessary to prove the damages claimed during the administrative process. The process ends with the final determination of the claim by the PCA in the form of a final settlement offer, which may or may not be accepted by the vessel, or the denial of the claim by the PCA.

Any claimant who is not satisfied with the determination of responsibility and damages made by the PCA may bring an action against the PCA in the Maritime Courts of Panama. The claimant must file the action within one (1) year counted from the service of process of the final determination of the claim made by the PCA. The Maritime Courts of Panama have exclusive jurisdiction over any other national or foreign court of justice to hear all claims, actions, or lawsuits arising from a marine accident against the PCA. While most claims against the PCA are settled through the administrative claim process, there have been various lawsuits filed against the PCA in the Maritime Courts of Panama. Most have ended in out-of-court settlements, while some have gone to trial on the merits.

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The Insufficient Regulation of the Freight Forwarder in Spain

As is well known, the freight forwarder is an entrepreneur who carries out a very important activity in the organization of international and multimodal carriage of goods on behalf of its customers. It is an organizer of the carriage of goods, but also performs, at the request of its customers, other activities or services of various kinds related to international transport, most of them auxiliary and complementary to it.

From experience we know that in countries around Spain (Netherlands, Italy, Germany, France, etc.) there is an adequate legal regulation of the freight forwarder or, at least, they have a basic regulation of its legal position. In general terms, in these countries the freight forwarder is a *commissionaire de transport,* a *spedizioniere,* a *spediteur,* a *expediteur,* a *forwarder agent* who, in addition to intervening at the request of his clients in the contracting of the transport, carries out a set of auxiliary and complementary transport activities and is not liable, except in certain legally stipulated circumstances, for the result of the transport in the contracting of which he has intervened.

Does Spain also have an adequate or basic regulation on the consignee? Without going into detail, historically in Spain the freight forwarders did not have an adequate, sufficient and safe legal framework for their business activities. The provisions of the former Code of Commerce- which are not any more in force- established a severe liability of the freight forwarder for damages and losses of the goods during the carriage organized by them. At present, I am afraid we can say the same since there is not yet adequate and complete regulation of the freight forwarder. This causes uncertainties, especially with regard to the freight forwarder's liability regime.

The Act 9/ 2013, referring to road transport, contains a definition of land freight forwarder in its art. 121, which can be equally applicable to sea or air freight forwarder:

> "A freight forwarder is considered to be a company specialized in organizing, on behalf of others, international transport of goods, receiving goods as consignees or delivering them to those who have to transport them and, where appropriate, carrying out the administrative, tax, customs and logistical formalities inherent to that kind of transport or intermediating in their contracting "

It should be noted that the Act 9/ 2013 expressly states that the organization of international transport and other activities are carried out by the freight forwarder "for the account of others" and, having declared the freight forwarder's acting for the account of others, (effectively it is an agent), it is difficult to qualify the freight forwarder as a contractual carrier, since this action would imply acting for its own account.

However, as far as maritime transport is concerned, the Spanish Maritime Navigation Act 14/ 2014 , after stating in article 277 that *"the carrier is liable for any damage or loss of the goods, as well as for delay in delivery",* indicates in article 278 that this liability for damage, loss or delay reaches jointly and severally both to *the person who undertakes to carry out the transport* and to the person who actually carries it out with his own means. The italicized language includes the freight forwarders and other persons who undertake with the shipper to carry out the transport "through others".

In our view, this rule is very striking, since in general when the freight forwarder acts in the exercise of his activity as such, he is not obliged to transport, but only to look for others who are obliged to transport.

Moreover, it seems as if in maritime transport we can no longer refer to the freight forwarder as the traditional *commissionaire de transport* that we all know, acting on behalf of others, being that it can now only be considered as a contractual carrier. We find it difficult to understand this, since in each case it will be necessary to analyse the contract signed by the freight forwarder with his client, to examine in detail its terms, the instructions received by the forwarder, the form in which he has bound himself, his remuneration, etc.

The legal matching of the maritime freight forwarder to the contractual maritime carrier seems to be an over-simple solution provided in the Maritime Navigation Act to the complex issue of the liability of the former that, on the one hand seems questionable and raises controversy and, on the other hand, is not the solution to the complex and varied scope of action of the freight forwarder, which goes beyond the transport, where its condition of commission agent is evident.

The Maritime Navigation Law, published in 2014, was an ambitious renovating project of Spanish maritime law in many areas, but as far as the role of the maritime freight forwarder is concerned, it is not what was expected of it. The freight forwarder, as a relevant entrepreneur for the organization of international carriages and other related and complementary activities thereof, deserves a complete and safe regulation that does not currently exist in Spain. Hence, there are very authoritative voices that rightly call for the development of a comprehensive and appropriate legal regulation of freight forwarders that responds to the importance of their activity in transport, puts an end to the uncertainties that the current regime entails, and provides the necessary legal clarity and certainty to issues such as the freight forwarders' s liability regime and others.

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Recent Grounding Incidents and their impact on Cargo Interest under Italian Law

Grounding incidents are maritime casualties which always have considerable factual and legal implications and usually involve different law sectors (civil, criminal, administrative).

This article will focus on the civil consequences which grounding accidents have for cargo interests under an Italian law perspective.

Italy ratified the Hague – Visby Rules. The regime of liability therein provided is therefore applied by Italian Courts. But Italy has also provided for its own regime of liability at Article 422 of the Italian Code of Navigation.

By way of principle, the regime of liability as provided for in the Italian Code of Navigation is not frequently applied because the Hague – Visby Rules (being an international treaty) prevails over the domestic law.

However, things are more complicated when grounding accidents are concerned.

In order to determine, within the Italian legal system, the regime of liability to be applied in case of grounding accidents (and therefore to choose between the Hague – Visby Rules and Art. 422 of the Italian Code of Navigation), the first element to be taken into account is whether the goods loaded on board the grounded vessel are perishable or non-perishable goods.

Generally speaking, it can be assumed that some refrigerated or perishable goods suffered physical damages as a consequence of the incident. In such a case, the liability of the carrier would be governed by the Hague-Visby Rules. The carrier would therefore escape liability if he is able to prove that the damage was caused by one of the "excepted perils" as listed in Art. IV.2.

However, the causes of the grounding are often difficult to be ascertained. By way of principle, we can say that the most common explanation is either (i) a mistake or error by the Master and/or by the Pilot, or (ii) the effect of a storm, or (iii) a combination of the first two options. In such a scenario, the carrier would be entitled to rely respectively on Art. IV.2.a ("act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship") or on Art. IV.2.c ("perils, dangers and accidents of the sea or other navigable waters")

As far as non-perishable goods are concerned, cargo owners will most likely face considerable damages caused by delay in the form of loss of profits, loss of market, penalties, business interruption.

However, the Hague – Visby Rules do not apply to damages by delay: it is only the Hamburg Rules and, more recently, the Rotterdam Rules, that recognize damages due to delay. But these Conventions are rarely recognized. Therefore, as of today, damages by delay would be regulated by the national law governing the contract of carriage (unless the Hague – Visby Rules are referred to in the contract of carriage as the applicable law).

In case the contact of carriage is subject to Italian law, Art. 422 of the Italian Code of Navigation, would be therefore applicable to set the liability in relation to damages by delay.

In this respect, it is noteworthy that the Italian Code of Navigation provides for a regime for damages by delay which is modelled upon the Hague Rules, as it contains a list of excepted perils which is substantially the same as those included in that international regulation. As a consequence, although the two regimes of liability (i.e. the one provided for by the Hague – Visby Rules and the other one provided for by Art. 422 of the Italian Code of Navigation) are, as a matter of fact, the same when it comes to carrier defenses, the carrier may also escape liability for damages by delay relying on the usual excepted perils in Art. 422.

For the above reasons, when it comes to delay claims, a carrier (in case of a contract of carriage subject to Italian law), can take advantage of the same defenses contained in the Hague Visby Rules even though that international convention fails to cover delay claims.

One further issue to take into account is that the defences available to the carrier under Art. IV.2 of the Hague-Visby Rules (where applicable thanks to their inclusion in the contract of carriage), as well as those provided for by Art. 422 of the Italian Code of Navigation, apply to delay directly caused from the grounding, i.e. to the period up to the refloating of the grounded vessel. It is however uncertain whether such defences would also be available to the carrier for subsequent periods of time after the refloating when the ship is (possibly) detained by the authorities. The issue then is whether it is a "factum principis" exonerating the carrier according to Art. IV.2.g of the Hague-Visby Rules- or are the owners to be blamed for failing to promptly provide for a security and having the ship released? It is an issue which has obviously to be examined case by case, as the answer mostly likely depends on a number of factual variables.

Finally, it has to be considered that in case the grounded vessel obstructs a passageway, the accident may also cause huge damages by delay to third parties' ships which have to go through that passage. As we all know, a recent and significant example of such a scenario arose in the "Ever Given" case.

The cargo on board the "Ever Given" was indeed only a small fraction of the goods that suffered a severe disruption of their carriage. Dozens of ships were blocked at the Northern end (in the Mediterranean) and at the Southern end (in the Red Sea) of the Suez Canal.

All cargoes on board those effected ships were heavily delayed. As a result, their owners may face (or may have already face) possible claims for damages by delay.

In assessing the liability of these ships towards cargo owners, Art. IV.2.a and Art. IV.2.c of the Hague-Visby Rules (where applicable thanks to their inclusion in the contract of carriage) would not be relevant since such ships were not directly involved in the incident. Liability of the owners of these ships should nevertheless be excluded by virtue of Art. IV.2.q and/or Art. 422 of the Italian Code of Navigation and/or Civil Code provisions concerning the "force majeure" events, since the grounding of the "Ever Given" was an event beyond their control, which occurred without any fault from their side

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Knock-For-Knock clauses may not always be what they seem

1. Introduction

Even though Norwegian contract law is built on the fundamental principle of freedom of contract, Norwegian courts have not always looked favourably at wide-ranging exclusion of liability clauses in situations where the party seeking to rely on the exclusion is at fault. By narrow interpretation of the clause in question and references to the parties' "fundamental assumptions" when entering into the contract (a form of an implied term), the courts have in certain cases restricted the application of wide-ranging exclusion of liability clauses. The courts also have at their disposal an archaic Norwegian law from 1687 on "immoral terms" (NL 1687 5-1-2) and the Norwegian Contracts Act, 1936 sec. 36, regarding "unfair" or "unreasonable" contract terms. However, it has been a contentious point as to what extent and in what situations these regulations empower the courts to set aside or restrict the application of exclusion of liability clauses. In this article, we will address how restrictions on the application of wide-ranging liability exclusions or limitations impact on the operation of typical "knock-for-knock" clauses, illustrated by a judgement rendered by one of our Courts of Appeal a few years ago.

2. Knock-for-knock clauses in the shipping and offshore industry

Knock-for-knock clauses are widely used in the Norwegian offshore industry and has gradually become an important feature of traditional shipping, *inter alia,* through the BIMCO standard agreements such as Towcon and Towhire, Supplytime and Wreckstage/Wreckfixed/Wreckhire. Modern knock-for-knock clauses contain provisions that seek to channel in a pre-agreed direction the *economic loss* related to damage and injury to each of the contracting parties' respective property and personnel, and the contracting parties' liability, towards specifically defined third parties and for specifically defined types of third-party liability.

A properly drafted knock-for-knock clause normally contains the following three key elements:

(1) Each party bears the risk of damage or injury to its own or its own group's (typically defined as "Owner's Group" and "Charterer's Group"/"Contractor's Group") equipment/property/personnel;

(2) Each party is liable towards specifically defined third parties and for specifically defined types of third-party liabilities, and waives its right to claim recourse from the other party for any such third-party liabilities; and

(3) Both parties shall indemnify and hold each other harmless from any liability that in light of the agreed division of liability has been misdirected or misplaced.

Obviously, the knock for knock clause does not prevent company "A" from being sued by a third party (e.g. company "B"'s subcontractor) for damages that according to the knock-for-knock clause should be borne by company B. However, the knock-for-knock clause will give company A the right to claim recourse from company B afterwards, restoring the agreed allocation of ultimate responsibility for the economic loss.

Normally, the parties agree that the agreed liability regime shall apply regardless of fault (see e.g. Supplytime 2017 Clause 14: *"... even if such loss, damage or personal injury or death is caused wholly or partially by the act, neglect or breach of duty (whether statutory or otherwise) or default of the Charterers' Group [Owners' Group]"*). Under Norwegian law, it is settled law that the parties cannot validly exempt themselves from liability arising out of intent or willful misconduct, and Norwegian courts will set aside a clause purporting to do so.

A more contentious point is whether the parties may validly exempt themselves from liabilities arising out of gross negligence. In Norwegian law, gross negligence is a distinct form of negligence, separate from ordinary negligence. In certain respects, gross negligence is by operation of law treated differently from ordinary negligence. Gross negligence has been described by the Norwegian Supreme Court in terms such as a *"marked deviation from reasonable care"* or *"significant lack of due care"* often coupled with the words *"recklessness"* or *"reproachable behavior"*. There is no decisive Supreme Court judgment on contractual parties' right to exclude liability for gross negligence in general, and legal scholars hold different views. Some have argued that in respect of companies, only gross negligence at the management level may be regarded as a basis for invalidating or setting aside a liability exclusion, but not gross negligence on a lower level in the organisation (a distinction similar (but not necessarily identical) to the question of privity under Norwegian law insurance contracts).

3. A concrete example on the interpretation of the knock-for-knock clause

A judgement handed down by one of our Courts of Appeal a few years ago may be seen as an indication that Norwegian courts have now moved a step closer towards applying a more general restriction on the use of contract clauses excluding or limiting liability for gross negligence, irrespective of at which level in the organisation the fault was committed. The matter concerned, *inter alia,* the interpretation of a knock-for-knock clause in a

Contract of Affreightment ("CoA") for the offloading and transportation of crude oil. The judgement is of interest not only to those involved in the Norwegian offshore industry, but to anyone involved in contracts governed by Norwegian law where the parties have used a knock-for-knock clause or other form(s) of direct or indirect exclusion or limitation of liability.

Following the collision between an FSO and shuttle tanker on the Norwegian Continental Shelf, the field licensees sought damages from the owners of the shuttle tanker, who in turn sought an indemnity from the charterer under the CoA's knock-for-knock clause (the licensees were alleged to be part of the "Charterer's Group" as defined in the CoA). The Court of Appeal held that the charterer was not liable to indemnify the shuttle tanker interests primarily on the basis of an interpretation of the term "Charterer's Group" as defined in the CoA, but held in an obiter that the shuttle tanker interests in any event could not rely on the indemnity provision in the knock-for-knock clause as they were found to have acted with gross negligence. Unfortunately, the court's statement on this contentious point under Norwegian law is quite categorical, but without any substantive discussion of the legal basis for the view expressed by the court.

4. Conclusive remarks

The impact of the agreed liability regime being set aside is three-fold; a party may be held liable for damage or injury that is of a nature that pursuant to the contract should be borne by the other party, the contractual limitations on liability in terms of absolute numbers or exclusion of indirect and consequential losses may be set aside and, finally, a party may not be entitled to the indemnities from the other party provided for in the contract.

The above cited decision is final as the Norwegian Supreme Court did not grant a leave to appeal. Although judgements rendered by our Courts of Appeal are not binding precedents, and the view on the application of the indemnity provision in the event of gross negligence is rendered in an obiter, the judgement is a clear signal that a more restrictive approach is taken by the Norwegian courts towards contract clauses seeking to exempt parties from liability even in the event of fault. The judgement is at least a signal that no one should rely purely on exclusion or limitation of liability clauses as a means to manage risk. Non-Norwegian readers should also be aware that within the offshore industry on the Norwegian Continental Shelf, Norwegian law is to some extent a mandatory choice of law, and hence the above scrutiny cannot be avoided by agreeing on foreign law.

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[1] See Hagstrøm, Obligasjonsrett ("the Law on Obligations") 2011 p. 642 et seq.

[2] Op. cit. p. 652 et. seq.

[3] Gulating Court of Appeal in matter No. LG-2012-77280

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VAN STEENDEREN MAINPORT LAWYERS

The Shell climate change case; a precedent setting judgment! What's next?

Introduction

In a class action brought by Friends of the Earth Netherlands (*Milieudefensie*) and other NGOs against Royal Dutch Shell plc ("RDS") the Hague District Court handed down a groundbreaking and unprecedented decision on 26 May 2021, ordering Shell to cut greenhouse emissions of the entire Shell group's activities by net 45% at end 2030, relative to 2019 levels, through the Shell group's corporate policy. This covers not only emissions of the Shell group (globally), but also the emissions of its suppliers and its customers.

The Shell decision is the first time a court has intervened to force a company to reduce its carbon emissions and bring its strategy in line with the Paris Agreement and it is expected to be a tipping point in climate litigation worldwide. The decision is likely to have significant implications for almost all multinational companies, particularly those in the energy sector and which bear the practical burden of delivering energy transition.

The Shell Group said in February 2021 that it would accelerate the transition of its business to net-zero emissions, including targets to reduce the carbon intensity of energy products by 20 percent by 2030 and aimed to become carbon neutral by 2050, but the court found Shell's climate plan not "concrete" enough. Meeting the goals of the Paris Agreement is not only up to governments, and whilst RDS cannot solve the global climate crisis on its own, that does not absolve RDS of its responsibility to curb the emissions it can control and influence. Companies have a human rights obligation to take further action and RDS must bring its emissions and those of it suppliers and customers in line with the Paris Agreement.

The court case

The claims of Millieudefensie et al were directed against the Royal Dutch Shell plc (RDS), established in The Hague, as the top holding company of the Shell group. Claimants argued that Shell Group's sustainability policy was in breach of article 6:162 of the Dutch Civil Code ("DCC"), which refers to an "unwritten standard of care," on the basis that Shell Group had been aware for many years of the dangers of rising carbon dioxide emissions. Claimants also maintained that Shell Group's future planning was in violation of articles 2 and 8 of the European Convention on Human Rights (ECHR) — the right to life and the right to family life.

RDS unsuccessfully argued that there was no legal basis for the case and that governments alone are responsible for meeting Paris Agreement targets. It also argued that forced emissions targets are pointless, as other oil majors will step in and extract more oil in any event. The Hague District Court acknowledged that RDS cannot solve this global problem on its own, but said that does not absolve RDS of its individual responsibility to do its part.

The Hague District Court accepted that RDS had obligations under both Dutch law and the ECHR. The court interpreted the standard of care of article 6:162 DCC (i) on the basis of the relevant facts and circumstances, (ii) the best available science on dangerous climate change and how to manage it (iii) and the widespread international consensus that human rights offer protection against the impacts of dangerous climate change and that companies must respect human rights. It adopted a broad approach to applying the Dutch standard of care, taking into account RDS's policy-setting influence over the rest of the companies in the Shell Group, the rights of individuals under the ECHR, and the duty to respect human rights set out in the UN Guiding Principles. It accepted the general consensus among climate scientists that a global emissions reduction of at least 45 percent is required to avoid global warming of 1.5Ð (which is the target limit set out in the Paris Agreement). It concluded that, if that target is not met, the human rights of the claimants in the case will be harmed.

A key issue for making RDS responsible for its subsidiaries and its supply partners was the court's finding that RDS establishes the general policy for the Shell group, including having oversight of climate change risk management. A particularly extraordinary aspect of the judgment, however, is that it in effect creates obligations that extend beyond Shell Group. The court found that Shell Group's policy was inadequate to meet the requisite standard of care under Dutch law. It also observed that 85 percent of the emissions for which Shell Group is responsible are indirect emissions — i.e., emissions created by the combustion of products sold by Shell Group — and it held that Shell Group has a "significant best efforts obligation" to "take the necessary steps to remove or prevent the serious risks ensuing from the CO2 emissions generated by them, and to use its influence to limit any lasting consequences as much as possible." In other words, not only is RDS required to address emissions created during Shell Group's extraction and refining activities, but it also has responsibilities relating to the emissions created when its end customers burn its fuels.

What's next?

In a statement on 21 July 2021, RDS confirmed that it will appeal against the judgment. The appeal will not suspend RDS' obligations arising from the judgment, as it has been declared provisionally enforceable. The court held that the interest of Milieudefensie et al for immediate compliance with the judgment outweighs

RDS' interest in maintaining the status quo until a final decision has been taken.

The court acknowledged that the provisional enforceability of the judgment may have far-reaching consequences, which may be difficult to undo at a later stage, but that this did not stand in the way of declaring the order provisionally enforceable. The judgment is likely to have very significant (financial) implications for RDS as reducing its carbon emissions by 45% by 2030 is considerably more stringent than the group's current climate plan.

The judgment shows the fast evolvement of climate litigation; historically, such claims were only initiated and successful against governments. Has the decision set a precedent for wider litigation? Is the case to lead to similar claims against other companies with a high carbon footprint - not just companies in the energy sector and not just against companies established in the Netherlands? Could it lead to other human rights claims against multinational companies - not just climate-related? The decision may provide precedence or incentive for courts in other countries to take similar position.

What's next remains to be seen, but multinational companies better be prepared as stakeholder litigation does not seem to lose momentum anytime soon.

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