THE LIABILITY ATTACHED TO THE SUPPLY OF CONTAINERS BY A MARITIME CARRIER: A COMPARATIVE ANALYSIS OF THE FRENCH DECISION *M/V MATISSE* COUR D'APPEL D'AIX-EN-PROVENCE 2EME CHAMBRE -15 FEVRIER 2007

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Between 14 May and 10 July 2001, the maritime carrier CMA-CGM carried 29 refrigerated shipping containers loaded with frozen lamb from Melbourne to Tripoli (Libya). The containers were loaded on different vessels and the last container was delivered in Tripoli on 10 July 2001. On 16 August 2001 the cargo loaded in a certain number of refrigerated containers was found to be damaged. After having the claim dismissed in the first instance on the ground of lack of valid subrogation, the cargo insurer, GALT G/S, appealed to the Cour d'Appel d'Aix-en-Provence.

In addition to the procedural argument about subrogation, the cargo insurer sought to argue on appeal that the damage had occurred during the carrier's period responsibility. Alternatively, the insurer argued that the carrier failed to show "conform delivery" on 10 July and that the carrier was simply negligent in not looking after the cargo once it had been discharged from the ship. The carrier argued that the insurer had not rebutted the presumption of "conform delivery" and that there was no evidence of refrigeration malfunction during the carriage. Additionally, the carrier argued that, given the clause "delivery under tackle," it was not liable for damage occurring after the unloading on the quay at the port of discharge.[1]

The Court held that the cargo insurer had a validly subrogated claim and that the carrier could rely on the "delivery under tackle" clause with the effect that the cargo was presumed to have been delivered in conformity with what was received from the shipper. However, the Court also held that since the carrier had supplied the containers that had caused the cargo damage to the shipper on the basis of a contract that is "*incidental*" to the contract of carriage, the carrier should be liable on the basis of the contract of supply of equipment. In so deciding, the Court applied the common civil law regime of such a contract of supply of equipment to the facts at issue.

The issue of the legal nature and regime of the contract of supply of containers has already given rise to litigation under French law and has been addressed almost entirely by a remarkable decision of the French Supreme Court on 5 March 2002.[2] In that case the Commercial Chamber of the French Supreme Court stated the principle that "regardless of the basis of the action against the carrier for cargo damage during transportation, the carrier's liability can only be addressed on the basis of maritime transport law".[3]

Hence, in respect of cargo damage occurring during the carrier's period of responsibility, even if such damage is caused by the container supplied for transportation and not by transport operations, the solution is clear: maritime transportation law rules must be applied exclusively. The situation of cargo damage occurring outside of the carrier's period of responsibility, but in connection with a container supplied by the latter, remained unclear. It is this issue which the Cour d'Appel d'Aix-en-Provence has resolved in the *Navire Matisse* case of 15 February 2007.
By deciding that the maritime carrier, which has supplied to the shipper a container for transportation, is responsible for damage to cargo occurring outside of the carrier's period of responsibility, but in connection

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[1] "Delivery under tackle" clauses are valid under French law since the Supreme Court decision: Cour de Cass (Ch Com) (16 January 1996), *Navires Monte Cervantes, Lafayette, Monte Rosa et GMB Memling* - (N° de pourvoi: 94-13653) - Legifrance - at <www.Legifrance.gouv.fr> - also in Bull. Civ IV, no 21; (1996) 48 *Droit Maritime Français* 627; Delebecque, P, (1996) 48 *Droit Maritime Français* 555.
[2] Cour de Cass (Ch Com) (5 mars 2002), *Navire Saint-Georges - Sté CGM SUD v Sté Le Continent* - (N° de pourvoi: 99-12852) – in Legifrance <www.Legifrance.gouv.fr> - See Raynaud, MN, (2002) 54 *Droit Maritime Français* 969, *La semaine Juridique (édition générale)* JCP G 2002, IV 1 683 - *Bulletin des Transports et de la Logistique* n° 2932 - 18 mars 2002, 203.
[3] In the *Navire St Georges* case the court had to apply the French domestic law on maritime carriage, but the principle would be the same for the application of any mandatory international convention.

with the container supplied, on the basis of the common civil law regime applicable to contracts of supply of equipment, the Cour d'Appel d'Aix-en-Provence has resolved the legal issue in a manner that needs to be considered carefully.

At first sight, the Court seems to have adopted an approach that is not only a legitimate application of maritime transport law, but which is also entirely consistent with the Supreme Court decision of 2002 earlier referred to. However, a closer examination of the case leads one to wonder whether the Court's approach is legally correct or indeed the most appropriate from a commercial point of view.

1 An Apparently Correct Application of Maritime Transport Law

Despite the contention from the cargo insurer that the cargo damage occurred during carriage operations, the Cour d'Appel d'Aix-en-Provence found that this was not established and granted the carrier the presumption of "conform delivery". This is nothing more than a straightforward application of one of the basic principles of the maritime carrier's system of responsibility, namely the limitation of the carrier's presumed liability to carriage operations.[4]

The question which then arises is - What is the basis of the carrier's liability for cargo damage occurring outside of its period of responsibility but in connection with the equipment supplied by the for such transport? The Cour d'Appel has held that it is pursuant to the "common civil law" regime of the contract of supply of equipment that this liability has to be assessed. This solution is consistent with the principle established by the French Supreme Court because it does not conflict with the mandatory application of maritime transport law rules to all issues arising during carriage operations. The Cour d'Appel decision is nevertheless innovative in the sense that it casts new light on the possible legal regime applicable to the contract for supply of containers under French law by implicitly giving it a regime that is "*autonomous and incidental*"[5] to the contract of carriage.[6]

Before going any further it is important to consider the consequences of such a regime for the supply of containers and to assess the coherence of the French jurisprudence in this regard. Fundamentally, given its supposed "*incidental*" nature, the main liability regime applicable to the supply of containers should be the regime applicable to the contract of carriage. In this regard the carrier should be able to claim its retention right on the cargo not only for the freight, but also in relation to the supply of the container. Lower courts have however adopted a contrary view by stating that: "the rental of shipping containers is an incidental agreement to the contract of transport and not subject to maritime transport law rules".[7] The French Supreme Court also seems opposed to the application of maritime transport law rules to litigation arising out of the supply of containers. Indeed, the Cour de Cassation implicitly refused the cargo retention right to a carrier for failure to pay for the service of supply of containers.[8]

Moreover, the definition of the contract for the supply of containers as "*autonomous and incidental*" also raises the issue of the rules applicable to the cargo loaded inside the container outside of carriage operations. Indeed, the contract for the supply of containers and the contract for the carriage of the cargo will usually have different borders, which do not necessarily correspond. Although this observation reinforces the idea of autonomy between the two contracts, it is in fact a source of difficulty when one recalls that, under French law, it is the maritime carrier's liability regime which is also applicable to the contract for supply of containers during carriage operations. Which of the liability regimes then is applicable to the contract for supply of containers outside of carriage operations?

In the *Navire Matisse* Case the Court held that the regime applicable to the contract for the supply of containers is the common civil law regime relating to the supply of equipment and not the maritime carrier's liability

[4] The operations actually covered by such period will fluctuate according to the substantive law applicable to the case (Hague-Visby Rules, Hamburg Rules, COGSA 1991 (Cth)) and the jurisdiction where the case is heard (*Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Cie Jordan Inc.* [2005] 1 Lloyd's Rep 57), but the minimum period of liability of the maritime carrier under French law is "tackle to tackle".

[5] The court expressly referred to the supply of containers as being "*incidental*" to the contract of transport and implicitly "*autonomous*" by giving it a different regime from the regime of the contract of transport to which it is attached.

[6] For some explanation of the operation of the concepts of autonomous and incidental contracts under French law see: Bénabent, A, 'Les contrats spéciaux' - *Domat Droit Privé* (ed. n°1 - 1993) – Montchrestien N° 487.

[7] Lamy S.A, *Lamy Transport* (Tome 2 - Lamy Professionnels, ed. Février 2001, n° 407 a) réclamation des transporteurs. C.A. d'Aix, 19 février 1987, BT 1988, 521 – C.A. d'Aix, 25 mai 1988, *Revue Scapel* 1989, 27.

[8] Cour de Cass. (Ch. Com.) (6 juin 2000), *Navire Red Sea En,terprises - CMA v Transports AUBRY* - (N° de pourvoi : 97-22546) - Legifrance <www.Legifrance.gouv.fr> - aussi in Bulletin des transports et de la logistique N° 2852 - 19 juin 2000, 467.

regime. The first observation that can be made is that, in deciding in this way, the Cour d'Appel did not follow the "incidental" approach to the contract for the supply of containers, contrary to what it said, but rather applied a system of "double successive qualification". With that system the contract for supply of containers becomes severable into two periods with two different applicable legal regimes. This approach, already adopted by the French Supreme Court for certain contracts of service such as contracts for car repairs,[9] is new in respect of transport law.[10]

Pursuant to such an approach, the maritime carrier is liable on the basis of the contract of carriage during the performance of the carriage operation as framed by the contract of transport. Beyond that, it is the common civil law regime relating to the contract for the supply of equipment that is applied to the container. This view had already been articulated by the Cour d'Appel d'Aix-en-Provence.[11] In that decision, the Court had refused to apply maritime transport law rules outside of the carrier's period of liability by considering that "*the supply of a container by the maritime carrier, contract distinct from the contract of carriage, does not as such modify the beginning of the contract of transport*". [12] This approach also seems to reflect the view of the French Supreme Court as the latter has already applied common civil law to address the carrier's liability for the supply of a defective container when the cargo damage had occurred outside of the carrier's period of liability.[13] A similar analysis can be also found in a decision of the High Court of Shanghai, [14] which refused to apply maritime transportation law rules to a situation where the maritime carrier was found liable.

However the decision of the Cour d'Appel in the *Navire Matisse* Case goes further. It adds to the position of the French Supreme Court by opting for the system of double successive qualification: a contract for the supply of containers is autonomous and incidental during carriage operations and, autonomous and independent outside of such operations since the applicable regime in the latter circumstance is distinct from the regime of maritime transport rules. Although rigorous, this solution appears perfectly coherent legally. A further analysis however, reveals various difficulties.

2 A Solution Not Really Appropriate and Legally Questionable

First of all, the application of the system of double successive qualification is not immune from criticism as some academics refer to it as an inappropriate splitting up of the contract. [15] Further, it can be argued that this solution is inappropriate because it leads to a fragmentation of international transport law rules and to the introduction of domestic law considerations in respect of the issue of the relevant applicable legal regime to contracts for the supply of containers. This observation is all the more relevant in the context of international transport, where uniformity of international law is a matter of paramount concern. It is not certain that the system of double successive qualification, which applies the French Civil Law regime to contracts for supply of containers, will address that concern. In summary, the solution provided in the *Navire Matisse* Case can be found to be very Franco-centric and not conducive to principles of international comity.

Without exaggerating the importance of a comparative law approach, or even suggesting any legal transposition of any sort, since French judges are not required to refer to other jurisdictions when making decisions, it is nevertheless critical to adopt a comparative law approach in the field of international transport in order to promote the uniformity of the law and therefore to render the decisions of each jurisdiction more compatible. [16] In common law countries, the contract of carriage does not have the same legal background as in continental law countries. To the mandatory force of legal provision of the latter will be substituted the contractual freedom and the force of precedent of the former. Hence, at common law, in cases of difficulty, it is the contractual provision, namely the clauses of the "bill of Lading", that will have primacy and which will be subject to a scrupulous analysis by the court in order to resolve a dispute between the parties.

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[9] The mechanic being bailee of the thing is also subject to the law of bailment.
[10] Bénabent, above n 6, N° 490.
[11] Lamy, above n 7.
[12] Cour d'Appel d'Aix-en-Provence (9 décembre 1999), *Navire Jolly Rubino - Groupe Concorde et autres v Sté SIVOMAR.* See Tassel, Y, (2000) 52 *Droit Maritime Français* 914, *Bulletin des Transports et de la Logistique* - N° 2833 - 7 Février 2000, 93. *« …La mise à disposition des conteneurs par le transporteur maritime, contrat distinct du contrat de transport, n'entraîne en elle-même aucune modification du moment de la prise en charge ».*
[13] Cour de Cass. (Ch Com) (13 juin 1995), *CGM - Sté Scandutch I/S Partnership v Commercial Union - Kodak* - (N° de pourvoi : 93-14861) - Legifrance - at <www.Legifrance.gouv.fr>.
[14] Guo, Y, 'Responsibility for unsuitable container in China' [1995] *Lloyd's Maritime & Commercial Law Quarterly*, 15.
[15] Bénabent, above n 6, N° 487ff .
[16] Tetley, W, 'Interpretation and construction of the Hague, Hague/Visby and Hamburg Rules' (2004) 10 *Journal of International Maritime Law*, 30.

Under US law, although certain decisions have applied State law to resolve this type of disputes,[17] the majority of decisions have simply interpreted the contractual provisions to resolve these types of issues, most notably the "Himalaya" or paramount clauses.[18] The principle is quite simple; with a paramount or Himalaya clause, the maritime carrier extends the application of the regime of maritime transport law rules to subcontractors, third parties or even himself for operations occurring outside of maritime transport operations. The application of this type of clause, with the purpose of generally extending the maritime carrier's regime of liability to non maritime operation, has been validated as a matter of principle by the Supreme Court of the United States.[19] The solution is quite similar in the UK,[20] even if the decision of the House of Lords in *The Starsin* has created some uncertainty as to the exact ambit of the portion of the Hague-Visby Rules that can be contractually invoked.[21] The Australian jurisprudence also enforces Himalaya clauses without much difficulty, and therefore applies the Hague-Visby Rules regime to operations provided for by those clauses.[22]

It is important to note that the French jurisprudence is also inconsistent in respect of the regime applicable to the supply of containers. A recent decision of the French Supreme Court seems not only to contradict the decision referred to previously, but also to implicitly follow the common law trend by extending the benefit of the maritime carriage rules to related operations.[23] Indeed, in that decision the French Supreme Court accepted the applicability of the regime of maritime transport law in addressing the cargo liability issue that had arisen after the delivery of the container to the consignee's agent on the basis that the maritime carrier had "wrongly loaded the cargo into a container insufficiently water tight".[24] This decision is difficult to understand in the context of maritime transport law for two reasons: first, because the cargo damage occurred after the end of the carrier's period of responsibility; secondly, because it refers to the "wrongdoing" of the carrier when it is well known that the Hague-Visby regime subjects the carrier only to a presumed liability. Moreover, the "wrongdoing" of the carrier was connected with a problem with the container loading. Yet that is not a transport operation but an incidental service, which in that instance leads nevertheless to the application of the maritime carrier's regime of liability. It is then possible to wonder if this means that the French Supreme Court intended to say, as a matter of principle, that services incidental to transport operations should invariably be subject to the application of the regime of maritime transport law.

If that is the case, it is possible to argue that the judges of the French Supreme Court went beyond the letter, and maybe the spirit of the Hague-Visby Rules, and therefore beyond their own jurisdiction. There is a convincing legal argument to support that approach, which would have been particularly relevant to consider in the *Navire Matisse* Case. This argument is based on the parties' contractual freedom in relation to a contract that is incidental to the contract of carriage and on the possibility for those parties to provide in their agreement that the regime applicable to maritime transport law would also apply to the incidental contract. This would not be based on the Himalaya clause principle, which is not accepted under French law given the doctrine of privity of contract,[25] but simply on a contractual agreement. In this regard, the terms on the back of the maritime carrier's

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[17] *Colgate Palmolive Cie.v S/S Dart Canada, Dart Containerline Ltd* [1984] AMC 305. See Nixon, EB & Hewson, BC, 'The Second Circuit Review -- 1983-1984 Term Part I Admiralty Law Commentary' (1985) 51 *Brooklyn Law Review*, 505 and *National Resources Trading Inc & Royal Insurance Cie of America v Trans Freight Lines* [1986] AMC 844.

[18] *Cera-Tech S.A. v The S/S Allison Lykes* [1992] AMC 2089; *Mori Seiki USA Inc v M/V Alligator Triumph* [1993] AMC 1521; *American Home Assurance Co v Crowley Ambassador* [2003] AMC 510; Force, R & Davies, M, 'United States Maritime Law 2003' [2004] *International Maritime & Commercial Law Yearbook*, 271.

[19] *Norfolk Southern Railway Company v James N Kirby Pty Ltd & Allianz Australia* [2004] AMC 2705. For a detailed analysis of these decisions and of their consequences for US transport law see Sweeney, JC, 'Crossing the Himalayas: Exculpatory Clauses in Global Transport' (2005) 36 *Journal of Maritime Law & Commerce* 155 ; Wyatt, MJ, 'COGSA Comes Ashore ... And More: The Supreme Court Makes Inroads Promoting Uniformity and Maritime Commerce in Norfolk Southern Railway v Kirby' (2006) 30 *Tulane Maritime Law Journal* 101. See also Costabel, AM, 'The "Himalaya" Clause Crosses Privity's Far Frontier. Norfolk Southern Railway Co v James N. Kirby, Pty Ltd' (2005) 36 *Journal of Maritime Law & Commerce* 217; Costabel, AM, 'Himalaya Strain? - A Forensic Examination of Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd. and Doe v. Celebrity Cruises, Inc.' (2005) 29 *Tulane Maritime Law Journal* 217; Strong, SI, 'Liability beyond the tackles - Norfolk Southern Ry v James N. Kirby' [2005] *Lloyd's Maritime & Commercial Law Quarterly* 290.

[20] Scruttons Ltd v Midland Silicones Ltd [1961] Lloyd's Rep 365.

[21] *Homburg Houtimport BV v Agrosin Pte Ltd* [2003] Lloyd's Rep 571; Girvin, SD, 'Contracting carriers, Himalaya clauses and tort in House of Lords - The Starsin' [2003] *Lloyd's Maritime & Commercial Law Quarterly* 311; Girvin, SD, 'English Shipping Law' [2004] *Lloyd's Maritime & Commercial Law Yearbook* 123; Tetley, W, 'Case note on the Starsin' (2004) 35 *Journal of Maritime Law & Commerce* 129.

[22] Davies, M and Dickey, A, *Shipping Law* (3rd Ed, 2004).

[23] Cour de Cass (Ch Com) (17 Septembre 2002), *Navire M/S Santa Margherita - Cie (CGM) tour du monde - Seafrigo v Sté Primex - PFA assurance et autres* - (N° de pourvoi : 00-17228) - Legifrance - at <www.Legifrance.gouv.fr> - also in *Revue Scapel* 2003, 22; DMF H.S. N°8 June 2004 n°89,79.

[24] Ibid.

[25] Tetley, W, 'The Himalaya Clause - Heresy or Genius?' [1977] *Journal of Maritime Law & Commerce* 111.

bill of Lading (CMA-CGM), as made available on the web site of that shipping line,[26] show in clause 6 that the provision of the Hague Rules are applicable in all legal actions against the maritime carrier, even for damage occurring outside of the carrier's period of responsibility.[27]

It is therefore possible to suggest that the Cour d'Appel d'Aix-en-Provence was in error in omitting to apply the carrier's regime of liability resulting from the incorporation of the Hague Rules as provided for by the parties. Such an extended application of the carrier's regime of liability to operations other than transport operations seems all the more valid given that the contract for the supply of containers by the maritime carrier and the contract of transport are often contained in the same document. The question which therefore arises is - Which of the regime of hidden defects formulated by Article 1721 of the French Civil code or by the Hague Rules regime as incorporated contractually should have applied to the issue? It is argued that the latter should have been preferred by the Cour d'Appel d'Aix-en-Provence given the incidental character of the supply of container in relation to the contract of transport as expressly recalled by the Court and having regard to principles of international comity.

Consequently, it is argued that the Cour d'Appel has not necessarily reached the correct conclusion and that it would have been more appropriate, both legally and commercially, to apply the liability regime applicable to contracts of maritime carriage to the contract for the supply of containers as agreed by the parties. In that case, the container supplier would probably not have been able to invoke one of the excepted perils, but would have been able to at least limit its liability.[28]

By way of post-script, it might also be desirable to consider that the supply of containers can be analysed legally as a supply of a means of transport. On that basis, there would no longer be any question about the application of the common regime of supply of equipment as, if anything, the regime applicable to voyage chartering would apply instead. This would offer the advantage of giving a clear solution and a clear legal framework to the operation of containers in respect, for instance, of issues such as container demurrage or in relation to the owner's and charterer's respective duties and liabilities. Such an analysis would suppose an internationally agreed definition of a container as a "means of transport". There are various arguments supporting that approach,[29] but no progress has been made in that respect and considerations of this kind are notably absent from the most recent draft project on international maritime carriage, the UNCITRAL Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea].

[26] Connaissements de la CMA-CGM disponibles à l'adresse <http://www.cma-cgm.com>

[27] 6. Carrier's responsibility and Clause Paramount "…*The Carrier shall be under no liability whatsoever for loss of or damage to the Goods, howsoever occurring, if such loss or damage arises prior to loading on to or subsequent to the discharge from the Vessel carrying the Goods. Notwithstanding the foregoing, where any applicable compulsory law provides to the contrary, the Carrier shall have the benefit of every right, defence, limitation and liberty in the Hague Rules as applied by this Clause during such additional compulsory period of responsibility, notwithstanding that the loss or damage did not occur at sea*…"

[28] On the trend of extension of the carrier's regime of liability to third parties under French law see Le Droit Maritime Français Vol. 54 n°632 and more particularly de Richmond, H, 'L'affréteur d'espace peut-il bénéficier de la limitation?' (2002) 54 *Le Droit Maritime Français* 1011.

[29] Bordahandy, P-J, 'Containers: a conundrum or a concept?' (2005) 11 *Journal of International Maritime Law* 342.