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CHRISTMAS BULLETIN

DECEMBER 2020

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MERRY CHRISTMAS & HAPPY HOLIDAYS!

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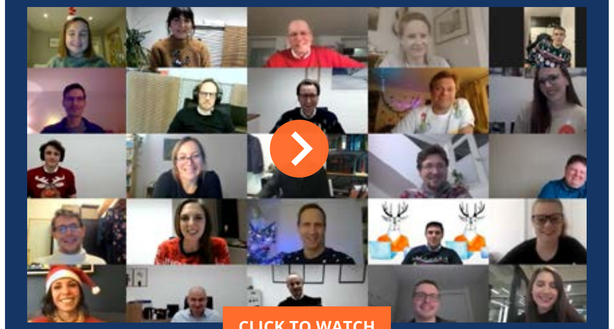
WELCOME TO OUR CHRISTMAS BULLETIN



This year our firm decided to dedicate its Christmas donations to charities helping children and adults in need of shelter and a warm meal, in four of our locations – New York, Vienna, London and Mexico City.

We are happy to extend this initiative to our clients, our colleagues and to our readers, and invite you to participate in some good old-fashioned holiday charity.

Below are the charities we have chosen this year. We encourage you to join us, trusting these contributions will help make a meaningful change in people's lives. We are confident a donation of any size would be most appreciated.

- New York: **The Bowery Mission**
- Vienna: **Caritas**
- London: **Crisis**
- Mexico City: **Fundación para la Protección de la Niñez, I.A.P.**

FRANZ, THE NEW REINDEER

AN EMPLOYMENT LAW CHRISTMAS STORY

Written by Hans Georg Laimer & Lukas Wieser

In early 2020, Rudolph reached statutory retirement age. As a result, Rudolph, who had been looking forward to this day for a few Christmases already, handed his notice in to Santa, used up his outstanding vacation and moved to Hawaii to enjoy his retirement in warmer climes.

Although the North Pole HR department had been preparing Santa for this day for a while, Rudolph's retirement came as quite a shock to him nonetheless. To raise Santa's mood, the North Pole HR department carried out an unprecedented recruitment procedure. Reindeers from all over the world applied for Rudolph's position. One of the applicants was Franz, a reindeer from Austria.

After several rounds of interviews and a sledge pulling assessment, Alabaster Snowball, Head of the North Pole HR department, offered Franz the job. As Alabaster Snowball was very impressed by Franz's sledge pulling skills, he agreed to Franz's proposal that Austrian law be included as the applicable law in Franz's employment contract.

Franz's employment commenced on 1 March 2020. Due to the COVID-19 pandemic, Franz worked from 17 March 2020 until 30 November 2020 from his home in Schönbrunn, Vienna, after concluding a home office agreement with Santa.

On 23 September 2020, Alabaster Snowball received an email from Franz to which a signed letter with the following text was attached:

> *Dear Mr. Snowball,*
> *I hereby inform you that I will consume my personal holiday this year on 24 December 2020.*
> *Kind regards,*
> *Franz the Reindeer*

Alabaster Snowball, who had never heard of the concept of personal holiday before, immediately contacted the Austrian ZFZ Employment team to find out whether Franz was entitled to take 24 December 2020 off.

After his consultation, Alabaster Snowball informed Santa that Franz was entitled to one day of personal holiday per vacation year which is deducted from his vacation entitlement pursuant to Section 7a of the Working Rest Act (*Arbeitsruhegesetz*). To exercise his right to a personal holiday, Franz would have to inform his employer three months in advance in writing. Thus, by sending his notification letter on 23 September 2020 to Alabaster Snowball, Franz had complied with this precondition.

Santa was devastated by this news. He was certain that

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without Franz he would never be able to deliver all the presents on time for Christmas morning. He also knew that he did not have any budget to hire a replacement.

However, Alabaster Snowball was not yet finished with briefing Santa on statutory personal holidays under Austrian law. Although Franz was entitled to his day off, he may still work on this day upon the employer's request. In this case, however, Franz would be entitled to vacation pay and the remuneration for the work carried out. Thus, he would receive double remuneration. Furthermore, the day would not be deducted from his vacation entitlement.

Excited about this news, Santa immediately arranged a Teams call with Franz for the next day to ask him to work on 24 December 2020 instead of taking it as personal holiday. During the Teams call, Santa told Franz that he really depended on him and needed his services on 24 December 2020 to deliver all the presents to the children on time. Franz explained to Santa that he celebrated Christmas with his family on Christmas Eve and, as a result, would very much like to have the day off. However, after Santa had informed Franz that he would receive double payment for the day, Franz finally agreed to come to work on 24 December 2020.

Santa and the whole North-Pole HR department were very happy that they had found a solution with Franz and that timely delivery of all the presents had been secured.

The End.

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DASHING THROUGH THE HAGUE VISBY RULES

Written by Lucy Noble & Calum Cheyne

As the Christmas festivities approach, market sources expect a remarkable influx of packages to depart from a particular Northern Hemisphere factory. The goods carried are of high significance and the consequences of non-delivery are grave. The proprietor has an almost complete monopoly on these shipments (including a horizontally integrated model across production and delivery), so there are questions of unequal bargaining power. It is therefore important for cargo interests to ensure they have the protections of the Hague Visby Rules ("HVR"). The deliveries are estimated for discharge via safe chimneys worldwide by latest 25 December 2020.

In this article we consider whether the HVR are mandatorily applicable, or if the parties can incorporate the HVR into their agreements. If the answer to either is in the affirmative this will serve to impart much needed standardisation and certainty in protecting cargo interests and reduce the need for extensive negotiation between parties. Such negotiation, historically, has required the drawing up of extensive lists – and those lists being checked twice – for the carrier to perform due diligence on potential cargo interests.

CARRIAGE OF GOODS BY SEA

This inquiry necessarily begins with a classification of the agreement reached between the individual cargo interest and the carrier, Santa Claus. The contracts are prepared on a sector-specific form, analogous to unilateral offer (See Carlill v Carbolic Smoke Ball Company [1892] EWCA Civ 1.), whereby:

1. The offeror sends an offer by way of letter of request to Mr Claus (hand-written and by chimney);

2. Mr Claus accepts that offer by supplying the requested cargo; and

3. Consideration flows both ways, with Mr Claus accepting various festive treats (which the parents of the offeror, acting in their capacity as agent(s), shall provide). Although it is accepted that the industry standard for such consideration varies between jurisdictions, from sherry, mince pie, and gingerbread to milk and cookies, this has no material impact on the legal assessment.

The law is not settled on the question of whether third party rights accrue to the eight reindeer, such that they are entitled individually to demand the carrots that are often left outside the property of the Offeror. This question is beyond the scope of this bulletin, save to advise that it is prudent to leave carrots outside, in order not to avoid any potential

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claim. We also confirm that these offering are not taken to contravene the terms of the Bribery Act 2010 (to that end, we note that although a person soliciting a bribe is referred to simply as "R" in Section 2, Bribery Act 2010, there is not thought to be any correlation between the use of this initial and Santa's Reindeer).

The HVR governs the liabilities and obligations arising from contracts for the carriage of goods by sea. There is, clearly, carriage of goods. However, it remains an unresolved and complex point of law whether such carriage can be characterised as 'by sea'. Additionally, there is the alternate question of whether a 'flying sleigh' can be considered a vessel for the purpose of the HVR.

The terms of the HVR define 'ship' to mean '*any vessel used for the carriage of goods by sea*' (Article I(e)), however the term 'vessel' is not independently defined. Within the broader context of shipping codes generally, the development and materialisation of innovative and varied new forms of commercial craft have made it difficult for courts to reach definitive agreement on a suitable concrete definition. Unfortunately, established case law offers little assistance in the legal treatment of a 'flying sleigh', which is the industry standard method of transportation in this context.

We would argue that either a seaplane or a hovercraft presents an appropriate departure point for consideration of comparable case law.

In a 2017 judgment in the Finland Supreme Court, the court, on consideration of the term 'merchant shipping' reflected that for the purpose of the International Regulations for Preventing Collisions at Sea, 'vessel' is a broad term including every description of watercraft. This broad definition included watercraft used or capable of being used as a means of transport on water, seaplanes expressly included. Regarding hovercraft, the *Hovercraft (Civil Liability) Order* (1986, S.I. 1986/1305 Art. 4, Sch. 2.) provides that the definition of ship for the purpose of the HVR will include hovercraft, albeit only hovercrafts that are used for the carriage of goods.

Drawing on these comparison points, there is a strong argument to be made in favour of the classification of sleigh as a vessel for the purposes of the HVR. The sleigh indisputably carries goods and is able to navigate across open water. Like a seaplane, a sleigh is capable of being used as a means of transport on water or hovering slightly above as in the case of a hovercraft. For certain remote island destinations, unconfirmed word has it that the sleigh indeed must land on water in its approach.

Unsurprisingly, Santa's contract team will push back forcefully on any attempts to include air carrier regimes, particularly those with any suggestion of presumptive liability for cargo loss, into these contractual relationships. Our experience is that attempts to incorporate these terms are a commercial non-starter, save only for the very nicest boys and girls who enter negotiations in a very strong position.

COMPULSORY APPLICATION THROUGH CONTRACTUAL PROVISION:

There is serious debate as to whether the load port of the goods is in a contracting state. Leading practitioners' texts comment that the load port is the North Pole, which is not a contracting state. However, a substantial (and growing) body of hearsay evidence supports the argument that the load port is in fact Lapland, Finland. While such evidence is admissible in civil law proceedings, we do caution that it may be of limited weight (Pursuant to Section 1 and Section 4 of the Civil Evidence Act 1995). Finland is a contracting state.

As there is a strong chance that the load port is considered to be the North Pole, consideration must be given to an alternate way by which the provisions of the HVR may be applied. Notwithstanding the fact that the requested goods specified in each letter vary considerably between households, it is essential that each letter contains designated provisions to ensure the HVR are compulsorily applicable as a matter of English law (Article X(c)).

We would recommend the following wording is inserted into any such letter:

> *The following wording applies to this letter, and is to be included in any Bills of Lading issued hereunder:*
>
> *The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading signed at Brussels on 25 August 1924 as amended by the Protocol signed at Brussels on 23 February 1968 ("the Hague-Visby Rules") shall apply to this letter to Santa as if this non-negotiable document was a bill of lading, irrespective of whether or not such rules are enacted in the country of the loading port, and irrespective of whether such legislation may only regulate outbound shipments.*
>
> *The governing law shall be English law. The Courts of England and Wales are to have jurisdiction over any and all disputes arising out of or as a result of this letter.*

*Please note, the above suggested wording is strictly for guidance purposes only. All letters to Santa are different and Zeiler Floyd Zadkovich LLP marketing materials are not to be taken as legal advice. Please contact the author should you have any questions in this relation.

While Article X(c) of the HVR expressly requires that the relevant contract be contained in or evidenced by an appropria-

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te bill of lading, Article 1(6) of the Carriage of Goods by Sea Act 1971 considerably widens this requirement. Article 1(6) provides that without prejudice to Article X, the HVR shall have the force of law in relation to any.

> *'receipt which is a non-negotiable document marked as such if the contract contained within it…is a contract for the carriage of goods by sea which expressly provides that the Rules are to govern the contract…'*

The preferred interpretation of this requirement is that for the HVR to be compulsorily applied to a non-negotiable document, the two elements of express HVR incorporation and that the non-negotiable document is marked as a bill of lading must be clear (McCarren v. Humber International Transport [1982] 1 Lloyd's Rep. 301). Strict adherence to the recommended wording fulfills these requirements so that irrespective of the non-contracting state status of the North Pole, the HVR will have the force of law to govern the agreement.

A perennial problem with such letters is establishing effective service. The question, "did Santa get my letter?" is often raised by the expectant end-receivers. While the receivers wait to see whether they were sufficiently nice during the preceding year, we recommend that all such letters are sent with recorded delivery (with copies kept on file along with confirmation of delivery), so as to establish clear service of the HVR terms. The Elves Claims Handling department have been known to take such technical points, including on claim notification requirements and time bars. We will explore the challenges in bringing such claims in next year's bulletin.

PERIOD OF CARRIAGE:

The phrase 'carriage of goods' pursuant to the HVR covers the period of time from when the goods are loaded onto the vessel to the time they are discharged from it (Article 1(e)). While this definition is ordinarily quite straightforward, an important consideration is the legal treatment of 'door to door' carriage contracts. Regarding the carriage of containers in its usual sense, it is common that the carrier obtains custody of the container prior to loading and delivery occurs after discharge from the ship. It is evident from case authority on this point that the contractual provisions used in a bill of lading can be used to expressly apply the HVR to all stages of the carrier's custody (Seafood Imports Pty. Ltd v. ANL Singapore Ltd (2010) 272 A.L.R. 149).

It is therefore prudent, in addition to the recommended wording, for letters to contain an express provision relating to the 'door to door' or clearer still, 'pole to tree', nature of the carriage obligations as is the industry standard. Failure to include such wording may raise questions about whether delivery actually occurs 'over the sleigh's rail', rather than under the tree, thereby reducing Santa's potential liability for arguably the most precarious aspect of the carriage, ie. the delicate manoeuvring required to avoid a "vertical grounding" (For more information on this particular phenomenon, we encourage our readers to review the very informative video at this link) during the chimney leg. In our experience, many a cargo damage survey report has attributed this leg as being the root cause of squashing damage.

CONCLUSION

The festive period is a time for goodwill and spending time in a cheerful disposition. But there is no greater sense of goodwill than that of a transparent, clearly drafted set of mutual rights and obligations between counterparties. We suggest that all letters to Santa are drafted clearly to incorporate the terms of the HVR, such that the parties can benefit from the legal certainty provided.

We wish you all happy holidays, and a merry Christmas to those celebrating.

For additional information and queries, please contact lucy.noble@zeilerfloydzad.com or calum.cheyne@zeilerfloydzad.com

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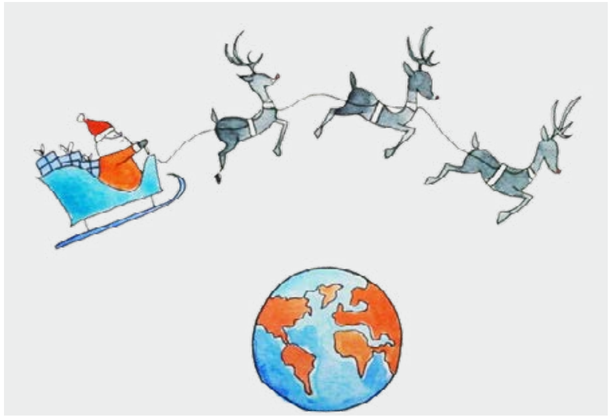

SANTA'S INTER-STATE COMMERCE

Written by Thomas Herbst

This year has offered plenty of challenges which have not spared Santa. Due to the economic pressure, he was even forced to lay off some of his elves and reindeer. With no immediate improvements in sight, tensions between Santa and his helpers is building up. Recently, he even overheard a conversation in the workshop and, apparently, some of his elves and reindeers are considering taking him to court. Worried how a jury of elves and reindeer might view any dispute against him, Santa is reminded that the contracts with his helpers contain arbitration agreements referring all disputes to mandatory arbitration. Santa asks himself whether the arbitration agreements will be enforceable if elves and reindeers decide to file a civil complaint in court.

1. THE SCOPE AND PURPOSE OF THE FEDERAL ARBITRATION ACT

Arbitration in the U.S. is generally governed by the Federal Arbitration Act, short the FAA (9 U.S.C.). With the ruling in *Southland*, the Supreme Court clarified that the FAA applies both before state and federal courts (*Southland Corp. v. Keating*, 465 U.S. 1 (1984)). This relatively short statute was passed in 1925 in response to a variety of court decisions that held arbitration agreements unenforceable. In the words of the Supreme Court, the FAA espouses a liberal federal policy favoring arbitration (*AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)) and, in pursuit of that goal, sweeps broadly, "*requir[ing] courts rigorously to enforce arbitration agreements according to their terms*." (*Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018)). Indeed, the FAA requires judicial enforcement of written arbitration agreements "*in any maritime transaction or a contract evidencing a transaction involving commerce*" (§ 2) and further grants the courts power to stay proceedings where the issue is referable to arbitration (§ 3) as well as to compel arbitration if a party fails to arbitrate (§ 4).

2. EXCEPTION OF EMPLOYMENT CONTRACTS?

The statute, however, expressly exempts certain contracts from its wide scope. In § 1, the FAA excludes employment contracts with two enumerated categories of workers, namely, "*seamen*" and "*railroad employees*", and contracts with a residual category of workers, *i.e. "any other class of workers engaged in foreign or interstate commerce*". In its *Circuit City* (*Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001)) decision, the Supreme Court put it beyond doubt that – in principle – employment contracts are contracts "involving commerce" and that arbitration agreements contained therein are enforceable under the FAA. By applying the interpretation maxim of *ejusdem generis* to the clause, the Court made it plain that the § 1 exception must be read narrowly, (*Id*. at 118) and in any case narrower than § 2, which extends the FAA's reach to the full extent of Congress's commerce power (*Id*. at 115). The Court further held it only exempts contracts of employment of transportation workers (*Id*. at 119) and hence is commonly referred to as the "transportation worker exception".

Therefore, while it appears sufficiently clear that little elves and reindeer are neither seamen nor railroad employees, Santa asks himself whether his helpers could argue that they qualify as members of the residual category of workers engaged in foreign or interstate commerce and thus are excluded from the scope of the FAA. Notably, he recalls that some of his reindeers work as independent contractors.

3. RELEVANCE OF THE TYPE OF CONTRACT

As a matter of fact, the exact test of how courts should determine if a worker belongs to a class of workers engaged in foreign or interstate commerce remains unclear. In New Prime (*New Prime Inc. v. Oliveira,* 139 S. Ct. 532 (2019)), the Supreme Court's latest decision on the scope of § 1, the parties admitted that the employee worked in interstate commerce. The Supreme Court hence did not consider applicable tests for coverage under the residual clause (*Id*. at 539). In that case, however, the Court clarified that all agreements to perform work are "contracts of employment" (*Id*. at 544). Hence, for the transportation worker exception it is irrelevant whether the little elves and reindeers work as Santa's employees or as independent contractors.

4. RELEVANCE OF THE INDIVIDUAL'S ENGAGEMENT IN MOVEMENT OF GOODS IN INTERSTATE COMMERCE

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As the case law of the U.S. Supreme Court provides little concrete guidance to determine the scope of the transportation worker exception, applied various and different approaches to interpret § 1. Mostly, courts have applied multi-factored or other vague tests, that do not lend themselves to easily predictable results (*E.g. Lenz v. Yellow Transp.*, 431 F. 3d 348, 352 (8th Cir. 2005); multi factored test rejected by *Eastus v. ISS Facility Services, Inc.*, Case No. 19-20258 (5th Cir. May 27, 2020)).

Not only does the reference to a "class of workers" rather than the individual's occupation in s 1 provide plenty of room for argument, but also the usage of the term "engaged in foreign ot interstate commerce. Indeed, while courts agree that the workers engagement must be very closely related to interstate and foreign commerce (*Cf. Rittmann v. Amazon.com, Inc.*, No. 19-35381 (9th Cir. August 19, 2020); *Singh v. Uber Techs., Inc.*, 939 F.3d 210, 219 (3d Cir. 2019); *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 593 (3d Cir. 2004) (*"So closely related thereto as to be in practical effect part of it"*); *Wallace v. Grubhub Holdings, Inc.,* No. 19-1564 (7th Cir. Aug. 4, 2020) (*"we consider whether the interstate movement of goods is a central part of the class members' job description"*)), often it is disputed to which extent an individual worker's actual involvement in the physical transportation of goods across state lines should be decisive. This question remains unresolved.

Another unresolved question is whether the exclusion only covers the transportation of goods or may also extend to workers engaged in the interstate transportation of passengers. Recently courts have stated that the exclusion could extend to a class of workers who transport passengers, so long as they are engaged in interstate commerce or in work so closely related thereto as to be in practical effect part of it (Singh v. Uber Techs. Inc., 939 F. 3d 210 (3d Cir. 2019); Cunningham v. Lyft, Inc., Case No 1:19-cv-11974, Order of Mar. 27, 2020). However, this question is of limited relevance for reindeers and elves since Santa arguably is not a passenger.

When interpreting § 1, in recent decisions courts have held that the application of the transport worker exclusion does not turn on the activities the individual worker was hired to perform, but whether the class of workers to which the complaining worker belongs engages in interstate commerce (*Waithaka v. Amazon.com, Inc.*, No. 19-1848 (1st Cir. July 17, 2020); *Wallace v. Grubhub Holdings, Inc.*, No. 19-1564 (7th Cir. Aug. 4, 2020); *Singh v. Uber Techs. Inc.*, 939 F. 3d 228 (3d Cir. Sept. 19, 2019))). Hence the exemption could apply even where a member of the class of workers does not personally engage in interstate transport of goods and, conversely, the exemption would not apply if someone occasionally performs this kind of work but whose occupation is not defined by its engagement in interstate commerce (*E.g. Hill v. Rent-A-Center, Inc.*, 398 F.3d 1286, 1289 (11th Cir. 2005)). In recent decisions, the 1st and the 9th circuit even held that the actual crossing of state lines is not necessary for a class of workers to be "engaged in commerce" for the purposes of the transportation workers exception and put the focus on the nature of the business for which the workers perform their activities (*Rittmann v. Amazon.com, Inc.*, No. 19-35381 (9th Cir. August 19, 2020); *Waithaka v. Amazon.com, Inc.*, No. 19-1848 (1st Cir. July 17, 2020)).

As unclear as the state of the law might be, for Santa's reindeers the case appears relatively straightforward. Santa's reindeers take part in his endeavors to transport presents all over the world. Reindeers thus employed are clearly "*engaged in the channels of foreign or interstate commerce*" (*Rittmann v. Amazon.com, Inc.*, No. 19-35381 (9th Cir. August 19, 2020); *Wallace v. Grubhub Holdings, Inc.*, No. 19-1564 (7th Cir. Aug. 4, 2020); *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 576 (10th Cir. 1998)). Unless certain reindeers are exclusively charged with intrastate deliveries, there is little room to argue that they are not members of a class of workers engaged in foreign or interstate commerce (*Cf. New Prime Inc. v. Oliveira*, 139 S.Ct. 532, 539 (2019) (observing that interstate truckers are plainly transportation workers)).

However, the case regarding the little elves is more difficult. The elves are predominantly employed in a workshop manufacturing and wrapping presents. On the one hand, both by relying on the global nature of the business for which the elves perform their activities (international supply of presents) (*Waithaka v. Amazon.com, Inc.*, No. 19-1848 (1st Cir. July 17, 2020)) and because they supervise and tend to the reindeers (*Cf. Palcko v. Airborne Express, Inc.*, 372 F.3d 588 (3d Cir. 2004) (holding that the direct supervisor of drivers that transported packages for a company engaged in intrastate, interstate, and international shipping was covered by the § 1 exemption)), one could argue that they are engaged in the business of interstate commerce. On the other hand, particularly due to their lack of actual involvement in the movement of goods across state lines, one could equally argue that they are not covered by the transportation workers exclusion. Indeed, courts have held that to fall within the exemption, the workers must be connected not simply to the goods, but to the act of moving those goods across the state borders (*Wallace v. Grubhub Holdings, Inc.*, No. 19-1564 (7th Cir. Aug. 4, 2020)).

In summary, hence, reindeers likely fall under the transportation workers exception, meaning that their contracts are not governed by the FAA's provisions. Regarding the little elves, depending on jurisdiction, Santa might have a stronger case to argue that their contracts are not covered by the transportation workers exception and hence that the FAA applies. Therefore, again, depending on jurisdiction, it is

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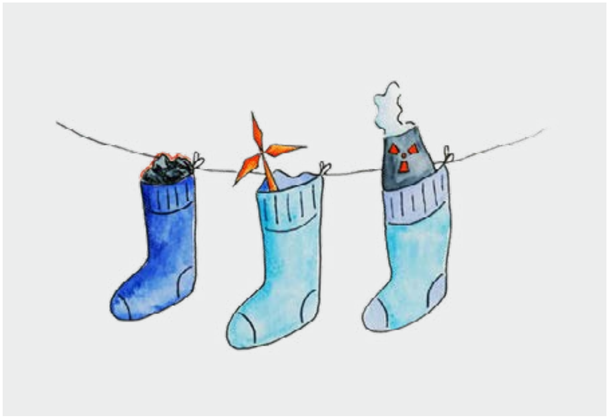
unlikely that Santa will be successful in relying on the FAA to enforce the arbitration agreements with all his helpers.

5. ENFORCEMENT UNDER STATE ARBITRATION LAW

Finally, even where the FAA is found not to apply to the contracts with his helpers, Santa might still be able to enforce the arbitration agreements contained therein. In *New Prime*, the Court left open the possibility that courts could compel arbitration pursuant to a its inherent authority or based on state arbitration statutes (*New Prime Inc. v. Oliveira*, 139 S. Ct. at 543 (2019)). In fact, courts have applied state arbitration laws to compel arbitration in cases where the FAA was held to be inapplicable (*Gloria Colon v. Strategic Delivery Solutions, LLC* (083154) (Union County & Statewide), A-7-19 (N.J. 2020); *cf. Palcko v. Airborne Exp., Inc.*, 372 F.3d 588, 596 (3d Cir. 2004); *Byars v. Dart Transit Co.,* No. 3:19-cv-541, 2019 U.S. Dist. LEXIS 181698, at *6 (M.D. Tenn. Oct. 21, 2019); *Merrill v. Pathway Leasing LLC*, No. 16-cv-2242, 2019 U.S. Dist. LEXIS 72922 (D. Colo. Apr. 29, 2019)). Hence, the relevant state law may provide an adequate legal basis to enforce the arbitration agreements between Santa and his helpers even where the FAA does not apply.

Finally, Santa should be aware that under the FAA's "savings clause" in § 2, the FAA expressly allows arbitration agreements to be avoided on any grounds that exist under state law for the revocation of a contract. Such grounds include; unconscionability, fraud, and duress. Importantly, the savings clause only allows invalidation of arbitration agreements on grounds that exist for the revocation of "any" contract but does not invalidate arbitration agreements on grounds which seek to alter one of arbitration's fundamental attributes such as its individualized nature (Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1622-3 (2018)). This in mind, Santa should be careful to assess if, besides being generally enforceable under the FAA or state arbitration statutes, the relevant arbitration agreements comply with the relevant states' unconscionability rules.

For additional information and queries, please contact thomas.herbst@zeilerfloydzad.com



SANTA CLAUS V XMASCOAL – FORCE MAJEURE IN COMMODITY SALES

Written by Luke Zadkovich

We report on a recent English Commercial Court decision in the long-standing commodities dispute between Santa Claus and his coal supplier, XmasCoal.

As you will be aware, tradition has it (for some) that when children are nice during the preceding year, they are rewarded with a present, candy, or some other item that brings an instant smile under the tree for Christmas. However, should said children be naughty during that year, their stocking will be filled with lumps of coal.

Parents the world over have become accustomed to using the threat of a coal-filled stocking to coax their children into doing all sorts of unwanted tasks. Those include, but are

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not limited to: getting kids dressed in the morning, eating breakfast, brushing teeth, combing hair and so many other steps involved in getting out of the house and into the day, *inter alia.* We are aware that negative school reports have been met with coal warnings. 2020 has seen the prevalence of such threats skyrocket, due to school closures and public lockdowns. Unfortunately this specific coal-based threat starts to wane as the child reaches secondary school, when parents are left with other threats such as: mobile phone confiscation, disablement of social media accounts and being forced to stay at home with the family during the whole Christmas period – the worst for a teenager.

Until recently, little has been known about how Santa sources the coal for this important aspect of the Christmas tradition. That all changed recently.

It has come to light that Santa initiated arbitration proceedings back in 2018, purportedly invoking a force majeure clause in his supply contract with XmasCoal. Under the supply contract, Santa had agreed to purchase and XmasCoal had agreed to sell the quantity of 10 million lumps of coal per year (that figure roughly equates to about 4 lumps of coal for 1 in 1000 children – with the global child population at 2.2 billion, taking into account the many children who do not follow the Christmas tradition and/or who are sufficiently nice). The purchase price is pegged to Argus fob Baltic, with delivery taking place by flying sleigh in a Russian port on the 24th of December each year. The contract ran indefinitely with no end-date.

Santa prevailed in his claim before the arbitral tribunal of the Three Wise Women, seated in London. However, XmasCoal appealed to the English Commercial Court on two grounds: (i) a point of law under s 69 of the English Arbitration Act and (ii) for serious procedural irregularity under section 68 of that Act.

We do not go into detail on this second point here, which was dismissed and given short shrift by the court. The alleged irregularity related to the panel's gifting of small gold-covered chocolate coins to participants at the hearing, with allegations of myrrh apparently sprinkled over lunchtime sandwiches at the IDRC, and a soft hint of frankincense allegedly infused into the main hearing room. None of those were deemed material, properly evidenced or unwelcome.

The substantive legal point taken up by the Commercial Court related to the operation of a force majeure clause in the supply agreement. Santa had argued successfully before the arbitral tribunal that he could rely on an express force majeure clause that allowed either party to suspend or terminate the contract in the event of certain events occurring. The specific named FM event Santa relied on was: "*fundamental changes in stocking use*".

Santa Claus has seen a steady increase in parents demanding an alternative energy source to be used instead of coal. Traditionally, once the child had accepted the disappointment of their black lumps, the coal would be used on the fire and put to good use as an energy source. However, times are changing and open fires are not being used as much anymore. We saw only recently that *The Economist* led with this front page title on its 5 December 2020 publication, "Making coal history" – addressing this topic, albeit in a slightly different context. Various alternative energy sources are being trialled for stockings. Parents are getting into the habit of writing an additional letter to Santa, accompanying the child's present list explaining the family's preferred alternative energy source including liquefied natural gas (LNG), wind, hydro, solar and nuclear. This simply did not happen ten years ago.

One of our firm's LNG-experienced partners, Damon Thompson, has been informed that many parents are experimenting with compressed, chilled stockings that are capable of safely holding LNG at or below -162C. There are clear advantages to using LNG as a substitute to coal. Primarily, there is less risk of the child picking up the coal and throwing it at the parent, angry at the outcome, which is a common reaction in children who were so naughty as to justify receiving coal. A coal toss across the room is almost to be expected – it is the scrawling of rude words in black coal on the walls that proves a bigger headache. Also, a child can pour the LNG out into room temperature and it simply *disappears* into a non-toxic gas. The downsides are these naughty kids may try to put other items in the freezer stocking, such as siblings' candy, new toys, or even the family cat. Parents are also cautioned against late-night new year's eve attempts to use these freezer stockings as champagne coolers.

As for other alternatives, children receiving miniature windmills in their stockings, as a coal substitute, are having too much fun with them. Entirely counterproductive and sends a mixed message. The hydro stockings sound great in theory with the abundance of water from the household tap, but as all parents know water balloons and water guns just are not good indoor toys. Solar stockings are also increasing in prevalence, particularly in the Southern Hemisphere, but not finding traction in the colder climates (where lumps of coal have always made more sense anyway). We have heard reports of eye injuries caused by the solar panels reflecting rays directly into infants' eyes. Nuclear is just not catching on, despite its obvious power and deterrence effects: telling a problem child that if they do not behave then the whole street will blow up has been known to work, when other threats have not. It still suffers from perception issues amongst parents, perhaps unsurprisingly.

The key issue before the English Commercial Court was whether these changes are sufficient to fall within the FM event of 'fundamental changes to stocking use'. The Court,

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having sat in a special holiday three judge sitting gave a split decision, ultimately dismissed the appeal. It found that the question of whether the changes were fundamental was largely a question of fact, with only tinges of a question of law. The court stated that it was reluctant to disturb the Three Wise Women's award in this case, which was well-reasoned, considered all of the evidence available and was a sound decision. The Court noted that it was open to the Three Wise Women to decide differently, but given they had the benefit of oral evidence from Santa, various letter submissions from parents and competing experts providing evidence on child psychology as to whether any of these alternative fuels are likely to catch on long-term when compared to the dreaded lumps of coal – the arbitrators were best placed to make this decision (unless they obviously erred, which the court found they did not).

The dissenting judgment given by Mr Justice Grinch held that "fundamental" was a legal construct, not a factual one, and found that these changes in stocking use have not been sufficient thus far to justify reliance on the FM clause. We note for the sake of completeness, and without any suggestion of judicial bias, that Grinch J (appearing as Queens Counsel, as he then was) argued for the nation states against Santa's claims in the famous land title English Supreme Court decision of *Santa Claus v Greenland, Finland et al.* Santa prevailed in that case too, which along with this decision, extends his enviable streak of never having lost a case.

CONCLUSION

This decision reaffirms that under English law, the parties can draft clear force majeure clauses and expect the English courts to uphold arbitrators' decisions when the facts support their decision. In this case, Santa Claus benefitted from a well drafted, specific FM clause, which we expect his legal advisors insisted upon at the time of drafting, given the unlimited nature of the supply contract period.

We understand from press reports that following this decision, Santa and XmasCoal are already in renegotiations to find a new flexible pricing formula that allows for the diminishing coal demand in the market, and allows XmasCoal to diversify into other energy sources.

Finally, we have also heard of Santa opening negotiations with leaders of the Global Parents Following Christmas Association as to whether the threat of a lump of coal is an appropriate disciplinary tactic in these modern times. The cynic amongst us may suggest that Santa is trying to lower his costs base in these discussions, however he may well have a point.

It will be interesting to see how these developments play out over the next year.

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NEW YEAR'S FIREWORKS IN AUSTRIAN FOREST CITIES

Written by Alexander Zojer & Gaudenz Küenburg

§ 38(1) of the Austrian Pyrotechnics Act ("PyroTG 2010") forbids the firing of Fireworks in urban areas to prevent fires. Notwithstanding this provision, New Year's celebrations without fireworks are unimaginable for the vast majority of the Austrian population. In a groundbreaking decision (1 Ob 178/18k) the Austrian Supreme Court finally clarified crucial questions concerning joint liability for the compensation of damages incurred by the unlawful use of fireworks in this festive season. The wide range of effects of the underlying decision are undeniable which renders a thorough analysis of the potential impacts of an exuberant New Year's celebration indispensable.

The facts of the underlying case concern the destruction of a thuja hedge on New Year's eve back in 2013, in the urban area of a lower Austrian village in the outskirts of Vienna.

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A group of three individuals set out to celebrate the end of the year by unlawfully firing New Year's fireworks from their backyard. During this celebratory act, one of the beer bottles emptied for the cause of serving as launch pad for the fireworks tipped over, thereby altering the anticipated trajectory of the explosive projectile from vertical (into night sky) to horizontal (into the neighbors thuja hedge). The thuja hedge, quite unfortunately, displayed the typical reaction of a plant set on fire by burning down completely. This inconvenient course of events led to a dispute over the monetary damage in the amount of EUR 9,089.30 (restoration of the hedge including disposal of its burned down remnants, plant costs and growth care) against the three fiery celebratees. Notably, the underlying dispute did not involve a potential affective value of the thuja hedges, which is to be reimbursed only in the event of particularly qualified misconduct (Reischauer in Rummel, ABGB3 § 1331 ABGB). The case culminated in the underlying decision of the Austrian Supreme Court only five years after the crackling incident.

The Supreme Court sets out by summarizing the legal framework for the liability of multiple damaging parties, namely §§ 1301 and 1302 of the Austrian Civil Code ("ABGB"). According to § 1301 ABGB, several persons can be held responsible for unlawfully inflicted damage "by contributing to it collectively, directly or indirectly, by seducing, threatening, ordering, helping, concealing, etc., or even by failing to comply with a special obligation to prevent the evil from happening". According to § 1302 ABGB, in such a case, if the damage was caused intentionally - or the shares in the damage cannot be determined - all involved persons are liable jointly and severally.

Ultimately, the Supreme Court held that the third defendant – even though he did not fire the firework which led to the ultimate destruction of the thuja hedge – is equally liable for the incurred damage. The third defendant was held to have made a psychological contribution to the incident by acting in a consensual manner, which is sufficient to establish joint liability. Notably, the court further held that even presumed psychological causality is found to be sufficient to establish the necessary condition of causality.

Especially with regard to upcoming New Year's festivities, it is indispensable to point out the potential effects of the underlying decision concerning the increased risk of damages caused through unprofessional handling of pyrotechnics.

In this context, a quite peculiar provision of the Austrian Civil code might be worth a closer look: According to § 1326 ABGB "if the injured person has been disfigured by the maltreatment, this fact must be taken into account, especially if the person is female, as it may prevent her from advancing". The term "advancing", in this context, is to be understood as advancing professionally as well as in prospects of marriage (Reischauer in Rummel, ABGB3 § 1326 ABGB). Yes, you read the last sentence correctly.

According to a literal interpretation of the text, the aforementioned provision seems to discriminate against men and elderly married women by favoring their defacement in contrast to the defacement of younger and unmarried women. The evident question to be considered in this context is whether the legislator implicitly seeks to prevent younger unmarried woman from partaking in New Year's festivities. Arguably, the exact opposite is the case. Regarding potential economic consequences of damages claims, it is in fact recommendable that younger unmarried women are assigned the responsibility of firing the fireworks on New Year's Eve. Following an economical approach to Austrian damages law, they are better suited for being the damaging party than the injured party. On the other hand, while women who have already achieved the supposed ultimate goal of spending their lives in matrimony may be just as capable of firing explosives as unmarried women, they are legally disadvantaged by not being entitled to compensation under § 1326 ABGB according to Austrian Case law (see Hinteregger in Kletečka/Schauer, ABGB-ON1.05 § 1326 para 11; 2 Ob 22/84; 8 Ob 44/87) and consequently – following the telos of § 1326 ABGB – constitute a less costly (unintended) target/injured party.

All in all, the Supreme Court's decision is to be welcomed as it brings clarity to the question of joint liability for the surprisingly common problem of fire clearance of thuja hedges in the course of New Year's festivities. Simultaneously, the decision emphasizes the importance of mutual responsibility within one of the most primeval structures of Austrian society, namely boozing companions. In light of the above, a moderate approach in the implementation of New Year's festivities is highly recommendable, as well as keeping an eye on beloved ones, not only in a purely altruistic manner but also keeping in mind one's own psychological contribution in potential damages cases. Also, even though for incomprehensible reasons the handling of fireworks is sometimes still regarded as a sign of masculinity, the application of an economic approach to damage limitation suggests that arguably younger – especially unmarried – women should be responsible for handling pyrotechnics at New Year's festivities.

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HERE'S TO 2021!

OUR EVENT SCHEDULE:

| JANUARY
Disputes for Breakfast | Employment
Update Arbeitsrecht – Spezial: "Restrukturierung"
With Hans Georg Laimer, Andreas Tinhofer and Lukas Wieser.
Thursday, 21 January 2021, 09:00 CET

| FEBRUARY
Disputes for Tea | Logistics & Transport
A discussion with Justin Reynolds, hosted by Damon Thompson and Lukas Wieser.
February 2021

| MARCH
Disputes for Breakfast | Employment
Update Arbeitsrecht – Spezial: "Work 4.0"
With Hans Georg Laimer, Andreas Tinhofer and Lukas Wieser.
Thursday, 4 March 2021, 09:00 CET

Disputes for Tea | Insurance
"Captive Insurers: The Commercial Role and Risk Management Benefits"
A discussion with Ali Hauser, hosted by Edward Floyd and Andrea de la Brena.
Wednesday, 24 March 2021
11:00 EST / 10:00 CST / 17:00 CET

| APRIL
Disputes for Breakfast | Employment
Update Arbeitsrecht – Spezial: "Aktuelle Rechtsprechung und gesetzliche Neuerungen"
With Hans Georg Laimer, Andreas Tinhofer and Lukas Wieser.
Thursday, 15 April 2021
09:00 CET

| MAY
Disputes for Breakfast | Arbitration
"False Friends in Arbitration: A (surprising) Comparative View of US and Austrian Law"
A discussion with Univ.-Prof. Hubertus Schumacher and Edward Floyd, moderated by Gerold Zeiler.
Thursday, 20 May 2021
15:00 CET / 09:00 EST

| JUNE
Disputes for Tea | Shipping
With Timothy S. McGovern and Luke Zadkovich.
June 2021

Disputes for Breakfast | Employment
Update Arbeitsrecht – Spezial
Thursday, 17 June 2021
09:00 CET

| SEPTEMBER
Disputes for Tea | Energy
"Energy Disputes: Spotlight on LNG"
Hosted by Damon Thompson and Lisa Beisteiner.
Thursday, 23 September 2021

| OCTOBER
Disputes for Breakfast | Employment
Update Arbeitsrecht | Aktuelle Rechtsprechung und gesetzliche Neuerungen
With Hans Georg Laimer and Lukas Wieser.
Thursday, 14 October 2021
09:00 CET

| NOVEMBER
Disputes for Breakfast | Intellectual Property
"The Human Factor – Creation, Ownership and Infringement of IP Rights in the Age of AI"
With Alexander Zojer and Lukas Hutter.
Thursday, 18 November 2021

| DECEMBER
Disputes for Tea | Litigation
"US Class Action and European Representative Action compared"
With Edward Floyd and Alfred Siwy.
Thursday, 9 December 2021

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CHRISTMAS WORD SEARCH

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S	G	T	M	G	A	S	E	I	H	H	D	R	P
T	G	O	L	I	E	N	E	S	G	G	I	P	L
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A	N	K	I	E	M	T	B	O	A	E	T	E	D
S	O	I	P	L	E	O	L	R	N	L	O	S	U
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V	L	G	N	E	R	R	O	P	T	A	O	N	R
E	E	E	Y	N	Y	L	A	N	O	O	D	T	O
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PRESENTS
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HOT CIDER
ELVES
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CAROLING
NAUGHTY
NICE
SLEIGH
XMAS
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NORTH POLE
PINECONE
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