The seller's right of stoppage when bills of lading are issued

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1 Introduction

In February 2019, the Norwegian Supreme Court (HR-2019-231-A)[1] issued a decision on important aspects of the seller's right to direct the carrier to retain goods carried under bills of lading, when the purchase price is not been paid in accordance with the contract for sale. The majority in the 4-1 decision[2] held that the right of stoppage existed, and that the carrier who had delivered the cargo to the buyer who had presented a bill of lading, was liable for any loss suffered by the seller arising from the subsequent bankruptcy of the buyer.

The facts are outlined below in section 2, to the extent necessary for discussion of the questions – with an indication of how the central legal issues were dealt with by both the court of first instance and the court of appeal. Section 3 provides a summary of the arguments brought before the Supreme Court, with the reasoning of the Supreme Court majority then discussed in Section 4, and the dissenting opinion in Section 5. Finally, Section 6 offers some conclusions and reflections by the author.

2 The background

From 2011 onwards, the Norwegian company Portland had a distribution agreement in place with the Canadian company Genfoot regarding shoes, which made reference to "the laws of Quebec". At first, the shoes were bought by Portland on a cash basis, but gradually credit terms were agreed.

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1 There is no authorized translation of the judgment. The translations below are by the present author.

2 The opinion of the first voting judge was adhered to by the following three.

Our case concerns a sale of shoes in 2014 on fob China-terms. The transportation was undertaken by Schenkerocean,[3] Hong Kong, which has a number of agencies in other countries, i.a. in China, Canada and Norway.

Prior to this particular shipment, a framework agreement existed covering transportation between Portland and Schenker Norway on the basis of NSAB 2000 (General Conditions of the Nordic Association of Freight Forwarders of 2000).

For the shoes, loaded in two containers, Schenker China, acting on behalf of Schenkerocean, issued three original bills of lading, with the Chinese producer as shipper and Genfoot as receiver, and with Portland as a party to whom notification of arrival in Oslo should be given. Once paid by Genfoot, the shipper then sent the three original bills of lading to Genfoot, who sent one of them on to Schenker Canada, endorsed in blank.

On 20th August, Genfoot asked Schenker Canada to forward the bill of lading to Portland, and Portland delivered the bill to Schenker Norway.

When the cargo arrived in Oslo, not later than 22nd September, Genfoot had two bills of lading and Schenker Norway had the third.

On 22nd September, Portland's financing bank (DNB), which had a claim against Portland totalling around NOK 50 million, terminated the relationship due to breach of contract; Genfoot was informed of this the same day. The following day Genfoot instructed Schenker Canada that the containers should not be delivered to Portland. This instruction was sent on to Schenker Norway, which replied, however, on 24th September, that this could not be done, as the containers now belonged to Portland. The reply led to some discussion and resulted in an understanding that release to Portland should be delayed, giving Genfoot the opportunity to make further inquiries and substantiate its right to give such directions.

On 25th September, Schenker Norway informed Genfoot and Schenker Canada that the cargo had been released to Portland.

However, Schenker Norway had not received full compensation for services rendered to Portland, and Schenker Norway retained the cargo

[3] The correct name is SCHENKERocean, but for practical purposes I use – as the Supreme Court does – Schenkerocean, and the Norwegian subsidiary – Schenker AS – I call Schenker Norway.

in accordance with NSAB § 14. Finally, on 27th September the cargo was released to Portland against payment of NOK 2 million.

Portland was declared bankrupt on 6th October, and Genfoot has argued that a substantial loss would have been avoided if Schenker Norway had followed the instructions on stoppage. Appearing before the Supreme Court, the parties agreed that if the claim is sound the loss amounts to USD 350,048.

The court of first instance found that Schenker Norway had not followed the instructions given by Genfoot, and that Schenkerocean was therefore liable for the resultant loss. The damages were fixed at USD 400 000. At this stage the litigation also concerned a third container, which was delivered to Portland without presentation of a bill of lading.

For the court of appeal, the central issue was whether the delivery of the bill of lading to Schenker Norway implied that Schenker Norway now held the cargo on behalf of Portland. This was found not to be the case, but Genfoot failed in its claim because Genfoot "had not tried to establish as against the carrier that the exercise of the right of stoppage was justified". Regarding the third container, there was agreement that it should not have been delivered to Portland, and Genfoot was awarded approximately USD 50,000.

3 The case presented to the Supreme Court

The case before the Supreme Court – on appeal by Genfoot – concerned only the two containers for which Portland had received the bill of lading.

Genfoot's main arguments were:

(i) that the right of stoppage followed from CISG (United Nations Convention on Contracts for International Sale of Goods) Art. 71, which is part of the law of Quebec. DNB's termination on 22nd September gave grounds for stoppage. Lack of preceding notice is immaterial;

(ii) Schenkerocean was under a duty to follow the stoppage instructions, even if Genfoot was not party to the contract of carriage; and

(iii) the liability of Schenkerocean was intact: a clause in the bill of lading on waiver of the right of stoppage was deemed immaterial, and so was the fact that the bill of lading had been given to Portland.

Schenkerocean's defence was:

(i) it contested for a number of reasons that CISG Art. 71 gave a right of stoppage in the present circumstances,

(ii) consequently, Schenker Norway was under no obligation to follow the stoppage directive,

(iii) in any case, that a waiver of the right of stoppage in the bill of lading was binding on Genfoot,

(iv) Genfoot had contributed to the delivery to Portland by giving the bill of lading to Portland and by not using the possibility inherent in Genfoot's possession of the two other bills of lading and, finally

(v) the claim was waived in a deal regarding a reconstruction plan – an issue which will not be discussed in detail here.

4 The view of the Supreme Court majority

4.1 Introduction

The Court discussed a number of issues before reaching the conclusion. We will pay special attention to questions of a legal nature, but some of them are closely connected to the concrete factual circumstances.

4.2 CISG Art. 71: Had payment taken place?

The first question dealt with by the majority was whether, according to CISG Art. 71, Genfoot had a right of stoppage that had to be respected by Schenkerocean.

The parties agreed that the sale agreement was governed by the law of Quebec, which made CISG Art. 71 applicable. The Court remarked that this was consistent with Sect. 3 of the Norwegian Act of 3rd April 1964 on choice of law when a sale of chattels has a connection with more than one country.

Art. 71 paragraph 1 and 2 reads:

> *(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform … as a result of … a serious deficiency … in his creditworthiness …*
>
> *(2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document, which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller."*

Schenkerocean contended that the purchase price had been paid, but the Court found that the payments referred to concerned previous obligations, not the present one.

4.3 Had there been a material change regarding creditworthiness?

In the alternative, Schenkerocean argued that the financial position of Portland was known before the shoes were shipped from China, and that consequently, Art. 71 was not applicable. To this argument, the Court said that Genfoot had knowledge of the financial difficulties prior to shipment, but that the situation was "substantially aggravated" when DNB terminated its engagement with Portland, and therefore, Schenkerocean's objection was not accepted.

4.4 Were the shoes delivered to Portland prior to the time the stoppage instructions were given?

The containers arrived in Oslo on 22nd September, and the following day the instructions were given regarding stoppage, but several days before Portland had delivered its bill of lading to Schenker Norway. In view of this, Schenkerocean claimed that the instructions came too late: Schenker Norway was by now the representative of Portland.

The Court did not accept this line of reasoning:

> *"In general, one cannot discount the possibility that an agent at a certain point of time becomes a representative of the buyer. But as this will have effect inter alia on the right of stoppage, concerns around notoriety*[4] *strongly indicate that such a transition must be clearly agreed, marked and documented. There is no documentation – or other circumstances – to imply that such representation has been agreed in this case. Thus, there is no basis for distinguishing between the sea carriage and the warehousing in Oslo harbour before delivery from [Schenker Norway] to Portland. I also note that Schenkerocean itself must have meant for Portland not to have received the cargo before Motorcompaniet AS – as the bank's agent – paid outstanding freight and compensation, and the cargo was delivered to Portland's warehouse on 27nd September 2014. Up to this time Schenkerocean exercised the right of stoppage according to NSAB 200 § 14 – which presupposes that Schenkerocean itself had legal possession of the cargo. Thus, it is in my view clear that Schenkerocean's discharge of the cargo in Oslo was not a transfer to Portland's representative, leading to the loss of the right of stoppage" (section 65).*

Thus, the Court accepted that the carrier might be considered as possessor of the goods on behalf of the buyer, but – which is in no way surprising – this is subject to strict conditions. Taken literally, a clear oral agreement is not sufficient, nor is a written agreement: in addition it has

[4] From the Norwegian legal term "notoritet", meaning the fact of being ascertainable.

to be "marked",[5] which, it must be surmised, is required for verification purposes: one needs to be reasonably certain that the agreement is not a post fact invention.

Two things are surprising: the first is that the delivery of the bill of lading by Portland to Schenker Norway is not mentioned: The fact that it was delivered several days before the issue of the stoppage directive is uncontested, and this delivery appears to fulfil at least the requirements regarding "marked and documented". But there is no word or reflection in the judgment on why the bill of lading was given to the carrier – nor, in this context, on the rules in the Maritime Code Section 307.

The second surprising circumstance is the implications which the Court derives from Schenker's use of NSAB § 14. The right of stoppage in order to secure the carrier's claims (or the freight forwarder's claims when he is not a carrier) presupposes, of course, that he has possession of the goods.

We have here two different types of stoppage rights – with different parties (seller-buyer, carrier-buyer) and different claims (purchase price, transportation costs). In both instances it is a prerequisite is that the carrier must have at least physical possession of the goods. For the seller to have a right of stoppage, the crucial issue is whether, in this case, a third party – the carrier – is obliged to follow the seller's directive (see further below). For the carrier, the question may be whether his right can be exercised against someone who has succeeded the original counterparty – typically: does he have the relevant right against the CIF-buyer, who has received the bill of lading on paying the purchase price to the seller? The answer is clearly yes. In other words: The carrier's right of stoppage may be exercised as against the owner of the goods, and it is difficult to see that this possibility has any bearing on the question of whether the carrier is "the representative" of Portland.

[5] The Norwegian word is «markert», and the verb «markere» is defined as "clearly state (with sign, trace or mark") (Det Norske Akademis ordbok: "tydelig angi, vise (med tegn, spor eller merke)").

4.5 The importance of CISG Art. 71 paragraph three

CISG Art. 71 paragraph three reads:

> *"A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance."*

No written notice was given, and Schenkerocean claimed that the effect was that the right of stoppage was lost.

The Supreme Court did not agree:

> *"The purpose of the notice requirement is that the buyer is given the opportunity to adjust his position in relation to the stoppage, for instance by posting security in order to obtain delivery, alternatively cancelling further transport and inform the next link in the sales chain of the delay. If notice is not given, possible damage may be remedied by holding the seller liable for the consequent loss suffered by the buyer, see e.g. the Norwegian Sales Act Section 61 paragraph three. According to Norwegian law it is clear that lack of notice is not a prerequisite for the exercise of the right of stoppage,*[6] *cf. Ot.prp. nr. 80 (1986–1987) page 112" (section 69).*

In addition to this general statement the Court mentioned that

> *"the situation here is that a possible liability for the carrier Schenkerocean arose because the company delivered the goods, despite the instructions given by Genfoot. Schenkerocean's view was that stoppage was not possible as Portland had already delivered the bill of lading. When the cargo was nevertheless retained some days later, this was due to Schenkerocean's own claim. Once Schenkerocean had received payment, the cargo was delivered to Portland. In these circumstances, the lack of any notice of stoppage from the seller Genfoot is irrelevant to the issue of the carrier's liability" (section 72).*

[6] Here there appears to be a printing error by the Supreme Court. The intention is obviously to state that lack of notice does not preclude the right of stoppage.

4.6 Was Schenkerocean obliged to follow directions given by Genfoot?

The most important part of the decision concerns the clarification of Schenkerocean's obligation to follow stoppage orders given by Genfoot.

It was agreed, and the Court approved, that neither CISG Art. 71, nor the Norwegian Sales Act Section 61, were applicable. There was no contract of a traditional character between Genfoot and Schenkerocean. Whether Schenkerocean was liable for not having followed such directives was therefore "a question of duties and liability outside contract", and "since the damage occurred in Norway", this was a question of Norwegian law (section 74).

The Court started with some remarks of a general nature:

> *"The parties have … agreed that an independent carrier, depending on the circumstances, may have a duty to comply with stoppage instructions from a seller who is not a party to the transportation agreement. This is a contractual-like duty; the carrier has a duty of loyalty as against both parties in the underlying sales contract. The transport spans a period of time and unforeseen situations may occur during this period. This may be of relevance for the relationship between seller and buyer. In turn, this may imply that an independent carrier, on request, has to respect the underlying legal relationship, without regard to which of the parties is party to the transport contract. The right of stoppage in a sale on credit terms is a typical example of this. However, the parties in the present case are not in agreement on the further requirements for deciding whether the carrier has a duty to follow such an instruction of stoppage" (section 75).*

To what extent do the rules on bills of lading interfere with this duty?

The Maritime Code Section 302 says that presenting a bill of lading gives a prima facie right, as against the carrier, to obtain possession of the goods.[7] There is, however, an exception in Section 307 paragraph one in favour of a seller who has a right of stoppage:

[7] The full text is: «The person who presents a bill of lading and, through its wording or, in the case of an order bill, through a continuous chain of endorsements or through

> *"The right of a seller in the event of breach of contract to prevent delivery of the goods to the buyer or the estate of the buyer or to demand their return, applies even if the bill of lading has been passed on to the buyer."*

These rules may present difficulties for the carrier. In the words of the Court:

> *"When a carrier receives instruction on stoppage from the seller, a duty to act arises: The carrier has to decide whether or not there are grounds for following the instruction. It is not sufficient to refer to the fact that the buyer has presented a bill of lading, cf. the Maritime Code Section 307 paragraph one" (section 80).*

The knowledge available to the carrier is relevant, says the Court, regardless of whether it comes from the seller or from other sources (section 82). If the carrier does not have sufficient knowledge to decide whether the instruction is justified, he should notify the seller, allowing him the possibility of documenting his right (section 81).

The starting point is this: was it justifiable – based upon the available information – to retain or deliver the cargo? Relevant factors here are: the time element and, in particular, the carrier's need to get rid of the cargo, and, further: the potential damage arising from either stoppage or delivery. The Court also notes that the existence of a bill of lading has the effect that the carrier must have more definite knowledge than in other instances, to be obliged to comply with the stoppage instruction (sections 83–85).

After these more general remarks, the Court discusses the specific issues in the case.

First, Schenkerocean asserted that the right of stoppage was waived: the bill of lading had a clause to that effect, and by receiving and later on transferring the bill of lading this restriction should be considered as accepted by Genfoot.

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an endorsement in blank, appears as rightful holder, is prima facie regarded as entitled to take delivery of the goods."

The Court disagreed: Genfoot had not demanded stoppage of the cargo based on a bill of lading – in which case it would have had to accept the terms of the bill of lading. The claim followed from the carrier's duty of loyalty to follow the seller's instruction on stoppage (section 91–92).

The Court expressed some sympathy for the carrier's obvious interest in getting rid of the cargo on arrival, but this was not decisive. With Schenker Norway's knowledge of the financial difficulties of the buyer, Schenkerocean (identified with Schenker Norway) could not – without liability – deliver the goods with reference to a received bill of lading (sections 93 and 94).

Schenkerocean also argued that Genfoot had not at any time documented its right of stoppage, but the Court said that Schenkerocean

> *"had not asked for documentation when Genfoot repeatedly gave instructions on stoppage. Schenkerocean, however, held the view that Portland had delivered the bill of lading and was consequently the owner – with the implication that the underlying relationship between Genfoot and Portland was immaterial. Correcting Schenkerocean's misconception of the legal situation is not a question of documentation of the right of stoppage. As a professional party Schenkerocean clearly runs the risk arising from lack of knowledge on the Maritime Code section 307" (section 95).*[8]

The next point dealt with by the Court was the arguments on exclusion or limitation of liability, because Genfoot had (i) given Portland a bill of lading endorsed in blank, (ii) had not presented their own bill of lading, and (iii) had not documented the right of stoppage. The Court's rejection of these issues is to some extent a repetition of what has been referred above, and it is sufficient to quote:

> *" … there is nothing illegitimate about Genfoot's use of the right of stoppage, instead of demanding that the goods be delivered or warehoused, by using the bill of lading.*[9] *Once Genfoot had given instruc-*

[8] Somewhat surprisingly, the same theme is dealt with also in sections 97 and 98.

[9] The Court does not at this stage refer to the complications with the waiver clause in the bill of lading, see above.

> *tions on stoppage and Schenkerocean's maintained the view that the goods were already delivered, because Portland had presented a bill of lading, it would not have been reasonable*[10] *to expect Genfoot to reverse the asserted delivery by presenting a bill of lading" (section 98).*

Finally, there was a question of whether the claim was waived in connection with a Portland reconstruction arrangement. The Court found it sufficient to remark that there was no documentation to show that Genfoot had directed or waived any claim as against Portland's successor.

5 The dissenting opinion – in particular on the Maritime Code Section 292 third paragraph

The dissenting judge was in agreement with the majority on most points, but voted for no-liability for Schenkerocean because Schenkerocean, in his view, was not obliged to follow Genfoot's directions on stoppage.

First, he quoted this clause in the bill of lading:

> *"Once the Goods have been received by the Carrier for Carriage, the Merchant shall not be entitled either to impede, delay, suspend or stop or otherwise interfere with the Carrier's intended manner of performance of the Carriage or exercise of the liberties conferred by this Bill of Lading … for any reason whatsoever including but not limited to the exercise of any right of stoppage in transit conferred by the Merchant's contract of sale or otherwise."*

He remarked that the term "Merchant" is defined in the bill of lading and includes Genfoot.

[10] Norwegian: "ikkje ha vore nærliggande".

As mentioned above, the majority held the view that Genfoot had not accepted this clause, and the dissenting judge agreed (section 110). Instead, he found – "as opposed to the first voting judge"[11] – grounds for rejecting Genfoot's claim in the Maritime Code Section 292 third paragraph:

> *"A bill of lading governs the conditions for carriage and delivery of the goods in the relationship between the carrier and a holder of the bill of lading other than the sender. Provisions in the contract of carriage which are not included in the bill of lading cannot be invoked against such a holder unless the bill of lading includes a reference to them."*

This means, he argued, that Schenkerocean "is not obligated to follow the instructions given by Genfoot" (section 110).

The essential part of his argument appears to be that

> *"when the clause is included in the bill of lading and does not conflict with mandatory law, is must also be respected by the holder of a bill of lading, as if he had been party to the transport agreement" (section 115).*

And:

> *"I cannot see that – as argued by the first voting judge – it is of relevance whether the holder of the bill of lading bases his claim on the bill of lading. According to the wording [in Section 292] it is the bill of lading that regulates the relationship between – in our case – Genfoot and Schenkerocean as regards the carriage and delivery of the cargo. This is, according to my view, applicable without regard to whether the right pleaded by Genfoot derives from the bill of lading or otherwise; the decisive point is that the clause concerns the carriage and delivery of the goods. When Genfoot receives the bill of lading, the clause on waiver of the right of stoppage becomes part of the legal relationship between Genfoot and Schenkerocean" (section 117).*

[11] The first voting judge did not specifically discuss or mention this paragraph.

What is somewhat surprising is that the dissenting judge neither discusses nor mentions the Maritime Code Section 307, on which the majority relied. He softens, however, his understanding of the rights of the buyer by saying that even though Genfoot "as a starting point" does not have the right to instruct Schenkerocean on stoppage,

> *"nevertheless, I assume*[12] *that the carrier, in spite of the waiver of the right of stoppage, will, in very special circumstances, be obliged to abide by such an instruction to retain the cargo. What I have in mind is first of all cases where the carrier* knows *that the requirements for stoppage are fulfilled. Even though the wording of the clause also encompasses such cases, fundamental principles of loyalty and general considerations regarding the scope of exception clauses imply such a limitation of the scope of the clause. The natural purpose of the clause is to protect the carrier against a duty to make investigations in order to evaluate the legitimacy of the right of stoppage where it is not immediately apparent that the seller has such a right" (section 119, emphasis on "knows" by the judge).*

6 Some reflections

Finding the facts is often difficult, and the difficulty is increased when the legal consequences are dependent upon fine distinctions. This is apparent from the opinions presented by the first voting judge and that of the dissenting one:

The carrier who receives instructions from a *third* party may be placed in a very difficult position.

The starting point is that the carrier has a contractual relationship with the sender who is, according to the Maritime Code Section 251, "the person who enters into a contract with a carrier for the carriage of general cargo by sea". Such a sender may be a seller under a CIF-sale – and

[12] The Norwegian text: «Jeg antar nok …».

then, of course, a waiver clause regarding stoppage is binding.[13] And the carrier is entitled to deliver the goods to the person presenting the bill of lading at the place of destination.

In e.g. a FOB-sale, the buyer is the sender, and the seller may be the shipper, i.e. "the person who delivers the cargo for carriage" (the Maritime Code Section 251). In either case, the shipper is the one who is entitled to have a bill of lading issued by the carrier (the Maritime Code Section 294). The carrier may presume that there is an underlying sales transaction, but in most instances, he will have no information as to who the parties are. And then – perhaps as late as when a bill of lading holder has presented his delivery claim – the carrier receives an instruction to retain the goods, because, it is said, the purchase price has not been paid. The instruction may come from

(i) the shipper, or – as in our case – the person to whom the bill of lading has been transferred, or from

(ii) a person with whom the carrier has no (direct or indirect) relationship.

The question is whether there is a legal basis for stating that the carrier has to pay regard to such instructions.

The Supreme Court has clearly stated that CISG Art. 71 – and the corresponding regulation in the Norwegian Sales Act – do not impose duties on the carrier.

Does the Maritime Code Section 307 provide an answer?

This regulation concerns the scope of the seller's right of stoppage: The buyer's possession of a bill of lading does not preclude the seller's having the right of stoppage (paragraph one). But if the buyer has transferred the bill of lading to a third party who had no knowledge of the seller's claim (he was acting "in good faith"), the seller then has no right of stoppage (paragraph two). In our context, the important observation is that Section 307 does not provide a basis for the right of stoppage; it clarifies to some

[13] In our case, the waiver clause was in in the bill of lading. If the bill in this respect does not conform to the previous carriage agreement, we may encounter delicate questions on whether the clause would be considered accepted when the sender, without objections or comments, receives the bill.

extent the relation between a right of stoppage and rules on bills of lading. However, neither this section nor other rules in the Maritime Code give more detailed guidance on the obligations of the carrier when presented with two conflicting claims, as follows.

One claim is solidly anchored in contractual rules: on presentation of the bill of lading the holder is, generally speaking, entitled to get the cargo from the carrier, and deviation from this rule may lead to heavy liability for the carrier.

The other claim is based upon rules that the Court characterised as "of a contractual nature" (section 75): The carrier is not party to the sale, but the reasoning appears to be that by having knowledge of the sale, the carrier has to some extent a duty to pay attention to the interest of the seller. There is no formal basis for this, but the principle derives, one must surmise, from "general principles of private law". This is called "a duty of loyalty towards the parties in the underlying sales relationship" (section 92).

Before dealing with the problem of balancing the two obligations, it makes sense to insert a few lines on some distinctions regarding loyalty in contractual relations.

Such obligations are of particular importance in the traditional two parties relationship: to what extent are the seller, the carrier etc. obliged to act in such a manner that the interests of the other party are taken care of? An extensive analysis of this part of the law is given by Nazarian, Lojalitetsplikt i kontraktsforhold (2007).

Loyalty obligations may also exist out of consideration for a third party. A much discussed example is the Supreme Court decision in Rt. 1994 p. 775 (Yousuf): Bank B was, according to its contract with A, entitled to extend credit against security in A's house, but such security would be contrary to A's obligations towards bank C. The Court found that bank B was not entitled to obtain security to the detriment of bank C. Of general interest is the fact that the Court said that B had no duty to make investigations before utilising its contractual right, and that knowledge of the A-C relationship was required before B had to step

aside. For the details, see e.g. Falkanger & Falkanger, Tingsrett (8th ed. 2016) pp. 831 et seq.

The Schenker case is one further step away from the basic idea of loyalty towards the contractual counterparty: The duty is placed on a person who has the position of a judge: He shall decide which one of two conflicting interests is to be preferred. The final result is of no importance for him – as long as he is not held liable!

It is somewhat surprising that the different types of loyalty are not mentioned, in particular as the Court in the Yousuf case decreed that knowledge was a precondition for establishing loyalty obligations.

Now, reverting to the Schenker case, I remind the reader of the interests at play and also that the standard of care placed on the carrier is a question of Norwegian law.

If the cargo has been delivered to the buyer, the total purchase price may be lost for the seller. Stoppage is, however, not a final solution. On the other hand, stoppage may cause considerable loss on the part of the buyer of the goods: his factory runs short of material, he is unable to fulfil resale contracts etc., with a corresponding risk of liability on the part of the carrier. In addition, we have specific problems for the carrier: He wishes to get rid of the cargo so that the vessel becomes available for further carriages. This may be achieved by warehousing the cargo, but perhaps there is no facility for this. If there is, it implies further contractual arrangements for the carrier: arranging and paying for warehousing, with the prospect of compensation from the proceeds from a forced sale.

In its decision, the Court has placed a heavy burden on the carrier, without clearly defining when the carrier is obliged to follow the instructions given by a non-contractual party, regardless of the apparent contractual obligations he has as carrier.

A minimum, one might think, is that the party giving the instructions of stoppage must document (make clear) (i) that he is the seller and still has the creditor position regarding the purchase price, (ii) that the purchase price has not been paid, (iii) that the basis for the originally granted credit has disappeared. In particular, this would seem neces-

sary when the carrier asks for further information on the receipt of the instructions.

To my mind, a very important additional aspect is the following:

Intervention in a contractual relationship, that is to a great extent is regulated by rules on bills of lading aiming at effective transactions, requires strong justification. If stoppage were the only means of protecting the interests of the seller, intervention might be justified, but this is not the situation. The seller has a remedy, by use of the bill of lading rules, which appears to be adequate to protect his interest when he has granted the buyer credit: he may (i) retain the bill of lading until the purchase price has been paid, or (ii) let the buyer have one of several bills of lading and use the others in case of need. If he chooses to disregard these possibilities, it is then not obvious that he has the right of intervention, thereby causing serious problems for the carrier.

Finally, some practical reflections:

When there is a conflict between the seller and the receiver, a temporary solution is often found. The parties agree that the goods shall be delivered to the receiver against an adequate guarantee, coupled with stipulations as to how the underlying conflict shall be solved. One may also have the situation that the carrier accepts the stoppage order against a guarantee that he will be held harmless if, at the end of the day, the receiver's claim is found to be justified.

If no such practical solutions are found, the question is whether the carrier has the possibility of warehousing the cargo, leaving it to the seller and the receiver to fight out the conflict. Such an action presupposes that there are suitable warehouse facilities, and we meet the problems of payment or security for the expenses in moving the cargo, as well as the actual warehouse costs. Supposing that such matters are resolved, we have the fundamental question of the carrier's right.

Regarding monetary claims, we have well established rules on depositing: When A and B do not agree on who is entitled to the sum owed by C, C may deposit the sum, and in this way avoid the risk of paying it to the wrong person. For goods, we do not have similar rules of a general nature, but the Maritime Code Section 303 does state:

> *"If several persons claim delivery, each demonstrating authority through separate originals of the bill of lading, the carrier shall warehouse the goods in safe custody for the account of the rightful receiver. This shall immediately be made known to the claimants."*

We note that this does not cover a conflict between a claim based on the contract of sale and a claim arising from the bill of lading. I would add, there is no other enacted rule that gives the carrier the possibility of escaping from the choice between Scylla and Charybdis, nor are there – as far as I can see – grounds for saying that we have customary law to that effect.