



USS Fitzgerald and ACX Crystal collision: The Fifth Circuit Court of Appeals delineates the reach of personal jurisdiction

The Court, sitting en banc, held that the Fifth Amendment due process test for personal jurisdiction governed this admiralty dispute and mirrors the Fourteenth Amendment test. Applying the test, the Court concluded that Nippon Yusen Kabushiki (NYK) had insufficient contacts with the United States to justify exercising personal jurisdiction over a foreign corporation for claims arising from a collision in foreign waters. This means that United States Navy Sailors' claims for wrongful death and personal injury must be pursued in a foreign court.

Published 08 September 2022

The information provided in this article is intended for general information only. While every effort has been made to ensure the accuracy of the information at the time of publication, no warranty or representation is made regarding its completeness or timeliness. The content in this article does not constitute professional advice, and any reliance on such information is strictly at your own risk. Gard AS, including its affiliated companies, agents and employees, shall not be held liable for any loss, expense, or damage of any kind whatsoever arising from reliance on the information provided, irrespective of whether it is sourced from Gard AS, its shareholders, correspondents, or other contributors.

Background

On 17 June 2017, the *ACX Crystal*, a 730-foot foreign flagged container ship chartered by NYK, collided with the destroyer *USS Fitzgerald* in Japanese territorial waters. Several midship compartments on the *Fitzgerald* flooded, killing seven United States Navy sailors and injuring dozens of others. Personal representatives of the deceased sailors sued NYK in federal court, asserting wrongful death claims under the Death on the High Seas Act, 46 U.S.C. § 30301 *et seq.* The injured sailors and their families sued NYK separately, asserting negligence and loss of consortium claims.

In both cases, plaintiffs alleged that NYK, a foreign corporation headquartered in Japan, was amenable to federal court jurisdiction under Fed. R. Civ. P. 4(k)(2) based on its “substantial, systematic and continuous contacts ...” with the United States.

NYK is a global logistics company that transports cargo by air and sea. On the seaside of its operations, NYK’s fleet of owned and chartered vessels includes bulk carriers, container ships, car carriers, tankers, shuttle tankers, drill ships, and LNG carriers. Between 2017 and 2019, about seven percent of NYK’s worldwide port calls were in the United States, totaling about 1,500 calls annually.

Because of NYK’s shipments bound for the United States, NYK litigates in American courts. Since 2010, NYK has filed approximately thirty lawsuits in federal courts, most involving claims for freight charges. And, occasionally, NYK and its vessels are sued in American courts. Typically for cargo damaged en route, or for injuries occurring during cargo operations in the United States.

However, overall, NYK’s business in the United States and North America accounts for less than ten percent of its annual revenue.

The Dispute

Fed. R. Civ. P. 4(k)(2) provides:

Federal Claim Outside State-Court Jurisdiction. For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:

- (A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and
- (B) exercising jurisdiction is consistent with the United States Constitution and laws.

NYK was not subject to jurisdiction in any state court in the United States because plaintiffs could not meet the established due process test for personal jurisdiction under the Fourteenth Amendment, which limits state court jurisdiction.

Personal jurisdiction under the Fourteenth Amendment requires a finding of either general or specific jurisdiction over a non-resident defendant. General jurisdiction is only appropriate when a non-resident corporation's contacts with a forum state are so "continuous and systematic" that the defendant is essentially "at home" in the forum state. *Daimler AG v. Bauman*, 571 U.S. 117, 139, 134 S. Ct. 746, 761 (2014). In other words, the forum state must be considered the center of the non-resident's activities or a surrogate for its place of incorporation or head office. If general jurisdiction is found, then the corporation is amenable to suit for any of its activities anywhere in the world.

If the non-resident corporation is not at home in the forum state, then the alternative is specific jurisdiction. Specific jurisdiction is appropriate when: 1) a non-resident corporation avails itself of the benefits and protections of the forum state; and 2) the claims arise out of or result from the corporation's forum related activities. In other words, the claims must arise from or relate to the business activities conducted in the forum state.

Since plaintiffs could not show that NYK was "at home" in any state, and since plaintiffs' claims did not arise from or relate to its business activities in any state, plaintiffs filed in federal court under Fed. R. Civ. P. 4(k)(2), arguing that the due process test for personal jurisdiction under the Fifth Amendment – which limits federal court jurisdiction – should be different than the Fourteenth Amendment test.

Specifically, because the United States Supreme Court has yet to definitively speak to the Fifth Amendment test, plaintiffs proposed a "national contacts" test whereby NYK, a foreign corporation headquartered in Japan, was amenable to federal court jurisdiction under Fed. R. Civ. P. 4(k)(2) based on its "substantial, systematic and continuous contacts ..." with the United States, regardless of whether the contacts are sufficient to consider NYK at home in the United States. Said differently, in the plaintiffs' view, the Fifth Amendment due process inquiry is simply whether a defendant, sued on a federal claim, was doing enough systematic and continuous business in the United States that it had fair notice it could be subjected to suit in federal courts.

NYK moved to dismiss the suits for lack of personal jurisdiction, arguing that plaintiffs' proposed test was inconsistent with the United States Constitution and laws. The United States District Court for the Eastern District of Louisiana agreed and granted NYK's motion. The cases were consolidated on appeal, and on 30 April 2021 the United States Court of Appeals for the Fifth Circuit affirmed the district court judgment. On 14 May 2021 plaintiffs filed a petition for rehearing *en banc* (rehearing by the entire Court).

The Decision

In *Stephen Douglass, et al. v. Nippon Yusen Kabushiki Kaisha*, 20-30382 c/w 20-30379 (5th Cir. August 16, 2022), Judge Edith Jones writing for the majority of the Court rejected plaintiffs' proposed national contacts test. Five of the seventeen justices dissented.

Noting that the Fourteenth and Fifth Amendment Due Process Clauses use the same language to protect persons from the deprivation of "life, liberty, or property, without due process of law" and serve the same purpose, the Court dismissed plaintiffs' foundational contention that the Fourteenth Amendment Due Process Clause vindicates federalism principles that are irrelevant under the Fifth Amendment. Acknowledging that the Fifth Amendment focuses on the United States' sovereign limits rather than the states' reciprocal sovereign limits, the Court nonetheless disagreed with the premise that the distinction warranted a more permissive standard under the Fifth Amendment. Mainly, because in the Court's view the emphasis on sovereignty was not the focus of the analysis.

Citing to *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S. Ct. 2099 (1982), the Court stated that individual liberty is what the Supreme Court emphasizes as the foundation of the personal jurisdiction requirement. That requirement "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." *Id.* at 2104.

On this basis, the Court held that the "tried-and-true" dichotomy between general and specific jurisdiction applies under the Fifth Amendment. Specifically, the Fifth Amendment due process test for personal jurisdiction mirrors the Fourteenth Amendment test, except that the Fifth Amendment test looks at contacts with the United States as a whole, rather than any one state.

Further, because neither complaint alleged that the federal claims at issue arose out of or were related to NYK's contacts with the United States, the Court went on to find that NYK could only be amenable to the district court's jurisdiction under a general jurisdiction theory. Meaning, NYK was amenable to jurisdiction if and only if its contacts were so continuous and systematic as to render it essentially at home in the United States.

Turning to NYK's specific contacts, the Court found that exercising general jurisdiction over NYK did not comport with its Fifth Amendment due process rights.

The Court recognized that NYK's contacts with the United States are, in absolute terms, substantial. NYK vessels call on at least forty-one separate ports, with several vessels dedicated exclusively to delivering cars between Japan and the United States. At one time, NYK even operated twenty-seven shipping terminals and six air-cargo terminals in the United States, with its North American entities generating about \$1.47 billion in consolidated revenue every year.

But the Court also noted that the general jurisdiction test is an inherently comparative inquiry. And comparatively, NYK's contacts with the United States comprise only a small fraction of its worldwide contacts.

Therefore, the Court found that the United States is not the center of NYK's activities or a surrogate for NYK's head office or place of incorporation.

Comments by the Court

In footnotes 5 through 7 of the majority Opinion, the Court felt it was important to place the Opinion in further context. The Court emphasized that NYK was a time charterer of the *ACX Crystal*, and that time charterers typically have little or no control over the vessel's navigation. As such, a time charterer "almost never bears liability for a collision stemming from navigational error." Citing *Moore v. Phillips Petroleum Co.*, 912 F.2d 789, 792 (5th Cir. 1990).

Thus, in the Court's view, even if plaintiffs could establish personal jurisdiction over NYK, "their claims would face other substantial hurdles." Including the fact that the after-accident reports issued by the National Transportation Safety Board and the Japanese Transport Safety Board largely fault the United States Navy for the collision and, according to the Court, neither places any fault on NYK.

The Court noted that the personal representatives of the deceased sailors and the injured sailors and their families also sued the owner of the *ACX Crystal*, Olympic Steamship Company, and its bareboat charterer, Vega Carriers Corporation, both Panamanian corporations, in Japan for the same injuries at issue in this lawsuit.

Gard Comment

Had the accident occurred in United States waters, the District Court presumably would have had jurisdiction over NYK, as well as the owner and the bareboat charter because the incident would have likely satisfied the specific jurisdiction requirements under the Fifth Amendment as applied to admiralty claims. This decision does, however, set a limitation as to personal jurisdiction for claims against a foreign corporation that arise outside of the United States where the claim does not arise from activities of the corporation in the United States.

The information provided in this article is intended for general information only. While every effort has been made to ensure the accuracy of the information at the time of publication, no warranty or representation is made regarding its completeness or timeliness. The content in this article does not constitute professional advice, and any reliance on such information is strictly at your own risk. Gard AS, including its affiliated companies, agents and employees, shall not be held liable for any loss, expense, or damage of any kind whatsoever arising from reliance on the information provided, irrespective of whether it is sourced from Gard AS, its shareholders, correspondents, or other contributors.