Newsletter

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Supreme Court of Canada: Contract Interpretation Update

The Supreme Court of Canada continues to provide guidance on the interpretation of contracts. In the recent decision of *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.* 2016 SCC 37 ("*Ledcor*"), it held that the interpretation of a standard form contract should be recognized as an exception to the Court's holding in *Sattva Capital Corp. v. Creston Moly Corp.* 2014 SCC 53 ("*Sattva*")(*1) and that in the contractual interpretation of standard form contracts the "factual matrix" carries less weight in interpretation.

In *Sattva* the Supreme Court of Canada affirmed the contextual approach to contractual interpretation and explained the role of surrounding circumstances in contractual interpretation. The contract must be read as a whole and the words in the contract must be given their plain and ordinary meaning, consistent with the surrounding circumstances at the time of contracting, i.e. the "factual matrix." The Supreme Court of Canada has in *Ledcor* indicated this "factual matrix" will be given less weight in contractual interpretation.

The *Ledcor* decision involved a claim that occurred during construction: a building's windows were scratched by the cleaners hired to clean them. The cleaners used improper tools and methods in carrying out their work, and as a result, the windows had to be replaced. The building's owner and the general contractor in charge of the construction project claimed the cost of replacing the windows against a builders' risk insurance policy issued in their favour and covering all contractors involved in the construction. The insurers denied coverage on the basis of an exclusion contained in the policy for the "cost of making good faulty workmanship".

The trial judge held the insurers liable, finding that the exclusion clause was ambiguous and that the rule of *contra proferentem* applied against

FIRM AND INDUSTRY NEWS

- **Rui Fernandes** and **Gordon Hearn** celebrated twenty years as partners at the firm on October 15th.

- **Louis Amato-Gauci** presented the Modal Update (Bus and Motorcoach) at the *2016 Canadian Transportation Lawyers Annual Conference* in Toronto, on September 24, 2016.

- **Jaclyne Reive** represented the firm at the *Canadian Society of Customs Brokers Conference*, which was held at Niagara on the Lake on September 25th to 27th.

- **Rui Fernandes** spoke at the Tredd Seminar on *Cargo Insurance and Shipping Contracts* in *Mississauga on October 25th, 2016.*

- **Alan Cofman** will be speaking at *Clean Gulf Conference 2016* in Tampa, Florida on November 2nd, 2016 on "An Update on Federal and Provincial Canadian Spill Response Rules."

- **Gordon Hearn** and **Louis Amato-Gauci** will be representing the Firm at the *Transportation Law Institute* in Houston, Texas on November 3-4, 2016. Gordon is an event co-chair.

- **Kim Stoll** will be attending the *Women's International Shipping and Trading Association 2016 International AGM & Conference APP* taking place on the MS Koningsdam from November 9-13.

- We are pleased to announce that **Carole McAfee Wallace** will be joining the firm as Counsel in November. Carole brings to the firm her extensive experience in transportation and employment law. In the transportation area, Carole represents trucking and bus companies, of all sizes, on a wide range of regulatory compliance issues. Carole also provides employment advice to employers and employees, in both federally and provincially regulated workplaces. Carole appears before all levels of court as well as various administrative tribunals, on behalf of her clients. Carole is named in the Canadian Legal Lexpert Directory as a leading practitioner in the area of Transportation (Road &Rail).

- **Rui Fernandes** will be speaking at the *Canadian Passenger Vessel Association Annual Meeting* in Banff on November 23rd, 2016 on "Dealing with Emergency Situations and Post Incident Aftermath".

- **Kim Stoll** will be speaking at the Ontario Bar Association Professional Development Seminar on *What to Look for When Dealing with Cross-Border Transportation Claims* on November 30, 2016.

the insurers. The Court of Appeal reversed that decision. Applying the correctness standard of review to the interpretation of the policy, the court held that the trial judge had improperly applied the rule of *contra proferentem* because the exclusion clause was not ambiguous. The court devised a new test of physical or systemic connectedness to determine whether physical damage was excluded as the "cost of making good faulty workmanship" or covered as "resulting damage". Based on this test, the court concluded that the damage to the windows was physical loss excluded from coverage, because it was not accidental or fortuitous, but was directly caused by the intentional scraping and wiping motions involved in the cleaners' work.

The Supreme Court of Canada allowed the appeal by the insured. It did apply the standard of review as correctness (which was an exception to the standard of review of reasonableness as set out in *Sattva*) as this was a standard form contract.

The Supreme Court of Canada held that, at para. 28:

> While a proper understanding of the factual matrix is crucial to the interpretation of many contracts, it is often less relevant for standard form contracts, because "the parties do not negotiate terms and the contract is put to the receiving party as a take-it-or-leave-it proposition": *MacDonald*, at para. 33. Standard form contracts are particularly common in the insurance industry

The Court, in this paragraph, was referring to *MacDonald v. Chicago Title Insurance Company of Canada*, 2015 ONCA 842 where the Ontario Court of Appeal dealt with standard form contracts (*2). The Court of Appeal in the same year also opined on standard form contracts in in *Daverne v. John Switzer Fuels Ltd.* 2015 ONCA 919(*3). The Ontario Court of Appeal considered whether a one year limitation period in an insurance policy was a "business agreement" and would be enforced. A fuel oil tank leak caused damages to property owned by Gerald Daverne and Jutta Daverne. McKeown & Wood Limited ("MW") had sold the tank to the Davernes. MW was insured by Federated Insurance Company of Canada ("Federated"). At issue in the litigation considered by the Court of Appeal was whether the one year limitation period set out in Federated's insurance policy was enforceable against MW. The judge hearing the original application had found that the clause was not enforceable. The Court of Appeal disagreed. Firstly, the Court of Appeal found that the standard of review (of the judge's decision) was correctness. The Court of Appeal reiterated that the correctness standard of review applies on standard form insurance contracts. The Court of Appeal held that, in the case of insurance policies, which involve the interpretation of similar if not common language and the application of general principles of insurance law, the high degree of generality and precedential value justifies a departure from the reasonableness standard of appellate review set out by the Supreme Court of Canada in *Sattva*.

This body of law from 2015 from the Ontario Court of Appeal was followed in *Ledcor* by the Supreme Court of Canada. The Court noted at paragraphs 37 to 39 of the *Ledcor* decision:

> In many cases, appellate courts need not review for correctness the contractual interpretation *itself* in order to perform their functions — namely, ensuring the consistent application of the law and reforming the law. That is because, in general, the interpretation of a contract has no impact beyond the parties to a dispute …
>
> For the interpretation of many contracts, precedents interpreting similar contractual language may be of some persuasive value. However, it is the intentions of the particular parties, as reflected in the particular contractual wording at issue and informed by the

> surrounding circumstances of the contract, that predominate…
>
> These teachings, however, do not necessarily apply in cases involving standard form contracts, where a review on the standard of correctness may be necessary for appellate courts to fulfill their functions. Standard form contracts are "highly specialized contracts that are sold widely to customers without negotiation of terms": *MacDonald*, at para. 37. In some cases, a single company, such as a bank or a telephone service provider, may use its own standard form contract with all of its customers: *Monk*, at para. 23. In others, a standard form agreement may be common throughout an entire industry: *Precision Plating*, at para. 28. Either way, the interpretation of the standard form contract could affect many people, because "precedent is more likely to be controlling" in the interpretation of such contracts: Hall, at p. 131. It would be undesirable for courts to interpret identical or very similar standard form provisions inconsistently, without good reason. The mandate of appellate courts — "ensuring the consistency of the law" (*Sattva*, at para. 51) — is advanced by permitting appellate courts to review the interpretation of standard form contracts for correctness.

In dealing with the *Ledcor* facts the Court held that while the base coverage under the relevant clause of the policy was for physical loss or damages, the exclusion clause need not necessarily encompass physical damage because perfect mutual exclusivity between exclusions and the initial grant of coverage is neither provided for under the policy nor required when interpreting the exclusion clause. Accordingly, the physical or systemic connectedness test established by the Court of Appeal was unnecessary.

The Court went on to note that while the language of the exclusion clause was ambiguous, the general principles of contractual interpretation led to the conclusion that the exclusion clause serves to exclude from coverage only the cost of redoing the faulty work, that is, the cost of recleaning the windows. The damage to the windows and therefore the cost of their replacement was covered. Given that the general rules of contract construction resolve the ambiguity, it was not necessary to turn to the *contra proferentem* rule.

The Court added, at para. 66:

> Therefore, in my view, the purpose behind builders' risk policies is crucial in determining the parties' reasonable expectations as to the meaning of the Exclusion Clause. In a nutshell, the purpose of these polices is to provide broad coverage for construction projects, which are singularly susceptible to accidents and errors. This broad coverage — in exchange for relatively high premiums — provides certainty, stability, and peace of mind. It ensures construction projects do not grind to a halt because of disputes and potential litigation about liability for replacement or repair amongst the various contractors involved. In my view, the purpose of broad coverage in the construction context is furthered by an interpretation of the Exclusion Clause that excludes from coverage only the cost of redoing the faulty work itself — in this case, the cost of recleaning the windows.

It is now clear that for standard form contracts, the "factual matrix" in the formation of the contract will carry less weight with interpretation. For standard form contracts, appeal judges will review the case based on correctness as opposed to reasonableness of the decision.

Rui M. Fernandes

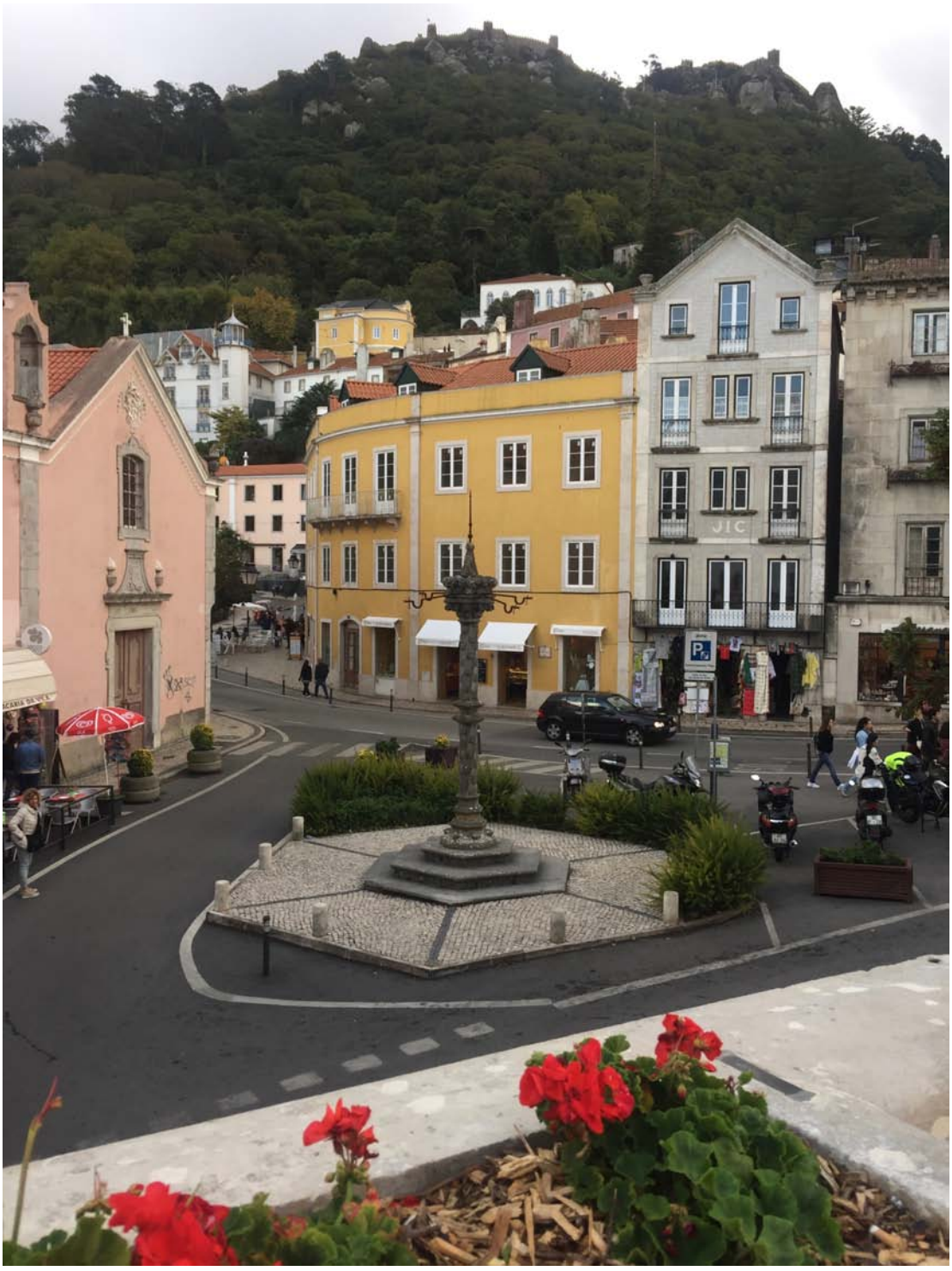
Follow Rui M. Fernandes on Twitter @RuiMFernandes and on Linkedin. See also his blog at http://transportlaw.blogspot.ca

Endnotes

(*1) See the Fernandes Hearn LLP newsletter article on *Sattva* in August 2014.

(*2) See the Fernandes Hearn LLP newsletter article in January 2016.

(*3) See the Fernandes Hearn LLP newsletter article in March 2016.



2. Coasting Trade in Canada

The marine transportation of goods and people between two points in Canada, as well as any other marine activity of a commercial nature in Canadian waters is restricted in Canada to Canadian vessels. "Coasting trade" refers to activity within Canada, as opposed to between Canada and another country. Canada has a vested interest in ensuring marine commercial activity in Canada is as often as possible facilitated by Canadian ships, in order to stimulate Canadian business generally. While Canadian ships are preferred, circumstances may require non-Canadian ships to operate in the Canadian coasting trade. The *Coasting Trade Act*, S.C. 1992, c. 31 (the "*Act*") sets out the method to ascertain when that might be permitted. Generally, it is when there is no suitable Canadian ship available to carry out the activity.

The *Act* defines "coasting trade" under s. 2(1) as either
a) the carriage of goods by ship alone, or by ship and another mode of transport;
b) the carriage of passengers by ship; or
c) engaging in any other commercial marine activity by ship; from one place in Canada or above the continental shelf of Canada, to any other place in Canada or above the continental shelf, either directly or via a place outside Canada.

With respect to references to a place above the continental shelf of Canada, coasting trade only applies to the exploration, exploitation, or transportation of the mineral or non-living natural resources of the continental shelf.

In order to be permitted to use a foreign vessel in the coasting trade, one must apply simultaneously to the Canada Revenue Agency ("CRA") and the Canadian Transportation Agency ("CTA"). The CTA is responsible for determining whether a suitable Canadian ship is available to perform the activity identified in the application and, in the case of the carriage of passengers, the CTA must also determine whether Canadian vessels offer adequate, similar passenger services.

During the application process which includes a notice to Canadian ship owners, potential Canadian suppliers can make submissions to the CTA opposing the granting of the license by representing that they have a Canadian ship or ships that can offer the service and by offering its ship(s) or services. The CTA decision can be contested. An appeal lies to the Federal Court of Appeal.

What happens, however, if the foreign ship does not make an application to the CTA? If a foreign ship does participate in the coasting trade in Canada without a license, the ship may be found guilty of an offence and is liable on summary conviction to a fine of up to $50,000 per day the activity occurs. An enforcement officer (from Transport Canada) may go so far as to require the owner, master or any other person to produce the official log book or other ship document that may evidence the offence. The officer may also order the ship detained.

What are the steps a Canadian ship owner can take if the foreign ship does not make an application to the CTA and neither Transport Canada nor the CTA enforce what is perceived as a coasting trade service? This scenario was recently before the Federal Court of Canada in *McKeil Marine Limited v. A.G. Canada and Foss Maritime Company* 2016 FC 1063. At issue in the case was whether a decision of the Chief, Marine Policy and Regulatory Affairs Seaway and Domestic Shipping Policy of Transport Canada made on February 5th 2016 that the towage of two decommissioned vessels from British Columbia via the Panama Canal to Nova Scotia, to be dismantled would not constitute engaging in the coasting trade. Part of the journey, from British Columbia to Panama, was being done by American vessels owned by Foss Maritime Company ["Foss"]. Canadian vessels owned by Atlantic Towing ("Atlantic") were performing the segment from Panama to Nova Scotia.

McKeil Marine Limited ("McKeil") is a Canadian tug and barge owning company based in Ontario with operations through the Great Lakes, St. Lawrence Seaway and the east coast of Canada. It brought an application to the Federal Court for relief including a declaration that the towage of vessels between British Columbia and Nova Scotia constituted coasting trade.

The activity in question had come to the attention of Transport Canada in two ways. In January 2016, McKeil brought to the attention of Transport Canada that U.S. flagged ships being used to tow the decommissioned vessels did not have a license and questioned whether there was a violation of the *Act.* Initially Atlantic was advised by Transport Canada that a license may be required. In late January, Transport Canada informed Atlantic that the operation did not seem to meet the definition of coasting trade. Transport Canada advised McKeil on February 5th 2016 of their "decision." Following the receipt of this information, Atlantic entered into a contract with Foss to tow the vessels and no application was made to the CTA for a license. Shortly thereafter, on February 24th 2016 Foss commenced the tow of the first vessel from British Columbia arriving in Panama on or about March 23, 2016. An Atlantic tug towed the vessel from Panama to Nova Scotia arriving on April 22, 2016. The second vessel left British Columbia on May 9th, 2016 and arrived in Nova Scotia on June 27th, 2016. The application by McKeil in the Federal Court was heard on July 13th, 2016. By that date, the towage of the decommissioned vessels had been completed.

In the Federal Court McKeil raised two issues:

1. The towage was a "carriage of goods" by a ship and triggered subsection 2(1)(a) of the *Act*; and
2. The towage was a commercial marine activity in Canadian waters contrary to section 2(1)(f) of the *Act.*

Foss countered that:

1. The towing of a ship cannot be properly characterized as the "carriage of goods" by ship;
2. Each towing operation was two tows neither of which was entirely within Canadian waters and thus not a "marine activity of a commercial nature in Canadian waters";
3. McKeil lacked standing to bring the application because it was not directly affected by the decision of Transport Canada as required by s. 18.1 of the *Federal Courts Act*, RSC 1985, c. F-7;
4. McKeil should not be granted public interest standing to challenge the decision; and
5. Even if McKeil had standing to challenge the decision of Transport Canada, the issue before the Court was moot because the towage of the two ships had been completed and the Court ought not to exercise its discretion to hear the matter.

Justice Zinn found on the evidence (cross examination transcripts) that McKeil acknowledged that it was principally concerned with the impact of the decision in this case to its operations in the Great Lakes. Justice Zinn found that McKeil provided no evidence demonstrating any direct advantage to it if its application succeeded or any direct disadvantage if it failed. "Its interest in the matter at issue, is at best, an indirect one." Justice Zinn found that McKeil had no direct standing to bring the application.

Justice Zinn then dealt with the issue of whether to grant public interest standing to McKeil. The Supreme Court of Canada in *Downtown Eastside Sex Workers United Against Violence Society v. Canada* [2012] 2 SCR 524 sets out the factors to be considered when determining whether to grant public interest standing, at para. 2:

> …whether the case raises a serious justiciable issue, whether the party bringing the action has a real stake or a genuine interest in its outcome and whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court.

Interestingly the Court found that the "issue of the interpretation of the meaning of the *Act* as it applies to the facts in this case is far from frivolous, and was not brought by a 'busybody' litigant. In my view, there is a serious justiciable issue in this case." Justice Zinn also found that he was prepared to find that the subject of the application was clearly within the business of McKeil and that it had a "real or a genuine interest in its outcome." Justice Zinn, however, was not prepared to find for McKeil on the basis of the third prong in the *Downtown* test, that is that the proposed suit was a reasonable and effective means to bring the case to the court. One factor considered was whether there was a realistic alternative means, which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination. Justice Zinn found, at paras. 34 and 35:

> Given the considerations in granting public interest standing and primarily relying on the consideration that the present case is not one closely reflecting McKeil's real concern, I do not think this is the appropriate case to grant it public interest standing. In this respect, I agree with Foss that it is better use of judicial resources to address McKeil's real concern which rests in Great Lakes towing if there is a future situation where that issue can be more effectively raised between the parties that are more directly opposed.
>
> This finding will not, however, bar McKeil from being granted public interest standing in the future (when a more appropriate case arises)…

Justice Zinn then dealt with the issue of mootness. His Honour held that, even if he had granted McKeil standing on the application, the matter was moot and he would not exercise his discretion to hear the matter. The evidence showed that there was no longer a live controversy as the Foss vessels had completed the towing operations and the decommissioned ships had arrived in Nova Scotia. Justice Zinn added, at para. 44:

> In the future, if McKeil were to hear of rumours of a US flagged vessel operating in the Great Lakes without a license and raised similar concerns to Transport Canada, a judicial review of Transport Canada decision could be brought on an urgent basis or an application could be made to the court for an interim injunction.

Justice Zinn declined to hear the application on its merits.

In summary, the decision did not deal with the main issue of whether a voyage from British Columbia to Nova Scotia through Panama, performed by a foreign vessel and Canadian vessel constitutes coasting trade. The decision does, however, provide a road map for Canadian operators who get wind of a foreign vessel performing coasting trade activities in Canada. They can bring an urgent application and injunction proceeding in the Federal Court of Canada.

Rui M. Fernandes

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[In *McKeil Marine Limited v. A.G. Canada and Foss Maritime Company* Foss Maritime Company was represented by Rui M. Fernandes and James Manson of Fernandes Hearn LLP]

3. License for Arrangers of Transportation Services in USA

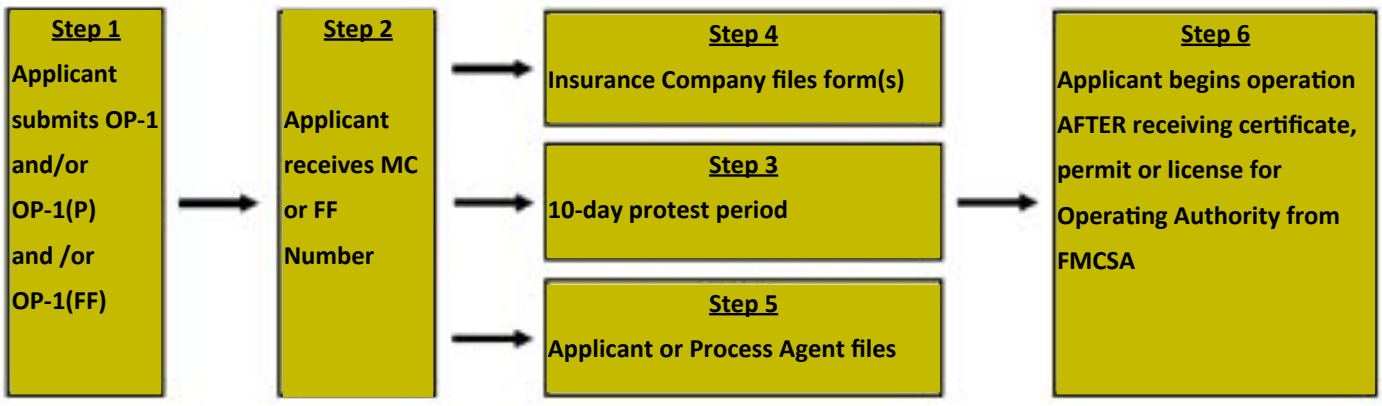
Freight forwarders, load brokers, carriers and agents who arrange for transportation of property with U.S. carriers should be aware of the U.S. Federal Motor Carrier Safety Administration ("FMCSA") requirements for a license ("Operating Authority"), even if that arranger is in Canada.(*1). Carriers are also included unless the carriage is part of an interlining operation. (*2)

The FMCSA sets out the following definitions for licensing:

> *Broker of Property (except Household Goods)*
> An individual, partnership, or corporation that receives payment for arranging the transportation of property (excluding household goods) belonging to others by using an authorized Motor Carrier. A Broker does not assume responsibility for the property and never takes possession of it.
>
> *Broker of Household Goods* — An individual, partnership, or corporation that receives payment for arranging the transportation of household goods belonging to others by using an authorized Motor Carrier. A Broker does not assume responsibility for the household goods and never takes possession of the goods. Household goods are personal items that will be used in a home. They include items shipped from a factory or store, if purchased with the intent to use in a home, and transported at the request of the householder who pays for the transportation charges.

Freight forwarders, load brokers, carriers and agents based in the U.S. or Canada must obtain an Operating Authority by submitting the appropriate form in the OP-1 series. All brokers are required to have proof of insurance coverage: a surety bond (form BMC-84) or trust fund agreement (form BMC-85). Form BOC-3 must also be submitted for the license. It is a designation of process agent form identifying an individual or company in the U.S. for the purposes of service of documents/claims. The application form and fee of $300 U.S. must also be filed. The application processing time is about 4-6 weeks.

The Operating Authority application process



An arranger who knowingly engages in interstate brokerage or freight forwarding operations without the required operating authority is liable to the United States for a civil penalty not to exceed $10,000 and can be liable to any injured third party for all valid claims regardless of the amount (49 U.S.C. 14916(c)). The penalties and liability to injured parties apply jointly and severally to all corporations or partnerships involved in the transportation and individually to all officers, directors, and principals of these business forms (49 U.S.C. 14916(d)). Under 49 U.S.C. 14901(d)(3), a broker of household goods (HHG) who engages in interstate operations without the required operating authority is liable to the United States for a civil penalty of not less than $25,000 for each violation. Source:78 FR 54720.

Rui M. Fernandes

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Endnotes

(*1) For more information see the articles in the Fernandes Hearn LLP newsletters of October 2013 and April 2014.

(*2) A motor carrier that is performing part of the transportation as an interline operation, however, typically performs that service under its own motor carrier operating authority registration or the operating authority of the originating motor carrier. As a result, the motor carrier arranging the interline service in order to perform the transportation service requested by the shipper would not be brokering the load and would not require broker registration. See https://www.fmcsa.dot.gov/faq/does-motor-carrier-participates-freight-interlining-have-register-broker

4. Duty to Protect Workers from Harassment Through Social Media

An employer has a duty to protect workers from harm and harassment in the workplace. In a most unusual decision on this issue, an arbitrator in Ontario recently found the Toronto Transit Commission ("TTC") should have taken additional steps to protect its workers from harassment by the public through a Twitter account that the TTC controlled. In *Toronto Transit Commission and ATU, Local 113 (Use of Social Media), Re* 2016 CarswellOnt 10550 a grievance was filed by the union against the employer TTC. Twelve days were devoted to the hearing. Six persons were called as witnesses.

The TTC's social media presence includes a corporate Facebook page, a YouTube channel, and two Twitter accounts: @TTCnotices, which commenced operation in January of 2009 and is used by the TTC's Transit Control to provide service updates, reminders, and information about service issues; and @TTChelps, which commenced operation in February of 2 012 and is used to receive and respond to customer service questions and concerns.

The Union's concerns about the Employer's use of social media pertained primarily to @TTChelps. Anyone with a Twitter account can send a tweet to @TTChelps by including "@TTChelps" in a tweeted message. Those tweets are monitored and responded to by six senior service representatives employed in the TTC's Customer Service Centre (the "CSC"),

@TTChelps replies to numerous tweets from users each day. Each of those replies is tagged to the individual user to whose tweet @TTChelps is responding. Some of the tweets received by @TTChelps are complimentary. However, others are critical of the service being provided by the TTC or the manner in which TTC employees perform their duties. As indicated below, replies sent by @TTChelps to tweets that are critical of TTC employees or service often include phrases such as "sorry to hear that", "that's not good", and "that was not nice at all".

Some of the tweets are aggressive, profane and derogatory. Some of these can be considered harassing. TTC customarily tweets a response such as "We are here to help, however discriminatory or abusive comments are not condoned".

A Union representative testified that bargaining unit members feel that they are just punching bags for the public and that the TTC does not care about them. He also testified that they are angry the TTC is allowing this to occur, that they are under enormous pressure, and that the negative stigma that they feel is overwhelming.

Other responses in the tweets introduced into evidence in the proceedings included: "I can see that you are frustrated but please refrain from derogatory comments towards our employees"; "I can see that you are frustrated but please refrain from abusive language and personal attacks on our employees"; "We understand you may be upset, however please refrain from personal insults"; "The TTC does not condone abusive or offensive comments"; "If you would like our help pls refrain from using that language"; "We understand your frustration but pls refrain from profanity"; "Can you please refrain from using vulgarity and elaborate on what happened?"; "Pls let me know what is upsetting u and I'll try to help but, pls refrain from the foul language - it is not acceptable"; "Please refrain from the offensive language. Please call 416-393-3030 or go here: ow.ly/AlhFc to submit complaint"; "Please refrain from making these types of comments when making a report. Please provide details location & vehicle#"; "Please explain what happened"; "I'm sorry it happened, but employee complaints have to be taken off line"; "Sorry to hear, call us at 416-393- 3030 if you want to discuss further"; and "Sorry to hear, I hear your frustration, however in order for me to assist may I please ask that you refrain from using profanity".

If a tweeter does not refrain from using profane or otherwise inappropriate language after being requested to do so by @TTChelps, the tweeter

may be blocked, muted or ignored by @TTChelps. Blocking and muting are both features of Twitter.

The arbitrator was asked by the Union to order a shut down of @TTChelps. Counsel for TTC had retained a social media expert, Amanda Clarke who testified that:

> A range of public sector organizations in Canada have been integrating social media into their communications and stakeholder engagement functions. It is primarily used by those organizations to deliver information through relatively static one-way communication, rather than being used in a consultative or interactive manner. Twitter is the social media tool most commonly used by governments in Canada, although they also make use of other social media tools such as Facebook, YouTube, and Flickr. Social media usage has grown rapidly in Canada at the municipal government level, and has become an accepted mainstream practice. By April of 2010 approximately 25 Ontario municipalities had developed social media presences, but by April of 2012 that number had increased by over 672% to just under 200 Ontario municipalities, of which 69% had Twitter accounts.
>
> In responding to the questions of whether a public service provider should use Twitter, and if so, why, Dr. Clarke indicated that the academic and practitioner literature generally concludes that use of social media, including Twitter, is a necessary and beneficial component of contemporary public sector communications and citizen engagement strategies. She also indicated that the three rationales typically cited as justification for that conclusion are: (1) public service providers should use social media because citizens want them to; (2) social media can support official communications functions by providing a useful platform for disseminating policy messages and official announcements, and can ensure that public service providers are communicating to citizens in the online spaces where they aggregate (as opposed to assuming the citizens will find such information via traditional channels); and (3) social media provide a new and more effective platform for citizen engagement, which can render government decision-making processes more democratically responsive, and support more effective or efficient public policies and services.

The arbitrator declined to order the shut down of @TTChelps. However, he found that TTC failed to take all reasonable and practical steps to protect bargaining unit workers from harassment, contrary to the law.

During the course of argument, reference was made to a number of statutes, including the *Occupational Health and Safety Act*, R.S.O. 1990, c. 0.1 (the *"OHSA")*, and the *Human Rights Code*, R.S.O. 1990, c. H.19 (the "*HRC").* The parts of those statutes potentially relevant to the disposition of the grievance include the following provisions:

> *OHSA*
> 1(1) "workplace harassment" means engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome;
>
> "workplace violence" means,
> . . .
> (c) a statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in the workplace, that could cause physical injury to the worker.
>
> [Section 25(1) imposes a strict duty on employers to ensure that prescribed equipment, materials and protective devices are provided, maintained in good

condition and used as prescribed; that prescribed measures and procedures are carried out in the workplace; and that any part of the workplace is capable of supporting any loads which may be applied to it.]

25(2) Without limiting the strict duty imposed by subsection (1), an employer shall,

. . .

(h) take every precaution reasonable in the circumstances for the protection of the worker;

. . .

32.0.1(1) An employer shall,

(a) prepare a policy with respect to workplace violence;

(b) prepare a policy with respect to workplace harassment; and

(c) review the policies as often as necessary, but at least annually.

. . .

32.0.6(1) An employer shall develop and maintain a program to implement the policy with respect to workplace harassment required under clause 32.0.1 (1) (b).

32.0.6(2) Without limiting the generality of subsection (1), the program shall,

(a) include measures and procedures for workers to report incidents of workplace harassment to the employer or supervisor;

(b) set out how the employer will investigate and deal with incidents and complaints of workplace harassment; and

(c) include any prescribed elements.

HRC

5(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

5(2) Every person who is an employee has a right to freedom for harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

In deciding for the union the arbitrator held:

> It is clear from the totality of the evidence that the TTC has failed to take all reasonable and practical measures to protect bargaining unit employees from that type of harassment by members of the community, as required by the *HRC*, the Agreement, and the Workplace Harassment Policy. The evidence discloses many inadequate responses by @TTChelps to offensive tweets of that type, such as: (1) ignoring the offensive language and merely advising the tweeter "You can call us at 416-393-3030 or go to ow.ly/AKsGz to report your experiences"; (2) responding by stating "We understand your concerns however please refrain from personal attacks against employees", but then going on to provide information on how to file a complaint; (3) responding "Can you please refrain from using vulgarity and elaborate on what happened?"; or (4) responding by merely stating that the TTC does not condone abusive, profane, derogatory or offensive comments.
>
> To deter people from sending such tweets, @TTChelps should not only indicate that the TTC does not condone abusive, profane, derogatory or offensive comments, but should go on to request the tweeters to immediately delete the offensive tweets and to advise them that if they do not do so they will be blocked. If that response does not result in an offensive tweet being deleted forthwith,

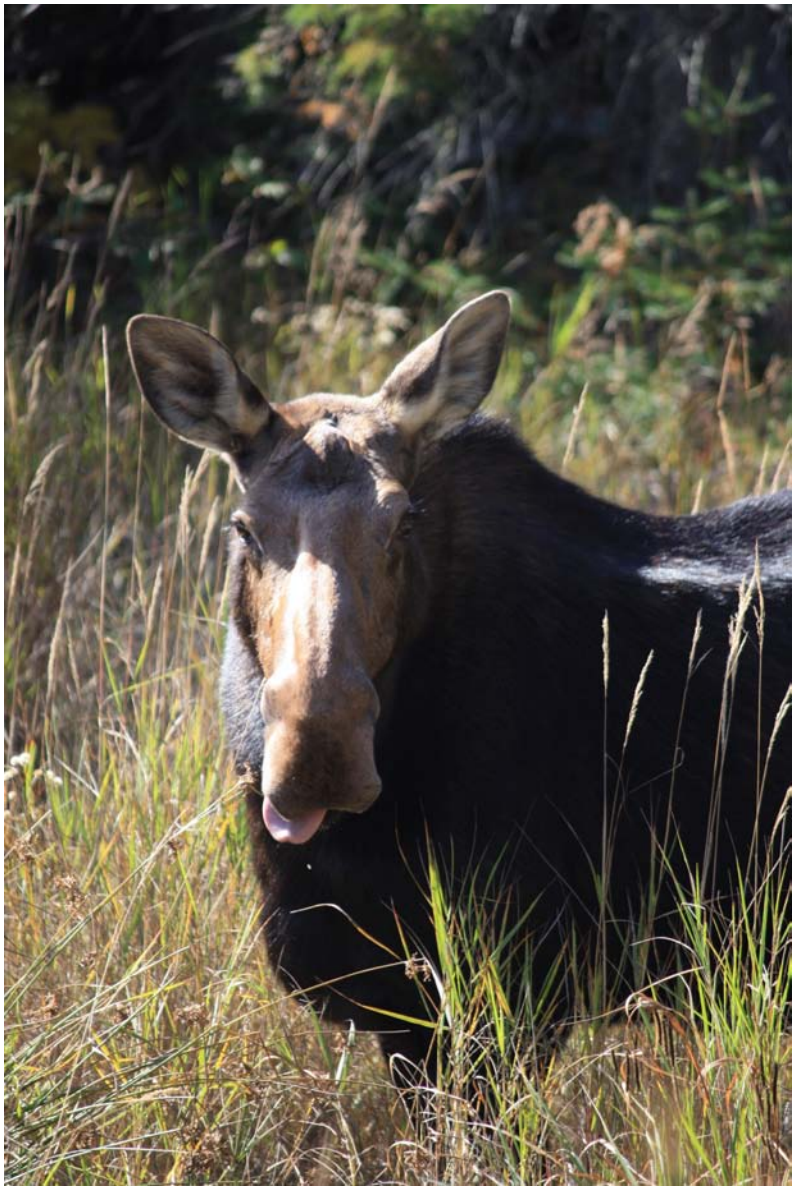
@TTChelps should proceed to block the tweeter. It may also be appropriate to seek the assistance of Twitter in having offensive tweets deleted. If Twitter is unwilling to provide such assistance, this may be a relevant factor for consideration in determining whether the TTC should continue to be permitted to use @TTChelps.

The decision is important in that it clarifies the idea that the workplace can include a virtual location such as the web. Once harassment is identified, the employer will need to take steps to address the activity. If necessary, it may have to close down the social media account.

Employers should review their exiting workplace policies to ensure those policies contain provisions for responding to complaints including proper investigation and action. The social media policy should be consistent with the law and the employer's business objectives.

Rui M. Fernandes

Follow Rui M. Fernandes on Twitter @RuiMFernandes and on Linkedin. See also his blog at http://transportlaw.blogspot.ca



5. Be Deliberate in Drafting Your Contract Language – *and Stay Deliberate for Continuity's Sake*

The recent Ontario Superior Court decision of *McMillan McGee Corp. v Northrop Grumman Canada* (*1) provides an illustration of how a contracting intention might be lost in the evolution of contract wordings. In the commercial setting, we frequently see a complex contractual framework. Perhaps there is a primary contract, speaking in general terms of rights and obligations. It might have schedules, exhibits or appendices. Perhaps specifics come later on by way of the issuance of purchase orders or invoices containing certain terms. Does such ancillary or subsequent paperwork solidify the application of the initial contract terms, or do the terms changing as time goes on?

In finding a contract intention, the courts look for certainty and continuity through the various phases of contractual dealings – putting a premium on deliberate and careful drafting and continuity in the paperwork.

Introduction

McMillan McGee Corp. (hereafter "McMillan") provided certain services for Northrop Grumman Canada and related companies (collectively hereafter, "Northrup") in relation to an environmental remediation project that it undertook on land in Brantford, Ontario. McMillan commenced a law suit to recover unpaid invoices amounting to $2.4 million (U.S.)

Northrup replied by bringing a court application for an order "staying" the action in favour of the state or federal courts of California in accordance with a contract forum selection clause agreed to by the parties. McMillan took the position there was no such contract term binding upon it. This issue was referred to Mr. Justice Faieta of the Ontario Superior Court for a determination. Justice Faieta ultimately ruled that there was in fact no such contract term requiring the plaintiff to take suit in California. The decision reveals how a contracting intention might 'unravel' as a result of subsequent inconsistent paperwork.

Background

The relevant contract evolution for the purposes of our story was as follows:

i) On April 5, 2010, a representative of Northrup who was located in California procured the subject remediation services by distributing an email to McMillan, headquartered in Calgary, as well as three other companies located in the United States of America. The email to McMillan stated:

> *" Per our phone conversations last Thursday, attached are the documents related to a new competitive RFP (*2) for a Thermal Heating Solution to treat impacted soil located at the former Kester-Brantford facility, located @ 68 Prince Charles Rd in Brantford, Ontario, Canada. The documents are as follows:*
>
> *1. Statement to Bidders – This document summarizes and outlines this competitive RFP.*
> *2. Request for Proposal – Due to the multiple number of bidders, the Bidder name, address and contact name was left blank. Please complete this portion of the RFP, sign at the bottom of page 1 and return along with your proposal and Exhibit B.*
> *3. Exhibit A – Terms and Conditions: CT-6 (Commercial Fixed Price – Services) and the Environmental Remediation Services Addendum*
> *4. Exhibit B – Scope of Work*
> *5. Exhibit C – Bid Form/Form of Proposal*
> *6. Exhibit D – Background Site Information*
> *…*
>
> *As stated in the Statement to Bidders, there is a mandatory pre-proposal site walk scheduled for Wednesday, April 14, 2010. … The due date for the submittal of questions*

is Monday, April 19, 2010 and the bid due date is Friday, April 30, 2010. …
For any questions, please feel free to call me anytime.
Thank you"

ii) The Statement to Bidders referred to in the above package was a letter dated April 5, 2010 from Northrop which stated:

" The Terms and Conditions for this work are provided in Exhibit A. If the Proposer wishes to amend or provide any alternative Terms and Conditions, the amendments or additions shall be submitted on a separate sheet as "proposed" along with the completed proposal package. …
It is the responsibility of each Proposer before submitting a proposal to:
i) Examine thoroughly the Contract Documents in Exhibit A and all other RFP Documents…

iii) Exhibit A in turn was entitled *"CT-6 Northrop Grumman Corporation – Purchase Order Terms and Conditions Commercial Fixed-Price – Services*" ("CT-6").

iv) Paragraph 13 of the CT-6 language contained the following dispute resolution provision ("forum selection clause"):

A. Any dispute that may arise under or in connection with this Order with respect to the rights, duties, or obligations of the Parties shall be submitted in writing for resolution to ascending levels of management of the respective Parties up to the Senior Executive of the Materiel [sic] *or Procurement organization placing the Order, and Seller's equivalent executive level.*

B. If a dispute cannot be resolved to both Parties' mutual satisfaction, after good faith negotiations, within ninety (90) calendar days from the date the written claim is received by the other Party, or such additional time as the Parties agree upon, in writing, ***either Party may only bring suit in federal or state court in the state from which this Order is issued.***

(emphasis added)

v) Paragraph 1 of CT-6 defines "Order" as follows:

ORDER means the instrument of contracting including this Purchase Order and all referenced documents.

vi) CT-6 also contained the following choice of law provision:

Both Parties agree that, irrespective of the place of performance of this Order, this Order will be construed and interpreted according to the law of ***the state from which this Order is issued, as identified in the Order****, excepting that state's laws on conflicts of laws.*
(emphasis added)

vii) McKinnon delivered a bid to Northrup by email dated April 30, 2010.

viii) By email to McKinnon dated June 9, 2010, Northrop confirmed its selection for the Remediation Project.

ix) Northrup later sent a Purchase Order to McKinnon by email on July 22, 2010 stating:

Attached is the new PO 2747852 which covers the cost of the referenced work at the Kester Brantford site in Ontario, Canada. Please note the invoicing instructions listed on page 2. Also, when you have a chance, please sign the last page of the PO and return …

x) Purchase Order 2747852 - being the first Purchase Order for the services in question ("First PO") incorporated the CT-6 language from Exhibit A from the original contract package. However, it did not expressly identify the state from which the First PO was being "issued." That said, the First PO did list the following information:

Buyer Information:
…
Buyer Address: One Hornet Way, El Segundo CA 90245-2804, USA
Billing Address: Northrop Grumman Systems Corp.

Attention: Accounts Payable 8710 Freeport Parkway, Suite 200, Irving, TX 75063-2577

xi) McMillan returned a signed copy of the First PO to Northrop on July 22, 2010 by email.

xii) Subsequently two further purchase orders ("Second PO" and "Third PO"), as well as many "change orders" (modifying the Purchase Orders) were delivered by Northrop to McKinnon.

xiii) McKinnon ultimately invoiced Northrup a total amount of $4,633,866.55 for its services. Northrup paid only $2,168,281.04. The unpaid amount, being the subject of the law suit did not relate to the First PO. It only related to work done *after* the delivery of the Second PO.

xiv) Northrup took the position that the Second PO incorporated and replaced the First PO following Northrop's change to a new internal contract management system. The Second PO stated that it was issued "as a replacement" to the First PO. It did not incorporate or mention CT-6. Instead, it provided that the terms and conditions of *"T-6 Commercial Fixed Price – Services (R-1-11)"* ("T-6") were incorporated by reference. The T-6 language did not contain a forum selection clause directing litigation to be commenced in the courts of California.

xv) Similarly, the Third PO incorporated a variation of the T-6 language, making no reference to the CT-6 wording.

Analysis

Northrup asserted that the Ontario Superior Court should decline to take jurisdiction over the case, and that the action should be "stayed" on the basis that the contract in question contained a "forum selection clause" (the CT-6 wording from the original contract package) that provided exclusive jurisdiction over this action to the courts of the State of California.

A forum selection clause chosen by the parties to a contract will govern unless the plaintiff (having chosen to commence suit in the Ontario courts) can show "strong cause" for litigating in a forum other than the forum agreed upon (*3). There are few exceptional circumstances which would direct that an FSC not be enforced. Such circumstances include a contract that is brought about by fraud or where the court in the forum named in the clause has declined jurisdiction (*4).

Mr. Justice Faieta did not have to resort to any such "exempting" principles on account of his finding that the CT-6 language had not been effectively incorporated into the contract:

1. The judge was not satisfied that the forum selection clause was in fact a binding contract term between the parties: McKinnon's claim in the action encompassed not only the First PO, but also the Second PO and the Third PO. While the First PO did contain the forum selection clause wording by incorporating the CT-6 language Northrup admitted that the First PO had been replaced by a new set of standard terms (i.e.T-6). There was no evidence that the forum selection clause was present in or incorporated by reference in the Second or Third POs. In this regard the Court noted that McKinnon's claims for unpaid services arose *after* the First PO, pertaining to the Second and Third POs.

2. Even if the forum selection clause wording was present in all three purchase orders, the language of the forum selection clause, when viewed in the context of the purchase orders, was unclear in establishing California as the exclusive forum for dispute resolution: The forum selection clause language did not reflect an intention of the parties to choose California or any a particular state as the exclusive forum, but rather only provided Northrop with an option to choose the forum as it controlled the location of the issuance of each purchase order. Justice Faieta ruled that if

the intention was to establish California as the exclusive forum for resolving disputes under the three purchase orders, then the purchase orders could have clearly identified California as place of issue of the purchase order, as contemplated by the CT-6 language. Alternatively, the forum selection clause language could itself have stated that California was the exclusive forum for resolving disputes. Neither approach was used.

3. Even if the forum selection clause language was found to be a term of the Second and Third POs, Justice Faieta was not satisfied that the three purchase orders were in fact issued in California. The judge noted the definition of the verb "*issue*" in *The Oxford English Dictionary* (*5) is "*to give or send out authoritatively or officially.*" There was nothing on the face of the three purchase orders that identified from which state they were issued, as contemplated by CT-6. There was no evidence that the covering email, delivered with each of the three purchase orders, expressly identified the state from which each purchase order was issued. There was one covering email in evidence and that was in respect of the First PO. As noted above, it indicated a California address. The judge was not prepared to infer that that email was actually sent from California, given that Northrup had failed to file sworn evidence that the three purchase orders were in fact sent from the state of California.

Justice Faieta accordingly ordered that McKinnon's claim could proceed in the Ontario court.

Conclusion – the "Take Away"

Contracting clarity and precision is not only a premium at the outset of drafting initial contract documentation. Where the dynamics of the relationship call for the subsequent issuance of paperwork, continuity is also important in demonstrating the objective intention of the terms governing the parties. The maintenance of harmony between initial contract terms, schedules, exhibits, appendices and subsequent work orders and invoices is critical in ensuring the applicability and enforcement of one's contracting goals.

Gordon Hearn

Endnotes

(*1) 2016 ONSC 6334 (CanLII)

(*2) RFP standing for a "Request for Proposal"

(*3) *Momentous.ca Corp. v. Canadian American Association of Professional Baseball Ltd.* 2012 SCC 9 (CanLII) at para. 9.

(*4) *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27 (CanLII) at para. 19; *Expedition Helicopters Inc. v. Honeywell Inc.*, 2010 ONCA 351 (CanLII) at para. 24.

(*5) 2d ed (Oxford: Clarendon Press, 1991)

6. Unregistered Foreign Vessel Mortgage Enforced in Canada

The Honourable Mr. Justice Harrington of the Federal Court of Canada has recently ruled that an unregistered foreign vessel mortgage was enforceable in Canada.

In *Lakeland Bank v. Never E Nuff, et al.*, (*1) an American lender sought to enforce an American vessel mortgage against a boat *in rem*. If successful, the plaintiff would proceed to require a marshal's sale of the boat and satisfy its losses from the proceeds of sale.

The subject boat, the *Never E Nuff*, had been mortgaged when its original owner, Breen McMahon, bought her in New York State in 2007. At the time of sale, the original mortgagor, First Choice Marine, registered the mortgage at the US Coast Guard's National Vessel Document Center. Some time later, it was assigned to the Plaintiff, Lakeland Bank.

The vessel mortgage was not registered in Canada because it had no connection to Canada at the time.

Still in 2007, Mr. McMahon sold the *Never E Nuff* to a subsequent purchaser, Salvail St.-Germain. However, Mr. McMahon and his sales agent failed to give notice of the sale to the bank. Similarly, they neglected to give notice of the mortgage to Mr. St.-Germain. Mr. Breen then continued to make mortgage payments to the bank until March 2008, but he defaulted totally thereafter.

Following the sale, Mr. St.-Germain imported the boat into Canada. At the time, he was unaware of the mortgage. It was his understanding that he had taken title free and clear.

Following Mr. McMahon's default in payments, the bank sued him in the United States District Court, Northern District of New York, where it obtained a judgment against him, personally, in 2010. However, the bank was unable to obtain an order against the vessel *in rem* because she could not be found.

By June 2012, the *Never E Nuff* was somehow located in Canada and the bank's action was commenced in our Federal Court.

The pleadings in the Canadian action were somewhat more complicated than the US action. The bank sued Mr. McMahon personally, but that claim was dismissed since he was not properly served. It also claimed against Mr. St.-Germain, personally, but that too was dismissed as he was an innocent purchaser for value. Meanwhile, Mr. St.-Germain made a Third Party claim against the financing company that had facilitated his purchase in 2007, but the Court left that issue to be determined in a parallel proceeding that he had commenced in the Quebec Superior Court. In the result, the neat legal issue left for the Federal Court to determine was the enforceability of the bank's claim against the *Never E Nuff in rem*.(*2) In other words, would it allow Mr. St.-Germain's boat to be sold for the benefit of the bank?

Of interest, the bank's standing in the Federal Court was based upon section 22(3)(d) of the *Federal Courts Act*. That provision grants jurisdiction to the Federal Court in relation to vessel mortgages. The section applies whether the mortgage is registered or not, and whether it is legal or equitable. Thus, the Court accepted that it had jurisdiction to adjudicate a vessel mortgage that arose in the United States.

The Honourable Mr. Justice Harrington found as a fact that the US mortgage was valid. It the process, His Honour determined that it was unnecessary for a plaintiff to prove foreign law in order to assert an American mortgage. Following earlier jurisprudence, he concluded that it was a question of fact, not law. In any event – even if the court was unable to confirm a valid, registered, foreign mortgage – His Honour found that he had jurisdiction to adjudicate unregistered mortgages also, including American ones. In effect, he considered the registration issue irrelevant.

Mr. St.-Germain argued that the claim was time-barred, as New York has a three-year limitation period. However, the Court found that no such limitation was applicable, particularly because it was not pleaded or proved in evidence, and, His Honour concluded, limitation periods are procedural rather than substantive. Similarly, Mr. St.-Germain was unable to rely upon a three-year limitation period under the *Marine Liability Act* because the relevant provision in that legislation had only come into effect in 2009. Instead, the Court found that a six-year limitation applied pursuant to section 39(2) of the *Federal Courts Act*, which covers any actions that arise "other than in a province".

Mr. St.-Germain's remaining arguments were all rejected, including technical and jurisdictional arguments. In the end, though, the Court concluded that it had jurisdiction as a matter of Canadian maritime law. Thus, judgment was granted and the bank was directed to make a motion for the vessel to be appraised and sold.

If nothing else, this case illustrates the importance of due diligence for the purchase of an expensive asset.

This case also illustrates that the Court will generally have sympathy for a mortgage lender, who has been left in the dark. In *National Bank v. Rogers*, (*3) "innocent" boat owners had returned a "lemon" vessel to the vendor without giving notice to their mortgage lender. In that case – also adjudicated by the Honourable Mr. Justice Harrington – the vendor eventually stopped funding the mortgage payments and it went bankrupt. In the end, the court granted judgment against the buyers, personally. Although Mr. St.-Germain may not be in as bad a predicament as the Rogers, since he has an ongoing Quebec Superior Court action against the sales agent – this was clearly a win for the bank.

Finally, this case also signals a willingness on the part of the Federal Court to interpret its jurisdiction broadly with respect to vessel mortgages. This is so, even in a case where the mortgage is non-Canadian and the litigants might have had a good "time limitation" argument in the jurisdiction where the mortgage arose.

Alan S. Cofman

Endnotes

(*1) 2016 FC 1096

(*2) It also adjudicated a counterclaim to the effect that the bank had overreached its right to arrest by impounding on only the boat itself, but also a trailer and other accessories. That was found to have been wrongful. As damages for a wrongful arrest are compensated by way of a costs award, this was addressed in the Court's global consideration of costs. The improperly arrested items were ordered to be returned.

(*3) 2015 FC 1207. See the Fernandes Hearn LLP newsletter article on this case in May 2016.

7. *Ballantrae Holdings Inc. v. The "Phoenix Sun"*: Federal Court Performs Ranking Exercise In Connection With Creditors' Claims To Proceeds Of Vessel Sale

Earlier this year, in *Ballantrae Holdings Inc. v. The "Phoenix Sun"*, 2016 FC 570 (F.C.), Justice Harrington of the Federal Court was tasked with resolving a priority dispute amongst various creditors arising out of a failed business venture, undertaken by Mr. Mengu Pasinli, by which a vessel was purchased and was supposed to make a final voyage before being sold for scrap metal. Ultimately, the voyage did not occur and the vessel was arrested and sold. The sale generated a fund of only $682,500 with which to satisfy the claims of the various creditors, which totaled $3,496,669.83.

While not particularly groundbreaking, this decision serves as a good example of how Canadian admiralty courts employ the traditional rules of priority in order to address competing claims by various creditors. Creditors in similar circumstances should expect results similar to the outcomes in this case.

The Facts

Mr. Pasinli's plan was to purchase the Canadian ship, the PHOENIX SUN, which was currently under arrest at the Port of Sorel in Quebec, and render her sufficiently seaworthy so that she could make one final voyage. He then planned to find cargo to carry overseas, following which he would sell the vessel in Turkey for scrap. Mr. Pasinli projected a profit in excess of $1,000,000.

In November 26, 2013, one of Mr. Pasilni's companies, Goldrich Waters International Shipping Ltd. of Hong Kong, purchased the PHOENIX SUN from the acting marshal in admiralty for $1,050,000. The vessel was then deleted from the Canadian registry. Goldrich borrowed the entire amount from the plaintiff, Ballantrae Holdings, Inc. ("Ballantrae"), which took out a mortgage and other security.

Thereafter, Mr. Pasilni hired a crew from Turkey and a Canadian welder to work on the ship. He persuaded others to pay the crew's passage to Canada, and ship chandlers to provide necessaries on credit.

Ultimately, the entire enterprise failed. The PHOENIX SUN was never rendered seaworthy; in fact, she never even left her berth. Thus, on July 29, 2014, Ballantrae filed an action against the vessel and her owners. The PHOENIX SUN was then arrested and sold for $682,500.

The defendant owners did not defend the action. Accordingly, the entire amount of $682,500 was available to satisfy all of the creditors, whose claims totaled over five times as much. The only issues before the Court were in connection with determining whether the defendants' creditors had valid claims, and if so, whether any of the claims enjoyed a priority over the others.

The Claims

The Acting Marshal's Fees to Bring the Ship to Sale

First on the list was the claim by the acting marshal for his fees and expenses in dealing with the sale of the PHOENIX SUN. This claim was in the amount of $39,106.37 and was allowed in full by the Court.

Ballantrae's Fees to Bring the Ship to Sale

Next, the Court also allowed a claim by Ballantrae for additional expenses that it incurred in order to arrest the vessel, commence the action and convert her into a fund against which all of the creditors could claim. The Court found that this amount was entitled to priority alongside the acting marshal's fees because all of the creditors benefitted from Ballantrae's actions. Ballantrae claimed $42,419.37, on a solicitor/client basis, for its costs. However, the Court declined to award Ballantrae its costs on the elevated solicitor/client scale and instead award costs on the lower party-and-party scale. Ultimately, after disbursements and taxes, the Court awarded the plaintiff

$12,830.46 for its costs in bringing the ship to sale.

The Sailors

Next in priority were the sailors' claims for unpaid wages. While the Court found that most of the sailors' claims were "beyond doubt", the Court did deal with a few unresolved issues. First, there was an issue with respect to the date at which the sailors' claims should be converted into Canadian dollars: the date of the breach, or the date of the hearing. If the latter, the sailors would be entitled to a larger award due to a more favourable exchange rate. However, the Court declined to do so. Following the rule set down by the Supreme Court of Canada, Justice Harrington ordered the claim to be converted using the exchange rate on the date of the breach.

Second, the Court was asked to determine the length of the various sailors' contracts, which it did.

Third, the sailors also claimed a retainer fee, or "stand by" fee equal to 1/3 of one month's salary. These fees totaled USD$11,766.69. While the Court agreed that the sailors had a valid claim to this amount, they were not able to assert a maritime lien over it. Accordingly, this portion of the sailors' claim did not enjoy any priority.

The Welder

Next, the Court dealt with a claim by a welder, Mr. Mustafa Etiz, who claimed unpaid wages of $50,875 and asserted a maritime lien. On the evidence before him, which the Court found to be "extremely vague", the Court was not prepared to find that Mr. Etiz was a member of the ship's crew at all, and thus unable to assert a maritime lien. The Court awarded Mr. Etiz $25,000 with no rights of priority. Mr. Etiz wound up with nothing.

City of Sorel-Tracy

Next came the claims of the City of Sorel-Tracy. It claimed $105,402.31, comprising unpaid berthage in the amount of $81,441.83 and unpaid electricity service in the amount of $23,960.48. Its claims in principal were $75,460.01 and $22,407.02, respectively. The Court agreed that the claim was valid; the issue was whether the City could claim priority.

First, the City claimed a maritime lien pursuant to s. 122(1) of the *Canada Marine Act*, S.C. 1998, c. 10, which gives a "port authority" the right to a maritime lien in certain circumstances. However, the Court found that the City of Sorel was not a "port authority" as defined by the *Canada Marine Act*, and so it could not claim a maritime lien under that section.

Alternatively, the City claimed a maritime lien under s. 139(2) of the *Marine Liability Act*, S.C. 2001, c. 6, which provides for a maritime lien in respect of goods, materials or services "for its operation or maintenance". The Court, however, was of the view that the particular charges at issue were "dock charges" and not "necessaries"; accordingly, they were not covered under s. 139(2).

The Court thus found that the City's claim was valid, it could not benefit from a maritime lien. However, the Court did acknowledge its authority, in the exercise of its admiralty and equitable jurisdiction, to alter the traditional ranking of priorities among competing claims if the interests of justice so require. In this case, the Court was of the view that the electricity supplied by the Port benefitted the entire mass of creditors. Consequently, Justice Harrington ranked the City's claim for electricity ($22,407.02) immediately after those of the sailors. The balance of the City's claim enjoyed no priority.

The Necessaries Men

The Court then found that the three ship chandlers who provided necessaries to the PHOENIX SUN did benefit from a maritime lien under s. 139 of the *Marine Liability Act*. Their claims ranked directly below those of the Master and crew, and of the City' electricity claim.

Mr. Ian Hamilton

The Court dealt next with a claim by an individual, Mr. Ian Hamilton, and his companies. They had been business partners with Mr. Pasilni and his companies. Unfortunately, however, Mr. Pasilni had also duped him as well as the other creditors. His claim was for various items including rental of a van to transport crew and spare parts; advances to the ship's crew and suppliers; advances to the defendants for various reasons; and general payments to the defendants to be used to assist with maintenance and upkeep of the vessel and other expenses.

The Court agreed that Mr. Hamilton had a valid claim against Mr. Pasilni; however, there was nothing that would establish a priority in favour of Mr. Hamilton's claim. In reality, Mr. Hamilton had simply loaned money to the joint venture between him and the defendants. He was thus equated with the owner, and only entitled to such funds as might be left over once all of the third party creditors were paid – which, in this case, was nothing.

Ballantrae's Main Claim

Ballantrae entered into a loan agreement with another of Mr. Pasilni's companies, Trenton Shipping and Trading Limited, to finance the purchase of the PHOENIX SUN. The principal amount of the loan was $1,050,000. The loan was guaranteed by Goldrich International Shipping Co. (another of Pasilni's companies), and by Pasilni himself. Other security was taken out in the form of a marine vessel mortgage-collateral to loan agreement and the registration of a financing statement under Ontario's *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("PPSA"). The loan was supposed to be short term, for only 75 days. No payments were made, and so Ballantrae commenced the action.

The mortgage was to have been registered in Panama, along with the ship itself; however, this never occurred. Ultimately, the Court found that Ballantrae held a legal, unregistered mortgage on the PHOENIX SUN, which accordingly outranked any equitable charges, all claims of holders of statutory rights *in rem* against the PHOENIX SUN, and Mr. Hamilton's claim. After all other valid claims were subtracted, Ballantrae was entitled to the balance of the proceeds of sale of the vessel, or $415,649.52.

Although not strictly necessary in order to resolve the priority disputes between the claimants, the Court went on to consider whether Ballantrae was able to claim priority over ordinary creditors by virtue of having obtained a security under the PPSA. In *obiter*, the Court embarked on a complicated analysis of the issue of whether it was entitled to consider and apply the PPSA (a provincial statute) in the circumstances. It concluded that it was; however, in the circumstances, the PPSA only applied if the PHOENIX SUN was in Ontario. Because the vessel was never in Ontario, the act did not apply.

In the result, the Court established the following order of priority in this case:

1. The Acting Marshal for costs related to the sale of the ship
2. Ballantrae for costs related to the sale of the ship
3. The Sailors for unpaid wages (but not for the "retainer fee" portion of their claim)
4. The City of Sorel for its electricity claim
5. The three chandlers for provision of necessaries
6. Ballantrae for payment of its mortgage

James Manson

8. CBSA's eManifest Requirements become Mandatory for Freight Forwarders on November 7, 2016

On November 7, 2016, the Canada Border Services Agency's (CBSA) eManifest requirements for freight forwarders to electronically submit advance house bill data will become mandatory.

The purpose of eManifest is to modernize and improve cross-border commercial processes. When fully implemented, it will require all carriers, freight forwarders and importers to send advance commercial information about shipments electronically to the CBSA. (*1) The CBSA will then use that data to assess the risk connected with each shipment. The program is meant to improve the CBSA's ability to detect high-risk shipments before they arrive at the border while allowing low-risk legitimate trade to cross more efficiently. (*2)

Responsibilities

The mandatory requirement to electronically submit advance house bill data applies to bonded and non-bonded freight forwarders who are responsible for consolidated import, in-bond and in-transit shipments. Consolidated freight remaining onboard (FROB) shipments will require supplementary data to be transmitted in the air and marine modes. (*3)

Under Section 7.1 of the *Customs Act*, the freight forwarder transmitting the house bill, house bill close message or supplementary data is liable for ensuring that all data is true, accurate, and complete. Pursuant to section 12.1, the freight forwarder is also liable for ensuring that all data is received within the timeframes specified in the *Reporting of Imported Goods Regulations.* (*4)

Freight forwarders are required to transmit a house bill close message that identifies the previous cargo control number and all related house bills. House bill close messages are not required for supplementary cargo reports. (*5)

Freight forwarders have the option to authorize a service provider or agent to transmit the pre-arrival house bill, house bill close message, and supplementary data on their behalf. However, the carrier code on the electronic transmission must be that of the actual freight forwarder, not the agent or service provider. (*6)

Carriers who are performing all or some of the functions of a freight forwarder may transmit supplementary data, house bill data, and house bill close message data using their CBSA approved carrier code. Whomever the carrier code that is used in the transmission of data belongs to is responsible for the completeness, accuracy and timeliness of the data transmitted. (*7)

The CBSA has also published a new memorandum in the D series with relevant information for freight forwarders. (*8)

Timeline for Compliance and Implementation of Penalties

The CBSA has advised that the following timeline will apply to freight forwarders:

(1) From **November 7, 2016 to January 10, 2017**, a transition period will be in effect where the CBSA will not issue any penalties for non-compliance. On November 7, 2016 electronic house bills will become mandatory, as outlined above.
(2) From **January 11, 2017 to July 11, 2017**, the CBSA may issue issued zero-rated penalties (non-monetary) under its Administrative Monetary Penalty System (AMPS) to freight forwarders deemed to be non-compliant.

(3) Beginning **July 12, 2017**, freight forwarders deemed to be non-compliant with eManifest requirements may be issued monetary AMPS penalties. (*9)

NOTE that consolidated shipments arriving in Canada on or after November 7, 2016, are subject to these requirements even if the movement begins prior to that date. (*10)

What Freight Forwarders Should Do Next

(1) Obtain a valid CBSA issued 8000 series freight forwarder code.

Freight forwarders will now require a unique carrier identifier code issued by the CBSA in order to transact business with the CBSA. Only one code is issued to each legal entity.

(2) Choose a Transmission Option:
Freight forwarders can transmit advance house bill data using an electronic data interchange (EDI), the CBSA's eManifest Portal or a third party service provider.

Note that freight forwarders and their service providers who would like to become EDI clients must undergo acceptance testing. They must apply to the Technical Commercial Client Unit (TCCU) by completing Form BSF691 – Electronic Data Interchange (EDI) Application for Advance Commercial Information (ACI).

(3) Obtain a copy of the CBSA's Electronic Commerce Client Requirements Document

Freight Forwarders should obtain Chapters 5 (ACI/eManifest House Bill) and 8 (ACI/eManifest House Bill Portal) of the ECCRD. These outline the basic business rules and requirements to trasmit data. Copies can be requested from the TCCU.

Jaclyne Reive

Twitter: @jaclyne_reive
Blog: https://jaclynereive.wordpress.com

Endnotes
(*1) "eManifest" CBSA, online: <http://www.cbsa-asfc.gc.ca/prog/manif/menu-eng.html>
(*2) Ibid.
(*3) "Mandatory Electronic House Bills" Customs Notice 16-17, CBSA, online: <http://www.cbsa-asfc.gc.ca/publications/cn-ad/cn16-17-eng.html>
(*4) Ibid. See also: *Customs Act,* R.S.C., 1985, c. 1 (2nd Supp.)).
(*5) Ibid.
(*6) Ibid.
(*7) Ibid.
(*8) See: CBSA Memo D3-3-1: "Freight Forwarder Pre-Arrival and Reporting Requirements" dated September 20, 2016.
(*9) Supra note 3.
(*10) "eManifest Requirements for Freight Forwarders" CBSA, online: <http://www.cbsa-asfc.gc.ca/prog/manif/reqfrfwdrs-extransitaires-eng.html>

9. Hague Rules Limitation Does Not Apply to Bulk Cargo

Vinnlustodin HF and another v. Sea Tank Shipping AS [2016] EWHC 2514 (Comm)

On October 14, 2016, the English High Court of Justice, Queen's Bench Division, ~~has~~ rendered a decision that cures 92 years of uncertainty regarding whether bulk cargo is included in the term "package or unit" in the limitation of liability section, Article IV r. 5, of the Hague Rules. His Lordship The Hon. Sir Jeremy Cooke found with certainty that the term does not apply to bulk cargo and that, accordingly, ship owners and carriers cannot limit their liability in the cases of damaged bulk cargo shipments.

The 1924 Hague Rules (the "Hague Rules") no longer have force of law in England or in Canada having been succeeded in both countries by the Hague-Visby Rules. However, this case is important to ship owners and carriers as well as to cargo interests and their insurers because the Hague Rules are incorporated regularly into sea waybills, charterparties and bills of lading issued and cargoes loaded in non-Hague Visby contracting states.

Facts

A cargo of fish oil was damaged during carriage on board a motor tanker, the *AQASIA*.

The associated charterparty agreement provided that the defendant agreed to carry cargo described as "2,000 tons cargo of fish oil in bulk, 5% mol chopt" from Iceland to Norway for freight of "NOK 817,500 – lump sum."

The charterparty was to be on the London Form, which stated that the Owners were entitled to "like privileges and rights and immunities as are contained in Section 2 and 5 of the Carriage of Goods by Sea Act 1924 and in Article IV of the Schedule thereto..." The said Schedule contained the Hague Rules including Article IV, Rule 5, which provided a limitation of liability,

> Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100l <u>per package or unit</u> or the equivalent of that sum in other currency, unless the nature and value of the such goods have been declared by the shipper before shipment and inserted in the bill of lading. (*1)
>
> (Emphasis added)

The bill of lading expressed the shipment not as "2,000 tons of cargo of fish oil in bulk", but as " 2,056,926 kgs of fish oil in bulk". A portion of the cargo, being 550,000 kgs (the "Subject Cargo"), was loaded into certain tanks of the *AQASIA*. Upon arrival in Norway, further fish oil was loaded and comingled with the Subject Cargo. At discharge, 547,309 kgs of the Subject Cargo was discovered damaged and the associated Plaintiff cargo interests claimed damage in the amount of $367,836 USD. (*2)

The defendant acknowledged responsibility, in principle, under the charterparty for the damage but claimed that it was also entitled to limit its liability to £100 per metric ton of damaged cargo for a total of £54,730.90.

The parties brought an application to determine an preliminary issue of law having agreed that the Court would determine the issue of whether the defendant was entitled to limit its liability, and specifically whether or not the package limitation provisions of the Hague Rules, Article IV r.5, applied to bulk cargo. (*3)

The Judgment

The defendant argued that the word "unit" in the Article IV, Rule 5, as referring to the unit used by the parties to quantify the cargo in the contract of carriage and, accordingly, such term and limitation could be applied to bulk or liquid cargo. The defendant relied upon the description of the cargo in the charter party as "2,000 tons of cargo" for the calculation of the limitation. The plaintiff cargo interests argued that the term

"unit" could only refer to a physical item or cargo or a combination of items bundled together for shipment and that liquid or bulk cargo could not be included in the term since there were no "packages" or "units" in that regard.

The Court rejected the defendant's submission that the wording of the charterparty and the intentions of the parties thereto should be considered because such a review might lead to a different result than that reached by interpreting the provisions of the Carriage by Sea Act and the Hague Rules attached by Schedule. The language of International Conventions should be construed on "broad principles of general acceptation" and give a purposive rather than a narrow literal one.

At para. 9, the Court stated,

> The courts should ascertain the ordinary meaning of the words used, not just in their context, but also in the light of the evidence object and purpose of the convention. In my judgment it is also right to lean towards and interpretation which is consistent with the approach taken in other jurisdictions, where that is possible and a reasonable construction of language and intent of the words used.

The Court noted in its judgment that there was no English authority on point that had determined the definition and use of the term "unit". His Lordship went on to review the language of the Hague Rules as a whole as well as reviewing the wording of the Hague-Visby Rules. Further His Lordship reviewed the Travaux Préparatoires to the Hague Rules (*4), the 1936 United States Carriage of Goods by Sea Act and also reviewed legal treatises and case law from various jurisdictions including Canada and Australia as well as the United States.

The Court stated that the real issue was the true meaning of the word "unit" rather than whether the Hague Rules clearly excluded bulk cargo or not as argued by the defendant. At para 12, the Court stated,

> If "unit" does not mean a unit of measurement, then there is no basis upon which bulk cargoes could be subject to limitation, however desirable an object that might seem to be. It is not right to resort to fictions to achieve that objective when construing an international convention and what is plain is that, at the time of the Convention, the price of such bulk cargoes as were being shipped was such that the limitation provisions would not have been seen as relevant. It is the increase in the price of commodities and the increase in bulk shipments in bulk carriers which has given rise to a perception on the part of some, especially owners, that the provisions of Article IV r. 5 ought to apply to such cargoes. The economics now are very different from the position in 1921-1924 as appears later in this judgment and the issue is whether on the proper construction of the word "unit", which is the only word which could conceivably apply to bulk cargoes, the Rules do have that effect.

The Court found that "unit" is a physical shipment unit and could find no compelling argument supporting the word "unit" to connote a unit of measurement especially where the Hague Rules referred to quantity or weight when measurable units were dealt with.

The defendant urged the Court to accept that the word "unit" could cover unpackaged items but also units of measurement for bulk cargos. The Court dismissed this stating that such different interpretations for different cargoes where weight or volume also appears on a bill of lading where different limitation amounts might apply. The defendant referred to the Hague-Visby wording.

The Hague-Visby Rules state at Article IV, r 5(a),

> Unless the nature and value of such goods have been declared by the shipper before

> shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding 666.67 units of account per package or unit or 2 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher." [Emphasis added]

The Court noted that the Hague - Visby Rules provide for the application of the higher of the limits assessed, regardless of the nature of the cargo, including limitations for bulk cargo; however, such provision was not included in the Hague Rules. The purpose in the Visby Protocol, the Court stated, was clearly not to introduce a bulk goods limitation that did not exist before, but to, at para. 18, "add an alternative weight limitation that would apply to goods of any nature if it were higher than the package or unit limitation. The value added by the Visby Protocol was not the application of limitation to a new type of goods, but the application, in cargo-interests' favour, of two alternative types of limitation whatever goods were shipped."

The Hague-Visby Rules provided for limitation for bulk cargoes as well as individual packages and clearly signified "unit" as a physical item rather than a freight unit in Rule 5 (c).

> ... Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit ...

The Court, at para. 46, confirmed that the terms of the Hague-Visby Rules could not affect the construction of the Hague Rules.

The Court went on to review authoritative decisions in other jurisdictions and quoted from the 1973 Supreme Court of Canada decision, *Falconbridge Nickel Mines v Chimo Shipping* (*5)

> …Ritchie J gave the judgment of the Court and at page 475-476 decided in terms that the word "unit" in Article IV r.5 applied to a physical unit of goods and not a unit of measurement. In this context he said:
> "The meaning of the word "unit" as it occurs in the phrase 'package or unit' in Rule 5 has given me very great difficulty but I am now satisfied that no substantial assistance can be obtained from the U.S. cases because of the clear difference in the wording of the Rules and such authorities as exist in this country and in England appear to me to bear out the statement of Mr. Justice Rand that the word in this context means a shipping unit, that is a unit of goods."

> He also cited with approval the dictum of Mr. Justice Kearney where he said that although the different wording in the US Carriage of Goods by Sea Act, referring to "customary freight unit", was said to have been included to clarify the meaning of "unit" rather than change it, he was not satisfied that this was the case. He concluded that it was only after considerable debate that the US adopted that form of words in their statute and he was satisfied that the words "per package" or, in the case of goods not shipped in packages, "per customary freight unit", did constitute a change from the Hague Rules as adopted in the UK and in Canada and did not afford any practical guidance to the solution of the problem of the meaning of the phrase "per package or unit", in Article IV r. 5.

After reviewing other learned authorities, the Court had no hesitation to ultimately finding that

the word "unit" could only mean, " a physical unit for shipment and cannot mean a unit of measurement or customary freight unit as is the case in the United States."

The Court noted in a practical fashion that the defendant simply wanted to apply the unit of measurement expressed in the charterparty using "tons" as the relevant "unit" as opposed to kilogrammes as per the bill of lading. If kilogrammes had been used, the limitation would be a far higher amount. If such a mathematical calculation was applied, the Court stated, the "units" to be used could be manipulated by shippers in bills of lading by their using the most beneficial measure regarding a limitation calculation.

The Court stated at para. 65,

> I conclude that the word "unit" in Article IV Rule 5 of the Hague Rules is not apt to apply to bulk cargoes and that even if it could apply, the only legitimate application would be by way of interpreting the word "unit" as "freight unit". This cannot be done in the present case in a way which gives rise to a lower limitation figure than the claim because of the lump sum nature of the freight.

Finally

Where the contracting states apply Hague-Visby including Canada, ship owners and carriers will have the benefit of a limitation of liability in respect of damaged bulk cargo; however, where the Hague Rules apply, it is now clear that there will be no limitation of liability applied to bulk cargoes. (*6)

Kim E. Stoll

Endnotes
(*1) 100l is £100
(*2) The insurer of the cargo was the second claimant, which took part in case there was an issue of title to the cargo.
(*3) The Court was also asked to consider if the said sum was calculated correctly, which issue was not decided since the limitation was held not to apply.
(*4) The Travaux Préparatoires is the official record of a negotiation. Such "preparatory works" are used for the purpose of clarifying the intentions of a treaty or convention. See Article 32 of the *Vienna Convention on the Law of Treaties*.
(*5) [1973] 2 Lloyd's Rep 269
(*6) It is to be noted that this decision impacts on the UK jurisdiction and may impact, therefore, on Canadian cases, the US having taken the position noted earlier.

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To Unsubscribe email us at: info@fernandeshearn.com

FERNANDES HEARN LLP

155 University Ave. Suite 700

Toronto ON M5H 3B7

416.203.9500 (Tel.) 416.203.9444 (Fax)

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