FERNANDES HEARN LLP NEWSLETTER JULY 2019

THE NAVIGATOR

IN THIS ISSUE

International Contracts for the Sale of Goods

Is your company buying goods from a seller located in another country? Is it selling goods to a buyer in another country? There is of, course, a need for the parties to a contract to list their relative expectations and obligations in writing. Certain contracts have to be in writing to even be enforceable. With the purchase and sale of goods involving a transportation element, there are extra "delivery" and "risk" dimensions: exactly how is the seller to "deliver" the goods to the buyer? Who bears the risk of transit loss or damage? Things tend to get more complex when a foreign seller is exporting goods sold to a buyer (importer) in Canada. In turn a Canadian seller may be exporting goods sold to a buyer in another country.

Sellers and buyers located in different countries have to consider the customs laws and trade restrictions (if any) and compliance requirements in effect in the countries of origin and destination, in addition to delivery (transportation) and insurance issues. They may however be unaware that most contracts for the sale of goods between parties in the major trading nations will be subject to certain "default" or automatically applicable "purchase and sale" contract terms unless certain steps are taken to opt out of same. While the deemed or automatic confirmation of certain rights and obligations may be welcomed, there remains the risk of unintended consequences, particularly where the automatically imposed terms deviate from the parties' intentions or for that matter the "local law" that one or both may habitually trade under. This deemed contracting regime arises by virtue of the *United Nations Convention on Contracts for the International Sale of Goods* -1980 (the "CISG").

The CISG

Prepared by the *United Nations Commission on International Trade Law* (UNCITRAL) and adopted by a diplomatic conference on 11 April 1980, the CISG is an international set of rules designed to provide clarity to most international sales transactions for the sale of goods. The CISG was adopted by Canada in 1992. Consistent with its constitutional powers, the federal government has declared that the CISG is effective in most provinces including Ontario (*1). Most

FIRM AND INDUSTRY NEWS

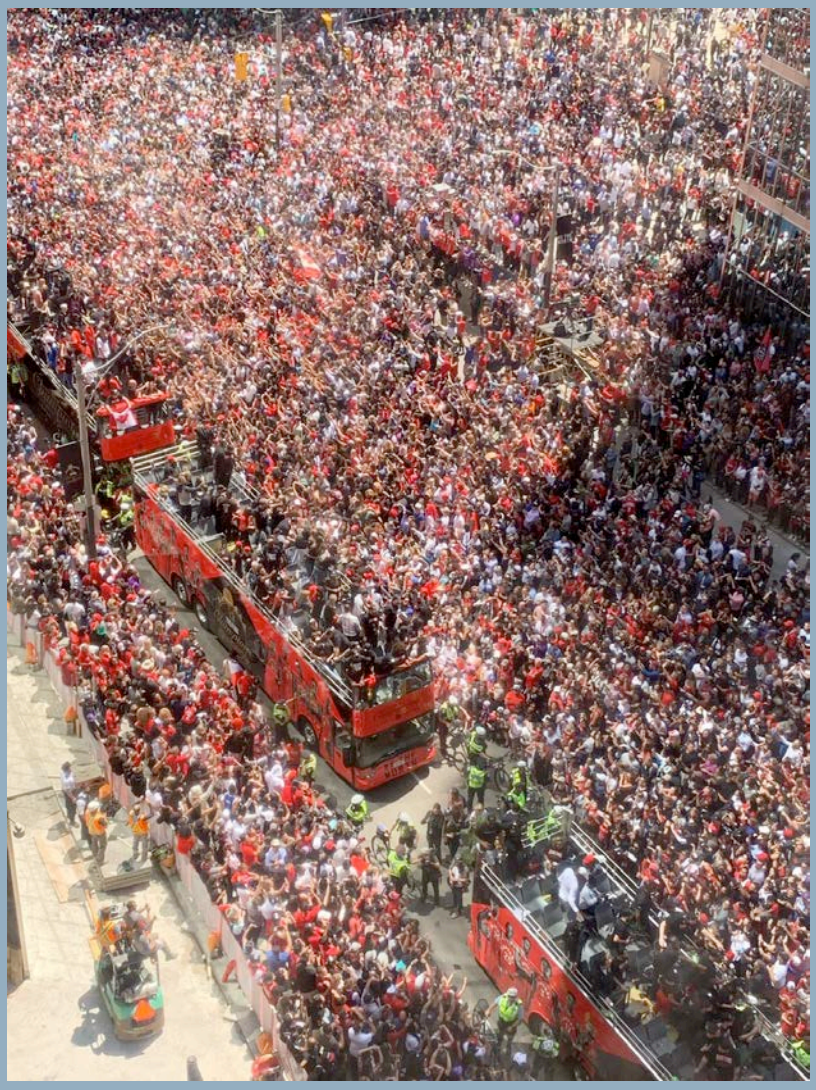
- **Gordon Hearn** will be participating in a Stafford Webinars panel presentation on "*Shipper-Broker-Carrier Contracts*" on August 14, 2019.

- **Women's Trucking Federation of Canada's 2019 Bridging the Barriers Conference** in Mississauga, Ontario on September 6, 2019. **Kim Stoll** and **Alan Cofman** will be speaking on a panel on "*Drivers Inc*."

- **CIFFA** 2019 Central Region Gulf Tournament: Caledon Woods Golf Club, September 12, 2019.

- **IUMI 2019** (International Union of Marine Insurance) will be holding its annual meeting in Toronto on September 15 to 18, 2019.

- **Canadian Transport Lawyers Association 2019 Annual General Meeting and Conference** in Winnipeg, Manitoba on September 19-21, 2019. **Kim Stoll** is on the Educational Programme Committee and will be moderating the Ethics Panel on *Conscientious Lawyering* and **Carole McAfee Wallace** will be speaking on "*Drivers Inc"*. Alan Cofman will also be attending.



western countries including Canada and the United States, are signatories. The CISG is deemed to apply to most contracts for the sale of goods when the seller and buyer are both in signatory countries. As a result, most international sale of goods contracts with parties in western countries will be subject to the CISG, unless specifically excluded in accordance with its "opt-out" provisions. While the CISG is silent on many issues that may arise in the sale of goods context, it does codify various rights and obligations that may lay a trap for the unwary.

A review of the headings of the topics covered by the CISG provides insight into its scope:

Part 1 Sphere of Application and General Provisions

Chapter I General Provisions

- Sphere of application
- General Provisions

Part II Formation of the Contract

Part III Sale of Goods

Chapter I General Provisions

Chapter II Obligations of the Seller

- Delivery of Goods and handing over documents
- Conformity of Goods and third-party claims
- Remedies for breach of contract by the seller

Chapter III Obligations of the buyer

- Payment of the price
- Taking delivery
- Remedies for breach of contract by the buyer

Chapter IV Passing of risk

Chapter V. Provisions common to the obligations of the seller and the buyer

- Anticipatory breach and installment contracts
- Damages
- Interest
- Exemptions
- Effects of avoidance
- Preservation of the goods

Part IV Final Provisions

Does the CISG Apply to your Contract?

The CISG has mandatory application when the parties are located in signatory countries, even if they do not choose to be bound by it. The CISG is discretionary, even when otherwise not automatically applicable, if both parties agree to be bound by its rules.

As a result, most international sales of goods contracts with parties in Canada and the United States will be subject to the CISG, unless specifically excluded in accordance with its terms.

Generally speaking, the "reach" of the CISG is restricted to rules concerning the formation of the contract and the rights and duties of the buyer and seller arising from such a contract. The CISG is not concerned with the validity of the contract, the effect which the contract may have on the property in the goods sold or the liability of the seller for death or personal injury caused by the goods to any person. These are matters reserved to the general provisions of the laws otherwise binding the parties.

Accordingly, in order to determine whether or not the CISG applies to an international contract one will need to examine the "choice of law" provision in the contract itself and also the method by which the CISG may have been adopted in each of the buyer and seller's countries.

All of the Canadian provinces and territories have followed the federal government's lead in adopting the CISG. This said, as each has enacted its own implementing legislation, there are inconsistencies. While all have incorporated

the CISG, the manner in which the parties in each province may contract out of the CISG is different. For example, in Ontario, the parties may do so by stating that the domestic law of a particular jurisdiction applies, or that the "CISG does not apply". (*2)

Whether the parties are to exclude the application of the CISG calls for special study and analysis as to the benefits of its application accounting for the unique circumstances of each case. In this regard the parties need to be aware that the CISG does not address a number of contracting issues or scenarios. For example, the CISG does not govern contracts for the sale of *all* goods. It excludes international consumer sales of goods bought for personal, family or household use. It also excludes sales by auction and specific kinds of goods, such as ships and aircraft. The CISG also excludes the sale of goods where the buyer is to provide a "substantial part" of the materials required for production. Sales of manufactured goods are also excluded where a significant part of the obligations of the supplier calls for the provision of labour or other services.

One Significant Difference in Comparison to Canadian Contract Law

The limited scope of this article does not permit for a detailed comparison; however, one difference calls for special mention concerning the formation of *oral agreements*. The CISG permits oral contracts to be enforced; there being no equivalent of the "parole evidence" rule (in Canada, most provinces have a writing requirement for contracts for the sale of goods, and courts tend to admit oral evidence of the making of contracts with great caution, if at all). The CISG however permits countries to opt out of the oral contracts provision. CISG Article 11 provides as follows:

> *A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.*

Article 29 weighs in with similar effect:

> *(1) A contract may be modified or terminated by the mere agreement of the parties.*
> *(2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.*

Article 12 in turn provides:

> *Any provision of Article 11 or Article 29… that allows a contract of sale or its modification or termination by agreement or any offer, acceptance of other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under Article 96 of this Convention….*

Article 96 provides:

> *A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced in writing may at any time make a declaration in accordance with Article 12 that any provision of Article 11 or Article 29…. that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than writing, does not apply where any party has his place of business in that State.*

Canada has not "opted out" pursuant to Article 96. Accordingly, an oral agreement between a Canadian and an American company would be

enforceable despite the existence of domestic writing requirements.

In order to accommodate those States whose legislation requires contracts of sale to be concluded in or evidenced by writing, Article 96 entitles those States to declare that neither Article 11 nor the "Clause 2" exception to article 29 applies where any party to the contract has his place of business in that State.

The Parties may Opt Out, or Augment or Change Individual CISG Terms

Where the CISG applies to a contract, any of its provisions can be excluded or modified. The basic principle of contractual freedom in the international sale of goods is recognized by the CISG provision that permits the parties to exclude its application or derogate from or vary the effect of any of its provisions. This exclusion will occur, for example, if parties choose the law of a non-contracting State or the substantive domestic law of a contracting State as the law applicable to the contract.

The CISG and its General Obligations

The general obligations of the seller are to deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and the CISG. The CISG provides supplementary rules for use in the absence of a written contractual agreement as to when, where and how the seller must perform these obligations.

The CISG provides a number of rules that implement the seller's obligations in respect of the quality of the goods. In general, the seller must deliver goods that are of the quantity; quality and description required by the contract and that are contained or packaged in the manner required by the contract. One set of rules of particular importance in international sales of goods involves the seller's obligation to deliver goods that are free from any right or claim of a third party, including rights based on industrial property or other intellectual property.

In connection with the seller's obligations in regard to the quality of the goods, the CISG contains provisions on the buyer's obligation to inspect the goods. It must give notice of any lack of conformity with the contract within a reasonable time after it has discovered it ought to have discovered it, and at the latest two years from the date on which the goods were actually handed over to the buyer, unless this time limit is inconsistent with a contractual period of guarantee.

The general obligations of the buyer are to pay the price for the goods and take delivery of them as required by the contract and the CISG. The CISG provides supplementary rules for use in the absence of contractual agreement as to how the price is to be determined and where and when the buyer should perform its obligations to pay the price.

As alluded to earlier, the determination of the exact moment when the risk of loss or damage to the goods passes from the seller to the buyer is of great importance in contracts for the international sale of goods. Parties may regulate the issue in their contract either by an express provision or by the use of a trade term such as, for example, an Incoterm (*3). The effect of the choice of such a term would be to amend the corresponding provisions of the CISG accordingly. However, in those cases where the sales contract does not contain such a provision, the CISG sets forth a complete set of rules on point.

Conclusion

The drafting of contracts in the sale of goods "space" is complex to start with. The exercise takes on complexity even further when the contract takes on an international character. Sellers and buyers must be live to their rights and obligations, and how they compare under one legal system compared to another. They must also be live to how this "mix" may be

affected in the deemed application of the CISG, which fills in various default rules on point. Special care and counsel must be taken in each individual case to ensure that the seller or buyer's business plan and allocation of risk will be not frustrated or be subject to unintended consequences.

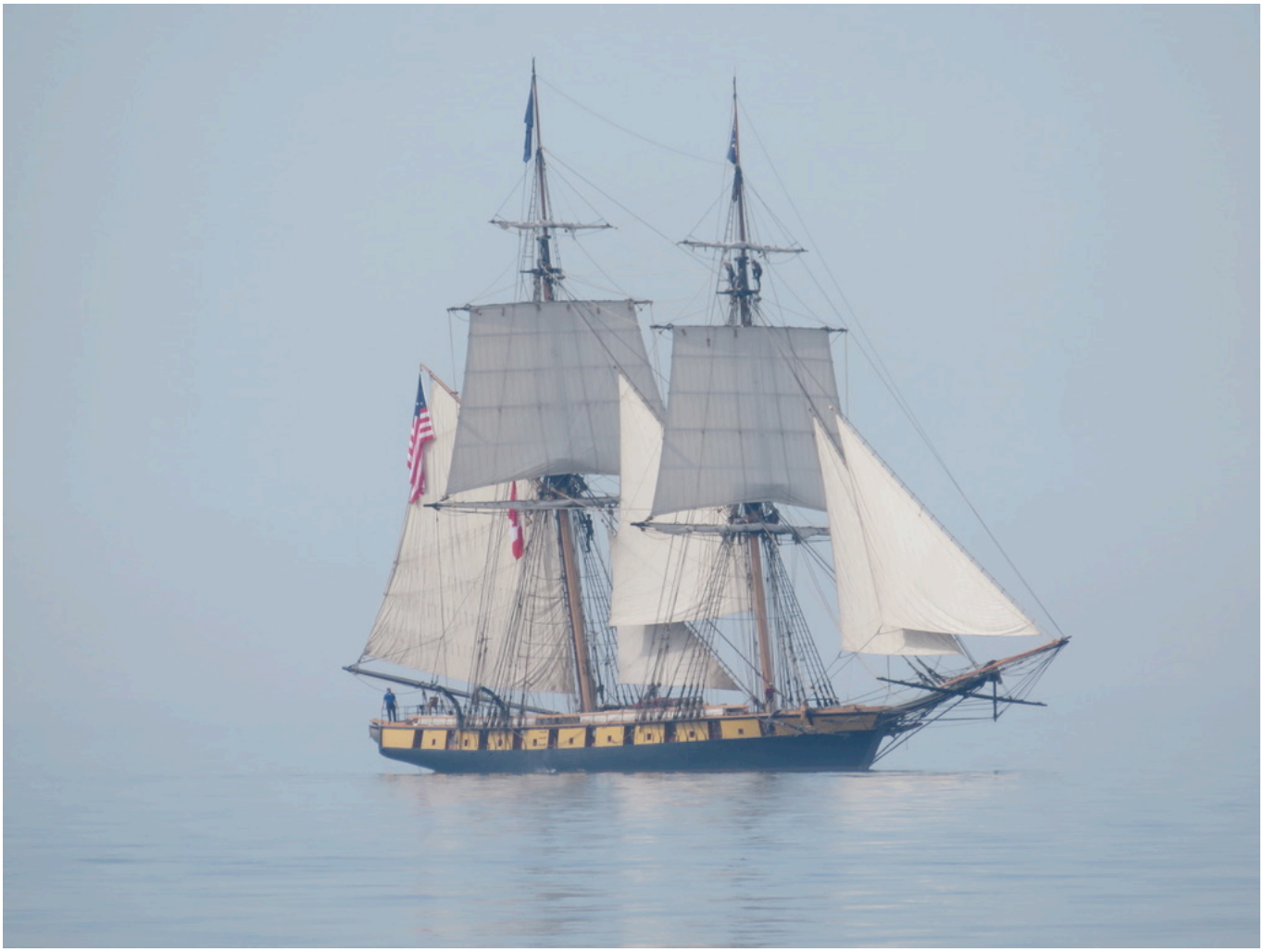
Gordon Hearn

Endnotes

(*1) Canada had filed an "Article 93 declaration". Under Article 93 of the CISG, a Contracting State (such as Canada) may declare the CISG is to extend to certain territorial units contained therein (i.e. the provinces and territories). In this regard the CISG thus extends to the provinces. Note should be made that several provinces have made declarations purporting to regulate the manner in which the CISG (or particular provisions therein) may be excluded by the parties to a contract. Such "territorial" declarations are not expressly authorized by the CISG and as such there is a risk that will they not necessarily be honored outside the relevant Canadian provinces.

(*2) *International Sale of Goods Act*, R.S.O. 1990 I.10. s 6

(*3) The *Incoterms* are a set of rules published by the International Chamber of Commerce which define the responsibilities of sellers and buyers for the delivery of goods under sales contracts. They are widely used in international commercial transactions.



2. Supreme Court of Canada to Hear International Arbitration Case

On July 5th, 2019 the Supreme Court of Canada granted leave to appeal a decision of the Quebec Court of Appeal involving the judicial recognition of an international arbitration award. Canada's legal landscape is "arbitration friendly". We will see just how arbitration friendly Canada will be when the Supreme Court of Canada renders its decision.

The case involves Instrubel n.v. ("Instrubel"), a Dutch company, seeking to enforce two international arbitration awards against the Republic of Iraq. After discovering that Iraq may have significant assets in Quebec, Instrubel began judicial proceedings in the Quebec courts for recognition and enforcement of the awards. Specifically, the International Air Transport Authority ("IATA"), whose headquarters is in Montreal, collects and remits fees from international airlines for use of airspace on behalf of airports and aviation authorities like the Iraqi Civil Aviation Authority ("ICAA"). Instrubel sought and obtained from the Superior Court of Quebec a writ of seizure before judgment by way of garnishment against IATA with respect to funds it collected and held for the ICAA. After learning that the funds in question were in fact located in IATA's bank account in Switzerland, the Republic of Iraq brought a motion to quash the writ on various grounds, including a challenge to the territorial jurisdiction of the Quebec courts to issue and enforce the writ.

A judge of the Superior Court of Quebec granted the motion to quash in part, finding that the writ of seizure was invalid insofar as it related to property located outside the province. The Quebec Court of Appeal set aside that decision, reinstated the writ of seizure in full, and dismissed the motion to quash, finding that the Quebec courts had jurisdiction to issue and enforce the writ.

Justice Mark Schrager reaffirmed that the Court's jurisdiction over IATA as a garnishee stemmed from the place at which the debt was collectible, rather than the location of the bank account. IATA was domiciled in Montreal, subject to the Québec courts. Justice Mark Schrager held that the debt was, for private international law purposes, located at the place where it was collectible, which was the domicile or principal place of business of the account debtor, stating at paragraph 42:

> IATA is domiciled in Montreal, subject to the jurisdiction of the Quebec courts. It owes money to ICAA and that account receivable or debt is for purposes of private international law located at the place where it is collectible, which is ordinarily the domicile or principal place of business of the account debtor (IATA) – i.e. in Montreal. Any contractual stipulation between ICAA and IATA that sums were payable in New York is *res inter alios acta* and does not bind Appellant or have any bearing on its rights. This is not a case of enforcement against a foreign asset; the property seized is the debt due by IATA to ICAA, which is situated in Montreal.

Justice Mark Schrager commented on the need for a workable result in the enforcement of awards by judgment creditors, stating at paragraph 50:

> More significantly it seems that the Appellant and others in similar positions which seek to execute an unsatisfied claim would be forced into an international "shell game" of somehow discovering (or guessing) where the mandatary/garnishee (IATA), deposited the money – a virtually impossible task. The law, correctly applied, should not lead, in my view, to such unworkable results. As the *in personam* debtor of ICAA, it matters not whether IATA deposited the money it collected and giving rise to such indebtedness in a bank account in Geneva, New York or Montreal. The *situs* of its bank account does not change the *situs* of the debt IATA owes to its creditor. As such, that funds were initially collected in Montreal or at an IATA branch office in another country is inconsequential. Thus, the judge should not have struck the words "either… or at

> any of its [IATA's] worldwide branches" from the writ of garnishment.

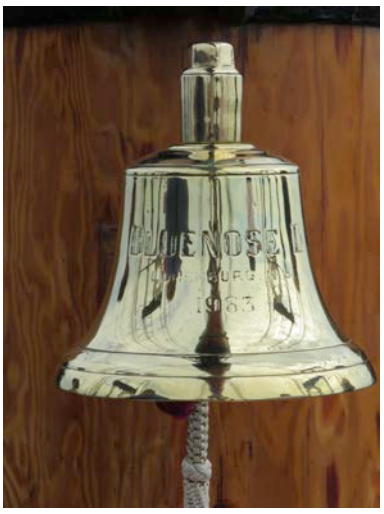
In a prior decision of the Supreme Court of Canada, *Chevron Corp. v. Yaiguaje* [2015] 3 SCR 69, the issue was the jurisdiction of an Ontario court in the recognition of a foreign judgment. The Supreme Court of Canada affirmed an Ontario Court of Appeal finding that an Ontario court had jurisdiction to adjudicate a recognition and enforcement action that also named a foreign judgment debtor's subsidiary.

In *Chevron,* the Supreme Court of Canada commented at paragraph 57 and 58:

> [57] In today's globalized world and electronic age, to require that a judgment creditor wait until the foreign debtor is present or has assets in the province before a court can find that it has jurisdiction in recognition and enforcement proceedings would be to turn a blind eye to current economic reality. The motion judge rightly opined as follows on this subject:
>
> > In an age of electronic international banking, funds once in the hands of a judgment debtor can quickly leave a jurisdiction. While it is highly unlikely that a judgment debtor would move assets into a jurisdiction in the face of a pending recognition action, in some circumstances judgment debtors may not control the timing or location of the receipt of an asset due to them; control may rest in the hands of a third party as a result of contract or otherwise. Where a judgment creditor under a foreign judgment learns that its judgment debtor may come into possession of an asset in the foreseeable future, it might want the recognition of its foreign judgment in advance of that event so that it could invoke some of the enforcement mechanisms of the receiving jurisdiction, such as garnishment. To insist that the judgment creditor under a foreign judgment await the arrival of the judgment debtor's asset in the jurisdiction before seeking recognition and enforcement could well prejudice the ability of the judgment creditor to recover on its judgment. Given the wide variety of circumstances - including timing - in which a judgment debtor might come into possession of an asset, I do not think it prudent to lay down a hard and fast rule that assets of the judgment debtor must exist in the receiving jurisdiction as a pre-condition to the receiving jurisdiction entertaining a recognition and enforcement action. [para. 81]
>
> I note that in one Ontario lower court decision, albeit in the context of *forum non conveniens*, the existence of assets has been held to be irrelevant to the jurisdictional inquiry: see *BNP Paribas (Canada) v. Mécs* (2002), 2002 CanLII 49490 (ON SC), 60 O.R. (3d) 205 (S.C.J.).
>
> [58] In this regard, I find persuasive value in the fact that other common law jurisdictions — presumably equally concerned about order and fairness as our own — have also found that the presence of assets in the enforcing jurisdiction is not a prerequisite to the recognition and enforcement of a foreign judgment.

It will be interesting to see if the Supreme Court of Canada continues this avenue of facilitating the recognition and enforcement of foreign judgments and arbitral awards.

Rui M. Fernandes



3. An End to Paper Reporting of Export Declarations is Coming

On July 8, 2019, Canada Border Services Agency (CBSA) announced a significant change concerning export declarations. As of June 30, 2020, CBSA will be eliminating paper reporting through Export Declaration form B13A. In its place, it will be instituting mandatory and exclusively electronic reporting by exporters.

With the extinction of paper filing, exporters will in its place have two methods available to them for filing declarations electronically: The Canadian Export Reporting System (CERS) and the G7 Export Reporting Electronic Data Interchange (G7-EDI). The latter is currently available to exporters wishing to register declarations electronically. CERS, however, is new. Exporters will be able to register to use it once established, which will be on March 16, 2020. Further, exporters currently using a further alternative for electronic reporting, the existing Canadian Automated Export Declaration (CAED) system, will have to switch to one of either G7-EDI or the new CERS. CERS is in fact being introduced to replace CAED, which will be decommissioned on the same day that exclusively electronic reporting becomes mandatory; that is, June 30, 2020.

CBSA describes the new CERS as "a web-based, self-service portal enabling exporters to submit electronic declarations (including bulk upload and summary reporting), to the CBSA." It thus differs from the existing G7-EDI system, in that the latter requires an investment by exporters in system specific computer software.

One exception to *exclusively* electronic reporting, however, will be in cases of goods requiring an export permit. In such cases, exporters will still have to present a paper copy of the new electronic export declaration together with the permit issued by the other government department (OGD) at the place specified in the permit or, if no place is specified, at the CBSA office nearest the place where the goods are exiting Canada. The submission of paper copies for goods requiring permits is not new, and this is not expected to change when the new electronic reporting requirements take effect in 2020.

These changes will impact most exporters since, generally speaking, the current paper reporting requirement applies to all goods exceeding CDN $2,000 in value (unless destined for the U.S., Puerto Rico or the U.S. Virgin Islands), except for those goods subject to one of the limited number of exceptions under the regulations granted pursuant to section 95 of the *Customs Act*. Exempt goods exceeding $2,000 in value are specified in the *Reporting of Exported Goods Regulations*, and CBSA provides a useful guide in its *Memorandum D20-1-1, Exporter Reporting* (Memorandum). Categories of exempted goods include, for example, containers, reusable skids, pallets, drums, and similar containers used in international commercial transportation, goods exported for repair or warranty repair of any value that will be returned to Canada and other similar exempt categories, a list of which is usefully included as Appendix A to CBSA's *Exporter Reporting* Memorandum. Compliance is important, since goods lacking an export declaration may be detained by CBSA, thus delaying delivery.

It is critical to note that, whether under the new electronic system or the existing paper declarations, the reporting of export must occur *before* shipping. The regulations further provide fairly precise deadlines as to how long in advance of shipping the reporting must occur. This timing requirement differs depending on the mode of export, moreover. For example, if goods are exported by aircraft, then reporting must be completed at least 2 hours before the goods are loaded; if by marine vessel, on the other hand, then at least 48 hours before the goods are loaded on the vessel. The complete list of time limits for reporting is also usefully and exhaustively set out in CBSA's *Exporter Reporting* Memorandum.

Regardless of the reporting method, properly completed export declarations are critical to ensuring that goods can proceed smoothly to their destination. Goods destined for export are subject to random detention by CBSA officers. Where this occurs, exported goods will not be permitted to proceed to their destination unless the officer is satisfied that the goods have been dealt with properly in accordance with the *Customs Act*. The absence of a properly completed declaration can thus lead to serious delays in shipment, and the cost of such detention are borne by the exporter.

Oleg M. Roslak

4. Frustration of an Employment Contract: How Long Does it Take?

An employee is disabled and not able to work. Canadian human rights laws require that the employer accommodate the employee to the point of undue hardship. In practice, what does this mean? How long does the employer have to keep the employee's job open? At what point in time can the employer safely take the position that the contract of employment has been frustrated and employment is at an end? The Ontario Divisional Court, in the recent decision of *Katz et al. v. Clarke* (*1), addresses these difficult issues.

Eugene Clarke was hired by Katz Group Canada Ltd. c.o.b. as Pharma Plus and/or Rexall (the "Employer") in 2000. He worked as a store manager and in July 2008 he started a leave of absence due to disability (depression). While on leave, in December 2008, he had a serious fall and broke his knee cap. He received both short term disability and long term disability. In January 2011 he had another fall injuring the same leg. In early 2013 the Employer's disability provider advised the Employer that, based on the medical information available, Mr. Clarke was unable to perform the essential duties of his position and there was no reasonable expectation that he would be capable of performing them in the foreseeable future. The Employer wrote to Mr. Clarke to advise that, based on information received to date and the prolonged absence from work, the employment relationship had been frustrated and would cease on December 31, 2013, at which time he would receive his 8 weeks' notice and 14 weeks' severance under the *Employment Standards Act, 2000* (where an employment contract is frustrated, an employee is still entitled to statutory notice and severance, but is not entitled to common law notice).

In response, Mr. Clarke, through his lawyer, advised the Employer that he was working very hard to get well so that he could return to work. The Employer asked Mr. Clarke to provide updated medical information including an estimated return to work date and the prognosis for recovery. Mr. Clarke did not respond. The Employer made a second request for this information, and still no response. As a result, the Employer proceeded to terminate Mr. Clarke's employment effective December 31, 2013 on the basis of frustration of the contract, and paid Mr. Clarke his statutory entitlements.

Mr. Clarke launched an action for wrongful dismissal damages and for damages under the *Human Rights Code*, including damages arising from the Employer's breach of its duty to accommodate him, by failing to try to get him back to work. The Employer defended the action on the basis that the employment contract was frustrated due to Mr. Clarke's absence from work for 5 years and the fact of no reasonable prospect of his returning to work. The Employer moved for summary judgement, seeking a dismissal of the action. The motions judge held that there was a genuine issue for trial, as Mr. Clarke's intention to return to work triggered the Employer's duty to accommodate, or at least consider accommodation.

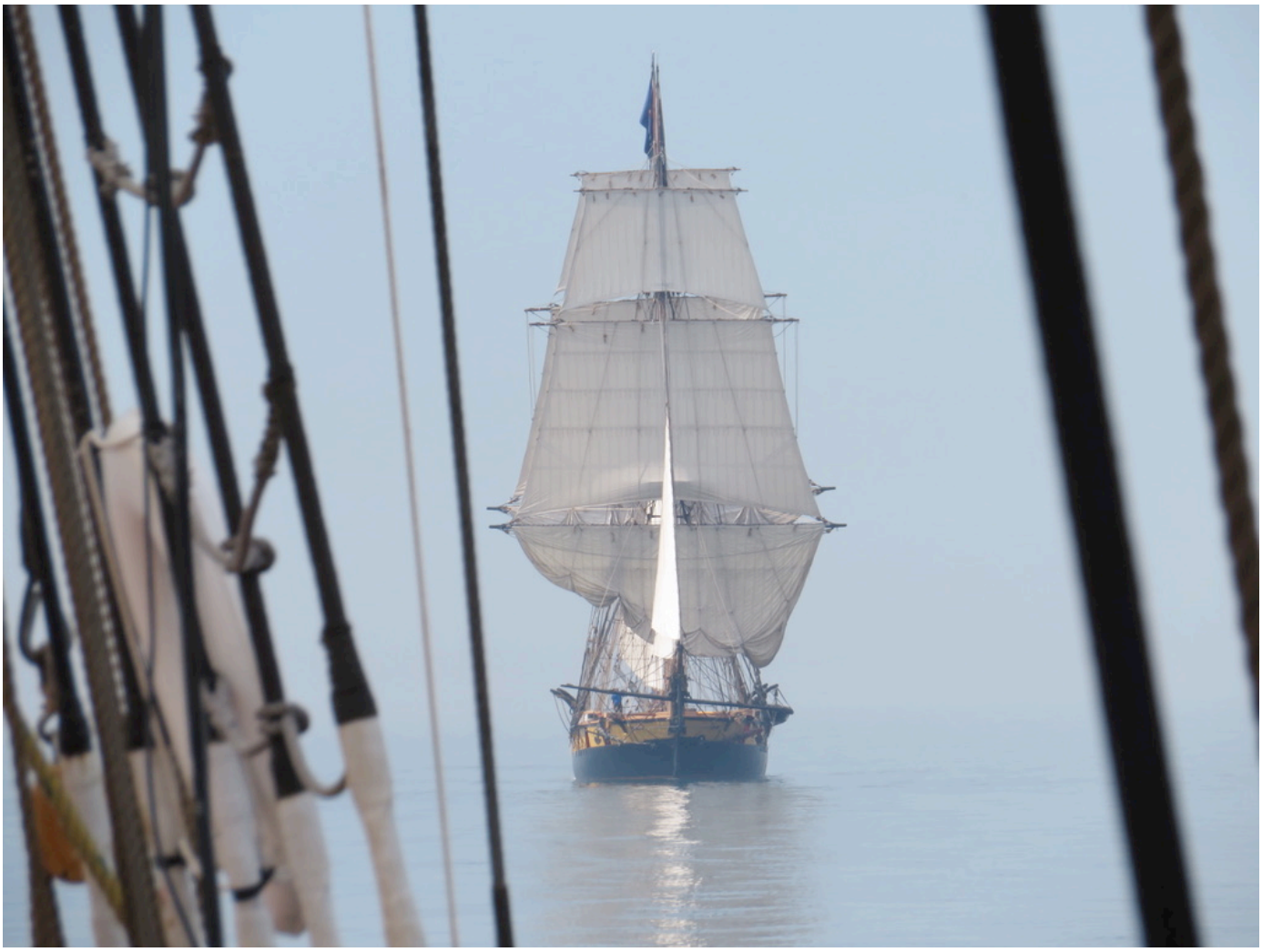
The Employer appealed the motion judge's decision to the Divisional Court, which set aside the motion judge's decision, granted summary judgement, and dismissed Mr. Clarke's action. The Divisional Court held that the motion judge had erred in finding that there was a genuine issue for trial based on his view that Mr. Clarke's expression of his desire to return to work triggered the Employer's duty to accommodate. Further, the Divisional Court held that the duty to accommodate is only triggered when an employee informs the employer of his or her wish to return to work **and** provides evidence of his or her ability to return to work, including any disability-related needs. An employer's duty to accommodate ends when the employee is no longer able to fulfill the basic obligations of the job for the foreseeable future. The motion judge erred when he misapprehended the medical evidence, which clearly stated that Mr. Clarke was totally disabled and unable to work "in any occupation at the time or for the foreseeable future".

In summary, Mr. Clarke had 8 years of active employment and a total of 14 years of employment. The employment contract was only frustrated when the Employer received medical evidence stating that due to disability, Mr. Clarke was unable to return to work for the foreseeable future.

While employers may be "frustrated" by the length of time it took the Employer in this case to be able to declare that the employment contract was frustrated, there are some valuable and practical lessons to be learned when dealing with employees on a long absence due to disability. Those best practices include communicating with the employee, obtaining updated medical information from the employee to support the continued absence, or to consider a return to work, or, as in this case, to determine whether there is any reasonable expectation that the employee will be capable of performing the duties of the job in the foreseeable future. Finally, once there is evidence to support frustration, this should be clearly communicated to the employee and statutory notice and severance paid.

Carole McAfee Wallace

Endnotes
(*1) 2019 ONCS 2188



5. Ontario Renewable Energy Updates

The former *Green Energy and Green Economy Act*, 2009 did not allow proponents of renewable energy generation facilities to secure land-use approval from municipal planning authorities. The *Green Energy Repeal Act*, 2018, restored municipal planning authority to ensure that *new* renewable energy proposals would only proceed in ready municipalities. Much uncertainty however continued as to whether operational and in-progress energy generation facilities would remain exempt from municipal siting approval or be subject to municipal planning authority, thus triggering potential planning amendments.

The adoption of Ontario Regulation 121/19 provided some clarity with regard to operational and in-progress energy generation facilities, provided one of the following conditions is met:

- The facility has been issued with a renewable energy approval prior to June 1st, 2019;
- The facility is the subject of a contract with the Independent Electricity System Operator under one of the following programs that was entered into before June 1st, 2019, and no party to the contract has exercised a right to terminate the contract before then:
    a) Feed-in Tariff Program;
    b) microFIT Program;
    c) Large Renewable Procurement;
    d) Renewable Energy Supply Program; or
    e) Renewable Energy Standard Offer Program.
- The construction and installation of the facility began before June 1st, 2019 and will be completed before August 31st, 2019.

Regarding expansion of existing projects, if the change involves a geographic expansion beyond that set out in the approval or license, then the change would be subject to municipal planning authority. If, however, the change takes place on the same parcel, or parcels of land, on which the generation facility is located, then the project change will enjoy the same exemption from municipal siting approval.

Ontario Regulation 122/19 established new requirements for the renewable energy approval (REA) required for new wind, solar or bio-energy projects that increase their name plate capacity by making a change on a different parcel of land than the one in respect of which the prior approval was granted. REA applications will need to include written confirmation that the proposed facility will not violate any zoning by-laws or zoning order under Part V of the *Planning Act* from the following bodies:

- Any local municipality where the project is located;
- Any planning board that has jurisdiction in the area where the project is located without municipal organization;
- The Ministry of Municipal Affairs and Housing if the project location is situated in an area without municipal organization or a planning board.

Robert Carillo

DISCLAIMER & TERMS

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CONTEST

This month we are giving away a complimentary ticket for attendance at our annual seminar day - in 2020 in Toronto Feb. 10 2020 - for the first individual to email us the name of the name of the tall ship depicted in photograph on page 6. Email your answer to info@fernandeshearn.com with a subject line "Newsletter contest". First response with the correct answer wins.