THE NAVIGATOR

IN THIS ISSUE

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FORCE MAJEURE AND THE CORONAVIRUS

The Coronavirus is taking an increased toll on life and health. Its spread has also started to impact the supply chain of goods and the provision of related services. 2003 saw the spread of Severe Acute Respiratory Syndrome (SARS). The Coronavirus is here. Future similar events are inevitable. These events - involving labour and port shutdowns, travel bans, government quarantine and the like – promise to adversely affect compliance with contractual mandates. Is there risk management or contingency planning available for participants in the supply chain of goods? The purchase of contractual liability insurance coverage may be possible, being dependent on its availability and scope not to mention its affordability. Risk management through insurance is beyond the scope of this article. Deliberate and astute contracting may however offer some protection to the provider of goods and services, in addition to certain other legal defences that are addressed below (*1).

Contracting and Force Majeure Clauses

"Force Majeure" is a civil law concept which aims to allow the continuation of a contract with the parties agreeing that certain events may excuse a party from the performance of its obligations, preventing the contract from otherwise being "frustrated" or considered to be at an end.

Literally translated, "Force Majeure" means "superior force". It is a common clause in contracts that essentially frees one or both parties from liability or obligation when an extraordinary event or circumstance occurs which is beyond their control.

The following is an example of a contractual Force Majeure clause:

Neither Party shall be liable to the other for failure to perform any of its obligations under this Agreement during any time in which such performance is prevented by fire, flood, or other natural disaster, war, embargo, riot, civil disobedience, or the intervention of any government authority, or any other cause outside of the reasonable control of the Shipper or Broker, provided that the Party so prevented uses its best efforts to perform under this Agreement and provided further, that such Party provide reasonable notice to the other Party of its inability to perform.

FIRM AND INDUSTRY NEWS

- **Fernandes Hearn LLP** is a proud new member of **Globalaw™**, a top tier international affiliation of over 100 law firms. As a member of **Globalaw™**, Fernandes Hearn LLP will now have networking access to over 4500 attorneys in 85 countries which promises to enhance our transportation, trade law and business practice.

- XXI **International Congress of Marine Arbitrators,** March 7 to 14, 2020, Rio de Janeiro. **Rui Fernandes** will be presenting a paper on "Limitation of Liability and Arbitration in Canada" and on "Blockchain and Arbitration". **Kim Stoll** will also be attending.

- **Tulane Admiralty Institute,** March 11-13, 2020 New Orleans Louisiana

- **Arctic Shipping Summit,** March 11-14, 2020, Montreal Quebec.

- **Women with Drive Leadership Summit,** March 12, 2020 Toronto Ontario, **Carole McAfee Wallace** will be attending.

- **Marine Insurance London 2020**, March 20, London England.

- **International Conference on Maritime Law and Transportation,** March 26 -27, 2020, Paris France.

- **Transportation Intermediaries Association Capital Ideas Conference & Exhibition**, April 1-4, 2020 Austin Texas. **Gordon Hearn** will be presenting a paper on "Legal Risks in the Freight Brokerage Industry and Related Insurance Risk Management"

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Standard clauses such as the above do not explicitly contemplate a global health epidemic such as the Coronavirus. Study, analysis and legal advice are recommended before a party to a contract can simply declare a Force Majeure event and in ceasing satisfaction of (or attempts in satisfying) their obligations. The relevant contract and circumstances may not effectively provide Force Majeure relief:

1. Does the clause by its terms address events such as mandatory office closures, lockdowns, travel bans and supply chain interruption?

2. Was the situation preventable or outside the reasonable control of the party seeking relief from its obligations? Were there reasonable contingency plans and, if not, should there have been any?

3. Are there notification requirements on the party of the party seeking to invoke the protection to the other, and have they been followed?

4. Is there a contractual or other any other legal obligation (for example, by statute) for the party seeking relief from obligation to mitigate the consequences of a force majeure event, such as by way of the reasonable absorption of expenses, rescheduling of business plan(s) and/ or the re-distribution and application of resources, assets and manpower?

"Force Majeure Certificates"

The *China Council for the Promotion of International Trade* ("CCPIT") issued a communication on January 30th encouraging businesses who have failed to fulfill an international trade contractual obligation as a result of the Coronavirus outbreak to apply for a "Force Majeure Certificate" excusing their performance of lack thereof.

In particular industries a party who maintains that circumstance has prevented its performance of a contractual obligation may request a "Force Majeure Certificate" with a view to having a neutral authority – such as a Chamber of Commerce – certify that Force Majeure elements exist so as to relieve the requesting party from liability for non-performance of a contract. The aim of the certificate is to excuse companies from not performing or only partially performing contractual duties owing to a Force Majeure event. While the evidentiary effect of such official declarations is unclear, the availability of Force Majeure related relief will of course depend on individual facts and circumstances and applicable law, such official certification may assist in proving that a Force Majeure event has occurred.

The Coronavirus has shut down plants across China – a disruption that could get much worse if rolling quarantines and suspended rail and air links prevent the return of the millions of blue-collar laborers to workstations. Bloomberg News reports (*2) that a car-parts supplier has become one of the first known companies to obtain a Force Majeure Certificate in China in the hope that it may help avoiding penalties for breaching contractual obligations because of the Coronavirus outbreak. The manufacturer, eastern-China based Huida Manufacturing (Huzhou) Co. supplies steering system components to a plant of Peugeot maker PSA Group in Africa. CCPIT reports that it issued the Certificate on February 2nd. More companies are reported to have received this document, which according to the CCPIT is recognized by enterprises, governments, trade associations and customs officials in more than 200 locations around the world.

The United Nations Convention on Contracts for the International Sale of Goods ("CISG")

A party to a CISG contract may find protection in the event of a Force Majeure event.

The CISG was 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. It has since been adopted by China and 91 other countries. 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 and China will be subject to the CISG, unless that regime is specifically excluded in accordance with its "opt-out" provisions.

The CISG Force Majeure relief is found at Article 79, which provides as follows:

(1) A party is not liable for failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or part of the contract, that party is exempt from liability only if:

a) he is exempt under the preceding paragraph, and
b)the person whom he has so engaged would be exempt if the provisions of that paragraph were applied to him.

(3) the exemption provided by this article has effect for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Noting in this article prevents either party from exercising any right other than to claim damages under this Convention.

The International Chamber of Commerce "ICC Hardship Clause 2003"

Parties to international contracts may also include or incorporate by reference the ICC Hardship Clause 2003 which may provide certain relief from a Force Majeure event:

1. A party to a contract is bound to perform its contractual duties even if events have rendered performance more onerous than could reasonably have been anticipated at the time of the conclusion of the contract.

2. Notwithstanding paragraph 1 of this Clause, where a party to a contract proves that:

a) The continued performance of its contractual duties has been excessively onerous due to an event beyond it reasonable control which it could not reasonably have been expected to have taken into account at the time of the conclusion of the contract, and that

b) It would not reasonably have avoided or overcome the event or its consequences, the parties are bound, within a reasonable time of the invocation of this Clause, to negotiate alternative contractual terms which reasonably allow for the consequences of the event.

3. Where paragraph 2 of this Clause applies, but where alternative contractual terms which reasonably allow for the consequences of the event are not agreed by the other party to the contract as provided in that paragraph, the party invoking this Clause is entitled to termination of the Contract.

Certain Defences Under Certain Liability Regimes

Particular services provided in particular industries may draw or involve Force Majeure defences as a matter of applicable law. While beyond the scope of this article, one such example is found in the *Hague Visby Rules* which governs ocean carrier bill of lading liability between most of the worlds maritime trading nations. These *Rules* provide a carrier shall be exempt from liability resulting from quarantine restrictions or by governmental restraint on the flow of people and goods – historically referred to as the "restraint of princes, rulers or people". The "take away" here is that in certain sectors there may be defences for the failure by a party to perform an obligation even where there is no contract provision providing it relief or where the common law doctrine of "frustration" addressed below is not applicable.

At Common law: Frustration of Contract

In limited circumstances where performance of a contract has become truly impossible or where the change of circumstances is considered to be so fundamental that it would be unjust to hold the parties to their original agreement a court might find that a contract has been "frustrated". Where a contract is frustrated, the contract will be terminated, and the parties released from future obligations.

If a contract does not contain a Force Majeure clause, the doctrine of frustration may accordingly still come into play. As a rule, frustration is however harder to establish and as such a detailed Force Majeure clause is preferable as a risk management tool.

Conclusion

Parties who have experienced disruptions to their businesses as a result of the Coronavirus must review their contractual wording(s) and take legal advice concerning the same and/or applicable laws prior to taking any business strategy. There may or may not have been a Force Majeure event and their go-forward rights and obligations call for careful study. Much will depend on the specific provisions of contractual provisions and the rights and remedies under the applicable law.

Both the past and present indicate the particular need for a party to an international sales or service contract to consider protections in the nature of those discussed above.

Gordon Hearn

Endnotes

(*1) This article is not legal advice. It is not recommending any particular course of action. It is intended to illustrate the need to proactively obtain legal advice.

(*2) www.bloomberg.com (February 11, 3:49 EST)

2. Court of Appeal Affirms Contractual Arbitration Term by Reference

In the recent decision of *Hydro Hawkesbury v. ABB Inc.* 2020 ONCA 53 the Ontario Court of Appeal had occasion to consider whether clauses in terms and conditions referenced in a contract for the supply of a piece of equipment should be upheld.

ABB Inc. ("ABB") was the manufacturer of a tap changer supplied to Pioneer Transformers Ltd. ("Pioneer"). The tap changer was installed in a transformer sold by Pioneer to Hydro Hawkesbury. The transformer failed and the motion judge granted Hydro Hawkesbury summary judgment against Pioneer. Pioneer had cross-claimed against ABB Inc. ("ABB"). The motions judge stayed the crossclaims because he found that the Orgalime standard terms and conditions (*1) between Pioneer and ABB included clauses requiring disputes between the parties to be resolved by arbitration and which excluded liability for consequential damage. His Honour dismissed Pioneer's argument that they did not receive proper notice of the standard terms and conditions, as such were simply referred to in the two documents creating the contract. These conditions were in essence an incorporation by reference (where one contract incorporates the terms of another document). Incorporation by reference is common in building contracts.

Incorporation by reference has been upheld in building contracts only if it does not affect rights and obligations outside of the project work *per se*. For example, specifications, profit sharing formulas and tender conditions have been upheld when incorporated by reference. On the other hand, some clauses incorporated by reference have not been applied. These include liquidated damages clauses, insurance, lien security etc.

The courts in other common law jurisdictions have also considered the incorporation of arbitration clauses from one contract to another. These decisions illustrate the nuances of this practice, especially when those clauses affect rights and obligations outside of the project work *per se*. The incorporation by reference of arbitration clauses from one contract to another has been the subject of a number of cases in the United Kingdom and Australia.

The general trend is that an arbitration clause in one contract is only incorporated into the other contract if the arbitration clause in the first contract is specifically referred to in the second agreement. This rule is sometimes referred to as the "rule in Aughton" named after the decision in *Aughton Ltd. v. M.F. Kent Services Ltd*.(*2) The rule was effectively applied over 100 years ago

by the House of Lords in *TW Thomas & Co. Ltd v. Portsea Steamship Co Ltd (The Portsmouth)* (*3)

In dismissing the appeal, the Court of Appeal in *Hydro Hawkesbury,* agreed with the motions judge that proper notice and tacit acceptance of the conditions were present when Pioneer accepted the terms of the tap changer's delivery by ABB. The Court added(*4):

> This is not a case where the signing party could not reasonably have been expected to read the contract before signing it. As the motion judge noted at paras. 8-10, the appellant was a "fairly sophisticated corporate consumer" and the Orgalime terms and conditions, which were readily available, were specifically referred to in two documents creating the contractual relationship between the appellant and ABB. The two documents were dated two weeks apart and the appellant confirmed the second document three days after receiving it. In the circumstances of this case, a "fairly sophisticated corporate consumer" doing business with a foreign supplier of electrical components in international markets would reasonably be expected to have reviewed the terms of both documents and would expect clauses of the type contained in Orgalime.

The Court of Appeal upheld the Orgalime terms and confirmed that the dispute between Pioneer and ABB was to be resolved by arbitration. This appears to be a change of direction from other common law jurisdictions.

Rui M. Fernandes

Endnotes

(*1) Orgalime is a European-level federation that represents Europe's technology industries engages with EU policymakers on behalf of its membership, speaking for 31 national industry associations and 15 European sector associations. It has a number of standard terms and conditions, referred to as Orgalime, used by the technology industries.

(*2) (1991), 57 B.L.R. 1; 31 Con. L.R. 60 CA

(*3) [1912] A.C. 1 HL.

(*4) at para. 6 of the judgment

3. Cannabis and Trucking in 2020

Recreational cannabis in plant or dried form has been legal in Canada since October 2018. The newly gained freedom to ingest cannabis also comes with a new host of restrictions and rules that are meant to protect the public which presents a new set of possible problems. In the short time that has passed, many have had to navigate the changes and none more so than the trucking industry, which has faced a driver shortage well before cannabis was legalized in Canada and is subject to zero-tolerance for commercial truck drivers.

For non- zero tolerance workplaces, the legal use of medical cannabis continues to be front and centre. To date, challenges continue with regard to human rights issues and accommodations for employees who have a prescription for medicinal use balanced by the employer's rights and interests including whether the employee is in a safety sensitive role and whether it is an undue hardship on the employer to permit cannabis use. There continues to be uncertainty as to whether use of cannabis (medical or recreational) in the workplace can lead to termination especially given that there is no test for impairment but only past use. Some employers are turning to zero tolerance policies, but change may be inevitable as the public becomes used to cannabis in daily life. There are even scientific studies suggesting that some people perform better when on medical cannabis (with a higher CBD or basically non-psychotropic component) as it is said to normalize brain function and assists in reducing the use of prescription medication such as opioids.

With legalization of recreational marijuana in Canada, the issues have become even more complex and now we are about to experience "Cannabis 2.0". There have been stumbles in the roll out of legalized cannabis as an industry, including in the distribution and supply chain. Regulatory amendments will, however, encourage the growth of the cannabis industry into potentially billions of dollars over the next 5 years. The new wave of legalization was passed in October 2019, including edibles (such as candies, chocolate, beer etc.), topicals and extracts that will likely spark the interest of those people who might otherwise not be interested in smoking cannabis. There will be more opportunity in the food and beverage industry as a natural extension of legalization.

Edibles raise new concerns regarding concentrations of THC and the time it takes to digest, potency and possible inadvertent overdose as well as exposure to youth and children, for example. Governments have considered amendments including age of consumption, licensing requirements, distribution and wholesale models. Ontario has just recently abandoned the retailers' lottery system in favour of an open application process. The new rules allow cannabis to be sold alongside accessories and allow licensed producers to have their own onsite stores. Needless to say, litigation involving the cannabis industry has already commenced and this is just beginning.

Companies must follow regulatory requirements at every level of production, distribution and sales. Insurance will be needed to cover the greater risks faced in manufacturing, producing and selling cannabis. It is likely that there will be further growth, mergers and more market consolidation.

As with any change, some are more affected than others. For Canadians, legalized cannabis is here. The United States is a different complicated story and our businesses are often intertwined.

In the United States, recreational cannabis is fully legal in 11 states and decriminalized/ medical cannabis is legal in 33 states. (*1) However, federally, cannabis is still illegal in the United States and the requirements for commercial truck drivers are becoming more onerous. Overall there does not seem any movement to legalize at the federal level even though the availability and acceptance of legalized cannabis is growing.

Commercial truck drivers in Canada face zero tolerance requirements regarding driving, whereas the ordinary Canadian public must also be found to be impaired to face penalty. For those carriers and drivers who operate cross border into the United States, there are even greater changes for them in 2020 (see below).

Key Takeaways for 2020

Here are some key takeaways you should know about recreational cannabis and its relationship to the trucking industry in 2020:

- Commercial truck drivers continue to face a zero-tolerance requirement in Canada and in the United States. In Canada, there is no mandatory government random drug testing and generally random testing is not permitted.

- Cannabis is legal in Canada; however, cannabis is listed on the US federal government's Schedule 1 List of illegal drugs (along with heroin, ecstasy and LSD). U.S. truckers are regulated federally. It is illegal to transport all cannabis — including medical cannabis — between states, even though some jurisdictions have legalized cannabis. Canadian truckers driving in the U.S. must comply with U.S. laws.

- Availability of legalized cannabis is expected to increase the amount of cannabis used in the population. The Conference Board of Canada report on *Alcohol and Drug Testing in Canadian Workplaces* (September 2019) stated that cannabis use is increasing and half a million current users admit consumption before and during work.

- From US states where cannabis has been legalized, statistics from Colorado show that marijuana related deaths increased by 48% in the three-year average after legalization. From Washington, in the two years following legalization, statistics show that the percentage of drivers involved in fatal crashes and who had recently used marijuana had increased from 8% to 17%. (*2)

- All Canadian cannabis contains at least some THC and is more potent today, containing 13-20% higher THC content than historically (*3). Edibles raise new concerns about THC concentration, slower/unpredictable absorption, and possible inadvertent overdose.

- Canadian workers are generally protected from drug testing under the human rights and privacy rights legislation. Employees must be fit for duty and employers must satisfy obligations under the *Occupational Health and Safety Act.* Drug testing may be permissible in some limited circumstances, such as an extremely dangerous workplaces or if there is reasonable cause like a history of drug abuse or as part of rehab programme. Where a requirement to drive in the U.S. is part of a trucker's employment, motor carriers must drug test to comply with U.S. regulations.

- In Canada, drivers legally authorized to use medical cannabis will not be subject to Ontario's zero-tolerance drug requirements for commercial drivers, but penalties and criminal charges will still be laid if the driver is impaired.

- An employee who has a medical cannabis prescription must be "accommodated" by Canadian employers unless they are employed in a safety-sensitive position. Canadian employers have no duty to accommodate an employee regarding use of recreational cannabis. Cannabis addiction may be considered a disability and must be accommodated to the point of "undue hardship".

- US commercial truck drivers are subject to random drug testing including pre-employment, after an accident, and after a failed drug test. The U.S. Federal Motor Carrier Safety Administration doubled random drug testing rates to 50%, up from 25% of driver positions as of Jan. 1, 2020. This was done when the testing surveys showed that the positive rate for controlled substances random testing was equal to or greater than 1%. (The minimum rate for random alcohol testing remains at 10%). Even a trace amount removes a driver immediately from service. All failed drug tests are treated the same way and impairment is not a consideration. There is no carve out for medical cannabis at the federal level.

- Urine and hair follicle testing show the presence of THC from all cannabis products including edibles and topicals. Oral fluid testing will detect smoked, vaporized and edible cannabis products, but not topicals.

- In the U.S., oral fluid testing is being considered for mandatory Department of Transportation drug testing. Further, a proposed federal rule would allow motor carriers to choose either currently approved urine testing or the newer hair follicle testing. Follicle testing is more accurate, is more easily administered and there is less cheating. With a drug detection window of up to 90 days, less repeat testing makes it cheaper.

- In Canada, oral fluid testing is used to detect the presence of THC, cocaine and meth, but not for impairment. Police officers can conduct a drug recognition evaluation and, with reasonable suspicion that a driver has taken such drug, can demand oral fluid testing with approved drug screening equipment. Failing such a test leads to an immediate driving suspension and possible criminal impaired driving charges. For commercial truck drivers, there is zero tolerance, so presence of any drug is all that is required to fail the test. It is recommended that commercial drivers refrain from using recreational cannabis in any form. Medical cannabis can only be used in Canada, as there is no carve out as noted.

- Testing for impairment/drugs has been only partially successful. The Draeger Drug Test 5000 (the saliva test used by police to detect THC) has shown error ratings of up to 14%, and there are unresolved concerns regarding its use in Canada's climate. (*4)

- Impairment testing using an app known as "Druid" is underway regarding functional impairment from drugs, alcohol, concussion, cognitive decline, or fatigue, which information is compared to a baseline, when used in an employment context. (*5)

- Online starting Jan. 6, 2020, the US federal Drug and Alcohol Clearing House (the "Clearing House") centralized electronic database is administered by the United States Department of Transport and the Federal Carrier Motor Safety Association ("FMCSA") and is required for tracking commercial drivers' licences regarding positive tests for illegal drugs, alcohol use, refusals to take tests, and other violations. The purpose is for data sharing regarding disqualified drivers and to enforce disqualifications. Records remain for five years after a violation, and thereafter will be kept in the FMCSA database.

Employers, third party administrators, substance abuse professionals and medical review officers will all be responsible for reporting this data. Employers, third party administrators, drivers, state authorities, the National Transportation Board and the FMCSA will all have access to this information. Employers must not allow any driver who has a Clearing House record to drive unless the Clearing House confirms that specified conditions for return to safety sensitive duties are met. Canadian motor carriers must also comply if they have drivers operating in the US and must obtain employee cooperation. Refusing to consent to queries about their status in the Clearing House will jeopardize drivers' ability to work. Employers subject to privacy legislation In Canada must consider their statutory obligations and whether the release of information is in keeping with the law (Canadian and/or US). Each case must be reviewed on its own merits. Both carriers and truckers should review all requirements regarding the Clearing House carefully.

Finally

The new world is here regarding cannabis in Canada and there are a lot of challenges. It will be interesting to see the effect of cannabis on litigation generally, which will no doubt include discoverability of information from the Clearing House database regarding drivers and their histories and possible expansion of liability based on company guidelines and policies (or lack thereof) regarding cannabis. We will keep an eye on it for you.

Kim E. Stoll

Follow Kim on LinkedIn and at url: linkedin.com/in/kim-stoll-transportationlaw

Endnotes

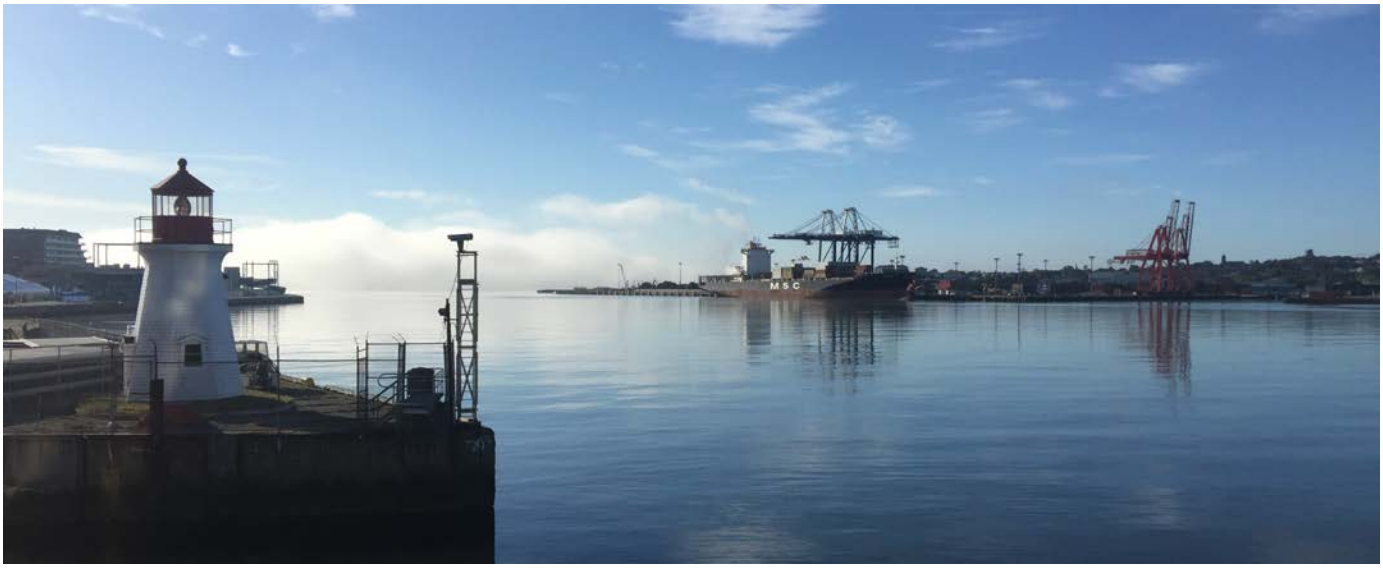
(*1) https://disa.com/map-of-marijuana-legality-by-state

(*2) Governors Highway Safety Association, April 2017 as quoted in Evans, DG, *Marijuana Legalization Will Cause Many Problems for Missouri Law Enforcement and Schools*, Mo Med, May-June 116(3) 164-167, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6690273/

(*3) Marijuana Break, *Average THC Strength Over Time: A 50 Year Look at Marijuana Potency, 20-01-09, https://www.marijuanabreak.com/average-thc-content-over-the-years*

(*4) *Evaluation of Draeger DrugTest 5000 in a Naturalistic Setting*, Journal of Analytical Toxicology Vol 42 Issue 4 May 2018, as quoted in *Concerns raised about first device to be approved for roadside drug detection, Aiello, Rachel, August 9 2018 CTV News Online*

(*5) Helem, Sakira, *A paradigm shift in impairment testing for cannabis: The Druid App,* Medical Cannabis Network, Feb 7 2020 https://www.healtheuropa.eu/a-paradigm-shift-in-impairment-testing-for-cannabis-the-druid-app/94154/



4. Is a Full and Final Release Really Final?

When terminating an employment relationship, without cause, an employee is entitled to reasonable notice of the termination or pay in lieu thereof. A written employment agreement may provide that the employee is only entitled to the statutory minimum entitlements. If there is no employment agreement, or if the termination provision in the agreement is poorly drafted, the employee is entitled to common law notice, which is calculated based on the employee's age, length of service and character of the position held. Common law notice is always greater than statutory notice, often significantly so.

Any payment made to an employee in excess of the statutory amounts to which they are entitled will be conditional on the employee executing a full and final release in favour of the employer. The employee will be required to acknowledge that the payment in excess of the statutory amounts is being made in full and final settlement of all claims and potential claims arising from the employment relationship. This gives the employer comfort that if it pays an additional amount, the employee will be precluded from suing the employer.

The enforceability of a release is not often tested in the courts, but a recent decision of the Human Rights Tribunal of Ontario ("HRTO") addressed this issue. In *Townsend v. John Deere Financial Inc.* (*1) the employee had settled her wrongful dismissal claim with her former employer, signed a release and then commenced an application with the HRTO claiming that the employer had discriminated against her, based on disability and reprisal under the *Human Rights Code*. The employer asked the HRTO to dismiss the application on the basis that the employee had signed a full and final release with respect to the same issues.

The employer's request was addressed in a preliminary hearing. The facts were not in dispute. After a little more than 6 months of employment, the employer's human resources manager met with the employee and advised her that her employment was being terminated without cause. The manager read the termination letter and the release to the employee and asked her if she had any questions. The employee did ask a few questions including how to retrieve her belongings. The manager also gave the employee the opportunity to seek legal advice or speak to other advisors and advised the employee that she had two weeks to return the release. The following day the employee delivered the signed release. Her signature was not witnessed, and the employee agreed that the manager could witness it.

The termination letter included a clause that provided: I HAVE READ, UNDERSTAND AND HEREBY VOLUNTARILY ACCEPT THE TERMS AS SET OUT ABOVE IN FULL AND FINAL SATISFACTION OF ALL CLAIMS WHICH I MIGHT HAVE AS A RESULT OF THE TERMINATION OF MY EMPLOYMENT BY JOHN DEERE FINANCIAL INC. I AGREE THAT I WILL SIGN THE ENCLOSED RELEASE.

The full and final release provided that in consideration for the payments made to the employee, she was releasing the employer from all actions arising out of 1) her employment; 2) the termination of her employment; and 3) any claim under the Ontario *Human Rights Code*. The release also required the employee to agree that she would not make any claim or taken any proceedings against the employee. Finally, the release required the employee to acknowledge that she had the opportunity to seek legal advice and that she understands the release and was executing it with full knowledge of its significance.

At the preliminary hearing the employee did not dispute that she signed the Release, or that it purports to preclude her from any action against the employer, including the application to the HRTO. She argued that the Release should not preclude her from her application because she could not afford a lawyer at the time that she signed the release, and that she signed it without fully understanding it and that she could not understand everything because of her mental illness.

The HRTO summarized the general principle with respect to the enforcement of a release, which is that where the literal and ordinary meaning of the release demonstrates a clear intention on the part of the parties to fully and finally release the releasee from all claims, it should not be easily disturbed. The HRTO also referred to the 4 criteria which must be met to depart from the general principle, which are as follows: 1) whether the party fully understood the significance of the release; 2) whether the party received sufficient and fair consideration for signing the release; 3) evidence of economic pressure; and 4) evidence of psychological or emotional pressure amounting to duress.

The employee agreed that the payment she received was fair consideration, and that the employer had not applied any economic, psychological or emotional pressure on her. Her focus was on the first criteria. She argued that because of her inability to afford a lawyer and because of her mental health issues, she was prevented from fully understanding the implications of the Release.

The employee did not present any medical information about her disability or whether her mental health issues prevented her from understanding the Release. The employee also did not present any evidence of her financial circumstances or her efforts to seek legal advice. The HRTO stated that the employee took the Release home the day she received it, signed it and returned it the following day, with no apparent attempt to obtain legal advice before doing so. In these circumstances the HRTO was not prepared to set aside the release and dismissed her application.

While the outcome in this case was a good result for the employer, it does suggest that there may be circumstances in which an employee could successfully argue that a signed release should not be a bar to commencing a claim against an employer. In any settlement of an employment dispute it is imperative that the release be clearly worded, that the consideration or payment being made in exchange for the release is sufficient, that the language around the claims being released be precise and that it expressly refers to the *Human Rights Code* and any other applicable employment legislation, and that it includes a provision that confirms that the employee was given the opportunity to seek legal or professional advice, and that a reasonable period of time to seek that advise is given. Other common provisions in a release in an employment dispute include no admission of liability on the part of the employer, the employee's agreement to keep the terms of the settlement confidential and, where appropriate, the employee's agreement to not disparage the employer. A release is a contract and as with any form of contract, clear drafting and the party's ability to seek legal advice before signing are key to its enforceability.

Carole McAfee Wallace

Endnotes
(*1) 2019 HRTO 1471 (CanLII)

5. Forum Selection Clauses: Proceed with Caution

A well thought-through written contract can be of great assistance in any commercial relationship. Contracts spell out exactly what the rights and obligations of each side in a commercial relationship are and, just as importantly, also set out the rules the parties must follow in case there is ever a dispute. One critical dispute resolution rule that the parties should always consider including is to agree on the "forum" of any dispute; that is, exactly where a court proceeding or other dispute resolution process must take place. This is especially important where parties reside in different jurisdictions and do business across borders. If a good working relationship does happen to go sour, you don't want to leave it as an open question which court in which corner of the world will have the power to decide your fate.

A very recent decision of the Court of Appeal for Ontario serves as a perfect illustration of an attempt to do just that, and what can go wrong when the forum selection clause the parties included was poorly worded. In *Select Comfort Corporation v. Maher Sign Products Inc.* (*1) the failure to write a contract clause that would make all the parties' disputes subject to the courts of Ontario left the defendant with an enforceable judgement against it, made by a court in Minnesota, for $610,236.23 (USD), plus interest in the amount of $145,236.22, at a rate of 10%, plus $763.11 in legal costs, with no possibility of challenging it. So what went wrong?

The facts

The plaintiff in this case, Select Comfort Corporation (now called Sleep Number Corporation), is a company doing business mainly from Minneapolis, Minnesota. Maher Sign, the defendant, is based in Mississauga. Maher Sign sells signage across Canada and the U.S. In 2012, Select Comfort entered an agreement with Maher Sign for some of its product, custom signs. Their contract included the following clause:

> This Agreement shall be construed in accordance with the laws of the Province of Ontario and the Customer hereby attorns to the jurisdiction of the Courts of Ontario for the purpose of pursuing any legal remedies here under.

Almost immediately after delivery of the signs Select Comfort alleged that the product was defective. Maher Sign had done some additional retro-fit work an attempt to address the complaints of Select Comfort, but Select Comfort still wasn't satisfied. Select Comfort then sued Maher Sign for breach of contract, among other things, in the U.S. District Court in Minneapolis, despite the forum clause designating Ontario as the venue where the parties would decide their disputes.

Relying on the clause, Maher Sign didn't defend the Minnesota action. Following U.S. law, Select Comfort then brought a motion for default judgment. Maher Sign hired a Canadian lawyer who wrote to the court in Minnesota disputing jurisdiction, but otherwise did not defend the motion. Because Maher Sign didn't take proper steps to challenge the motion on the grounds of lack of jurisdiction, the U.S. District Court judge gave Select Comfort its judgment for approximately $1,000,000 (CAD). Maher Sign similarly failed to appeal the U.S. judgment in the time permitted by its courts, and Select Comfort then proceeded to bring a motion to enforce the judgment in Ontario.

Forum selection clauses and foreign proceedings

In Ontario, foreign judgments that were obtained without fraud are generally enforceable. On the motion brought to enforce Select Comfort's U.S. judgment in Ontario's Superior Court of Justice, from which Maher Sign recently appealed, the motion judge criticized Maher Sign's failure to defend the action in Minnesota despite the forum selection clause. He noted that even where parties agree to such a clause, it merely is one reason among many that might lead a foreign court to decline to exercise jurisdiction in favour of Ontario. The Minnesota court could still

assume jurisdiction because it had a "real and substantial connection" to the subject matter of the dispute (*2). Given that Select Comfort was based in Minneapolis and had Maher Signs' product installed there, Select Comfort had no difficulty in showing that its dispute had just such a connection with the courts in Minnesota.

As the motion judge noted, furthermore, the Minnesota court might even have used its own discretion to decline jurisdiction in Ontario. This still requires someone to attend at the Minnesota proceeding to make this case, however. What value is the contract clause if the Minnesota court could effectively ignore it? It is evidence on which a foreign court might rely to refuse jurisdiction. The clause alone is not enough, but it can be useful, if only Maher Sign had taken the additional step to advance the argument in the foreign proceeding that the court should not hear the action because of the parties' choice of Ontario as their venue for resolving their differences. Because of this and other reasons, the Superior Court made an order to enforce Select Comfort's U.S. judgment here.

Just this month, the Court of Appeal for Ontario sealed Maher Sign's fate and went one step further with regards to the wording of the contract clause itself. On appeal, the court noted that if the clause is not an *exclusive* jurisdiction clause, the appeal must fail. It then went on to find that the clause, quoted above, was "permissive" rather than exclusive. That means that, although the parties *could*, relying on the clause, settle their disputes in the Ontario courts, they did not *have* to do so. Maher Sign and Select Comfort could easily have signaled a different intention simply by adding the word "exclusive" in front of "jurisdiction," but they failed to do so.

Conclusion

This case teaches two valuable lessons. The first is that, if you have a genuine desire that all contractual disputes be settled in a particular locale, make sure that you include an *exclusive* jurisdiction clause so that your preference is respected. The second lesson is that, even when you have included such a clause in your agreement, you may still need to go to the jurisdiction where a claim is improperly brought and present a legal defence. Otherwise, you might find yourself in the position of Maher Sign, with a million-dollar debt and no way out of it.

Oleg M. Roslak

Endnotes
(*1) 2020 ONCA 95 [*Select Comfort*].
(*2) *Select Comfort Corporation v. Maher Sign Products Inc.*, 2019 ONSC 2478 at paras. 29-32.

6. Who is an Importer? CITT Adopts a Substance-Based definition.

Given how central the concept of an importer is to a customs regime, it is perhaps surprising that the *Customs Act (*1)*, in effect in Canada, fails to afford a definition to the term. While certain related laws do define the term importer, including the *Special Import Measures Act* ("SIMA") (*2), which governs anti-dumping and countervailing duties, there is a definitional vacuum in the core legislation.

This is problematic given that there can be very serious implications for an importer who brings goods into the Canadian marketplace. Importers are liable for all duties and taxes associated with the goods brought into Canada, and in the event of a trade compliance audit, the importer is responsible for all reassessments of duties and taxes owing. The reassessment can be many times greater than the original assessment if the compliance audit uncovers that for example special duties were owed under SIMA, or if the goods are reclassified to codes that are subject to quotas and exorbitant duties apply to goods imported in over the access commitment quota.

In order to process an import transaction into Canada, it is necessary that a Canada Revue Agency Import/Export ("RM") Business Number be declared on the B3 Canada Customs Coding Form ("B3"). Non-residents can register to import in their own name into Canada by obtaining an RM Business Number; however, they are subject to verification processes by CRA in order to confirm their legitimacy as a transacting entity. There are also limited cases in which a customs broker is permitted to use its RM Business Number to process the importations as detailed in D Memorandum 17-1-5, one such exception is for non-commercial (casual) goods.

The Canadian International Trade Tribunal ("CITT") recently ruled on this issue of the implications of the use of the brokerage's RM account in the context of a dispute between the Canada Border Services Agency ("CBSA") and Landmark Trade Services ("Landmark"), a licensed customs brokerage that had lent its business number to transactions for the importation of various food produce to non-commercial residential addresses.

Following a compliance audit, the CBSA determined that the goods should be reclassified, and in certain cases this resulted in high duty rates as the goods fell outside of access commitments.

The CBSA issued Detailed Adjustment Summaries (DASs) in respect of the subject transactions and sought to collect payment of the recalculated duties identified on the DASs from Landmark on the basis of its use of its RM Business Number.

Landmark brought an appeal before the CITT arguing that it could not be compelled to pay the increased duties since it was not by any practical definition the importer as it did not purchase the goods, participate in the structuring of the sales transaction, receive the goods, or benefit financially from the sale of the goods, apart from a small customs brokerage fee.

Landmark further argued that the legislative history of the Customs Act shows that the removal of a definition of importer from the legislation was intended to limit broker exposure, and also that it could not be held liable for duties where it could not satisfy the burden of proof concerning the classification of the goods.

The CBSA refuted the argument and relied on the B3 in its endeavours to hold the broker accountable. The CBSA underlined that the broker in this case had gone beyond the traditional role of a customs broker acting as agent for an importer since here Landmark had used its own business account to account for the goods and pay duties.

The CITT member firstly identified a circular problem insofar as if the customs broker were in fact the importer of the goods, then the brokerage business as importer would not be able to claim within access commitments that were designated for non-commercial uses, and therefore all of the goods would have to be reclassified as over access commitment.

In addressing the pivotal question of who the importer of these goods was, the CITT aligned with Landmark and employed a substance-based test to identify the importer as opposed to using a form-based test looking at the paperwork trail that would have traced directly back to Landmark. The CITT founds precedence for this approach in a SIMA premised decision dating to 1987. (*3) The CITT summarized that to identify an importer, it is necessary to look at "the totality of the matter".

The CITT noted that the eventual recipient of the goods were named as the respective importers on the B3s notwithstanding the use of the broker's RM account with CRA, and were clearly the consignees of the goods and not the customs broker. Based on this, the CITT was satisfied that Landmark was "not in reality the importer of the goods in issue" but rather "a paper intermediary with no ties to the sale of the goods in issue".

The CITT moreover rejected an argument that Landmark should be held fully accountable for the taxes and duties as a result of its failure to be properly appointed as an agent for the transactions in issue. The CITT was not amenable to this argument holding that an "improperly authorized customs broker does not *ipso facto* become the importer if it is not properly authorized".

This is a victory for customs brokers who have lent their import/export account information to their clients. This decision is likely however to have ramifications since the outcome severely curtails the enforcement mechanisms available to the CBSA to ensure that the duties owed are remitted. It remains open for the decision to be appealed up to 90 days after it was rendered to the Federal Court of Appeal. (*4) There is the potential for the already narrow scope of instances where customs brokers are permitted to lend their RM Business Number to import transactions per D-Memo 17-1-5 to be further eroded, and those exceptions are likely to be construed increasingly narrowly by the CBSA.

Mark Glynn

Endnotes

(*1) *Customs Act* (R.S.C., 1985, c. 1 (2nd Supp.))
(*2) *Special Import Measures Act* (R.S.C., 1985, c. S-15)
(*3) *Artificial Graphite Electrodes and Connecting Pins (Re)*, [1987] CIT No 14
(*4) *Customs Act* at s. 68(1)

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