Federal Court of Appeal  Cour d'appel fédérale

Date: 20121108

Docket: A-378-11

Citation: 2012 FCA 284

CORAM: **PELLETIER J.A.**
GAUTHIER J.A.
MAINVILLE J.A.

BETWEEN:

CANADA MOON SHIPPING CO. LTD.
and
FEDNAV INTERNATIONAL LTD.

Appellants

and

COMPANHIA SIDERURGICA PAULISTA-COSIPA

Respondent

and

T. CO. METALS LLC

Plaintiff

Heard at Montréal, Quebec, on March 26, 2012.

Judgment delivered at Ottawa, Ontario, on November 8, 2012.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: PELLETIER J.A.
MAINVILLE J.A.

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REASONS FOR JUDGMENT

GAUTHIER J.A.

INTRODUCTION

[1] The main issue in this case is the effect to be given to an arbitration clause in a voyage charter-party where the charterer is pursued by the ship-owner and the time charterer in third party

proceedings in the context of an action brought by the holder and endorsee for value of the bills of lading for damage to the cargo. In a decision reported at 2011 FC 291, Prothonotary Morneau (the Prothonotary) dismissed the charterer's motion for a stay of the third party proceedings in favour of arbitration proceedings as provided by the charter-party as well as the motion based on *forum non conveniens*. On appeal, Justice Scott of the Federal Court (the Judge), in a decision reported at 2011 FC 1067, allowed the appeal and granted the stay. That decision is now appealed to this Court.

FACTS

[2] The facts are set out in some detail at paragraphs 4 to 19 of the Prothonotary's decision. For present purposes, they can be summarized as follows.

[3] On or about July 22, 2004 Companhia Siderurgia Paulista-Cosipa (Cosipa) entered into a voyage charter-party in GENCON form with Fednav International Ltd. (Fednav) in respect of steel products (cargo) from Brazil to Canada. The ship used to carry the cargo was the M/V Federal Ems owned by Canada Moon Shipping Co. Ltd. (Canada Moon). That ship was operated under a time charter-party between Canada Moon and Fednav.

[4] It should be noted that there are two Fednav corporations in these transactions, Fednav International Ltd and Fednav Limited. The parties agree that for the purposes of this dispute, each corporation can be taken as the agent of the other so that there is no difference in their positions. I

note, however, that as will be discussed later on, the Judge found as a fact that Fednav Limited acted as agent for Canada Moon when it sought to obtain a letter of indemnity (LOI) from Cosipa.

[5] Clauses 5(a) of the voyage charter-party deals with the responsibility for the loading and offloading of the cargo while clause 45E refers to the use of plastic covers on the cargo:

> 5(a) The cargo shall be brought into the holds, loaded, stowed and/or trimmed, tallied, lashed, and/or secured by the Charterers and taken from holds and discharged by the receivers, free of any risk, liability and expense whatsoever to the Owners. The Charterers shall provide and lay all dunnage material as required from the proper stowage and protection of the cargo on board, the Owners allowing the use of all dunnage available on board.
>
> 45E Whenever Charterers/Shippers cover the cargoes with plastic canvas in order to protect them during the voyage, Owners guarantee that said plastic canvas placed at loadport will be withdrawn only at the time of discharge of cargoes at respective disports [sic].
> Should Owners fail in fulfilling the above they will be fully responsible for any penalty, charges, extra expenses, etc. that Charterers may face arising therefrom.

[6] A dispute arose between Cosipa, the Master of the vessel and Fednav with respect to the use of plastic covers on the cargo prior to loading. To resolve this dispute, at the request of Fednav Limited acting on behalf of both Canada Moon and Fednav, the disponent owner, Cosipa, issued a LOI addressed to Fednav Limited. That letter, dated November 10, 2004, referenced the voyage charter-party. The operative part of the letter reads as follows:

> Provided that the Owners/Master ensure that the vessel's ventilation system will be properly functioning during all the voyage, Charterers hereby confirm that they will relieve Master/Vessel/Owners/Managers from any liability, and will hold them harmless for any possible cargo damage by moisture condensation under the plastic cover as a result of restricted ventilation of the cargo.

[7] Two bills of lading consigned to the order of T. CO Metals LLC were issued for and on behalf of the Master of the ship to Cosipa as shipper on November 16 and 18, 2004, respectively. These bills of lading included the following provision: "Subject to all terms, conditions, clauses and exceptions as per charter-party dated July 26, 2004 (sic) at Rio de Janeiro including arbitration clause". The transferable bills of lading were negotiated by Cosipa and presented by T. Co Metals LLC (T. Co. Metals) to obtain delivery of the cargo described therein in Canada. Although the Judge refers several times in his reasons (see paragraphs 52, 58, 59, 76 and 91) to the fact that Cosipa was the holder of the bills of lading at all material times, the parties agree that this was a factual error.

[8] On October 20, 2008, T. Co. Metals commenced an action in the Federal Court seeking compensation from Canada Moon and Fednav (collectively the defendants) for damage to the cargo.

[9] In its Statement of Claim, T. Co. Metals alleges that the defendants received the cargo in good order and condition at the port of loading for carriage and delivery in the same condition to Toronto. According to T. Co. Metals, the defendants, in breach of their contract, failed to safely load and deliver the cargo in good order and condition. In addition, T. Co. Metals alleges that the defendants were negligent. T. Co. Metals claims as the holder and endorsee for value of the bills of lading covering the carriage of the damaged cargo.

[10] The Defendants filed a common Statement of defence. In it, they deny that they were bound to load, stow, handle, discharge or store the cargo, and deny that they had in fact loaded, handled,

discharged or stored the cargo and that these operations had been undertaken by Cosipa (in Brazil) or T. Co. Metals (in Toronto). The defendants plead that the bills of lading negotiated to T. Co. Metals were expressly subject to all terms, conditions clauses and exceptions as per the charter-party dated July 2[2], 2004 at Rio de Janeiro including clause 5(a) quoted above.

[11] At the same time as they filed their Statement of Defence, the defendants also filed a common third party claim against Cosipa. In that claim, the defendants pleaded the terms of the charter-party, in particular clause 5(a), and alleged that the cargo was in fact loaded, stowed, tallied, lashed and secured by Cosipa. The defendants also pleaded that if the loss was caused by the use of plastic sheeting to cover the cargo, Cosipa had agreed to indemnify them for such loss pursuant to the LOI.

[12] The Defendants obtained a Letter Rogatory from the Federal Court to serve their third party claim on Cosipa.

[13] Cosipa responded to the third party claim by bringing a motion for a stay of such proceedings on the basis that the parties had agreed to submit disputes arising under the charter-party to arbitration in New York.

THE DECISIONS BELOW

[14] The Prothonotary dismissed Cosipa's motion for a stay. He determined (a) that the contract between Cosipa and Fednav is found primarily in the voyage charter-party and not in the bills of

lading; and (b) that the LOI issued by Cosipa to Fednav was an amendment to their voyage charter-party agreement.

[15] The Prothonotary does not deal expressly with the position of Canada Moon *per se*.

[16] However, the Prothonotary refused to give effect to the arbitration clause of the voyage charter-party since he found that the latter was a "contract for the carriage of goods by water" within the meaning of subsection 46(1) of the *Marine Liability Act*, S.C. 2001, c. 6 (the *Act*). which is reproduced below for ease of reference:

46. (1) If a contract for the carriage of goods by water to which the Hamburg Rules do not apply provides for the adjudication or arbitration of claims arising under the contract in a place other than Canada, a claimant may institute judicial or arbitral proceedings in a court or arbitral tribunal in Canada that would be competent to determine the claim if the contract had referred the claim to Canada, where

(*a*) the actual port of loading or discharge, or the intended port of loading or discharge under the contract, is in Canada;

(*b*) the person against whom the claim is made resides or has a place of business, branch or agency in Canada; or

(*c*) the contract was made in Canada.

46. (1) Lorsqu'un contrat de transport de marchandises par eau, non assujetti aux règles de Hambourg, prévoit le renvoi de toute créance découlant du contrat à une cour de justice ou à l'arbitrage en un lieu situé à l'étranger, le réclamant peut, à son choix, intenter une procédure judiciaire ou arbitrale au Canada devant un tribunal qui serait compétent dans le cas où le contrat aurait prévu le renvoi de la créance au Canada, si l'une ou l'autre des conditions suivantes existe :

a) le port de chargement ou de déchargement — prévu au contrat ou effectif — est situé au Canada;

b) l'autre partie a au Canada sa résidence, un établissement, une succursale ou une agence;

c) le contrat a été conclu au Canada.

[17] The Prothonotary reasoned that charter-parties would come within the meaning of "contracts for the carriage of goods by water", and that if Parliament had wanted to exclude them from the scope of section 46 of the *Act*, it could have easily done so by adopting wording similar to that contained in the *Hamburg Rules* (Schedule 2 to the *Act*, articles 2 and 21) confirming that they were excluded.

[18] Cosipa also argued that the third party claim should nevertheless be stayed on the ground that Canadian courts were *forum non conveniens*. The Prothonotary examined each of the factors identified in *Spar Aerospace Ltd v. American Mobile Satellite Corporation*, [2002] 4 S.C.R. 205 (*Spar Aerospace*), and concluded that, on balance, they were not of sufficient weight to displace the defendant's choice of forum. As a result, the Prothonotary dismissed the motion for a stay of the third party proceedings.

[19] The Judge allowed Cosipa's appeal from the Prothonotary's decision. Unlike the Prothonotary, the Judge found that subsection 46(1) of the *Act* did not apply to charter-parties *per se*. Before coming to this conclusion, the Judge carefully considered the ordinary meaning of the words used, the scheme of the *Act*, the object of the *Act*, the intention of Parliament and Canada's international obligations.

[20] Though he found that the expression "contract for the carriage of goods by water" in subsection 46(1) was wide enough, in its ordinary meaning, to include charter-parties, the Judge nonetheless concluded that, in context, subsection 46(1) did not apply to charter-parties.

[21] Canada Moon also argued before the Judge that, in any event, its situation was different from that of Fednav because its contractual relationship with Cosipa was governed by the bills of lading. Thus, even if subsection 46(1) of the *Act* did not apply to the voyage charter-party, it certainly applied to the contract evidenced by the bills of lading. Cosipa responded by arguing that it was not party to the said contract. Canada Moon further submits that insofar as it is concerned, the LOI could not be viewed as an amendment of the charter-party (even if this was so vis-à-vis Fednav) as it was never a party to that charter-party.

[22] The Judge confirmed that the contract between Fednav and Cosipa is found primarily in the charter-party rather than the bills of lading. He disagreed with Canada Moon's position that its relationship with Cosipa is governed by the bills of lading. After erroneously noting that the said bills of lading remained in the hands of Cosipa at all material times, the Judge found that they only function as receipts for the goods loaded onboard the ship (paragraph 59 of his reasons).

[23] The Judge also found that:

> More importantly, the respondents admit that the bills of lading incorporated the Gencon standard form charter-party by reference. Thus, the charter-party would still remain the applicable contract for the carriage of goods between the defendants (Fednav and Canada Moon Shipping) and the appellant.

[24] The Judge then went on to agree with the Prothonotary that, in the circumstances, the LOI constituted an amendment to the charter-party rather than a separate stand alone agreement.

[25] In the result, the Judge stayed the third party claim in the Federal Court pending the conclusion of the arbitration in New York under the terms of the voyage charter-party. In light of this last conclusion, the Judge did not have to address the motion based on *forum non conveniens*.

ISSUES

[26] The ultimate issue in the appeal is the proper disposition of Cosipa's motion for an order staying the third party claim in favour of arbitration proceedings pursuant to the voyage charter-party. As I agree that Canada Moon and Fednav stand in different positions in relation to the charter-party, their positions must be considered separately.

[27] As regards Fednav, the main issue is the application of subsection 46(1) of the *Act* to charter-parties. As regards Canada Moon, the first issue is the proper interpretation of the LOI, specifically whether the indemnity offered by Cosipa can only be enforced through arbitration proceedings and whether the bills of lading evidence a distinct contract of carriage of goods between Cosipa and Canada Moon.

[28] The questions to be determined therefore are:

> 1) Is Cosipa entitled to a stay of proceedings of the third party claim brought against it by Fednav?
>
> 2) Is Cosipa entitled to a stay of proceedings of the third party claim brought against it by Canada Moon?
>
> 3) If the answer is no in either case, is Canada a *forum non conveniens* for the third party claim?

STANDARD OF REVIEW

[29] This is an appeal from a decision of a court of first instance. Questions of law are to be reviewed on the correctness standard while questions of fact and mixed fact and law (apart from extricable errors of law) are to be reviewed on the standard of reasonableness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paragraphs 8, 10, and 36.

[30] Except for the proper meaning of "contract for the carriage of goods by water" in section 46 of the *Act* which, in my view, is an extricable question of law, the other issues raised in this appeal raise questions of mixed fact and law.

Is Cosipa entitled to a stay of proceedings of the third party claim brought against it by Fednav?

[31] By its motion, Cosipa seeks to hold Fednav to the bargain it made to arbitrate disputes arising out of the charter-party. Clause 19(b) of the charter-party reads as follows:

> (b) This Charter Party shall be governed by and construed in accordance with Title 9 of the United States Code and the Maritime Law of the United States and should any dispute arise out of this Charter party, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and a third by the two so chosen; their decision or that of any two of them shall be final, and for purpose of enforcing any award, this agreement may be made a rule of the Court. The proceedings shall be conducted in accordance with the rules of the Society of Maritime Arbitrators, Inc.

[32] The Courts will generally respect the choice of commercial entities to resolve their disputes by arbitration:

> Absent legislative intervention, the courts will generally give effect to the terms of a commercial contract freely entered into, even a contract of adhesion, including an arbitration clause.
>
> *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531 at paragraph 2

[33] In the normal course, then, Fednav would be bound by its agreement to arbitrate. The issue is whether there has been legislative intervention, specifically, whether subsection 46(1) of the *Act* relieves Fednav from its agreement to arbitrate disputes arising under the charter-party. This in turn requires us to determine the meaning of the expression "contract for the carriage of goods by water" found in that subsection.

The meaning of "contracts for the carriage of goods by water"

[34] Fednav submits that the Judge erred by looking at external aids (particularly the schedules to the *Act* and the transcript of the Standing Committee on Transport and Government operations for March 27, 2001 hearings), after having accepted that voyage charter-parties in general could come within the ordinary meaning of these words (paragraph 72 of his reasons). It says that there was no ambiguity that justified such an approach.

[35] According to Fednav, the Judge ignored the fact that Canada could well restrict or prohibit arbitration under the *United Nations Foreign Arbitral Awards Convention Act*, S.C. 1986, c. 21, R.S.C. 1985, c. 16 (2nd Supp.) and the *Commercial Arbitration Act*, R.S.C., 1985, c. 17 (2nd

Supp.). It also says that the Judge gave too much weight to the external aids and that he misconstrued the temporal application of section 46 by treating it simply as a transitional measure.

[36] In my view, there is no doubt that the Judge's general approach was justified. To give effect to the modern rule of construction, one must consider the entire context before concluding that there is no ambiguity in a legislative provision. If this were not so, one would simply pay lip service to the modern rule, falling back into the old "plain meaning rule".

[37] The following passage from the decision of the Supreme Court of Canada in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at page 622, is particularly apposite:

> The first part of the inquiry under s. 245(4) requires the court to look beyond the mere text of the provisions and undertake a contextual and purposive approach to interpretation in order to find meaning that harmonizes the wording, object, spirit and purpose of the provisions of the *Income Tax Act*. There is nothing novel in this. Even where the meaning of particular provisions may not appear to be ambiguous at first glance, statutory context and purpose may reveal or resolve latent ambiguities. "After all, language can never be interpreted independently of its context, and legislative purpose is part of the context. It would seem to follow that consideration of legislative purpose may not only resolve patent ambiguity, but may, on occasion, reveal ambiguity in apparently plain language." See P. W. Hogg and J. E. Magee, *Principles of Canadian Income Tax Law* (4th ed. 2002), at p. 563. In order to reveal and resolve any latent ambiguities in the meaning of provisions of the *Income Tax Act*, the courts must undertake a unified textual, contextual and purposive approach to statutory interpretation. [My emphasis]

[38] It is for this reason that the Supreme Court of Canada had concluded in a previous paragraph (paragraph 10), on which the Appellants relied, by saying that:

> The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[39] In *Canada 3000 Inc. (Re)*, 2006 SCC 24, [2006] 1 S.C.R. 865, Justice Binnie, writing for the Court, had to determine if the word "owner" as used and defined in the *Civil Air Navigation Services Commercialization Act*, S.C. 1996, c.20, included the legal titleholder. It was evident that the ordinary and grammatical meaning of the word would include it. Still, the learned Judge noted at paragraph 45 that "it is necessary to suspend judgment on the precise scope of the word 'owner' in section 55(1) and first to examine the 'contextual' elements of the Drieger approach". In the end, he gave more weight to these elements and concluded that this term did not include the legal titleholder.

[40] As noted by Ruth Sullivan in *Sullivan on the Construction of Statutes*, 5th edition (Markham, Ont.: LexisNexis, 2008) at page 21:

> Texts are not either plain or ambiguous; rather they are more or less plain and more or less ambiguous. The factors that justify outcomes in statutory interpretation are multiple, involving inferences about meaning and intention derived from the text, non-textual evidence of legislative intent, specialized knowledge, common sense and legal norms. These factors interact in complex ways. It is never enough to say the words made me do it.

[41] In the present case, the Judge was very prudent in his use of the so-called external aids. With respect to the schedule containing the *Hamburg Rules*, which rules are not yet in force in Canada, he noted at paragraph 75:

> […] the Court cannot rely on the remainder of the *Hamburg Rules*, which are external to the *Act* to interpret section 46, nor can it ignore the fact that the wording of section 46 is taken directly from article 21 of the *Hamburg Rules*.

[42] The Judge said nothing new with respect to the purpose and origin of section 46, as this was canvassed in details in an earlier decision of this Court in *Magic Sportswear Corp. v. Mathilde Maersk (The)*, 2006 FCA 284, [2007] 2 F.C.R. 733 (*Magic Sportswear*), at paragraphs 56-66.

[43] Furthermore, the Judge's comments under the headings of "Scheme of the Act" and "Object of the Act" indicate that he correctly understood that a Court must consider all evidence, direct and indirect, in respect of the purpose of the *Act* and the provision under review, as well as the legal context in which it was adopted, which includes the mischief to be addressed. In my view, all the elements considered by the Judge were admissible, and the final construction depends on the weight given to all of them. This is where the Judge parted view with the Prothonotary, who gave predominant weight to the ordinary meaning of the words in subsection 46(1), whereas the Judge believed that this was not determinative in this case.

[44] I am not convinced that the Judge gave undue weight to the elements before him. In any event, I will now explain why I would reach the same conclusion, even assuming without deciding that, as argued by Fednav, section 46 is not a transitional measure.

(i) Legal context

[45] Part V of the *Act* which incorporates section 46 essentially reproduced the 1993 statute giving effect in stages to two international conventions not ratified by Canada. Thus, as part of the legal

context, it is worth considering how these conventions, which will be simply referred to as the *Hague-Visby Rules* and the *Hamburg Rules*, came about, what they covered, and what mischief they were meant to address.

[46] As noted in *Maritime Law* by Edgar Gold C.M., Aldo Chircop Q.C. & Hugh M. Kindred (Toronto: Irwin Law, 2003) at pages 433-434, in the 19th century, common ocean carriers were treated virtually as insurers of the goods they carried. This led to the inclusion of very wide exclusions of liability clauses in the bills of lading issued by such carriers. Under the near-sacrosanct application of the "freedom to contract" principle at that time, these provisions were enforced by the Court even if these contracts were "contracts of adhesion" for the most part. Clauses of the bills of lading were essentially boilerplate, and were dictated by the carriers.

[47] After an unsuccessful attempt at creating a more balanced international regime, a number of States, such as the United States (in 1893), Australia (in 1904), New Zealand (in 1908), and Canada (in 1910), adopted what might be considered the first consumer protection legislation regulating the rights and obligations of ocean carriers under bills of lading, albeit in the commercial world.

[48] As noted by the learned authors, "It soon became clear that a proliferation of national legislation imposing different rules on merchant ships, which, by the nature of their business, call in many different countries, would cause legal confusion and inhibit trade" (*Ibid*. at page 433).

[49] Thus, shortly after the Comité Maritime International (CMI) was founded in 1897, efforts were made to establish an international uniform set of rules dealing with the rights and obligations of carriers under contracts of carriage of goods evidenced by bills of lading used by common carriers. This resulted in the so-called *Hague Rules* of 1924, which convention came into force in 1931. Those rules were widely adopted throughout the world. Canada incorporated them in its domestic legislation in 1936.

[50] Updating and revising the *Hague Rules* became necessary because of various technological developments in the shipping trade including, for example, the use of containers. The *Hague-Visby Rules* were adopted in 1968.

[51] Then, in the mid-1970s, The United Nations Commission on International Trade Law (UNCITRAL) became interested in this topic for the first time and undertook to create a new convention dealing with carriage of goods by sea. This resulted in the *Hamburg Rules* of 1978. These rules were meant to also apply to new types of sea carriage documents used by common carriers – for example the sea waybill, which had different characteristics than the traditional bills of lading. These rules provided, among other things, for higher limits of liability than the *Hague-Visby Rules* and fewer excepted perils. They also applied to carriage from as well as to a Contracting State, and included for the first time, detailed provisions dealing with jurisdiction and arbitration clauses (articles 21 and 22).

[52] As noted in *Maritime Law* (*Ibid*. at page 434), "About two dozen states, few of whom are significant maritime trading nations, apply the *Hamburg Rules*. The rest of the world operates under the *Hague Rules* or the *Hague-Visby Rules* or some variants of them." Since the date of publication of this book, five more countries implemented the *Hamburg Rules*. None are significant maritime trading nations.

[53] In 1991, Australia adopted a two-step approach giving immediate effect to the *Hague-Visby Rules* (Schedule 1 to the Australian Act) with some amendments. For example, like the *Hamburg Rules*, the Australian rules were meant to apply to other "sea carriage documents", such as sea waybills, consignment notes and other non-negotiable documents. The *Hamburg Rules* were included in a second schedule which ultimately never came into force. In effect, the Australian statute provided a maximum period of 10 years during which the Schedule containing the *Hamburg Rules* could be proclaimed in force.

[54] In 1993, Canada adopted a similar approach with a new *Carriage of Goods by Water Act* (1993 c. 21, repealed), which extended the application of the *Hague-Visby Rules* to domestic shipments. The *Carriage of Goods by Water Act* also extended their application to shipments from countries that implemented the *Hague-Visby Rules*, even if, like Canada, they were not Contracting States within the meaning of that convention.

[55] In 2001, the *Act* was adopted to consolidate all Canadian legislation dealing with marine liability. Part V of the *Act* replaced the 1993 *Carriage of Goods by Water Act*. More will be said later in relation to section 46, the only new provision in Part V.

[56] To complete this history, it is worth noting that the so-called *Rotterdam Rules* were adopted in 2008. These rules cover more subject-matter than any of the previous rules discussed above, and are meant to apply to all the contracts of carriage of goods covered by the *Hamburg Rules*, including for the first time any such contract concluded solely through electronic communication. These rules have yet to come into force, although the United States, France, Spain, Sweden, Norway and the Netherlands are among the 24 signatories of the convention.

[57] It is important to note that none of the international regimes discussed above regulate the rights and obligations of parties to a charter-party. They all specifically mention that the rules will essentially only come into play when a distinct contract for the carriage of goods exists or "springs to life", for example through the endorsement of a bill of lading between a carrier and a person who is not a party to a charter-party.

[58] At this stage, it is useful to describe the different types of charter-parties that are used, and explain why these contracts were not regulated like the contracts for carriage covered by the various international regimes.

[59] Charter-parties are normally described as contracts of hire of a ship. In French they are referred to as "contrats d'affrètement" (See William Tetley, *Marine Cargo Claims* 4th edition (Cowansville, Quebec: Editions Yvon Blais, 2008) at page 350, note 24). There are three main types of charter-parties.

(i) the bareboat or demise charter, which provides for the hire of an unmanned ship;

(ii) the time charter-parties, which are contracts for the hire of a fully manned ship for a specific duration. These include the more recent type of time charter, referred to as a slot-charter, where for example a carrier will hire from a competitor specific space or a slot (containership) for a specific time period;

(iii) the voyage charter-parties, which are used to hire a specific ship or type of ships for one or more voyages.

[60] As pointed out by John Wilson in *Carriage of Good by Sea* 6th edition (Essex: Pearson Education Limited, 2008) at page 3, it is common knowledge that:

> A charter-party is a contract which is negotiated in a free market, subject only to the laws of supply and demand. While the relative bargaining strengths of the parties will depend on the current state of the market, shipowner and charterer are otherwise able to negotiate their own terms free from any statutory interference. In practice, however, they will invariably select a standard form of charter-party as the basis of their agreement, to which they will probably attach additional clauses to suit their own requirements. These standard forms have a variety of origins. Some have developed over a number of years in association with a particular trade, such as grain, coal or ore, while others have been designed by individual firms with a monopoly in a particular field, such as the transport of oil. A considerable number which have appeared during the past century, however, are the products of the documentary committees of such bodies as the United Kingdom Chamber of Shipping, the Baltic and International Maritime Conference and the Japanese Shipping Exchange, on many of which both shipowner and charterer interests are represented.

> The existence of these standard forms is of considerable advantage in international trade where the parties may be domiciled in different countries and their negotiations hampered by language problems. In such circumstances, parties conversant with the terms of a standard form are unlikely to be caught by an unusual or unexpectedly onerous clause, and accordingly can concentrate their attention on the essential terms covering such matters as freight, laytime and demurrage rates.

[61] One can readily see that the imbalance in the bargaining power that is the mischief that led to the development of the various international regimes discussed above did not exist in relation to charter-parties. The liner trade (common carriers operating regular services in certain areas, using the sea carriage documents covered by the various international regimes) is simply quite different from the tramp trade (chartered vessels). There was thus no policy to restrict the freedom to contract of parties to such agreements.

(ii) Arbitration and jurisdiction

[62] The traditional mode of settling charter-party disputes has been arbitration. This is based on the belief of the parties that these disputes require technical and specialized knowledge that experienced arbitrators possess. In fact, many arbitrators specialize in certain types of charter-parties for certain types of cargos, e.g. oil. The arbitral case law is important. However, it is not commonly available because most arbitration awards are private.

[63] In the 1970s, one could often find jurisdictional clauses and even some arbitration clauses in bills of lading. This raised the question of whether such clauses were contrary to Article III (8) of the *Hague Rules* or *Hague-Visby Rules* which prohibit any clause lessening the carrier's liability. At the time, national laws were not uniform as to how they dealt with such jurisdiction clauses. For

example, the validity of such clauses was controversial even in the United States. In fact, it is only in the 1990s that the debate ended with two decisions of the U.S. Supreme Court in *Carnival Cruise Lines Inc. v. Shute*, 499 U.S. 85 (1991), 1991 A.M.C. 1697 (jurisdiction clause), and in *Vimar Seguros Y Reaseguros S.A. v. The MV Sky Reefer*, 515 U.S. 528 (1995), 1995 A. M. C. 1817 (arbitration clause) recognizing the enforceability of such clauses in bills of lading.

[64] Furthermore, the cost of enforcing small cargo claims outside of one's jurisdiction was seen as unfair by many delegations at UNCITRAL, especially when the carrier imposed a forum that had no relation to the carriage performed (for example, a clause giving jurisdiction to courts in London, England, in a bill of lading covering a voyage from the United States to Africa). This is what led to the adoption of articles 21 and 22 of the *Hamburg Rules*.

[65] In some countries that did not generally embrace the *Hamburg Rules*, legislators chose to incorporate into their domestic legislation implementing the other international regimes, provisions similar to articles 21 and 22 of the *Hamburg Rules*. These countries include South Africa (1986), Australia (1991), New Zealand (1994) and the Scandinavian countries (Norway, Finland, Denmark and Sweden) (1994).

[66] At first glance, subsection 46(1) appears to be the Canadian response to the mischief which led to the adoption of articles 21 and 22 of the *Hamburg Rules* and to the national provisions referred to above. This view is somewhat corroborated by what one finds in the Legislative

Summary cited by the Judge at paragraphs 82 and 83 of his reasons. More particularly, in respect of section 46, one can read at paragraph 83 of the reasons that:

> According to departmental sources, the fact that Hague-Visby Rules, unlike the Hamburg Rules, contain no jurisdiction clause has given rise to some problems where the inclusion of foreign jurisdiction clauses in bills of lading, has prevented adjudication or arbitration of any dispute in Canada. Accordingly, an amendment is needed to confirm Canadian jurisdiction in situations where a bill of lading stipulates that disputes must be submitted to foreign Courts.

[67] In *Marine Cargo Claims*, above, at pages 1424-1425, William Tetley notes that the Canadian provision is less restrictive than most of the provisions adopted in other countries, for it does not prohibit the ousting of the Canadian jurisdiction. Section 46 only gives an option to the claimant to arbitrate or litigate in Canada in certain circumstances. The learned author adds that "[t]his solution seems fair and reasonable pending Canada's possible eventual transition from the *Hague-Visby Rules* to the *Hamburg Rule*s."

[68] Quite apart from the above mentioned developments, arbitration has become a favourite method of settling international commercial disputes, generally. This led to the adoption of various international instruments. As noted earlier, in the mid-1980s, Canada adopted the *United Nations Foreign Arbitral Awards Convention Act*, R.S.C. 1985, c. 16 (2nd Supp.) (the New York Convention Act), and the *Commercial Arbitration Act*, R.S.C., 1985, c. 17 (2nd Supp.).

[69] Pursuant to article 8(1) of the *Commercial Arbitration Code*, included as an Annex to the *Commercial Arbitration Act*, Canadian Courts "shall" stay proceedings in the presence of a valid

and enforceable arbitration clause. Obviously, when section 46 of the *Act* applies, the arbitration clause is not enforceable in Canada (See article 1(3) of the *Commercial Arbitration Code*).

[70] Nevertheless, the Court should be prudent in construing subsection 46(1), as one should not too readily assume that Parliament has limited the effect of arbitration clauses in respect of disputes that have traditionally been the subject of arbitration, like charter-party disputes.

(iii) Scheme of the Act

[71] The *Act* itself says nothing about its purpose and object. I have already referred to the Legislative Summary cited by the Judge. I will only note that it confirms that the *Act* sought to consolidate existing marine liability regimes (Fatal Accidents; Limitation of Liability for Maritime Claims; Liability for Carriage of Goods by Water; Liability and Compensation for Pollution Damage) into a single piece of legislation. The specific passage regarding the purpose and object of section 46 was discussed earlier (also see *Magic Sportswear*, above, at paragraphs 56-66).

[72] There is no definition of "contract for the carriage of goods" in part V. This expression is used in sections 43, 45 and 46. After defining the "Hague-Visby Rules" and the "Hamburg Rules", section 43 gives the *Hague-Visby Rules* force of law in Canada in respect of contracts for the carriage of goods by water between different states, as described in article X of the said Rules, reproduced in Schedule 1 to the *Act*. This applies until the entry into force of section 45 (subsection 43(4) of the *Act*). This means that they will apply to all contracts for the carriage of goods evidenced by a bill of lading issued in a Contracting State, or to any carriage from a Contracting State (port of

loading), or to a contract evidenced by a bill of lading that incorporates them . Section 43(2) extends the reach of the *Hague-Visby Rules* to apply to domestic carriages unless there is no bill of lading issued and the contract stipulates that the rules do not apply.

[73] For the purpose of applying subsection 43(1), subsection 43(3) provides that the expression "Contracting States" will include States which, like Canada, implemented the *Hague-Visby Rules* in their domestic legislation without becoming a party to the convention.

[74] Section 44 indicates that the Minister will report to Parliament every five years on whether the *Hague-Visby Rules* should be replaced by the *Hamburg Rules*. The last report was issued in 2009 and it recommended against the implementation of the *Hamburg Rules* because of the low percentage of Canadian trade to countries that had implemented them.

[75] Section 45, which is not yet in force, also refers to contracts for the carriage of goods by water between different states as described in article 2 of the *Hamburg Rules*. As mentioned earlier, the said rules have a wider application given that they will apply to various non-negotiable documents such as sea waybills issued in the Contracting State or to carriage to or from a Contracting State. Again, once in force, the *Hamburg Rules* will also apply to domestic carriage, unless the contract stipulates that the rules will not apply. One notes that there is no reference to bills of lading in subsection 45(2) because the contracts of carriage to which the rules can apply are broader and include documents such as sea waybills. Subsection 45(3) is meant to mirror subsection 43(3).

[76] We then come to subsection 46(1) which, as mentioned, starts with the words:

> If a contract for the carriage of goods by water to which the *Hamburg Rules* do not apply…

[77] As acknowledged by the Judge at paragraph 72 of his reasons, the ordinary (more accurately, the dictionary meaning) of "carriage of goods by water" could include charter-parties because all such contracts are ultimately entered into in order "to convey goods" by water.

[78] That said, in the context of legislation dealing with the rights and obligations of common carriers and which implements international rules, I am satisfied that this expression would not and should not be understood to include charter-parties.

[79] This legal conclusion is consistent with commercial reality. Charter-parties are contracts between commercial entities dealing directly with each other, whose execution and enforcement are the private concern of the contracting parties. There is no policy reason why such actors should not be held to their bargains.

[80] To reiterate, considering the general purpose of part V and the mischief that section 46 was meant to cure (that is, boilerplate jurisdiction and arbitration clauses dictated by carriers to the detriment of Canadian importers or exporters who became parties to such contracts), and the different commercial reality that lead to the conclusion of charter-parties, the Judge's conclusion that the voyage charter-party under review is not covered by subsection 46(1) is correct.

(iv) The LOI

[81] Fednav argues that its third party proceeding against Cosipa is based at least in part (corrosion damage) on the LOI, which, contrary to the Judge's and the Prothonotary's finding, is a stand-alone contract that is not subject to the arbitration clause in the voyage charter-party. In its view, the Judge misconstrued the evidence in that respect.

[82] As mentioned, Fednav as a party to the voyage charter-party is bound to arbitrate all its disputes (certainly those based on clause 5(a)) with Cosipa in any event. The issue here is therefore whether Cosipa's undertaking in the LOI, if construed to include an indemnity to Fednav itself, is also subject to the arbitration clause as a dispute under the charter-party.

[83] The Judge's conclusion that the LOI was an amendment to the charter-party with Fednav is logical and amply supported by the evidence before him. I have not been convinced that he made a palpable and overriding error that would justify this Court's intervention.

[84] Fednav is thus bound by its agreement to arbitrate these disputes with Cosipa in New York.

Is Cosipa entitled to a stay of proceedings of the third party claim brought against it by Canada Moon?

[85] As mentioned, the third party proceedings of Canada Moon are also based on clause 5(a) of the voyage charter-party incorporated as a term of the bills of lading in respect of any damage

caused during the operations performed by Cosipa in Brazil and on the LOI in respect of damage, if any, resulting from the use of plastic canvas covers on the cargo.

[86] In the commercial context, arbitration is a consensual dispute resolution forum. Therefore, in order to force Canada Moon to arbitrate its claim against it, Cosipa must be able to show that Canada Moon either actually or constructively agreed to arbitration.

[87] The arbitration clause which forms part of the terms of the bill of lading is an example of a constructive agreement to arbitrate since, in the absence of legislative intervention, it would bind Canada Moon. But Cosipa cannot rely on that agreement to arbitrate as it is caught by subsection 46(1) of the *Act*. In fact, before us, Cosipa took the position that it was not a party to the contract evidenced by the bills of lading.

[88] Nor, on the face of it, can Cosipa rely on the arbitration clause in the charter-party since Canada Moon is not a party to that agreement. At law, incorporating the terms of a distinct contract to which one is not a party – the voyage charter-party – could not have the effect of making Canada Moon a party to that contract.

[89] Canada Moon argues that the Judge's mistaken belief that it was a party to the charter-party through the incorporation in bills of lading necessarily impacted on his conclusion that the LOI was not a stand alone contract at least insofar as it was concerned

[90] Canada Moon argues that Cosipa's undertaking to indemnify it was a free standing agreement containing no arbitration clause. As regards Canada Moon, a free standing agreement to indemnify, without any reference to arbitration would not constitute an agreement, actual or constructive, on Canada Moon's part to arbitrate any disputes with respect to that indemnity. It would be free to pursue its claim for indemnity in the third party proceedings

[91] At the time the LOI was negotiated and issued, there was no legal relationship whatsoever between Cosipa and Canada Moon. The cargo had not been accepted by the Master. No bills of lading had been issued.

[92] The Judge accepted that Fednav Limited was acting on behalf of two principals (Fednav and Canada Moon) when it negotiated the LOI. If one considers that the letter addressed to Fednav Limited as agent was addressed to its two distinct principals, one of which, contrary to the Judge's finding at paragraph 59, was not a party to the charter-party, it would be logical to conclude that the LOI was indeed a stand alone contract in respect of Canada Moon. This even if one concluded that in so far as Fednav was concerned the LOI was an amendment to their existing contract with Cosipa.

[93] All the elements of a stand alone contract are present including consideration that is Canada Moon‘s acceptance of the cargo as packaged.

[94] Cosipa argues that regardless of the Judge's erroneous conclusion at paragraph 59 that all the players were parties to the charter-party, his finding that the LOI was an amendment to the charter-party can still stand on the basis that Fednav and Cosipa can include in their contract a term for the benefit of a third party, in this case, the ship owner Canada Moon.

[95] The enforceability of contractual terms for the benefit of a third party raises the problem of privity of contracts. In the ordinary course, Canada Moon, as a stranger to the contract could not claim the benefit of the charter-party nor be subject to its obligations. However, the law has developed to include principled exceptions to the doctrine of privity (*London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299, and *Fraser River Pile & Dredge Ltd v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 308 (*Fraser River*).

[96] There is little reason for the law to restrict those who, by agreement, wish to confer a benefit on a person who is a stranger to their agreement. However, the question of privity has a different cast when parties seek, by their agreement, to impose an obligation upon a stranger. The law has little interest, outside the law of tort, in imposing obligations on those who have not agreed to them. In this case, Cosipa seeks to impose on Canada Moon an obligation which it did not otherwise have when the LOI was issued.

[97] If one considers that as is now proposed by Cosipa, the LOI was simply an amendment to the charter-party which contained a term for the benefit of Canada Moon, it seems to me that the proper question is whether the benefit conferred on the latter was a qualified benefit in the sense that the

indemnity could only be invoked through arbitration proceedings. If that is the true meaning of the amended charter-party, then by invoking the indemnity which the parties offered it, Canada Moon agreed to submit that question to arbitration.

[98] On a proper interpretation of the amended charter-party, did the parties confer a qualified benefit on Canada Moon? That question is one which must be resolved by an examination of the terms of the LOI and the charter-party as well as the surrounding circumstances at the relevant time.

[99] Cosipa relied on two cases involving the so called Himalaya clause to say that Canada Moon is necessarily bound by the arbitration clause. I find that the present situation is distinguishable on its facts. The text of the LOI is far-removed from the more elaborate language found in the Himalaya clauses commonly included in the standard printed clauses of bills of lading.

[100] All concerned knew that the cargo was destined for Canada. If the Master balked at Cosipa's method of packaging, it can only be because it wished to avoid damage claims from the Canadian consignee. It would hardly suit Canada Moon to have to arbitrate its claim for indemnity in New York while it was being sued in Canada. While the relevant intentions are those of Cosipa and Fednav as parties to the charter-party, and not of Canada Moon, in order to be acceptable to Canada Moon, the LOI would have to be responsive to its concerns. Since Canada Moon accepted the LOI, one can presume that it understood it to address its concerns.

[101] In this context, the absence of a reference to the arbitration clause in the LOI is a significant indicator of the intention of the parties. I contrast the omission of a reference to the arbitration clause in the LOI to the inclusion of that clause in the bills of lading issued to Cosipa. I also note that the arbitration clause itself does not lend itself well to being invoked by a third party.

[102] In my view, the parties were alive to the circumstances in which the indemnity would be of value to Canada Moon and drafted the LOI accordingly. It is not necessary to make the indemnity subject to the arbitration clause in order to give it commercial efficacy. The opposite is more likely to be the case.

[103] In the end, even if one accepts that the LOI was an amendment to the charter-party, in my view, on a proper construction, the amended charter-party does not require Canada Moon to pursue the benefit of indemnity in arbitration proceedings. It is not a qualified benefit.

[104] In the circumstances, in my view, the Judge's error (paragraph 59, third bullet) impacted on his ultimate conclusion with respect to Canada Moon. Cosipa has not met its burden of establishing that Canada Moon was bound to arbitrate the third party proceeding dispute.

[105] It is not necessary to deal with the other arguments raised by Canada Moon. Particularly, whether there are good reasons to conclude here that the *prima facie* rule that a bill of lading is not evidence of a distinct contract of carriage in the hands of a voyage-charterer should not be applied (*The President of India v. Metcalfe Shipping Co. Ltd.*, [1970] 1 Q.B. 289, [1969] 3 All E.R. 1549

(C.A.); *Rodoconachi, Sons & Co v. Milburn Brothers* (1887), 18 Q.B.D. 67, 56 L.J.Q.B. 202 (C.A.)).

If the answer is no in either case, is Canada *forum non conveniens* for the third party claim?

[106] Because he ordered the stay of the third party claim, the Judge did not deal with the question of *forum non conveniens*. However, the Prothonotary found that Canada was not *forum non conveniens* for the hearing of the third party claim. As noted above, the Prothonotary considered each of the factors enumerated in *Spar Aerospace* and, having carefully weighed them all, he found that they did not displace Canada Moon's presumptive right to choose its forum.

[107] Since *Spar Aerospace*, the Supreme Court has considered the question of *forum non conveniens* in two recent cases: *Club Resorts Ltd v. Van Breda*, 2012 SCC 17, and *Breeden v. Black*, 2012 SCC 19. In both of those cases, the Supreme Court cautioned against giving the factor of juridical advantage too much weight in the *forum non conveniens* analysis.

[108] Bearing in mind such caution, I still essentially agree with the Prothonotary's assessment of the relevant factors. Cosipa has not convinced me that this Court should exercise its discretion to stay the third party proceedings in favour of proceedings in Brazil.

CONCLUSION

[109] On the basis of the foregoing analysis I find that Cosipa is entitled to a stay of the third party claim against it insofar as that claim is advanced by Fednav. On the other hand, I find that Cosipa is not entitled to a stay of the third party claim advanced by Canada Moon. In addition, I find that the allegation that Canada is *forum non conveniens* has not been made out.

[110] In the result, I would allow the appeal. I would set aside the orders of the Federal Court dated March 10, 2011 and September 12, 2011. I would grant Cosipa's motion for a stay of the third party claim as regards Fednav but dismiss it as regards Canada Moon. I would grant Cosipa its costs throughout.

"Johanne Gauthier"
J.A

"I agree
J.D. Denis Pelletier J.A."

"I agree
Robert M. Mainville J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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DATED:	November 8, 2012

APPEARANCES:

David G. Colford Montréal, QC	FOR THE APPELLANTS
Jean-Marie Fontaine / Peter Pamel Montréal, QC	FOR THE RESPONDENT
Paul Blanchard Montréal, QC	FOR THE PLAINTIFF

SOLICITORS OF RECORD:

Brisset Bishop S.E.N.C. Montréal, QC	FOR THE APPELLANTS
Borden Ladner Gervais LLP Montréal, QC	FOR THE RESPONDENT
Stikeman Elliott LLP Montréal, QC	FOR THE PLAINTIFF