Federal Court of Appeal | Cour d'appel fédérale

**Date: 20210602**

**Docket: A-466-19**

**Citation: 2021 FCA 110**

**CORAM:** **NADON J.A.**
**PELLETIER J.A.**
**LOCKE J.A.**

**BETWEEN:**

**HAPAG-LLOYD AG**

**Appellant**

**and**

**IAMGOLD CORPORATION**
**and**
**NIOBEC INC.**

**Respondents**

Heard by online video conference hosted by the Registry

on April 13, 2021.

Judgment delivered at Ottawa, Ontario, on June 2.

REASONS FOR JUDGMENT BY: NADON J.A.

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

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**REASONS FOR JUDGMENT**

**NADON J.A.**

I. Introduction

[1] Before us is an appeal by the appellant Hapag-Lloyd AG (Hapag-Lloyd) from a decision of Southcott J. (the Judge) of the Federal Court, dated November 26, 2019 (2019 FC 1514)

pursuant to which he ordered Hapag-Lloyd to pay to the respondents the sum of CAD $872,909.57.

[2] More particularly, the Judge found, on the basis of German law, that the loss of three containers that were to be carried from Montreal, Canada to Moerdijk, the Netherlands, by way of ship and truck, had occurred during the road leg of the multimodal transport between the two countries.

[3] As a result, liability having been admitted by the carrier Hapag-Lloyd, the Judge applied the limitation of liability provisions of the applicable legislation.

[4] Hapag-Lloyd says that the Judge erred in concluding that the loss occurred during the road leg of the transport. For the following reasons, I am of the view that, in concluding as he did, the Judge made no reviewable error.

## II. Facts

[5] The parties proceeded before the Judge on an Agreed Statement of Facts. For present purposes, the following summary will suffice.

[6] On August 4, 2011, a contract of multimodal carriage was entered into between Hapag-Lloyd, as carrier, and the respondent Iamgold Corporation, as shipper, pursuant to which four containers containing ferroniobium were to be carried from Montreal to Antwerp, Belgium by

ship and then by truck from Antwerp to Moerdijk, where the other respondent, Niobec Inc. (Niobec), had its warehouse.

[7] On August 11, 2011, Niobec or its agents gave instructions to Hapag-Lloyd to deliver the containers to its warehouse in Moerdijk on August 15, 2011. As a result, Hapag-Lloyd made arrangements with an authorized trucker for the pick-up of the containers at the port of Antwerp.

[8] The containers were discharged from the ship in Antwerp on August 12, 2011 and placed at the port terminal pending pick-up for road carriage to Moerdijk. On that day, an unauthorized trucker came to the terminal and provided the necessary PINs so as to secure the release of three of the four containers. These containers were never delivered to Niobec. The last container was picked-up later that day by a trucker duly authorized by Hapag-Lloyd and delivered to Niobec.

[9] The specific circumstances which allowed for the illegal removal of the three containers remain unknown.

[10] As a result of the theft, the respondents have suffered a loss in the sum of USD $1,566,586.90 plus €59,372.43. The weight of the stolen cargo was 66,266 kg.

[11] Hapag-Lloyd admitted that it was liable for the loss. Thus, the only question before the Judge was the amount of Hapag-Lloyd's liability which depended on whether the loss occurred during the ocean leg of the transport or during the road leg.

[12] The parties have agreed that if the loss occurred during the ocean leg, Hapag-Lloyd's liability amounts to CAD $209,582.13 (2 Special Drawing Rights (SDRs) per kg, at the rate of 1.581370 per SDR, current on August 12, 2011) whereas if the loss occurred during the road leg of the transport Hapag-Lloyd's liability amounts to CAD $872,909.57 (8.33 SDRs per kg, at the rate of 1.581370 per SR, current on August 12, 2011).

[13] It was also agreed by the parties that the law of Germany was the applicable law in respect of the determination which the Judge had to make, *i.e.* whether the loss had occurred during the ocean leg or the road leg and hence the amount payable by Hapag-Lloyd.

## III. The Federal Court Decision

[14] The Judge began by stating the question which he was called upon to decide, namely whether, under the law of Germany, the limitation of liability provisions applicable to the ocean leg or the road leg of the carriage applied to the loss of the containers.

[15] The Judge then set out a summary of the facts upon which the parties were in agreement and which they consigned to a document entitled "Agreed Statement of Facts".

[16] The Judge then turned to the evidence of the two experts on German law put forward by the parties, namely Dr. Dieter Schwampe for the respondents and Dr. Jost Kienzle for Hapag-Lloyd.

[17] First, the Judge examined their respective qualifications which led him to conclude that they were both qualified to testify with respect to the matters in issue. He then set out the areas of German law upon which the experts agreed. At paragraph 18 of his Reasons, he wrote:

> Before proceeding to analyze the dispute between the parties on the applicable German law, it is useful to canvass certain areas in which there is no dispute, because there is no material difference in the experts' opinions in such areas. Both experts agree on the following principles of German law:
>
> A. In the case of multimodal transport, where it is established that cargo loss or damage occurs on a particular transport leg, the liability of the contractual carrier is to be determined in accordance with the legal provisions that would apply to a hypothetical contract, made between the parties to the multimodal contract, for the carriage of goods on that transport leg only.
>
> B. Unless there are special circumstances (and there are not in this case), German law does not treat the handling of goods at a terminal, after discharge from a ship and before transport by other means, as a transport leg of its own. Rather, such handling is regarded as falling within either the ocean transport leg or the subsequent transport leg.
>
> C. As the parties agree where the loss occurred, on the Antwerp terminal, this case is governed by either the liability regime that applies to the ocean transport leg or the regime that applies to the road transport leg.

[18] Then, at paragraphs 20 to 24 of his Reasons, he set out the areas of disagreement between the experts. More particularly, the Judge made it clear that the principal disagreement concerned the application of the law of Germany to the facts of the case. In other words, did the loss occur during the ocean leg or the road leg of the carriage? This is the question which the Judge was bound to decide.

[19] In highlighting the areas of disagreement between the parties, the Judge indicated, at paragraph 20 of his Reasons, that they both relied "on principles derived from German jurisprudence to support [their] opinion as to the position of German law on this question", adding that Dr. Schwampe was of the view that the loss occurred during the road leg whereas Dr. Kienzle concluded that the loss occurred during the ocean leg.

[20] The Judge then assessed the evidence of the two experts. He began with Dr. Schwampe noting that he had based his conclusion on four decisions of the German Federal Court of Justice (the FCJ), the highest Court of applicable jurisdiction in Germany. More particularly, Dr. Schwampe had relied on what the Judge conveniently referred to as the 2005, 2007, 2013 and 2016 Decisions.

[21] After a review of Dr. Schwampe's analysis of the above decisions, the Judge pointed out that Dr. Schwampe had conceded that the four decisions did not deal with facts similar to those present in this case but that applying the principles articulated in those decisions to the facts of the case led him to the conclusion that the loss occurred during the road leg of the carriage. Of particular importance to Dr. Schwampe's conclusion was the fact that the PINs used by the thieves to obtain possession of the three containers "have a close relationship with the road leg because they are the means to allow the terminal to hand over the goods to road carriers" (Reasons at para. 37).

[22] Dr. Schwampe also expressed the view, which the Judge later rejected, that the question of who had possession of the goods at the time of the loss was irrelevant to the determination of the leg of carriage during which the loss occurred.

[23] The Judge then turned to the evidence of Dr. Kienzle. He began by stating that, like Dr. Schwampe, Dr. Kienzle examined the four decisions rendered by the FCJ, noting that Dr. Kienzle was of the view that none of the FCJ decisions had dealt with a situation like the present one, *i.e.* where goods had been stolen during multimodal transport.

[24] Also, like Dr. Schwampe, Dr. Kienzle believed that the question which had to be answered was whether the theft was attributable to the ocean leg or to the road leg. In his view, as I have already indicated, the loss was attributable to the ocean leg. More particularly, it was his contention that the theft had not occurred during, or in the preparation for, the loading of the goods onto an authorized means of road transport, adding that the act of loading the goods onto the unauthorized truck did not terminate the ocean leg. In the end, Dr. Kienzle's opinion was that the unauthorized truck was simply the means by which the theft had been committed. In other words, it did not matter to him whether the goods had been stolen by way of an unauthorized truck, by way of railway, or even by way of helicopter.

[25] Thus, for Dr. Kienzle, the road leg of the carriage had not begun when the theft occurred. Hence, the loss was attributable to the ocean leg.

[26] The Judge noted that, in addition to his reliance on the four FCJ decisions, Dr. Kienzle relied on a 2008 decision of the Hanseatic Court of Appeal of Hamburg, a Court below the FCJ. This decision had not been appealed to the FCJ. Dr. Kienzle relied on the 2008 decision because, unlike the four FCJ decisions, the Hanseatic Court had addressed the delineation between the road and ocean legs of multimodal transport in the context of stolen goods.

[27] Finally, the Judge noted that, contrary to Dr. Schwampe, Dr. Kienzle was of the view that custody of the goods, at the time of the theft, was relevant to identifying the leg during which the loss occurred.

[28] After his summary of the experts' evidence, the Judge indicated that his role was to decide the state of German law as a matter of fact, adding that it was open to him to consider the experts' opinions and whether the decisions relied upon by them supported their respective interpretation of the law.

[29] The first question addressed by the Judge was the weight that he should give to the experts. He then opined that, after consideration of their evidence, he was inclined to give more weight to Dr. Schwampe's evidence than to that of Dr. Kienzle because of his view that Dr. Schwampe's opinion was more consistent with the principles expressed by the German courts in the aforementioned decisions.

[30] The Judge then stated that, on his understanding of German law, whether a particular loss occurred during the ocean or road leg of a multimodal transport depended on whether the events

giving rise to the loss were "characteristic or attributable or closely tied to a particular leg", adding that the FCJ, in making determinations based on the facts of the cases before it, had determined that losses attributable to the road leg of a multimodal transport were losses which had "materialized from risks related to activities performed in preparation for loading for such land transport or in preparation for such transport itself" (Reasons at para. 64).

[31] In forming that view, the Judge rejected Dr. Kienzle's opinion that the German decisions restricted such a conclusion to circumstances involving loading or preparing to load goods upon an authorized vehicle.

[32] The Judge then stated that he agreed with Dr. Schwampe that, in the present matter, there was no connection between the events giving rise to the theft and the storage of the goods following a voyage by sea. Rather, in the Judge's view, the theft was more closely connected to road transport as the events leading to the loss pertained to a security feature, *i.e.* the PINs which were there to ensure the lawful transfer of goods from the ocean carrier to the road carrier. At paragraph 66 of his Reasons, he wrote as follows:

> … Therefore, as the present loss arose from an activity characteristic of road transport, I accept that German law would regard the loss as having occurred on the road leg of the multimodal transport.

[33] The Judge also expressed the view that his analysis was not weakened by the fact that the goods had not been delivered to an authorized trucker chosen by Hapag-Lloyd, adding that the PINs process, the purpose of which was to mitigate the risks of unlawful transfer, had failed for reasons which the parties could not explain. In the Judge's view, "the risk of such failure is

surely a risk associated with the road leg, not the ocean leg." (Reasons at para. 67). In forming this view, the Judge made a distinction between, on the one hand, a loss resulting from the failure of a terminal's security system to safeguard goods and, on the other hand, a loss resulting from the failure of the PINs process to perform its intended role, *i.e.* to ensure the orderly release of goods for road transport. For the Judge, breaches with respect to storage activity are not characteristic of the road leg.

[34] The Judge then indicated that he could not agree with Dr. Schwampe's opinion that possession, custody or control of the goods at the time of the loss was irrelevant to the question of whether a loss occurred during the ocean or road leg. He indicated that he understood German law to be to the effect that custody could be a relevant factor depending on the facts of a particular case but that this factor was not determinative.

[35] The Judge concluded his analysis by pointing out, at paragraph 80 of his Reasons, that each side had taken the position that if Canadian law applied to the loss, the jurisprudence favoured their position. This led the Judge to say that Canadian law would only apply should he find that German law had not been proven, adding that he did not understand the parties' position to be that the evidence with regard to German law was insufficient to prove the state of that law.

[36] The Judge made it clear that it was his view that the experts' evidence was sufficient to allow him to determine the relevant principles of German law and their application to the agreed facts. Thus, the Judge saw no reason to have recourse to Canadian law.

[37] Consequently, the Judge concluded that the respondents' position was well-founded and, as a result, he found in their favour and ordered Hapag-Lloyd to pay the sum of CAD $872,909.57.

[38] In a separate judgment rendered on May 12, 2020 (2020 FC 610), the Judge granted costs in favour of the respondents. No appeal has been taken from this decision.

## IV. Issues

[39] Hapag-Lloyd submits that we must consider three issues, namely: 1) whether the respondents have proved that German law differs from Canadian law; 2) if not, what is the amount of Hapag-Lloyd's liability under Canadian law and; 3) whether the Judge's findings with respect to German law are to be reviewed by this Court on the correctness or reasonableness standard.

[40] On the other hand, the respondents frame the issues as follows, *i.e.* what is the standard of review applicable in this appeal and whether the Judge made an error in determining, on the basis of German law, that the loss had occurred during the road leg of the multimodal transport.

[41] I need not reformulate the issues as I will deal with all of them in my analysis.

## V. Analysis

### A. *Standard of Review*

[42] There can be no doubt that the applicable standards in this appeal are those enunciated by the Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 [*Housen*] where the Court indicated that questions of law were subject to the standard of correctness whereas questions of fact and mixed questions of law and fact, except where an extricable question of law arises, are subject to the palpable and overriding error standard.

### B. *Does Canadian law or German law apply?*

[43] I will deal first with Hapag-Lloyd's submission that either German law has been proven to be the same as Canadian law or it has not been proven to differ, in which case Canadian law should apply. More particularly, relying on the Supreme Court's decision in *ITO Int'l Terminal Operators v. Miida Electronics*, [1986] 1 S.C.R. 752, 68 N.R. 241, Hapag-Lloyd says that the loss of the three containers, having occurred while the goods were at the marine terminal in Antwerp, falls within the ocean leg of the multimodal transport and is thus subject to the lower limitation of 2 SDRs per kg.

[44] I cannot agree with Hapag-Lloyd's submission as I am satisfied that German law has been proven and is the law applicable in the present matter.

[45] First, by reason of their Agreed Statement of Facts dated July 16, 2019, the parties agreed that the law of Germany, without renvoi, applied to the questions which the Judge had to decide (Agreed Statement of Facts, clause 15). The parties further agreed that should the evidence adduced by the experts on German law be incomplete, the Judge was entitled, and was invited, to ask additional questions to the experts at the hearing so as not to have to rely on the presumption that foreign law is assumed to be the same as the *lex fori* (Agreed Statement of Facts, clause 17).

[46] Second, the Judge clearly found that the evidence of the experts was sufficient so as to allow him to find the relevant principles of German transportation law and their application to the facts agreed to by the parties (Reasons at para. 80). In so concluding, the Judge remarked that he did not understand the parties to be taking the position that the evidence given by the experts was insufficient to enable him to make his findings in regard to the foreign law.

[47] Thus, it is clear that the Judge did not make a reviewable error in applying German law with regard to the determination which he had to make.

## C. *German Law: What is the Standard of Review Applicable to the Judge's Findings Concerning German Law?*

[48] Before answering the question of whether the Judge made a reviewable error in regard to the evidence adduced by the experts on German law, I must first deal with the standard of review applicable to the Judge's findings.

[49] There is no dispute between the parties that foreign law must be proven as a fact. They disagree, however, as to the standard of review applicable to the Judge's findings with respect to the state of German law. Hapag-Lloyd says that the standard of correctness is the standard which should be applied while the respondents say that the palpable and overriding error standard is the proper standard.

[50] In support of its view that correctness is the relevant standard and that hence no deference should be afforded to the Judge by this Court, Hapag-Lloyd relies on two decisions of the Supreme Court rendered prior to *Housen*, *i.e. Allen v. Hay*, [1922] 69 D.L.R. 193 at p. 80-81, 64 S.C.R. 76 [*Allen*]; and *Drew Brown Ltd. v. The 'Orient Trader'*, [1974] S.C.R. 1286, 1972 CanLII 194 (SCC) [*Drew Brown*]. Hapag-Lloyd also relies on three post-*Housen* decisions rendered by the Ontario Court of Appeal (the ONCA) in *General Motors Acceptance Corporation of Canada, Limited v. Town and Country Chrysler Limited*, 2007 ONCA 904, 288 D.L.R. (4th) 74 [*General Motors*]; *Das v. George Weston Limited*, 2018 ONCA 1053, 43 E.T.R. (4th) 173 [*Das*] and *Grayson Consulting Inc. v. Lloyd*, 2019 ONCA 79 [*Grayson*].

[51] With respect to the Supreme Court's decisions in *Allen* and *Drew Brown*, I wish to say that I have carefully read these decisions and it is clear that they do not address the standard of review applicable to findings made by a judge in respect of foreign law. In my respectful opinion, these cases are of no help to Hapag-Lloyd.

[52] As to the ONCA's decisions, I will address only *General Motors* as the Court in *Das* and *Grayson* relied heavily on this decision. For the reasons below, I find *General Motors* unpersuasive and decline to adopt the ONCA's reasoning.

[53] In *General Motors*, the main issue before the Court was the standard of appellate review applicable to questions of law as found by the trial judge. The foreign law before the Court was the personal property security legislation of the province of Quebec, as found in various provisions of its Civil Code. I might add here, and I will return to this shortly, that the Supreme Court of Canada takes judicial notice of the law of Quebec (*Pettkus v. Becker*, [1980] 2 S.C.R. 834, 1980 CanLII 22 (SCC) at 853-54). Thus, had the matter before the ONCA gone to the Supreme Court, the issue with respect to the foreign law would have been clearly one of law attracting the standard of correctness. However, that was not the case before the ONCA, which does not take judicial notice of the law of Quebec.

[54] After stating that the appellant and the respondent took different positions with regard to the standard of review applicable to the judge's findings with respect to the law of Quebec, the ONCA referred to the Supreme Court's decision in *Housen*. It then set out, at paragraph 31 of its reasons, the policy reasons given by the Supreme Court for its determination that questions of fact and questions of mixed fact and law were subject to the palpable and overriding standard, namely: i) that a trial judge was in a better position to assess the credibility of witnesses; ii) that unlimited intervention by appellate courts would increase the number and length of trials; iii) that substantial resources are allocated to trial courts for them to assess the evidence; and finally iv)

the importance of preserving the autonomy and integrity of the trial process by deferring to a trial judge's findings with respect to facts.

[55] Then, at paragraph 32 of its reasons, the Court stated that the rationale behind deference to trial judges' findings of facts did not apply to findings made in respect of foreign law. In other words, the ONCA was of the view that the policy reasons behind the principle of deference in regard to findings of fact by a trial judge did not support deference when those findings concerned foreign law.

[56] The Court went on, at paragraph 33 of its reasons, to state that it was in as good a position as a trial judge to determine the credibility of an expert witness testifying in regard to foreign law because questions of law were "squarely within the province of an appellate court, which is well accustomed to evaluating the persuasiveness of legal arguments."

[57] Finally, at paragraph 34 of its reasons, the Court relied on the following excerpt from *Phipson on Evidence*:

> I also find as relevant the following excerpt from Phipson on Evidence, 16th ed. (London: Sweet & Maxwell, 2005) at para. 1-35, which indicates that English courts view foreign law as a question of law on appeal:
>
> > Thus, in English courts, although the existence of English law is a question of law to be determined by authorities in argument, the existence of Scots, colonial or foreign law is treated as a question of fact to be determined by evidence; so that, in the House of Lords or Privy Council, what was a question of fact in the court below, to be established by evidence, may become on appeal a question of law to be judicially noticed.

[58] This led the ONCA to conclude, at paragraph 35 of its reasons, that the applicable standard on questions of foreign law was correctness.

[59] My principal reason for disagreeing with the ONCA's decision in *General Motors* is that it is not up to courts of appeal to second-guess the Supreme Court of Canada when it says, as it clearly did in *Housen*, that questions of fact are subject to the palpable and overriding error standard. In other words, it is not up to courts of appeal to determine, on a case-by-case basis, whether the policy reasons given by the Supreme Court in *Housen* for deferring to the factual findings of a trial judge apply. In my view, if a finding is a finding of fact, it must be reviewed *as per* the standard of review applicable to such finding. In concluding as it did in *General Motors*, the ONCA had to accept, as it did, that determinations as to foreign law were questions of fact. Consequently, the standard applicable was that of palpable and overriding error. It should be remembered that in *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, the Supreme Court made it clear that lower courts were bound to follow decisions of higher courts with few exceptions permitted. At paragraph 44 of its reasons in that case, the Supreme Court wrote as follows:

> The doctrine that lower courts must follow the decisions of higher courts is fundamental to our legal system. It provides certainty while permitting the orderly development of the law in incremental steps. However, *stare decisis* is not a straitjacket that condemns the law to stasis. Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate" (*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at paragraph 42).

[60] Also of relevance is the Supreme Court's decision in *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489 [*Craig*] where the question before the Court was whether it should overrule its prior decision in *Moldowan v. The Queen*, [1978] 1 S.C.R. 480, 77 DLR (3d) 112 [*Moldowan*].

[61] Before the Supreme Court, in *Craig*, was a decision of this Court which upheld a decision of the Tax Court of Canada. More particularly, Hershfield T.C.C.J. had found, on the basis of this Court's decision in *Gunn v. Canada*, 2006 FCA 281, [2007] 3 F.C.R. 57 [*Gunn*], that he was not bound to follow *Moldowan*. In *Gunn*, this Court had expressed its disagreement with *Moldowan* and declined to follow it. On appeal, this Court found in favour of Mr. Craig by reason of our prior decision in *Gunn*. Thus, this Court followed *Gunn* but not *Moldowan* (*Canada v. Craig*, 2011 FCA 22, [2011] 2 F.C.R. 436).

[62] In answering the question as to whether the Tax Court and the Federal Court of Appeal should have followed *Moldowan* or *Gunn*, Rothstein J., writing for a unanimous Supreme Court, made it clear that both the Tax Court and this Court should have followed *Moldowan*. More particularly, Rothstein J. indicated that although it was open to both the Tax Court and this Court to question the correctness of *Moldowan*, both courts were bound to follow it (Rothstein's J. Reasons at paras. 18-23).

[63] I also do not agree with the ONCA's statement in *General Motors* that the credibility of an expert witness testifying on legal issues can as easily be assessed by an appellate court as by a trial judge. Whether the expert is an expert on foreign law or, for example, on patents, the trial

judge has the advantage of, *inter alia*, observing the witness, the manner in which he or she answers the questions, both in chief and in cross-examination, and his/her demeanour within the context of the trial. As Iacobucci and Major JJ. stated in *Housen* at paragraph 24 of their reasons for the Court, "[t]he essential point is that making a factual conclusion, of any kind, is inextricably linked with assigning weight to evidence, and thus attracts a deferential standard of review". Thus, this standard, in my respectful opinion, applies to all expert witnesses including those testifying with respect to foreign law. I note, in concluding, that the British Columbia Court of Appeal in *Friedl v. Friedl*, 2009 BCCA 314, 95 B.C.L.R. (4th) 102 chose not to follow *General Motors* and applied the standard of palpable and overriding error to the trial judge's findings on foreign law, as adduced by expert witnesses.

[64] Lastly, I wish to say that the excerpt from *Phipson on Evidence* does not support the ONCA's view. The excerpt does not deal with the question of standard of review but rather addresses the status of Scottish, colonial or foreign law once these questions reach the House of Lords (as it then was) and the Privy Council. As is the case with the law of Quebec before the Supreme Court, which, as I have already indicated, takes judicial notice thereof, the House of Lords in England took judicial notice of Scottish law and the Privy Council took judicial notice of colonial or foreign law within the Commonwealth, *i.e.* such as the law of Jamaica. That is the point of the excerpt. In other words, although the law of Scotland must be proven as a fact before a trial judge in England once the matter reaches the House of Lords, that question, *i.e*. a question of fact, becomes a question of law before the House of Lords because it takes judicial notice thereof (*see Cooper v. Cooper* (1888), 13 App. Cas. 88 at 101, 109).

[65] The excerpt from the 16th Edition of *Phipson on Evidence* cited by the ONCA is also found in the 19th Edition where the excerpt can be found at pages 18-19, under number I-36 and it reads as follows:

> *Matter of law*, in this connection, usually means some duty, or standard, which it is the province of the court to apply and enforce; and *matter of fact* means some issue of fact which is raised on the pleadings. But this distinction is not always reliable. Thus in English courts, although the existence of English law is a question of law to be determined by authorities and argument, the existence of Scots, colonial or foreign law is treated as a question of fact to be determined by evidence; so that, in the Supreme Court or Privy Council, what was a question of fact in the court below, to be established by evidence, may become on appeal a question of law to be judicially noticed. Again, what is "reasonable" is sometimes treated as a question of law and sometimes as one of fact.

[66] That excerpt should be read with another excerpt from the same edition which appears at page 69 thereof, under number 3-07 (3-08 in the 16th Edition):

> Judicial notice will be taken of the existence and contents of all public statutes; and of all Acts of Parliament of a public nature, as well as every branch of unwritten law obtaining in England or Ireland. Thus, if in a common law court points of equity or of parliamentary, ecclesiastical or Admiralty law arose, even before the Judicature Acts, they had to be determined not by calling experts, but by the court itself, either of its own knowledge, or by inquiry, or by hearing authorities and argument. Scots, colonial or foreign law however, are not judicially noticed, but must be proved as a fact by skilled witnesses, or by appropriate reference to the courts of those countries, except Scots law and the law of Northern Ireland in the Supreme Court, or colonial law in the Privy Council, where what was a question of fact in the court below to be proved by evidence becomes a question of law to be judicially noticed. …
>
> [My emphasis.]

[67] Thus, there can be no doubt that the above excerpts from *Phipson on Evidence* do not address the question which was before the ONCA in *General Motors* nor the one before us in this appeal.

[68] I therefore conclude that we should not follow *General Motors*. Consequently, this Court should apply the palpable and overriding error standard to the Judge's determinations in respect of the foreign law.

D. *Did the Judge make any Reviewable Error with Respect to his Findings on German Law?*

[69] I now turn to Hapag-Lloyd's specific submissions with respect to the errors which it says the Judge made in concluding as he did. More particularly, Hapag-Lloyd says that the Judge erred in accepting and relying on the evidence of Dr. Schwampe, adding that his evidence was conjectural and speculative. Hapag-Lloyd says that the FCJ decisions relied on by the Dr. Schwampe and the Judge were of no help to them in that the cases were not on point and did not address facts such as the ones before us in this appeal.

[70] Hapag-Lloyd further says that the cases relied on by Dr. Schwampe and the Judge pertained to physical mishandling by a carrier's authorized subcontractors and that none of the cases dealt with a theft by third parties.

[71] Hapag-Lloyd further submits that even if the palpable and overriding error standard applies, the Judge's decision should be set aside in that "[h]e relied on speculation and conjecture which have no legal value at all" (Hapag-Lloyd's Memorandum of Fact and Law at para. 56).

[72] Hapag-Lloyd concludes its arguments on this point by saying that the only conclusion possible is that the issuance of PINs is not a step in the preparation for road transport and thus that the loss clearly occurred during the ocean leg of the multimodal transport. As a result, Hapag-Lloyd says that the applicable limitation of liability is the one based on 2 SDRs per kg., *i.e.* CAD $209,582.13.

[73] I cannot accept any of Hapag-Lloyd's propositions. In my view, it has not been shown that in concluding as he did the Judge made a palpable and overriding error.

[74] I begin by saying that with respect to the relevant principles of German law, there was no disagreement between the experts. The only disagreement between them pertains to the application of these principles to the facts of the case. Stated differently, the experts did not agree on the "Ultimate Issue", *i.e.* whether, on the basis of the relevant principles, the loss occurred during the ocean leg or during the road leg transport. The Judge, as was his role in the case, had to decide that issue based on the help of the experts. After his assessment of both Drs. Schwampe and Kienzle's evidence, he concluded that the loss occurred during the road leg transport. At best, for Hapag-Lloyd, this answer falls in the category of mixed fact and law, a category that also attracts the standard of palpable and overriding error.

[75] As I understand Hapag-Lloyd's arguments, it does not say that the Judge misunderstood the principles of German law applicable to this case. What it says is that, on the basis of the principles which he found based on the experts' evidence, he should have concluded that the loss occurred during the ocean leg of the transport. In other words, Hapag-Lloyd disagrees with the

Judge's assessment of the evidence. For the following reasons, I can see no basis on which we could interfere with the Judge's findings.

[76] Faced with conflicting evidence on the part of Dr. Schwampe and Kienzle with regard to the application of the relevant principles of German law to the facts of the case, the Judge had to resolve the differences in the same manner as other conflicting evidence. He heard the experts who gave their opinions on German law and it was by assessing the German decisions presented to him by these experts that the Judge was able to determine the principles of German law applicable to the facts of the case.

[77] All the above led the Judge to the conclusion that determining whether the loss in the present matter occurred during the ocean leg or the road leg depended on whether the activities or operations which gave rise to the loss were characteristic of, or attributable to, or closely tied to, a particular leg of transport. In other words, on his understanding of German law, which Hapag-Lloyd does not challenge, the Judge found that losses which occur during a road leg are those that result from risks pertaining to or associated with activities performed in preparation for that leg of transport. Hence, the Judge did not, as Hapag-Lloyd suggests, engage in speculation or conjecture.

[78] In reaching his ultimate conclusion that the loss of the three containers fell within the road leg, the Judge was clearly aware that none of the FCJ decisions were directly on point. However, the Judge did not, correctly in my view, see this as a bar in concluding that the loss occurred during the road leg.

[79] The essence of his ultimate determination can be found at paragraphs 65 and 66 of his Reasons where the Judge says:

> [65] First, I do not regard the principles derived from the FCJ decisions as restricted to situations involving the loading process for the subsequent means of transport. Such a conclusion would be inconsistent with, for instance, the 2016 decision, in which the error resulting in the loss related not to loading but to the process of sorting cargo for allocation to particular vessels. I agree with Dr. Schwampe's opinion that there is nothing in the analyses of the FCJ Decisions suggesting that the principles would not be applicable to a loss caused by a category of activity not yet considered by the FCJ, such as the process involving release of containers against the provision of PIN numbers.
>
> [66] Applying the FCJ principles to that activity, I again agree with Dr. Schwampe that there is no connection between the activity at issue in this case and the storage of cargo following an ocean voyage. Rather, that activity is characteristic of or attributable to road transport, as it represents a security feature (albeit unsuccessful in the present case) intended to ensure transfer of the cargo to the correct road carrier. Therefore, as the present loss arose from an activity characteristic of road transport, I accept that German law would regard the loss as having occurred on the road leg of the multimodal transport.

[80] I can see no basis on which to conclude that the Judge made a palpable and overriding error in finding that, under German law, the loss occurred during the road leg of the multimodal transport. The conclusion which the Judge reached was clearly open to him on the evidence. As I indicated earlier, Hapag-Lloyd clearly does not agree with the Judge's assessment of the evidence but that does not constitute a ground upon which we could interfere.

## VI. Conclusion

[81] For there reasons, I would dismiss the appeal with costs.

"M. Nadon"

J.A.

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

"I agree.
George R. Locke"

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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