Federal Court  Cour fédérale

Date: 20190524

Docket: T-772-17

Citation: 2019 FC 740

Ottawa, Ontario, May 24, 2019

PRESENT: The Honourable Mr. Justice Lafrenière

BETWEEN:

LABRADOR-ISLAND LINK GENERAL PARTNER CORPORATION ACTING AS THE GENERAL PARNTER FOR THE LABRADOR-ISLAND LINK LIMITED PARTNERSHIP AND THE LABRADOR-ISLAND LINK LIMITED PARTNERSHIP

Plaintiffs

and

PANALPINA INC. AND DESGAGNÉS TRANSARCTIK INC. AND LOGISTEC STEVEDORING INC.

Defendants

JUDGMENT AND REASONS

[1] The Plaintiffs commenced an action seeking judgment in the amount of $3,711,451.94 against the three Defendants as a result of damage allegedly caused to two shipments of aluminium conductor steel-reinforced cable provided on steel reels [the Conductor Reels]. The

Defendants have moved separately for summary judgment dismissing the action against them on the basis that it is time-barred.

[2] For the reasons that follow, I conclude that the motions for summary judgment should be granted on the ground that the action is effectively time-barred and that the question is determinative of the whole of the action.

I. The Parties

[3] The Plaintiffs, Labrador-Island Link General Partner Corporation, acting as the General Partner for the Labrador-Island Link Limited Partnership, and the Labrador-Island Link Limited Partnership are affiliated entities. Both are subsidiaries of Nalcor Energy and were created for the execution of the Lower Churchill electrical transmission project between Labrador and Newfoundland Island [Lower Churchill Project]. The Plaintiffs are collectively referred to in these reasons as "Nalcor".

[4] Nalcor retained Panalpina Inc. [Panalpina] to provide general freight forwarding services to effect carriage of all cargo for the Lower Churchill Project. In that regard, the parties executed a freight forwarding service agreement [FFSA] on October 3, 2013. Panalpina agreed to act as the principal and to be fully responsible for the services in accordance with and subject to the provisions of the FFSA.

[5] Panalpina contracted with the Defendant, Logistec Stevedoring Inc. [Logistec], for the receipt and storage of the Conductor Reels at Logistec's terminal at the port of Trois-Rivières

pending ocean shipment, as well as with the Defendant, Desgagnés Transarctik Inc. [Desgagnés], for the transportation of the cargo by sea.

I. Overview of the Claim

[6] The Defendants agree that the Plaintiffs, or any one of them, purchased the Conductor Reels which are the subject of Nalcor's claim. The cargo was required to be shipped by sea from Trois-Rivières, Quebec to Argentia, Newfoundland. To carry out the ocean carriage and stevedoring of the Conductor Reels, Panalpina subcontracted with Desgagnés and Logistec after receiving Nalcor's approval.

[7] The first shipment of 510 reels was shipped on board Desgagnés' multipurpose Canadian flagged cargo ship, the *Sedna Desgagnés*, on May 28, 2015 [May Shipment]. Upon the arrival of the Conductor Reels to Argentia on June 1, 2015, Nalcor noticed during the discharge operations that the Conductor Reels were damaged. On September 9, 2015, Nalcor advised Panalpina of the damage and put Panalpina on notice of its intent to claim.

[8] The second shipment, consisting of 533 reels, was shipped on board the *Zelada Desgagnés* on October 28, 2015 [October Shipment]. Damage was first noticed during the discharge operations. On November 2, 2015, Nalcor advised Panalpina of its intent to claim for the damage to the shipment.

[9] Nalcor commenced the underlying action on May 29, 2017, seeking damages based on the Defendants' alleged negligence in storing, loading, securing and carrying the Conductor Reels.

[10] It is common ground between the parties that more than a year has elapsed between the delivery of both shipments and the issuance of the Statement of Claim asserting cargo claims.

II. Issues to be Determined

[11] These motions are not about the merits of Nalcor's damage claim against the Defendants. The dispute turns on whether Panalpina is entitled to invoke the nine (9) month limitation period contained in the Canadian International Freight Forwarders Association [CIFFA] Standard Trading Conditions [the CIFFA Terms] or, alternatively, whether any of the Defendants can rely upon the one (1) year time limitation of *the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading*, better known as the *Hague Rules*, as incorporated by reference in the sea waybills issued by Desgagnés [Sea Waybills], whether it be on the basis of either:

(1) the Paramount Clause [clause 2] of the Sea Waybills;

(2) a sub-bailment; or

(3) the Himalaya clause contained in the booking notes as between Nalcor and Panalpina.

[12] Before turning to these issues, the Court must first consider whether summary judgment is appropriate on the facts of this case.

III. Whether Summary Judgment is Appropriate

[13] With respect to the principles applicable to a summary judgment brought pursuant to rules 213, 214 and 215 of the *Federal Courts Rules*, SOR/98-106, I can do no better than to adopt the reasons of Madam Justice Anne Mactavish in *Milano Pizza Ltd v 6034799 Canada Inc*, 2018 FC 1112 at paragraphs 33 to 40:

> [33] The test on a motion for summary judgment "is not whether a party cannot possibly succeed at trial; rather, it is whether the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial". As a consequence, "summary judgment is not restricted to the clearest of cases": both quotes from *Canada (Citizenship and Immigration) v. Campbell*, 2014 FC 40 (CanLII) at para. 14, [2014] F.C.J. No. 30, citing *ITV Technologies Inc. v. WIC Television Ltd.*, 2001 FCA 11 (CanLII) at paras 4-6, 199 F.T.R. 319; *Premakumaran v. Canada*, 2006 FCA 213 (CanLII) at paras 9-11, [2007] 2 F.C.R. 191; *Canada (Minister of Citizenship and Immigration) v. Schneeberger*, 2003 FC 970 (CanLII) at para. 17, [2004] 1 F.C.R. 280.
>
> [34] The onus is on the party seeking summary judgment to establish that there is no genuine issue for trial. However, parties responding to motions for summary judgment are also required to "put their best foot forward" in their response: *F. Von Langsdorff Licensing Ltd. v. S.F. Concrete Technology, Inc.* (1999), 1999 CanLII 7912 (FC), 165 F.T.R. 74 at paras. 12 and 27, [1999] F.C.J. No. 526.
>
> [35] Responses to motions for summary judgment cannot be based upon what might be adduced as evidence at a later stage in the proceeding. Respondents must instead set out specific facts in their response to a motion for summary judgment and adduce the evidence showing that there is a genuine issue for trial: Rule 214. See also *MacNeil Estate v. Canada (Indian and Northern Affairs Department)*, 2004 FCA 50 (CanLII) at para. 37, [2004] F.C.J. No. 201. This requirement has been described as necessitating that a responding party "lead trump or risk losing": see *Kirkbi AG v. Ritvik Holdings Inc.* (1998), 1998 CanLII 8100 (FC), 150 F.T.R. 205 at para. 18, [1998] F.C.J. No. 912.
>
> [36] As noted above, to be "fair and just", the record before the motions judge must permit the judge to find the facts necessary to

> resolve the dispute: *Hryniak*, above at para. 28. Summary judgment should therefore not be granted where the necessary facts cannot be found, or where it would be unjust to do so.
>
> [37] The jurisprudence is clear that issues of credibility ought not to be decided on motions for summary judgment. Generally, a judge who hears and observes witnesses giving evidence orally in chief and under cross-examination will be better positioned to assess the witnesses' credibility and to draw the appropriate inferences than a judge who must depend solely on affidavits and documentary evidence: *TPG Technology Consulting Ltd. v. Canada*, 2013 FCA 183 (CanLII) at para. 3, [2013] F.C.J. No. 836.
>
> [38] Without hearing oral evidence, a motions judge faced with a genuine issue for trial cannot properly assess credibility or sift through and weigh the evidence: *MacNeil Estate*, above at para. 38. Consequently, cases should go to trial where there are serious issues with respect to the credibility of witnesses: *Newman v. Canada*, 2016 FCA 213 (CanLII) at para. 57, [2016] F.C.J. No. 952; *Suntec Environmental Inc. v. Trojan Technologies, Inc.*, 2004 FCA 140 (CanLII) at paras. 20 and 28-29, [2004] F.C.J. No. 636; *MacNeil Estate*, above at para. 32.
>
> [39] That said, "the mere existence of apparent conflict in the evidence does not preclude summary judgment". Judges have to take a "hard look" at the merits of the case and decide if there are issues of credibility that need to be resolved: *Granville Shipping Co. v. Pegasus Lines Ltd.* S.A., 1996 CanLII 4027 (FC), [1996] F.C.J. No. 481 at para. 7, [1996] 2 F.C. 853.
>
> [40] Judges dealing with motions for summary judgment must, moreover, proceed with care, as the effect of the granting of summary judgment will be to preclude a party from presenting any evidence at trial with respect to the issue in dispute. In other words, the unsuccessful party will lose its "day in court": see *Apotex Inc. v. Merck & Co.*, 2004 FC 314 (CanLII) at para. 12, 248 F.T.R. 82, aff'd 2004 FCA 298 (CanLII), [2004] F.C.J. No. 1495.

[14] In *Graymar Equipment (2008) Inc* v *Cosco Pacific Shipping Ltd*, 2018 FC 974 at para 16, Justice Sean Harrington adds that "there is no genuine issue for trial if the motion allows the judge to make the necessary findings of fact, allows him or her to apply the law to the facts, and that this is a proportionate, expeditious and less expensive way to proceed."

[15] There is no dispute between the parties that a motion for summary judgment is an appropriate procedural vehicle in the present case. They agree that a determination as to whether the CIFFA Terms apply or whether the Sea Waybills are enforceable against Nalcor can be made based on the evidentiary record before the Court. I agree.

[16] The substantial evidence adduced by the parties provides a thorough paper trail concerning their activities and contractual relationships. Further, the affidavits provided by the parties and transcripts of cross-examinations allow the Court to ascertain the parties' intention when concluding the underlying agreements. No credibility assessments of witness are required to deal with these matters. Further, allowing a time-barred claim to proceed to trial on facts that are largely undisputed would be a waste of the Court's resources and time. I therefore conclude that it is just and appropriate to determine whether Nalcor's claim is time-barred by way of summary judgment.

IV. The Facts

[17] The hearing proceeded on the basis of a common evidentiary record.

[18] In support of its motion, Panalpina relies on the affidavit of Mr. Lorne Grant, Project Manager, Energy & Project Solutions, who was directly involved in Panalpina's freight forwarding activities with respect to the Lower Churchill Project.

[19] Desgagnés filed the affidavit of Mr. Daniel Desgagnés, its Director of Sales and Client Services, who was directly involved in preparing detailed offers for the carriage of the two shipments and arranging for the carriage of the cargo.

[20] Logistec filed the affidavit of Mr. Michel Miron, its Vice President of Operations, who has personal knowledge of the quotes provided to Panalpina and services provided by Logistec in relation to the two shipments.

[21] Nalcor responded with the affidavit of Mr. Pat Hussey, Supply Chain Manager for the Lower Churchill Project, which was amended on September 11, 2018. Mr. Hussey was involved in the negotiations between Nalcor and Panalpina which led to the execution of the FFSA. Mr. Hussey was also involved in the purchase and transportation arrangements for the two shipments, along with Mr. Rick Caporiccio, a logistics manager who reported to him on the Lower Churchill Project.

[22] All four deponents were cross-examined and transcripts of the cross-examinations have been produced.

[23] Answers to undertakings arising from the cross-examinations of the deponents are attached as exhibits to the affidavit of Mr. Philip Louis, a lawyer at the law firm representing Nalcor.

[24] As stated earlier, the facts are fairly straightforward given that all transactions are well documented. There are also no significant issues of credibility involved.

A. *Freight Forwarding Service Agreement*

[25] The FFSA sets forth the terms and conditions that apply to movements of Nalcor’s cargo by Panalpina. It contains provisions regarding Panalpina's role, obligations, representations and warranties, the furnishing of personnel and equipment, subcontracting, compensation and terms of payment, default and termination, liability and indemnification and other related provisions.

[26] In general, Nalcor initiates this process by issuing a Request for Quotation [RFQ], which contains specific information regarding the movement in question, including the nature of the cargo, its quantity, its location, the preferred mode of transportation and the required delivery date. The RFQ allows Panalpina to go to the market and request quotes from carriers based on the specifics provided by Nalcor.

[27] Once Panalpina obtains quotes, it relays them to Nalcor. After reviewing each quote’s pricing, scheduling and logistics, Nalcor selects a quote by issuing a Procurement for Transportation Recommendation. Nalcor informs Panalpina of its selection by issuing a Material Movement Ticket [MMT], which confirms the mode of transport, collection point, delivery point, required delivery date and information relevant to the collection and transportation of the goods.

[28] Upon receipt of the MMT, Panalpina contacts the selected carrier and makes all of the necessary arrangements and bookings for the transportation of the cargo, including issuing booking notes to Nalcor.

[29] Article 1.9 of the FFSA states that the agreement will "be construed in accordance with the laws of the Province of Newfoundland and Labrador and Canada" and that Panalpina "irrevocably attorns to the exclusive jurisdiction of the courts of the Province of Newfoundland and Labrador and Canada for the resolution of any dispute arising in respect of this Agreement."

[30] Article 2.2 of the FFSA explicitly states that Panalpina "is not an agent of [Nalcor] or an agent of any Affiliate of [Nalcor]."

[31] Article 6 deals with subcontracting by Panalpina:

> 6.1 Contractor shall not Subcontract the whole of the Work or the performance of any portion of the Work without Company's prior Approval.
>
> 6.2 Any Subcontract Approved by Company shall not relieve Contractor of any of its duties, obligations, warranties, liabilities or responsibilities under this Agreement.
>
> 6.3 Contractor shall be responsible for the acts, omissions and negligence of any agent and any Subcontractors and any of their respective Personnel as fully as if they were the acts, omissions or negligence of Contractor's own Personnel.

[32] The FFSA also contains an "Entirety of Agreement" at Article 28:

> 28.1 This Agreement constitutes the entire agreement between the parties with respect to the subject matter dealt with herein. This Agreement replaces and supersedes all prior agreements, documents, writings and verbal understandings between the parties

> in respect of the Work and there are no oral or written understandings, representations or commitments of any kind, express or implied, which are not expressly set forth herein.
>
> 28.2 No modification of this Agreement by Contractor or Company shall be of any force or effect unless such modification is in writing, is expressly stated to be a modification of this Agreement and is signed by duly authorized representatives of each of the Parties.
>
> 28.3 No waiver of any provision of this Agreement shall be of any force unless such waiver is in writing, is expressly stated to be a waiver of a specified provision of this Agreement and is signed by the Party to be bound thereby.

[33] Exhibit 1 of the FFSA contains a Scope of Work that establishes the procedure that must be followed to effect transportation of Nalcor's cargo by Panalpina.

[34] Section 2.2 of the Scope of Work states that Panalpina will act as Nalcor's principal:

> 2.2 Project Freight Forwarding
>
> Contractor shall provide general freight forwarding services for the Project. The freight forwarder will act as the principal, fully responsible for the services in accordance with and subject to the provisions of the Agreement […]

B. *Sequence of Events Relating to the May and October Shipments*

[35] Panalpina acted as freight forwarder in accordance with the terms of the FFSA with respect to both the May and the October shipments. Desgagnés acted as carrier and Logistec as stevedore. The shipments were, respectively, the 299th and 459th shipments moved on behalf of Nalcor. Neither Desgagnés nor Logistec had any direct dealings with Nalcor.

[36] For each of the shipments, the following sequence of events occurred.

[37] Nalcor initiated the process by issuing a RFQ containing specific information regarding the movement in question, including the nature of the cargo, its quantity, its location, the preferred mode of transportation and the required delivery date. This document allowed Panalpina to go to the market and request quotes from carriers based on the specifics provided by Nalcor.

[38] Logistec provided Desgagnés with its rates, terms and condition for stevedoring and vessel loading services in relation to the cargo pursuant to its standard stevedoring and terminal contract. Desgagnés retained Logistec on such terms for the loading of the cargo from Desgagnés' ship's hook to stowage in the vessel cargo hold. Similarly, Logistec provided Panalpina with its rates, terms and condition in relation to the terminal services, which include receiving the cargo from the trucks to transfer to dock, under ship's hook, in order to allow for the loading of the cargo aboard Desgagnés' vessels.

[39] Panalpina then submitted to Nalcor quotes from one or more carrier(s) and stevedore(s). In each case, Panalpina made the following reference in the document containing the quote(s): *"Rates are subject to latest CIFFA Terms and Conditions (available upon request)"*. Pursuant to section 19 of the CIFFA Terms, any suit against the freight forwarder must be brought within 9 months from *"the date of delivery of the goods for claims for damage to goods"*, failing which the freight forwarder *"shall, unless otherwise expressly agreed, be discharged from all liability"*.

[40] Mr. Caporiccio was the primary interlocutor with Panalpina. He received a copy of each document submitted by Panalpina, reviewed them and then forwarded them to Mr. Hussey. Nalcor responded to Panalpina by way of a MMT, accepting the quotes provided by Panalpina from Logistec and Desgagnés.

[41] Panalpina contracted with Logistec for the receipt and storage of the Conductor Reels at its terminal pending ocean shipment, as well as with Desgagnés for the transportation of the shipments by sea.

[42] Panalpina then sent to Nalcor "back-to-back" booking notes (one issued by Desgagnés and an identical one issued by Panalpina) with respect to each shipment, listing Desgagnés as Carrier, Panalpina as Shipper and Nalcor (Labrador Island Link Ltd Partnership) as Receiver (Consignee).

[43] In each case, the booking notes contained the following statement under "Sea Waybill": *"All other terms and conditions are as per Desgagnés Transarctik's Sea Waybill"*.

[44] The terms and conditions of the Sea Waybills include the following clauses:

> Condition of Carriage
>
> **1. DEFINITIONS.** "Carrier" means DESGAGNÉS TRANSARCTIK INC. (hereinafter DTI) (…).
>
> "Shipper" means not only the person or the company which deliver the goods to the Ship at the loading port but also the owner of said goods as well as any person or company acting on behalf of said owner.

> "Consignee" means anyone entitled to the delivery of the goods at the port of discharge including, as the case may be, the owner of the goods or the person designated as Consignee.
>
> **2. PARAMOUNT CLAUSE.** The parties acknowledge and agree that the carriage performed under this contract is not governed by a Bill of Lading but rather by this Sea Waybill. However, they agree that the terms, provisions and conditions of Articles II to IX of the International Convention for the Unification of Certain Rules Relating to Bills of Lading signed at Brussels on August 25, 1924 (The Hague Rules) are incorporated by agreement into this contract. The Carrier's rights and immunities including the $500.00 limitation of liability per package or unit are more specifically herein incorporated. In the event said rules are in contradiction with the other terms, provisions and conditions of this contract, said other terms, provisions and conditions shall prevail.

[45] Mr. Pat Hussey signed the booking notes issued by Panalpina on behalf of Nalcor and returned them to Panalpina. Panalpina's representatives signed Desgagnés' booking notes.

[46] After each shipment departed, Panalpina issued an invoice to Nalcor. Each invoice contained the following text in the section entitled "Terms and Conditions":

> 1) All business will be accepted by Panalpina Inc. (hereinafter the "Company") from the Owner, Consignee or Shipper (hereinafter the "Customer") subject to the Standard Trading Conditions of the Canadian International Freight Forwarders Association, Inc. currently in effect which Conditions contain provisions which exonerate the Company from liability and limit the amount recoverable, and each Condition shall be deemed to be incorporated in and to be a Condition of any agreement between the "Company" and the "Customer". In transacting such business with the "Company", the "Customer" acknowledges that he is familiar with and accepts such Conditions. A copy of the Standard Trading Conditions can be obtained on request from the "Company" or from the Canadian International Freight Forwarders Association, Inc., in the latter case, by addressing such request to: the Canadian International Freight Forwarders Association (CIFFA), 170 Atwell Drive, Suite 480, Toronto, Ontario, M9W 5Z5, or via web http://www.ciffa.com/.

[47] Nalcor's payment of Panalpina's invoice occurred in a two-step process. First, a Payment Certificate containing Panalpina's quotes and Degagnés' invoices was prepared and sent to Nalcor, Logistics Department, for review and approval. Second, once the Payment Certificate was signed and approved by Nalcor, Panalpina submitted its invoice to Nalcor's Accounts Payable Department.

V. Analysis

[48] It is well established that a party bringing the motion for summary judgment bears the onus of proving that there is no issue of merit requiring trial.

[49] Panalpina submits that it can only have acted in this case as: (a) freight forwarder and agent for Nalcor or (b) carrier or agent of the carrier. Panalpina argues that, in either scenario, there is no question that either the CIFFA Terms or the terms and conditions set forth in the Sea Waybills must apply. As explained below, I agree that Nalcor is inevitably caught by either a nine month or one year limitation period.

A. *Freight Forwarder – Dual Role*

[50] The traditional view of the legal status of the freight forwarder was stated by Mr. Justice Rowlatt in *Jones v European & General Express Company, Ltd*, (1920) 25 Com Cas 296 at p 298 and approved by the English Court of Appeal in *Marston Excelsior Ltd v Arbuckle, Smith & Co Ltd*, [1971] 2 Lloyd's Rep 306 and *Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd*, [1973] 1 Lloyd's Rep 10:

> It must be clearly understood that a forwarding agent is not a carrier; he does not obtain the possession of the goods; he does not undertake the delivery of them at the other end unless prevented by some excepted cause of loss or something which affords an excuse. All that he does is to act as agent for the owner of the goods to make arrangements with the people who do carry—steamships, railways, and so on—and to make arrangements so far as they are necessary for the intermediate steps between the ship and the rail, the Customs or anything else…

[51] The essential feature of this traditional relationship is that the freight forwarder is an agent of the shipper. If the freight forwarder acts as agent for the shipper, then the shipper may not have a claim against the freight forwarder provided that it performed its agency duties with the appropriate skill and care.

[52] However, at times, the freight forwarder has acted as principal contractor arranging for the carriage in its own name. In such cases, the freight forwarder assumes responsibility for carriage on the basis of its expertise in choosing competent carriers. As stated by William Tetley, *Marine Cargo Claims,* 4th Edition (Cowansville: Les Éditions Yvon Blais, 2008) at p 1695: "On these occasions, the freight forwarder's responsibility to the shipper is often that of a carrier."

[53] The contractual documents and the parties' dealings in relation to the May and October Shipments are consistent with Panalpina acting as Nalcor's principal and not its agent. Beyond the express wording in the FFSA, Panalpina's conduct had all the trappings of a party acting as principal, including the following:

(1) Nalcor contracted and communicated directly and exclusively with Panalpina. Panalpina contracted and communicated directly and exclusively with Desgagnés and Logistec;

(2) Nalcor was not identified as a party to any contract between Panalpina, Desgagnés and/or Logistec;

(3) Panalpina was identified as the shipper in a series of documents issued by Panalpina and Desgagnés;

(4) Panalpina requested that a two-step booking process be applied, whereby Panalpina would prepare a booking note to be signed by Nalcor, and Desgagnés would prepare a booking note to be signed by Panalpina;

(5) Desgagnés admitted having been retained by Panalpina whereas Logistec admitted having been retained by Panalpina for terminal services and by Desgagnés for stevedoring services; and

(6) Desgagnés was paid by Panalpina and Logistec was paid by Desgagnés and Panalpina.

[54] It cannot be said, however, that Panalpina was acting throughout as an independent contractor. Atypically, Nalcor was closely involved in the carriage by sea of the Conductor Reels. It approved the choice of carrier and stevedores and the vessels' cargo securing plans. It also issued bills of lading instructions and approved Desgagnés' actual freight invoices, all with Panalpina essentially acting as a messenger between the two.

[55] Notwithstanding, it is clear that Panalpina agreed that it was fully responsible for the services in accordance with and subject to the provisions of the FFSA.

B. *Whether the CIFFA Terms Apply*

[56] Panalpina seeks to rely on the 9 month time-bar established by virtue of section 19 of the CIFFA Terms.

[57] Nalcor disputes that the CIFFA Terms apply on two grounds. First, Nalcor claims that Panalpina never advised it of the CIFFA Terms' application further to the execution of the FFSA. Second, Nalcor argues that the CIFFA Terms are in direct contradiction with the FFSA's terms. For the reasons that follow, I disagree.

[58] With respect to the first ground, it is important to note that Nalcor is a sophisticated shipper with significant knowledge and experience regarding the role and business terms of the various players in the shipping industry. Mr. Hussey admitted in cross-examination that he had prior experience working with Panalpina and other international freight forwarders and knew the nature of their role. Further, although he claimed that he could not recall whether Panalpina was a member of CIFFA prior to entering into the FFSA, he assumed that it would be. In the circumstances, I conclude that Nalcor was or ought to have been aware that Panalpina was a member of CIFFA from the start.

[59] Although the fact that a freight forwarder is a member of CIFFA does not amount to incorporating CIFFA Terms into a contractual agreement between parties, it remains that it is a matter of common knowledge that freight forwarders in the market of carriage of goods commonly offer their services on the basis of standard terms and conditions that apply to all activities in arranging transportation or providing related services.

[60] Even if Nalcor had no advance knowledge that Panalpina was a member of CIFFA, the evidence establishes that the standard terms and conditions were brought to Nalcor's attention by Panalpina in its dealings with Nalcor, and more particularly in connection with the May and

October Shipments. As noted at paragraph 39 of these reasons, explicit reference was made to the application of the CIFFA Terms in Panalpina's quotes relating to the shipments.

[61] Nalcor submits that a plain reading of the terms invoked by Panalpina "Rates are subject to the latest CIFFA Terms and Conditions (available upon request)", does not have the meaning Panalpina purports to ascribe to them. According to Nalcor, the reference is unclear and seems to say that CIFFA terms and conditions apply to "rates" and not to any other aspect of carriage of cargo.

[62] Mr. Hussey states in his affidavit and during his cross-examination that since the FFSA contained all the terms and conditions applicable between Nalcor and Panalpina, when Nalcor received shipping documentation from Panalpina, the sole items reviewed were pricing, scheduling and logistics. When asked whether he took note at the time of the various terms and conditions that were set forth in the documents, Mr. Hussey answered that he "wouldn't focus on that" or "didn't pay attention to any other terms." His response speaks volumes.

[63] Nalcor acknowledges that Mr. Caporiccio was the primary interlocutor with Panalpina. And yet, Mr. Caporiccio has offered no evidence regarding his own consideration of the references to the CIFFA Terms. When asked whether Mr. Caporiccio was asked to sign an affidavit, Nalcor responded that he was no longer contracted to Nalcor and did not have access to any documents or emails in Nalcor's files. Nalcor added that Mr. Hussey was considered the appropriate witness for Nalcor.

[64] Panalpina invites the Court to draw a negative inference from Mr. Caporiccio's silence. I agree. As the person directly and intimately making arrangements with Panalpina, Mr. Caporiccio is an important witness. There is an obligation on a responding party to a motion for summary judgment to put its best foot forward and provide the evidentiary foundation for its case. There is no indication that Nalcor took any steps to secure Mr. Caporiccio's testimony, electing instead to rely on the second hand knowledge of Mr. Hussey.

[65] I conclude that Mr. Caporiccio took note of the application of the CIFFA Terms. There is no evidence that Mr. Caporiccio or Mr. Hussey sought clarification or ever took issue with the reference to the CIFFA Terms. To the contrary, the evidence shows that in response to the quotes, Nalcor issued MMTs approving the terms proposed by Panalpina.

[66] I should note that even if Nalcor failed to take actual notice of the reference to the application of the CIFFA Terms, this cannot serve as a basis to refuse to apply the CIFFA Terms. Any failure by Nalcor to take proper notice of terms that were clearly set forth in the documents exchanged between the parties is simply not an excuse and cannot serve to alter or render inapplicable such contractual terms.

[67] As for the second ground, Nalcor invokes the FFSA which states that it is the "sole contract" for the transportation of the Conductor Reels. I disagree. The FFSA makes no mention of the transportation of the Conductor Reels. It also does not contain any of the material terms relating to their carriage. In fact, it was clearly contemplated by the parties to the FFSA that the

terms and conditions of each specific shipment would be determined in the future by way of distinct contractual documents.

[68] Mr. Hussey admitted that when the FFSA was signed, the expectation was that the specific terms and conditions of each shipment would be set forth in subsequent documents, as appears from the following excerpt from his cross-examination:

> A- It was understood that for the shipments we would give a document -- I thought it was called an MMT, and then I've seen again it's RFQ -- telling them the material that we wanted moved, what location, what quantity, and that allowed them to go to the market to find the carriers... the appropriate carriers to give us a proposal on moving that freight.
>
> 81 Q- And those terms were not contained in the Freight Forwarding Services Agreement?
>
> A- They wouldn't be.
>
> 82 Q- No?
>
> A- The terms, no, because that's... that's how you handle a freight forwarding contract, you would give them that information to... to go and... and seek proposals from carriers.
>
> 83 Q- And then following each individual RFQ...
>
> A- Yes.
>
> 84 Q- ... there was one (1) or more quotes that came back from Panalpina...
>
> A- Yes.
>
> 85 Q- ... for one (1) or more carriers...
>
> A- Yes.
>
> 86 Q- ... at... at specified pricing...
>
> A- Yes.

> 87 Q- ... correct? And that was always contemplated from the start as well, right?
>
> A- Yes.

[69] Mr. Hussey later acknowledged the importance of the terms that were intended to be agreed after the FFSA was entered into:

> 175 Q- But certainly you'll agree with me that in the RFQs and in the quotations there are important elements that are not in the Freight Forwarding Services Agreement at all, correct?
>
> Me SHAWN FAGUY:
>
> Sorry, did you say "important"?
>
> Me MATTHEW LIBEN:
>
> Important elements.
>
> Me SHAWN FAGUY:
>
> I don't know what... I don't know... I object to the qualification of "important elements." You can ask him a factual question, but I don't think he has to agree with your qualification of what an important element is.
>
> Me MATTHEW LIBEN:
>
> It's a perfectly... perfectly reasonable question, you can't... you can't object to my qualifications, I am saying "Would you agree with me that important elements..." I'm not trying to mislead the witness, I want him to decide, does he agree that the... that certain elements that were important were not in the Freight Forwarding Services Agreement but were instead in the RFQs and the quotes that came back?
>
> Me SHAWN FAGUY:
>
> Vague, objection. If you want to re-qualify the question without the word "important," that's fine.
>
> Me MATTHEW LIBEN:
>
> 176 Q- Would the nature of the cargo be an important element?

A- What do you mean “the nature”?

177 Q- Each individual...

A- The...

178 Q- ... movement, the nature of the cargo, is it...

A- For sure.

179 Q- ... an envelope, or is it a turbine? You'll agree with me that's an important element?

A- Yes.

180 Q- Okay, and the price that's going to be charged to move it is an important element?

A- Yes.

181 Q- And how long it will take to get there?

A- Yes.

182 Q- And the identity of the carrier?

A- Yes.

183 Q- And you approved all of those things in each case?

A- On the procurement recommendation, yes.

184 Q- Based on the quotes that came back from...

A- Yes.

185 Q- ... Panalpina?

A- Yes.

[70] Nalcor submits that section 19 of CIFFA Terms, which provides for a limitation period that is much shorter than that provided by the laws of Newfoundland and Labrador, conflicts with Article 1.9 of the FFSA. Nalcor argues that if Panalpina wished to incorporate terms which modify the FFSA, it was required to abide by the amendment procedure established at Article

28.2 of the FFSA. I disagree that Panalpina's attempt to limit its liability was constrained in any way by the FFSA.

[71] On a plain reading of Article 1.9 of the FFSA, "the laws of Newfoundland and Labrador and Canada" are only meant to apply to the construction of the FFSA and to the resolution of any dispute arising in respect of the FFSA itself. There is no evidence that the parties turned their minds to the issue of delay of suit during their negotiations. The FFSA is silent on this subject. In fact, Nalcor recognizes in a footnote to paragraph 15 of its written submissions that potentially applicable limitation periods are: Quebec - 3 years, Newfoundland and Labrador - 2 years and federal law - 3 years.

[72] In the absence of any language in the FFSA dealing with a specific limitation period to commence an action, it was open to Panalpina to put forward terms when providing quotes to Nalcor which placed it in the same position as if it were only an agent and, therefore, had the advantage of leaving the burden of any contract so made on its customer, Nalcor: *Schenker and Co (Aust) Pty Ltd v Maplas Equipment and Services Pty Ltd*, [1990] VicRp 74; [1990] VR 834.

[73] Nalcor submits that the contractual allocation of risk between the parties must be respected. It maintains that concluding that Nalcor contracted with and is bound by terms not found in the FFSA would set aside the well-established doctrine of privity of contract. However, Panalpina's trading conditions are in standard form and are incorporated in many contracts in regard to the carriage of goods. These are substantially contracts of adhesion. Nalcor could have

taken issue or rejected the CIFFA Terms upon reviewing the quotes received from Panalpina, but failed to do so.

C. *Estoppel*

[74] Nalcor submits, in the alternative, that should the CIFFA Terms be found applicable, Panalpina clearly extended the applicable time-bar on consent and that Panalpina is now estopped from invoking time-bar given its statements and Nalcor's reliance on these statements. The only evidence filed by Nalcor in support of these arguments is a heavily redacted exchange of e-mails between Panalpina and Charles Taylor Adjusting, Nalcor's adjuster, in January 2017.

[75] Beyond the fact that the contents of the e-mails are hearsay, there is no indication that Panalpina agreed to a time-bar extension. Panalpina's Country Claims Manager incorrectly in her email states that "the standard time bar here is 2 years from the date of delivery, per the Hamburg Rules" and that it is Panalpina's policy to give due consideration to a request for extension made in the months before the original time bar deadline. Moreover, Nalcor has not established the essential factors giving rise to an estoppel. In particular, Nalcor failed to adduce evidence that Nalcor relied on a representation made by Panalpina to its detriment.

[76] For the above reasons, I conclude that Nalcor is bound by the CIFFA Terms and the action as against Panalpina is time-barred.

[77] It follows that the action as against Desgagné and Logistecs, as contractors engaged by the Panalpina to perform transport and related service in relation to the Conductor Reel, is also

time-barred as both of them can rely upon section 2 of the CIFFA Terms in order to invoke the shorter nine (9) month time-bar found at section 19 of these terms and conditions. Section 2 is a form of Himalaya clause that provides as follows:

> 2. CLAIMS AGAINST OTHERS
>
> These Conditions also apply whenever any claim is made against any employee, agent or independent contractor engaged by the Company to perform any transport or related service for the Customer's goods, whether such claims are founded in contract or in tort, and the aggregate liability of the Company and all such persons shall not exceed the limitations of liability in these conditions. For purposes of this clause the Company acts as agent for all such persons who may ratify such agency at any subsequent time.

[78] A Himalaya clause is a contractual provision that attempts to extend the benefits of the carrier's contractual limitations to sub-carriers or other third parties engaged by the carrier to assist in the transportation of goods.

[79] In *New Zealand Shipping Co v AM Satterthwaite & Co*, [1975] AC 154 (PC), the Judicial Committee of the Privy Council accepted the argument that a Himalaya clause may be effective against third parties on the basis that the contracting party was acting as agent for the third parties in respect of the limitations. The Court gave effect to the language of the contract finding that both parties knew that third parties would be engaged and that this was a standard practice in the industry. The Court concluded that it would not be unreasonable to hold that the contracting party was acting as agent for the third parties for the purposes of the contract. Himalaya clauses have since been accepted as forming a part of Canadian law.

[80] Himalaya clauses are well recognized terms in transport contracts, and they are enforceable by the courts notwithstanding a third party's complete ignorance of the existence of a clause granting it a benefit at the time of the performance of its own contract: *Boutique Jacob Inc v Pantainer Ltd*, 2006 FC 217 at para 38, overturned on appeal on other grounds: *Boutique Jacob Inc v Pantainer Ltd*, 2008 CAF 85.

[81] The effect of such clauses is simple. Every participant in the contract of carriage, whether they are explicitly named or simply an agent or sub-contractor, is entitled to rely upon and benefit from the conditions of carriage set forth in said contract.

[82] In the event I am wrong in the above conclusions, I find in the alternative that Sea Waybills are the best evidence of the contracts of carriage of the Conductor Reels. Panalpina did not issue any shipping document for the carriage by sea of the cargo. This is consistent with Panalpina acting as an agent of Nalcor, not a principal. In his RFQ forms, Mr. Capporicio, indicated under "Contract": "… No NVOC bill of lading", which could only mean that the actual shipping document evidencing the contract of carriage had to come from the actual carrier by sea, not from a freight forwarder acting as a Non-Vessel Operating Carrier. The bills of lading instructions naming Nalcor as shipper of each shipment actually originated from Nalcor itself and were relayed to Desgagnés by Panalpina. In the circumstances, Nalcor was a party to the contract of carriage with Desgagnés as evidenced by the Sea Waybill for each shipment and is therefore bound by all of its terms and conditions, including the Paramount Clause reproduced at paragraph 44 of these reasons.

[83] In the futher alternative, even if Nalcor were to succeed with their contention that Desgagnés and Logistec acted strictly as subcontractors of Panalpina, the claims would still be time-barred.

[84] I agree with the Defendants that attempts by cargo claimants to circumvent the carriers' limitations of liability and other terms, whether it be by suing in tort or by artificially raising privity of contract issues, are long passé now. Sub-bailment on terms and the increased recognition of Himalaya Clauses have brought an end to these artificial attempts, especially in cases such as the present one where Nalcor was fully aware that Panalpina would not be the party actually performing the stevedoring and carriage by sea of the Conductor Reels.

[85] There is sub-bailment where a contracting carrier subcontracts the whole or part of the carriage to subcontracting carrier(s). There is sub-bailment on terms where the primary carrier (here assumed to be Panalpina for present purposes) either had express, implied or ostensible authority from the owners of the cargo (here Nalcor) to subcontract the portion of the carriage under the terms of the sub-carrier (here Desgagnés) in which case the owner of the goods is bound by these terms, including terms excluding or limiting the liability of that sub-carrier. These principles have been recognized and consistently applied in Canadian shipping cases.

VI. Conclusion

[86] For the above reasons, I conclude that the motions for summary judgment should be granted.

[87] As for costs of the motion, I see no reason to deviate from the general rule that costs should follow the event. Notwithstanding, I am prepared to entertain submissions from the parties on the issue of costs if they cannot agree. In such event, Nalcor shall serve and file written submissions on costs, not exceeding five (5) pages, and a Bill of Costs by June 3, 2019. The Defendants shall serve and file written submissions in response by June 13, 2019. Any reply submissions by Nalcor shall be served and filed by June 20, 2019.

JUDGMENT IN T-772-17

THIS COURT'S JUDGMENT is that:

1. The motions for summary judgment are granted.

2. The action as against the Defendants is dismissed.

3. In the event the parties cannot agree on costs, the Plaintiffs shall serve and file written submissions, not exceeding five (5) pages, by June 3, 2019. The Defendants shall serve and file written submissions in response by June 13, 2019. Any reply by the Plaintiff shall be served and filed by June 20, 2019.

"Roger R. Lafrenière"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-772-17
STYLE OF CAUSE:	LABRADOR-ISLAND LINK GENERAL PARTNER CORPORATION ACTING AS THE GENERAL PARNTER FOR THE LABRADOR-ISLAND LINK LIMITED PARTNERSHIP AND THE LABRADOR-ISLAND LINK LIMITED PARTNERSHIP v PANALPINA INC. AND DESGAGNÉS TRANSARCTIK INC. AND LOGISTEC STEVEDORING INC.
PLACE OF HEARING:	MONTRÉAL, QUEBEC
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JUDGMENT AND REASONS:	LAFRENIÈRE J.
DATED:	MAY 24, 2019

APPEARANCES:

M[e] Shawn Faguy M[e] Emilie Kokmanian	FOR THE PLAINTIFFS
M[e] Matthew Liben	FOR THE DEFENDANT, PANALPINA INC.
M[e] Louis Buteau M[e] Fady Toban	FOR THE DEFENDANT, DESGAGNÉS TRANSARCTIK INC.
M[e] Peter Pamel	FOR THE DEFENDANT, LOGISTEC STEVEDORING INC.

SOLICITORS OF RECORD:

Stikeman Elliott Barristers and Solicitors Montréal, Québec	FOR THE PLAINTIFFS
Faguy & Co. Barristers and Solicitors Montréal, Québec	FOR THE DEFENDANT, PANALPINA INC.

Navilex Inc. Saint-Lambert, Québec	(FORMERLY) FOR THE DEFENDANT, DESGAGNÉS TRANSARCTIK INC.
Borden Ladner Gervais Barristers and Solicitors Montréal, Québec	FOR THE DEFENDANT, LOGISTEC STEVEDORING INC