Federal Court  Cour fédérale

Date: 20221107

Docket: T-122-21

Citation: 2022 FC 1512

Ottawa, Ontario, November 7, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

BRINK'S GLOBAL SERVICES KOREA LTD. AND BRINK'S GLOBAL SERVICES INTERNATIONAL, INC.

Plaintiffs, Respondents in this Appeal

and

WOOWON SEA & AIR CO. LTD.

Defendants, Appellant in this Appeal

and

BINEX LINE CORP., JOHN DOE BINEX EMPLOYEE, JANE DOE BINEX EMPLOYEE AND OTHER PERSONS UNKNOWN TO THE PLAINTIFFS CURRENTLY OR FORMERLY EMPLOYED BY BINEX

Defendants, Respondents in this Appeal

and

A.P. MOLLER-MAERSK A/S AND CANADIAN NATIONAL RAILWAY COMPANY

Third Parties

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an appeal of a decision dated April 20, 2022, now reported as *Brink's Global Services Korea Ltd. v. Binex Line Corp.,* 2022 FC 571, [Decision] made by Case Management Judge Aalto [CMJ] who dismissed a motion by the Appellant Woowon Sea & Air Co. Ltd. [Woowon] to stay this Federal Court action so that issues may be litigated in Korea.

[2] Woowon (along with the Binex Line Corp. parties) is a Defendant in the action but has not attorned to this Court's jurisdiction. Woowon has its principal place of business in Korea and no physical presence in Canada although it has a longstanding agency relationship with the Binex Line Corp [Binex]. Woowon says this Court has no jurisdiction, and in the alternative asks the Federal Court to decline jurisdiction.

[3] Because it disputes the jurisdiction of this Court, Woowon has not filed a defence and pleadings are not closed. No discoveries or documentary exchange relating to the claim against Woowon have taken place.

[4] The underlying claim involves the shipment of 18,276.023 kilograms of silver ingots [the Cargo] with an estimated value of $10,262,242.37 USD on a container yard to container yard (CY/CY) basis from Busan, Korea to Prince Rupert (port of discharged changed to Vancouver) aboard the vessel GEORG MAERSK, with on-carriage by rail to Montreal, the whole pursuant to

Multimodal Transport Bill of Lading number WSAMTR192351 [BOL] issued in Seoul on December 25, 2019 by Woowon.

[5] Woowon seeks a stay on the grounds that: (1) this Court lacks *jurisdiction simpliciter* over the claim, including subject matter jurisdiction and jurisdiction over Woowon, or alternatively, because the jurisdiction clause in the carriage terms selecting Korea ought to be enforced; and (2) the Court ought to decline jurisdiction over the claim in any event, based on the doctrine of *forum non conveniens*, and (3) the Plaintiffs have not established "strong cause" why the Korean courts are not appropriate to resolve the matters in dispute, given Korea is the forum identified in the underlying contract of carriage evidenced by the BOL.

[6] Woowon's stay motion was successfully opposed by the Plaintiffs (Respondents here) namely Brink's Global Services Korea Ltd. [BGS Korea] and its American sister company, Brink's Global Services International Inc. [together, Brink's]. Brink's provides logistics and security solutions for the transport of high value cargo. Brink's opposes this appeal.

[7] Woowon's stay motion was also successfully opposed by the Defendants Binex and its unnamed employees (also Respondents here). Binex is incorporated under the laws of California. Binex is registered to do business and has an office in Ontario. Binex operates as an international transportation company, offering services including freight forwarding services. Binex opposes this appeal.

II. Facts

[8] The core facts are not in dispute, although given this is a preliminary motion filed before pleadings, document exchange and discoveries have been initiated between Woowon and Brink's, certain matters require a more fulsome record before final determinations may be made. That said, determinations were and may be made on the basis of the record before the Court.

[9] In short, Simitomo Corporation purchased the Cargo from Korea Zinc. On January 1, 2019, Korea Zinc and BGS Korea entered into an International Valuables Transport Contract providing that BGS Korea would transport various shipments of silver from Korea to New York via Canada. In this case, and to fulfil its obligations towards Korea Zinc, BCG Korea engaged Ex Logistics Co., Ltd, [Ex Logistics], a freight forwarder, to arrange for the shipment; Ex Logistics Co. then retained Woowon which issued the BOL as the contracting carrier. Although Korea Zinc appears as shipper on the BOL, with the named consignee being Brink's Canada Ltd FAO (which I assume to mean "for account of") Sumitomo Corporation, neither Korea Zinc, Brink's Canada Ltd nor Sumitomo Corporation are parties to the present action. In addition, the Defendant Binex appears as Notify Party under the BOL. Ex Logistics was a Defendant, however the claim against it was discontinued.

[10] As Woowon was a non-vessel operating carrier, it retained Maersk Line A/S [Maersk] as performing carrier to transport the Cargo from Busan to Montreal, the whole pursuant to Maersk Sea Waybill 588788299, showing Woowon as the shipper and Binex as the consignee; Maersk

retained Canadian National Railway Company Limited [CN] for the on-carriage by rail from Vancouver to Montreal.

[11] Under its Sea Waybill, Maersk was obliged to and did generate a secret pick-up code which would allow for the release of the Cargo from the CN Railyard once the Cargo arrived in Montreal; Maersk provided the pick-up code to Binex (the consignee under its Sea Waybill) who would then transmit the pick-up code to Brink's Canada Ltd (the consignee under the BOL) along with the original BOL once received.

[12] Maersk and CN are third parties in this action at the suit of Binex.

[13] On December 26, 2019, the Cargo left Korea on the ocean vessel bound for British Columbia. The vessel arrived in Vancouver, on January 7, 2020. On January 10, 2020, the Cargo was loaded onto a CN railcar destined for Montreal, where the container arrived on January 16, 2020.

[14] In the interim, on January 6, 2020, Maersk e-mailed the pick-up code to Binex. The transmission and reception of that email and subsequent access to it by thieves is the subject of ongoing investigations.

[15] On January 20, 2020, Oriental Cartage, a trucking company based in Quebec, received an email from "monica@delmardistribution.ca" instructing it to pick up the Cargo from the CN railyard in Montreal. The email contained the secret pick-up code, and other information

including the precise weight of the Cargo. Upon presentation of the pick-up code to it by Oriental Cartage, CN located the Cargo container in its Montreal railyard and released the Cargo to Oriental Cartage. Oriental Cartage transported the Cargo to a warehouse in LaSalle, Quebec, as per the instructions it received with the pick-up code. Oriental Cartage is neither a party nor third party in this action.

[16] The Cargo was never seen again, except for a small portion subsequently recovered.

[17] It is common ground the email sent to Oriental Cartage was part of a fraud. Person or persons unknown had obtained the pick-up code and other information in the email. At this stage in the proceedings it appears such unknown persons fraudulently used information obtained to instruct Oriental Cartage to obtain and transport the Cargo from CN's railyard, to the warehouse in LaSalle.

[18] What we know at this point is the Cargo was not released to Brink's or Brink's Canada as should have happened.

[19] As a result of the stolen Cargo, Korea Zinc became indebted to Sumitomo for its value. Sumitomo was paid for its loss by Korea Zinc which assigned its rights to the Plaintiffs. Brink's seeks to recover the amount paid and related costs in this action.

[20] Brink's Statement of Claim was filed in Federal Court January 15, 2021. Binex filed its Statement of Defence on May 26, 2021. As noted, Binex also instituted third party proceedings dated June 9, 2021 against both Maersk and CN.

[21] Further proceedings on the Plaintiffs' action await determination of the jurisdictional issue raised by Woowon. Woowon's jurisdictional motion was dismissed by the CMJ, which decision Woowon now appeals.

[22] I note that two months after Brink's brought this action in Canada, on March 22, 2021, Woowon commenced proceedings against Brink's in the Seoul Southern District Court in Korea [the Korean Proceedings]. There, Woowon seeks an order it is not liable for the stolen Cargo.

[23] Notably, Binex, Maersk, and CN are not parties in the Korean Proceedings. Damages are not in issue in the Korean Proceedings, only liability.

[24] The Court was advised at the hearing that the Korean Proceedings are currently in abeyance because Woowon has yet to serve necessary parties.

[25] Assuming such service is eventually effected, and no other delays, hearings in the Korean Proceeding are scheduled for January 10 and February 1, 2023, with a decision expected by March 1, 2023.

[26] Investigations are ongoing into those responsible for the fraud and or theft and the whereabouts of the remaining Cargo.

A. *The multimodal through bill of lading*

[27] The purpose of the BOL is to govern the carriage of the Cargo, responsibility for the Cargo and to provide critical information as to its delivery. Article 2 of the BOL provides:

> **MULTIMODAL TRANSPORT BILL OF LADING**
>
> **2** The Carrier, by the issuance of this Multimodal Transport Bill of Lading, undertakes to perform or in its own name to procure the performance of the entire transport from the place at which the goods are taken in charge to the place designated in this Bill of Lading.
>
> Notwithstanding the above, the provisions set out and referred to in this Bill of Lading shall also apply when the transport is performed by one mode of transport.

[28] Article 4 provides:

> **GOVERNING LAW, JURISDICTION AND LIMITATION STATUTES**
>
> The conduct evidenced by or contained in this Bill of Lading shall be governed by the laws, statutes and regulations where this Bill of Lading is issued except as may be otherwise provided for herein, and any action against the Carrier thereunder shall be brought before the court where the Carrier of any statutory protection or exemption or limitation of liability authorized by any applicable laws, statutes and regulations of any country.
>
> [Emphasis added]

[29] Article 7 provides:

> **RESPONSIBILITY**
>
> 7 (1) The carrier's responsibility for loss of or damage to the goods shall commence only when the good are received by any means whatsoever and cease absolutely when the goods are delivered to the Merchant. […]
>
> [Emphasis added]

[30] Article 8 provides:

> **RECEPTION AND DELIVERY OF GOODS**
>
> 8 […] If delivery of the goods or any part thereof is not taken by the Merchant at the time and place when and where the Carrier is entitled to call upon the Merchant to take delivery thereof, the Carrier shall be entitled to store the goods or the part thereof, at the sole risk or [sic] the Merchant whereupon the responsibility of the Carrier in respect of the goods or that part thereof stored as aforesaid (as the case may be) shall wholly cease and the cost and expense of such storage shall forthwith upon demand by the Carrier be paid by the Merchant.

III. Decision under review

[31] The CMJ dismissed Woowon's motion to stay this action. Therefore this action will continue in the Federal Court unless Woowon succeeds in this appeal.

[32] The CMJ awarded costs to Brink's. The CMJ also awarded costs to Binex although Binex did not request costs against Woowon. Woowon appeals this aspect of the CMJ's decision but only against Binex.

IV. Issues

[33] These Reasons will discuss:

1) Standard of review;

2) *Jurisdiction simpliciter*;

3) Application of subsection 46(1) of the *Marine Liability Act*, SC 2001, c. 6 ["MLA"];

4) *Forum non conveniens*;

5) The strong cause test; and

6) Costs

V. Relevant law

[34] Section 91(10) of the *Constitution Acts, 1867 to 1982* states:

Legislative Authority of Parliament of Canada	**Autorité législative du parlement du Canada**
91 It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive	**91** Il sera loisible à la Reine, de l'avis et du consentement du Sénat et de la Chambre des Communes, de faire des lois pour la paix, l'ordre et le bon gouvernement du Canada, relativement à toutes les matières ne tombant pas dans les catégories de sujets par la présente loi exclusivement assignés aux législatures des provinces; mais, pour plus de garantie, sans toutefois restreindre la généralité des termes ci-haut employés dans le présent article, il est par la présente déclaré que (nonobstant toute disposition

Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,	contraire énoncée dans la présente loi) l'autorité législative exclusive du parlement du Canada s'étend à toutes les matières tombant dans les catégories de sujets ci-dessous énumérés, savoir:
[…]	[…]
10. Navigation and Shipping.	**10.** La navigation et les bâtiments ou navires (shipping).
[…]	[…]

[35] Subsection 22(1) of the *Federal Courts Act* states:

Navigation and shipping	**Navigation et marine marchande**
22 (1) The Federal Court has concurrent original jurisdiction, between subject and subject as well as otherwise, in all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping, except to the extent that jurisdiction has been otherwise specially assigned.	**22 (1)** La Cour fédérale a compétence concurrente, en première instance, dans les cas — opposant notamment des administrés — où une demande de réparation ou un recours est présenté en vertu du droit maritime canadien ou d'une loi fédérale concernant la navigation ou la marine marchande, sauf attribution expresse contraire de cette compétence.
[Emphasis added]	[Je souligne]

[36] Paragraph 22(2)(f) of the *Federal Courts Act* provides:

Maritime Jurisdiction	**Compétence maritime**
(2) Without limiting the generality of subsection (1), for greater certainty, the Federal Court has jurisdiction with respect to all of the following:	**(2)** Il demeure entendu que, sans préjudice de la portée générale du paragraphe (1), elle a compétence dans les cas suivants :
[…]	[…]
(f) any claim arising out of an agreement relating to the carriage of goods on a ship under a through bill of lading, or in respect of which a through bill of lading is intended to be issued, for loss or damage to goods occurring at any time or place during transit;	**f)** une demande d'indemnisation, fondée sur une convention relative au transport par navire de marchandises couvertes par un connaissement direct ou devant en faire l'objet, pour la perte ou l'avarie de marchandises en cours de route;
[…]	[…]
[Emphasis added]	[Je souligne]

[37] Paragraph 22(2)(i) of the *Federal Courts Act* provides:

Navigation and shipping	**Navigation et marine marchande**
Maritime jurisdiction	**Compétence maritime**
(2) Without limiting the generality of subsection (1), for greater certainty, the Federal Court has jurisdiction with respect to all of the following:	**(2)** Il demeure entendu que, sans préjudice de la portée générale du paragraphe (1), elle a compétence dans les cas suivants:
[…]	[…]
(i) any claim arising out of any agreement relating to	**i)** une demande fondée sur une convention relative au

the carriage of goods in or on a ship or to the use or hire of a ship whether by charter party or otherwise;	transport de marchandises à bord d'un navire, à l'usage ou au louage d'un navire, notamment par charte-partie;
[…]	[…]
[Emphasis added]	[Je souligne]

[38] Subsection 43(1) of the *Marine Liability Act* [*MLA*] states:

Hague-Visby Rules	**Règles de La Haye-Visby**
Effect	**Force de loi**
43 (1) The Hague-Visby Rules have the 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 those Rules.	**43 (1)** Les règles de La Haye-Visby ont force de loi au Canada à l'égard des contrats de transport de marchandises par eau conclus entre les différents États selon les règles d'application visées à l'article X de ces règles.

[39] Subsection 46(1) of the *MLA* states:

Claims not subject to Hamburg Rules	**Créances non assujetties aux règles de Hambourg**
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	**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

contract had referred the claim to Canada, where	où le contrat aurait prévu le renvoi de la créance au Canada, si l'une ou l'autre des conditions suivantes existe:
(a) the actual port of loading or discharge, or the intended port of loading or discharge under the contract, is in Canada;	**a)** le port de chargement ou de déchargement — prévu au contrat ou effectif — est situé au Canada;
(b) the person against whom the claim is made resides or has a place of business, branch or agency in Canada; or	**b)** l'autre partie a au Canada sa résidence, un établissement, une succursale ou une agence;
(c) the contract was made in Canada.	**c)** le contrat a été conclu au Canada.
[Emphasis added]	[Je souligne]

[40] Article 5 of the *Hague-Visby Rules* provides:

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and obligations under these Rules, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper. The provisions of these Rules shall not be applicable to charter parties, but if bills of lading are issued in the case of a ship under a charter party they shall comply with the terms of these Rules. Nothing in these Rules shall be held to prevent the insertion in a bill of lading	Un transporteur sera libre d'abandonner tout ou une partie de ses droits et exonérations ou d'augmenter ses responsabilités et obligations tels que les uns et les autres sont prévus par la présente Convention pourvu que cet abandon ou cette augmentation soit inséré dans le connaissement délivré au chargeur. Aucune disposition de la présente Convention ne s'applique aux chartes-parties; mais si des connaissements sont émis dans le cas d'un navire sous l'empire d'une charte-partie, ils sont soumis aux termes de la présente Convention. Aucune disposition dans ces règles ne

of any lawful provision regarding general average.	sera considérée comme empêchant l'insertion dans un connaissement d'une disposition licite quelconque au sujet d'avaries communes.

[41] Article 10 of the *Hague-Visby Rules* provides:

The provisions of these Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States if	Les dispositions de la présente Convention s'appliqueront à tout connaissement relatif à un transport de marchandises entre ports relevant de deux États différents quand:
(a) the bill of lading is issued in a contracting State, or	**a)** le connaissement est émis dans un État Contractant ou
(b) the carriage is from a port in a contracting State, or	**b)** le transport a lieu au départ d'un port d'un État Contractant ou
(c) the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract; whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.	**c)** le connaissement prévoit que les dispositions de la présente Convention ou de toute autre législation les appliquant ou leur donnant effet régiront le contrat, quelle que soit la nationalité du navire, du transporteur, du chargeur, du destinataire ou de toute autre personne intéressée.
[Emphasis added]	[Je souligne]

[42] Section 51 of the *Federal Courts Rules* states:

Appeals of Prothonotaries' Orders	**Appel des ordonnances du protonotaire**
Appeal	**Appel**

51(1) An order of a prothonotary may be appealed by a motion to a judge of the Federal Court.	**51(1)** L'ordonnance du protonotaire peut être portée en appel par voie de requête présentée à un juge de la Cour fédérale.

VI. Analysis

A. *Standard of review*

[43] Both the Plaintiffs and Defendants submit, and I agree, that the standards of review on this appeal are "palpable and overriding error" on questions of fact or mixed questions of law and fact, and correctness on questions of law, and mixed questions of law and fact where there is an extricable principle of law: *Housen v Nikolaisen*, 2002 SCC 33 at para 36; *Apotex Inc v Bayer Inc*, 2020 FCA 86 [*Bayer*] at paras 30-31 The Federal Court of Appeal put it this way in *Bayer*: "[31] Consequently, questions of fact and mixed questions of law and fact are subject to the palpable and overriding error standard while questions of law and mixed questions, where there is an extricable principle of law, are subject to the correctness standard."

[44] Stratas JA for the Federal Court of Appeal in *Canada v South Yukon Forest Corporation*, 2012 FCA 165 held that the palpable and overriding error standard is a highly deferential standard involving obvious errors:

> [46] Palpable and overriding error is a highly deferential standard of review: *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *Peart v. Peel Regional Police Services* (2006) 2006 CanLII 37566 (ON CA), 217 O.A.C. 269 (C.A.) at paragraphs 158-59; Waxman, supra. "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

[Emphasis added]

[45] The Federal Court of Appeal, again per Stratas JA, repeats and sets out additional guidance on palpable and overriding error in *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157:

> [61] Palpable and overriding error is a highly deferential standard of review: *Benhaim v. St. Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352 at para. 38; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall. See *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 431 N.R. 286 at para. 46, cited with approval by the Supreme Court in *St. Germain*, above.
>
> [62] "Palpable" means an error that is obvious. Many things can qualify as "palpable." Examples include obvious illogic in the reasons (such as factual findings that cannot sit together), findings made without any admissible evidence or evidence received in accordance with the doctrine of judicial notice, findings based on improper inferences or logical error, and the failure to make findings due to a complete or near-complete disregard of evidence.
>
> [63] But even if an error is palpable, the judgment below does not necessarily fall. The error must also be overriding.
>
> [64] "Overriding" means an error that affects the outcome of the case. It may be that a particular fact should not have been found because there is no evidence to support it. If this palpably wrong fact is excluded but the outcome stands without it, the error is not "overriding." The judgment of the first-instance court remains in place.
>
> [65] There may also be situations where a palpable error by itself is not overriding but when seen together with other palpable errors, the outcome of the case can no longer be left to stand. So to speak, the tree is felled not by one decisive chop but by several telling ones.
>
> [Emphasis added]

[46] In addition, on appeals under Rule 51 of the *Federal Courts Rules*, SOR/98-106, the Case Management Judge is assumed to be very familiar with the particular circumstances and issues in a proceeding and therefore, a case management judge's decision must be afforded deference, especially on factually suffused questions: see *Sawridge Band v R*, 2001 FCA 338, at para 11; and *Merck & Co v Apotex Inc.*, 2003 FCA 438, at para 12.

[47] In addition, the Federal Court of Appeal has held that "detailed reasons are not required in a prothonotary's order" (*Maximova v Canada (Attorney General)*, 2017 FCA 230 at para 11). This is because among other things, "Prothonotaries deal with an extraordinary volume of procedural issues" (*Novopharm Ltd v Nycomed Canada Inc*, 2011 FC 109 [per Mandamin J] at para 22 [*Novopharm*]). This Court has also determined "[i]t would be intolerable, and the wheels of justice would grind most slowly indeed, if each discretionary order had to be accompanied by a full set of motivated reasons in order to discourage the unsuccessful party from appealing and inviting the Court to exercise its discretion anew," (*Novopharm, supra*).In elaborating these standards, it is important to first note that a non-mention of reasons by a decision maker does not mean the issue was ignored. Rather, the first instance decision maker is presumed to have considered everything: *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157.

B. *Framework and jurisdiction simpliciter*

[48] The CMJ held *jurisdiction simpliciter* of the Federal Court was established. The leading authority in determining the jurisdiction of the Federal Court is the Supreme Court of Canada's judgment in *ITO-Int'l Terminal Operators v Milda Electronics*, [1986] 1 SCR 752 [*ITO*]. In *ITO*

the Supreme Court of Canada determined the following criteria must be met for this Court to have jurisdiction:

> a) There must be a statutory grant of jurisdiction by Federal parliament;
>
> b) There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction; and
>
> c) The law on which the case is based must be "a law of Canada" as the phrase is used in s. 101 of the *Constitution Act*, 1867.

[49] In this connection, the CMJ correctly held the Court must determine the essential nature of character of the claim on "a realistic appreciation of the practical result sought by the claimant". In undertaking this analysis, the CMJ followed jurisprudence of the Supreme Court in *Windsor (City) v Canadian Transit Co*, 2016 SCC 54 at paras 25-26, and of the Federal Court of Appeal in *Domtar Inc. v Canada (Attorney General)*, 2009 FCA 218, at para 28.

[50] In particular, I find neither error nor palpable and overriding error in the following outline of the law by the CMJ:

> 54] To determine this Court's jurisdiction, the first step is to ascertain the essential nature or character of the claim (*Windsor (City) v Canadian Transit Co.*, 2016 SCC 54 (*Windsor*) at para 25; *Apotex Inc. v Ambrose*, 2017 FC 487 at para 47). As stated by the Supreme Court in *Windsor*:
>
> > [26] The essential nature of the claim must be determined on "a realistic appreciation of the practical result sought by the claimant" (*Domtar Inc. v. Canada (Attorney General)*, 2009 FCA 218, 392 N.R. 200, at para. 28, per Sharlow J.A.). The "statement of claim is not to be blindly read at its face meaning" (*Roitman v. Canada*, 2006 FCA 266, 353 N.R. 75, at para. 16, per Décary J.A.). Rather,

> the court must "look beyond the words used, the facts alleged and the remedy sought and ensure . . . that the statement of claim is not a disguised attempt to reach before the Federal Court a result otherwise unreachable in that Court" (ibid.; see also *Canadian Pacific Railway v. R.*, 2013 FC 161, [2014] 1 C.T.C. 223, at para. 36; *Verdicchio v. R.*, 2010 FC 117, [2010] 3 C.T.C. 80, at para. 24).
>
> [27] On the other hand, genuine strategic choices should not be maligned as artful pleading. The question is whether the court has jurisdiction over the particular claim the claimant has chosen to bring, not a similar claim the respondent says the claimant really ought, for one reason or another, to have brought.

[51] The CMJ, following the teachings of the Supreme Court, determined the "essence of the claim is for loss incurred as a result of the carriage of goods pursuant to a multimodal through bill of lading":

> [55] In this case, the essence of the claim is for loss incurred as a result of the carriage of goods pursuant to a multimodal through bill of lading. This brings the claim within paragraph 22(1) of the *Federal Courts Act*. This section grants jurisdiction to the Federal Court "with respect to any claim arising out of an agreement for the carriage of goods on a ship under a through bill of lading . . . for loss or damage to goods at any time or place during transit." *Prima facie*, this claim falls within that section (see, *Elroumi* at para 11). The first part of the *ITO* test is therefore met.
>
> [Emphasis added]

[52] I see no error nor palpable and overriding error in determining the essence of the claim in this case is for loss incurred as a result of the carriage of goods pursuant to a through bill of lading. The CMJ followed the correct framework. And, with respect, the CMJ did not err in identifying section 22 of the *Federal Courts Act* which includes paragraph 22(2)(f):

Maritime Jurisdiction	**Compétence maritime**
(2) Without limiting the generality of subsection (1), for greater certainty, the Federal Court has jurisdiction with respect to all of the following:	**(2)** Il demeure entendu que, sans préjudice de la portée générale du paragraphe (1), elle a compétence dans les cas suivants:
[...]	[…]
(f) any claim arising out of an agreement relating to the carriage of goods on a ship under a through bill of lading, or in respect of which a through bill of lading is intended to be issued, for loss or damage to goods occurring at any time or place during transit;	**f)** une demande d'indemnisation, fondée sur une convention relative au transport par navire de marchandises couvertes par un connaissement direct ou devant en faire l'objet, pour la perte ou l'avarie de marchandises en cours de route;
[…]	[…]
[Emphasis added]	[Je souligne]

[53] Paragraph 22(2)(i) of the *Federal Courts Act* provides:

Navigation and shipping	**Navigation et marine marchande**
Maritime jurisdiction	**Compétence maritime**
(2) Without limiting the generality of subsection (1), for greater certainty, the Federal Court has jurisdiction with respect to all of the following:	**(2)** Il demeure entendu que, sans préjudice de la portée générale du paragraphe (1), elle a compétence dans les cas suivants:
[…]	[…]
(i) any claim arising out of any agreement relating to the carriage of goods in or on a ship or to the use or	**i)** une demande fondée sur une convention relative au transport de marchandises à bord d'un navire, à

hire of a ship whether by charter party or otherwise;	l'usage ou au louage d'un navire, notamment par charte-partie;
[…]	[…]

[54] It was open for the CMJ to find as he did. This is established by looking at paragraph 22(2)(f) of the *Federal Courts Act* in the context of the record in this case. First, the words "any claim arising out of an agreement" are met here: the claim arises out of an agreement. Next follow are the words "relating to the carriage of goods on a ship under a through bill of lading". Here there is a through bill of lading. While the BOL is a multimodal bill of lading, I am not persuaded the CMJ erred in finding a multimodal through bill of lading is nonetheless a through bill of lading for the purposes of paragraph 22(2)(f) of the *Federal Courts Act*. This is especially so given the CMJ's determination that the essence of the claim is for loss incurred as a result of the carriage of goods pursuant to a multimodal through bill of lading.

[55] In this connection, I also note the Supreme Court of Canada ruled the expression "relating to" is "probably the widest of any expression intended to convey some connection between two related subject matters," and did so in *Slattery (Trustee of) v Slattery*, [1993] SCR 430, 106 DLR (4th) 212 at 445 [*Slattery*]. This confirms the CMJ made no error in finding the presence of carriage by ships and rail satisfies the requirement that there be an agreement "relating to the carriage of goods on a ship under a through bill of lading". The agreement, in the "widest of any expression" sense, is one relating to carriage of goods on a ship. This among things flows from my earlier conclusion that a multimodal through bill of lading is a through bill of lading in this context.

[56] Notably also, in making this finding the CMJ focussed on the continuing liability of the multimodal through bill of lading.

[57] As it did before the CMJ, Woowon continues to submit this Court lacks jurisdiction based on the Federal Court's decision in *Black & White Merchandising Co. Ltd. v Deltrans International Shipping Corporation*, 2019 FC 379 [*Deltrans*]. Woowon argues the Plaintiffs' loss occurred during inland warehousing after the Cargo was delivered (rather than during transit), such that the essence of the claim on the facts of this case is theft after the conclusion or fulfilment of the contract of carriage and during warehousing, thus falling outside the scope of paragraph 22(2)(f) of the *Federal Courts Act*.

[58] With respect, there is no merit in this argument. In my view the CMJ made neither error nor palpable and overriding error in this respect. *Deltrans* is clearly distinguishable on its facts and I can do no better than repeat the reasons of the CMJ:

> [56] As each of the parties rely upon the *Deltrans* case, it is necessary to consider carefully what the case decides. It is a factually driven decision and has some similar facts to this case. *Deltrans* concerned the theft of a cargo that was shipped from China to Montreal pursuant to a bill of lading for combined transport shipment. The bill of lading described the type of move as CY/CY, as is the case here.
>
> [57] The party responsible for arranging the logistics for the transportation of the cargo retained Canchi Bon Trading Company Inc. (Canchi) to warehouse the cargo. The cargo was delivered to the container yard as required and then warehoused elsewhere by Canchi. The cargo was stolen from the warehouse where it was being stored.
>
> [58] The Court in *Deltrans* determined that the bill of lading had expired because the cargo was delivered to the place of delivery. Accordingly, any liability under the bill of lading was exhausted.

> As a result, the Federal Court was without jurisdiction and the action dismissed.
>
> [59] As outlined above, the parties in this case disagree whether delivery was carried out. If delivery was carried out by the delivery of the Cargo to the CN Railyard, as Woowon submits, then the Bill of Lading would have expired. If, on the other hand, delivery was not carried out because the cargo was never delivered into the hands of the consignee, then liability under the Bill of Lading would remain.
>
> [60] In my view, the face of the Bill of Lading stipulates that the Cargo had to be delivered to the consignee at the container yard. It remains an open question whether Woowon's responsibilities under the Bill of Lading were exhausted. It is necessary to determine whether the tendering of the correct code amounted to delivery or whether additional steps were necessary. In my view, this further differentiates the case from *Deltrans*. A full evidentiary record is necessary to establish with finality the question of "delivery" to the consignee.

[59] In this connection the BOL refers to "Place of delivery" as Montreal. As with the CMJ, I am not persuaded the issue of delivery in the factual circumstances of this case may be finally determined at this time. Nor, with respect, is such final determination always required. While there are obvious clear advantages to early determinations, the Federal Court of Appeal states that early resolution is "generally" required: *Great White Fleet v Arc-En-Ciel Produce Inc., 2021 FCA 70* at para 12 per Rennie JA: "For these reasons, questions as to the application of section 46 of the MLA should generally be settled prior to trial."[Emphasis added] In my view there is neither error, nor palpable and overriding error, in the CMJ's determinations including the finding a full evidentiary record is necessary to establish with finality the question of "delivery" to the consignee.

[60] The CMJ also found the BOL positively "stipulates that the Cargo had to be delivered to the Consignee at the container yard." I see neither error nor palpable and overriding error in the CMJ's conclusions in this respect. This is what the BOL itself provides. It identifies a Consignee (Brink's Canada), it states CY/CY, and states Montreal as "Place of delivery". It seems to me on this record that while the Cargo (or at least the container) may have *arrived* at CN's container yard in Montreal, *delivery* was not carried out because the Cargo did not come into the possession of the Consignee. I am not satisfied "delivery" in this case was simply the arrival of the container, with or without the Cargo, at Montreal.

[61] The conclusion the Federal Court has *jurisdiction simpliciter* is also supported by the decision of our highest Court in *Z.I. Pompey Industrie v ECU-Line N.V.*, 2003 SCC 27; [2003] 1 S.C.R. 450 [*Pompey*]. In my view *Pompey* confirms the Federal Court's jurisdiction. In *Pompey*, cargo was shipped under a multimodal bill of lading from Antwerp via Montreal to Seattle, Washington, USA. As with the case at bar, the cargo was carried by ship in the first stage, from Antwerp to Canada (Montreal) where it was unloaded. This is analogous to the Cargo in the case at bar being carried by ship from Korea and unloaded in Canada (Vancouver). From Montreal, the cargo was shipped by railcar to Seattle where it was discharged. The bill of lading provided Antwerp as the "port of loading", and Seattle the "port of discharge". Notably, in *Pompey* the cargo was actually discharged in Montreal and loaded onto railcars in Montreal for onward transportation to Seattle. This is the same situation as in the case at bar; the second phase of the carriage was by rail.

[62] In *Pompey* at paragraph 37, the Supreme Court held (in a unanimous judgment) per Justice Bastarache, that where the *actual* port of loading or discharge is in Canada, "there would be no question that the Federal Court is an appropriate forum to hear the respondents' claim". After coming to this conclusion, the Supreme Court held the Federal Court did not have jurisdiction because of ("but for") certain transition provisions in the *MLA* to the effect section 46 did not apply to proceedings commenced before the *MLA* came into force. The Supreme Court held:

> D. Section 46 of the *Marine Liability Act*
>
> 37. Section 46(1) of the *Marine Liability Act*, which entered into force on August 8, 2001, has the effect of removing from the Federal Court its discretion under s. 50 of the *Federal Court Act* to stay proceedings because of a forum selection clause where the requirements of s. 46(1)(a), (b), or (c) are met. This includes where the actual port of loading or discharge is in Canada. In this case, there would be no question that the Federal Court is an appropriate forum to hear the respondents' claim but for the fact that s. 46 does not apply to judicial proceedings commenced prior to its coming into force: *Incremona-Salerno Marmi Affini Siciliani (I.S.M.A.S.) s.n.c. v. Ship Castor* (2002), 297 N.R. 151, 2002 FCA 479, at paras. 13-24. Section 46 of the *Marine Liability Act* is therefore irrelevant in this appeal.
>
> [38] Indeed, s. 46(1) would appear to establish that, in select circumstances, Parliament has deemed it appropriate to limit the scope of forum selection clauses by facilitating the litigation in Canada of claims related to the carriage of goods by water having a minimum level of connection to this country. Such a legislative development does not, however, provide support for the fundamental jurisprudential shift made by the Court of Appeal in the case at bar. To the contrary, s. 46(1) indicates Parliament's intent to broaden the jurisdiction of the Federal Court only in very particular instances that can easily be ascertained by a prothonotary called upon to grant a stay of proceedings pursuant to the forum selection clause of a bill of lading. Section 46(1) in no way mandates a prothonotary to consider the merits of the case, an approach in line with the general objectives of certainty and efficiency, which underlie this area of the law.
>
> [Emphasis added]

[63] With respect, the legal and jurisdictional situation in the case at bar is the same as in *Pompey*: the Federal Court has jurisdiction here, as it did in *Pompey* (subject to the *MLA's* transition provisions which do not apply in the case at bar), because *actual* discharge in both cases took place in Canada (be it Vancouver (as in case at bar) or Montreal (as in *Pompey*)).

[64] In this connection, Woowon offers another objection, asking this Court to reject the conclusion the Supreme Court of Canada reached in *Pompey* because it is simply *obiter dictum* or an "offhand comment", in favour of a decision by the Quebec Court of Appeal in *SDV Logistics (Canada) Inc. v SDV International Logistics*, 2006 QCCA 750 [*SDV Logistics*]. I find no merit in this submission. In my view, the Supreme Court concluded as a threshold issue that subsection 46(1) applied in *Pompey*, but ultimately determined resort to the *MLA* was withheld by *MLA's* transition provisions. In other words, while subsection 46(1) was applicable, the Supreme Court held it itself prevented from applying subsection 46(1) not because it did not cover the situation at hand (which it did), but because subsequent transition sections rendered the *MLA* inapplicable.

[65] As Justice Binnie noted there are degrees of *obiter*, some binding others not: *R. v Henry*, [2005] 3 S.C.R. 609 [*Henry*] at paragraph 57:

> [57] […] All *obiter* do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not "binding" in the sense the *Sellars* principle in its most exaggerated form would have it. The objective of the exercise is to promote certainty in the law, not to stifle its growth and creativity. The notion that each phrase in a

> judgment of this Court should be treated as if enacted in a statute is not supported by the cases and is inconsistent with the basic fundamental principle that the common law develops by experience.
>
> [Emphasis added]

[66] I accept *Henry's* analysis and find, in their context, that the passages cited above from *Pompey* are sufficiently proximate to the Supreme Court's *ratio decidendi* and intended for guidance as to justify reliance by the CMJ.

[67] On another point, in the case at bar it is also noteworthy there is no term on the BOL that defines CY/CY to mean the Cargo is considered delivered (and Woowon's responsibility ends) when the Cargo simply *arrives* at CN's railyard. In fact, and to the contrary, Article 7(1) of the BOL states:

> 7(1) The Carrier's responsibility for loss of or damage to the goods shall commence only when the goods are received by any means whatsoever and cease absolutely when the goods are delivered to the Merchant.
>
> [Emphasis added]

[68] These facts also support the finding of the CMJ in terms of paragraph 22(2)(f) of the *Federal Courts Act*, in that the BOL defines the word "Merchant" (used in Article 7(1)) as including the shipper, consignee, owner and receiver of the goods and holder of the Bill of Lading. I am not persuaded CN or its railyard may be considered "the Merchant" on the arrival of the Cargo in Montreal, if that occurred in this case.

[69] While the parties focussed on paragraph 22(2)(f) of the *Federal Courts Act*, it should be recalled subsection 22(2) sets out examples where the Federal Court is granted jurisdiction in matters of navigation and shipping i.e., maritime law.

[70] In addition to these examples, the Court has the general grant of maritime law jurisdiction conferred by subsection 22(1) of the *Federal Courts Act*. The general grant of jurisdiction relevant in this case. I have no difficulty concluding the Federal Court has jurisdiction in this under both sections 22(1) and 22(2)(f) of the *Federal Court Act*:

Navigation and shipping	**Navigation et marine marchande**
22 (1) The Federal Court has concurrent original jurisdiction, between subject and subject as well as otherwise, in all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping, except to the extent that jurisdiction has been otherwise specially assigned.	**22 (1)** La Cour fédérale a compétence concurrente, en première instance, dans les cas — opposant notamment des administrés — où une demande de réparation ou un recours est présenté en vertu du droit maritime canadien ou d'une loi fédérale concernant la navigation ou la marine marchande, sauf attribution expresse contraire de cette compétence.
Maritime Jurisdiction	**Compétence maritime**
(2) Without limiting the generality of subsection (1), for greater certainty, the Federal Court has jurisdiction with respect to all of the following:	**(2)** Il demeure entendu que, sans préjudice de la portée générale du paragraphe (1), elle a compétence dans les cas suivants :
[…]	[…]

(f) any claim arising out of an agreement relating to the carriage of goods on a ship under a through bill of lading, or in respect of which a through bill of lading is intended to be issued, for loss or damage to goods occurring at any time or place during transit;	**f)** une demande d'indemnisation, fondée sur une convention relative au transport par navire de marchandises couvertes par un connaissement direct ou devant en faire l'objet, pour la perte ou l'avarie de marchandises en cours de route;
[…]	[…]
(i) any claim arising out of any agreement relating to the carriage of goods in or on a ship or to the use or hire of a ship whether by charter party or otherwise;	**i)** une demande fondée sur une convention relative au transport de marchandises à bord d'un navire, à l'usage ou au louage d'un navire, notamment par charte-partie;
[…]	[…]
[Emphasis added]	[Je souligne]

[71] Woowon further disputes the jurisdiction arguing the correct test to be applied is *Club Resorts Ltd. v Van Breda*, 2012 SCC 17 [*Van Breda*]. *Van Breda* develops a test requiring a "real and substantial connection" concerning contested jurisdiction.

[72] Notably however, while the Supreme Court of Canada did not preclude the application of the *Van Breda* test to establish the Federal Court's jurisdiction, since its decision in *Van Breda* the Supreme Court itself has not done so. Instead, the Supreme Court relied on *ITO* as the correct approach to determine this Court's jurisdiction in both *Windsor (City) v Canadian Transit Co., 2016 SCC 54*, at paras 34-71, and *Desgagnés Transport Inc. v Wärtsilä*, 2019 SCC 58. As a result, I am unable to see either error or palpable and overriding error in the CMJ's reliance on

the *ITO* test; because *ITO* is a sufficient measure for the Supreme Court of Canada, *ITO* is likewise appropriate for this Court.

[73] Binex submits that paragraph 22(2)(i) of the *Federal Courts Act* also supports the conclusions of the CMJ. Paragraph 22(2)(i) states:

Maritime Jurisdiction	**Compétence maritime**
22(2) Without limiting the generality of subsection (1), for greater certainty, the Federal Court has jurisdiction with respect to all of the following:	**(2)** Il demeure entendu que, sans préjudice de la portée générale du paragraphe (1), elle a compétence dans les cas suivants:
[…]	[…]
(i) any claim arising out of any agreement relating to the carriage of goods in or on a ship or to the use or hire of a ship whether by charter party or otherwise;	**i)** une demande fondée sur une convention relative au transport de marchandises à bord d'un navire, à l'usage ou au louage d'un navire, notamment par charte-partie;
[…]	[…]

[74] Binex puts its case this way, although I need not decide the point:

> 48. In the further alternative and in any event, as was argued by Binex on the motion, s. 22(2)(i) of the *Federal Courts Act* says that the Federal Court has jurisdiction with respect to any claim arising out of any agreement relating to the carriage of goods in or on a ship or to the use or hire of a ship whether by charter party or otherwise.
>
> 49. This Court has previously confirmed in *Pantainer v. 996660 Ontario Ltd.* [183 FTR 211 (FC) [*Pantainer*]] that subsection 22(2)(i) *"must be given a broad and purposeful interpretation so*

> *as to include all claims which stem from a contract relating to the carriage of goods by sea"* [*Pantainer* at para 100].
>
> 50. Binex relies on *Pantainer*. In that case, the plaintiff carrier claimed against the defendant for unpaid freight and ancillary charges relating to the cargo it had been hired by the defendant to transport. The defendant launched a counterclaim for various damages allegedly suffered to the cargo. The damages were allegedly suffered during warehousing and storage, and not during the actual transportation of the cargo itself.
>
> 51. The issue raised was whether the Court had jurisdiction over the defendant's counterclaim. The plaintiff argued that the Court did not have jurisdiction for three reasons: (a) the warehouse was in Toronto, nowhere near the port of discharge; (b) there was no connection between the activities of the defendant (or its subsidiary) and the port; and (c) the storage occurred after delivery and was not short-term [*Pantainer* at para 60].
>
> 52. In response, the defendant argued that the plaintiff was providing not only carriage services but also storage and distribution services as well. Therefore, it was in this Court's jurisdiction to entertain the entire matter because the warehousing and storage of the goods was an integral part of the freight contracts [*Pantainer* at paras 71-72].
>
> 53. Ultimately, the Court determined that the defendant's counterclaim did fall within the wording of s. 22(2)(i) because the claims for warehousing and storage "*arose out of contracts for the carriage of goods by sea*". The Court thus agreed to hear the counterclaim.
>
> 54. In this case, Binex submits that the plaintiffs' claim against Woowon (and all the defendants) is manifestly one that "*arises out of a contract relating to the carriage of goods by sea*." There can be no serious argument otherwise. Accordingly, following *Pantainer*, s. 22(2)(i) can be invoked to provide this Court with jurisdiction to determine the plaintiffs' claim against all parties in this litigation, including Woowon.
>
> [Emphasis added]

[75] In the result, I am not persuaded the CMJ was either incorrect or made a palpable and overriding error on *jurisdiction simpliciter*. The first part of the *ITO* test is therefore met.

[76] For a claim to fall within the jurisdiction of the Federal Court under paragraph 22(2)(f) of the *Federal Courts Act*, it must relate to Canadian maritime law as defined in *ITO* to meet the second and third branches of the *ITO* test. As the following analysis shows, these branches are met.

C. *Application of the Marine Liability Act [MLA]*

[77] As noted by the CMJ at paragraph 62 of his Order, the *MLA* exists to "establish Canada's jurisdiction in spite of a jurisdiction clause stipulating a foreign jurisdiction in cases where there is a contract for carriage of goods by water."

[78] The framework analysis for determining the application of subsection 46(1) is set out by the Federal Court of Appeal in *Mazda Canada Inc. v Cougar Ace (The)*, 2008 FCA 219:

> [8] The principles of law governing this matter are relatively well settled now. It is clear that subsection 46(1) of the *Marine Liability Act*, S.C. 2001, c. 6 eclipses the former Canadian law in cases where parties by contract choose the jurisdiction in which the case will be tried. Such a clause in a contract of carriage is no longer controlling in Canada, but it may be considered as one of the factors to consider in deciding whether an allegation of *forum non conveniens* is made out (*Magic Sportswear Corp. v. Mathilde Maersk (The)*, 2006 FCA 284 (CanLII), [2007] 2 F.C.R. 733 (F.C.A.) [hereinafter *OT Africa*]).
>
> [9] Subsection 46(1) allows a Canadian plaintiff to sue in Canada despite a clause like Clause 28 in this contract, if certain conditions are met. Section 46 reads as follows:
>
> > 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.
>
> (2) Notwithstanding subsection (1), the parties to a contract referred to in that subsection may, after a claim arises under the contract, designate by agreement the place where the claimant may institute judicial or arbitral proceedings.
>
> [10] This provision in subsection 46(1) merely opens the door for Canadian plaintiffs, allowing an action to be instituted. However, the Court may still decline the jurisdiction on the basis of *forum non conveniens* (*OT Africa*). Subsection 46(1) applies here because the intended port of discharge of the vehicles was New Westminster, British Columbia. The plaintiff may therefore institute proceedings here, but *forum non conveniens* arguments remain available to the defendants.

[79] Woowon asserts Article X of the *Hague-Visby Rules* limits the scope of the *Hague-Visby Rules* to the carriage of goods on a ship by water between two ports. It submits in its Memorandum:

> [87] … according to Article I(b) and (e), II and X taken together, the Hague-Visby Rules apply only "from the time when the goods are loaded on to the time they are discharged from the ship" (this classic rules is better known as "tackle to tackle").

[80] From this Woowon submits the effect of article 46 of the *MLA* should only apply to losses which occurred during the compulsory application of the *Hague-Visby Rules*. However, and with respect, limiting the application of section 46 to only where losses took place during the ocean leg of transport is not supported by any jurisprudence. I am not aware of any case law that says a contract for the carriage of goods by water is limited to a port to port bill of lading, and does not include a through bill of lading. In addition as noted already, this Court has jurisdiction over through bills of lading under 22(2)(f).

[81] To recall, Article 10 of the *Hague-Visby Rules* state:

The provisions of these Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States if	Les dispositions de la présente Convention s'appliqueront à tout connaissement relatif à un transport de marchandises entre ports relevant de deux États différents quand:
(a) the bill of lading is issued in a contracting State, or	**a)** le connaissement est émis dans un État Contractant ou
(b) the carriage is from a port in a contracting State, or	**b)** le transport a lieu au départ d'un port d'un État
(c) the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract; whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.	**c)** le connaissement prévoit que les dispositions de la présente Convention ou de toute autre législation les appliquant ou leur donnant effet régiront le contrat, quelle que soit la nationalité du navire, du transporteur, du chargeur, du destinataire ou de toute autre personne intéressée.
[Emphasis added]	[Je souligne]

[82] In this connection, Woowon relies on *SDV Logistics (Canada) Inc. v SDV International Logistics*, 2006 QCCA 750 [*SDV Logistics*], a decision of the Quebec Court of Appeal:

> [35] Paragraph (e) of Article I of the [*Hague Visby Rules*] states that the term, "carriage of goods" covers the period from the time when the goods are loaded on to the time they are discharged from the ship. This means that the *Rules* do not apply to operations prior to transport by water proper.
>
> [Emphasis added]

[83] While *SDV Logistics* found on its facts that the *Hague-Visby Rules* do not apply to operations *prior to* transport by water, Woowon argues the *Hague-Visby Rules* should likewise not apply *after* transport by water, i.e., that they do not apply after discharge of the Cargo in Vancouver at which point carriage on this multimodal through bill of lading became the responsibility of CN to Montreal. There is no support for the proposition that the determination of what constitutes a contract for the carriage of goods by water must follow the compulsorily applicable liability regime. That said, the liability regime is set out in the BOL for loss post discharge. The BOL is a contract for the carriage of goods by water, even though it has multiple legs i.e., the BOL is a through bill of lading that is multimodal.

[84] Brink's submits subsection 46(1) of the *MLA* applies in this case. With respect, I agree.

[85] For convenience, section 46 of the *MLA* provides:

Claims not subject to Hamburg Rules	**Créances non assujetties aux règles de Hambourg**
46 (1) If a contract for the carriage of goods by water to which the Hamburg Rules do not apply provides for the	**46 (1)** Lorsqu'un contrat de transport de marchandises par eau, non assujetti aux règles de Hambourg, prévoit le

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	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) the actual port of loading or discharge, or the intended port of loading or discharge under the contract, is in Canada;	**a)** le port de chargement ou de déchargement — prévu au contrat ou effectif — est situé au Canada;
(b) the person against whom the claim is made resides or has a place of business, branch or agency in Canada; or	**b)** l'autre partie a au Canada sa résidence, un établissement, une succursale ou une agence;
(c) the contract was made in Canada.	**c)** le contrat a été conclu au Canada.
[Emphasis added]	[Je souligne]

[86] It is not disputed the provisions of section 46 are disjunctive. Therefore, if any one of paragraphs (a), (b) or (c) of subsection 46 applies, the Federal Court has jurisdiction to determine this action subject to other criteria within the *MLA* and *forum non conveniens*.

[87] In my view, the CMJ neither erred nor made palpable and overriding error in concluding this case satisfies the requirements of paragraph 46(1)(a) of the *MLA*. This is unanswerably the case. Both parts of paragraph 46(1)(a) are met. Both the *actual* and the *intended* ports of

discharge are in Canada: Prince Rupert was the *intended* port of discharge as per the BOL on its face, and Vancouver was the *actual* port of discharge. No one disputes both Prince Rupert and Vancouver are "in Canada." Therefore the requirements of paragraph 46(1)(a) of the *MLA* are met.

[88] Thus it is not necessary to consider whether paragraphs 46(1)(b) or (c) also apply, and I decline to do so.

D. *Forum non conveniens*

[89] The CMJ dealt with this issue at paragraphs 77 to 95 of his Order. With respect, I am not persuaded the CMJ's findings warrant interference by this Court either in terms of the legal principles enunciated or the factual, evidentiary and mixed findings of fact and law made by the CMJ. In my respectful view, and despite Woowon's submissions, they reveal neither error not palpable and overriding error.

E. *Distinct strong cause test*

[90] In maritime law cases there is a special burden placed on plaintiffs who seek to avoid the jurisdiction of a court set out in the shipping documents. They must do so on a strong cause basis.

[91] However, this special burden does not apply where section 46 of the *Maritime Liability Act* apply, as it does in this case.

[92] The Federal Court of Appeal has determined a plaintiff who is entitled to the benefit of section 46 should not have to also meet the burden of establishing strong cause: *Great White Fleet v Arc-En-Ciel Produce Inc*., 2021 FCA 70 per Rennie J.A. at paragraph 12.

[93] I am bound by this determination. Therefore I decline to consider strong cause arguments.

[94] Therefore Woowon's appeal with respect to jurisdiction will be dismissed.

F. *Costs*

[95] Rule 400(1) of the *Federal Courts Rules* provides:

Awarding Costs Between Parties	**Adjudication des dépens entre parties**
Discretionary powers of Court	**Pouvoir discrétionnaire de la Cour**
400 (1) The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.	**400 (1)** La Cour a le pouvoir discrétionnaire de déterminer le montant des dépens, de les répartir et de désigner les personnes qui doivent les payer.

[96] The Plaintiffs and Binex were both successful on the motion before the CMJ. Given the general rule that costs follow the event, it is not surprising the CMJ awarded costs to the Plaintiffs and to Binex given their success on the motion.

[97] However, while the Plaintiffs requested costs in their written filings, Binex (represented by a different counsel than those who appeared before the Court) did not request costs. Moreover, Woowon did not seek cost relief against Binex before the CMJ.

[98] As I understand it, the issue of costs was not addressed at the hearing.

[99] Both parties refer to the Federal Court of Appeal's decision in *Exeter v Canada (Attorney General)*, 2013 FCA 134:

> [12] The general principle is that a court may not award costs when costs were not requested: see, for example, *Balogun v. Canada*, 2005 FCA 350. To award costs in these circumstances would be a breach of the duty of fairness because it would subject the party against whom they are awarded to a liability when the party had had no notice or an opportunity to respond: see, for example, *Nova Scotia (Minister of Community Services) v. Elliott (Guardian ad litem of)* (1995), 141 N.S.R. (2d) 346 (N.S.S.C.) at para. 5.

[100] Given this binding jurisprudence, and given Binex did not request costs, in my respectful view it was an error for the CMJ to have awarded costs in favour of Binex. That part of the judgment below will be set aside.

VII. Conclusion

[101] In my view, based on the above reasons, Woowon's appeal must be dismissed, except that the award of costs to Binex must be set aside.

VIII. Costs

[102] Pursuant to the longstanding practice of this Court, I issued a practice direction before the hearing addressing among other things the need to make submissions on costs at the hearing: "All parties are requested to review the Practice Direction issued by Chief Justice Lufty dated April 30, 2010, on the issue of costs, which is available at: https://www.fct-cf.gc.ca/content/assets/pdf/base/notice-avis-30apr2010.pdf. Please be advised that in most cases the Presiding Judge will award lump sum costs. Therefore, counsel must be prepared to provide the Court at the hearing with the lump sum all-inclusive cost award they wish to receive assuming they are successful. Counsel are directed to consult with each other on their respective requests for costs, and if possible to agree on the lump sum(s) requested."

[103] The parties complied at the hearing and subsequently provided the following joint written confirmation:

> Main Appeal
>
> Woowon and the Plaintiffs agreed that the successful party ought to be awarded lump sum costs of $7,500 CAD, all-inclusive, and on a "costs in the cause" basis, for the main appeal.
>
> Woowon denies that Binex ought to be entitled to costs of the main appeal because it was a voluntary participant, with no relief sought against Binex (save for the costs appeal).
>
> Binex disagrees and says that it would be directly affected by the motion, and opposed all issues on the appeal.
>
> In the alternative, if this Court decides that Binex is entitled to costs if successful, Woowon and Binex agreed that Binex ought to be awarded lump sum costs of $4,000 CAD, all-inclusive, and on a "costs in the cause" basis, for the main appeal.
>
> Woowon is not seeking costs against Binex.

> CMJ's Order
>
> In Michelle Staples' letter dated May 18, 2022, the parties advised the CMJ that Brink's, Woowon and Binex, through their counsel, agreed that the issue of costs with respect to the stay motion would be best addressed following the outcome of this appeal.
>
> In an email from the Registry on May 18, 2022 the CMJ agreed to counsel's request.
>
> Accordingly, the parties request that the question of what amount Binex may be awarded on the stay motion if successful on the appeal be put over until the appeal is decided.

[104] I agree this result is reasonable. Therefore, Brink's as the successful party is awarded lump sum costs of $7,500 CAD, all-inclusive on a "costs in the cause" basis, payable by Woowon.

[105] In terms of the main appeal, Binex and Woowon, I see no reason why costs should not follow the cause. Binex has successfully opposed the appeal before me. I therefore will award Binex lump sum costs of $4,000 CAD, all-inclusive on a "costs in the cause" basis, for the main appeal.

[106] Further, I will order the question of what amount Binex may be awarded on the stay motion if successful on the appeal, be put over until the appeal is decided.

[107] There will be no order of costs payable by Binex to Woowon because Woowon is not seeking costs against Binex.

JUDGMENT in T-122-21

THIS COURT'S JUDGMENT is that:

1. The appeal is dismissed, except that the CMJ's cost order in favour of Binex payable by Woowon is set aside.
2. Brink's is awarded lump sum costs of $7,500 CAD, all-inclusive in the cause in the main appeal, payable by Woowon.
3. Binex is awarded lump sum costs of $4,000 CAD, all-inclusive in the cause, for the main appeal, payable by Woowon.
4. No costs are payable by Binex to Woowon.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-122-21
STYLE OF CAUSE:	BRINK'S GLOBAL SERVICES KOREA LTD. AND BRINK'S GLOBAL SERVICES INTERNATIONAL, INC. v WOOWON SEA & AIR CO. LTD. v BINEX LINE CORP., JOHN DOE BINEX EMPLOYEE, JANE DOE BINEX EMPLOYEE AND OTHER PERSONS UNKNOWN TO THE PLAINTIFFS CURRENTLY OR FORMERLY EMPLOYED BY BINEX v A.P. MOLLER-MAERSK A/S AND CANADIAN NATIONAL RAILWAY COMPANY
PLACE OF HEARING:	HELD BY WAY OF VIDEOCONFERENCE
DATE OF HEARING:	AUGUST 22, 2022
JUDGMENT AND REASONS:	BROWN J.
DATED:	NOVEMBER 7, 2022

APPEARANCES:

Marc Isaacs Michelle L. Staples	FOR THE PLAINTIFFS
Andrea Fernandes Rui Fernandes	FOR THE DEFENDANTS (BINEX)
Jason Kostyniuk Matthew Crowe	FOR THE DEFENDANT (WOOWON)
Robin Squires Nigah Awj	FOR THE THIRD PARTIES (A.P. MOLLER-MAERSK A/X)

SOLICITORS OF RECORD:

Isaacs Odinocki LLP Barrister and Solicitor Toronto, Ontario	FOR THE PLAINTIFFS

Fernandes Hearn LLP Barrister and Solicitor Toronto, Ontario	FOR THE DEFENDANTS (BINEX)
Alexander Holburn Beaudin + Lang LLP Barrister and Solicitor Vancouver, British Columbia	FOR THE DEFENDANT (WOOWON)
Borden Ladner Gervais LLP Barrister and Solicitor Toronto, Ontario Montreal, Quebec	THIRD PARTIES (A.P. MOLLER-MAERSK A/X)