Federal Court  Cour fédérale

Date: 20251007

Docket: T-247-23

Citation: 2025 FC 1653

Ottawa, Ontario, October 7, 2025

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

QSL CANADA INC.

Plaintiff/
Defendant by Counterclaim

and

CLIFFS MINING COMPANY

Defendant/
Plaintiff by Counterclaim

and

UNITED STATES STEEL CORPORATION

Defendant

JUDGMENT AND REASONS

I. Overview

[1] This is a motion brought by the Plaintiff, QSL Canada Inc. [QSL], seeking summary trial of certain issues between QSL and United States Steel Corporation [USS], one of the Defendants

in the underlying action [the Action] by QSL against USS and Cliffs Mining Company [Cliffs]. This motion seeks adjudication of a dispute between QSL and USS as to which contractual terms and conditions governed the relationship between them from which the Action arose and, in particular, a dispute as to the application of a limitation of liability clause contained in QSL's standard terms and conditions.

[2] USS agrees that these issues are suitable for summary trial, but it disagrees as to which contractual terms and conditions, if any, governed the relationship between the parties. USS takes the position that the limitation of liability clause contained in QSL's standard terms and conditions has no application to the claim that gives rise to the Action.

[3] As explained in these Reasons, I accept QSL's position in this motion and find that QSL's standard terms and conditions, including the limitation of liability clause included therein, applied to the contractual relationship between QSL and USS from which the Action arose.

II. Background

[4] QSL is a company incorporated under the *Canada Business Corporations Act*, RSC 1985, c C-44, with its head office in Québec, Québec, which provides stevedoring, logistics and storage services throughout northeastern Canada and the United States, including operating the Beauport terminal in the Port of Québec. USS is a company, with its head office in Pittsburgh Pennsylvania, which specializes in the mining and pelletizing of iron ore as well as steelmaking. Cliffs, a company with its head office in Cleveland, Ohio, similarly specializes in the mining and pelletizing of iron ore and steelmaking.

[5] At the times in 2022 that are material to the events giving rise to this Action, QSL provided stevedoring services to both USS and Cliffs at the Port of Québec. QSL has provided such services to USS since approximately 2003.

[6] In a decision addressing an earlier motion in this Action, which concerned whether this Court was the appropriate forum for adjudicating the dispute between QSL and USS that is the subject of the Action (and ultimately dismissed USS's motion to stay the Action), Justice Peter Pamel summarized the facts giving rise to the dispute as follows (*QSL Canada Inc v Cliffs Mining Company*, 2023 FC 1429 [*QSL Canada*] at para 4):

> 4. In late July 2022, about 30,000 metric tons of Flex iron ore pellets in bulk [the Flex pellets] for the account of US Steel and about 91,000 metric tons of Hibbing iron ore pellets in bulk [the Hibbing pellets] for the account of Cliffs were stockpiled adjacent to each other on the dock at section Q-52B, with part of the Hibbing pellets also stored in hoppers at section Q-53; the commodities had arrived at the Port of Quebec during the course of that month aboard a series of Canadian lakers. QSL had handled the discharging and stockpiling of the cargoes onto the terminal and into the hoppers. On July 31, 2022, the ocean-going vessel MAGIC THUNDER arrived at the Port of Quebec intending to load just under 82,000 metric tons of the Hibbing pellets destined for Cliffs' customer in Hamburg. However, what was actually loaded by QSL aboard the vessel was about 61,000 metric tons of the Hibbing pellets along with about 21,000 metric tons of US Steel's Flex pellets; the error in the commingling of the iron ore cargoes – leading to what is ostensibly, from US Steel's perspective, the misappropriation of its Flex pellets – was discovered by QSL in early August, with the defendants being so advised shortly thereafter.

[7] Both USS and Cliffs asserted claims against QSL as a result of the co-mingling of their cargo [the Co-mingling Incident]. QSL subsequently filed the Action, seeking declarations against both USS and Cliffs to the effect that their claims are limited or excluded based on

provisions in QSL's standard terms and conditions that QSL asserts governed its contractual relationships with both Defendants. USS, the only Defendant to which this motion for summary trial relates, quantifies its claim at $6,444,639.17. QSL asserts that its liability to USS, while not admitted, is limited to $17,022.60.

[8] Pursuant to a case management process in this Action, QSL and USS filed their respective motion records in the within motion for summary trial, including memoranda of fact and law, on July 15, 2025. The parties argued this motion at a hearing held on September 10, 2025. Cliffs has not actively participated in this motion.

[9] This motion does not focus upon the events surrounding the Defendants' cargoes, or QSL's liability *per se,* but rather upon the question of whether QSL is entitled to limit its liability to USS. The answer to this question turns on whether: (a) the relationship between the parties at the time of the Co-mingling Incident in 2022 was governed by a form of agreement that QSL provided to USS on March 1, 2022, which USS did not sign [the Proposed Agreement], or by a purchase order [PO] that USS issued to QSL on March 20, 2022 [the March PO]; and (b) if the Proposed Agreement applies, whether QSL's limitation of liability clause [the Limitation of Liability Clause] as found in its standard terms and conditions [the QSL Standard Terms], which the Proposed Agreement purports to incorporate by reference, also applies and is enforceable.

III. Issues

[10] Based on the parties' written and oral submissions and consistent with the above explanation, I would articulate the issues for the Court's determination in this motion as follows:

A. Are the issues raised in this motion appropriate for disposition by summary trial?

B. Is the relationship between QSL and USS, pursuant to which QSL's services were performed in July 2022, governed by either the Proposed Agreement or the March PO?

C. If the Proposed Agreement applies, is the Limitation of Liability Clause as found in QSL's Standard Terms also applicable and enforceable?

IV. Analysis

A. *Law*

(1) Summary Trial

[11] Under Rule 213(1) of the *Federal Courts Rules*, SOR/98-106 [the Rules], a party may bring a motion for summary trial on all or some of the issues raised in the pleadings, at any time after the defendant has filed a defence but before the time and place of the trial have been fixed. The onus of proof on a summary trial is the same as at trial, where the party asserting the claim or defence must prove it on a balance of probabilities (*Louis Vuitton Malletier SA v Singga Enterprises (Canada) Inc*, 2011 FC 776 [*Louis Vuitton*] at paras 95, 97; *Commodore's Boats Ltd v Tyee Shepard (Ship)*, 2025 FC 1051 at para 85, citing *Mud Engineering Inc v Secure Energy Services Inc*, 2024 FCA 131).

[12] Rule 216 speaks to the nature of summary trial and the powers of the Court in a motion therefor. Rule 216(5) requires the Court to dismiss the motion if the issues raised are not suitable for summary trial or a summary trial would not assist in the efficient resolution of the action. However, Rule 216(6) provides that, if the Court is satisfied that there is sufficient evidence for adjudication, regardless of the amounts involved, the complexities of the issues and the existence of conflicting evidence, the Court may grant judgment either generally or on an issue, unless the Court is of the opinion that it would be unjust to decide the issues on the motion.

[13] In determining whether summary trial is appropriate, the Court should consider factors such as the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings, and any other matters that arise for consideration (*Louis Vuitton* at paras 96-97; *Cascade Corp v Kinshofer GmbH*, 2016 FC 1117 at para 35).

[14] The Federal Court has also considered whether a summary trial would take considerable time, whether credibility was a crucial factor and if cross-examination had taken place, and whether the summary trial would result in detrimental “litigation by slices” (*Society of Composers, Authors and Music Publishers of Canada v Maple Leaf Sports & Entertainment*, 2010 FC 731 at paras 41-42; *Wenzel Downhole Tools Ltd v National-Oilwell Canada Ltd*, 2010 FC 966 at paras 36-38).

[15] The burden is on the moving party to demonstrate that summary trial is appropriate (*Teva Canada Limited v Wyeth and Pfizer Canada Inc*, 2011 FC 1169 at para 35, appeal allowed on other grounds, 2012 FCA 141).

(2) Formation of Contracts

[16] As canvassed in *QSL Canada*, there remains a disagreement between the parties as to whether the relationship between them, and therefore the dispute arising from the Co-mingling Incident, is governed by Canadian law or US law. However, for purposes of the present motion, USS acknowledges (and QSL concurs) that it is appropriate that the Court's analysis of the issues raised in this motion, including as to which contractual terms and conditions, if any, apply to the parties' relationship, should be performed based on Canadian maritime law.

[17] As USS correctly submits, Canadian maritime law is a comprehensive body of federal law, governing maritime and admiralty disputes in Canada, which encompasses the common law principles of contract (*Desgagnés Transport Inc v Wärtsilä Canada Inc*, 2019 SCC 58 at para 8; *ITO-Int'l Terminal Operators v Miida Electronics*, 1986 CanLII 91 (SCC), [1986] 1 SCR 752 [*ITO*] at 779).

[18] Turning to relevant principles of Canadian contract law, I note first that, in *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v Aga,* 2021 SCC 22 [*Ethiopian*] at paragraphs 35 to 36, the Supreme Court of Canada [SCC] summarized as follows the requirements for the formation of a contract and the objective nature of the necessary analysis:

> 35. A contract is formed where there is "an offer by one party accepted by the other with the intention of creating a legal

> relationship, and supported by consideration": *Scotsburn Co-operative Services Ltd. v. W. T. Goodwin Ltd.*, [1985] 1 S.C.R. 54, at p. 63. The common law holds to an objective theory of contract formation. This means that, in determining whether the parties' conduct met the conditions for contract formation, the court is to examine "how each party's conduct would appear to a reasonable person in the position of the other party": *Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corp.*, 2020 SCC 29, [2020] 3 S.C.R. 247, at para. 33.
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> 36. For present purposes, it will suffice to focus on the requirement of intention to create legal relations. As G. H. L. Fridman explains, "the test of agreement for legal purposes is whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract": *The Law of Contract in Canada* (6th ed. 2011), at p. 15; see also S. M. Waddams, *The Law of Contracts* (7th ed. 2017), at p. 105. This requirement can be understood as an aspect of valid offer and acceptance, in the sense that a valid offer and acceptance must objectively manifest an intention to be legally bound: *Crystal Square*, at paras. 49-50."

[19] To similar effect, in *Owners, Strata Plan LMS 3905 v Crystal Square Parking Corp*, 2020 SCC 29, the SCC explained at paragraph 31 that the common law of contract generally protects the parties' reasonable expectations, meaning that a subjective mutual consensus is neither necessary nor sufficient for the creation of an enforceable contract and that a person may be bound by contractual obligations that she did not intend (subjectively) to assume.

[20] Acceptance of an offer so as to bind the acceptor to a contract can be by conduct, unaccompanied by any verbal or written undertaking (*Saint John Tug Boat Co Ltd v Irving Refining Ltd*, 1964 CanLII 88 (SCC), [1964] SCR 614 [*Saint John Tug Boat*] at 621). In *Saint John Tug Boat* at page 622, the SCC adopted the test as to whether there is acceptance by conduct as expressed by Lord Blackburn in *Smith v Hughes* (1871), LR 6 QB 597 at page 607:

> If, whatever a man's real intention may be he so conducts himself that a reasonable man would believe that he was consenting to the terms proposed by the other party and that other party upon that belief enters into a contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.

[21] USS argues that the circumstances of the case at hand represents a so-called "battle of the forms," described as follows in *Repap (aka Skeena) v Electronic Technology Systems*, 2002 BCSC 539 [*Repap*] at paragraph 2:

> 2. A "battle of the forms" is described in W.R. Anson, *Anson's Law of Contract*, 27th ed. (Oxford: Oxford University Press, 1998) at 39:
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> > In modern commercial practice, a particular problem has arisen which is that of the 'battle of the forms'. A firm may, for example, offer to buy goods from another on a form which contains or refers to its standard conditions of trade. The seller 'accepts' the offer by a confirmation on a form which contains or refers to its (the seller's) standard conditions of trade. These may differ materially from those of the buyer. Two questions typically arise; is there a contract and, if there is, do the buyer's or the seller's conditions prevail?

[22] In *Butler Machine Tool Co Ltd v Ex-Cell-O Corporation (England) Ltd*, [1979] 1 All ER 965 at pages 968 to 969, Lord Denning famously described the challenge in identifying the terms of contract resulting from an exchange of forms. Sometimes the battle is won by the party who "fires the last shot," sometimes by the party who "gets the blow in first." Sometimes the shots fired on both sides contribute to the identification of the relevant terms. As noted in *Repap* at paragraph 21, there are no rigid rules to be applied in adjudicating a dispute of this sort. *Repap*

cites the following explanation in S.M. Waddams, *The Law of Contract*, 3rd ed (Toronto: Canada Law Book, 1993) [Waddams] at pages 53 to 54:

> Our rules of contract formation do not require the use of special formulas. The question in each case is whether the conduct of the party sought to be bound, taken as a whole, including what has been said and done as well as what has been written, would lead a reasonable person in the position of the other party to believe that the former had manifested his assent to a particular set of terms. Unless one were to recommend the requirement of strict formalities (and the experience of formalities in our law of contracts has not been a happy one) one cannot expect certainty in the law of contract formation, particularly in a case where the parties themselves are ambivalent. The most that can be expected is that the law will adopt a framework with sufficient flexibility to enable it to apply relevant criteria. There are several signs of flexibility in the present structure of the law. One is the interconnection of notice requirements with the reasonableness of the term sought to be incorporated. Another is the examination of the course of previous dealings in determining whether terms are incorporated. A third, and more general, trend that may prove to be the most significant of all is the development of doctrines of unconscionability. The question of the initial incorporation of terms may seem less significant when there is an established device for rejecting any terms found to be unfair.

[23] QSL does not agree that this is a battle-of-the-forms case, presumably because its form of agreement (which QSL argues governs the parties' relationship) is to some extent a bespoke document, and QSL's standard terms and conditions (which its form of agreement seeks to incorporate by reference) are not a standard form contract in the sense of a standard form that is in common use by multiple parties in a particular industry.

[24] In my view, this dispute does have features of the battle of the forms, in that it is derived from the parties' exchange of their respective standard form terms and conditions and can be characterized at least in part as having resulted from what Waddams refers to as the parties'

ambivalence in negotiating the terms of their contract. However, as *Repap* and Waddams observe, this characterization does not materially alter the application of general contract law principles (as explained in *Ethiopian*) to the identification of the terms to which the parties have agreed.

(3) Enforceability of Limitation of Liability Clauses

[25] In *Earthco Soil Mixtures Inc v Pine Valley Enterprises Inc*, 2024 SCC 20 [*Earthco*] at paragraphs 70 to 71, the SCC reaffirmed the following three steps from *Tercon Contractors Ltd v British Columbia (Transportation and Highways),* 2010 SCC 4 [*Tercon*] to assess whether an exclusion of liability clause is enforceable:

> 70. The problem-plagued doctrine of fundamental breach was finally "laid to rest" in *Tercon*, in which this Court favoured a modern and holistic approach that focused on "the real question of what agreement the parties themselves intended" (para. 108, per Binnie J., dissenting, but not on this point). *Tercon* sets out three steps to help assess the enforceability of an exclusion clause. First, the court must determine whether an exclusion clause even applies in the circumstances, which necessarily depends on an "assessment of the intention of the parties" (para. 122). Post-*Tercon*, interpretation is thus the initial analytical step when a court is faced with an exclusion clause and this includes "a search for intent using the general rules of contractual interpretation" (A. J. Black, "Exclusion Clauses in Contracts and their Enforceability Following the Decline of Fundamental Breach" (2015), 44 *Adv. Q.* 139, at p. 163; see also p. 150).
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> 71. If the exclusion clause is found to be valid at the first step, the second step requires a court to consider "whether the exclusion clause was unconscionable at the time the contract was made" (*Tercon*, at para. 122). Third, even if not unconscionable, a court may consider if there is some overriding public policy consideration that outweighs the strong public interest in the enforcement of contracts and if there is, the court may refuse to enforce the otherwise valid exclusion clause (para. 123). Thus, concerns of potential unfairness that the doctrine of fundamental breach attempted to remedy are now addressed in the second and

> third step of the *Tercon* test (see also C. Pike, "Now We're Talking: Revisiting the Canadian Approach to No Oral Modification Clauses" (2021), 47:1 *Queen's L.J.* 1, at p. 31; J. D. McCamus, "The Supreme Court of Canada and the Development of a Canadian Common Law of Contract" (2022), 45:2 *Man. L.J.* 7, at pp. 16-17; S. O'Byrne, "Assessing Exclusion Clauses: The Supreme Court of Canada's Three Issue Framework in *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*" (2012), 35 *Dal. L.J.* 215, at pp. 231-32). Establishing unconscionability and the public interest as limits on freedom of contract has returned the focus onto the true contractual intention of the parties.

[26] *Earthco* further states at paragraph 72 that the modern contractual interpretation principles explained in *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 [*Sattva*] apply to contracts with exclusion clauses, particularly at the first step of the *Tercon* test. *Sattva* directs the Court to have regard to the surrounding circumstances of the contract, referred to as the factual matrix, including objective evidence demonstrating what was within the parties knowledge at or before the contract's formation (*Earthco* at para 65). Particularly in a commercial contract, the Court should know the commercial purpose of the contract which presupposes knowledge of the genesis of the transaction, the background, the context, and the market being operated within (*Sattva* at para 47).

[27] USS also draws the Court's attention to cases in which onerous terms that were not brought to the attention of a party were deemed inoperative (e.g., *Tilden Rent-A-Car Co v Clendenning*, 1978 CanLII 1446 (ONCA) [*Tilden*]; *MacQuarrie Equipment Finance Ltd v 2326695 Ontario Ltd (Durham Drug Store)*, 2020 ONCA 139 [*MacQuarrie*]).

B. *Evidence*

(1) Sources of Evidence

[28] As will be canvassed in greater detail below, the evidence in the parties' motion records includes affidavits sworn by representatives of the parties, excerpts of transcripts from the discovery and/or cross-examination of those representatives, and responses to undertakings provided during discovery or cross-examination.

[29] The motion record also includes other documents, appended to the parties' pleadings or taken from their respective affidavits of documents. Some, but not all, of these documents are identified or commented upon in the other evidence. However, counsel for QSL and USS conveyed at the hearing of the motion the parties' agreement as to the authenticity of these documents and that they be admitted into evidence for purposes of the Court's adjudication of the motion, on the basis that the particular use of the documents and the weight to be afforded to them remained to be determined by the Court.

[30] QSL's representative, Geoff Lemont, swore two affidavits, dated May 16, 2023 [the First Lemont Affidavit] and May 31, 2023 [the Second Lemont Affidavit]. While Mr. Lemont held various positions with QSL or its predecessor company since the commencement of his employment in 1991, he held the position of Vice-President Sales when he swore his affidavits. Since 2003, Lemont was QSL's principal contact with USS involved in arranging stevedoring services for the handling of iron ore pellets for USS in the Port of Québec.

[31] In his affidavits, Mr. Lemont provides evidence surrounding his negotiations with representatives of USS and resulting operations, commencing in 2003 and culminating with communications with Mr. Nathaniel Joseph in 2021 and 2022, and identifies and attaches copies of documents exchanged between the parties in the course of their relationship. Mr. Lemont was subsequently examined by USS's counsel in May 2024. The record before the Court includes extracts of the transcript of that examination and subsequent answers to undertakings.

[32] USS's representative, Mr. Nathaniel Joseph, swore an affidavit dated April 21, 2023 [the Joseph Affidavit]. Mr. Joseph had been the Senior Manager – Raw Materials for USS since February 2022 (having previously held the role of Manager – Raw Materials since August 2019). The Joseph Affidavit provides evidence surrounding USS's negotiations with QSL in late 2021 to early 2022 and subsequent operations, including the Co-mingling Incident, and identifies and attaches copies of documents exchanged between the parties. Mr. Joseph was subsequently examined by QSL's counsel in May 2023 and April 2024. The record before the Court includes extracts of the transcripts of those examinations and subsequent answers to undertakings.

[33] As counsel confirmed at the hearing, there is little disagreement between the parties surrounding the facts to be derived from the evidence in this motion. Rather, the parties' dispute relates to the application of the governing law to those facts, in identifying the terms of their contractual relationship at the time of the Co-mingling Incident.

(2) Observations in *QSL Canada*

[34] As I understand the record in this proceeding, the above referenced affidavits (although not all the subsequent examination transcripts and responses to undertakings) were also before Justice Pamel when deciding *QSL Canada*. Justice Pamel summarized his observations from that evidence as follows (at paras 16-20):

> 16. From the evidence, US Steel seems to have had a longstanding business relationship with QSL, having shipped cargoes via QSL's facilities at the Port of Quebec since about 2003. The nature of the contractual dealings between the parties seems not to have significantly change [sic] over time; Mr. Geoff Lemont, the now Vice-President of Sales for QSL, gave evidence that towards the latter part of each shipping season, or within the first three months of the following year, he would be contacted by the Manager of Raw Materials of US Steel – who I understood to be, at least since 2019, Mr. Nathaniel E. Joseph, today the Senior Manager – Raw Materials for US Steel – to discuss projected volumes of iron pellets expected to be shipped to QSL's Beauport terminal during that upcoming shipping season. As commercial people often do, they would primarily focus on stevedoring rates for the upcoming season. I should also mention that the shipping season for the Canadian lakes trade through the St. Lawrence Seaway and the St. Lawrence River generally runs each year from the opening of the Seaway sometime around mid-March until the closure of the Seaway sometime around the end of December.
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> 17. Once rates were agreed, Mr. Lemont would typically send an email to Mr. Joseph confirming the updated rates for the upcoming shipping season, and also attach QSL's stevedoring contract [QSL's proposed agreement] setting out such terms as the Scope of Work, Term of the Contract, Liability Provisions, Rates, Vessel Nomination, Laytime and Demurrage, and Standard Terms and Conditions, amongst other things. As confirmed by Mr. Lemont in his affidavit and cross-examination, at least as regards more recent years, US Steel was not in the habit of signing QSL's proposed agreement; US Steel takes no issue with this assertion. However, cargos were shipped by US Steel and stevedoring services provided by QSL each year.
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> 18. Once QSL's proposed agreement was emailed to US Steel, for planning purposes, US Steel's procurement department would then typically send QSL forecasted inbound shipments for the

coming months, as well as purchase orders from time to time throughout the year so as to trigger specific shipments. At least according to Mr. Lemont, throughout the parties' business relationship, including for the 2022 shipping season, US Steel conducted itself as if the parties were bound by QSL's proposed agreement as submitted by QSL for that year, and at no time did US Steel either object to, reject, or otherwise comment on, the terms of QSL's proposed agreement, including the incorporated Standard Terms and Conditions which included QSL's Applicable Law and Jurisdiction clause. In fact, QSL points to the demand letter received from US Steel in late February 2023 which arguably threatens legal action in Canada notwithstanding that the US Steel Governing Law clause only provides for an option to sue within Pennsylvania, as support for the proposition that US Steel knew that it was bound by QSL's Applicable Law and Jurisdiction clause and Canadian jurisdiction.

19. Specifically as regards the 2022 shipping season, Mr. Joseph reached out to Mr. Lemont in November 2021 requesting rates for the upcoming 2022 shipping season; discussions ensued and, on March 1, 2022, Mr. Lemont sent an email to Mr. Joseph submitting QSL's proposed agreement with updated stevedoring rates. Although Mr. Lemont signed the copy of QSL's proposed agreement sent to Mr. Joseph, as in the past, the agreement was not signed by US Steel notwithstanding the fact that the contract included a signature line seemingly requiring a signature. In addition, the 2022 version of QSL's proposed agreement sent to US Steel included a recently amended clause 2, the Term provision, which read as follows: "If signed prior to March 18, 2022, this agreement will be valid until December 31st, 2022" (more on this issue below). In any event, as was also customary, about a week later, Ms. Carly DeSantis – who, I take it, was with US Steel's procurement department – sent QSL forecasted inbound shipments for March through August 2022; QSL takes the position that this was confirmation that QSL's proposed agreement with the updated rates was accepted by US Steel. Thereafter, and again as was customary and in their normal course of business, around March 20, 2022, QSL was sent a purchase order by US Steel without any further information or explanation; according to Mr. Lemont, no further explanation was required as purchase orders were meant simply to trigger shipments and were never meant to amend or alter the governing stevedoring contract. A second purchase order was sent by US Steel to QSL in May 2022. US Steel argues that the issuance of its purchase order was not, as contends QSL, acceptance by performance of QSL's proposed agreement, but rather a counteroffer. According to US Steel,

> QSL's acceptance of its counteroffer was signalled by QSL having eventually provided the stevedoring services.
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> 20. The evidence seems to confirm that the parties only negotiated and agreed upon commercial terms, and that neither Mr. Lemont nor Mr. Joseph turned their minds to any other aspect of the stevedoring agreement, especially the other party's forum selection clause. …

[35] Justice Pamel's observations were made in the context of the evidence before him and the particular issue that he was addressing (i.e., whether there was a contractual relationship between the parties in 2022 that included USS's forum selection clause). The parties' positions and arguments in the motion now before the Court are not identical to those advanced before Justice Pamel. However, there is a relationship between the issue in *QSL Canada* and the issue now before the Court, as the potential application of either a forum selection clause or the Limitation of Liability Clause turns on which party's terms and conditions, if any, applied to the 2022 contractual relationship.

[36] Ultimately, *QSL Canada* concluded that the evidence then available was not sufficient to determine the terms and conditions governing the contract. Rather, such determination remained a triable issue of mixed fact and law that would be better determined by a judge hearing the Action on the merits or potentially by way of a motion for summary judgment or summary trial. In particular, Justice Pamel referred to the potential benefit of the Court having access to historical evidence of agreements between the parties to support an assessment of their contractual intentions (at para 26).

[37] In the course of these Reasons, I will canvass aspects of that historical evidence that is now before the Court, including the parties' respective positions on the relevance of that evidence.

However, for present purposes, taking into account not only the affidavit evidence but also the subsequent examinations and undertaking responses, I find that paragraphs 16 to 20 of *QSL Canada* continue to represent a useful summary of facts to be derived from the evidence as to the parties' communications in late 2021 and 2022 related to their contractual relationship for the 2022 navigation season.

[38] In particular, Justice Pamel's observation at paragraph 20 sets the stage for the particular task that the Court must undertake in the motion at hand. The evidence is that the discussions between Mr. Lemont and Mr. Joseph focused upon commercial terms, not upon contractual terms and conditions. Both witnesses confirmed this point in their respective examinations. I accept that the evidence establishes that neither Mr. Lemont nor Mr. Joseph turned his mind to the other party's contractual terms and conditions other than commercial terms.

[39] However, consistent with the jurisprudence canvassed earlier in these Reasons, the Court's task is not to determine the subjective intentions of either Mr. Lemont or Mr. Joseph, but rather to assess whether the parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract (*Ethiopian* at para 36).

(3) First Lemont Affidavit

[40] Turning to that task, I first note that (consistent with the above summary *in QSL Canada*) the First Lemont Affidavit (and exhibits) establish facts including the following:

A. The typical pattern of negotiations between QSL and USS since 2003 involved Mr. Lemont communicating with USS's Manager of Raw Materials late in a calendar year or early the following year, to negotiate rates that would apply to QSL's services for that following year's navigation season (from late March to the end of the calendar year). Mr. Lemont would subsequently write to his USS contact by email, confirming the updated rates and including a form of agreement intended by QSL to apply to that year's services.

B. The format of the agreement that Mr. Lemont sent to USS remained consistent over the years, including terms governing Purpose, Term, Scope of Work and Rates, Responsibility, Force Majeure, Payment Terms, Standard Terms and Conditions, Lien, Vessel Nomination, Laytime, Demurrage/Dispatch, and Confidentiality.

C. Since at least 2008, the form of agreement that Mr. Lemont sent to USS included (under the heading "Standard Terms and Conditions") an incorporation by reference of QSL's standard terms and conditions.

D. USS did not typically sign the form of agreement provided by Mr. Lemont. He was once told by USS that this was because USS's bureaucracy was such that the year would be over by the

time the agreement was vetted by several internal departments in order to support signature.

E. While there was typically no subsequent discussion of the form of agreement that Mr. Lemont sent to USS, there was an exception in 2017, when USS requested (and QSL agreed to) modifications of the proposed period of the agreement and its payments terms.

F. In relation to the 2022 navigation season (which is the subject of the Action), the negotiations between the parties commenced with Mr. Joseph sending an email to Mr. Lemont and others at QSL on November 19, 2021, requesting QSL's rates for 2022. On November 22, 2021, Mr. Lemont sent Mr. Joseph an email with rates, which included the sentence, "All terms and conditions remain unchanged." Following further communications, Mr. Lemont sent Mr. Joseph an email on March 1, 2022, attaching the Proposed Agreement and a covering letter, which included the following statement:

> We are pleased to submit our updated rates for the handling of Iron Ore Pellets in bulk through our Port of Québec facilities.

G. Structurally, the Proposed Agreement consisted of the main body of the agreement entitled "Agreement with U.S. Steel Corporation for the Handling of Iron Ore Pellets in Bulk

through our Port of Québec Facilities in 2022," plus an Appendix A entitled "Scope of Work & Rates" and an Appendix B entitled "Screening of Iron Pellets (Flux)."

H. As evidenced by the copy of the Proposed Agreement exhibited to the First Lemont Affidavit, it included signature lines for both parties and had already been signed by QSL when it was sent to Mr. Joseph on March 1, 2022.

I. On March 9, 2022, Ms. Carly DeSantis, who worked in USS's Raw Materials group, sent by email to Mr. Lemont and others at QSL a Forecasted Shipment Schedule for shipments between March and August 2022.

J. On March 20, 2022, Ms. DeSantis (employing her then married name, Carly Riemer) sent the March PO by email to Mr. Lemont. USS also issued to QSL a second PO dated May 4, 2022 [the May PO]. These POs bore the title "Standard Purchase Order" and included a set of terms and conditions on their face as well as an incorporation by reference of USS standard purchase order general terms and conditions.

(4) Joseph Affidavit

[41] As previously noted, there is little disagreement between the parties surrounding the facts available to be examined by the Court in identifying the terms of their contractual relationship. Consistent with that observation, the Joseph Affidavit canvasses largely the same sequence of events as the First Lemont Affidavit from the beginning of the discussions between the parties in late 2021 to USS's issuance of the March PO on March 20, 2022. The Joseph Affidavit also notes that, on July 8, 2022, QSL issued an invoice to USS (addressed to Mr. Joseph), which referenced the PO number of the March PO. On or about August 8, 2022 (before USS was made aware of the Co-mingling Incident), USS paid the invoice in the amount of $247,513.77.

(5) QSL Forms of Agreements

[42] QSL's motion record includes a selection of documents extracted from the affidavit of documents produced by QSL in the Action. These documents include copies of the individual form of proposal or agreement that QSL provided to USS in 2004 and most of the years thereafter, as well as, for most of those years, Mr. Lemont's covering correspondence.

[43] As previously noted, this documentation is being admitted into evidence by agreement between the parties and is acknowledged to be authentic. While this documentation is not necessarily acknowledged to be admissible for the truth of its contents, that point is not particularly material, as the evidence is not being introduced for any such purpose. Rather, it is being introduced to demonstrate documentation that was exchanged between the parties over the years. Consistent with what I understand to be the agreement between the parties as explained at the hearing, I accept this evidence for that purpose.

[44] This evidence includes a form of proposal or agreement between QSL (or its predecessor, St. Lawrence Stevedoring [SLS], a division of Québec Stevedoring Co. Ltd.) and USS applicable to each of 2004, 2005, 2007-2008, 2009, 2010, 2011, 2012, 2013, 2015, 2016, 2017, 2018, 2019, 2020, and 2021 (as well as 2022 when the Co-mingling Incident occurred). For most of these years, the proposal or agreement is accompanied by a covering letter from Mr. Lemont to USS (or what appears to have been an agent for USS). The language of this covering correspondence varies, typically referring to the enclosed or attached proposal or agreement and sometimes asking for USS to return an executed copy.

[45] The agreements applicable to services provided in the years 2009 to 2012 were signed by both parties. In the other years, USS did not sign the form of agreement. For several of the years commencing with the form of agreement applicable to 2015, the form of agreement was signed by QSL (or its predecessor, SLS), but not by USS.

[46] The form of proposal or agreement applicable to the years from 2004 to 2013 included a clause (under the heading "Standard Term and Conditions") that reads, "Our standard terms and conditions have been incorporated in all our quotation and contracts. If you are not aware of them upon request a copy will be forwarded to you." Commencing in 2016, that clause changed to the following (or similar) language: "Our standard terms and conditions have been incorporated in all our quotation and contracts. If you are not aware of them, please contact our website at www.qsl.com." Also commencing in 2016, a clause was added at the end of the form of agreement, which includes the following (or similar) language: "Please note that once operation commences, it is understood to signify the acceptance of the above rates, terms and conditions."

[47] The Proposed Agreement that Mr. Lemont sent to Mr. Joseph on March 1, 2022, also included new language, in clause 2 under the heading "Term", reading, "If signed prior to March 18, 2022, this agreement will be valid until December 31st, 2022."

[48] Both parties' motion records include a copy of QSL's Standard Terms, in the form in which they are attached as an exhibit to QSL's Re-Re-Amended Statement of Claim. USS's motion record also includes a copy of the home page of QSL's website, in the form in which it is archived in the Internet Archive of the Wayback Machine for March 14, 2022. At the hearing of this motion, counsel confirmed the parties' agreement that, if in March 2022 one were to have clicked on the link "www.qsl.com" displayed in the "Standard Terms and Conditions" clause of the Proposed Agreement, one would have been taken to this homepage. Then, scrolling to the bottom of that page, if one were to have clicked on the link "QSL General," one would have been taken to the QSL Standard Terms.

[49] The QSL Standard Terms include the Limitation of Liability Clause, which is fundamental to the dispute that is the subject of this motion. The Limitation of Liability Clause reads as follows:

> 9) LIABILITY
>
> Our liability shall be governed by the following:
>
> …
>
> c) Notwithstanding anything to the contrary herein, we shall in no event be liable in contract, delict or tort for any loss, personal injury or death, or loss, misdelivery of or damage to Goods, or for special or consequential damages whether foreseeable or not or whether caused by our fault or neglect or otherwise, or that of our servants, employees, sub-contractors or agents beyond the sum equivalent to one (1) Special Drawing Right per kilogram of the

> Goods lost or damaged; or the amount that we have charged for Services rendered in connection with the Goods lost or damaged, whichever is less, but in no case, including the loss, personal injury or death of passengers, shall our liability or that of our servants, employees, subcontractors or agents exceed a sum equivalent to 10,000 SOR per event.

[50] Other clauses in the QSL Standard Terms, relevant to the parties' arguments in this motion, will be identified later in these Reasons.

(6) Purchase Orders

[51] QSL's motion record also includes a selection of documents extracted from the affidavit of documents produced by USS in the Action. These documents are copies of what appear to be POs issued by USS in each year from 2012 to 2023, as well as a spreadsheet listing those POs. This spreadsheet suggests that there were 34 POs issued in 2012, ten POs issued in 2013, eight POs issued in 2014, two POs issued in 2015, eight POs issued in 2016, four POs issued in 2017, three POs issued in 2018, one PO issued in 2019, one PO issued in 2020, two POs issued in 2021, two POs issued in 2022, and two POs issued in 2023.

[52] Notwithstanding the parties' agreement that documents included in their motion records from the affidavits of documents produced in the Action be admitted into evidence (as well as my earlier comments that there is little disagreement between the parties surrounding the facts to be derived from the evidence in this motion), the parties do not agree on the evidentiary value of all of these POs.

[53] QSL asserts that, with the exception of one PO issued by USS in 2008 (upon which neither parry has focused), QSL did not receive any POs from USS for shipments of iron ore, nor was a PO number required for the payment of QSL's invoices, at any time between 2003 and December 2015. QSL submits that in early December 2015, a representative of USS named Daryl Criss faxed a PO to a representative of QSL named Guy Bertrand, although without advising Mr. Bertrand as to what the PO was intended to cover or its purpose. Mr. Bertrand then proposed to insert the PO number on QSL invoices.

[54] In support of this position that the use of POs began in December 2015, QSL relies on copies of invoices that it issued to USS between 2010 and March 2016 and emphasizes that no invoices bearing a PO number were issued by QSL prior to the December 2015 communications between Mr. Criss and Mr. Bertrand. QSL also refers the Court to an exchange of email correspondence between Mr. Bertrand and Mr. Criss on December 4, 2015, in which Mr. Bertrand notes having received a PO from USS and advises that QSL will add the invoice number to future invoices if that is what USS wishes. These invoices and correspondence are taken from QSL's affidavit of documents and are included in QSL's motion record.

[55] QSL also refers to what it describes as anomalies in the POs produced in USS's affidavit of documents. QSL notes that a number of the POs that appear to relate to the earlier years, commencing in 2012, bear a "Date Approved" of July 31, 2018. QSL also notes that some POs are addressed to SLS while others are addressed to QSL, even though they predate QSL's incorporation on December 5, 2018. QSL emphasizes that the record before the Court does not include any evidence to establish the date or year these earlier POs were actually issued, whether they were

issued before the relevant services were performed, or that they were actually sent to QSL at any time.

[56] In Mr. Joseph's examination, QSL queried the anomalies it had identified. Resulting undertaking responses provided on behalf of Mr. Joseph indicate that the "Date Approved" represents the last update or change made to a PO and that, when USS's system was updated to show QSL as the new name of its supplier, the system changed that name even in POs that had already been issued.

[57] At the hearing of this motion, USS's counsel explained that it is USS's position that the POs that QSL says it did not receive (*i.e.*, prior to December 2015) were indeed issued by USS, although I do not understand USS to be disputing QSL's assertion that it did not receive those POs. In any event, USS's counsel took the position that nothing turns on whether these pre-December 2015 POs were issued by USS or received by QSL.

[58] Consistent with the parties' agreement, I am prepared to admit into evidence the POs and other documents canvassed above. However, in relation to the pre-December 2015 POs, given the parties' disagreement as to what that documentation demonstrates, the lack of evidence establishing that these POs were sent to QSL, and the fact that neither party relies on that documentation to advance its position in this motion, I afford no weight to that evidence.

[59] I accept the December 2015 email correspondence between the parties, and the copies of QSL's invoices, as evidencing that QSL began receiving POs from USS in December 2015. I

also accept (and understand that the parties agree) that the evidence demonstrates that USS thereafter continued to issue to QSL, and QSL received, POs in the following years up to and including 2022. Indeed, for various dates in 2018 to 2022, evidence extracted from QSL's affidavit of documents includes email communications from USS (in the latter years, from Ms. DeSantis) to Mr. Lemont referencing and apparently attaching POs.

[60] Turning to other evidence related to POs issued following December 2015, Mr. Lemont deposes in the Second Lemont Affidavit that, based on his review of his files, in the years 2016, 2018 and 2019, QSL received vessels carrying USS cargoes of iron ore pellets without POs having been received by QSL prior to the vessels' arrivals. By way of example, Mr. Lemont attaches April 13, 2018 email correspondence on this subject from him to Christopher Bair, USS's Manager - Raw Materials. Mr. Lemont's email advised Mr. Bair that POs for 2018 had not yet been received, noted that accounting was preparing invoices, and asked Mr. Bair to look into this. Mr. Bair responded the same day, advising that this would be taken care of.

[61] Similarly, at his examination for discovery, Mr. Joseph confirmed that there were instances in 2017, 2018, 2019 and 2020 when USS issued its PO after QSL had provided services in relation to USS's cargo. Mr. Joseph also noted that these instances were exceptions, in that POs were typically issued in advance of services being performed, and explained that during his tenure (including in 2022) POs were issued in advance.

[62] Neither party has identified any particular variation in the form of the PO that was issued to QSL over the years. Focusing upon the March PO, it is a four-page document, the upper half of

each page of which bears USS's name, the title "Standard Purchase Order," QSL's name and address, an order number, the March 20, 2022 date, and the language, "COMPLETE USS ORDER NUMBER AND LINE NUMBER FOR EACH ITEM MUST BE SHOWN ON BILL OF LADING AND INVOICE."

[63] The first page of the document also refers to payment terms of net 30 days. Thereafter, the document states in bold letters, "***PLEASE NOTE THE FOLLOWING REGARDING THE TERMS AND CONDITIONS***," and then the following:

> TERMS AND CONDITIONS: The terms "Purchaser", "Buyer", "U.S. Steel", "USS" wherever used in this Purchase Order or any document incorporated by reference or made a part hereof shall mean United States Steel Corporation, its operating divisions and domestic \\\\\\\(USA\\\\\\\) subsidiaries, unless specifically provided otherwise; provided, however, United States Steel Corporation does not assume and shall not be directly or indirectly responsible for the liabilities or obligations of any of its subsidiaries or affiliated entities other than for its express obligations under this Purchase Order. In addition to the specific terms and conditions printed on this form Seller agrees to be bound by and adhere to the U.S. Steel standard Purchase Order General Terms and Conditions which are hereby incorporated by this reference. Any oral or written expression of acceptance of this Purchase Order or any action by Seller to perform whichever shall first occur shall constitute Seller's acceptance and form an agreement. The terms of this Purchase Order including the Purchase Order General Terms and Conditions are the exclusive terms and conditions to apply to this agreement and any additional or different terms proposed by Seller are hereby rejected. To view the Purchase Order General Terms and Conditions visit the U.S. Steel website at WWW.USSTEEL.COM and using the "Doing Business" dropdown bar go to the VENDORS page. From the VENDORS page the Purchase Order General Terms and Conditions can be viewed and printed by clicking on the Purchase Order General Terms and Conditions link. The Conditions of Purchase are subject to change from time to time.
>
> [Emphasis added]

[64] Following this language, the March PO includes a Note to Supplier, which reads, “2022 Stevedoring Charges – Minntac FLUX Pellet Export Program, For Item or Ship-To questions contact Taylor, Lee Ann 2187497563.” The document then references various items, each with an item number, item description, dollar figure and delivery date (in each case, March 31, 2023). The item descriptions read “DIRECT SERVICE|OTHER FEES/TAXES|OTHER CHARGES|SCREENING SERVICES,” “DIRECT SERVICE|HANDLING FEES|OCEAN OVERHEAD|LOADING/UNLOADING CHARGES – OCEAN – IRON ORE PELLETS” and “DIRECT SERVICE|OTHER FEES/TAXES|OCEAN OVERHEAD|OTHER FEES/TAXES OCEAN – IRON ORE PELLETS.” The dollar figures for the items vary but total CAD $39 million.

[65] USS’s motion record includes a copy of USS’s Purchase Order General Terms and Conditions in the form in which they are attached as an exhibit to USS’s Defence and Counterclaim [the USS Standard Terms]. I understand that the parties agree that this document represents the Purchase Order General Terms and Conditions referenced in the March PO.

[66] Particular clauses in the USS Standard Terms, relevant to the parties’ arguments in this motion, will be identified later in these Reasons.

C. *Discussion*

(1) Are the issues on the merits raised in this motion appropriate for disposition by summary trial?

[67] As previously noted, the parties agree that the issues on the merits raised in this motion are appropriate for determination through a summary trial motion. As such, the parties did not advance substantive submissions on this question. Nevertheless, for the sake of good order, I confirm that I am satisfied that there is sufficient evidence in the record now before the Court to permit determination of those issues.

[68] As observed earlier in these Reasons, there is little disagreement between the parties surrounding the facts to be derived from the evidence in this motion. The parties' respective positions in this motion do not require the Court to make findings of credibility. Rather, the parties' arguments largely surround the application of the governing law to the facts, in identifying the terms of their contractual relationship at the time of the Co-mingling Incident. This is a task that is well-suited to adjudication through summary trial.

[69] While determination of the issues raised in this motion will not dispose of all the disputes raised by the parties' pleadings, I am satisfied that such determination will significantly advance this proceeding towards overall resolution, either through settlement or further adjudication.

[70] I therefore find that the issues on the merits raised in this motion are appropriate for disposition by summary trial.

(2) Is the relationship between QSL and USS, pursuant to which QSL's services were performed in July 2022, governed by either the Proposed Agreement or the March PO?

[71] Fundamentally, QSL takes the position that its contractual relationship with USS in 2022 and at the time of the Co-mingling Incident was governed by the terms of the Proposed Agreement including the QSL Standard Terms incorporated by reference therein. In contrast, USS takes the principal position that the relationship was governed by the terms of the March PO including the USS Standard Terms incorporated by reference therein. In the alternative, USS takes the position that the parties agreed to only commercial terms and that neither the Proposed Agreement (including the QSL Standard Terms) nor the March PO (including the USS Standard Terms) applied to their contractual relationship in 2022.

[72] In support of these positions, USS emphasizes that it did not sign the Proposed Agreement, notwithstanding that the main body of that document included a signature line for USS and therefore clearly contemplated execution by USS. USS notes that QSL's cover letters, accompanying previous versions of proposed agreements in some of the years prior to 2022, expressly requested that USS return an executed copy. USS further notes the language of the Proposed Agreement, in clause 2 under the heading "Term," reading, "If signed prior to March 18, 2022, this agreement will be valid until December 31st, 2022." USS argues that these elements of the evidence support USS's position that, in the absence of its signature, the Proposed Agreement did not constitute a valid contract.

[73] USS also contrasts these circumstances with those surrounding the contract between QSL and Cliffs governing QSL's services for Cliffs in 2022, a copy of which is included in USS's motion record and bears Cliffs' signature.

[74] As USS submits, a signature is a manifestation of consent to the contents of an agreement (*L'Estrange v F Graucob Limited*, [1934] 2 KB 394 (KBD) [*L'Estrange*] at 165-166). Indeed, in his examination, Mr. Lemont explained that his understanding of the purpose of including a signature line in the Proposed Agreement was to get the other party to sign to indicate their acceptance of QSL's terms. Of course, as emphasized in the authorities canvassed earlier in these Reasons, the Court's task is to conduct an objective analysis of the communications between the parties, not to analyse the parties' subjective understandings. Nevertheless, analysed objectively, I accept USS's submission that the form of the Proposed Agreement contemplated signature by each party as a means of confirming its assent to its terms.

[75] However, this conclusion does not necessarily translate into a finding that, absent USS's signature, it did not agree to be bound by the terms of the Proposed Agreement. As explained in *L'Estrange*, in the absence of a signature on a written agreement, a party can still be bound thereto if it was aware, or ought to have been aware, of its terms and there is evidence other than a signature establishing that the party assented to its terms (at 165-166). The requirement is an objective manifestation of an intention to be legally bound (*Ethiopian* at para 36).

[76] QSL takes the position that USS manifested its intention to be legally bound by the Proposed Agreement when it caused its cargo to be carried to QSL's facility to receive QSL's

services. In support of that position, QSL emphasizes the final clause of the Proposed Agreement (clause 15, under the heading "Agreement"), which reads, "Please note that once operations commence, this is understood to signify the acceptance of the specified rates, terms and conditions."

[77] Consistent with that position, Mr. Lemont explained at his examination (excerpts from the transcript of which are included in USS's motion record) that, in his mind, USS had reverted to QSL such that an agreement was in place when USS "sent the first vessel down." Again, whether an agreement was reached does not turn on what was subjectively in the minds of the parties' representatives. However, it is clear from the jurisprudence (cited by both parties) that a party's conduct, analyzed objectively, can evidence an intention to be contractually bound to terms that were previously communicated by the counterparty (*Saint John Tug Boat* at 622). That is, if a party communicates to another that it is prepared to provide services to the other party on particular terms (representing an offer) and the other party accepts the provision of those services, that conduct by the other party can represent acceptance of the offer and can give rise to a binding contract.

[78] Absent the potential contractual impact of the March PO, I have no difficulty concluding that, by USS directing a ship bearing its cargo to QSL's facility for the provision of QSL's services, USS indicated acceptance of the offer represented by QSL's earlier communication of the Proposed Agreement. Even absent the clause 15 language in the Proposed Agreement, the analysis explained in *Saint John Tug Boat* would support such a conclusion. However, clause 15 reinforces that conclusion, as it communicated to USS (and, in my view, would have been so interpreted by an

objective observer) that acceptance of QSL's services represented agreement with the terms in the Proposed Agreement.

[79] In so concluding, I have considered an argument by USS that clause 15 is unclear as to which are the "specified" rates, terms and conditions referenced therein. I find little merit to that argument. In my view, the only reasonable interpretation of this language is that it references rates, terms, and conditions specified in the Proposed Agreement, including the QSL Standard Terms.

[80] The impact of clause 15 also undermines USS's argument as to the effect of clause 2. While clause 2 provides that signature of the Proposed Agreement by USS would secure the offered rates until the end of the calendar year (and therefore clearly represents a means of confirming acceptance of the proposed rates and terms), clause 15 provides that the rates and terms of the Proposed Agreement would be deemed accepted upon commencement of operations and therefore makes it clear that signature was not the only means of confirming acceptance.

[81] However, it remains necessary to consider the effect of the March PO. If, as argued by USS, the March PO were to be properly characterized as a counter-offer of contractual terms and conditions differing from those represented by the Proposed Agreement, then the contractual formation analysis would change, as the counter-offer would represent a rejection of the Proposed Agreement (*Hyde v Wrench* (1840), 49 ER 132 [*Hyde*]; *101008161 Saskatchewan Ltd v Saskatchewan Wheat Pool*, 2002 SKQB 209 at paras 20, 25-26).

[82] I will focus upon the March PO, rather than the May PO, as I understand it to be the former that applied to the particular services performed in late July 2022 during which the Co-mingling Incident arose and that USS argues caused its PO terms and conditions to govern the parties' contractual relationship.

[83] If the March PO were properly characterized as a counter-offer then, applying the analysis explained in *Saint John Tug Boat*, QSL's provision of its services upon arrival of the vessel with USS's cargo at QSL's facility could well represent acceptance of USS's counter-offer, giving rise (as USS submits) to an agreement on the terms and conditions of the March PO. Indeed, the terms and conditions on the face of that document expressly stated the following (extracted from the complete language quoted earlier in these Reasons):

> … Any oral or written expression of acceptance of this Purchase Order or any action by Seller to perform whichever shall first occur shall constitute Seller's acceptance and form an agreement. …

[84] In further support of its position that the March PO should be characterized as a rejection of the Proposed Agreement, USS argues that the March PO represented an express rejection of the Proposed Agreement, as the terms and conditions on the face of that document included the following [the Rejection Term]:

> … The terms of this Purchase Order including the Purchase Order General Terms and Conditions are the exclusive terms and conditions to apply to this agreement and any additional or different terms proposed by Seller are hereby rejected. …

[85] In response to this particular argument (related to the Rejection Term), QSL refers the Court to the language emphasized below in the following provision from the USS Standard Terms (which USS argues are incorporated by reference into the March PO):

> (C) If the purchase order is deemed to be an acceptance of a prior offer by Seller, such acceptance is limited to the express terms contained herein and on the face of the purchase order. Additional or different terms or any attempt by Seller to vary in any degree any terms of the purchase order shall be deemed material and are hereby rejected. However, the purchase order shall not operate as a rejection of the Seller's offer unless it contains variances in the terms of the description, quantity, price, or delivery schedule of the goods or work to be performed.
>
> [Emphasis added]

[86] Based upon the last sentence in this provision, QSL argues that USS cannot rely on the Rejection Term to support its position that the March PO represents a rejection of the Proposed Agreement, because the March PO did not contain any variances of commercial terms of the sort referenced in that sentence. USS does not suggest that the March PO contained any such variances. However, it argues that the language on which QSL relies must be read in the context of the whole provision quoted above. USS emphasizes the introductory language of that provision, "If the purchase order is deemed to be an acceptance of a prior offer by Seller …"

[87] QSL did not address this argument in its oral submissions in reply. I find USS's argument compelling. I read all three sentences in the provision quoted above as related and qualified by the introductory language to which USS refers. As neither party is advancing an argument to the effect that the March PO represented an acceptance of the Proposed Agreement, I agree with USS's position that the provision does not apply.

[88] As such, given the potential impact of the Rejection Term and common law principles (per *Hyde*), the Court must consider whether to accept USS's position that the March PO is properly characterized as a rejection of the Proposed Agreement and a counter-offer. QSL's principal argument in response to this position is that the March PO (and, more generally, the POs that USS has issued since December 2015), viewed objectively and particularly in the context of the history of the parties' relationship, were not intended to have contractual effect. QSL submits that the POs were rather intended to fulfill an administrative function, related to record-keeping and the processing of payments.

[89] In support of their position that the parties' history is relevant, QSL notes Justice Pamel's observation at paragraph 26 of *QSL Canada* as to the potential benefit of the Court having access to historical evidence of agreements between the parties to support an assessment of their contractual intentions (at para 26):

> 26. Under the circumstances, I must agree with QSL that the determination of what constitutes the terms and conditions of the stevedoring contract between US Steel and QSL, in particular the competing forum selection clauses, is a triable issue of mixed fact and law which will be better determined by the judge hearing the underlying action on the merits, or possibly, by way of a motion for summary judgment or summary trial pursuant to Rules 213 et seq following discoveries, when a full record on this issue may be prepared and available to the Court. The historical evidence of the agreements between US Steel and QSL is not fully before the Court, and the record that is before the Court is constrained by the fact that Mr. Joseph has only been in the position he now holds for a few years. During the hearing before me, it quickly became evident that we were left to supposition, speculation, and conjecture as regards any reasonable assessment of the intention of the parties during the history of their relationship as to what truly constituted the terms of their stevedoring agreement, in particular as regards the governing forum selection clause.
>
> [My emphasis]

[90] QSL also relies on the decision of the SCC in *Sattva*. Although recognizing that *Sattva* concerns contractual interpretation as opposed to contractual formation, QSL draws the Court's attention to the SCC's reference to the value in examining evidence of surrounding circumstances (limited to that which was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting) to deepen a decision-maker's understanding of the mutual and objective intentions of the parties (at paras 56-57).

[91] I also note that, as observed earlier in these Reasons, *Earthco* explains at paragraph 72 that the modern contractual interpretation principles identified in *Sattva* apply to contracts with exclusion clauses, including at the first step of the *Tercon* test. In my view, the analysis required at the first step of the *Tercon* test clearly has the potential to involve assessment of contract formation. Indeed, USS advances such arguments that the Court will address under the final issue considered later in these Reasons.

[92] I note USS's reference to the summary in *Repap* of principles extracted from "battle of the forms" authorities, including the following (at para 11(c)):

> (c) Previous dealings between contracting parties may be relevant if they prove actual knowledge and consent to the terms to be imposed. A term cannot be implied against a party if the term was unknown to them. In *Western Processing & Cold Storage Ltd. v. Hamilton Const. Co. Ltd.* (1965) 51 D.L.R. (2d) (Man. C.A.), the court held that clauses on an acknowledgement of order form could have no effect unless, through a course of well-established prior business conduct, the party affected knew that it was bound by the form. In so holding, the court approved at 250 the passage in *McCutcheon v. David MacBrayne, Ltd.*, [1964] 1 All E.R. 430 at 437:
>
> > In my opinion, the bare fact that there have been previous dealings between the parties does not assist the respondents at all. The fact that a man has

> made a contract in the same form ninety-nine times (let alone three or four times which are here alleged) will not of itself affect the hundredth contract, in which the form is not used. Previous dealings are relevant only if they prove knowledge of the terms, actual and not constructive, and assent to them. If a term is not expressed in a contract, there is only one way in which it can come into it and that is by implication. No implication can be made against a party of a term which was unknown to him. If previous dealings show that a man knew of and agreed to a term on ninety-nine occasions, there is a basis for saying that it can be imported into the hundredth contract without an express statement. It may or may not be sufficient to justify the importation, ─ that depends on the circumstances; but at least by proving knowledge the essential beginning is made. Without knowledge there is nothing.

[93] I note the reference in the above passage from *McCutcheon v David MacBrayne, Ltd*, [1964] 1 All ER 430 (UK HL) [*McCutcheon*] to previous dealings between the parties not being of assistance. Later in these Reasons when addressing the final issue in this Motion, I will return to *Repap* and the authorities cited therein, when considering USS's arguments that the Limitation of Liability Clause was not sufficiently brought to its attention.

[94] For present purposes, I accept that the fact that parties have contracted on particular terms in the past is not determinative of the terms of subsequent contracting. However, I do not read *McCutcheon* as standing for the proposition that the history of previous dealings between contracting parties cannot be relevant to determining the basis on which the parties have subsequently contracted. Indeed, *Saint John Tug Boat* represents a case in which the SCC took into account the previous contractual arrangements between the parties in interpreting the continued

availability of tugboat services from the appellant, following the conclusion of those arrangements, as an offer that the respondent accepted through its conduct (at 618-622).

[95] Evidence as to the history of the parties' relationship has been canvassed in some detail earlier in these Reasons. Analyzing the import of that evidence, to begin, I consider it relevant that in almost every year since 2004, before commencement of operations between the parties for the year, QSL furnished USS with a copy of its proposed form of agreement. I consider it particularly relevant that, in relation to services provided in the years 2009 to 2012, both USS and QSL signed the form of agreement furnished by QSL. Clearly, in those years the parties' relationship was governed by those agreements, and the copies of those agreements in evidence demonstrate that they included terms that addressed categories of rights and obligations similar to those later included in the Proposed Agreement.

[96] Following the 2012 navigation year, USS stopped signing QSL's proposed form of agreement. While he has not positioned this in time, Mr. Lemont states in the First Lemont Affidavit that he was once told by USS that it was not signing because its bureaucracy was such that the year would be over by the time the agreement was vetted by several internal departments in order to support signature. However, other than in 2014 for which there appears to be no agreement in the record, the evidence is that, even after USS stopped signing, QSL continued to provide its form of agreement to USS every year up to and including 2022. USS argues that the Court should infer from the fact that it stopped signing the agreement after the 2012 navigation year that it was thereby rejecting QSL's form of agreement. I do not find this argument compelling, particularly as, prior to December 2015 when USS began sending POs to QSL, there is no evidence of any

communication from USS to QSL that could be characterized as a rejection of the terms in QSL's form of agreement or as proposing any alternative terms.

[97] Consistent with my earlier analysis of the events of 2022, when QSL provided USS with its form of agreement applicable to the 2013 and 2015 navigation years and USS subsequently directed a ship bearing its cargo to QSL's facility for the provision of QSL's services, it is difficult to reach any conclusion other than that USS was thereby accepting the terms in QSL's agreement. As previously noted, even though the clause 15 language did not begin to appear in QSL's form of agreement until 2016, the *Saint John Tug Boat* analysis supports this conclusion.

[98] The practice of USS regularly issuing POs commenced in December 2015. The evidence does not include any explanation by USS to QSL at that time as to why that practice was then being introduced. Rather, in early December 2015, USS's representative, Mr. Criss, faxed a PO to QSL's representative, Guy Bertrand, and it was Mr. Bertrand who then proposed inserting the PO number on subsequent QSL invoices. As previously noted, the record before the Court includes email communications from USS to QSL in various subsequent years, referencing and apparently attaching POs. As QSL emphasizes, these emails did not include any covering message identifying the purpose of the POs.

[99] Consistent with USS having begun issuing POs in December 2015, I note that invoices issued by QSL in December 2015 and January 2016, related to services provided in December 2015, first reference PO numbers. However, the form of agreement applicable to the 2015 navigation year was sent by Mr. Lemont to USS on March 23, 2015. Clause 2 of that form of

agreement states that it will apply during the 2015 season and terminate December 31, 2015. The QSL invoices in the record reflect services having been provided in June, July, September, October, November, and December 2015.

[100] Flowing from the conclusion explained above that, at least prior to the introduction of POs, the relationship between the parties was governed by QSL's annual form of agreement, it follows that all services provided by QSL in calendar 2015 were governed by the 2015 agreement. It therefore further follows that, at least when the POs were first introduced in relation to December 2015 shipments, there was no scope for them to have contractual effect. This analysis supports QSL's position that, notwithstanding the terms and conditions on their face, the POs were issued for administrative, not contractual, purposes.

[101] This conclusion is also supported by the evidence in the Second Lemont Affidavit as to instances in 2016, 2018, and 2019 when USS directed vessels to QSL's facility, and QSL provided services, without POs yet having been issued. I appreciate that, as Mr. Joseph testified in his examination, such instances appear to have been the exception rather than the rule, as POs were typically issued before services were provided. However, the fact that these instances occurred, and the parties nevertheless conducted themselves as if they were under contract, supports a finding that the POs were being issued for administrative purposes rather than for purposes of establishing contractual terms.

[102] This conclusion is further supported by the express contractual negotiations that took place between the parties in 2017. As previously noted, Mr. Lemont explained in the First Lemont

Affidavit that in 2017 USS requested, and QSL agreed to, certain contractual modifications. Email correspondence exhibited to the affidavit shows that on March 22, 2017, USS's representative requested changes to "Section 2 Term," "Section 6 Payment Terms" and "Appendix A Section 3 Rates," and on March 28, 2017, Mr. Lemont agreed to the first two of these requests.

[103] Significantly, it is clear from reviewing the form of agreement sent by QSL to USS on March 6, 2017, that the agreed changes relate to clauses in the main body of that agreement, including extending the term of the agreement to March 31, 2018. Accordingly, notwithstanding that the parties did not sign that agreement, the above negotiation supports the conclusion that the parties intended their relationship in the 2017 navigation year (and into early 2018) to be governed by the agreement provided by QSL and that POs subsequently issued by USS in that navigation year were not intended to have contractual effect.

[104] I note USS's argument that the fact that, after USS began issuing POs, QSL began referencing the relevant PO numbers in its invoices, represented assent to the PO terms and conditions. I do not find this argument particularly strong, as QSL's practice is equally consistent with its position that the POs fulfilled an administrative function, including in connection with processing the payment of QSL's invoices.

[105] In my view, the various elements of the parties' history canvassed above, viewed through the lens of the objective observer, lend substantial support to QSL's position as to the role of the

POs. However, as explained below, even if I were analyzing only the documentation exchanged in connection with the 2022 navigation year, I would still find QSL's position to be compelling.

[106] As QSL emphasizes, the rates that USS ultimately paid in 2022 are found in the appendices to the Proposed Agreement. There is no dispute as to the application of those rates to the parties' relationship in the 2022 navigation year. Indeed, even under USS's alternative position, that the parties did not reach agreement on contractual terms and conditions, USS accepts that there was an agreement between the parties on commercial terms.

[107] The March PO does not include or reference QSL's rates. There are elements of the March PO that do not appear to be particularly relevant to the parties' transaction. It includes references to a "Ship To" address that Mr. Joseph described in his examination as a required default field within USS's purchasing system with no particular value in this case. The only pricing included in the March PO is the $39 million figure, which Mr. Joseph described as representing the maximum value that QSL was permitted to invoice under that PO without further approval from USS.

[108] In contrast, the structure and content of the Proposed Agreement support QSL's position that that document, rather than the March PO, governs the parties' relationship. When QSL sent its 2022 rates to USS on March 1, 2022, it did not do so in isolation. The documents capturing the rates were appendices to an agreement. The principal documentary source of the rates, which rates USS acknowledges were agreed, formed part of that agreement.

[109] I have considered the fact that Mr. Lemont's March 1, 2022 covering letter to Mr. Joseph, which attached the Proposed Agreement, referred to QSL thereby submitting its updated rates. I appreciate that this letter references only rates and not other contractual terms and conditions that are found in the body of the Proposed Agreement. However, I do not accept that this reference would lead an objective observer to conclude that only the appendices and not the body of the Proposed Agreement were intended to have contractual effect. Consistent with that analysis, I note that, when Mr. Lemont first advised Mr. Joseph of the 2022 rates in his November 22, 2021 email, Mr. Lemont expressly referenced terms and conditions as remaining unchanged.

[110] To a lesser extent, the categories of terms and conditions found out in the body of the Proposed Agreement, when contrasted with the terms and conditions on the face of the March PO, also support a conclusion that the former were intended to govern the parties' relationship. The Proposed Agreement's terms and conditions included matters such as vessel nomination, laytime, and demurrage/dispatch, which are commercially relevant to the provision of stevedoring services. In contrast, the PO terms and conditions read as far more boilerplate. Even the USS Standard Terms that the PO incorporates by reference, while potentially relevant as a matter of general application, do not have the same direct relevance as the terms of the Proposed Agreement.

[111] I do not consider the better "fit" of the terms and conditions of the Proposed Agreement to be a significant factor, as it is of course available to parties to contract on terms and may not be particularly well-suited to their transaction. However, I do consider this factor to favour QSL's position.

[112] In my view, the above analysis of the documentation exchanged between the parties in connection with the 2022 navigation year, like the documentation relevant to historical contractual dealings, supports a conclusion that the POs issued by USS to QSL served an administrative function and, notwithstanding the inclusion of terms and conditions on the face thereof, were not intended to have contractual effect and did not represent rejection of, or counter-offers to, QSL's proposed terms.

[113] Based on the foregoing analysis, I find that the relationship between QSL and USS, pursuant to which QSL's services were performed in July 2022, was governed by the Proposed Agreement.

(3) If the Proposed Agreement applies, is the Limitation of Liability Clause as found in QSL's Standard Terms also applicable and enforceable?

[114] In my analysis and conclusion under the last issue, I have not yet addressed the question whether the contractual terms and conditions in the Proposed Agreement, which I have found applied to the parties' relationship in 2022, included the QSL Standard Terms that the Proposed Agreement purports to incorporate by reference and, in particular, the Limitation of Liability Clause contained therein. USS advances arguments, including related to its notice or knowledge of the Limitation of Liability Clause, as bases for challenging its validity, to which arguments I will now turn.

[115] To begin, USS refers the Court to paragraphs 121 to 123 of Justice Binne's dissenting reasons in *Tercon* (agreed to by the majority on this aspect):

> 121. The present state of the law, in summary, requires a series of enquiries to be addressed when a plaintiff seeks to escape the

> effect of an exclusion clause or other contractual terms to which it had previously agreed.
>
> 122. The first issue, of course, is whether as a matter of interpretation the exclusion clause even *applies* to the circumstances established in evidence. This will depend on the Court's assessment of the intention of the parties as expressed in the contract. If the exclusion clause does not apply, there is obviously no need to proceed further with this analysis. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made, "as might arise from situations of unequal bargaining power between the parties" (*Hunter*, at p. 462). This second issue has to do with contract formation, not breach.
>
> 123. If the exclusion clause is held to be valid and applicable, the Court may undertake a third enquiry, namely whether the Court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts.

[116] USS's counsel advised at the hearing of this motion that it is not advancing arguments under the second or third of the three inquiries identified in *Tercon*. That is, USS does not suggest that the Limitation of Liability Clause was unconscionable when the parties contracted or that there is any overriding public policy that militates against its enforcement. Rather, its arguments focus on the first *Tercon* inquiry, whether the Limitation of Liability Clause applies to the circumstances established in evidence (i.e., the Co-mingling Incident).

[117] As *Earthco* explained at paragraph 70, this first inquiry involves assessing the intention of the parties using the general rules of contractual interpretation. That is the analytical exercise in which the Court has been engaged under the second issue in this motion, resulting in the conclusion that the relationship between QSL and USS, pursuant to which QSL's services were performed in

July 2022, was governed by the Proposed Agreement. However, USS takes the position that, even if the Proposed Agreement were the applicable contract between the parties, the Limitation of Liability Clause does not apply, because USS was not given sufficient notice of that provision and, in the alternative, because that provision contradicts other clauses in the body of the Proposed Agreement or in the QSL Standard Terms.

[118] First, USS argues that requirements for notice escalate when a term is particularly harsh. USS invokes Lord Denning's famous statement in *J Spurling Ltd v Bradshaw*, [1956] EWCA Civ 3 at 4:

> I quite agree that the more unreasonable a clause is, the greater the notice which must be given of it. Some clauses I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient.

[119] USS draws the Court's attention to Canadian authorities that have considered whether onerous terms that were not brought to the attention of a signatory to a contract may be inoperative. In *Tilden*, the Ontario Court of Appeal declined to enforce a limitation of liability clause in a rental car contract, in circumstances where the clause was inconsistent with other express terms of the contract, it was printed in particularly small and faint type so as to be hardly legible, and it would have been apparent to the rental clerk that the customer had signed the contract without reading that clause (at 3, 5). The Court held as follows (at 8-9):

> In modern commercial practice, many standard form printed documents are signed without being read or understood. <u>In many cases the parties seeking to rely on the terms of the contract know or ought to know that the signature of a party to the contract does not represent the true intention of the signer, and that the party signing is unaware of the stringent and onerous provisions which the standard form contains. Under such circumstances, I am of the opinion that the party seeking to rely on such terms should not be</u>

> able to do so in the absence of first having taken reasonable measures to draw such terms to the attention of the other party, and, in the absence of such reasonable measures, it is not necessary for the party denying knowledge of such terms to prove either fraud, misrepresentation or non est factum.
>
> [USS's emphasis]

[120] USS further notes that, in *MacQuarrie*, the Ontario Court of Appeal confirmed that the reasoning in *Tilden* is not confined to standard form contracts. The Court held that an onerous no-cancellation provision in a contract between the parties was unenforceable because it had not been adequately brought to the attention of the party against which it operated, even though the parties had signed the contract (at paras 37-42). The contract was signed in a hurried manner, with no opportunity to negotiate terms, without the signature reading it with care because she was occupied with customers when the representative of the other party came by to collect her signature, and without the benefit of legal advice (at para 38). As in *Tilden*, the result in *MacQuarrie* turned significantly on the circumstances under which the contract was signed, such that it was not reasonable for the party seeking to enforce the clause to conclude that the other party assented to it without first having taken reasonable measures to bring that clause to the signatory's attention (*MacQuarrie* at para 40).

[121] Applying these authorities, USS argues that the QSL Standard Terms and the Limitation of Liability Clause therein were never brought to USS's attention, were unreasonably inaccessible, and are therefore unenforceable under the first step of the *Tercon* test.

[122] In response to the jurisprudence upon which USS relies, QSL emphasizes that Canadian maritime law recognizes that a party may be bound by a provision contained in a charterparty of

which it had no knowledge at the time it accepted a bill of lading (*Thyssen Canada Ltd v Mariana (The)*, [2000] 3 FC 398 (FCA) [*Thyssen*] at para 19; *Crosby Molasses Company Limited v "Scott Stuttgart,"* 2024 FC 1358 [*Crosby*] at paras 99-103, citing *Thyssen* at para 14 and *Herculito Maritime Ltd v Gunvor International BV*, [2024] UKSC 2 at para 77). Consistent with *Ethiopian*, *Crosby* confirms that it is the objective intention of the parties that is relevant (at para 99).

[123] Outside the context of bills of lading and charterparties, in *Labrador-Island Link General Partner Corporation v Panalpina Inc*, 2019 FC 740 [*Labrador*], Justice Roger Lafrenière considered whether a limitation period, contained in the Canadian International Freight Forwarders Association Standard Trading Terms [the CIFFA Terms], applied to freight forwarding services supplied by the defendant Panalpina to the plaintiff (described as Nalcor). In Panalpina's quotes related to the shipments in issue, it referenced the application of the CIFFA Terms, stated to be available upon request (at paras 60-61). The evidence of Nalcor's representative was that, when he received shipping documentation from Panalpina, he reviewed only pricing, scheduling and logistics, not any other terms (at para 62). The Court concluded as follows (at para 66):

> 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.

[124] In *Labrador-Island Link General Partner Corporation v Panalpina Inc*, 2020 FCA 36 [*Labrador FCA*], the Federal Court of Appeal upheld Justice Lafrenière, commenting as follows at paragraph 32 on his analysis of the application of the CIFFA Terms:

> 32. It was open to the Judge to find on the evidentiary record before him that the CIFFA Terms applied and he committed no reviewable errors in so finding. The appellants had notice of the CIFFA Terms hundreds of times, through the quotes and invoices provided for each shipment. Indeed, as stated in paragraph [10] above, the two shipments were, respectively, the 299th and 459th shipments arranged at the request of Nalcor, all of which followed the same sequence of events of quotes offered by Panalpina, acceptance by Nalcor, and invoices issued by Panalpina to Nalcor for payment of its services.

[125] To similar effect, although outside the maritime context, QSL refers the Court to *Freshway Services Inc v CDEnviro Ltd*, 2017 ONSC 6591 [*Freshway*], in which the contract between the parties referred to standard terms and conditions that were stated to be available for review upon request. Those terms included a choice of law and forum selection clause. In concluding that the standard terms and conditions were enforceable against the plaintiff, the Court reasoned as follows (at paras 38-39):

> 38. Nevertheless, the defendant ensured that the provision incorporating the Standard Terms and Conditions into the contract was clear and visible to any person reading the contract. It was plain and obvious that the Standard Terms and Conditions were available for review on request. Importantly, there was no obligation on the defendant to draw the plaintiff's attention to the clause.
>
> 39. The plaintiff was careless and failed to request a copy of the Standard Terms and Conditions referred to in the clause. The plaintiff was so focused on, amongst other things, the technical aspects of the project and the project completion date that it did not request these items. These are legitimate concerns, however, the plaintiff's representatives are experienced business persons. The plaintiff is expected to do its own due diligence and was simply careless. Carelessness is not a basis to avoid obligations under a contract: *TFS RT Inc. v. Dyck*, 2017 ONSC 2780 (Ont. S.C.J.), at paras. 50-51.

[126] Returning to the case at hand, as explained earlier in these Reasons, in most of the years from 2024 to 2022, the form of agreement that QSL provided to USS included a clause that read, "Our standard terms and conditions have been incorporated in all our quotation and contracts. If you are not aware of them upon request a copy will be forwarded to you." Commencing in 2016, that clause changed to the following (or similar) language: "Our standard terms and conditions have been incorporated in all our quotation and contracts. If you are not aware of them, please contact our website at www.qsl.com." That language appeared in the Proposed Agreement that the Court has found governed the parties' relationship in 2022.

[127] I note that the evidence before the Court does not address the extent to which the QSL Standard Terms may have changed over the years in which the parties were doing business. In fact, there is no evidence as to whether the Limitation of Liability Clause was included in the same form, or at all, in the QSL Standard Terms prior to 2002. However, QSL's proposed form of agreement was provided to USS over the course of many years and, while that form itself also evolved, it consistently included a clause incorporating by reference the QSL Standard Terms. As such, by the time QSL sent USS the Proposed Agreement in March 2022, USS had been receiving notice for close to two decades that QSL intended the parties' contractual relationship to include the QSL Standard Terms and the means by which those terms could be accessed.

[128] Turning to 2022 in particular, as previously explained, the parties agree that, if in March 2022 one were to have clicked on the link "www.qsl.com" displayed in the "Standard Terms and Conditions" clause of the Proposed Agreement, one would have been taken to QSL's homepage. Then, scrolling to the bottom of that page, if one were to have clicked on the link "QSL General,"

one would have been taken to the QSL Standard Terms in which the Limitation of Liability Clause was found.

[129] To the extent that USS argues that this was an onerous, complex, or confusing method of providing USS access to the Standard Terms, I find no basis for such a conclusion. Indeed, in *Labrador* and *Freshway*, parties were found to have had notice of counterparties' standard terms by virtue of a reference to such terms being available upon request (as was the case with the QSL Standard Terms until 2016). QSL's provision of access to the QSL Standard Terms, commencing in 2016 and in particular in 2022, by inclusion of the link in its form of agreement, further enhanced that access.

[130] I appreciate that the evidence of both Mr. Lemont and Mr. Joseph is to the effect that their discussions included only commercial terms, and Mr. Lemont confirmed in his examination that he did not draw USS's attention to the QSL Standard Terms or the Limitation of Liability Clause therein. However, as Mr. Lemont also noted in that examination, the form of agreement that QSL provided to USS over the years, including the Proposed Agreement in 2022, referenced the QSL Standard Terms.

[131] While, as previously explained, I accept that the evidence establishes that Mr. Joseph did not turn his mind to these contractual terms, these circumstances are distinguishable from those in *Tilden* and *MacQuarrie*. There is no basis in the evidence in the case at hand for the Court to conclude that Mr. Lemont was aware, or should have been aware, in 2022 that USS had not reviewed the QSL Standard Terms including the Limitation of Liability Clause. As in *Labrador*, the

fact that USS failed to take actual notice of terms that were clearly set forth in the documents exchanged between the parties does not render those terms inapplicable (at para 66).

[132] I therefore find that USS had adequate notice of the Limitation of Liability Clause and that it forms part of the terms of the Proposed Agreement that applied to the parties' relationship in 2022.

[133] In so concluding, I have considered arguments advanced by USS's counsel at the hearing based on principles identified in *Repap* as having been extracted from "battle of the forms" authorities. While quoted earlier in these Reasons, I repeat for ease of reference the following principle identified in *Repap* (at para 11(c)):

> (c) Previous dealings between contracting parties may be relevant if they prove actual knowledge and consent to the terms to be imposed. A term cannot be implied against a party if the term was unknown to them. In *Western Processing & Cold Storage Ltd. v. Hamilton Const. Co. Ltd.* (1965) 51 D.L.R. (2d) (Man. C.A.), the court held that clauses on an acknowledgement of order form could have no effect unless, through a course of well-established prior business conduct, the party affected knew that it was bound by the form. In so holding, the court approved at 250 the passage in *McCutcheon v. David MacBrayne, Ltd.*, [1964] 1 All E.R. 430 at 437:
>
> > In my opinion, the bare fact that there have been previous dealings between the parties does not assist the respondents at all. The fact that a man has made a contract in the same form ninety-nine times (let alone three or four times which are here alleged) will not of itself affect the hundredth contract, in which the form is not used. Previous dealings are relevant only if they prove knowledge of the terms, actual and not constructive, and assent to them. If a term is not expressed in a contract, there is only one way in which it can come into it and that is by implication. No implication can be made against a party of a term which was unknown to him. If previous dealings show that a man knew of and agreed to a term on ninety-nine occasions,

> there is a basis for saying that it can be imported into the hundredth contract without an express statement. It may or may not be sufficient to justify the importation, ─ that depends on the circumstances; but at least by proving knowledge the essential beginning is made. Without knowledge there is nothing.

[134] USS argues that the above jurisprudence supports its position that, without it having actual (as opposed to constructive) notice of the Limitation of Liability Clause, that provision is not enforceable against it.

[135] The principle from *McCutcheon*, upon which the above jurisprudence is based, is that the fact that a party has previously contracted under particular terms, but without having actual knowledge of them, does not support an argument that such terms apply to a present contract. In *McCutcheon*, the defendant had indicated his assent to particular terms in the past that, although without having read them. In the transaction under consideration in *McCutcheon*, the defendant did not indicate his assent to those terms, and the Court concluded that, in the absence of actual knowledge of those terms, the fact that the defendant was bound to those terms in past contracts did not assist the plaintiff in seeking to invoke those terms in the present contract.

[136] The circumstances in the case at hand are not comparable to those being considered in *McCutcheon*. As I have concluded earlier in these Reasons, USS's conduct in directing its cargo to USS after having received the Proposed Agreement represented assent to the terms of that document. Based on the analytical framework applied in *Labrador* and other authorities cited above, those terms include the QSL Standard Terms incorporated by reference.

[137] USS also refers the Court to the principle summarized as follows in paragraph 11(e) of *Repap*:

> (e) It is not necessary for trading terms to be specifically set out in order for them to be incorporated into a contract, provided that they are common or usual terms in the relevant business. It is sufficient if adequate notice is given identifying and relying upon the conditions and that they are available on request. See *Circle Freight International Ltd. v. Medeast Gulf Exports*, [1988] to Lloyd's Rep, 427 (C.A.) at 433.

[138] Relying on that paragraph, USS submits that, in the absence of evidence in this motion that provisions such as the Limitation of Liability Clause are common in the business in which USS and QSL are engaged, the Limitation of Liability Clause is not properly incorporated into the Proposed Agreement without being set out in that document.

[139] I accept that the extent to which a set of standard terms and conditions is in common use in a particular industry can be relevant, on the facts of a particular case, to whether such terms are effectively included into a contract between parties doing business in that industry. However, as noted at page 430 of *Circle Freight International Ltd v Medeast Gulf Exports*, [1988] 2 Lloyd's Rep 427 (CA) [*Circle Freight*], upon which *Repap* relies, whether reasonable notice of contractual terms has been given is a question of fact depending on the circumstances of each case including the nature of the business and the position of the parties to the transaction. Similarly, following its summary of "battle of the forms" principles based on *Circle Freight* and other authorities, *Repap* confirms that there are no rigid rules to be applied in determining disputes of this nature (at para 21).

[140] In my view, it would be inappropriately rigid, and not in keeping with the jurisprudence canvassed in these Reasons, to conclude that, in order to establish that a set of contractual terms and

conditions has been validly incorporated by reference, the party seeking to invoke those terms must adduce evidence establishing that they are common in the relevant industry. In a situation where the relevant standard terms are those of a particular party, rather than industry association terms such as the CIFFA Terms, practice in the industry may still be relevant, but it would not be unusual (as in the case at hand) for the evidence to focus upon the history of dealings between the parties (see, e.g., *Labrador FCA* at para 32).

[141] Moreover, while the use of limitation of liability clauses in the parties' industry was not the subject of evidence in this motion, I note and concur with QSL's argument that Canadian maritime law recognizes the use of so-called Himalaya clauses, including for the purposes of limiting the liability of providers of stevedoring services. *Labrador* describes a Himalaya clause as a contractual provision, enforceable by the courts, that attempts to extend the benefits of a carrier's contractual limitations to sub-carriers or other parties engaged by the carrier to assist in the transportation of goods (at paras 78-80). The seminal decision of the SCC in *ITO*, while focusing upon the jurisdiction of the Federal Court, involved the application of a Himalaya clause that extended limitation of liability clauses for the benefit of those providing stevedoring services (at 782-783). The SCC canvassed jurisprudential and academic support for the acceptance of such clauses, concluded that they may be effective in Canadian maritime law (at 791) and ultimately held that the stevedores had the benefit of the Himalaya clause under consideration in that matter (at 800).

[142] The matter at hand does not involve a Himalaya clause, and I do not consider the jurisprudence surrounding such clauses to be of great significance to the analysis at hand. However, it does lend modest support to QSL's position that there is nothing particularly unusual about a

contract applicable to the provision of commercial stevedoring services including a limitation of the provider's liability.

[143] Finally, I turn to USS's arguments that the Limitation of Liability Clause is unenforceable because, in its submission, the provision is ambiguous and contradicts other provisions of the QSL Standard Conditions. USS refers the Court to authorities identifying that the application of limitation of liability clauses may be limited in the absence of sufficiently clear and explicit language (*Kishinshand & Sons (Hong Kong) Ltd v Wellcorp Container Lines Ltd*, [1995] 2 FC 37 at 51-53; *Capitaines Propriétaires de la Gaspésie (ACPG) Inc v Pêcheries Guy Laflamme Inc*, 2014 FC 456 at para 25, aff'd 2015 FCA 78).

[144] USS submits that the Limitation of Liability Clause (found in clause 9(c) of the QSL Standard Terms) is inconsistent with clause 9 (a)(i) of the QSL Standard Terms and with clause 4(a) of the body of the Proposed Agreement itself. Clause 9(c) is set out earlier in these Reasons and, in essence, purports to limit QSL's liability to a maximum of 10,000 International Monetary Fund Special Drawing Rights per event. QSL quantifies this limit at approximately CDN $17,022.60. The other referenced clauses read as follows:

> 4) RESPONSIBILITY
>
> > a) QSL CANADA INC. shall not be liable for damage caused by contamination, wind loss, and any other cause or reason whatsoever, to or by the material while under QSL CANADA INC.'s care and custody, unless such contamination or loss is the result of negligent handling and care;
> >
> > ….
>
> 9) LIABILITY

> Our liability shall be governed by the following:
>
> a) Subject to the provisions of the present Terms and Conditions, we shall not be liable for:
>
> i. loss or damage resulting from Services, including loss of or damage to Goods or to any means of conveyance including vessels, vehicles, trucks or railcars unless caused by our negligence or fault or that of our servants or agents;

[145] USS notes that both clause 4(a) and clause 9(a)(i) contemplate QSL being liable for its negligence and argues that it is inconsistent therewith for clause 9(c) to limit QSL's liability for negligence to a particular monetary amount.

[146] I find little merit to this argument. I find no conflict or inconsistency between the provisions that seek to limit QSL's liability to circumstances where it is negligent and the Limitation of Liability Clause that further seeks to limit such liability, even in the case of negligence, to a monetary amount. This conclusion is bolstered by the fact that the Limitation of Liability Clause is expressed to apply "[n]otwithstanding anything to the contrary herein."

[147] Having considered USS's arguments under this issue, I am satisfied the Proposed Agreement, which governed the relationship between QSL and USS in 2022, included the QSL Standard Terms and the Limitation Liability Clause therein and that the Limitation of Liability Clause is enforceable.

V. Conclusion and Costs

[148] As QSL has prevailed in this motion for summary trial, my Judgment will grant relief to QSL on the issues raised in this motion, materially in the form sought in its written submissions. This form includes reservation of USS's right to plead and argue, *inter alia*, gross negligence on the part of QSL in an effort to defeat the limit imposed by the Limitation of Liability Clause, should USS proceed to do so.

[149] This proceeding will continue for purposes of resolution of the remaining issues between the parties.

[150] At the hearing, the Court encouraged the parties to consult with each other in an effort to agree on a proposed quantification of lump-sum costs of this motion, which the Court would award to whichever party prevailed herein. By letter dated September 23, 2025, the parties jointly recommended a figure of $40,000.00. I consider this to be an appropriate costs disposition and, given QSL's success in this motion, my Judgment will award it costs in that amount.

JUDGMENT in T-247-23

THIS COURT'S JUDGMENT is that:

1. The motion for summary trial is granted, and the Court hereby declares that:

    a. The Proposed Agreement, including the QSL Standard Terms, governed the contractual relationship between QSL and USS in 2022; and

    b. Clause 9(c) of the QSL Standard Terms applies *prima facie* to limit QSL's liability to USS for any and all damages claimed by USS herein, subject to USS's right to plead and argue, *inter alia*, gross negligence to defeat such limit, should it proceed to do so.

2. USS shall pay QSL costs of this motion in the lump-sum all-inclusive amount of $40,000.00.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-247-23
STYLE OF CAUSE:	QSL CANADA INC. v CLIFFS MINING COMPANY v UNITED STATES STEEL CORPORATION
PLACE OF HEARING:	MONTRÉAL, QUÉBEC
DATE OF HEARING:	SEPTEMBER 10, 2025
JUDGMENT AND REASONS:	SOUTHCOTT J.
DATED:	OCTOBER 7, 2025

APPEARANCES:

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