Federal Court  Cour fédérale

Date: 20110912

Docket: T-1613-08

Citation: 2011 FC 1067

Ottawa, Ontario, September 12, 2011

PRESENT: The Honourable Mr. Justice Scott

ADMIRALTY ACTION *IN REM* AGAINST THE VESSEL "FEDERAL EMS" AND *IN PERSONAM* AGAINST THE OWNERS, CHARTERERS AND ALL OTHERS INTERESTED IN THE VESSEL "FEDERAL EMS", CANADA MOON SHIPPING CO. LTD. AND FEDNAV INTERNATIONAL LTD.

BETWEEN:

T. CO. METALS LLC

Plaintiff

and

THE VESSEL "FEDERAL EMS",
THE OWNERS, CHARTERERS AND ALL OTHERS INTERESTED IN THE VESSEL "FEDERAL EMS",
CANADA MOON SHIPPING CO. LTD.
and
FEDNAV INTERNATIONAL LTD.

Defendants
Respondents

and

COMPANHIA SIDERURGICA PAULISTA - COSIPA

Third Party Appellant

REASONS FOR ORDER AND ORDER

I. NATURE OF THE MATTER

[1] This is an appeal to set aside the Order dated March 10, 2011 of Prothonotary Richard Morneau, Esq. (Motion Doc. No 62), by which he dismissed the Motion for a Stay of Proceedings of the third party, Companhia Siderurgica Paulista [COSIPA].

[2] There exists another proceeding (T-2020-08: *T. Co. Metals LLC v The Vessel "Federal St. Laurent" et al*), to which Prothonotary Morneau's Order applied *mutatis mutandis.* The third party did not file a similar motion in Docket T-2020-08, but requests that the order issued in this matter apply *mutatis mutandis* to the other proceeding as well. Both the respondent and the plaintiff agree.

[3] The Court orders that this order shall apply also to docket T-2020-08.

[4] For the reasons that follow this appeal is allowed.

II. FACTS

A. Background to the main action between T. Co. Metals LLC and The Vessel "Federal EMS" et al.

[5] As the basic findings of Prothonotary Morneau are not contested by COSIPA (the appellant), Canada Moon Shipping Co. Ltd. and Fednav International Ltd. (the respondents) or T. Co. Metals LLC (the plaintiff), the Court finds it appropriate to reproduce paragraphs 4 to 17 of the prothonotary's Reasons for Order (2011 FC 291), in which are set out the background facts. Those paragraphs read as follows:

> [4] On October 20, 2008, the plaintiff T. Co. Metals LLC (T.Co), as owner of a cargo of 806 cold-rolled steel coils, commenced an action in this docket against, *inter alia*, the defendants Canada Moon and Fednav for a capital sum of C$2,450,000 for damages to that cargo as a result of the defendants carrying it by sea from the port of Piaçaguera in Brazil to the final port of Toronto, Canada, on board the ship *Federal Ems* (the Ship), owned by Canada Moon.
>
> [5] COSIPA manufactures and exports steel products. Since at least 1996, it has called upon Fednav under similar conditions to transport its products from Brazil to North American ports.
>
> [6] When the cargo was loaded on board the Ship on or about November 16, 2004, the master of the Ship issued two bills of lading (the Bills of lading).
>
> [7] Each bill of lading incorporated by reference a charter party in the following terms: "Subject to all terms, conditions, clauses and exceptions as per charter party dated July 28, 2004 at Rio de Janeiro including arbitration clause".
>
> [8] The charter party was actually signed on July 22, 2004. This fact does not cause a problem in this case.
>
> [9] It constituted, in fact, a charter party voyage (the Charter party), and the Court understands that it was signed by COSIPA as the voyage charterer and FedNav Ltd. as the disponent owner. It appears, at least for the purposes of this motion, that at all relevant times FedNav Ltd. acted as an agent, *inter alia*, of Fednav, and consequently the Court will refer to Fednav to designate both interchangeably.
>
> [10] We note here that the Charter party contained various clauses including an arbitration clause, which can be found at

clause 19. This clause is entitled "Law and Arbitration" and reads as follows (Arbitration clause 19):

> (b) This Charter Party shall be governed by and construed in accordance with Title 9 of the United States Code and the Maritime Law of the United States and should any dispute arise out of this Charter Party, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and a third by the two so chosen; their decision or that of any two of them shall be final, and for purpose of enforcing any award, this agreement may be made a rule of the Court. The proceedings shall be conducted in accordance with the rules of the Society of Maritime Arbitrators, Inc.
>
> For disputes where the total amount claimed by either party does not exceed the amount stated in Box 24 the arbitration shall be conducted in accordance with the Shortened Arbitration Procedure of the Society of Maritime Arbitrators Inc.
>
> (c) Any dispute arising out of this Charter Party shall be referred to arbitration at the place indicated in box 25, subject to the procedures applicable there. The laws of the places indicated in Box 25, shall govern this Charter Party.
>
> [Emphasis added.]

[11] The Charter party also contained a clause relieving the owners, here essentially Fednav, from liability and imposing, *inter alia* on the charterer, here COSIPA, the risks and liabilities for everything related to the loading and good condition of the cargo. This clause 5(a) reads as follows:

> 5. Loading/Discharging
>
> (a) Costs/Risks (See Clauses 22 + 40)
>
> The cargo shall be brought into the holds, loaded, stowed and/or trimmed, tallied, lashed, and/or secured by the Charterers and taken from holds and discharged by the receivers, free of any risk, liability and expense whatsoever to the Owners. The Charterers shall provide and lay all dunnage material as required from the proper stowage and protection of the cargo on board, the Owners allowing the use of all dunnage available on board.

[12] Another document that should be mentioned is a letter of indemnity (Letter of Indemnity or L0I) dated at São Paulo, Brazil, November 10, 2004, i.e. after the Charter party was signed and a few days before the cargo was loaded on the Ship.

[13] The LOI was aimed at resolving a difference of opinion that arose between the parties as to whether it was appropriate to pack the cargo of steel coils in plastic sheeting; COSIPA was in favour of this method while Fednav was against it because it believed that doing so would cause condensation or moisture on the metal.

[14] The L0I reads as follows:

São Paulo, November 10th, 2004.

To: Fednav Limited

Re: M/V FEDERAL EMS
22,740 mt of steels prod. Piaçaguera/Philadelphia, Toronto and Hamilton
COSIPA/Fednav – C/P's dated July 22nd and
September 21st, 2004

Dear Sirs,

Upon request of Companhia Siderurgica Paulista – COSIPA, as Charterers, we herewith confirm that the cargo of steel products loaded on board of M/V Federal Ems at Piaçaguera and destined to Philadelphia, Toronto and Hamilton was covered with plastic sheets.

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

Yours faithfully,

(signed)

João Carlos de S. Tranjan

Cia.Siderurgica Paulista - COSIPA

[15] It was on the basis, *inter alia*, of clause 5(a) of the Charter party and the LOI that the defendants filed a defence with the Court on November 26, 2008, as well as a separate Third party claim against COSIPA.

[16] In the Third party claim, the defendants make the following allegations:

> 6. The cargo was shipped pursuant to a voyage charter in Gencon Form dated at Rio de Janeiro, Brazil, July 22, 2004, between Fednav Limited as disponent owner, and the Third Party as charterer.
>
> 7. Under Clause 5 of the said charter party, the cargo was to be brought into the holds, loaded, stowed, tallied and/or secured by the Third party and was, in fact, loaded, stowed and secured by the Third Party.
>
> 8. At time of loading, the Third party covered the cargo with plastic sheets and by letter to Fednav Limited dated at São Paulo, Brazil, November 10, 2004, gave an undertaking that, provided the vessel's ventilation system functioned properly during the voyage, it would relieve the Master, Owners and managers of the vessel from any liability and would hold them harmless for cargo damage resulting from moisture condensation under the plastic sheeting as a result of restricted ventilation of the cargo.
>
> 9. In entering into the voyage charter party and receiving the aforementioned hold harmless letter, Fednav Limited was acting as agent on behalf of the Defendants.
>
> 10. In the principal action, the Defendants have pleaded that they are not liable to the Plaintiff for any damage resulting from loading, stowage or handling of the cargo, because these operations were not performed by them and were to be performed by the Third Party free of any risk, liability and expense whatsoever to them.
>
> 11. Should it be determined by the Court that these defences cannot be raised against the Plaintiff, as bills of lading holder or otherwise, the Defendants are entitled to contribution or indemnity from the Third Party for any amount they will be ordered to pay the Plaintiff for such damage.

> 12. In addition, should the Court hold the Defendants liable to the Plaintiff for damage resulting from moisture condensation under the plastic sheeting, the Defendants similarly are entitled to contribution or indemnity from the Third Party for such damage.
>
> [17] The defendants had to ask this Court to issue a letter rogatory to serve their Third party claim on COSIPA.

[6] On October 20, 2008, the plaintiff, T. Co. Metals LLC, as owner of a cargo of 806 cold-rolled steel coils, commenced an action in this docket against, *inter alia*, the defendants, Canada Moon Shipping Co. Ltd. (Canada Moon) and Fednav International Ltd. (Fednav), for a capital sum of C$2,450,000 for damage to that cargo as a result of the defendants carrying it by sea from the port of Piaçaguera in Brazil to the final port of Toronto, Canada, on board the ship *Federal Ems* (the Ship), owned by Canada Moon.

[7] COSIPA manufactures and exports steel products. Since at least 1996, it has called upon Fednav, under similar conditions, to transport its products from Brazil to North American ports.

[8] When the cargo was loaded on board the Ship on or about November 16, 2004, the master of the Ship issued two bills of lading (the bills of lading).

[9] Each bill of lading incorporated by reference a charter party, in the following terms: "Subject to all terms, conditions, clauses and exceptions as per charter party dated July 28, 2004 at Rio de Janeiro including arbitration clause".

[10] The charter party was actually signed on July 22, 2004. This fact does not cause a problem in this case.

[11] It constituted, in fact, a voyage charter party (the charter party), and the Court understands that it was signed by COSIPA, as the voyage charterer, and FedNav Ltd. as the disponent owner. It appears, at least for the purposes of this motion, that at all relevant times, FedNav Ltd. acted as an agent, *inter alia*, of Fednav, and consequently, the Court will refer to Fednav to designate both, interchangeably.

[12] We note here that the charter party contained various clauses including an arbitration clause, which can be found at clause 19. This clause is entitled "Law and Arbitration" and reads as follows (arbitration clause 19):

> (b) This Charter Party shall be governed by and construed in accordance with Title 9 of the United States Code and the Maritime Law of the United States and should any dispute arise out of this Charter Party, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and a third by the two so chosen; their decision or that of any two of them shall be final, and for purpose of enforcing any award, this agreement may be made a rule of the Court. The proceedings shall be conducted in accordance with the rules of the Society of Maritime Arbitrators, Inc.
>
> For disputes where the total amount claimed by either party does not exceed the amount stated in Box 25 the arbitration shall be conducted in accordance with the Shortened Arbitration Procedure of the Society of Maritime Arbitrators Inc.

> (c) Any dispute arising out of this Charter Party shall be referred to arbitration at the place indicated in box 25, subject to the procedures applicable there. The laws of the places indicated in Box 25, shall govern this Charter Party.
> [Emphasis added.]

[13] The Charter party also contained a clause relieving the owners, here essentially Fednav, from liability and imposing, *inter alia* on the charterer, here COSIPA, the risks and liabilities for everything related to the loading and good condition of the cargo. This clause, namely clause 5(a), reads as follows:

> 5. Loading/Discharging
> (a) Costs/Risks (See Clause[s] 22 + 40)
>
> The cargo shall be brought into the holds, loaded, stowed and/or trimmed, tallied, lashed, and/or secured by the Charterers and taken from holds and discharged by the receivers, free of any risk, liability and expense whatsoever to the Owners. The Charterers shall provide and lay all dunnage material as required for the proper stowage and protection of the cargo on board, the Owners allowing the use of all dunnage available on board.

[14] Another document that should be mentioned is a letter of indemnity (Letter of Indemnity or LOI) dated at São Paulo, Brazil, November 10, 2004, i.e. after the Charter party was signed and a few days before the cargo was loaded on the Ship.

[15] The LOI was aimed at resolving a difference of opinion that arose between the parties as to whether it was appropriate to pack the cargo of steel coils in plastic sheeting; COSIPA was in favour of this method while Fednav was against it because it believed that doing so would cause condensation or moisture on the metal.

[16] The LOI reads as follows:

> São Paulo, November 10th, 2004.
>
> To: Fednav Limited
> Re: M/V FEDERAL EMS
> 22,740 mt of steels [*sic*] prod. Piaçaguera/Philadelphia, Toronto and Hamilton
> COSIPA/Fednav – C/P's dated July 22nd and September 21st, 2004
>
> Dear Sirs,
>
> Upon request of Companhia Siderurgica Paulista – COSIPA, as Charterers, we herewith confirm that the cargo of steel products loaded on board of M/V Federal Ems at Piaçaguera and destined to Philadelphia, Toronto and Hamilton was covered with plastic sheets.
>
> Provided that Owners/Master ensure that the vessel's ventilation system will be properly functioning during all voyage, Charterers hereby confirm that they will relieve Master / Vessel / Owners / Managers from any liability, and will hold them harmless for any possible cargo damage by moisture condensation under the plastic cover as a result of restricted ventilation of the cargo.
>
> Yours faithfully,
>
> (signed)
> João Carlos de S. Tranjan
> Cia.Siderurgica Paulista - COSIPA

[17] It was on the basis, *inter alia*, of clause 5(a) of the charter party and the LOI that the defendants filed a defence with the Court on November 26, 2008, as well as a separate third party claim against COSIPA.

[18] In the third party claim, the defendants make the following allegations:

> 6. The cargo was shipped pursuant to a voyage charter in Gencon Form dated at Rio de Janeiro, Brazil, July 22, 2004, between

Fednav Limited as disponent owner, and the Third Party as charterer.

7. Under Clause 5 of the said charter party, the cargo was to be brought into the holds, loaded, stowed, tallied and/or secured by the Third Party and was, in fact, loaded, stowed and secured by the Third Party.

8. At time of loading, the Third Party covered the cargo with plastic sheets and by letter to Fednav Limited dated at São Paulo, Brazil, November 10, 2004, gave an undertaking that, provided the vessel's ventilation system functioned properly during the voyage, it would relieve the Master, Owners and managers of the vessel from any liability and would hold them harmless for cargo damage resulting from moisture condensation under the plastic sheeting as a result of restricted ventilation of the cargo.

9. In entering into the voyage charter party and receiving the aforementioned hold harmless letter, Fednav Limited was acting as agent on behalf of the Defendants.

10. In the principal action, the Defendants have pleaded that they are not liable to the Plaintiff for any damage resulting from loading, stowage or handling of the cargo, because these operations were not performed by them and were to be performed by the Third Party free of any risk, liability and expense whatsoever to them.

11. Should it be determined by the Court that these defences cannot be raised against the Plaintiff, as bills of lading holder or otherwise, the Defendants are entitled to contribution or indemnity from the Third Party for any amount they will be ordered to pay the Plaintiff for such damage.

12. In addition, should the Court hold the Defendants liable to the Plaintiff for damage resulting from moisture condensation under the plastic sheeting, the Defendants similarly are entitled to contribution or indemnity from the Third Party for such damage.

[19] The defendants had to ask this Court to issue a letter rogatory to serve their third party claim on COSIPA.

B. Motion underlying the impugned decision

[20] COSIPA filed a motion on August 31, 2009, seeking a stay of the respondent's third party claim in favour of arbitration in New York based on the arbitration provision in clause 19 of the charter party. COSIPA had also requested, in the alternative, that the third party claim against it be stayed in favour of proceedings in the Brazilian courts on the basis of the doctrine of *forum non conveniens.*

C. Present motion and relief requested by COSIPA

[21] The appellant's present motion, brought pursuant to rules 51 and 359 of the *Federal Courts Rules*, is an appeal of the prothonotary's order dismissing the original motion for a stay of the third party claim. In this appeal, the appellant requests from the Court an order:

1) Setting aside the order of Prothonotary Morneau dated March 10, 2011, in which he dismissed the Motion for a Stay of Proceedings of the third party, COSIPA;
2) Staying the present third party claim in favour of arbitration in New York City, in accordance with the terms of the applicable charter party;
3) Alternatively, staying the present third party claim in favour of proceedings in a more appropriate forum, in Brazil, in accordance with the doctrine of *forum non conveniens*;
4) In the further alternative, granting an extension of time for COSIPA to file a statement of defence with respect to the third party claim;

5) Granting to the third party the costs of the motion heard by the prothonotary and of the present appeal;

6) Applying *mutatis mutandis* to action T-2020-08 the results of this appeal.

[22] The appellant further emphasizes that the order herein is vital to the final issue of the third party claim, as a stay of proceedings would put an end to the jurisdiction of this Court on the merits of the third party claim.

D. Impugned decision of Prothonotary Morneau

[23] Prothonotary Morneau, in his Reasons for Order of March 10, 2011, made three findings that are disputed in the present appeal.

[24] Firstly, the prothonotary agreed with COSIPA's submission that the Letter of Indemnity signed between it and Fednav should be regarded as an amendment to the charter party rather than a separate agreement, as is argued by the respondents.

[25] In his decision, the prothonotary reasoned that the LOI was drafted in order to reassure Fednav (para 24), that it was intended to resolve a difference of opinion that arose between the parties as to whether it was appropriate to pack the cargo of steel coils in plastic sheeting, and that the fact that it serves as an amendment to the charter party is reinforced by the subject line of the LOI, which references directly the charter party.

[26] Secondly, Prothonotary Morneau analyzed subsection 46(1) of the *Marine Liability Act* (the *Act*) and agreed with the respondent's identification of the purpose and key elements of the provision. Specifically, the prothonotary accepted the respondent's submissions and found that, in order for section 46 to apply, it must be shown that:

> a) there is:
> i. a contract for the carriage of goods by water
> ii. to which the *Hamburg Rules* do not apply, and
> b) the actual port of loading or discharge, or the intended port of loading or discharge under the contract, is in Canada, or
> c) the defendant has a place of business or an agency in Canada, or
> d) the contract was concluded in Canada.

[27] The main subject of dispute between the applicant and respondent was whether a charter party constitutes "a contract for the carriage of goods by water" under section 46. If so, the prothonotary reasoned, that it would favour the respondent in the motion and prevent clause 19 of the charter party from ousting the jurisdiction of the Federal Court over the third party claim against COSIPA (para 29).

[28] On this issue, the prothonotary found he could not agree with COSIPA's submissions. COSIPA had made a comparison between section 46 and article 21 of the *Hamburg Rules*. Although the prothonotary agreed that various decisions and authorities confirm the similarity of those two provisions, the *Hamburg Rules* (article 2(3)) expressly provide that they do not apply to charter parties (para 35-36). He reasoned that the *Marine Liability Act* did not expressly exclude charter parties and that, since the *Hamburg Rules* are included in a schedule to the said *Act,* had Parliament wanted to clearly exclude charter parties from section 46, it would have done so (para 37). Moreover, the various comments made by COSIPA regarding the Parliamentary debates

surrounding the enactment of the *Marine Liability Act* did not support a finding that section 46 did not contemplate the relationship between a charterer and a disponent owner (para 39).

[29] Finally, the prothonotary considered COSIPA's alternative argument that Canada is a *forum non conveniens*. That is a determination which is governed by the Federal Court of Appeal decision in *Mazda Canada Inc v Cougar Ace (The)*, [2009] 2 FCR 382 [*Cougar Ace*]. The *Cougar Ace* decision emphasized that the Court will intervene only exceptionally with respect to the forum chosen by a plaintiff (here, the defendants), only doing so where the choice is "clearly inappropriate compared to another obviously superior jurisdiction" (para 43). The Federal Court of Appeal decision also referred to the 10 factors set out in *Spar Aerospace Ltd v American Mobile Satellite Corp*, [2002] 4 SCR 205 [*Spar Aerospace*], to be weighed by the Court in making a determination of *forum non conveniens.*

[30] Prothonotary Morneau weighed each factor from *Spar Aerospace* and made the following determinations:

1. the parties' residence and that of witnesses and experts → this factor is neutral or at best, Brazil has a small advantage;
2. the location of the material evidence → this factor favours Canada;
3. the place where the contract was negotiated and executed → this factor is neutral;
4. the existence of proceedings pending between the parties in another jurisdiction → this factor favours Canada;
5. the location of the defendant's assets → this factor favours Brazil;

6. the applicable law → the applicable law is that of New York, so this factor is neutral;
7. advantages conferred upon the plaintiff by its choice of forum, if any → this factor favours Canada, as two of the three parties support the jurisdiction of the Federal Court;
8. the interests of justice → this factor favours Canada;
9. the interests of the parties → this factor favours Canada;
10. the need to have the judgment recognized in another jurisdiction → this factor favours Brazil.

[31] In sum, the prothonotary concluded that COSIPA failed to demonstrate that the Federal Court is clearly inappropriate and that Brazil is an obviously superior jurisdiction.

III. ISSUES

[32] This appeal raises the following three issues:

1) What is the standard of review for the appeal of the prothonotary's Order?

2) Does the definition of "contract for the carriage of goods by water" in subsection 46(1) of the Marine Liability Act encompass an agreement to hire a vessel by way of a charter party?

3) Is there a forum more convenient for the hearing of the dispute between COSIPA and the defendants (respondents) than the Federal Court?

IV. RELEVANT PROVISIONS

[33] The relevant provisions are appended to this decision.

V. SUBMISSIONS OF PARTIES AND ANALYSIS

1. What is the standard of review for the appeal of the prothonotary's Order?

Appellant's submissions

[34] The appellant submits that the prothonotary's Order is to be reviewed *de novo* on the standard set out in *Merck v Apotex*, below. Had the motion been granted, it would have put an end to the third party proceedings in the Federal Court in favour of proceedings in New York (arbitration) or Brazil (courts). Therefore, the questions raised in the motion for a stay are vital to the third party claim.

Respondents' submissions

[35] The respondents agree that the interpretation of section 46 of the *Marine Liability Act* and whether this Court is a *forum non conveniens* are questions vital to the issues herein and, hence, that the prothonotary's Order should be reviewed *de novo* (respondent's Written Representations at para 14).

[36] The respondents note that but for section 46 of the *Marine Liability Act* they would have had no choice but to pursue the appellant via arbitration in New York (respondent's Written Representations at para 15).

[37] They also argue, alternatively, that if they cannot avail themselves of section 46, the agreement to arbitrate should be declared inoperative pursuant to article 8(1) of the *Commercial Arbitration Code,* due to the LOI (respondent's Written Representations at para 16), which, they claim, constitutes an implied waiver of any agreement to arbitrate in the event of any proceedings instituted by a third party cargo interest such as the plaintiff and an explicit waiver of any right to raise a *forum non conveniens* objection.

Analysis

[38] As noted in a previous appeal of an Order by Prothonotary Morneau in this case (judgment rendered by Justice Yvon Pinard, on September 21, 2010), the applicable test governing appeals from a prothonotary's decision is set out in *Canada v Aqua-Gem Investments Ltd*, [1993] 2 FC 425 (QL) (CA), as follows:

> **95** … discretionary orders of prothonotaries ought not to be disturbed on appeal to a judge unless:
>
> (a) they are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts, or
>
> (b) they raise questions vital to the final issue of the case.

> Where such discretionary orders are clearly wrong in that the prothonotary has fallen into error of law (a concept in which I include a discretion based upon a wrong principle or upon a misapprehension of the facts), or where they raise questions vital to the final issue of the case, a judge ought to exercise his own discretion de novo.

[39] The test was reformulated in *Merck & Co. v Apotex Inc*, 2003 FCA 488, to read as follows:

> . . . "Discretionary orders of prothonotaries ought not be disturbed on appeal to a judge unless: (a) the questions raised in the motion are vital to the final issue of the case, or (b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts."

(See also: *ZI Pompey Industrie v ECU-Line N.V.,* 2003 SCC 27, [2003] 1 SCR 450.)

[40] If the stay of proceedings is granted to the third party, COSIPA, the third party claim by COSIPA against the respondents will be taken out of the Federal Court. This is certainly vital to the final issue in the third party claim, which is whether the defendants are entitled to contribution or indemnity from COSIPA.

[41] Arguably, a stay of proceedings would also deprive the respondents of the evidence they need to defend the main action; that is, their defence would be incomplete without the presence of COSIPA to defend its use of the plastic sheeting (see respondent's Written Representations at p 29). This is also vital to the final issue of the main action and, consequently, it is this Court's determination that a *de novo* review is appropriate.

2. Does the definition of "contract for the carriage of goods by water" in subsection 46(1) of the Marine Liability Act encompass an agreement to hire a vessel by way of a charter party?

Appellant's submissions

1) Source of contract

[42] The appellant submits that even if a bill of lading is issued, the charter party is still the contract of carriage and the Court should therefore refer the matter to arbitration (appellant's Written Representations at para 106-114). In the carriage of goods at issue, the appellant (the shipper and voyage charterer) received bills of lading from Fednav; these functioned only as receipts for the goods loaded aboard the ship since the documents remained in the appellant's hands. The charter party remained at all times the applicable and binding contract for the carriage of goods.

2) Letter of Indemnity

[43] The appellant also preemptively countered the respondent's argument that the Letter of Indemnity is a separate contract from the charter party (appellant's Written Representations at para 115-131). The appellant submits that this is a question within the arbitrator's jurisdiction, but that it is apparent that the LOI, on its face, is an amendment to the charter party. The heading of the LOI supports this proposition, as does the fact that the terms of the LOI restate clauses already in the charter party. It was the understanding of the appellant's representative, Mr. Eduardo Vieira

Munhoz, that the LOI was an amendment to the charter party. Mr. Munhoz was not, however, cross-examined on this. Finally, the appellant argues that it never received any consideration based on the LOI; consequently, no separate contract could have arisen. It is the appellant's view that since the LOI was an amendment to the charter party, it cannot affect the referral of the matter to arbitration, which was agreed to between the parties in their original charter party agreement.

3) Statutory interpretation

[44] The appellant's main contention is that charter parties, such as the voyage charter used in this case, are excluded from section 46 of the *Marine Liability Act*, since Parliament based that section on the *Hamburg Rules*, which expressly exclude charter parties. Moreover, the fact that a bill of lading was issued on behalf of the master of the vessel does not alter the analysis of section 46 of the *Marine Liability Act* (appellant's Written Representations at para 50).

[45] The appellant presents several arguments to support this contention.

- Firstly, it submits that the prothonotary erred in his interpretation of the *Marine Liability Act* under the principles of statutory interpretation outlined in *Canada Trustco Mortgage Co v Canada,* 2005 SCC 54 at para 10 [*Canada Trustco Mortgage*] and *Celgene Corp v Canada (Attorney General),* 2011 SCC 1 at para 21 [*Celgene Corp*]. Specifically, it claims that the prothonotary ignored the definition of "contract for the carriage of goods by water" within the scheme of the *Act*, misconstrued the purpose of the *Act* as also including sophisticated chartering

arrangements rather than being to protect shippers and consignees, and misconstrued Parliament's intention to exclude charter parties (appellant's Written Representations at para 51-53).

- The appellant further argues that the exclusion of charter parties from the *Act* conforms to the scheme of the *Act* (appellant's Written Representations at para 54-65), the object of section 46 of the *Act* (appellant's Written Representations at para 66-77), and Parliament's intention to protect Canadian shippers and receivers under bills of lading, because these are essentially contracts of adhesion. (appellant's Written Representations at para 78 - 101). Furthermore, the appellant contends that section 46 must be interpreted in light of Canada's international obligations (appellant's Written Representations at para 102-105).

4) Scheme of the Act

[46] Essentially, the appellant argues that the *Act* must be interpreted in light of the definitions in the *Act* itself and its schedules. The *Hamburg Rules* are appended thereto as a schedule, and they explicitly exclude charter parties (article 2(3)). Given the similarity in drafting and intention between article 21 of the *Hamburg Rules* and section 46 of the *Act*, these provisions, the appellant argues, should be interpreted similarly. The *Hague-Visby Rules* are likewise appended to the *Act* as a schedule, and the definition of "contract of carriage" in those rules also excludes charter parties, so it is the appellant's position that the term "contract of carriage" in the *Act*, properly construed within the scheme of the *Act*, must exclude charter parties.

5) Object of section 46

[47] The appellant argues that the object of section 46 was to incorporate a strikingly similar provision to that in the *Hamburg Rules*. It was meant to be an advanced incorporation of part of the *Hamburg Rules* and will become mostly redundant once the *Hamburg Rules* come into force. The appellant cites several academic and Parliamentary examples showing that section 46 of the *Act* is indeed reflective of articles 21 and 22 of the *Hamburg Rules*. The appellant argues that it is illogical to assign to section 46, a transitional provision, a wider scope than the international convention (the *Hamburg Rules*, once they come into force) that will replace it.

6) Parliament's intention

[48] The appellant submits that Parliament's stated intention was to benefit Canadian shippers and receivers, not shipowners and chartering companies such as Fednav and Canada Moon. It refers to several articles, books, and statements made before Parliamentary committees to support this assertion. There is a distinction between bills of lading (contracts for the carriage of goods) and charter parties (contracts for the hire of a ship or her services), and this distinction relates to the differences in the negotiation dynamics of the two instruments. While the bill of lading is often treated as a contract of adhesion, with little bargaining, between contracting parties, charter parties are contracts negotiated in the free market, where the respective weight of the negotiating parties has a direct impact on the final provisions found in that contract. Thus, it is illogical to apply section 46 to charter parties, which are not regulated, as are bills of lading, to protect weaker parties.

7) Canada's international obligations

[49] The appellant argues that any doubt as to the applicability of section 46 should be resolved in favour of enforcing the arbitration clause of the "Gencon (standard form) Charter Party". This is supported by Canada's acceptance of international commercial arbitration as a mode of dispute resolution (as Canada's *United Nations Foreign Arbitral Awards Convention Act* gives force of law to the New York Convention of 1958 (Convention on the Recognition and Enforcement of Foreign Arbitral Awards) and the *Commercial Arbitration Code* does so for the UNCITRAL (United Nations Commission on International Trade Law) Model Law on International Commercial Arbitration).

Respondents' submissions

1) Source of contract

[50] The respondents admit that the charter party is the contract of carriage between Fednav and the appellant, COSIPA. They argue, however, that this is not the case with respect to the defendant Canada Moon Shipping and the appellant. The respondents maintain that, in this latter case, the contractual relationship is governed by the bill of lading, even though it incorporates the terms and conditions of the charter party. They submit that, in the event that the Court were to find that section 46 does not apply to charter parties, Canada Moon would still have recourse under section

46 because it is a party to a contract of carriage evidenced by a bill of lading. The respondents contend that this distinction was not properly considered by Prothonotary Morneau.

2) Letter of Indemnity

[51] The respondents also argue that the Letter of Indemnity is a separate agreement which constitutes an implied waiver of any agreement to arbitrate and an explicit waiver of any right to raise a *forum non conveniens* objection. There is no evidence, other than self-serving statements of the appellant's representative, to suggest that the LOI was an amendment to the charter party. The wording, according to the respondents, does not give Fednav any rights beyond those that Fednav already had under the charter party. The LOI was redrafted by the appellant to include the wording repeating clause 5(*a*) of the charter party, but does not incorporate the jurisdiction, choice of law or arbitration clauses found in the charter party.

3) Statutory interpretation

[52] Applying the test—that was repeated by Prothonotary Morneau in his order—for the applicability of section 46 of the *Marine Liability Act*, the respondents state that:

> a) there is:
> i) a "contract for the carriage of goods by water", as this term is all-inclusive and had Parliament intended to restrict its meaning, it would have done so,
> ii) to which the *Hamburg Rules* do not apply, as they have never been declared in force in Canada,
> iii) and the contract provides for the adjudication of claims in a place other than Canada, as the bills of lading incorporate by reference an agreement to arbitrate disputes in New York and there is also such an agreement in the charter party;

b) the port of discharge under the contract was in Canada (Toronto) and the cargo was in fact discharged in Canada: and
c) neither (c) nor (d) of the test are applicable in this case.

[53] Contrary to the appellant's submission, the respondents argue that on a plain reading of section 46 either party to a contract for the carriage of goods by sea may invoke the rights conferred by that section and that there is no ambiguity or lack of clarity as to the provision's meaning that would justify recourse to external aids in order to understand the sense of the words used in section 46.

[54] The respondents argue that there is no restriction on the scope of the expression "contract for the carriage of goods" in section 46. They also submit that the appellant argues for a restrictive approach to the section which ignores section 12 of the *Interpretation Act* and Ruth Sullivan's caution that freedom of contract must be counterbalanced with other values that Parliament seeks to protect, namely, the right of access to Canadian courts for shippers and receivers.

[55] The respondents further submit that there is no restriction on the nature of the interest a party must have under section 46 in order to be a "claimant". According to the respondents, the essence of the appellant's argument is that it was Parliament's intention to extend section 46 rights to cargo interests, but not to carrier's interests. The respondents contend that there is no evidence that denies the availability of the right to sue to carrier interests. Moreover, a statute's meaning should not be interpreted in light of what those present at Senate hearings wanted the statute to mean, but according to what Parliament's elected representatives finally decided. The respondents submit that the assertion that cargo interest claimants can only exercise section 46 rights when they are holders of a bill of lading is wrong and unsupported.

[56] According to the respondents, Parliament clearly intended to address the rights of litigants whose claims arose from a contract for the carriage of goods, regardless of the instrument used to evidence the contract. There are various functions of a charter party which, they submit, are ignored by the appellant, including the fact that it can be in the nature of a contract for the carriage of goods by sea, whether or not a bill of lading is issued (*Lantic Sugar Ltd v Blue Tower Trading Corp* (1991), 52 FTR 161, 30 ACWS (3d) 1001, [1991] FCJ No 1309 (QL); *Thyssen Canada Ltd v Mariana (The)*, [2000] 3 FC 398).

[57] The respondents also submit that, as to the appellant's argument regarding Canada's international obligations, Parliament clearly intended to render inapplicable certain provisions of international conventions with respect to arbitration. Canada, according to the respondents, is not an exception in this regard, as several countries have legislated to limit the ousting of their jurisdiction. Nothing in the conventions prevents states from legislating to render arbitration agreements inoperative or to restrict their enforcement. In any event, the presumption that legislation conforms to international obligations is rebuttable.

Analysis

[58] The following issues need to be addressed:

- ***Firstly, is the appellant's position correct that the contract of carriage between the appellant and the respondents is still the charter party because, even though bills***

of lading were issued, as they never left the appellant charterer's hands, they cannot act as a contract of carriage but serve merely as receipts?

- ***Secondly, is the appellant's position correct that the LOI is an amendment to the charter party?***

- ***Finally, does the term "contract for the carriage of goods" in section 46 of the Marine Liability Act exclude charter parties?***

What is the source of the contract between the appellant and the respondents?

[59] Prothonotary Morneau concluded that the contract between Fednav and COSIPA is found primarily in the charter party rather than in the bills of lading. This is the approach argued for by the appellant. The Court agrees with that finding for the following reasons:

- The respondents admit that the source of the contract for the carriage of goods between COSIPA and Fednav is the charter party, but assert that the bill of lading governs the contract for the carriage of goods between COSIPA and Canada Moon. The Court disagrees with this position and agrees with the appellant's position that the bills of lading functioned only as receipts for the goods loaded aboard the ship, since they remained in the hands of COSIPA and never passed to a third party. In this respect, it is interesting to read Professor John Wilson in *Carriage of Goods by*

Sea (London: Pearson Longman, 2008), at p 6-7, where he discusses the situation in which charter parties and bills of lading are used simultaneously:

> . . . Thus charterers shipping their own goods on a chartered vessel require at least an acknowledgement of the quantity of goods taken aboard and the condition in which they were shipped. Bills issued to a charterer in such circumstances act merely as receipts for the cargo shipped and as potential documents of title should the charterer decide to sell the goods while they are still in transit. But the bills provide no evidence of the terms of the contract of carriage between shipowner and charterer since their relationship is governed solely by the terms of the charterparty. Nor will the Hague or Hague/Visby Rules apply to the contract of carriage while the bill remains in the hands of the charterer, although they will apply as soon as the cargo is sold and the bill negotiated to a third party.

- The respondent Fednav itself claims to have acted as agent for the shipowner, Canada Moon Shipping (Affidavit of Dong Li, Motion Record of the appellant at Tab 6, p 5, para 16 referencing the Letter of Indemnity).

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

Is the Letter of Indemnity an amendment to the charter party?

[60] Prothonotary Morneau agreed with the appellant that the LOI constituted an amendment to the charter party rather than a separate agreement. The Court accepts this finding as, on its face, as

correctly noted by the prothonotary and the appellant, the LOI constitutes a modification of the charter party in view of its subject line:

> Re: …COSIPA/Fednav – C/P's dated July 22nd and September 21st, 2004.

[61] Further, although the respondents submit that the LOI was an implied waiver of any agreement to arbitrate and an explicit waiver of any right to raise a *forum non conveniens* objection, there is nothing in the e-mail negotiation of the LOI (affidavit of Mr. Munhoz at Exhibit D) to support this contention. Certainly, there are conflicting and self-serving statements by Mr. Munhoz (COSIPA) and Mr. Li (Fednav) as to the intention of their respective companies in drafting the LOI.

[62] The representative of the respondents, Mr. Dong Li, states that the purpose of the LOI was not to amend the charter party, which adequately protects "owners" or "disponent owners" (clause 5(a)), but to protect against indemnity claims against the "Master/Vessel/Owners/Managers" and/or by cargo interests (such as the plaintiff), arising out of the use of plastic sheets (Affidavit of Dong Li at para 19).

[63] Clause 5(*a*) reads as follows:

> **5. Loading Discharging**
>
> **(*a*) Costs/ Risks (See Clauses 22 + 40)**
>
> The cargo shall be brought into the holds, loaded, stowed and/or trimmed, tallied, lashed and/or secured by the Charterers and taken from holds and discharged by the Receivers, free of any risk, liability and expense whatsoever to the Owners.
> The Charterers shall provide and lay all dunnage material as required for the proper stowage and protection of the cargo on board, the Owners allowing the use of all dunnage available on board. . . .

[64] Clause 45E), however, specifies that:

> **Whenever Charterers/Shippers cover the cargoes with plastic canvas in order to protect them during the voyage, Owners guarantee that said plastic canvas placed at loadport will be withdrawn only at the time of discharge of cargoes at respective disports [*sic*].**
> Should Owners fail in fulfilling the above they will be fully responsible for any penalty, charges, extra expenses, etc. that Charterers may face arising therefrom.

[65] The Court does not agree with the respondent's argument, since the LOI clearly adds to the protection offered already to the owners by way of clause 5(a) of the charter party, and also acts as an addition to rider clause 45E), stating that when the charterers use plastic sheets, the owners will not remove those sheets until discharge of the cargo. The e-mail exchange indicates that COSIPA realized that it was liable for any moisture problems arising from the use of plastic sheets, and thus the LOI can only be seen as an added benefit to the defendants, putting in clearer terms, and within the scope of the agreed upon charter party, the fact that COSIPA was responsible for the use of the plastic sheets. In Exhibit D to the affidavit of Mr. Munhoz is an e-mail from a member of COSIPA's chartering division which states:

> 4. As long as it is clearly stated on the governing C/P (cl. 45.E) that "whenever Charterers/Shippers cover the cargoes with plastic canvas in order to protect them during the voyage, Owners guarantee that …" we understand that it is our responsibility any possible problem with the cargo by moisture condensation under the plastic cover.

[66] Based on the preceding analysis, the Court finds the appellant's contention that the LOI is an amendment to the charter party to be correct.

Statutory interpretation of the expression "contract for the carriage of goods by water" in section 46

[67] The basic principles of statutory interpretation were discussed in *Canada Trustco Mortgage*, above:

> **10** It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play[s] a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[68] The Supreme Court repeated *Canada Trustco Mortgage*'s statutory interpretation principles recently in *Celgene Corporation,* above, stating at paragraph 21: "The words, if clear, will dominate; if not, they yield to an interpretation that best meets the overriding purpose of the statute."

Ordinary meaning

[69] As noted by Prothonotary Morneau, the expression "contract for the carriage of goods by water" is not defined in the *Marine Liability Act.* Ruth Sullivan notes that the expression "ordinary

meaning" is used inconsistently, sometimes meaning a term's dictionary meaning, literal meaning or meaning derived from reading the words in their literary context (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham: LexisNexis, 2008) at p 25). She further writes that:

> Most often . . . ordinary meaning refers to the reader's first impression meaning, the understanding that spontaneously comes to mind when words are read in their immediate context . . . [p 25-26]

[70] One dictionary meaning of the word "carriage" is "the conveying of goods". So, in its ordinary sense, the expression "contract for the carriage of goods by water" would appear to mean a contract or agreement which provides for the conveying of goods by water—on a vessel, for example. This supports the inclusion of charter parties in section 46 of the *Marine Liability Act*, as they are agreements between a charterer and a disponent owner whereby the charterer hires a vessel to convey goods, or, as defined by Julian Cooke et al (Julian Cooke et al, *Voyage Charters*, 3d ed (London: Informa, 2007) at p 3):

> Voyage charters are those by which the owner agrees to perform one or more designated voyages in return for the payment of freight and (when appropriate) demurrage . . . .

[71] Prothonotary Morneau states in his Order, and the respondents argue, that there is nothing, in section 46, that expressly excludes charter parties from the benefit of that provision.

[72] The ordinary meaning of the expression "contract for the carriage of goods by water" could support the inclusion of charter parties in section 46 of the *Marine Liability Act.*

Scheme of the Act

[73] However, the appellant relies in part on a comparison of section 46 of the *Act* with article 21 of the *Hamburg Rules*, which are included as a schedule to the *Act*. It is clear that schedules to an Act are considered internal to that Act and can be looked at and relied upon for statutory interpretation purposes (Ruth Sullivan, above, at p 403).

[74] There is a distinction; however, that needs to be made between scheduled material which is part of the enactment, scheduled material not made part of the enactment, and scheduled material set out for convenience only. In the first case, the material is interpreted as an integral part of the enactment and has the same force as the remainder of the legislation. In the third case, the material is not part of the enactment and the legal effect is "exactly the same as it would be if the materials is [*sic*] not included in the Schedule." (Ruth Sullivan, above, at p 403-406)

[75] Thus, the *Hague-Visby Rules*, which, pursuant to section 43 (stating that these rules have the force of law in Canada), are of the first type of scheduled material, can be considered as part of the *Act.* The *Hamburg Rules*, however, are not yet in force in Canada (in fact, Canada has not even signed the 1978 Convention (United Nations Convention on the Carriage of Goods by Sea, 1978) (See http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/Hamburg_status.html), and as a consequence, the schedule can be considered as being of the third type described above. In essence, they are non-existent in terms of legal effect. Yet they are nonetheless indicative of the contents of future legislation, should they ever be proclaimed in force. The schedule containing the *Hamburg Rules* is, for interpretation purposes, external to the *Act*. Section 46 has been enacted and

its wording adheres very closely to article 21 of the *Hamburg Rule*s. The Court cannot rely on the remainder of the *Hamburg Rules*, which are external to the *Act*, to interpret section 46, nor can it ignore the fact that the wording of section 46 is taken directly from article 21 of the *Hamburg Rules*.

[76] Both the *Hague-Visby Rules* and the *Hamburg Rules* exclude charter parties, the only exception being with regard to bills of lading issued to third parties pursuant to a charter party (i.e., to parties other than the two parties who entered into the charter party) (See William Tetley, *Marine Cargo Claims*, 4th ed. (Cowansville, Que: Les Éditions Yvon Blais, 2008), at p 25). Such a case does not present itself in this instance since the bills of lading stayed in the hands of COSIPA, the charterer, rather than being passed on to a third party. Thus, and as previously stated, the bills of lading acted as mere receipts.

[77] The *Hague-Visby Rules* (Schedule 3 to the *Marine Liability Act*) state:

> **Article I(*b*)** "contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by water, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter-party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same;
>
> **Article V** . . . The provisions of these Rules shall not be applicable to charter-parties, but if bills of lading are issued in the case of a ship under a charter-party they shall comply with the terms of these Rules. . . . [Emphasis added.]

[78] The *Hamburg Rules* (Schedule 4 to the *Marine Liability Act*) state:

> **Article 2(3)** The provisions of this Convention are not applicable to charter-parties. However, where a bill of lading is issued pursuant to a charter-party, the provisions of the Convention apply to such a bill

> of lading if it governs the relation between the carrier and the holder of the bill of lading, not being the charterer. [Emphasis added.]

[79] As Professor William Tetley notes in *Marine Cargo Claims,* 4th ed.:

> The *Hamburg Rules* add little to the Hague/Visby Rules in respect to charterparties. Art. 2(3) of the *Hamburg Rules* is to the same effect as art. 5 and art. 1(b) of the Hague/Visby Rules but is perhaps clearer.
>
> [p 91; footnotes removed]

[80] Section 46 also states that it includes contracts to which the *Hamburg Rules* do not apply, but the *Hague-Visby Rules* are not excluded. It is our opinion that the scheme of the *Act,* including the incorporation of the *Hague-Visby Rules*, strongly suggests that the expression "contract for the carriage of goods" in section 46 is meant only to apply to charter parties where there is a:

> . . . bill of lading or any similar document as aforesaid issued under or pursuant to a charter-party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same. [*Hague-Visby Rules*, art. 1(*b*)]

[81] In this case, although bills of lading exist, as we have discussed, they do not regulate the relations between the carrier (defendants) and the holder of the bills of lading (COSIPA); their relationship is governed by the charter party, as amended by the LOI. Accordingly, on this reading, section 46 is not applicable.

Object of the *Act*

[82] The object of the *Marine Liability Act* was to consolidate existing marine liability regimes, as prior to its enactment there existed several instruments relating to marine liability (Legislative

Summary - Bill S-2: *Marine Liability Act*; LS-377E, February 5, 2001; appellant's Book of Authorities):

> Bill S-2 would consolidate existing marine liability regimes (Fatal Accidents; Limitation of Liability for Maritime Claims; Liability for Carriage of Goods by Water; Liability and Compensation for Pollution Damage) into a single piece of legislation which would also include new regimes concerning shipowners' liability to passengers and apportionment of liability applicable to torts governed by Canadian maritime law. In addition, the bill would retroactively validate certain by-laws made under the *Canada Ports Corporation Act* and certain regulations made under the *Pilotage Act.* The validating provisions are of a strictly house-keeping nature and are unrelated to the marine liability regimes set out in the bill.

[83] The object of section 46, according to the legislative summary prepared by the Library of Parliament was to introduce:

> E. Part 5 – Liability for Carriage of Goods by Water (clauses 41-46)
> The *Carriage of Goods by Water Act* applies to all international carriage of goods between Canada and other countries which give the force of law to the Hague-Visby Rules embodied in the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, concluded at Brussels on 25 August 1924 and its Protocols of 1968 and 1979. The Act also applies to the domestic carriage of goods by water, but with some modifications. The Act provides for the eventual replacement of the Hague-Visby Rules with the Hamburg Rules, which are embodied in the United Nations Convention of the Carriage of Goods by Sea, 1978, concluded at Hamburg on 31 March 1978. Both of the Conventions apply to maritime claims for loss or damage to cargo and their key elements are basis of liability; limitation of liability; and shipowners' defences. According to departmental sources, the fact that the Hague-Visby Rules, unlike the Hamburg Rules, contain no jurisdiction clause has given rise to some problems where the inclusion of foreign jurisdiction clauses in bills of lading has prevented adjudication or arbitration of any dispute in Canada. Accordingly, an amendment is needed to confirm Canadian jurisdiction in situations where a bill of lading stipulates that disputes must be submitted to foreign courts.

> Part 5 of Bill S-2 would re-enact existing provisions of the *Carriage of Goods by Water Act* respecting the application of the Hague-Visby Rules in Canada (reproduced in Schedule 3 to the bill) and the eventual implementation of the Hamburg Rules (reproduced in Schedule 4 to the bill). The Hamburg Rules would come into force only by an Order of the Governor in Council to bring clause 45 of the bill into effect (clause 131(2)), after which, according to clause 43(4) of the bill, the Hague-Visby rules would no longer apply. However, a new provision, not contained in the Hague-Visby Rules, would be introduced to confirm Canadian jurisdiction in situations where a bill of lading stipulates that disputes must be submitted to foreign courts. According to clause 46(1), if a contract for the carriage of goods by water to which the Hamburg Rules did not apply were to provide for the adjudication or arbitration of claims arising under the contract in a place other than Canada, a claimant could nevertheless institute judicial or arbitral proceedings in a court or arbitral tribunal in Canada; such court or tribunal would have to be competent to determine the claim if the contract had referred the claim to Canada. This would apply where the actual or intended port of loading or discharge under the contract was in Canada; where the person against whom the claim was made resided or had a place of business, branch or agency in Canada; or where the contract was made in Canada. Clause 46(2) stipulates that, notwithstanding clause 46(1), the parties to a contract referred to in the latter sub-clause could, after a claim arose under the contract, designate by agreement the place where judicial or arbitral proceedings could be instituted.

[84] This is clearly not the case in this matter, since the reference to a foreign forum is found directly in the charter party, negotiated freely by the parties.

[85] The position of the respondents that the transitional provision that is section 46 should be given a broader interpretation than the Rules that it will eventually replace is not logical and diminishes the weight the Court assigns to their position founded on section 12 of the *Interpretation Act*.

[86] The respondents argue that the Court should consider the fact that the *Interpretation Act* stresses the remedial purpose of legislation. Section 12 of the *Interpretation Act* reads as follows:

> Enactments deemed remedial
>
> 12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[87] Section 46 being a transitional provision, applicable until the *Hamburg Rules* are adopted, it is difficult to subscribe to an interpretation so broad that the transitional provision will grant more rights than the *Hamburg Rules* confer.

[88] In light of this remedial interpretation, the object of the provision, namely, to confirm Canadian jurisdiction for shippers and receivers, must also be considered and must be weighed against Parliament's intention.

Parliament's intention

[89] As the appellant makes clear in its submissions, the intention of Parliament in enacting section 46 was to put in place a jurisdiction provision similar to article 21 of the *Hamburg Rules*. The transcript of the evidence given before the Standing Committee on Transport and Government Operations (March 27, 2001) and the Legislative Summary of Bill S-2, the *Marine Liability Act*, amply support this contention, but they also make clear that the specific intention was to import into the *Marine Liability Act* and the *Hague-Visby Rules* a "desirable" jurisdictional feature of the *Hamburg Rules*, as follows:

Given the topic this morning, I would like to turn to the question of the jurisdiction clause in part 5, and that's clause 46 of Bill S-2. I'll skip over the other things, but I would be quite willing to comment on them if you'd like. Suffice it to say we do support the whole bill.

The CMLA strongly supports the adoption of the jurisdiction clause set out in clause 46 of Bill S-2. In a way, it reflects the provisions of articles 21 and 22 of the Hamburg Rules, which, as you know, are already part of our law, since they're already a schedule to our existing Carriage of Goods by Water Act. They just haven't been proclaimed in force.

. . .

Furthermore, and perhaps most importantly, the Comité, the CMI, is actively reviewing issues relating to the carriage of goods by sea. There is substantial agreement within the CMI that the provisions of articles 21 and 22 of the Hamburg Rules should be incorporated in any new convention on carriage of goods by sea." [Book of Authorities of the appellant, Tab 30, p. 26, comment by Mr. James Gould, President, Canadian Maritime Law Association.]

. . . However, a new provision, not contained in the *Hague-Visby Rules*, would be introduced to confirm Canadian jurisdiction in situations where a bill of lading stipulates that disputes must be submitted to foreign courts. According to clause 46(1), if a contract for the carriage of goods by water to which the *Hamburg Rules* did not apply were to provide for the adjudication or arbitration of claims arising under the contract in a place other than Canada, a claimant could nevertheless institute judicial or arbitral proceedings in a court or arbitral tribunal in Canada; such court or tribunal would have to be competent to determine the claim if the contract had referred the claim to Canada. This would apply where the actual or intended port of loading or discharge under the contract was in Canada; where the person against whom the claim was made resided or had a place of business, branch or agency in Canada; or where the contract was made in Canada. Clause 46(2) stipulates that, notwithstanding clause 46(1), the parties to a contract referred to in the latter sub-clause could, after a claim arose under the contract, designate by agreement the place where judicial or arbitral proceedings could be instituted. [Book of Authorities of the appellant, Tab 32, Legislative Summary LS-377E, section E]

[90] Although, as the appellant argues, the intention was to permit the transition to the *Hamburg Rules*, the Rules are not yet in force (neither is section 45). Thus, it is reasonable to consider that the intent of Parliament was to add to the *Act* and the *Hague-Visby Rules* only section 46.

[91] As previously noted, the *Hague-Visby Rules* also do not include charter parties, unless a bill of lading has been issued regulating the relationship between the carrier and the holder, which is not the case in this instance, as the bill remained with the charterer.

[92] That said, Prothonotary Morneau concluded that:

> . . . if Parliament had wanted to clearly exclude charter parties from subsection 46(1), it would have, at some point in time, included in the MLA a provision similar to Article 2(3) of the *Hamburg Rules*, especially since these rules are still not in force in Canada. [para 37]

[93] The Court does not agree with this reasoning because, when section 46 was enacted by Parliament, clearly the intent was for that section to act as a transitional provision, knowing that the *Hamburg Rules* would eventually come into force and replace section 46. There was, therefore, no need to enact a provision similar to article 2(3) to specifically exclude charter parties, because the intent was that they be excluded. The *Hague-Visby Rules*, in article 1(*b*) defining a contract of carriage, excludes charter parties from the application of those rules. It would therefore have been redundant to add a provision similar to article 2(3).

International obligations

[94] The Supreme Court of Canada has held on numerous occasions that Parliament and provincial legislatures are presumed to enact legislation that is consistent with international law generally and with Canada's international obligations. On different occasions, that court has held that it is reasonable for a tribunal to examine a domestic law in the context of an international agreement in order to clarify any uncertainty (*National Corn Growers Assn v Canada (Import Tribunal)*, [1990] 2 SCR 1324 (QL) at para 74; also *Daniels v White*, 1968 SCR 517, *GreCon Dimter Inc v J.R. Normand Inc*, 2005 SCC 46, [2005] 2 SCR 401 at para 41, and *R v Sharpe*, [2001] 1 SCR 45 at para 175 and 176).

[95] The appellant submits that any doubt should be resolved in favour of upholding Canada's support for international arbitration agreements, pursuant to the *New York Convention* (Text available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html).

[96] The Court concludes that Canada's being aware of its international obligations when section 46 was enacted is an element further supporting the view that section 46 must be assigned a narrow interpretation rather than a broad one that runs counter to the enforcement of the right of the parties to a charter party to choose their forum.

VI CONCLUSION

[97] In conclusion, the Court weighs the factors relating to the interpretation of section 46 as follows. It is clear that the *Hague-Visby Rules* are part of the *Act* and in force in Canada and that they stipulate that charter parties are excluded except in the specific circumstances discussed above. Moreover, the *Hamburg Rules*, which exclude charter parties, although not in force, were also in the minds of the drafters of Part V of the *Act*. An interpretation based on the ordinary meaning of the terms "contract for the carriage of goods" in section 46 leads to the exclusion of charter parties, primarily because they are excluded in the *Hague-Visby Rules*, which are incorporated into the *Act* and also because it is not logical to assign to a transitional disposition a broader and different interpretation than that given to the international convention that it will eventually replace, particularly when that convention is appended as a schedule to the *Act*. Finally, it has been recognized that the courts can turn to international treaties to interpret domestic legislation. The Court finds that the cumulative effect of these factors weighs in favour of an interpretation of "contract for carriage of goods" in section 46 of the *Ac*t that excludes charter parties.

[98] Having found that the respondents cannot avail themselves of the right granted under section 46 of the *Marine Liability Act*, the issue of Brazil being a more appropriate forum or not is therefore moot.

ORDER

THIS COURT ORDERS that

1. The appeal is allowed.

2. The Order issued by Prothonotary R. Morneau on March 10, 2011 is set aside.

3. The defendants'-respondents' third party claims in actions T-1613-08 and T-2020-08 are stayed pending the conclusion of arbitration in New York under clause 19(b) of the Gencon charter party.

4. One set of costs of $10,990 is awarded against the defendants-respondents.

"André F.J. Scott"

Judge

ANNEX

- ***Federal Courts Act***, RSC 1985, c F-7

Stay of proceedings authorized	Suspension d'instance
50. (1) The Federal Court of Appeal or the Federal Court may, in its discretion, stay proceedings in any cause or matter	**50.** (1) La Cour d'appel fédérale et la Cour fédérale ont le pouvoir discrétionnaire de suspendre les procédures dans toute affaire :
(*a*) on the ground that the claim is being proceeded with in another court or jurisdiction; or	*a*) au motif que la demande est en instance devant un autre tribunal;
(*b*) where for any other reason it is in the interest of justice that the proceedings be stayed.	*b*) lorsque, pour quelque autre raison, l'intérêt de la justice l'exige.

- ***Marine Liability Act***, SC 2001, c 6

PART 5 **LIABILITY FOR CARRIAGE OF GOODS BY WATER**	**PARTIE 5** **RESPONSABILITÉ EN MATIÈRE DE TRANSPORT DE MARCHANDISES PAR EAU**
Interpretation	Définitions et disposition interprétative
Definitions	Définitions
41. The definitions in this section apply in this Part.	**41.** Les définitions qui suivent s'appliquent à la présente partie.
"Hague-Visby Rules" « règles de La Haye-Visby » "Hague-Visby Rules" means the rules set out in Schedule 3	« règles de Hambourg » "Hamburg Rules" « règles de Hambourg » Les règles figurant à l'annexe 4 et

and embodied in the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, concluded at Brussels on August 25, 1924, in the Protocol concluded at Brussels on February 23, 1968, and in the additional Protocol concluded at Brussels on December 21, 1979.

"Hamburg Rules"
« règles de Hambourg »
"Hamburg Rules" means the rules set out in Schedule 4 and embodied in the United Nations Convention on the Carriage of Goods by Sea, 1978, concluded at Hamburg on March 31, 1978.

. . .

Hague-Visby Rules

Effect

43. (1) The Hague-Visby Rules have the force of law in Canada in respect of contracts for the carriage of goods by water between different states as described in Article X of those Rules.

Extended application

(2) The Hague-Visby Rules also apply in respect of contracts for the carriage of goods by water from one place in Canada to another place in Canada, either directly or by way of a place outside Canada, unless there is no bill of lading

faisant partie de la Convention des Nations Unies sur le transport de marchandises par mer, 1978, conclue à Hambourg le 31 mars 1978.

« règles de La Haye-Visby »
"Hague-Visby Rules"
« règles de La Haye-Visby » Les règles figurant à l'annexe 3 et faisant partie de la Convention internationale pour l'unification de certaines règles en matière de connaissement, conclue à Bruxelles le 25 août 1924, du protocole de Bruxelles conclu le 23 février 1968 et du protocole supplémentaire de Bruxelles conclu le 21 décembre 1979.
[…]

Règles de La Haye-Visby

Force de loi

43. (1) Les règles de La Haye-Visby ont force de loi au Canada à l'égard des contrats de transport de marchandises par eau conclus entre les différents États selon les règles d'application visées à l'article X de ces règles.

Application étendue

(2) Les règles de La Haye-Visby s'appliquent également aux contrats de transport de marchandises par eau d'un lieu au Canada à un autre lieu au Canada, directement ou en passant par un lieu situé à l'extérieur du Canada, à moins

and the contract stipulates that those Rules do not apply.

qu'ils ne soient pas assortis d'un connaissement et qu'ils stipulent que les règles ne s'appliquent pas.

Meaning of "Contracting State"

Définition de « État contractant »

(3) For the purposes of this section, the expression "Contracting State" in Article X of the Hague-Visby Rules includes Canada and any state that, without being a Contracting State, gives the force of law to the rules embodied in the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, concluded at Brussels on August 25, 1924 and in the Protocol concluded at Brussels on February 23, 1968, regardless of whether that state gives the force of law to the additional Protocol concluded at Brussels on December 21, 1979.

(3) Pour l'application du présent article, « État contractant », à l'article X des règles de La Haye-Visby, vise, outre le Canada, tout État qui, n'étant pas lui-même un État contractant, donne force de loi à ces règles, qu'il donne ou non force de loi au protocole supplémentaire de Bruxelles conclu le 21 décembre 1979.

Replacement by Hamburg Rules

Remplacement par les règles de Hambourg

(4) The Hague-Visby Rules do not apply in respect of contracts entered into after the coming into force of section 45.

(4) Ne sont pas assujettis aux règles de La Haye-Visby les contrats conclus après l'entrée en vigueur de l'article 45.

Hamburg Rules
Report to Parliament

Règles de Hambourg
Rapport au Parlement

44. The Minister shall, before January 1, 2005 and every five years afterwards, consider whether the Hague-Visby

44. Avant le 1er janvier 2005, et par la suite tous les cinq ans, le ministre examine la possibilité de remplacer les

Rules should be replaced by the Hamburg Rules and cause a report setting out the results of that consideration to be laid before each House of Parliament.

règles de La Haye-Visby par celles de Hambourg et fait déposer un rapport sur ses conclusions devant chaque chambre du Parlement.

[*Section 45 not yet in force*.]

Effect

45. (1) The Hamburg Rules have the force of law in Canada in respect of contracts for the carriage of goods by water between different states as described in Article 2 of those Rules.

Force de loi

45. (1) Les règles de Hambourg ont force de loi au Canada à l'égard des contrats de transport de marchandises par eau conclus entre les différents États selon les règles d'application visées à l'article 2 de ces règles.

Extended application

(2) The Hamburg Rules also apply in respect of contracts for the carriage of goods by water from one place in Canada to another place in Canada, either directly or by way of a place outside Canada, unless the contract stipulates that those Rules do not apply.

Application étendue

(2) Les règles de Hambourg s'appliquent également aux contrats de transport de marchandises par eau d'un lieu au Canada à un autre lieu au Canada, directement ou en passant par un lieu situé à l'extérieur du Canada, à moins qu'ils stipulent que les règles ne s'appliquent pas.

Meaning of "Contracting State"

(3) For the purposes of this section, the expression "Contracting State" in Article 2 of the Hamburg Rules includes Canada and any state that gives the force of law to those Rules without being a Contracting State to the United Nations

Définition de « État contractant »

(3) Pour l'application du présent article, « État contractant », à l'article 2 des règles de Hambourg, vise, outre le Canada, tout État qui, n'étant pas lui-même un État contractant de la Convention des Nations Unies sur le transport de marchandises par

Convention on the Carriage of Goods by Sea, 1978.

mer, 1978, donne force de loi à ces règles.

References to “sea”

(4) For the purposes of this section, the word “sea” in the Hamburg Rules shall be read as “water”.

Mention de « mer »

(4) Pour l’application du présent article, la mention de « mer » dans les règles de Hambourg vaut mention de « eau ».

Signatures

(5) For the purposes of this section, paragraph 3 of article 14 of the Hamburg Rules applies in respect of the documents referred to in article 18 of those Rules.

Signature

(5) Pour l’application du présent article, le paragraphe 3 de l’article 14 des règles de Hambourg s’applique aux documents visés à leur article 18.

Institution of Proceedings in Canada
Claims not subject to Hamburg Rules

Procédure intentée au Canada
Créances non assujetties aux règles de Hambourg

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

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

(*a*) the actual port of loading or discharge, or the intended port of loading or

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

discharge under the contract, is in Canada;	situé au Canada;
(*b*) the person against whom the claim is made resides or has a place of business, branch or agency in Canada; or	*b*) l'autre partie a au Canada sa résidence, un établissement, une succursale ou une agence;
(*c*) the contract was made in Canada.	*c*) le contrat a été conclu au Canada.
Agreement to designate	Accord
(2) Notwithstanding subsection (1), the parties to a contract referred to in that subsection may, after a claim arises under the contract, designate by agreement the place where the claimant may institute judicial or arbitral proceedings.	(2) Malgré le paragraphe (1), les parties à un contrat visé à ce paragraphe peuvent d'un commun accord désigner, postérieurement à la créance née du contrat, le lieu où le réclamant peut intenter une procédure judiciaire ou arbitrale.

- *UN Convention on the Carriage of Goods By Sea,* 1978 (*Hamburg Rules*) attached as Schedule 4 to the *Marine Liability Act*

Article 2.	Article 2.
Scope of application	Champ d'application
. . .	[…]
3. The provisions of this Convention are not applicable to charter-parties. However, where a bill of lading is issued pursuant to a charter-party, the provisions of the Convention apply to such a bill of lading if it governs the relation between the carrier and the holder of the bill of lading, not being the	3. Les dispositions de la présente Convention ne s'appliquent pas aux contrats d'affrètement. Toutefois, lorsqu'un connaissement est émis en vertu d'un contrat d'affrètement, il est soumis aux dispositions de la présente Convention pour autant qu'il régit les relations entre le

charterer.

transporteur et le porteur du connaissement, si ce dernier n'est pas l'affréteur.

Article 21
Jurisdiction

Article 21
Compétence

1. In judicial proceedings relating to carriage of goods under this Convention the plaintiff, at his option, may institute an action in a court which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

1. Dans tout litige relatif au transport de marchandises en vertu de la présente Convention, le demandeur peut, à son choix, intenter une action devant un tribunal qui est compétent au regard de la loi de l 'Etat dans lequel ce tribunal est situé et dans le ressort duquel se trouve l'un des lieux ou ports ci-après :

(*a*) the principal place of business or, in the absence thereof, the habitual residence of the defendant; or

a) l'établissement principal du défendeur ou, à défaut, sa résidence habituelle;

(*b*) the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or

b) le lieu où le contrat a été conclu, à condition que le défendeur y ait un établissement, une succursale ou une agence par l'intermédiaire duquel le contrat a été conclu;

(*c*) the port of loading or the port of discharge; or

c) le port de chargement ou le port de déchargement;

(*d*) any additional place designated for that purpose in the contract of carriage by sea.

d) tout autre lieu désigné à cette fin dans le contrat de transport par mer.

- *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading* (1924) (***Hague-Visby Rules***) attached as Schedule 3 to the *Marine Liability Act*

Article I	Article I
Definitions	Définitions
In these Rules the following expressions have the meanings hereby assigned to them respectively, that is to say,	Dans les présentes règles, les mots suivants sont employés dans le sens précis indiqué ci-dessous :
(*a*) "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper;	*a*) « transporteur » comprend le propriétaire du navire ou l'affréteur, partie à un contrat de transport avec un chargeur;
(*b*) "contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by water, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter-party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same;	*b*) « contrat de transport » s'applique uniquement au contrat de transport constaté par un connaissement ou par tout document similaire formant titre pour le transport des marchandises par eau, il s'applique également au connaissement ou document similaire émis en vertu d'une charte-partie à partir du moment où ce titre régit les rapports du transporteur et du porteur du connaissement;

- *Commercial Arbitration Code* attached as a schedule to the *Commercial Arbitration Act*, RSC 1985, c 17

Article 8	Article 8.
Arbitration Agreement and Substantive Claim before Court	Convention d'arbitrage et actions intentées quant au fond devant un tribunal
(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.	1. Le tribunal saisi d'un différend sur une question faisant l'objet d'une convention d'arbitrage renverra les parties à l'arbitrage si l'une d'entre elles le demande au plus tard lorsqu'elle soumet ses premières conclusions quant au fond du différend, à moins qu'il ne constate que la convention est caduque, inopérante ou non susceptible d'être exécutée.
(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.	2. Lorsque le tribunal est saisi d'une action visée au paragraphe 1 du présent article, la procédure arbitrale peut néanmoins être engagée ou poursuivie et une sentence peut être rendue en attendant que le tribunal ait statué.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1613-08
STYLE OF CAUSE:	T. CO. METALS LLC v THE VESSEL "FEDERAL EMS", THE OWNERS, CHARTERERS AND ALL OTHERS INTERESTED IN THE VESSEL "FEDERAL EMS", CANADA MOON SHIPPING CO. LTD. and FEDNAV INTERNATIONAL LTD. and COMPANHIA SIDERURGICA PAULISTA-COSIPA
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	June 9, 2011
REASONS FOR ORDER AND ORDER:	SCOTT J.
DATED:	September 12, 2011

APPEARANCES:

Paul Blanchard	FOR THE PLAINTIFF
David G. Colford and Vanessa Arviset	FOR THE DEFENDANTS-RESPONDENTS
Jean-Marie Fontaine and Daniel Grodinsky	FOR THE THIRD PARTY-APPELLANT

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