Federal Court of Canada
Trial Division

Section de première instance de
la Cour fédérale du Canada

97 098 020

T-1260-96

BETWEEN :

SIDMAR N.V. and TRADEARBED INC. and ALL OTHERS HAVING AN INTEREST IN THE CARGO LADEN ON BOARD THE M.V. "HOLCK-LARSEN"

Plaintiffs

- and -

FEDNAV INTERNATIONAL LTD. and FEDNAV LIMITED and LARSEN & TOUBRO LTD. and THE OWNERS AND CHARTERERS OF THE VESSEL "HOLCK-LARSEN" and THE VESSEL "HOLCK-LARSEN"

Defendants

T-1378-96

BETWEEN :

SIDMAR N.V. and TRADEARBED INC. and ALL OTHERS HAVING AN INTEREST IN THE CARGO LADEN ON BOARD THE M.V. "FEDERAL MACKENZIE"

Plaintiffs

- and -

FEDNAV INTERNATIONAL LTD. and FEDNAV LIMITED and PROMINENT RICH LTD. c/o UNIVAN SHIP MANAGEMENT LTD. and UNIVAN SHIP MANAGEMENT LTD. and THE OWNERS AND CHARTERERS OF THE VESSEL "FEDERAL MACKENZIE" and THE VESSEL "FEDERAL MACKENZIE"

Defendants

T-1379-96

BETWEEN :

**SIDMAR N.V. and LAMINOIR DE DUDELANGE S.A.
c/o TRANSAF N.V. and TRADEARBED INC. and
ALL OTHERS HAVING AN INTEREST IN THE
CARGO LADEN ON BOARD THE M.V.
"FEDERAL MACKENZIE"**

Plaintiffs

- and -

**FEDNAV INTERNATIONAL LTD.
and FEDNAV LIMITED and PROMINENT
RICH LTD. c/o UNIVAN SHIP MANAGEMENT
LTD. and UNIVAN SHIP MANAGEMENT LTD. and
THE OWNERS AND CHARTERERS OF THE
VESSEL "FEDERAL MACKENZIE" and THE
VESSEL "FEDERAL MACKENZIE"**

Defendants

REASONS FOR DECISION

TREMBLAY-LAMER J.

The facts and the chronology of the proceedings in this Court may, in my opinion, be summarized as follows:

(A) The M.V. "Holck-Larsen"

On May 28, 1996 an action was commenced in file T-1260-96. A similar "protective action" was simultaneously commenced in Detroit. On June 11, 1996, an action was commenced in this Court in each of files T-1378-96 and T-1379-96. On June 19, 1996 the plaintiffs moved for a declaration by way of summary judgment that their action against Fednav International Ltd. (hereinafter "Fednav") was not barred by limitation and had been validly brought in the

Federal Court of Canada. In fact, they are seeking a declaration that the action was brought in Canada pursuant to clause 4 of the bills of lading, as amended by the letters of extension. The plaintiffs further ask that the defendant be ordered to bear the costs, without however specifying whether this order should include only the costs pertaining to the motion or, on the contrary, include as well the costs entailed by the institution of a "protective action" in the United States, more particularly in Detroit. On the same day, Fednav responded with a motion for a declaration by way of summary judgment that the action brought in the Federal Court of Canada was barred by limitation.

(B) **The "Federal MacKenzie/Chicago" and the "Federal Mackenzie/Detroit"**

An action was commenced on June 11, 1996 in each of files T-1378-96 and T-1379-96. On June 19, 1996 the plaintiffs moved for a declaration by way of summary judgment similar to the one filed in file T-1260-96. They rely as well on the clause in the bills of lading, which is virtually identical to the one at issue in file T-1260-96. On June 27, 1996 I invited the defendant's counsel to contact his client to ensure that measures were taken to avoid the plaintiffs having to bring new protective actions in the United States; this was rejected. The plaintiffs were thus restrained, in order to protect their rights, from bringing protective actions in the United States. In both initial motions, the plaintiffs did not ask for costs. On July 24, 1996, because of the defendant's conduct, they amended the said motions to ask that the defendant be ordered to pay costs. Here again, they do so without specifying whether the order should be limited to the costs pertaining to the three motions or, instead, should include the costs incurred for the institution of protective actions in the United States. The defendant's answer consisted of the filing of two motions for a declaration by way of summary judgment that the two actions brought in the Federal Court of Canada are barred by limitation.

Clause 4 of the bills of lading and the letters of extension

The bills of lading at issue in this case involve the carriage of goods from Belgium to the United States. The bills were issued in Belgium. Clause 4, which appears on the back of the bills, is at the heart of this dispute. It reads as follows:

> 4. **Jurisdiction clause**
> Any action by the merchant arising out of goods carried under this Bill of Lading shall be brought in the Courts of Canada within one year after delivery of the goods at the port of discharge or the date when the goods should have been delivered at such port.

However, in this instance, in each of the files, the plaintiffs are seeking an extension of time for bringing an action. They did so prior to the expiration of the initial one-year limitation period in clause 4 of the bills of lading so that if Fednav had refused to allow an extension to the plaintiffs they would nevertheless have been able to bring their actions within the prescribed time.

The defendant Fednav granted the plaintiffs, in each case, an extension of time for bringing an action. However, it specified in paragraph 4 of the letters by which it did so that the actions should be brought not in the Federal Court of Canada but in the United States, more particularly in Chicago or Detroit as the case might be.[1] For example, in file T-1260-96, the letter of extension reads:

> February 21, 1996
>
> Your Ref: J-12-3-37879
> Our Ref: ATTORNEY GENERAL 137/94
>
> TradeARBED Inc.
> 825 Third Avenue
> New York, N.Y. 10022
> U.S.A.
>
> Attention: Mr. E.S. Branker
>
> Dear Sirs:
>
> RE: M.V. HOLCK LARSEN - VOYAGE 9/94
> Ghent/Detroit - Bs/L SP218-276,321-361
> At Detroit: December 2-4, 1994
> Coils/damage - U.S. $70,000.00 (est.)

[1] The applicable letter of extension in each of the cases is identical. Only some items differ. For example, the date, the description of the claim and the addressee of the true copy differ. The letters also differ concerning the place in which the action is to be brought. In files T-1260-96 and T-1379-96, the letters stated that the actions were to be brought in Detroit. In file T-1378-96, the letter of extension stated instead that the action was to be brought in Chicago.

Following your request of **February 16, 1996,** we hereby extend your time within which to commence suit, in accordance with the stipulations of the captioned B/L, up to and including **June 4, 1996** on the following conditions:

1. It is understood and agreed that the amount of any eventual suit shall not exceed the captioned amount, being the sum claimed by you, and it is further understood and agreed that any Writ issued in excess of the said amount shall be null and void *ab initio*;

2. That you shall not be in a better position than if this extension had not been granted and that this extension shall not enlarge or create any rights under the said Bill of Lading;

3. That this letter and extension are without prejudice to any immunities, defences, rights and limitations, statutory, contractual or otherwise;

4. Actions, if any, are to [sic] filed in Detroit.

Yours faithfully,

FEDNAV LIMITED, as agents for
Fednav International Ltd.

(s) Dong Li

Dong Li
Claims Department

/ll
c.c.: Larsen & Toubro Limited

The plaintiffs' actions were brought within the time provided in the letters of extension. However, as we noted earlier, instead of being brought in the United States, they were brought in Canada.

Issue

Were the plaintiffs' actions against the defendant Fednav validly brought in the Federal Court?

Analysis

(A) Applicability of the *Hague-Visby Rules*

The plaintiffs submit, first, that the *Hague-Visby Rules* are binding in the case at bar. In this regard, they rely on section 7 of the *Carriage of Goods by Water Act*, which states:

> 7. (1) *The Hague-Visby Rules* have the force of law in Canada.
>
> (2) *The Hague-Visby Rules* apply in respect of contracts entered into after the coming into force of this Part and before the coming into force of Part II.
>
> (a) To which those Rules apply pursuant to Article X of those Rules; or
>
> (3) For the purposes of this Part, the expression "Contracting State" in Article X of *The Hague-Visby Rules* includes Canada and any other 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, done at Brussels on August 25, 1924, as amended by the Protocol done at Brussels on February 23, 1968, regardless of whether that state gives the force of law to the Protocol done at Brussels on December 21, 1979.

The plaintiffs argue that since section 7 states that the *Hague-Visby Rules* have the force of law in Canada, a party cannot contractually derogate from them. Accordingly, they submit, it was futile to insert a "Paramount Clause" in the bills of lading in question. The said clause reads as follows:

> 3. **PARAMOUNT CLAUSE**
>
> (1) If either the port of loading or the port of discharge named on the face hereof is located in the United States of America, this bill of lading shall have effect subject to the provisions of the *Carriage of Goods by Sea Act* of the United States approved April 16, 1936, and the governing law of the contract evidenced by this bill of lading shall be the law of the United States;
>
> (2) Subject to subparagraph (1) of this Clause, if this bill of lading is issued in a country which has adopted the Hague Rules or has no laws of a mandatory nature respecting the rights and obligations of parties to a contract of sea carriage of goods, this bill of lading shall have effect subject to, and shall be deemed to incorporate, the Hague Rules. Where the amount of the carrier's limit of liability has not been translated into national currency under the Hague Rules, the carrier's limit of liability shall be deemed to be $ 500.00 United States currency per package or physical unit.
>
> (3) In all cases not provided for in subparagraphs (1) and (2) of this Clause, this bill of lading shall have effect subject to the *Hague-Visby Rules*.
>
> In this bill of lading "the Hague Rules" mean the International Convention for the Unification of Certain Rules of Law relating to Bills of Ladings, signed at Brussels on August 25, 1924 or any enactment given effect to the substance of the Rules. "*The Hague-Visby Rules*" mean the Hague Rules as amended by the Protocols signed at Brussels on February 23, 1968 and December 21, 1979 Except where the law of the United States applies in accordance with subparagraph (1) of this Clause, the governing law of the contract evidenced by this bill of lading shall be Canadian Maritime Law.

The defendant, for its part, does not deny that the *Hague-Visby Rules* apply to the said bills of lading. But it does contend that the *Rules* are inapplicable to the letters of extension.

Thus the Court must, in this case, examine whether the *Hague-Visby Rules* are applicable notwithstanding the Paramount Clause appearing in the bills of lading.

In my opinion, the reply to this question largely depends on the consequences which flow from the statutory implementation of the *Hague-Visby Rules*. In particular, it lies in the appropriate construction of the expression "The *Hague-Visby Rules* have the force of law in Canada", in section 7 of the *Carriage of Goods by Water Act*.

In "*The Morviken*", after reviewing the said Rules, Lord Denning, writing on behalf of the English Court of Appeal, concludes that the effect of their statutory implementation was to bind the English courts to apply them mandatorily. He adds that the *Rules* must prevail over any provision included in a bill of lading. That being so, any clause in a bill of lading that breaches any of the *Rules* must be disregarded, he says. Thus, in Lord Denning's opinion, it is impossible to contract out of the *Hague-Visby Rules*. This decision of the Court of Appeal was subsequently upheld by the House of Lords.[2]

There is a further argument militating in favour of the mandatory nature of the Rules. It has been formulated by Professor Tetley.[3] He addresses the issue while discussing the impact of "Paramount Clauses" of a type that is nevertheless

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[2] [1983] Lloyd's Law Reports, Vol. 1, Part I, p. 1 (H.L.).

[3] William Tetley, *Marine Cargo Claims*, 3rd ed., International Shipping Publications, Montréal, 1988, at pages 5 and 6.

quite different from the ones we are concerned with here. He discusses Paramount Clauses that effectively give the *Hague-Visby Rules* paramountcy over any potentially applicable rule of law. He writes:

> Even if the bill of lading does not contain a paramount clause, the Rules still apply. This seems manifestly clear from the Hague Rules themselves and was so declared in *Shackman* v. *Cunard White Star Ltd.*[4] [reference omitted]

It is in this context that he adds:

> If the bill of lading does not contain a paramount clause and does not invoke the Hague Rules but invokes some other law, the Hague Rules still apply. The decision of the Privy Council in *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd. (The Hurry On)* is in error. Fortunately, *Vita Food* is limited in its application and itself contains the source of its being distinguished - the Court stating that whether or not the Hague Rules will be given effect depends on where the case is tried. For example, if the *Vita Food* case had been tried in Newfoundland, where the bill of lading was issued, then the Hague Rules would have applied. As Lord Wright himself stated: "A Court in Newfoundland would be bound to apply the law enacted by its own Legislature...."[5] [reference omitted] [emphasis added]

Thus, according to Professor Tetley, the Canadian courts ought to apply the laws promulgated, as the case may be, by Parliament or the legislatures. In this case, the applicable provision is section 7 of the *Carriage of Goods by Water Act*, which, need it be recalled, has served to statutorily implement the *Hague-Visby Rules* and, more particularly, article X of those *Rules*. The latter article states:

> **Article X - Application**
> The provisions of these Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States if:
>
> (a) the bill of lading is issued in a Contracting State, or
>
> (b) the carriage is from a port in a Contracting State, or
>
> (c) the contract contained in or evidenced by the bill of lading provides that these Rules of legislation of any State giving effect to them are to govern the contract,
>
> whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.

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[4] Ibid.

[5] Ibid.

The introductory paragraph in article X of the *Rules* is in my opinion unequivocal in its statement that the *Rules* shall apply to <u>every</u> bill of lading relating to the carriage of goods contemplated in any of subparagraphs (a) to (c). Given the language of this paragraph, it seems to me that once any of the conditions set out in subparagraphs (a) to (c) of this article is met, a clause included in a bill of lading cannot override the application of the *Rules*. The appropriate question, then, is whether any of these conditions set forth in subparagraphs (a) to (c) is satisfied.

In this case, not only was the freight shipped from a Belgian port, but the bills of lading were issued in Belgium. Since Belgium is a contracting state, the conditions set out in subparagraphs (a) and (b) have been fulfilled.

I conclude, therefore, in light of the preceding discussion, that the *Hague-Visby Rules* alone apply to each of the shipments now at issue.

(B) <u>Article III(8) of the *Hague-Visby Rules*</u>

Article III(8) of the *Hague-Visby Rules* declares that any provision in a contract of carriage by sea under which the carrier tries to lessen the liability it would otherwise have under these *Rules* is void. It reads as follows:

> **Article III**
> (8) Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.
>
> A benefit of insurance or similar clause shall be deemed to be a clause relieving the carrier from liability.

The plaintiffs argue that by including paragraph 4 in the letters, granting an extension of time within which to sue, the defendant was in fact attempting to lessen the liability it would otherwise have had under the *Hague-Visby Rules*. Paragraph 4 of the said letters is consequently void and of no effect, they say.

Under the *Hague-Visby Rules*, the applicable limitation on liability would be the one contained in paragraph 5 of article IV. This article limits liability to 666.67 units per package or unit, or 2 units per kilogram of gross weight of the goods lost or damaged, whichever limitation is greater. This is a fairly high limitation on liability.

In the United States, given the much lower limitation on liability in that country, Fednav would be subject to appreciably lower claims. Mr. Miller explains, in his affidavit, that the limitation on liability in the United States is $500.00 per package. This limitation on liability is set by the *Carriage of Goods by Sea Act*.

The plaintiffs cite, in support of their contention, the decision of the House of Lords in *The "Morviken"*.[6] In that case, article III(8) was applied in opposition to a choice of forum clause that claimed to make the Dutch courts the courts of relevant jurisdiction. The Netherlands had not, as of that date, adopted the *Hague-Visby Rules*. The choice of forum clause consequently allowed the carrier to adopt lesser liability than what would otherwise result from the *Rules*. The House of Lords concluded that the clause in question was void and of no effect. Lord Diplock stated:

> If the dispute is about duties and obligations of the carrier or ship that are referred to in that rule and it is established as a fact (either by evidence or as in the instant case by the common agreement of the parties) that the foreign Court chosen as the exclusive forum would apply a domestic substantive law which would result in limiting the carrier's liability to a sum lower than that to which he would be entitled if art. IV, r.5 of the *Hague-Visby Rules* applied, then an English Court is in my view commanded by the 1971 Act to treat the choice of forum clause as of no effect.

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[6] Ibid., at page 1.

The plaintiffs add that this reasoning has been followed or cited with approval on many occasions. In this regard, they cite, first, the following English precedents: *The "Vechscroon"*[7], *The "Benarty"*[8], and *The "Antares"*[9]. They also cite the decision of the Federal Court of Canada in *Agro Co. of Canada Ltd. et al v. The "Regal Scout" et al.*[10] That case involved a clause by which the carrier attempted to make Japanese law applicable, under which the owner of the vessel was not considered a party to the contract of carriage. Cattanach J. held that since the carrier was in fact seeking to lessen the liability that otherwise would have been his under the *Hague Rules*, the relevant clause should, under article III(8), be considered void and of no effect. He stated:

> On the basis of the facts found in the present matter and the law as stated by Lord Diplock, a Canadian court is likewise commanded by the *Carriage of Goods by Water Act* to treat the choice of forum clause as of no effect which I accordingly do.

The defendant, for its part, argues that article III(8) of the *Rules* is inapplicable in this instance since the letters of extension are not an integral part of the contract of carriage by sea, but rather constitute agreements separate and distinct from the said contract.

I do not agree with the defendant. In my opinion, article III(8) of the *Rules* applies to the letters of extension that are at issue here. I am unable to conclude that they constitute in fact a contract separate and distinct from the contract of carriage by sea.

A number of factors militate in favour of this conclusion. In the first place, how can it be said that the letters of extension are separate and distinct from the bills of lading when, in fact, the only reason they exist is clause 4 of

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[7] [1982] Q.B. (Com. Ct.), Vol. 1.

[8] [1984] C.A., Vol. 2.

[9] [1987] C.A., Vol. 1.

[10] (1984), 148 D.L.R. (3d) 412 (F.C.T.D., *per* Cattanach J.).

those bills of lading. The purpose of the letters of extension was simply to extend a deadline that was contained, as it happens, in clause 4 of the bills of lading. The defendant submits that paragraph 4 of the bills of lading simply repeats one of the requirements in the *Rules*, in particular the rule in article III(6), and that accordingly the letters of extension were not based on the contract of carriage by sea. I do not agree. Clause 4 in the bills of lading, while simply repeating a requirement that happens to be contained in the *Rules*, nevertheless constitutes a contractual clause from which the letters of extension are directly derived.

In my opinion, the letters of extension should be considered a rider to the initial contracts of carriage by sea. As such, they should be considered to form an integral part of those contracts. In this regard, Dubé J.'s decision in *Société d'habitation du Québec v. Navigation Harvey et frères Inc.*[11] sufficiently disposes of the matter. In that case, the name of the carrier had been altered through a rider to the contract of carriage by sea. The Court, far from considering this rider to be a document separate and distinct from the initial agreement, referred to the clauses of the initial contract in order to settle the matter.

Clause 4 of the letters of extension is clearly a choice of forum clause which is aimed at amending a clause in the bills of lading, namely clause 4. To the degree that the plaintiffs are required by this clause to pursue their remedy in a jurisdiction with a lower limit of liability than the one in force under the *Hague-Visby Rules*, the clause is, in my opinion, void and of no effect under article III(8).

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[11] (June 1, 1987), T-1648-84 (F.C.T.D.).

In view of the conclusion I have reached, it is unnecessary, in my view, to rule on the issues of "estoppel" and "waiver". I would add, however, in regard to estoppel, that I find it hard to believe that the plaintiffs can legitimately plead that they were unaware of the possible effects of clause 4 of the letters of extension, which, as we know, contemplate a change in forum. The language used in this paragraph is clear: "Actions, if any, are to be filed in Detroit." Need we add that a quick reading of the letter would inform the reader of this. Then again, this was not an unusual clause since it had been used many times previously. Mr. Branker, as a reasonably informed individual, surely had the necessary knowledge to understand that the paragraph might have the result of bringing about a change in forum or at least to refer the problem to a competent person.

Accordingly, I am allowing the plaintiffs' motions for summary judgment and dismissing the defendants' motions. I conclude that paragraph 4 of the letters of extension is void and of no effect. The actions brought against the defendant Fednav in files T-1260-96, T-1378-96 and T-1379-96 are not barred by limitation and have been validly brought in this court. The whole with costs.

OTTAWA, Ontario
October 11, 1996

"Danièle Tremblay-Lamer"
J.

Certified true translation

Christiane Delon

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

FILE NO.	T-1260-96. T-1378-96 & T-1379-96
STYLE:	SIDMAR N.V. ET AL. v. FEDNAV INTERNATIONAL LTD. ET AL.
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	SEPTEMBER 23, 1996

REASONS FOR JUDGMENT OF TREMBLAY-LAMER J.

DATED: OCTOBER 11, 1996

APPEARANCES:

LOUIS BUTEAU	FOR THE PLAINTIFF
PETER DAVIDSON	FOR THE DEFENDANT

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SPROULE CASTONGUAY POLLACK MONTRÉAL, QUEBEC	FOR THE PLAINTIFF
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APR 0 4 1997

THE FEDERAL COURT OF CANADA

LA COUR FÉDÉRALE DU CANADA

Court No.: T-1260-96

No. de la cause:

Let the attached certified translation of the following document in this cause be utilized to comply with Section 20 of the **Official Languages Act.**

Je requiers que la traduction ci-annexée du document suivant telle que certifiée par le traducteur soit utilisée pour satisfaire aux exigences de l'article 20 de la **Loi sur les langues officielles.**

REASONS FOR DECISION

MAR 2 1 1997

DATE

Danièle Tremblay-Lamer

J.F.C.C. J.C.F.C.

Form T-4F

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