Date: 20090227

Docket: T-826-05

Citation: 2009 FC 201

Ottawa, Ontario, February 27, 2009

PRESENT: The Honourable James K. Hugessen

BETWEEN:

HAPAG-LLOYD CONTAINER LINIE GmbH

Plaintiff

and

MOO TRANSPORT & COMMODITIES INC.
carrying on business as COOLTRADE and NBL AMERICA CORP.

Defendants

AND BETWEEN:

MOO TRANSPORT & COMMODITIES INC.
carrying on business as COOLTRADE

Plaintiff by Counterclaim

and

HAPAG-LLOYD CONTAINER LINIE GmbH

Defendant by Counterclaim

REASONS FOR ORDER AND ORDER

[1] This is a motion for summary judgment brought by the plaintiff, defendant by counterclaim (the moving party) to dismiss certain parts of the counterclaim brought by the defendant, plaintiff by

counterclaim (the respondent) on the ground that such claims are excluded by the terms of the contractual arrangements between them.

I. **The Facts**

[2] The moving party, Hapag-Lloyd Container Linie GmbH operates ocean going vessels worldwide, it is an international carrier of container cargo and at all material times, was the carrier of various shipments of Frozen Foods from ports in the United States to Jakarta, Indonesia.

[3] The respondent Moo Transport & Commodities Inc. carrying on business under the name Cooltrade is a body incorporated under the laws of Ontario.

[4] The main action relates to various fees and charges allegedly incurred by the plaintiff, moving party, regarding the shipments of seventeen containers of beef lungs and hearts in the spring and summer of 2004 from various ports in the United States to Jakarta, Indonesia.

[5] All seventeen containers were originally destined to travel from the United States to Jakarta. The Indonesian government had put a ban on the importation of American beef products while the containers were in the process of being shipped. Fourteen of the seventeen containers were detained by the Indonesian authorities at the port in Jakarta. Accordingly, the cargo could not be released to the respective consignees and the containers were forced to remain at the Indonesian terminal. The remaining three containers were stopped in Singapore on the instructions of the respondent before Hapag-Lloyd's feeder line from Singapore could deliver them to Jakarta.

[6] Nine of the seventeen containers detained at the port of Jakarta were released from the terminal in September, 2004 when a new purchaser for the contents of those containers was found in Indonesia. The contents of the five remaining containers in Jakarta and of the three containers in Singapore were ultimately destroyed.

[7] The moving party's original claim was comprised of damages in two parts:

i) a claim for terminal and demurrage charges of the nine containers that were detained and then subsequently released from the port of Jakarta;

ii) a claim for terminal, demurrage and destruction charges incurred for the remaining eight containers whose contents were destroyed.

[8] The respondent has counterclaimed against the moving party for four different types of damages incurred by it regarding the shipment of the seventeen containers:

i) the return of US$23,000.00 to the respondent that the moving party is alleged to have improperly retained after it allegedly breached an agreement regarding the discharge of terminal fees at the port of Jakarta relating to the nine containers that were released from the port;

ii) a claim in the amount of US$19,082.92 for damage cargo that resulted from the failure of the refrigeration system in one of the eight containers that were ultimately destroyed;

iii) a claim in the amount of US$54,904.26 for consequential damages sustained by the respondent as a result of the failure of the moving party to discharge the terminal fees in Jakarta regarding the nine containers subsequently released as per an agreement that was reached between the parties;

iv) damages for the value of the cargo in the eight containers that were ultimately destroyed in Jakarta and Singapore.

[9] The moving party's present motion puts in issue the claims listed in (ii) and (iv) above on the grounds that those claims are excluded by the terms of the contracts evidenced by the Bills of Lading both because they are out of time and because they are for consequential damages. Because the first of those grounds relates to the claims arising out of the destruction of the contents of all eight of the containers whose contents were destroyed while the second relates to only some of them it is convenient to deal first with the issue of the timeliness of the counterclaim and only to move on to the second issue if that claim is found to have been brought within the applicable period.

II. The Bill of Lading

[10] Although the Bill of Lading provides for the application of the *Hague-Visby Rules* to the contract of carriage, it is common ground that since those Rules only cover the period "tackle to tackle" (i.e. from the time the goods cross the ship's rail at the loading port to the time of discharge) it is the rules contained in the Bill of Lading itself which must govern. The following provisions are relevant:

> 5(b) The Carrier shall be under no liability whatsoever for loss of or damage to the Goods howsoever occurring, if such loss or damage arises prior to loading on or subsequent to the discharge from the vessel. Notwithstanding the above, in the event that the applicable compulsory law provides the contrary, the Carrier shall have the benefit of every right, defence, limitation and liberty in the Hague-Visby Rules or the Hague Rules, notwithstanding that the loss or damage did not occur at sea. In the event that the Bill of Lading covers a shipment to or from the United States or territories where COGSA is applicable, however, the Carriage of Goods by Sea Act (COGSA) shall be applicable before the Goods are loaded on or after

they are discharged from the vessel.

…

6. Time for Suit

In any event, the Carrier shall be discharged from all liability in respect of loss of or damage to the Goods, non-delivery, mis-delivery, delay or any other loss or damage connected or related to the Carriage unless suit is brought within one (1) year after delivery of the Goods or the date when the Goods should have been delivered.

7. Sundry Liability Provisions

…

(6) Scope of Application and Exclusions

(a) The rights, defenses, limitations and liberties of whatsoever nature provided for in this Bill of Lading shall apply in any action against the Carrier for loss or damage or delay, howsoever occurring and whether the action be founded in contract or in tort.

(b) Save as otherwise provided herein, the Carrier shall in no circumstances whatsoever and howsoever arising be liable for direct or indirect or consequential loss or damage or loss of profits.

III. Was the Counterclaim timely brought?

[11] The starting point for the running of the time period stipulated in clause 6 above is the time when the goods were delivered or should have been delivered. The eight containers in issue were offloaded in Jakarta or Singapore on dates between May 20 and May 27, 2004. The grace period for a consignee to take delivery is five days in Jakarta and nine days in Singapore. Assuming that this grace period can be applied to extend the time of the carrier's obligation to deliver rather than to the consignee's obligation to accept such delivery, this would place the latest possible date at which

delivery should have taken place at June 5, 2004. The counterclaim herein was filed June 24, 2005, almost three weeks after the expiry of the one year period.

[12] Since the containers were all shipped from ports in the United States clause 5 above indicates that the United States *Carriage of Goods by Sea Act* (COGSA) is the governing law. There is no evidence that the provisions of COGSA differ in any material respect from the law of Canada and I shall decide this case on my understanding of the latter.

[13] The law is clear that a clause such as clause 6 of the Bill of Lading herein is not a mere prescription period or limitation of the right of action but is rather an exclusion or forfeiture of any right or cause of action whatsoever. The classic statement of the law was made by Lord Wilberforce in *Aries Tanker Corp. v. Total Transport Ltd. (The "Aries")*, [1977] 1 All ER 398 at 402:

> My Lords, if this case is to be decided on the terms of the contract it would appear to me to be a comparatively simple one. There is an obligation to pay freight, calculated on the amount of cargo intaken, which obligation arises on discharge. There is no dispute as to the amount: it is a liquidated claim. The contract contemplates the possibility of a cross-claim by the charterers in respect of loss or damage to the cargo and it expressly provides by incorporation of art III, r 6 of the Hague Rules that the carrier and the ship *shall be discharged* unless suit is brought within one year after the date of delivery or the date when delivery should have been made. This amounts to a time-bar created by contract. But, and I do not think that sufficient recognition to this has been given in the courts below, it is a time-bar of a special kind, viz one which extinguishes the claim (cf art 29 of the Warsaw Convention 1929) not one which, as most English statutes of limitation (e g the Limitation Act 1939, the Maritime Conventions Act 1911), and some international conventions (e g the Brussels Convention on Collisions 1910, art 7) do, bars the remedy while leaving the claim itself in existence. Therefore, arguments to which much attention and refined discussion has been given, as to whether the charterer's claim is a defence, or in

> the nature of a cross-action, or a set-off of one kind or another, however relevant to cases to which the Limitation Act 1939 or similar Acts apply, appear to me, with all respects, to be misplaced. The charterers' claim, after May 1974, and before the date of the writ, had not merely become unenforceable by action, it had simply ceased to exist, and I fail to understand how a claim which has ceased to exist can be introduced for any purpose into legal proceedings, whether by defence or (if this is different) as a means of reducing the owners' claim, or as a set-off, or in any way whatsoever. It is a claim which, after May 1974, had no existence in law, and could have no relevance in proceedings commenced, as these were, in October 1974. I would add, though this is unnecessary since the provision is clear in its terms, that to provide for the discharge of these claims after 12 months meets an obvious commercial need, namely to allow shipowners, after that period, to clear their books.

[14] To the same effect the same learned judge in *Port Jackson Stevedoring Pty. Ltd. v. Salmond & Spraggon (Australia) Pty. Ltd.* (*The* "*New York Star"),* [1980] 3 All ER 257 at 262:

> Their Lordships' opinion on these arguments is clear. However adroitly presented, they are unsound, and indeed unreal. Clause 17 is drafted in general and all-embracing terms:
>
>> 'In any event the Carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after the delivery of the goods or the date when the goods should have been delivered. Suit shall not be deemed brought until jurisdiction shall have been obtained over the Carrier and/or the ship by service of process or by an agreement to appear.'
>
> The reference to delivery of the goods shows clearly that the clause is directed towards the carrier's obligations as bailee of the goods. It cannot be supposed that it admits of a distinction between obligations in contract and liability in tort; 'all liability' means what it says.
>
> Moreover it is quite unreal to equate this clause with those provisions in the contact which relate to performance. It is a clause which comes into operation when contractual performance has become

> impossible, or has been given up; then, it regulates the manner in which liability for breach of contract is to be established.

[15] To the argument that the counterclaim is out of time the respondent raises two objections, one substantive, the other procedural. In substance the point is taken that the respondent did not and could not know the amount and extent of its loss until the contents of the eight containers had actually been destroyed and information to that effect had been communicated to it. Reliance is placed on *Central Trust Co. v. Rafuse,* [1986] 2 S.C.R. 147. This is the familiar "*contra non valentem*" argument.– It is without merit in the present circumstances for it misapprehends the nature of the respondent's claim. That claim is not at bottom based on the fact that the contents of the eight containers were destroyed but much more fundamentally on the fact that they were not, and could not have been, delivered when they should have been. That fact was to the respondent's knowledge, as I have indicated, at the latest on June 5, 2004, and that is when it could and should have claimed for non delivery.

[16] Of far more concern to me is the respondent's procedural argument. It is based on the fact that clause 6 of the Bill of Lading is not pleaded in the moving party's defence to the counterclaim. This is contrary not only to the well known practice that limitation defences must be specifically pleaded (see for example *Hanna v. Canada*, [1986] F.C.J. No. 716) but also to the requirements of Rule 183 of the *Federal Courts Rules*:

183. In a defence or subsequent pleading, a party shall	183. Une partie est tenue, dans sa défense ou tout acte de procédure ultérieur:

(a) admit every allegation of material fact in the pleadings of every adverse party that is not disputed;	a) d’admettre, parmi les faits substantiels allégués dans l’acte de procédure d’une partie adverse, ceux qu’elle ne conteste pas;
(b) where it is intended to prove a version of facts that differs from that relied on by an adverse party, plead that version of the facts; and	b) de présenter sa version des faits si elle entend prouver une version des faits différente de celle d’une partie adverse;
(c) plead any matter or fact that	c) de plaider toute question ou tout fait qui, selon le cas:
(i) might defeat a claim or defence of an adverse party, or	(i) pourrait entraîner le rejet d’une cause d’action ou d’un moyen de défense d’une partie adverse,
(ii) might take an adverse party by surprise if it were not pleaded.	(ii) pourrait prendre une partie adverse par surprise, s’il n’était pas plaidé.

[17] This is a very serious point. The defence to the counterclaim filed by the moving party (with one exception not presently relevant) simply fails to plead the terms of the Bill of Lading. If the counterclaim went to trial on the present pleadings and without amendment the argument that the counterclaim is out of time could not be heard.

[18] The moving party, however, urges upon me that its Motion for Summary Judgment sets out very clearly in the statement of the grounds for the motion its reliance on the terms of the Bill of Lading:

> 8. Containers HLXU 6736027, HLCU 4762232, HLXU 4761062, HLXU 6733265, HLCU 4774676, HLXU 6700662, HLXU 6709042 & HLXU 6740639 were discharged in either Jakarta or Singapore between May 20 and May 27, 2004.
>
> 9. The Statement of Defence and Counterclaim was issued on June 24, 2005.
>
> 10. Both the terms of the Hapag-Lloyd bill of lading and the *Hague-Visby Rules*, which are incorporated as part of the *Marine Liability Act*, provide that an action against the carrier in respect of goods is time barred unless suit is brought within one year of the date when those goods should have been delivered;
>
> 11. Moo Transport's right of action is therefore time barred as the counterclaim was brought more than one year after the date the goods would have been delivered.

[19] Counsel also points to the definition of "pleading" in Rule 2:

"pleading" means a document in a proceeding in which a claim is initiated, defined, defended or answered.	« acte de procédure » Acte par lequel une instance est introduite, les prétentions des parties sont énoncées ou une réponse est donnée.

[20] In my view this definition is certainly broad enough to include the Motion for Summary Judgment and there can be no doubt that the paragraphs quoted set forth in adequate detail the limitation defence and put the respondent on proper notice thereof. This results in the following anomalous situation: the limitation defence is properly before the Court on the motion and, if well founded, may result in the early dismissal of some parts of the counterclaim; if the matter were to go to trial, however, the Court could not, unless leave to amend were sought and obtained with whatever collateral consequences, including costs, might flow from that, give effect to that defence to the counterclaim.

[21] In the result, I conclude that the counterclaim in respect of the contents of the eight containers which were destroyed was filed out of time and the moving party is entitled to judgment dismissing that part of the counterclaim. However, because the moving party has failed timely to amend its pleadings to the counterclaim, I shall deprive it of any costs to which it might otherwise have been entitled on the motion. That is a result which, in accordance with the requirements of Rule 3, does substantive justice to the parties based on the merits of their respective claims while at the same time imposing a properly proportional sanction on the moving party for its inadequate and sloppy pleading.

IV. The other Grounds

[22] Because I have concluded that the counterclaim must fail with respect to all eight containers, there is no need to reach the moving party's arguments with respect to only some of them.

ORDER

THIS COURT ORDERS that

1. The motion is allowed and the counterclaim is dismissed with respect to all claims relating to containers described as: HLXU 6736027, HLCU 4762232, HLXU 4761062, HLXU 6733265, HLCU 4774676, HLXU 6700662, HLXU 6709042 & HLXU 6740639.

2. No order as to costs.

"James K. Hugessen"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mr. Jean-Marie Fontaine	FOR THE PLAINTIFF
Mr. John Carter	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

Borden Ladner Gervais LLP Montreal, Quebec	FOR THE PLAINTIFFS
Isaacs & Co. Toronto, Ontario	FOR THE DEFENDANTS