

Federal Court



Cour fédérale

Date: 20250314

Docket: T-1741-22

Citation: 2025 FC 474

Ottawa, Ontario, March 14, 2025

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

ETG COMMODITIES INC.

Plaintiff

and

HAPAG-LLOYD (CANADA) INC.

Defendant

REASONS AND ORDER

I. INTRODUCTION

[1] By a Notice of Motion filed on September 11, 2023, Hapag-Lloyd (Canada) Inc. (the “Defendant”) seeks summary judgment against ETG Commodities Inc. (the “Plaintiff”), pursuant to the *Federal Courts Rules*, SOR/98-106 (the “Rules”).

II. BACKGROUND

[2] The following factual background is taken from the pleadings filed by the parties and the affidavits filed in respect of the motion for summary judgment.

[3] The Plaintiff is an importer, exporter and supplier of agricultural crops and commodities. The Defendant is a Canadian corporation and a subsidiary of Hapag Lloyd Aktiengesellschaft (“H-L, Hamburg”) and pleads that it is an agent of H-L, Hamburg.

[4] By a Statement of Claim issued on August 24, 2022, the Plaintiff advanced a claim against the Defendant in the amount of \$268,492.60 United States dollars, or an amount equivalent in Canadian Dollars, and \$159,750.00 CDN, for damage to a cargo of red lentils, due to be carried by water from the port of Vancouver, Canada to the port of Kolkata, India, pursuant to a Bill of Lading, dated August 14, 2020.

[5] The port of discharge was subsequently changed to Karachi, Pakistan.

[6] The Plaintiff alleged that the Defendant is a common carrier by water and accepted to carry the cargo of lentils as “the owner, operator, manager, and/ or charterer” of the ship *Athos*. It further alleged that the cargo “purportedly” arrived in Kolkata, India on September 26, 2020, but the Defendant failed to deliver the cargo to Karachi, Pakistan, the final port of discharge.

[7] The Plaintiff further alleged that as a result of the non-delivery to the final port of discharge, it lost the sale of the cargo. It alleged that the Defendant is liable for breach of contract and in negligence.

[8] The Defendant filed its Statement of Defence on October 3, 2022.

[9] The Defendant generally denied the allegations set out the Plaintiff's Statement of Claim, and relied on the terms and conditions set out in the Bills of Lading that were issued in respect of the cargo.

[10] The Defendant also pled that the action was improperly taken against it as a "common carrier", since it is a subsidiary of H-L, Hamburg. It also pled that the contract of carriage, as evidenced by the Bills of Lading, barred an action against it, as an agent of the carrier, that is H-L, Hamburg, and that this action amounts to a breach of the contract of carriage. The Defendant also pleads that the two Bills of Lading were issued by H-L, Hamburg as the "Carrier". It pleads that it signed the Bills of Lading as the "declared agent" of the Carrier.

[11] As well, the Defendant pled that this action is time-barred since it was commenced more than one year after the cargo should have been delivered.

[12] The Defendant acknowledged that the cargo sailed from Vancouver on August 14, 2020, destined for Kolkata, India and admitted that the port of discharge was changed to Karachi,

Pakistan at the request of the Plaintiff. As well, it admitted that the cargo was never delivered to Karachi, Pakistan and denied any responsibility for the non-delivery.

[13] The Plaintiff agreed to sell and ship 408.8 metric tons of Canadian red lentils from Vancouver, Canada to Kolkata, India under a sales agreement dated August 6, 2020. Booking confirmations were delivered by the Defendant to the Plaintiff between June 2020 and August 2020.

[14] The Defendant issued a booking confirmation on August 4, 2020, that was accepted by the Plaintiff. The booking confirmation provided that 15 containers of red lentils would be loaded on board the vessel *Athos* in Vancouver, that the vessel would leave on or around August 13, 2020, and that it would arrive in Singapore on September 15, 2020. The cargo would then proceed to Kolkata with an arrival date of September 19, 2020.

[15] A Bill of Lading was issued on August 14, 2020, identifying H-L, Hamburg as the Carrier, and the Defendant as the agent, pursuant to the August 4, 2020, booking confirmation.

[16] The Plaintiff originally planned to sell the lentils to a buyer in Kolkata. This sale was cancelled in early September 2020 and the Plaintiff found another potential buyer in Karachi, Pakistan.

[17] By email dated September 8, 2020, to the Defendant, the Plaintiff inquired about the feasibility of diverting delivery to Karachi.

[18] The Defendant responded on September 8, 2020, advising that the cargo was en route to Kolkata. The Defendant also advised of additional fees that would be payable in respect of delivery to the new destination.

[19] The Plaintiff and the Defendant agreed to divide the cargo into two separate Bills of Lading. The two new Bills of Lading were delivered to the Plaintiff in September 2020. Both Bills of Lading identified Karachi as the port of discharge.

[20] The Defendant filed the affidavit of Mr. Rémy Saqué in support of its motion for summary judgment.

[21] Mr. Saqué is the Director, Customer Service of the Defendant. He deposed that the cargo of lentils was originally to be loaded on board the ship *Athos* in Vancouver, Canada for shipment to Kolkata, India. He further deposed that at the request of the Plaintiff, the port of discharge was changed to Karachi, Pakistan.

[22] Mr. Saqué attached copies of the Bills of Lading, that is Bill of Lading HLCUMTR200804864 and HLCUMTR200918479, as exhibits to his affidavit.

[23] Mr. Saqué further deposed that he was advised and believes that the cargo was discharged in Kolkata, India on September 24, 2020. He also deposed that he was advised and believes that the transit time from Kolkata, India to Karachi, Pakistan is between 22 and 30 days.

[24] In response to the Defendant's motion, the Plaintiff filed the affidavit of Mr. Nick Bozzelli. He is employed by the Plaintiff as Freight Traffic Controller, managing international freight traffic.

[25] Mr. Bozzelli deposed as to the cargo to be shipped. He referred to a "draft" Bill of Lading issued by the Defendant on August 13, 2020, that is Bill of Lading HLCUMTR200804864. A copy of this draft Bill of Lading is attached as an exhibit to his affidavit. This draft Bill of Lading shows Kolkata, India as the port of discharge.

[26] Mr. Bozzelli further deposed as to the history of this shipment, including the plan that the cargo would be carried from Vancouver, Canada to Singapore on board the ship *Athos* for arrival on September 15, 2020. The transit would continue from Singapore to Kolkata, India on board the Ship "X-Press Ganges" for arrival on September 19, 2020.

[27] Mr. Bozzelli further deposed that the cargo was divided into two lots: ten containers were covered by Bill of Lading HLCUMTR200804864 and five containers were covered by Bill of Lading HLCUMTR200918479.

[28] Mr. Bozzelli further deposed, at paragraph 8 of his affidavit, that the Plaintiff has "no direct knowledge of where or when *Athos* or the Cargo arrived at Kolkata or any other port."

[29] In its statement of defence filed on October 3, 2022, the Defendant admitted that the cargo was discharged at Kolkata, India on September 20, 2020.

[30] The Plaintiff asserts that the Defendant continued to advise it, up to April 2021, that the cargo was in the process of being shipped from Kolkata to Karachi. The Plaintiff's buyer terminated the contract of purchase on April 27, 2021.

[31] The Defendant, in its statement of defence, alleges that the cargo was discharged at Kolkata on September 24, 2020, and could not be reloaded for carriage to Karachi, due to the failure of the Plaintiff or its customers, to comply with documentary requirements made by the Indian customs authorities.

[32] The Plaintiff claims that it was unaware of the discharge until receipt of the Defendant's statement of defence.

III. MOTION FOR SUMMARY JUDGMENT

[33] The Defendant now moves for the entry of summary judgment on two grounds: first, that the Plaintiff's action is time-barred, and second, that no cause of action lies against the Defendant, who acted as an agent of H-L, Hamburg.

[34] The Defendant argues that clause 6 of the Bills of Lading sets out a one-year time limit for the commencement of an action in respect of the delay in delivery or any other loss or damage related to the contract of carriage. Clause 6 provides as follows:

In any event 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 to 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.

[35] The Defendant relies upon the *Marine Liability Act*, S.C. 2001, c. 6, which incorporates the Hague-Visby Rules as Schedule III. Article III (6) of those Rules imposes a one-year time limit for the commencement of an action, as follows:

Article III	Article III
Responsibilities and Liabilities	Responsabilités et obligations
...	[...]
<p>6 Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be <i>prima facie</i> evidence of the delivery by the carrier of the goods as described in the bill of lading.</p>	<p>6 À moins qu'un avis des pertes ou dommages et de la nature générale de ces pertes ou dommages ne soit donné par écrit au transporteur ou à son agent au port de déchargement, avant l'enlèvement des marchandises et leur remise sous la garde de la personne ayant droit à la délivrance sous l'empire du contrat de transport, ou lors de cet enlèvement et de cette remise, ou, si les pertes ou dommages ne sont pas apparents, dans un délai de trois jours, cet enlèvement constituera jusqu'à preuve contraire, une présomption que les marchandises ont été délivrées par le transporteur telles qu'elles sont décrites au connaissement.</p>
<p>The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.</p>	<p>Les réserves écrites sont inutiles si l'état de la marchandise a été contradictoirement constaté au moment de la réception.</p>
<p>Subject to paragraph <i>6bis</i> the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is</p>	<p>Sous réserve des dispositions du paragraphe <i>6bis</i>, le transporteur et le navire seront en tout cas déchargés de toute responsabilité, à moins qu'une</p>

brought within one year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has arisen.

action ne soit intentée dans l'année de délivrance des marchandises ou de la date à laquelle elles eussent dû être délivrées. Ce délai peut toutefois être prolongé par un accord conclu entre les parties postérieurement à l'événement qui a donné lieu à l'action.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

En cas de perte ou dommage certains ou présumés, le transporteur et le réceptionnaire se donneront réciproquement toutes les facilités raisonnables pour l'inspection de la marchandise et la vérification du nombre de colis.

[36] As well, the Defendant pleads that it is an agent of the Carrier and that H-L Hamburg should be a party to this action. Further, Article IV *bis* (2) provides that all defences under these Rules apply to the servants and agents of the Carrier:

Article IV *bis*

Article IV *bis*

Application of Defences and Limits of Liability

Application des exonérations et limitations

...

[...]

2 If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under these Rules.

2 Si une telle action est intentée contre un préposé du transporteur, ce préposé pourra se prévaloir des exonérations et des limitations de responsabilité que le transporteur peut invoquer en vertu des présentes règles.

[37] For its part, the Plaintiff submits that this case does not meet the test for entry of summary judgment. It argues that its claim is not so doubtful that it does not merit adjudication in a trial.

[38] Substantively, the Plaintiff pleads that the evidence to date shows that a geographic deviation took place when the goods were delivered to Kolkata, rather than to Karachi. It submits that this geographic deviation amounts to a breach of contract, resulting in repudiation of the contract, such that it is not bound by the time bar relating to the commencement of action.

[39] The Plaintiff casts its arguments in terms of a fundamental breach of contract. Among others, it relies on the decision in *Dera Commercial Estate v. Derya Inc.; The Sur* [2019] 1 All E.R. 1147 to argue that the geographic deviation to a different port of delivery is sufficient to defeat the time limitation.

[40] Further to a Direction issued on July 31, 2024, the parties were given the opportunity to address the decision in *Parsons Corporation and Others v. C.V. Scheepvaartonderneming ("The Happy Ranger")* [2002] 2 Lloyd's Reports 357 (EWCA, Civ.), in particular the interpretation of the words "in any event" as they appear in the "*Happy Ranger*".

[41] While both parties submitted arguments distinguishing the facts of the "*Happy Ranger*" decision from the facts in the present case, the factual differences are not determinative. The interpretation given to the words "in any event", as they appear in Article III (6) of the Hague-Visby Rules, which also applies in this motion for summary judgment is important.

[42] The England and Wales Court of Appeal interpreted those words as follows:

...the words “in any event” mean what they say. They are unlimited in scope and I can see no reason for giving them anything other than their natural meaning...

[43] Pursuant to a Direction issued on December 11, 2024, the parties were given the opportunity to make further submissions on the recent decision of the Supreme Court of the United Kingdom in *Fimbank Plc v. KVH Shipping Co Ltd*, [2024] UKSC 38. Each party did so.

[44] The Defendant argued that the Court found that the language of Article III (6) of the Hague Visby Rules was clear and that the one-year time limitation to commence an action for non-delivery of goods applies “no matter the extent of or type of breach of contract or tort”. It further submitted that no exception was made for cases involving geographic deviations.

[45] For its part, ETG contended that the decision in *Fimbank*, *supra* does not refer to a geographic deviation and that there is no binding authority that overrules the principle that a geographic deviation deprives a carrier of all defences, including a time limitation defence.

[46] In reply, H-L argued that the words “all liability” and “in any event” are clear. It submitted that had the Court intended to make an exception for a geographic deviation, it would have said so.

IV. DISCUSSION

[47] The determinative issue here is a question of law, that is whether the one-year time bar is defeated by the geographic deviation?

[48] Rules 213 to 216 of the *Federal Courts Rules*, SOR/98-106 (the “Rules”) are relevant.

The pertinent parts of those Rules are set out below:

Motion and Service**Requête et signification****Motion by a party****Requête d’une partie**

213 (1) A party may bring a motion for summary judgment or summary trial on all or some of the issues raised in the pleadings at any time after the defendant has filed a defence but before the time and place for trial have been fixed.

213 (1) Une partie peut présenter une requête en jugement sommaire ou en procès sommaire à l’égard de toutes ou d’une partie des questions que soulèvent les actes de procédure. Le cas échéant, elle la présente après le dépôt de la défense du défendeur et avant que les heure, date et lieu de l’instruction soient fixés.

...

[...]

Summary Judgment**Jugement sommaire****Facts and evidence required****Faits et éléments de preuve nécessaires**

214 A response to a motion for summary judgment shall not rely on what might be adduced as evidence at a later stage in the proceedings. It must set out specific facts and adduce the evidence showing that there is a genuine issue for trial.

214 La réponse à une requête en jugement sommaire ne peut être fondée sur un élément qui pourrait être produit ultérieurement en preuve dans l’instance. Elle doit énoncer les faits précis et produire les éléments de preuve démontrant l’existence d’une véritable

If no genuine issue for trial

215 (1) If on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.

Genuine issue of amount or question of law

(2) If the Court is satisfied that the only genuine issue is

...

(b) a question of law, the Court may determine the question and grant summary judgment accordingly.

Powers of Court

(3) If the Court is satisfied that there is a genuine issue of fact or law for trial with respect to a claim or a defence, the Court may

(a) nevertheless determine that issue by way of summary trial and make any order necessary for the conduct of the summary trial; or

(b) dismiss the motion in whole or in part and order that the action, or the issues in the action not disposed of by summary judgment, proceed to

question litigieuse.

Absence de véritable question litigieuse

215 (1) Si, par suite d'une requête en jugement sommaire, la Cour est convaincue qu'il n'existe pas de véritable question litigieuse quant à une déclaration ou à une défense, elle rend un jugement sommaire en conséquence.

Somme d'argent ou point de droit

(2) Si la Cour est convaincue que la seule véritable question litigieuse est :

[...]

b) un point de droit, elle peut statuer sur celui-ci et rendre un jugement sommaire en conséquence.

Pouvoirs de la Cour

(3) Si la Cour est convaincue qu'il existe une véritable question de fait ou de droit litigieuse à l'égard d'une déclaration ou d'une défense, elle peut :

a) néanmoins trancher cette question par voie de procès sommaire et rendre toute ordonnance nécessaire pour le déroulement de ce procès;

b) rejeter la requête en tout ou en partie et ordonner que l'action ou toute question litigieuse non tranchée par jugement sommaire soit

trial or that the action be conducted as a specially managed proceeding.

instruite ou que l'action se poursuive à titre d'instance à gestion spéciale.

[49] In *Canada (Citizenship and Immigration) v. Mahendran*, 2024 FC 30, Justice Southcott reviewed the principles applicable to a motion for summary judgment at paragraphs 20 to 22 as follows:

[20] ... Recently, in *Canmar Foods*, the Federal Court of Appeal stated that the underlying rationale of summary judgments is that a case ought not to proceed to trial, with all the consequences that would follow for the parties and the costs involved for the administration of justice, unless there is a genuine issue that can only be resolved through the full apparatus of a trial (at para 24).

[21] Rule 215(1) of the Rules provides that the Court shall grant summary judgment where the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence. The test on a motion for summary judgment is not whether a party cannot succeed at trial, but rather whether the case is clearly without foundation (*Canmar Foods* at para 24) or that the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial (*Orij*i at para 35; *Milano Pizza* at para 33; *Kaska Dena Council v Canada*, 2018 FC 218 at para 21; *Canmar Foods* at para 24). As such, claims that are clearly without foundation should not take up the time and incur the costs of a trial (*Orij*i at para 35).

[22] Summary judgment can only be granted where the necessary facts to determine questions of fact and law are found in the material before the Court (*AMR Technology Inc v Novopharm Limited*, 2008 FC 970 at para 6)...

[50] The Defendant raises the one-year time bar for the commencement of action under Article III (6) of the Hague-Visby Rules, as incorporated in the *Marine Liability Act, supra*. It argues that upon the law and the evidence, it is entitled to summary judgment on this basis. It

also pleads that it is an agent of the Carrier and entitled to the “forbearance of suit” clause contained in Clause 4 of the Bills of Lading which provides as follows:

4. Sub-Contracting and Indemnity

(1) Carrier shall be entitled to sub-contract on any terms whatsoever the whole or any part of the Carriage, including but not limited to loading, unloading, storing and warehousing.

(2) Merchant hereby agrees that no Servants or Agents are, or shall be deemed to be liable with respect to the Goods or the Carriage as Carrier, bailee or otherwise, and agrees not to file any claim against any Servant or Agent seeking to impose liability in connection with the Carriage. If any claim is made against any of the Servants or Agents, Merchant shall indemnify Carrier against all consequences thereof. Without prejudice to the foregoing, all rights, exemptions, defenses, and limitations of and exoneration from liability provided by law or by these Terms and Conditions, including the jurisdiction clause, shall be available to every Servant or Agent and Vessel which shall be entitled to enforce same against Merchant.

(3) The provisions of Clause 4(2) shall extend to claims of whatsoever nature against other persons chartering space on the carrying Vessel.

[51] The Plaintiff relies on the occurrence of a geographic deviation, that is from Karachi to Kolkata, as a defence to the Defendant’s motion.

[52] The Defendant contends that the Plaintiff “knew” by September 26 that the cargo was in Kolkata. It further submits that the cargo remained in Kolkata and deteriorated, due to the inactions of the Plaintiff in complying with requirements of the Indian customs authorities.

[53] Giving the Plaintiff the benefit of a doubt, alternate “start” dates of the limitation period, that is when the cargo “might have” arrived in Karachi and when the buyer cancelled its contract to purchase the cargo, will be considered.

[54] According to the affidavit of Mr. Saqué, filed on behalf of the Defendant, an estimated sailing time between Kolkata, India and Karachi, Pakistan is between 22 and 30 days. In my view, for the purposes of this motion, it is appropriate to take an average of those times, for an “estimated” sailing time of 26 days.

[55] The Defendant also argues that in any event, by May 5, 2021, the cargo was not in Karachi and the Plaintiff, by its own admission was aware of this fact.

[56] Finally, there is the date of April 27, 2021, when, according to the evidence of Mr. Bozzelli, the buyer of the lentils terminated the contract of purchase.

[57] The Defendant proposes that the one-year time limitation began to run, at the earliest, on September 26, 2020, and at the latest, on April 27, 2021. It highlights that this action was not begun until August 24, 2022.

[58] As noted above, the Statement of Claim in this proceeding was issued on August 24, 2022.

[59] That date is nearly 24 months after the “arrival” of the cargo in Kolkata, according to the evidence of the parties.

[60] It is nearly 21 months after the anticipated arrival of the cargo in Karachi.

[61] It is nearly 16 months after the Plaintiff received notice of the cancellation of the contract to purchase the cargo.

[62] The time bar is set out in clause 6 of the Bills of Lading. As noted by the Defendant, the shipment originated in a Canadian port and is subject to Canadian maritime law, including the *Marine Liability Act, supra*. That Act incorporates the Hague-Visby Rules which include a one-year time bar.

[63] Upon the evidence submitted, I find that the Plaintiff’s action was commenced beyond the one-year limitation period that is set out in the Bills of Lading. That same limitation of action is provided for by law, that is pursuant to the inclusion of the Hague-Visby Rules in the *Marine Liability Act, supra*.

[64] The Defendant has shown that the action is time-barred.

[65] The issue now becomes whether the time bar defence is defeated by the geographic deviation from Karachi to Kolkata.

[66] Geographic deviation as a defence has not been definitively recognized in Canada. The subject was considered by the Supreme Court of Canada in *Drew Brown Ltd. v. The "Orient Trader"* (1972), 34 D.L.R. (3d) 339 (S.C.C.), where Justice Spence, in dissent, said the following at page 354:

Having already determined that there was an unreasonable deviation in the performance of this marine contract which unreasonable deviation was not waived by the shipper, I am of the opinion that the effect in law is that the contract is at an end and apart from any procedural provisions as to the adjustment of the compensation no party can depend on the provisions of that contract. [...]

[67] The Plaintiff refers to the decision of the Commercial Court of England and Wales in *Dera Commercial Estate, supra*. It also refers to the decision of the Supreme Court of Canada in *Z.I. Pompey Industrie v. ECU-Line N.V.*, [2003] 1 S.C.R. 450 (S.C.C.), where the Supreme Court left the issue about the occurrence of a geographic deviation and its effect, to be determined by the court identified by the parties in any applicable forum selection clause, in that case.

[68] The Plaintiff relies upon the opinion of the late William Tetley in his book *Marine Cargo Claims*, 4th ed (Cowansville: Thomson Carswell, 2008) at pages 239 and 259:

[...] courts are encouraged to construe the contract as a whole (including any exemption or limitation clause) in the light of the circumstances of the case, in an attempt to ascertain whether the specific "deviation" which occurred was one which the parties may be said to have reasonably contemplated as falling within the scope of the exclusion or limitation of liability provision in their agreement. If the exclusion or limitation clause is found applicable to the particular deviation, a reasonableness test is then applied to determine whether or not the exclusion or the limitation is enforceable.

and

[...] In the U.K., and therefore throughout the Commonwealth as well, there is now uncertainty as to whether unreasonable geographic deviation still deprives the carrier of the Hague Rules package limitation or other defences. [...]

[69] Relying upon the writings of Professor Tetley, the Plaintiff submits that a geographic deviation from the agreed course of carriage should be accepted as a complete answer to the time limitation defence advanced by the Defendant.

[70] I am not persuaded by the Plaintiff's arguments on this point. Although academic writings can shape developments in the law, I note the comments of Justice Côté in *R. v. McGregor*, 2023 SCC 4 at paragraph 22:

[22] To be sure, this Court has taken notice of scholarly writings in reconsidering the soundness of its own precedents (see *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at paras. 39 and 209; *Nishi v. Rascal Trucking Ltd.*, 2013 SCC 33, [2013] 2 S.C.R. 438, at para. 28; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489, at para. 29; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, at paras. 86-88, 146-48 and 235-46; *R. v. Robinson*, [1996] 1 S.C.R. 683, at para. 39; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, at p. 1042; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, at pp. 765-71; *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299, at pp. 421-23; *R. v. Bernard*, [1988] 2 S.C.R. 833, at pp. 865-68). This is not to say, of course, that the judiciary is bound to adopt the prevailing approach proffered in the scholarship or that academic criticism is a sufficient reason not to apply the principles of *stare decisis* (see *Fraser*, at para. 86; *R. v. Tran*, 2010 SCC 58, [2010] 3 S.C.R. 350, at paras. 28-29; *Friesen v. Canada*, [1995] 3 S.C.R. 103, at paras. 56 and 58; *B. (K.G.)*, at pp. 774-77)...

[71] No Canadian court has recognized geographic deviation as a defence to a time limitation in respect of a contract of carriage by water.

[72] In *Dera Commercial Estate, supra*, the geographic deviation in issue occurred with the knowledge of the plaintiff but without its consent.

[73] That is not the situation here.

[74] Upon the evidence submitted, the geographic deviation here, that is delivery at Kolkata rather than Karachi, was done without the knowledge of the Plaintiff.

[75] In *Z.I. Pompey, supra*, the Supreme Court of Canada considered arguments about the effect of a geographic deviation. However, the determinative issue before that Court was whether the proceedings in Canada should be stayed in view of a forum selection clause in the contract of carriage.

[76] At paragraphs 31-36, the Supreme Court of Canada said the following about the issue of a geographic deviation:

[31] Issues respecting an alleged fundamental breach of contract or deviation therefrom should generally be determined under the law and by the court chosen by the parties in the bill of lading. The “strong cause” test, once it is determined that the bill of lading otherwise binds the parties (for instance, that the bill of lading as it relates to jurisdiction does not offend public policy, was not the product of fraud or of grossly uneven bargaining positions), constitutes an inquiry into questions such as the convenience of the parties, fairness between the parties and the interests of justice, not of the substantive legal issues underlying the dispute. See *Mackender v. Feldia A.G.*, [1966] 3 All E.R. 847 (C.A.), per Lord Denning, at pp. 849-50, and per Lord Diplock, at p. 852...

[32] The position adopted by the Court of Appeal would remove many disputes from the reach of a widely framed forum selection clause by the mere allegation of various types of wrongful conduct. In my view, where, as here, the parties agree that claims or

disputes arising under or in connection with a bill of lading are to “be determined by the courts in Antwerp and no other Courts”, a proceeding in which one party contends that the other party deviated from the agreement such as to give the former the right to terminate or void the contract remains a proceeding in respect of a claim or dispute arising under or in connection with the bill of lading: *Fairfield v. Low* (1990), 71 O.R. (2d) 599 (H.C.), at pp. 605-8; *Ash v. of Lloyd’s Corp.* (1992), 9 O.R. (3d) 755 (C.A.), at p. 758, leave to appeal refused, [1992] 3 S.C.R. v; *Morrison, supra*, at paras. 13 and 19. See also *Drew Brown Ltd. v. The “Orient Trader”*, [1974] S.C.R. 1286, per Ritchie J., at p. 1288, and per Laskin J., at p. 1318, where an alleged deviation was found not to displace an otherwise valid choice of law clause.

[33] The conclusion that allegations of deviation or fundamental breach are matters arising under the contract that should not be considered in determining whether to give effect to a forum selection clause is supported by the construction approach to fundamental breach considered by our Court in *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, a case concerning the use of fundamental breach in the context of time limitation provisions. Discussing *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426 (a case involving fundamental breach in the context of clauses excluding liability), the Court said this, at para. 52:

[W]hether fundamental breach prevents the breaching party from continuing to rely on an exclusion clause is a matter of construction rather than a rule of law. The only limitation placed upon enforcing the contract as written in the event of a fundamental breach would be to refuse to enforce an exclusion of liability in circumstances where to do so would be unconscionable, according to Dickson C.J., or unfair, unreasonable or otherwise contrary to public policy, according to Wilson J.

In my view, the policy rationale in support of the construction approach applied to exclusion and time limitation clauses is equally applicable to forum selection clauses in bills of lading.

...

[36] Given my conclusions, I do not consider it necessary to address the issue of the relationship between deviation and fundamental breach. Suffice it to say that, in this case, either

allegation concerns a dispute arising under or in connection with the bill of lading...

[77] The Defendant, in the affidavit of Mr. Saqué, admits that the cargo was discharged in Kolkata, India on September 20, 2020.

[78] There is no evidence that the cargo left Kolkata, India for Karachi, Pakistan.

[79] In my opinion, the motion here primarily raises questions of law: that is whether a geographic deviation occurred and if so, its effect, and the effect of clause 4 of the Bills of Lading, that is the alleged forbearance of suit clause.

[80] The test upon a motion for summary judgment is whether a genuine issue for trial is disclosed.

[81] The Plaintiff initially contracted for delivery of the cargo of lentils to Kolkata, India. It then asked for delivery of the cargo to Karachi, Pakistan. According to the affidavit of Mr. Bozzelli, the Plaintiff learned that the cargo “arrived” in Kolkata on or about September 29, 2020. The Plaintiff argues that delivery in Kolkata, not Karachi, amounts to a geographic deviation upon which it can rely to defeat the one-year limitation period to commence litigation.

[82] Did the arrival of the cargo in Kolkata amount to a “geographic deviation”?

[83] The contract of carriage between the parties, as evidenced by the two Bills of Lading referred to above, provided for delivery of the cargo of lentils in Karachi, Pakistan. The cargo was not delivered to that port.

[84] Upon the basis of the evidence submitted by the parties, I find that any deviation occurred when the cargo “arrived” in Kolkata, on or about September 29, 2020.

[85] Failure to complete the voyage contracted for constitutes a geographic deviation. The cargo was supposed to be delivered to Karachi, Pakistan. It was not.

[86] I find that there was a deviation. The question then is the legal effect of that deviation upon the time bar defence raised by the Defendant to the action commenced by the Plaintiff.

[87] According to the applicable law, that is the language of Article III of the Hague-Visby Rules as incorporated in the *Marine Liability Act, supra*, an action for loss of or damage to cargo is to be commenced within one year “in any event”. The meaning of the words “in any event” have been considered by the England and Wales Court of Appeal, and the Supreme Court of the United Kingdom in recent cases. Following those decisions, which are of persuasive value in Canada, I conclude that the one-year time limitation is not defeated by the geographic deviation of which the Plaintiff complains.

[88] In *Fimbank, supra*, the central issue upon appeal to the Supreme Court of the United Kingdom was the application of Article III (6) of the Hague-Visby Rules to claims that arise

after discharge of the cargo and specifically to claims of misdelivery. That Court said “yes”, noting at paragraph 38 that both the English and French texts of the Rule support that interpretation that the one-year time bar applies in “all” cases.

[89] The Court, at paragraph 39, observed that the time bar applies to claims in respect of “all liability”. For greater clarity, the Court spelled out the breadth of protection conferred by the Hague-Visby Rules in paragraph 112 as follows:

Secondly, the addition of article IV *bis* which provides: “The defences and limits of liability provided for in these Rules shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or in tort...” This makes it clear that the application of the Rules is not limited to claims for breaches of obligations under the Rules but extends to all breaches of duty, whether in contract, tort or bailment...

[90] In the present matter, the Plaintiff claims damages for the loss of the sale of the cargo of lentils to a buyer in Karachi. It pleads that the sale was lost because the cargo was not delivered to Karachi. In its Statement of Claim it advanced claims for breach of contract and in negligence.

[91] The Plaintiff raised the issue of deviation only in response to the Defendant’s motion for summary judgment, as a defence to the time limitation argument that is a basis for the Defendant’s motion.

[92] Although the facts in *Fimbank, supra* are different from those arising in the present action, the statement of principle is relevant and applicable.

[93] The one-year time limitation set out in Article III, Rule 6 of the Hague-Visby Rules is to be interpreted broadly and applied generally.

[94] The fact that the *Happy Ranger, supra*, decision dealt with an issue as to limitation of liability does not detract from the relevance of its interpretation of the words “in any event”, for the purpose of this motion.

[95] In my opinion, the geographic deviation here falls within the meaning of the words “in any event”. The geographic deviation does not defeat the time bar limitation raised by the Defendant.

[96] Deviation from contractual terms can be raised as an aspect of fundamental breach of contract, as discussed by the Supreme Court of Canada in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, [2010] 1 S.C.R. 69.

[97] In *Tercon, supra*, the Supreme Court of Canada addressed a broad question about exclusion clauses and the engagement of issues of public policy in enforcing them.

[98] The public policy behind the time bar in the present case is well-established and needs no justification, especially in the context of maritime trade, which is an international undertaking.

[99] Applying the decision in *Fimbank, supra*, the decision in *Tercon, supra*, does not assist the Plaintiff.

[100] The Plaintiff pleads a breach of a contract of carriage. The terms of that contract are set out in the two Bills of Lading referred to above.

[101] The terms of the contract include a forbearance of suit clause. In the usual course, the terms of the contract are subject to interpretation on the basis of the ordinary and grammatical meaning of the words used, consistent with the surrounding circumstances known to the party when the contract was made; see the decision in *Corner Brook (City) v. Bailey*, [2021] 2 S.C.R. 540.

[102] Clause 4 of the Bills of Lading is headed “Sub-Contracting and Indemnity”.

Subparagraph 2 of that clause provides as follows:

Merchant hereby agrees that no Servants or Agents are, or shall be deemed to be liable with respect to the Goods or the C as Carrier, bailee or otherwise, and agrees not to file any claim against any Servant or Agent seeking to impose liability in connection with the Carriage. If any claim is made against any of the Servants or Agents, Merchant shall indemnify Carrier against all consequences thereof. Without prejudice to the foregoing, all rights, exemptions, defenses, and limitations of and exoneration from liability provided by law or by these Terms and Conditions, including the jurisdiction clause, shall be available to every Servant or Agent and Vessel which shall be entitled to enforce same against Merchant.

[103] Clause 1 defines “Servants or Agents” as follows:

includes the owners, managers and operators of any Vessel (other than Carrier), master, officers and crew of the Vessel(s), charterers, slot and space charterers, the Vessel, all underlying carriers, bailees, direct and indirect subcontractors, stevedores, terminal and groupage operators, road and rail transport operators, or any other party employed by or on behalf of Carrier, or whose services or equipment have been used to perform this contract whether in direct contractual privity with Carrier or not.

[104] The Plaintiff has sued “Hapag-Lloyd (Canada) Inc.” as the Defendant. Mr. Bozzelli deposed in his affidavit, filed on behalf of the Plaintiff, in response to this motion for summary judgment, as follows:

HL Canada is known to ETG as being the Canadian subsidiary or associate of the global shipping company Hapag-Lloyd... We have no knowledge as to the actual relation between HL Canada and Hapag-Lloyd.

[105] The principles reviewed in *Ford Aquitaine Industries S.A.S. v. Canmar Pride (Ship)*, 2004 FC 1437 and *Timberwest Forest Corp. v. Pacific Link Ocean Services Corp.* 2008 FC 801, aff'd 2009 FCA 119 are relevant.

[106] I refer to paragraph 37 of *Ford Aquitaine, supra*, where this Court said the following:

[37] As to the presence of the owners of the vessel, I think as well that both OOCL and the vessel owners themselves are justified in seeking a stay of the Ford action against the vessel owners under paragraph 50(1)(b) of the *Federal Courts Act* since, as mentioned previously, Ford, in the TSM agreement - and more specifically in clause 25 of the OOCL standard bill of lading, a clause reproduced in para. [11], *supra* - undertook not to make any claim or allegation against any subcontractor with which OOCL might wish to do business, which in this case covers any bar to litigation against the vessel owners that was in fact relied on by OOCL under the SLCS agreement (*Nippon Yusen Kaisha v. International Import and Export Co. Ltd. "The Elbe Maru"*, [1978] 1 Lloyd's Rep. 206, page 210; *B.H.P. v. Hapag-Lloyd Aktiengesellschaft*, [1980] 2 N.S.W.L.R. 572; *The Nedlloyd Columbo*, [1995] 2 HKC 655 (Hong Kong Court of Appeal)).

[107] The forbearance of suit clause is clear. It is not uncommon. This Court and the Federal Court of Appeal have upheld such clauses. I see no reason to depart from the jurisprudence of this Court concerning such clauses.

[108] The named Defendant is an agent of H-L, Hamburg. I agree with the submissions of the Defendant that in these circumstances, Hapag-Lloyd (Canada) Inc. is protected against suit.

[109] The Defendant has successfully established that the one-year time limitation contained in the contract of carriage is valid and enforceable, according to the applicable law and jurisprudence. The argument about the effect of a geographic deviation, raised by the Plaintiff, as a defence to the limitation argument, is not sound.

[110] The Defendant has also successfully pled the forbearance of suit against it, as an agent of the Carrier.

[111] In the result, the motion for summary judgment will be granted, and the Plaintiff's action will be dismissed with costs to the Defendant.

ORDER IN T-1741-22

THIS COURT'S ORDER is that the motion is granted and the action is dismissed with costs to the Defendant.

"E. Heneghan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1741-22

STYLE OF CAUSE: ETG COMMODITIES INC. v. HAPAG-LLOYD
(CANADA) INC.

PLACE OF HEARING: HEARD BY WAY OF VIDEOCONFERENCE

DATE OF HEARING: FEBRUARY 6, 2024

**FURTHER SUBMISSIONS
RECEIVED:** JULY 31, 2024, AUGUST 13, 2024, DECEMBER 17,
2024, DECEMBER 30, 2024 & DECEMBER 31, 2024

REASONS AND ORDER: HENEGHAN J.

DATED: MARCH 14, 2025

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