Federal Court  Cour fédérale

Date: 20101222

Docket: T-1478-05

Citation: 2010 FC 1318

Ottawa, Ontario, December 22, 2010

PRESENT: The Honourable Justice Johanne Gauthier

BETWEEN:

CALOGERAS & MASTER SUPPLIES INC.

Plaintiff

and

**CERES HELLENIC SHIPPING ENTERPRISES LTD. and
THE OWNERS AND ALL OTHERS INTERESTED IN
THE SHIP "CAP LAURENT" and THE SHIP "CAP LAURENT"
and THE OWNERS AND ALL OTHERS INTERESTED
IN THE SHIP "CAP ROMUALD" and THE SHIP "CAP ROMUALD"
and THE OWNERS AND ALL OTHERS INTERESTED IN
THE SHIP "CAP GEORGES" and THE SHIP "CAP GEORGES"
and THE OWNERS AND ALL OTHERS INTERESTED
IN THE SHIP "CAP LEON" and THE SHIP "CAP LEON"
and ALL OWNERS AND OTHERS INTERESTED IN
THE SHIP "CAP JEAN" and THE SHIP "CAP JEAN"
and THE OWNERS AND ALL OTHERS INTERESTED
IN THE SHIP "CAP DIAMANT" and THE SHIP "CAP DIAMANT"
and THE OWNERS AND ALL OTHERS INTERESTED IN
THE SHIP "CAP PIERRE" and THE SHIP "CAP PIERRE"**

Defendants

REASONS FOR JUDGMENT AND JUDGMENT

[1] The plaintiff Calogeras and Master Supplies Inc. (Calogeras) seeks payment of unpaid invoices for goods and services supplied at St-Romuald, Quebec, to various ships under the

management of Ceres Hellenic Enterprises Ltd. (Ceres) as well as interest at a rate of 26.824% on all invoices paid after the agreed term since August 2002.[1]

[2] It is not disputed that the services referred to in the allegedly unpaid invoices were provided. Thus, one would normally think that this case would be easy to deal with. Unfortunately, it was anything but that. On the last day of the two-session trial, after a change of solicitor took place on the final day of the first leg of the trial, defendant counsel described the case as a "memorable trial". I agree.

[3] In effect, as will be explained later on, the situation was made so complex by a series of blunders and the plaintiff's lack of transparency during the parties' relationship that it became almost impossible for the plaintiff to establish its claim. Calogeras' last counsel[2] described the situation as of June 14, 2001 as an "incredible mess" (cafouillis incroyable[3]).

Background[4]

[4] The parties began their business relationship in September 1998 and ended it sometime in March 2005.[5] Until the beginning of 2002, it appears that things went rather smoothly as Ceres consistently paid Calogeras' invoices on time. Then, in 2002 because of what was referred to as bad

[1] This is according to the latest amendment.
[2] During this relationship it appears that Calogeras had no less than four different law firms representing it.
[3] Transcript of June 14, 2010, p. 52.
[4] The Court will refer here only to the most relevant events, it being understood that it considered all the evidence produced. It would simply be impossible to relate all that went on during the particular relationship of these parties or during the proceedings.
[5] The Statement of Claim at para. 9 states that the overdue balance remains the period from May 2004 to March 2005. The evidence however indicates that few services were rendered after January 2005.

investments,[6] Ceres experienced cash flow problems and it appears from the terms agreed to by Calogeras (90 days then 120 days) that the supplier agreed to finance Ceres at least on a short term basis. There is a dispute as to whether it was also agreed that, in exchange for future business, Calogeras would not charge the interest referred to in its invoices and then in its General Terms and Conditions (edition 2002) (hereinafter GTC) on overdue amounts. The evidence which will be discussed in more detail later on appears to indicate that the parties have played a game of hide and seek in respect of that issue.

[5] Although it is agreed that, according to the usual practice, a statement of account listing all amounts outstanding was sent monthly, at least until January 2005, only a few samples of such statements were produced.[7] The most relevant ones are, in my view, TX 65 (statement of account dated December 22, 2004 attached to the first demand letter sent by Calogeras' lawyer dated December 23, 2004), TX 69 (statement of account dated January 25, 2005 sent by Mr. Moutsios of Calogeras to Mr. Lagonikas of Ceres on January 25, 2005) and TX 89 (statement of account of August 16, 2005 attached to the second letter of demand sent by the second counsel for Calogeras on August 18, 2005 (TX 91)). It was shortly after this second letter of demand issued in August 2005 that a statement of claim was issued together with a warrant of arrest.

[6] Before discussing the proceedings *per se*, it is useful to refer to two events which are particularly significant.

---

[6] Mr. Moutsios referred to the building of new ships.
[7] For example, TX 24 (March 2003), TX 39 (November 2003), TX 51 (July 2004, TX 52 (August 2004).

[7] In effect, although Calogeras (particularly through Mr. Moutsios) regularly reminded Ceres of the need to pay their invoices on time,[8] there were two main crises during this relationship: first in November 2003 and then in December 2004/January 2005.

[8] In November 2003, Calogeras advised Ceres that its bank, who had an assignment on Calogeras' receivables, was insisting that Calogeras lower the outstanding amount owed by Ceres. At that time, the parties discussed a payment plan and Calogeras appears to have even considered changing banks and extending Ceres' future terms of payment to 150 days. During that period, Mr. Lagonikas, the chief accountant of Ceres, allegedly stated that if Ceres was forced to pay the interest charges set out in Calogeras' statements of account or any interest in the future, it would simply stop doing business with Calogeras.[9] Ceres claims that Mr. Kottos, the President of Calogeras, agreed to waive Calogeras' right to claim such interest. However, in an e-mail dated November 10, 2003 from Mr. Kottos to Mr. Lagonikas, an attached letter signed by Mr. Moutsios, indicates that as far "as the interest of $63,148.61 we negotiate at a later date". [10] Apparently this amount was the total of all invoiced[11] interest charges included in Ceres' statement of account as of that date.

---

[8] Mr. Moutsios visited Ceres in Greece regularly and Mr. Kottos got involved at least twice, TX 23 and TX 40.

[9] Prior to November 2003, Mr. Lagonikas testified that Mr. Moutsios had advised him that the interest charges shown on some of the statements of account were there solely because of Calogeras' bank. They were not to be paid. He also testified that he spoke from the Monaco airport with Mr. Kottos about the payment of interest on November 7 (the Friday before receiving TX 39). He also spoke with Mr. Kottos about the proposal set out by Mr. Moutsios, after his return to Greece during the week of November 10, 2003. This is disputed by Mr. Kottos who said in reply that he never spoke to Mr. Lagonikas before the institution of these proceedings. Calogeras did not present evidence to contradict the alleged statement made by Mr. Moutsios to Mr. Lagonikas. However Mr. Moutsios testified in chief that sometime in March or January 2003 he gave a copy of Calogeras' GTC to Mr. Lagonikas and said that "from **now** on we charge interest"; Transcript of 1 March 2010, p. 78.

[10] According to Mr. Moutsios, this was only meant to give Ceres a break.

[11] This term is used to refer to charges that have been given an account receivable number such as INT-000000050 and have been listed in a statement of account.

[9] It appears that there were no further negotiations or discussions in that respect until January 2005. However, it also appears that Calogeras' statements of account continued to show only the invoiced interest charges incurred as of November 2003. In effect, there is no evidence that Calogeras ever invoiced Ceres for new interest charges before December 2004, and this, despite the fact that the schedule of payment proposed in the November 10, 2003 letter was not adhered to.

[10] The second crisis occurred in December 2004, when Calogeras sent a letter of demand through its first legal counsel advising that Ceres' failure to pay all outstanding amounts set out in the statement of account attached thereto would result in the arrest of vessels managed by Ceres. This statement of account (TX 65) included various new interest charges (about $61,250) all dated December 2004 in addition to the interest charges invoiced prior to November 2003.[12] According to Mr. Kottos, it is impossible to relate these charges to any specific invoices or services rendered. It also appears that the percentage used to calculate these interest charges was not the one set out in Calogeras' GTC, but rather a default rate[13] set in by Calogeras' accounting software. In this December statement of account all outstanding invoices were described as overdue, presumably on the basis that Ceres had lost the benefit of the 120-day term by failing to pay on time (see paragraph 7D, Annex 1). Finally, the long-term charterer of Ceres' vessels calling at St-Romuald, Quebec, was notified of Calogeras' claim then amounting to $905,063.27 and of the possibility of an arrest.

[12] Except for two invoices INT-000000068 and INT-000000075 relating to the Ship MAASSLOT L which no longer appeared.
[13] 18% versus 26.824% per annum or .6% per month instead of 2% per month.

[11] Ceres promptly contacted Calogeras' lawyer with detailed comments on this statement of account. However, Calogeras could not be reached at least for a couple of weeks during that period. Apparently, Calogeras had ceased its operations and Ceres had to use another ship supplier for its vessels calling at St-Romuald on a weekly basis.

[12] Finally, in mid-January 2005, Mr. Lagonikas was able to speak with Mr. Moutsios and he asked him to send a revised up-to-date statement of account stating only what was really owed by Ceres to Calogeras.[14] In his view, based on their prior agreement, same should not include any invoice for interest charges. This conversation was carried out in Greek and could not be misunderstood by Mr. Moutsios. This request was also confirmed in an e-mail dated January 21st, 2005 (TX 68).

[13] Shortly thereafter a revised statement of account dated January 25, 2005 (TX 69) was sent showing a total amount outstanding of $834,187.99, of which $351,744.37 was now described as current and $482,100.12 as past due. In the said statement, all invoiced interest charges were deleted. According to Mr. Moutsios, for reasons unknown and allegedly never understood by him, Ceres had asked him to send a statement of account showing only the outstanding invoices for services rendered. Apparently, this is reflected in his e-mail accompanying the said revised statement where he says: "this list is complete and there are no other outstanding invoices owed to us by Ceres Hellenic Shipping Enterprises Ltd.".

[14] Mr. Moutsios disputes what exactly was discussed and requested. This will be dealt with later on.

[14] On January 25, 2005, Calogeras also apologized to Ceres' operational department for the inconvenience it may have caused noting that they wanted to continue their relationship and that Calogeras was even going to expand operations into the U.S., particularly, New York and Houston.

[15] As mentioned, out of necessity, Ceres had to use another ship supplier in December and the personnel in the purchasing department clearly had some hesitation to revert to business as usual. By that time, Ceres had also received a letter of demand from a sub-contractor of Calogeras claiming that its invoices were unpaid since September 2004. That said, it appears that subject to confirmation of Calogeras' financial situation, Ceres was willing to keep Calogeras as a supplier but as a back-up or in competition with the other suppliers used by Ceres in December-early January 2005. On that basis Calogeras did supply some services in early 2005. However, in March 2005, Ceres' principals sold the tanker fleet (CAP vessels) calling at St-Romuald and their management was transferred elsewhere.

[16] After receiving the January 25th statement of account, requesting missing invoices and seeking notification to their charterer that there was no further dispute, Ceres made several payments between January 28 and June 17, 2005, amounting to $727,198.65 (see TX 1).[15] In light of the fact that several invoices listed in TX 69 had already been paid in August 2004, according to Ceres' records, these payments were in the defendant's view sufficient to cover all amounts owed to Calogeras.[16]

[15] The amount paid on March 1, 2005 was $498,352. It was meant to cover, according to Ceres, all amounts due as per TX 69.

[17] Despite Ceres' request for updated statements of account, none were sent until August 2005. However, on February 23, 2005, Mr. Kottos wrote to Ceres advising that unless Calogeras received payment of $969,168.30 by Monday, February 28, 2005, it would be forced to initiate legal action (TX 76). Then on about March 21, 2005, Mr. Moutsios[17] (with Mr. Bolanis) met with various representatives of Ceres in Greece to tell them that Calogeras wanted payment of all its outstanding invoices as well as interest. On June 15, 2005, Mr. Moutsios wrote to Mr. Lagonikas stating that an amount of $136,132.25 for invoices for services rendered was still outstanding plus $172,884.90 for interest charges.

[18] It is to be noted that since the beginning of their relationship with Calogeras, Ceres sent detailed instructions as to which invoices were being paid with each of its bank transfers. Ceres also appears to have applied various credit notes referred to in the said instructions. This was originally disputed by Messrs. Kottos and Moutsios, who claimed that on at least four or five occasions those instructions were missing.[18] Considering the documentary evidence produced which indicated that such instructions were indeed usually given and that when[19] said instructions were missing or unclear Calogeras did ask for those details, the position adopted by Calogeras during final argument was much more nuanced, admitting that indeed as a general rule Calogeras did apply Ceres' instructions.[20]

---

[16] See also Exhibib B.
[17] Mr. Moutsios had apparently asked him to apply some pressure on Ceres in order to accelerate the payment of the overdue invoices.
[18] It is not clear from Mr. Moutsios' testimony later on if what he meant was simply that Ceres although referring to invoices numbers did not say what amount they were paying in respect of those invoices. (Transcript March 2, at pages 33 to 36 and 44)
[19] At least in 2002, 2003 and 2005 (see TX 9, 13, 31 and 80).
[20] It is likely that by that time Calogeras knew of the sale of the Cap vessels.

[19] However, in August 2005, apparently on the advice of their second counsel, Calogeras re-allocated the "payments" received to invoiced and uninvoiced interest charges adjusted to the contract rate (26.824%) and thereafter to the oldest invoices since December 2001.[21] Surprisingly, towards the end of the trial, the Court was advised by Calogeras' fourth counsel that this re-allocation in fact only applied to three of the payments received in 2005. Apart from this admission or statement of counsel during arguments, the evidence in this respect remains unclear. Be it as it may, it is on the basis of such re-allocation that the statement of account dated August 16, 2005 was sent to Ceres by Calogeras' second lawyer showing an outstanding amount of $740,359.90 which, according to the parties, comprised about $604,000 for services rendered between May 2004 and March 2005 and about $136,000 for interest charges.

[20] The day after receiving Calogeras' lawyer's second letter of demand and this statement of account, Ceres sent a reply listing the date of payment of each invoice set out in this last statement (excluding those for interest charges). This exercise was based on the payment instructions attached to Ceres' bank transfers.

[21] The evidence in this respect is not particularly clear in light of contradictory statements by Mr. Kottos on discovery and at trial and by Mr. Moutsios. The weight of the evidence in that respect was particularly diminished during their cross-examination.

[21] After the institution of the proceedings, a letter of guarantee was issued for an amount of $1,600,000. [22] Also, given that Calogeras is not in operation anymore, the plaintiff was ordered to put up $115,000 as security for costs.[23]

[22] Ceres proceeded to an examination of discovery of Mr. Kottos, Mr. Moutsios and Mr. Gassios, a technology consultant for Calogeras[24]. It appears that Calogeras did not exercise its right to examine on discovery a representative of Ceres. Expert reports were exchanged and a date for trial was set out.

[23] At the first Trial Management Conference in February 2010,[25] having perused, with the consent of the parties, the expert reports filed by them, the Court advised the parties that Calogeras' expert report was not particularly helpful considering that it consisted essentially of a very thick accounting printout based on documents that were not all provided to Ceres or its expert, such as invoices, details of interest charges, etc. After lengthy discussions in respect of various other relevant issues, the parties agreed that at the trial they should focus on legal issues rather than quantum. Thus, the Court issued an Order for a meeting to be presided by the Case Manager (Madam Prothonotary Tabib) between counsel and their experts to deal with a series of scenarios to be considered and quantified. On February 16, 2010, after several hours of discussions, it became

[22] It appears from the Motion Record of Ceres in respect of Calogeras' motion for leave to file a further revised list of documents as well as new documents, that the cost of such a bank guarantee is about US $1,200 per month.
[23] Order of Madam Prothonotary Tabib dated 27 March 2009.
[24] Apparently, Mr. Moutsios who testified during the first leg of the discovery was not sufficiently informed to answer Ceres' questions.
[25] Four Trial Management Conferences were held in this matter, the first on February 8 and 9, 2010, then on February 18, 2010, April 16, 2010 and May 10, 2010.

clear that the parties could not come to any agreement. Apparently Mr. Moutsios discovered some discrepancies in the schedule of payment used by the two experts. More will be said about this later.

[24] The Court also ordered that all documents referred to in Calogeras' expert report be served and filed no later than February 11, 2010. The parties also had until February 12, 2010 to serve an amended affidavit(s) of documents[26] as well as copies of any document not already forwarded to the other party. Finally, the plaintiff was given until February 15, 2010 to serve and amend its Statement of Claim, given that it was apparent that it did not include the claim as calculated by its expert, which appeared to reduce the amount claimed for services rendered from $604,000 to $104,653.25 (in respect of 17 invoices provided to the defendant shortly before trial) and increase plaintiff's claim for interest charges.

[25] On February 18, 2010, Calogeras' counsel sought a Trial Management Conference because of a dispute in respect of its revised affidavit of documents. It became obvious that leave of the Court was required in respect of the filing of several documents. Given that Ceres intended to hotly contest the granting of such leave, a schedule was set out whereby Calogeras would present a formal motion to be heard on the first day of trial. The Court gave explicit instructions as to the details to be included in the revised list of documents and the motion. The Registry was even asked to alert plaintiff's counsel about paragraphs 81 and 82 of the *Federal Courts Rules* to avoid any dispute in that respect.

[26] For example, the plaintiff had not listed the 17 allegedly unpaid invoices totalling $104,653.25 as per Calogeras' expert report.

[26] Despite this, the proposed new affidavit of documents attached to Calogeras' motion was not properly detailed while the affidavit in support of said motion was signed by Calogeras' counsel. As expected, Ceres contested the motion on various bases including that no explanation was given for the delay in providing this additional documentation, that the affidavit had been signed by counsel without leave of the Court and that if permission was granted at this late date it should be entitled to special costs to cover the prejudice it suffered.

[27] As it was not clear at all how crucial this documentation was to establish the plaintiff's claim (plaintiff's main argument), the Court decided to take the motion under reserve and to start the evidence in chief.

[28] Because of a problem with locating Calogeras' expert and the possibility that the Court could still decide to appoint an assessor (although the parties had not been able to come up with any suggestions and had indicated that this might be too costly), it was agreed that both sides would present all their factual evidence and that the expert evidence would be heard last.

[29] The first witness was Mr. Moutsios who described himself as a silent partner in Calogeras[27] who was particularly involved in the financial aspects of the company and the relationship with Ceres. During his testimony, he started testifying about a subject that had not previously been disclosed to the defendant for it was the result of an exercise that had just been carried out the weekend before trial. According to Mr. Moutsios, during the meeting with Madam Prothonotary

[27] He is the uncle of Mr. Kottos.

Tabib, Calogeras realized that there was a discrepancy between the amounts used by the parties[28] in their reconciliation because TX 90 failed to include old invoices starting with a number lower than 8129[29] and the payment received from Ceres in December 2001 ($119,530.52) had been split in two by Calogeras, resulting in a difference of $82,882. With that in mind, Calogeras had now tried to reconcile all of its accounts with the instructions for payment received from Ceres. It is not clear whether the plaintiff had ever done this before. As a result, Mr. Moutsios prepared a list of 137 invoices dated between 2001 and 2004 amounting to $131,919.94 for which Ceres had allegedly failed to give instructions for payment. This list was marked as Exhibit A, subject to an objection under reserve, after it was agreed that it would be dealt with as part of the motion filed by Calogeras. Apparently, at that time, this evidence was only meant to be a response to the defence set out by Ceres since the beginning of the proceedings. It was not the basis of the plaintiff's claim. Finally, Calogeras sought to introduce two additional volumes of invoices (volumes 31 and 32 not in the boxes of documents sent to the defendant a week before trial). These again were added to the documents to be considered as part of Calogeras' motion.

[30] In addition to Mr. Moutsios, Calogeras presented two lay witnesses: Mr. Kottos, its President, and Mr. Bolanis, a salesman who visited Ceres with Mr. Moutsios in 2003 and 2005. Ceres presented only one witness: Mr. Lagonikas. Ceres also filed various extracts from the examination for discovery (exhibits TX 111 and TX 112). The parties relied on two volumes of

[28] When Ceres' expert compared the total amount of invoices (receipt adjustments or applied receipt adjustments used by the Expert witness) with the total amount paid by Ceres he concluded that there was a maximum variance of $5,589.92 and thus that the claimant outstanding invoices balance was significantly overstated.
[29] Calogeras' invoices were issued in numerical order, the smaller number being the oldest.

documents filed by consent. The Court made it clear to them, however, that unless the documents were properly explained, the Court would not be in a position to give them much weight.

[31] During the cross-examination of Mr. Lagonikas, Calogeras' counsel attempted to obtain some admission in respect of the 137 invoices listed in Exhibit A.[30] In his answer to a question from the Court, Mr. Lagonikas acknowledged that given time and despite the fact that it might be difficult to find all of the applicable documentation, he could attempt to verify if those specific invoices which were not included in either the August 16, 2005 statement of account or the January 25, 2005 one had been paid or not. It was agreed that if the Court were to allow Exhibit A in evidence, Ceres would be entitled to respond with further evidence from Mr. Lagonikas.[31]

[32] After Calogeras' counsel had announced that he had a very brief reply (between 5 and 15 minutes), Mr. Kottos advised the Court that Calogeras had lost confidence in its counsel and wished an adjournment to enable him to find a replacement. After discussions, it was agreed that Calogeras' counsel would complete the plaintiff's reply and that the trial would be adjourned to enable Calogeras to appoint a new counsel who would present its expert evidence and its final arguments. At the time, it was made very clear that the factual evidence of both sides was closed, subject only to Ceres' right to provide additional evidence from Mr. Lagonikas should the Court allow the filing of Exhibit A.

---

[30] Total amount due $131,919.94 minus outstanding credit notes referred to during Mr. Moutsios' testimony of $27,010.73, giving a total claim in capital of $104,909.21.

[31] The Court was also to deal with Exhibit B, an e-mail that was sent in December 2004 by Ceres if the first documents listed in Calogeras' motion were admitted in evidence.

[33] At one of the Trial Management Conferences held before the resumption of trial, Calogeras' new counsel sought the right to amend the Statement of Claim in order to include an alternative basis for its claim which was, according to him, supported by the evidence presented during the first leg of the trial. As the Court was to deal with the issue of extra costs necessary to compensate the prejudice suffered by Ceres, if any, as part of Calogeras' motion (particularly in respect of Exhibit A) and subject to their right to amend their own defence to rely on time limitation, Ceres consented to the following amendments to paragraph 12:

> 12 a) As of August 16th, 2005 there remains overdue and owing by the Defendants to the Plaintiff a balance of CDN $740,359.90 in capital and interest in relation to goods or services supplied to the Defendant vessels for the period from May 2004 to March 2005, inclusive, said balance remaining after and resulting from the imputation of 648,378.72$ of Defendant's remittances to interest accrued on Plaintiffs' invoices paid after their due date, such invoices having been issued in relation to goods and services supplied to the Defendant's vessels within 3 years from said imputation.
>
> b) Alternatively, if Plaintiff's method of imputation of said Defendant remittances is not approved by this Court and if it is the imputation of the remittances as per Defendants' instructions which prevails, there still remains overdue and owing by Defendant to Plaintiff a balance of 761,795.00$ in capital and interest as of August 16, 2005 being 104,653.25$ of unpaid invoices and interest thereon of 175,324.22$ and 481,818.00$ of interest on other invoices paid after their due date, all such capital and interest being in relation to goods or services supplied to the Defendant vessels for the period from August 15, 2002 to March 2005, inclusive.
>
> (amendments underlined)

[34] In order to reduce costs, the parties also agreed to the filing of an affidavit from Mr. Lagonikas in lieu of further testimony. Obviously, if Calogeras wanted to cross-examine him, this could have been done by videoconference. However, Calogeras did not exercise such right and the affidavit was filed under reserve as exhibit TX 113 subject to the Court's decision in respect of Exhibit A. In the said affidavit dated May 26, 2010, Mr. Lagonikas, having checked Ceres' accounting records that were still available, came to the conclusion that $74,737.92 appeared to be outstanding in respect of 80 invoices listed in Exhibit A (from a total of 137).

[35] In their Statement of Defence, Ceres alleged that any claim for interest charges relating to invoices for services rendered before May 2004 was time-barred because the claim described in paragraph 12(b) of the Amended Statement of Claim constituted a new cause of action for which the time limitation could not have been suspended by the filing of the statement of claim in August 2005. With respect to the amount referred to in TX 113, Ceres agreed that if it became evidence, it would waive its right to rely on time limitation to avoid the payment of the invoices acknowledged to be due by Mr. Lagonikas.

[36] When the trial resumed in June 2010, Calogeras decided not to present any expert evidence and to rely instead on the admission(s) of Mr. Lagonikas in respect of 80 of the invoices listed in Exhibit A. It also disputed the validity of the deduction of credit notes referred to in paragraph 18 of TX 113 as well a few other deductions under paragraph 10 of the said affidavit. It was made clear that the claim referred to in paragraph 12(b) of the Amended Statement of Claim was strictly in respect of the invoices referred to in Mr. Lagonikas' affidavit in Exhibit A, even though the amount

set out in paragraph 12(b) on its face appears not to be the same.[32] It was well understood that by not presenting its expert, Calogeras renounced its claim to as calculated by the said expert in respect of 17 invoices.[33]

[37] Calogeras' new counsel then presented the Court with several Excel sheets which he had allegedly prepared to calculate the interest owing on each invoice paid after its due date at the "contractual" rate of 26.824% per annum. According to him, if the Court were to accept Calogeras' position that it was entitled to interest from the date of each of these invoices to the date of the institution of the proceedings in August 2005, there was no need for the plaintiff to present expert evidence to calculate this amount.

[38] Ceres presented Mr. Pavelic who was accepted as an expert accountant by the Court. Although Ceres filed his report which was originally meant as a reply to a report that is not before the Court, this witness' testimony focussed on what might be relevant to the Court with regards to the claim for interest and he explained the relevance of Calogeras' financial statements (TX 105 to 107) and general ledger (TX 108). Still, this testimony was not as useful as one would have hoped.[34]

[39] Calogeras bases its right to claim interest as well as reimbursement of its attorney fees, court costs and other collection costs[35] principally on the GTC which according to Calogeras apply to all

---

[32] Rather it is the amount found in Calogeras' expert report that was not filed before the Court.
[33] The actual basis or reasoning adopted by the said expert was never really explained to the Court as it is irrelevant.
[34] The Court found many unexplained entries in TX 108 including entries for interest charges prior to November 2003.
[35] In that respect Calogeras has only filed 3 accounts from their second counsel totalling $69,275.53, 2 accounts from their third counsel amounting to $92,221.51.Invoices from the expert that were not presented at trial were also included but the Court was advised that these had yet to be paid and need not be considered.

the above-mentioned transactions[36] but also on the terms appearing on their invoices since at least 2001. The GTC are included in Annex I to these reasons. They are to be read with the terms of Calogeras' other contractual documentation including its quotation, acknowledgement of order, delivery notes, etc.[37] However, according to this document, "[i]n case of inconsistency, the text of [these] general terms and conditions shall prevail".[38] Despite this, Calogeras' latest calculation of the interest claimed relies on a mention in their invoices which is contrary to what one finds in paragraph 7 of Annex I.

Analysis

[40] It is not disputed that there is no master agreement that regulated the relationship of the parties. Ceres was free to use any supplier it wanted and Calogeras had no right of exclusivity. Each purchase was made on the basis of a punctual request for quotation. Each quotation is thus to be construed as a distinct transaction to which certain terms of payment and conditions applied, which may have an impact on how the payment of prior distinct transactions are dealt with[39] (see for example, section 7(b) Annex I).

[36] Although the use of the word "edition" could suggest that there was another version of the GTC prior to 2002, the Court accepts Mr. Moutsios' testimony that Calogeras had no such terms before, apart from mentions appearing on their invoices and delivery notes.
[37] Only one sample of such documentation from 2004 was included in the record (TX 58). Some delivery notes and most invoices were filed in 32 volumes covering more or less years 2001 to 2005. These are part of Calogeras' motion under reserve.
[38] See Annex I, paragraph 1, last line.
[39] If the GTC applied, Calogeras would have a right to allocate payment made in respect of one transaction to a prior distinct transaction (obviously after having first applied such payment to any outstanding interest). However it is far from clear that section 7(b) could be applied in respect of transactions occurring before April 2003. In respect of those transactions the debtor had the right to give instructions in respect of its payments which the creditor had to follow. It is difficult to envisage how Calogeras could unilaterally affect this right of Ceres in respect of transactions entered into before the GTC were implemented.

[41] The parties made no representations in respect of the law applicable to such transactions. They appear to agree[40] that the Court must apply the general principles of common law and civil law that are part of Canadian Maritime Law as defined in the *Federal Courts Act* at sections 2 and 42.[41]

[42] The main issues to be determined are thus :

1) Does Calogeras have the right to claim the amounts set out in its August 16, 2005 statement of account? (paragraph 12(a) of the Amended Statement of Claim)
2) If not, does Calogeras have the right to re-calculate its claim on the basis of the instructions for payment received from Ceres? If so, can they also claim interest on all the invoices paid after their due date? (paragraph 12(b) of the Amended Statement of Claim)
3) Can Calogeras recover the attorney fees (TX 98) and the other court expenses set out in paragraph 7(e) of the GTC[42]?

[43] I must first deal with some of the documents that are the subject of Calogeras' motion referred to above. I say some because before the end of the trial, it was agreed that what was referred to in the motion as exhibit 12 would be marked by consent as TX 110.[43] The Court was advised when this was done that this document was more or less the same as exhibit TX 101. What

[40] See also paragraph 14(b) at Annex I.
[41] For this Court to have jurisdiction, the claim had to be a maritime claim subject to Federal Law (subsections 22(1) and (2)(m) and section 43). *ITO International Terminal Operators v.Midda Electronics Inc.* [1986] 1 S.C.R. 752, particularly at 766 and 781-782.
[42] A similar mention also appears on Calogeras' invoices.
[43] Exhibits 1, 2, 3 in the motion have already been included in the joint book of documents.

was referred to in the motion as exhibits 4, 5, 6 and 7 were documents that could only be entered in evidence if and when Calogeras' expert testified. They are, thus, not part of the evidentiary record.

[44] With respect to exhibit 13 (Tab 2 in the volume containing TX 110) the Court was given no explanation as to why this document is relevant to the claim as it now stands. There is no explanation either as to why a document purporting to describe Calogeras' internal records as of July 25, 2005 could not have been printed and produced earlier than February 15, 2010. It shall not be admitted in the evidentiary record.

[45] Turning now to the 32 volumes of invoices, the Court has decided to grant leave to Calogeras to file volumes 1 to 29 and volume 30 excluding the two last invoices (numbered IN0015134 and IN0015139). Obviously, Ceres had no opportunity to verify whether these volumes of invoices are complete and whether there are discrepancies between the amounts accepted by Ceres in its instructions to pay and the amounts invoiced. With respect to volume 32, only those invoices appearing after Tab 3 shall be part of the record given that the invoices in Tabs 1 and 2 are, in my view, irrelevant as they are not part of the invoices on which Calogeras based its claim for interest. I have no doubt that these should have been produced earlier if they were to have any useful purpose.

[46] Volume 31 purports to contain the 137 invoices listed in Exhibit A. For reasons that I will explain shortly, Exhibit A will enter into evidence, thus these invoices are relevant. Ceres had an opportunity to carefully examine them. This is the subject of Mr. Lagonikas' affidavit.

[47] As is readily apparent from the position taken by Calogeras' latest counsel and given the Court's conclusion in respect of the interest, it is obvious that Exhibit A is crucial to the plaintiff's case. No satisfactory explanation has been given to explain why the exercise carried out in a couple of days on the last weekend before trial was not done back in August 2005 when Ceres replied to Calogeras' second letter of demand or, at the very least, when Calogeras sought an alternative approach with the help of an expert the amount. Still, the Court has discretion to admit this evidence even if it does not meet all the criteria set out in *Canada (A.G.) v. Hennelly*,[1999] FCJ No 846 (CA) (see *Canada v. Hogervost* 2007 FCA 41, [2007] FCJ No 37 at para 33) if it is convinced that it is in the interest of justice to do so and if the prejudice to the defendant can be properly compensated. In that respect, there is no doubt in my mind, that the new position taken by Calogeras in paragraph 12(b), which can only be supported by reliance on Exhibit A renders meaningless many steps taken and expenses incurred by Ceres, at least those related to the defence of the claim described in Calogeras' expert report.

[48] That said, the Court does not feel that it would be appropriate to quantify or assess the monetary impact of its decision to admit this evidence, before it has had the benefit of hearing the parties' final arguments on costs. In effect, both sides agreed that the matter of costs should be settled in a distinct order after the judgment of the merits of the action is issued and after giving them an opportunity to make further arguments including some relevant to the application of Rule 420.

[49] I will now turn to the merits of the claim but before answering the questions raised by the parties, it is worth mentioning how the Court generally assessed the evidence. As the credibility of the lay witnesses is an important element in this case, before reaching any conclusion, the Court spent an inordinate amount of time reviewing and trying to reconcile the testimonies at the trial and discovery and the documentation filed.

[50] Although the Court attempted to excuse various contradictions and discrepancies in the testimonies of Messrs. Kottos and Moutsios on the account of nervousness and difficulty to express themselves (especially Mr. Moutsios), it later became clear that this could not be the sole explanation for most of them. While the Court did not simply put aside their version of all the events, the weight of their evidence was greatly diminished and this had an impact on the plaintiff's ability to meet its burden of proof.

[51] On the other hand, the Court finds that as a whole Mr. Lagonikas was a credible witness who candidly answered difficult questions from the Court. His willingness to admit Ceres' liability vis-à-vis 80 of the new invoices referred to in Exhibit A and to waive the time limitation in respect of these services is worth mentioning again. Here I note that the Court does not believe that Calogeras' counsel (the last one) was right when he said that Mr. Lagonikas' admissions only made things simpler for Calogeras given that it could still have relied on its expert to establish an alternative claim based on the unidentified 17 invoices. In fact, it is far from clear that such a claim would have succeeded.

[52] As a result of the above, where the version of Mr. Moutsios or Mr. Kottos or the two of them taken together was not corroborated by other evidence and was in direct contradiction with that of Mr. Lagonikas, the Court preferred the evidence of the latter.[44]

[53] It must be clear that this result has nothing to do with their legal representation *per se*.

[54] Calogeras' principals and new counsel were quick to blame their legal representation for the sorry state of the evidentiary record, one cannot but notice the fact that four different law firms were involved in this file for Calogeras. To perform efficiently counsel must receive clear and accurate disclosure of the facts.[45]

[55] During argument the parties did not spent much time on the law.[46] Their main difference in respect of the claim set out in paragraph 12(a) of the Amended Statement of Claim is not in my view that relevant. Whether in August 2005 Calogeras illegally -imputed Ceres' payments as the defendant puts it or simply, as the plaintiff puts it, exercised its right to impute payment as per

[44] For example, the Court does not accept Mr. Kottos' evidence to the effect that he never spoke with Mr. Lagonikas in November 2003. Exhibit TX 40 corroborates to some extent Mr. Lagonikas' testimony in that respect.
[45] The Court noticed while reviewing the Motion Record of Ceres that in Mr. Kottos' affidavit to lead warrant (paras. 2(g) and 2(h)) and in the reply affidavit by Mr. Moutsios (para.6.1), those witnesses said that Calogeras' invoices as of March or April 2002 referred to the GTC. In all the volumes of invoices produced, the Court found no invoice referring to the said conditions prior to April **2003**. Also, in Calogeras' counsel's letter to Ceres dated August 22, 2005 (TX 93) the said counsel appears to have been advised that at the meeting in Greece in March 2005 Ceres would have advised Calogeras that the remaining claim with interest would be settled and that Calogeras would remain the main vessels ship supplier. Before the Court Mr. Moutsios said that at this brief meeting, Ceres only said that it would pay what was due when due. Also as the Cap vessels had ben sold by that time, this statement is not plausible.
[46] The Court did review all the authorities referred to by the parties in their written and oral submissions.

paragraph 7(b) of the GTC,[47] is not important. What matters is whether Calogeras has established that there was a debt of at least $648,378.72 for interest charges at the time they proceeded to the imputation which resulted in the issuance of the August 16, 2005 statement of account.

[56] The evidence relevant to the issue of interest is for obvious reasons the most difficult one to reconcile.

[57] Probably, for this reason, Calogeras' position is simple. Since the very beginning, its written terms provided for the payment of interest at 2% per month compounded (26.824% per annum). After the GTC were implemented, nothing it did or said could constitute a waiver of that right as clause 13 of the GTC clearly called for a waiver in writing duly signed by Calogeras. Also, any waiver in respect of one invoice could not be construed as a waiver in respect of another.

[58] Calogeras, in its final argument, did not address the period before the implementation of the GTC but the Court understands from the notes filed by the previous counsel that nothing done by Calogeras during the relationship could constitute, in its view, a clear, unequivocal waiver of its right to rely on its written terms and it could not be estopped from claiming the interest.

[47] If what was done in August 2005 is simply an imputation as per the agreement, then there is no doubt that Calogeras exhausted its right and cannot thereafter re-juggle the numbers and the payments which appeared to have been the goal underlying Calogeras' expert report filed but not heard.

[59] Ceres argues that the parties had agreed that the terms concerning interest included in Calogeras' standard printed documentation[48] were not to apply. Ceres had a particular agreement with Calogeras in that respect.

[60] Also, if as Calogeras alleges, the GTC were meant to apply to Ceres, certainly Calogeras consistently failed to respect its obligation to allocate all payments received to the payment of such interest before applying the payment to overdue amounts.[49] This provision in clause 7(b) is for the benefit of the debtor and the party who does not respect its own contractual obligation loses its right to rely on the strict application of clauses such as clause 13. At the very least, clause 13 should be construed strictly. Ceres argued that the issuance of Calogeras' statements of account, particularly the January 25, 2005 statement sent under the electronic signature of Mr. Kottos or Mr. Moutsios, constituted waivers within the meaning of clause 13.[50]

[61] Mr. Kottos was very clear that during the relationship up to August 2005, Calogeras never applied any payment received from Ceres to interest charges, invoiced or not.

[62] There is little evidence as to how the accounting program of Calogeras was set up in respect of interest. Mr. Kottos acknowledged that it was impossible for Ceres to trace to which set of invoices a charge for interest appearing in a statement of account was applied. Although his evidence in that respect was not very clear, Mr. Moutsios appeared to say that the system would

---

[48] Contract of adhesion.
[49] There is no evidence that it did not accept Ceres' allocation of credit notes.
[50] It is to be noted that with respect to invoices listed in Exhibit A and which are found in the volume of invoices No. 31, only the two last invoices refer to the GTC.

start to automatically charge interest on all overdue invoices shortly after the end of the monthly period during which these invoices became due.[51]

[63] Finally, Mr. Kottos testified that[52] the rate of interest used by the computer to calculate the interest charges was not the contractual rate but rather a default rate set out in the software program (ACCPAC).[53]

[64] There is no statement of account for any period prior to March 4, 2003[54] before the Court. The document purporting to be the statement as of March 4, 2003 does include several interest charges which are also ordered numerically. Although in the first five pages interest charges appear to have been entered in the system as of June 30, 2002, there are on page 6 some batches starting with number INT-000000017 dated February 28, 2002. However, in the next statement of account before the Court which is dated November 2003 (TX 39), the oldest batches (ending with number INT-000000017 to INT-000000044) as well as batches numbered INT-000000046 and INT-000000052 disappeared while seven new interest charges all bearing the date of February 28, 2003 were included.

[65] The next two statements before the Court, TX 51 and TX 52 cover the periods up to July 24, 2004 and up to August 23, 2004 respectively. They do not include any new charges for interest

---

[51] Transcript of March 1st at p. 166-167.
[52] After some contradictory statements in that respect.
[53] Mr. Moutsios made some confusing statements regarding the rate of interest that was entered manually at pages 153 – 154 of the Transcript of March 1, 2010; see also Mr. Kottos' comments at pages 111-116 of the Transcript of March 2, 2010.
[54] Although a document filed as TX 24 is entitled A/R Aged Trial Balance by Due Date, it is described in the attached e-mail of Mr. Kottos to Ceres as Ceres' statement of account for that period.

compared to TX 39 (November 2003). Mr. Pavelic confirmed that Calogeras' general ledger did not include any interest charge for the period between November 2003 and the end of November 2004.

[66] Certainly, it is difficult to understand why interest charges that were invoiced simply disappeared or why the accounting program did not add new charges monthly as suggested by Mr. Moutsios. These issues were not addressed at all by Calogeras' witnesses. Given that no payment was ever applied to interest invoiced or uninvoiced, did Calogeras purportedly alter its system so that no automatic monthly charges would be added to Ceres' account? Were the charges deliberately deleted?

[67] In Calogeras' ledger for the periods starting September 1, 2002 to August 31, 2003 and September 1, 2003 to August 31, 2004, one finds various unexplained entries dealing with adjustment of interest batches including what appears to be a deletion of about $62,104.99 as well as various entries under the heading of "Bad debt expenses".

[68] All this to say that Calogeras' own documentation does not support the position they put forth.

[69] The Court accepts as a fact that in November 2003, Mr. Kottos had verbally agreed that no interest charges would be applied to outstanding invoices of Ceres in the future. As to the interest charges already invoiced before this conversation, although it is likely that Mr. Kottos was not very

clear in that respect, the most that Calogeras has established is that there was an amount of no more than $63,148.61[55] to be negotiated.

[70] Although Calogeras has established to my satisfaction that Ceres did receive a copy of its GTC in early 2003 at a meeting between Messrs. Lagonikas, Moutsios and Bolanis, the Court agrees with Ceres that they were consistently disregarded by Calogeras until it sent its first letter of demand in December 2004.

[71] There is no doubt that the issuance of the January 25th statement of account with the accompanying e-mail from Mr. Moutsios constitutes a written waiver within the meaning of clause 13 at least in respect of Calogeras' right to deny Ceres the benefit of the term (such as 120 days) on all the outstanding invoices (See TX 65).

[72] Before deciding whether it also constitutes a waiver in respect of Calogeras' claim for interest, the Court must mention that even before the issuance of the December 2004 statement of account, Calogeras was estopped from claiming any interest other than the $63,148.61 for I am satisfied that it had made clear unequivocal representations to that effect to Ceres (specifically, an express agreement by Mr. Kottos in respect of future interest followed by the issuance of statements of account that did not include any new interest charges after November 2003). This is not a case where the creditor was merely indulgent with its debtor.

[55] Most of which appears to have already been deleted or treated as bad debt by that time in Calogeras' ledger (TX 108).

[73] Also, having had the benefit of consulting with legal counsel, it appears that subject only to the alleged error in the rate of interest, Calogeras had quantified the maximum amount of interest that could be charged on all the invoices listed as due in the December 2004 statement. The difference between the total amount of such interest (not more than $125,000) and the amount of interest to which payments were reapplied in the summer of 2005 (plus the balance of $134,000 of interest shown in TX 89) in the scenario set out in paragraph 12(a) of the Amended Statement of Claim cannot be explained simply by the difference in the interest rate and the few months elapsed since December 2004.

[74] Turning back to the events of January 2005, in addition to the exchange of e-mails found at TX 67, TX 68 and TX 69 and the testimonies of Messrs. Moutsios and Lagonikas, the record includes unexplained entries in Calogeras' general ledger in respect of the new interest charges added in the December 2004 statement of account. In effect, most of these interest batches which were deleted from the January 25th statement of account (TX 69) are listed on pages 2239-2240 of the ledger for the period ending August 31, 2005 under the heading "Bad debt" but under the name of Harbour Shipping and Trading S.A., while others appear under the name of Atlas Ship Services Inc. and M/V ISMINAKI. Many such entries appear to have been made as early as December 30, 2004.

[75] Mr. Moutsios evidently attempted to finesse his answer to Ceres' clear request for a statement of account listing all amounts owing "for any reason whatsoever". Still, the Court is convinced that the statement of account sent on January 25th, 2005 was meant to induce Ceres to

believe, and they did so at the time, that Calogeras had waived not only the $63,148.12 that had been left in the air in November 2003, but all and any interest that could be owed on any amount past due. This last item only confirmed the clear and unequivocal representations made earlier by Mr. Kottos and by the statements of account issued until the first letter of demand.

[76] The Court has no hesitation to find that in the particular circumstances it was issued, it constitutes a written waiver duly signed by Mr. Moutsios on behalf of Calogeras. Thus even if Calogeras were entitled to rely on the GTC, the conditions set out in clause 13 would be met.

[77] In light of the foregoing, the Court concludes that Calogeras has not met its burden[56] of establishing its claim pursuant to paragraph 12(a) of the Amended Statement of Claim nor its claim for any interest set out in paragraph 12(b) of the said document.

[78] This leaves the issue of the invoices for services rendered as set out in Mr. Lagonikas' affidavit. In the final argument, Calogeras' counsel advised the Court that the plaintiff was not pursuing its claim in respect of invoices number 8308, 8309, 9618, 9978 and 10041.[57] Calogeras thus claims that it can recover at least $95,067.80 for the invoices set out in paragraph 17 of TX 113. The Court agrees.

[56] As noted by the Federal Court of Appeal in *Remo Imports Ltd. v. Jaguar Cars Ltd.*, 2007 FCA 258 at para 20, one must always remember that judges are not ferrets who must find in the record the evidence that might support the plaintiff's case.

[57] These were clearly time-barred as of the date of the filing of the Statement of Claim in August 2005.

[79] Having carefully considered the issue of the credit notes in the amount of $27,010.73, the Court is satisfied that despite Mr. Moutsios' testimony in that respect, this amount should not be deducted given that the various credit notes applicable throughout the relationship have been included in the instructions for payment of Ceres. The Court also accepts the representations of Calogeras' counsel in respect of two deductions[58] made under paragraph 10 of Mr. Lagonika's affidavit. This means that Ceres should pay Calogeras a total of $99,171.16.

[80] As mentioned, the Court does not believe that any contractual interest is due on such invoices. That said, the Court still has discretion to grant some interest on this amount prior to judgment. Such interest is fixed at 5% per annum (not compounded) as of March 1, 2010 (date Exhibit A was filed). The same rate of interest shall apply after judgment.

[81] Finally, with respect to the attorney fees and the other costs claimed, it is trite law that although the type of clause found on Calogeras' invoices and in the GTC (paragraph 7(e)) is generally recognized by courts, the Court always retains discretion to reduce the amount recoverable when there are special circumstances requiring it to do so. (See for example *Bossé v. Mastercraft Group Inc.*, [1995] OJ No 884, 123 DLR (4th) 161 (Ont. C.A.) at para 65. The same rule now prevails even in Québec: *Groupe Van Houtte Inc. (A.L. Van Houtte ltée) v. Développements industriels et commerciaux de Montréal Inc.*, 2010 QCCA 1970 at paras 99 *et seq*). Here not only is there clear duplication of services due to the change of solicitor in the accounts produced under TX 98, but it is clear that these services do not all relate to the claim set out in new

[58] $3,372.46 and $730.90, see Transcript of June 15, 2010, p. 34.

paragraph 12(b) of the Amended Statement of Claim. Also, these invoices appear to already include various court costs that would normally be part of the costs that will be dealt with in a distinct order. It is thus best to leave this question to be determined in the distinct order, which will also deal with other outstanding issues relating to costs, especially since the fees of the last counsel who actually argued the case on the basis of Exhibit A are not in the record.

[82] Unless the parties are able to come to an agreement, they shall have until January 30, 2011 to file their written representations (a maximum of 15 pages) in respect of costs, including the question of costs recoverable under clause 7(e) of the GTC (or similar clause in Calogeras' invoices) and the special costs arising from the admission of Exhibit A. Each party shall include an affidavit with its *pro forma* Bill of Costs or invoices for legal fees, if appropriate, to enable the Court to quantify the costs awarded. Each party will be entitled to respond to the other party's submissions (a maximum of 5 pages) on or before February 7, 2011.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The plaintiff's action is granted in part as follows: the defendant shall pay $99,171.16 with simple interest at 5% beginning March 1, 2010 until the date of payment;
2. The Court retains jurisdiction to deal with the costs including special costs arising from the granting of leave to file Exhibit A, as well as any fees or costs recoverable pursuant to the terms of Calogeras' invoices or clause 7(e) of its General Terms and Conditions (edition 2002);
3. Submissions in respect of the issues set out above in paragraph 2 shall be filed in accordance with paragraph 82 of my Reasons.

"Johanne Gauthier"
Judge

ANNEX I

Calogeras & Master Supplies Inc.

GENERAL TERMS AND CONDITIONS (EDITION 2002)

Effective from January 1st, 2002, these are the General Terms and Conditions of Calogeras & Master Supplies Inc. and of its affiliate(s) (hereinafter collectively referred to as the "Ship Supplier") pursuant to which all goods and services are supplied bye the Ship Supplier to the subject vessel, its owners, master and to the person or entity ordering same (hereinafter collectively referred to as the "Buyers"). These General Terms and Conditions apply to every sale, provision or delivery of ship supplies or necessaries by the Ship Supplier to the Buyers and to any agreement as to the supplying of goods and services between the Ship Supplier and the Buyers. These General Terms and Conditions are completed by the specific terms provided for in the Ship Supplier's quotation, acknowledgement of order, delivery note and other documents. These General Terms and Conditions, together with the Ship Supplier's quotation, confirmation or acknowledgement of order and delivery note, taken all together, shall constitute the full agreement between the Buyers and the Ship Supplier. In case of inconsistency, the text of the present General Terms and Conditions shall prevail.

1. **INCORPORATION:** All agreements for the provision of goods and services by the Ship Supplier to the Buyers incorporate or shall be deemed as incorporating the present General Terms and Conditions notwithstanding any declaration or statement to the contrary made by the Buyers and notwithstanding any omission as to their incorporation in the documentation used.

2. **PRICES:** The prices to be paid for the goods supplied or services rendered by the Ship Supplier to the Buyers shall be the price stated 'in the Buyer's confirmation or acknowledgement. Unless otherwise specified, all quoted prices are free alongside the (f.a.s.) or free on board (f.o.b.) the subject vessel provided that the subject vessel lies at a public wharf accessible, free of charges, by the Ship Supplier's truck(s) such that the Buyers shall pay any additional expenses or costs for the use of a launch or of boatman, for demurrage, wharfage, port dues, duties, taxes, fees and any other costs including, without limiting the generality of the foregoing, those imposed by governmental authorities.

3. **QUALITY:** Unless otherwise specified, the goods and services supplied by the Ship Supplier to the Buyers shall be of the quality or grade expressly ordered by the Buyer or, in the alternative, as available on the market at the time and place of their source of supply. The Buyers shall have the sole responsibility for the selection, quality and quantity of goods and services ordered from the Ship Supplier and as to their fitness for their intended use or purpose.

4. **QUANTITY:** Subject to the other terms of these, presents, the quantity of goods and services

supplied by the Ship Supplier shall be as per the agreement reached with the Buyers as stated in -the confirmation or acknowledgement of order. Notwithstanding acceptance of the Buyer's order, the Ship Supplier's obligation to supply the stated quantities of goods or services is subject to their availability from the Ship Supplier's sources of supply at the time of their delivery. Unless the Ship Supplier agrees in writing, the refusal or failure by the Buyers to fake delivery of the whole or part of the ordered goods shall not relieve the Buyers from its duty to pay in full the agreed price for same.

5. **TITLE:** The property in the goods supplied by the Ship Supplier shall not pass from the Ship Supplier to the Buyers until they are full paid and notwithstanding their delivery to the Buyers.

6. **CLAIMS:** The Buyers irrevocably waive any claim they may have against the Ship Suppliers with respect to the goods and services supplied by the Ship Supplier unless notice of such claim is given in writing to the Ship Supplier within 48 hours from the completion of their provision or delivery. Under no circumstances shall the Ship Supplier's liability to the Buyers exceed the value of the subject goods supplied or services rendered. Furthermore, there shall be no liability whatsoever on the Ship Supplier's part or any indirect, incidental or consequential loss or damages sustained by the Buyers or for any loss or damages arising from delay.

7. **PAYMENT:**
   a) Unless otherwise specifically agreed to in writing, all payments for goods supplied or services rendered by the Ship Supplier to the Buyers shall be made in full, without any deduction whatsoever, in immediately available in U.S. or Canadian funds (as agreed between the parties) upon receipt of the Ship Supplier's invoice without any discount, set-off or deduction whatsoever for any claim or dispute.

   b) All overdue amounts shall bear interest, compounded monthly, at the rate of 2% per month for 26.824% per annum) from the date each amount became due. All payments received from the Buyers after any amount is overdue shall be first applied to accrued interest and legal collection costs before they will be applied to the overdue amounts. The Ship Supplier shall otherwise be at liberty to apply partial payments received to any overdue account of its choice and notwithstanding any designation made by the Buyers as to the application of such partial payment. Any waiver by the Ship Supplier of interest or legal collection costs on a particular invoice shall not be construed as a waiver of the Ship Supplier's right to impose such charges on other deliveries of goods or provision of services.

   c) If a payment due date falls on a weekend or a bank holiday in the country where the payment is to be remitted, Buyers must then effect payment on a prior available banking day.

   d) The Buyers are responsible for the payment of all bank charges.

   e) In addition, the Buyers agree to pay the attorney's fees, court costs and other collection costs of any overdue amount, including the costs of putting up bonds for a ship arrest, attachment or other legal proceeding or otherwise associated with the enforcement of the Ship Supplier's maritime lien.

f) Notwithstanding any term of payment agreed to between the parties for a specific order, all unpaid invoices shall immediately be considered overdue and the Ship Supplier shall be entitled to immediately put the Buyers on notice and to exercise all its legal recourses for the recovery of all amounts due if:

i) The payment of any invoice payable by the Buyers becomes overdue beyond the agreed payment terms;
ii) Anyone of the Buyers becomes insolvent, in receivership, in liquidation or file for bankruptcy;
iii) The subject vessel or any sister-ship of that vessel is arrested or attached by the Ship Supplier or a third party for unpaid debts; or if
iv) A change in the financial circumstances or structural organization of the Buyers occur without the Ship Supplier's consent and which give reasonable ground to the Ship Supplier to believe that the amounts owed to it by the Buyers are jeopardized or that its security interest in any of Buyer's owned or operated vessels is jeopardized.

8. CREDIT AND MARITIME LIENS:

a) All goods and services are supplied on the credit of the supplied vessel and of its sister ships as well as on the promise of the Buyers to pay same. Therefore, if is expressly agreed between the Buyers and the Ship Supplier and the Buyers warrant that the Ship Supplier hold and may assert a maritime lien against the supplied vessel or its sister ships for all amounts due by the Buyers. This maritime lien shall extend to the freight, hire and insurance proceeds owed to or collected by or on behalf of the Buyers in relation to the supplied vessel or its sister ships. Any disclaimer of the existence of such a lien stamped or otherwise added by the Buyers' on the Ship Supplier's delivery note shall be invalid.

b) If goods and services are ordered by an agent, then such agent, as well as its principal, shall be bound by and fully responsible for all obligations of the Buyers, whether the identity of such principal is disclosed or not.

c) All agreements for the supplying of goods and services are entered into with, in addition to all parties stated in the Buyer's confirmation or acknowledgement of order, the owners and the Master of the supplied vessel. Therefore, all orders made by a crewmember, agent, management company, charterer, broker or any other party in apparent authority are also deemed to have been ordered on behalf of the owners of the supplied vessel.

9. DELIVERIES

a) The Buyers shall give the Ship Supplier minimum of 48 hours notice, excluding Sundays and holidays, of the ETA of the subject vessel's arrival at the port of delivery.

b) To the extent that a delivery must be effected outside normal working hours and is permitted by the pertinent port regulations, the Buyers shall pay for all overtime and additional expenses incurred by the Ship Supplier in order to effect such delivery.

c) The Buyers and its representatives on site shall provide all necessary assistance and make available, at Buyers' sole costs and expenses, all cranes and other equipment required to promptly receive the ordered ship supplies or necessaries.

d) Subject to due compliance with the foregoing provisions by the Buyers, the Ship Supplier shall endeavor its best efforts to effect timely deliveries. However, unless expressly agreed to in writing by the Ship Supplier, the Ship Supplier does not warrant the timeliness of any delivery and shall not be liable for any consequence arising from delay.

e) If the actual delivery date is significantly later than the contracted date, the Ship Supplier shall be entitled to claim an increase of the agreed prices or, shall the vessel not have arrived after 48 hours of the agreed ETA, the Ship Supplier shall have the right to cancel the Buyers' order without prejudice to any other rights the Ship Supplier may have.

f) The Ship Supplier shall be at liberty to sub-contract, in whole or in part, the performance of any order.

10. CONTINGENCIES:

a) The Ship Supplier shall not be in breach of its obligations in the event that performance is prevented, delayed, or made substantially more expensive as a result of any one or more of the following contingencies, whether or not such contingency may have been foreseen or foreseeable at the time of contracting and regardless or whether such contingency is direct or indirect:
    i) Labor disturbance:
    ii) Compliance with a direction, request or order from any competent state, governmental or port authority;
    iii) Shortage in product, transportation or manufacturing from the Ship Supplier's contemplated source of supply; or
    iv) Any cause beyond the reasonable control of the Ship Supplier, whether or not foreseeable.

b) In the event that performance is prevented, made substantially more expensive or delayed by such a contingency, the Seller may cancel a particular delivery or increase prices in fair proportion of the increased costs of operation under such a contingency.

c) The Ship Supplier shall not be liable for demurrage or delay resulting from such a contingency.

d) Quantities not sold or purchased due to the occurrence of such a contingency may be reduced or eliminated at the discretion of the Ship Supplier.

e) Nothing in this provision shall excuse the Buyers from their obligation to pay for the services and ship supplies received.

11. TAXES AND COMPLIANCE: The Buyers will pay to the Ship Supplier all applicable taxes and customs duties which may apply, if any. The Buyers will provide the Ship Supplier with all documentation required for the purpose of complying with all national and local requirements at the port of delivery.

12. SAFETY: It shall be the sole responsibility of the Buyers to comply and advise its personnel, agents and/or customers to comply, both during and after delivery, with all the health and safety requirements applicable to the goods and services which are supplied by the Ship Supplier. The Ship Supplier shall not be liable for any consequences arising from the Buyer's failure to comply with such health and safety requirements.

13. NON-WAIVER AND SEVERABILITY: No waiver of any of the provisions of this Agreement shall be effective unless it is in writing and signed by the Ship Supplier, and any such waiver shall only be applicable to the specific instance to which it relates and shall not be deemed to be a continuing of future waiver of any such breach. If any part of this agreement was held invalid by a competent tribunal, all other conditions and provisions of this agreement shall remain in full force as if the invalid portion had never been part of the original agreement.

14. LAW AND JURISDICTION:

a) The Ship Supplier shall be entitled to assert its maritime lien in any country where the subject vessel or its sister ships may be found. The creation and existence of a maritime lien in favor of the Ship Supplier over the subject vessel and its sister ship shall be governed by the general maritime law of the United States of America and the laws of the State of New York. For the purpose of asserting the Ship Suppliers' maritime lien, all goods and services shall be deemed as having been supplied to the subject vessel in the port of New York regardless of the actual location or the port(s) where the subject deliveries were in fact effected.

b) Any proceeding or legal action against the Ship Supplier shall be brought in the country and before the Court of the competent jurisdiction where the Ship Supplier has its principal place of business and the laws of such of such country and place shall apply except as otherwise provided herein.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1478-05
STYLE OF CAUSE:	CALOGERAS & MASTER SUPPLIES INC. v. CERES HELLENIC SHIPPING ENTERPRISES LTD. and THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "CAP LAURENT" et al
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	March 1 - June 15, 2010
REASONS FOR JUDGMENT:	GAUTHIER J.
DATED:	December 22, 2010

APPEARANCES:

Mr. André A. Lévesque	FOR THE PLAINTIFF
Mr. Jean-Marie Fontaine Mr. Mark Phillips	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

André A. Lévesque 118, rue de Plaisance Bonaventure, Qc G0C 1E0	FOR THE PLAINTIFF
Borden Ladner Gervais Montreal, Qc	FOR THE DEFENDANTS