

Federal Court



Cour fédérale

Date: 20130523

Docket: T-1595-12

Citation: 2013 FC 534

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

BETWEEN:

**DHL GLOBAL FORWARDING
(CANADA) INC.**

Plaintiff

and

CMA-CGM S.A.

Defendant

REASONS FOR ORDER

PROTHONOTARY MORNEAU

[1] This is a motion by the defendant CMA-CGM S.A. (at times, CMA CGM) pursuant to section 50 of the *Federal Courts Act*, RSC 1985, c F-7, for a stay of the declaratory action filed on August 28, 2012, by the plaintiff, DHL Global Forwarding (Canada) Inc. (DHL), and this, by reason of a jurisdiction clause found in bills of lading and which, in essence, provides as follows:

30. LAW AND JURISDICTION

...

(2) Jurisdiction

All actions against Carrier under the contract of Carriage evidenced by this Bill of Lading shall be brought before the “Tribunal de Commerce de MARSEILLE” and no other Court shall have jurisdiction with regards to any such action. Actions against the Merchant under the contract of Carriage evidenced by this Bill of Lading may be brought before the “**Tribunal de Commerce de MARSEILLE**” or, in Carrier’s sole discretion, in another court of competent jurisdiction. [Emphasis in original.]

(Jurisdiction clause)

Background

[2] This declaratory action undertaken by DHL and the proceedings initiated by CMA-CGM S.A. before the said Tribunal de Marseille in France (the French proceedings) relate to demurrage (*surestaire*) and storage (*stockage*) charges that have accumulated and continue to accumulate daily (as of August 15, 2012, the total was in the order of \$681,655.55 US) due to the fact that 68 containers transported by sea from Halifax by CMA-CGM S.A. remain on the quays in Ho Chi Minh City, Vietnam, given that the bills of lading in question are being held by DHL and have therefore not been remitted to the consignee (*destinataire*) Tan Mai Group Joint Stock Company (Tan Mai) thereby allowing Tan Mai to obtain a proper release of the shipment from CMA-CGM S.A..

[3] Without having to delve further into the matter, it appears that DHL is holding the bills of lading because HSB International (HSB), in its capacity as shipper (*expéditeur*) failed to repay, in whole or in part, the freight charges that it, DHL, had paid to the carrier CMA-CGM S.A.

through the carrier's agent in Canada, namely, CMA-CGM Canada. The position taken by HSB might be rooted in its dispute with Tan Mai.

[4] In any event, having met its obligations as a container carrier (*transporteur*), CMA-CGM S.A. does not agree with having to assume the demurrage charges and is therefore seeking, in the French proceedings, joint payment of these charges in respect of, among others, DHL and Tan Mai.

[5] Following the Court's assessment, the action instituted by DHL is evidently in reaction to the French proceedings by CMA-CGM S.A., which were commenced on August 24, 2012, when French counsel sent a notice to that effect. The French proceedings, as such, were instituted on or about September 14, 2012. It should be noted that the present action in our Court was filed in the meantime on August 28, 2012.

[6] Thus, in its statement of claim in this case, DHL is seeking a declaration exempting it from any liability with regard to demurrage charges. Paragraphs 1 a) and b) of this statement of claim read as follows:

1. Plaintiff claims judgment declaring that:
 - a) Plaintiff is not liable to Defendant for the payment of the sum of \$681,655.55 (US\$681,655.55) or any other charges related to or arising from the performance of the contract(s) of carriage by ocean as evidenced by Defendant's bills of lading nos. CA1310736, CA1311126, CA1310767, CA1309771, CA1309411, CA1308901, CA1307765, CA1308170, CA1308265, CA1309047 and consequential services such as

container demurrage and port storage services, and that,

- b) with respect to the aforesaid bills of lading, Plaintiff is not bound by any of the terms and conditions stated therein.

[7] To assess the positions of CMA-CGM S.A. and DHL in these proceedings as to DHL's possible liability for the demurrage charges, and the application of the jurisdiction clause, the following facts and documents should be noted.

[8] CMA-CGM S.A. is an international carrier of goods by container. It operates in Canada through its agent CMA-CGM Canada.

[9] As for DHL, there is no dispute that it approached CMA-CGM Canada and at all material times acted as freight forwarder (*transitaire*).

[10] It appears that CMA-CGM Canada and DHL, in their respective roles and capacities, have had a business relationship dating back a number of years.

[11] In this case, the relationship between DHL and CMA-CGM Canada that concerns us began between December 23, 2010, and February 24, 2011, with a series of bookings (*réservations*) at the request of DHL to transport 68 containers from Halifax to Ho Chi Minh City.

[12] To confirm all of this, CMA-CGM Canada issued a series of booking confirmations (*notes de réservations de fret*).

[13] Although DHL sought to prove that its past business relationships had always been solely with CMA-CGM Canada and that CMA-CGM Canada had not disclosed its role as agent for CMA-CGM S.A. to DHL, and although the affiants of the parties were not cross-examined on their respective affidavits, the Court is not convinced that DHL was truly unaware, given its experience in and knowledge of the field, that CMA-CGM S.A. was ultimately behind the scenes and that CMA-CGM Canada was acting as an agent for CMA-CGM S.A. which, itself, would take care of the issuing of the bills of lading and the marine transport of the containers.

[14] If the presence and existence of CMA-CGM S.A. could not clearly be seen by DHL in the booking confirmations of December 2010, the invoices subsequently issued in February 2011 unquestionably reveal the presence of CMA-CGM S.A., even if these same invoices indicate, most likely for the sake of convenience, that they are payable in Canada to CMA-CGM Canada.

[15] Furthermore, the following wording of some clauses of the booking confirmations in which only DHL is identified must be kept in mind in assessing whether or not DHL was bound by the terms and conditions of the bills of lading that would later be issued by CMA-CGM S.A. (referred to in the booking confirmations and bills of lading as CMA-CGM) as a result of instructions given by DHL to CMA-CGM Canada.

[16] Under the Clauses part or section on page 3 of the booking confirmations, we find clauses 6 and 7, which read as follows:

6. Bill of Lading – All moves referenced in this Booking Confirmation are subject to the terms and conditions of the carrier issued long form bill of lading. The customer named on this Booking Confirmation hereby acknowledges and agrees to all the terms and conditions of the carrier issued long form bill of lading.

7. Booking subject to CMA CGM terms and conditions available on web site <http://www.cma-cgm.com/ProductsServices/ContainerShipping/ShippingGuide/BLClauses.aspx> or in any CMA CGM agency.

[17] In addition, on page 2 of these booking confirmations, the following notice appears:

Shipment shall be subject to CMA CGM bill of lading terms and conditions available in any CMA CGM agencies or on CMA CGM web site: www.cma-cgm.com

It is reminded that if this shipment has been booked on a “freight collect” basis you guarantee and will be responsible for the payment of all freight and charges payable by the receiver and that you shall proceed with the full payment of all outstanding freight and charges should they remain unpaid for more than three consecutive days after discharge.

[18] We note that while DHL is identified as forwarding agent in the booking confirmations and not as “customer”, only its presence is specifically indicated therein. It is only at the bills of lading stage, pursuant to instructions from DHL, that HSB is identified as shipper, Tan Mai as consignee and DHL as forwarding agent (*agent transitaire*).

[19] As to the terms and conditions of the bills of lading to which the booking confirmations refer, it is important to note the following definitions of the terms “Merchant” and “Holder”:

Merchant includes the Shipper, Holder, Consignee, Receiver of the Goods, any Person owning or entitled to the possession of the Goods or of this Bill of Lading and anyone acting on behalf of any such Person.

Holder means any Person for the time being in possession of this Bill of Lading by reason of the consignment of the Goods or the endorsement of this Bill of Lading or otherwise.

[Emphasis added.]

Analysis

[20] For the reasons that follow, I am of the view that this motion by CMA-CGM S.A. should be granted and the declaratory action brought by DHL in this matter stayed.

[21] The Court agrees in principle with a number of the distinctions that were forcefully argued by DHL.

[22] In this regard, the Court understands that a forwarding agent such as DHL may act as principal if, for example, it issues bills of lading or holds the shipment or interests in it. Here, and the Court agrees, DHL was acting as an agent of its customer, the shipper HSB.

[23] The Court also understands that a booking (*réserve*) and a booking confirmation (*note de réserve*) can be viewed as preliminary contracts to the contract of carriage as such.

[24] Furthermore, the Court appreciates that DHL submits that it fulfilled all of its obligations under the preliminary contracts here, namely, the bookings and booking confirmations, and that

the accumulating demurrage charges fall under what it understands to be the second contract, namely, the contract of carriage as such.

[25] However, the clauses set out above, which are found at the very beginning of the booking confirmations, and which themselves make reference to the terms and conditions of the bills of lading, are, in the Court's view, precisely intended to render moot the splitting up of contracts sought by DHL.

[26] As a result, the Court considers that at the booking confirmation stage, the reference in clause 6 (see paragraph [16], *supra*) to the term "customer" necessarily applies to DHL because at that point only the identity of DHL was known by CMA-CGM Canada and was identified in the booking confirmations.

[27] Therefore, by virtue of this clause, DHL, as the customer, acknowledges and accepts the terms and conditions of the bills of lading.

[28] In addition, even if one were to insist that the term "customer" could not be applied to DHL, clause 7 of the booking confirmations clearly states that every booking is subject to the terms and conditions of the bills of lading.

[29] At no material time during this process did DHL attempt to speak out against or clarify the effect or scope of clauses 6 and 7 of the booking confirmations, and I cannot agree with

DHL's position that it is not bound by the bills of lading on the ground that there was no positive and specific evidence in the record that it had given its consent.

[30] I find that the wording of clause 6 of the booking confirmations "... hereby acknowledges and agrees" is sufficiently clear to secure the consent of DHL. Moreover, there was no evidence of any express and positive consent of DHL being a normal and required measure in the maritime industry with regard to the kinds of agreements in play here.

[31] As to the bills of lading, it should be noted that the definitions of Holder and Merchant state the following:

Holder means any Person for the time being in possession of this Bill of Lading by reason of the consignment of the Goods or the endorsement of this Bill of Lading or otherwise.

Merchant includes the Shipper, Holder, Consignee, Receiver of the Goods, any Person owning or entitled to the possession of the Goods or of this Bill of Lading and anyone acting on behalf of any such Person.

[Emphasis added.]

[32] As for the definition of Holder, I find in this case that at all material times and even at present, DHL must be viewed under this definition as any Person otherwise (*autrement*) in possession of the bills of lading. The fact, according to DHL, that it merely has physical possession of the bills of lading and is holding them in the name of and for HSB does not change this finding by the Court. Moreover, it should be noted that DHL's possession of the bills of lading allows it to hold them and brandish or rely on them as a means to extract payment of the freight charges it had earlier paid to CMA-CGM Canada at the start of this process.

[33] Moreover, if we were to agree that DHL is not the holder of the bills of lading but that it is in fact HSB, then the definition of Merchant at its very end catches up with DHL.

[34] As shown, among other things, in the following excerpt from *Q.N.S. Paper Co. v Chartwell Shipping Ltd.*, [1989] 2 SCR 683, at page 698, the terms or wording constituting a contract take on great significance in each specific case:

... As my colleague observes, in cases of this kind, the issue whether an agent contracted personally, or solely in the capacity of agent (in which case only the principal is bound), is a matter of construction of a particular contract. I leave aside, of course, any custom that may exist at any particular port or in a particular trade. In this case, the relevant documents reveal that Chartwell consistently attempted to bring home to Q.N.S. that its sole responsibility was as an agent. In the body of its letters, it identified itself as "Managing Operators [i.e., as agents] for the Charterers" or as acting "On behalf of our principals", and it consistently signed "as Managing Operators only". While the simple addition of the word "agent" or its equivalent following a signature can easily be read as a mere description of the signatory, that cannot be said of "as agent only". Those words do more. They are obviously directed to limiting or

... Ainsi que le fait remarquer ma collègue, dans des affaires de ce genre, la question de savoir si un mandataire a contracté en son propre nom ou en qualité de mandataire uniquement (auquel cas seul le mandant est lié) relève de l'interprétation du contrat en cause. Je ne tiens pas compte, évidemment, des coutumes pouvant exister dans tel ou tel port ou dans une industrie donnée. En l'espèce, il ressort des documents pertinents que Chartwell a constamment essayé de faire comprendre à Q.N.S. qu'elle engageait sa responsabilité uniquement en tant que mandataire. Dans le corps de ses lettres, elle se présentait comme [TRADUCTION] "exploitante-gérante [c.-à-d., comme mandataire] pour les affréteurs" ou comme agissant "au nom de nos mandants", et elle a toujours signé [TRADUCTION] "en qualité d'exploitante-gérante uniquement". Quoique le simple ajout du mot

[page699] explaining a liability, and not merely to describing the person signing or his authority to do so; see *Universal Steam Navigation Co. v. James McKelvie & Co.*, [1923] A.C. 492 (H.L.), and esp. at p. 500, per Lord Sumner. What particularly impresses in the present case is Chartwell's insistent repetition in its correspondence that it is acting as an agent and its repeated signature "as agent only". [Emphasis added.]

"mandataire" ou [page699] de son équivalent après la signature puisse facilement s'interpréter comme une simple description du signataire, il n'en va pas de même de l'expression "en qualité de mandataire uniquement". Ces mots font davantage. Ils visent manifestement à limiter ou à expliquer la responsabilité et non pas simplement à décrire le signataire ou son pouvoir de signer; voir *Universal Steam Navigation Co. v. James McKelvie & Co.*, [1923] A.C. 492 (H.L.), et en particulier, à la p. 500, les motifs de lord Sumner. Ce qui frappe particulièrement en l'espèce est l'insistance avec laquelle Chartwell a répété dans sa correspondance qu'elle agissait en tant que mandataire et le fait qu'elle a régulièrement signé [TRADUCTION] "en qualité de mandataire uniquement". (Je souligne.)

[35] In this case the review at paragraph [25] *et seq.* of the relevant clauses indicates to us that DHL must be held liable.

[36] We note, without it being determinative here since each case turns on its own facts, that in two decisions of this Court, a nearly identical definition of Merchant led the Court to conclude that the forwarding agent fell within that definition (see *Encan Liquidation General Canada Inc. v Transintra Canada*, 2000 CarswellNat 2989, and *CTO International Ltd. v Intercon Freight* (1992), 56 F.T.R. 94).

[37] Lastly, as previously noted, and as indicated at paragraph 14 of DHL's statement of claim in the present matter and at paragraph 31 of the Tassone affidavit submitted by DHL, the plaintiff acknowledges that it has control over the bills of lading to the extent that it holds them and may possibly offer them for sale. Such a position leads the Court to conclude that DHL is also a holder of the said bills of lading. Paragraphs 14 and 31 read as follows:

14. HSB International has failed to pay in full to Plaintiff [DHL] the balance of freight and overland charges owed and in the exercise of its freight forwarding agent's right of detention / lien pursuant to the laws of the Province of Québec, Plaintiff withheld the delivery of the aforesaid ocean bills of lading from HSB International until payment in full was received.
31. I do not dispute the assertions of Ms Poirier in paragraphs 17 through to 29 of her Affidavit, save that DHL Canada has no contractual relationship with "Tan Mai", the consignee, and has no claim against this company; DHL Canada reserves its right to ask this Court to approve by judicial sale the transmission of the bills of lading to the highest bidder; thus far, Tan Mai has been totally unresponsive to any overture by DHL Canada to engage in settlement negotiations;

[38] As noted at paragraph [1], *supra*, subsection 30(2) of the terms and conditions of the bills of lading contains the following exclusive jurisdiction clause:

30. LAW AND JURISDICTION

...

(2) Jurisdiction

All actions against Carrier [CMA CGM] under the contract of Carriage evidenced by this Bill of Lading shall be brought before the "Tribunal de Commerce de MARSEILLE" and no other Court shall have jurisdiction

with regards to any such action. Actions against the Merchant under the contract of Carriage evidenced by this Bill of Lading may be brought before the “**Tribunal de Commerce de MARSEILLE**” or, in Carrier’s sole discretion, in another court of competent jurisdiction. [Emphasis in original.]

[39] Like CMA-CGM S.A., I find that the DHL’s action in this matter falls within the scope of this clause and that DHL has not established – to the extent our Court even has jurisdiction to rule on this point – that Marseille was otherwise a forum *non convenient* within the meaning of the case law presented by DHL. In any event, DHL did not press this point in its oral argument.

[40] Thus, the motion brought by CMA-CGM S.A. will be granted as follows, with costs, which the Court fixes at \$1,640. The Court stays the action brought by the plaintiff, DHL, in this case in favour of the Tribunal de Commerce de MARSEILLE.

“Richard Morneau”

Prothonotary

Certified true translation
Sebastian Desbarats, Translator

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1595-12

STYLE OF CAUSE: DHL GLOBAL FORWARDING (CANADA) INC.
v CMA-CGM S.A.

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: May 16, 2013

REASONS FOR ORDER: PROTHONOTARY MORNEAU

DATE OF REASONS: May 23, 2013
Amended on May 24, 2013

APPEARANCES:

David G. Colford FOR THE PLAINTIFF

Jean-Marie Fontaine FOR THE DEFENDANT

SOLICITORS OF RECORD:

Brisset Bishop FOR THE PLAINTIFF
Montréal, Quebec

Borden Ladner Gervais FOR THE DEFENDANT
Montréal, Quebec