TRANSPORTATION & LOGISTICS GROUP NEWSLETTER

May 2024

In the May issue:

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Letters of Credit and Fraud Exception

By Rui M. Fernandes

A bank issuing a letter of credit has a near absolute duty to honour a demand for payment under the letter. Notwithstanding, one such exception to this near absolute duty is the fraud exception. The Supreme Court of Canada recognized this exception and set a high bar for it in 1987.

In *Bank of Nova Scotia v. Angelica-Whitewear Ltd.*, 1987 CanLII 78 (SCC), [1987] 1 S.C.R. 59, the Court recognized the fraud exception to an issuing bank's near absolute duty to honour a demand for payment under a letter of credit. Writing for the Court, Le Dain J. carefully sought to balance two competing policy objectives that he described as being in "tension" in the law: the importance to international commerce that banks respect the autonomous character of letters of credit and the importance of suppressing fraud in transactions (p. 72). On the one hand, widening the fraud exception might undermine the reliability of letters of credit; on the other hand, turning a blind eye to fraud might encourage misconduct in letter transactions. Le Dain J. concluded that the fraud exception should be confined to cases of obvious fraud of the beneficiary that is so egregious that the legitimacy of the supporting letter of credit can no longer be assumed. The bar for the fraud exception was set high. In keeping with this careful balance and high bar, he wrote, the exception should not extend to the fraud of a third party of which the beneficiary is "innocent" (p. 84).

In April of 2024, the Supreme Court had occasion to revisit the fraud exception in *Eurobank Ergasias S.A. v. Bombardier inc.*, 2024 SCC 11 ("*Eurobank*"). In *Eurobank*, the Supreme Court was asked to consider if the fraud exception can extend to fraud by a third party and the circumstances in which the beneficiary's conduct will not be viewed as "innocent".

The dispute in *Eurobank* centered on a Letter of Counter-Guarantee governed by Quebec law and a dispute between Bombardier Inc. and the Hellenic Ministry of Defense ("HMOD"). In 1998, HMOD entered into a procurement contract with Bombardier for the purchase of firefighting amphibious aircraft. The parties also agreed to an offsets contract in which Bombardier would subcontract work associated with the aircraft procurement to Greek companies. The offsets contract provided that Bombardier would owe HMOD liquidated damages if it did not fulfil its subcontracting obligations. Payment of these liquidated damages was secured by a letter of credit issued by Eurobank in favour of HMOD ("Greek Letter of Guarantee"). A second letter of credit was issued by the National Bank of Canada in favour of Eurobank to secure payment of the amounts that the latter would be required to pay HMOD under the Greek Letter of Guarantee ("Canadian Letter of Counter-Guarantee"). The plan for the interlocking letters of credit was straightforward: should HMOD call on Eurobank to honour the Greek Letter of Guarantee, Eurobank would be entitled to call on the National Bank to reimburse it under the Quebec Letter of Counter-Guarantee. Disputes under the offsets contract were to be resolved by an arbitral tribunal under the rules of the International Chamber of Commerce ("ICC").

Bombardier determined it could not meet its subcontracting obligations, which led to arbitration before the ICC. HMOD formally undertook not to demand payment under the Greek Letter of Guarantee for as long as the arbitration procedure was ongoing. However, while the issuance of the final award was still pending, HMOD repeatedly demanded payment

from Eurobank. Bombardier sought and obtained an order from the ICC Arbitral Tribunal preventing HMOD from demanding payment under the Greek Letter of Guarantee until issuance of the final award. It also sought and obtained provisional injunctions from the Superior Court of Quebec to prevent payment under the Greek Letter of Guarantee and the Canadian Letter of Counter-Guarantee. Despite this, HMOD made a final demand for payment, seven days before the final award was set to be released, and said that Eurobank would be subject to civil and criminal legal measures if it refused to pay. Eurobank paid HMOD under the Greek Letter of Guarantee, and Eurobank then demanded payment from the National Bank of Canada under the Canadian Letter of Counter-Guarantee.

The ICC Arbitral Tribunal's final award decided that the offsets contract violated European Union law such that it was null and void ab initio and that no liquidated damages were due by Bombardier to HMOD. In response to the final award, Eurobank commenced proceedings before Greek courts, where it unsuccessfully sought to recover the money that it had paid to HMOD. The Greek courts decided that the conduct of HMOD under the Greek Letter of Guarantee was not fraudulent under Greek law. In parallel proceedings before Quebec courts, Bombardier sought a permanent injunction enjoining National Bank of Canada from paying Eurobank under the Canadian Letter of Counter-Guarantee. It argued that the fraud exception to an issuing bank's near absolute duty to honour a demand for payment under a letter of credit applied to Eurobank as beneficiary under the Canadian Letter of Counter-Guarantee. Given that HMOD's conduct was fraudulent, Eurobank's demand for payment under the Canadian Letter of Counter-Guarantee was, by extension, also fraudulent.
The trial judge held that HMOD engaged in fraud in obtaining payment under the Greek Letter of Guarantee. He also held that Eurobank*'s* own conduct was fraudulent because its payment to HMOD was a result of fraud of which it was aware. He thus enjoined the National Bank of Canada from paying any amount to Eurobank under the Canadian Letter of Counter-Guarantee. The Court of Appeal for Quebec dismissed Eurobank's appeal, holding that it was open to the trial judge to conclude that the National Bank of Canada was not bound to pay Eurobank as beneficiary under the Canadian Letter of Counter-Guarantee, since the Eurobank had sufficient knowledge of the fraud prior to paying under the Greek Letter of Guarantee.

The majority of the Supreme Court held that the trial judge's finding that HMOD engaged in fraud was entitled to deference. The evidence supported a finding that HMOD engaged in a fraudulent attempt to circumvent the ICC tribunal's interim order and final award by repeatedly demanding payment. There was no basis to interfere with the trial judge's conclusion that Eurobank had clear knowledge of HMOD's fraud and that it actively participated in HMOD's fraud by paying HMOD in improper circumstances. "Fraud" in the context of this defence did not refer to fraud in the criminal sense. In the civil or commercial sense, it could include a beneficiary demanding payment while knowing that they had no right to be paid. Here, Eurobank knew that HMOD was enjoined from demanding payment under the Greek Letter of Guarantee and that the issuance of the final arbitral award was imminent. Eurobank was not merely suspicious that HMOD demanded payment contrary to the interim order; it clearly knew that this was happening. At the very least, this suggested that it knew that the demand for payment was made in contravention of at least one order, which, in the circumstances, amounted to clear knowledge of the fraudulent conduct of HMOD. The Court found that because it knew of and participated in HMOD's fraud, Eurobank became the coauthor of that fraud and

must, for the purposes of the fraud exception, bear responsibility for it. The Court maintained that while the bar for the fraud exception was high, and reserved for cases of "obvious fraud" which imported aspects of "impropriety, dishonesty or deceit", here, it was made out.

The minority (Karakatsanis and Côté JJ dissenting) found that the appeal should be allowed and the action instituted by Bombardier against Eurobank and the National Bank of Canada should be dismissed. They found that to conclude otherwise would dismiss the decisions of the Greek courts, which held that the conduct of HMOD was not fraudulent. The dissenting judges pointed out that international comity is an essential guiding principle when considering or enforcing foreign judgments. There was no public policy rationale for not giving weight to the judgments of the Greek courts. Eurobank was faced with a demand for payment and a judgment from the only court of competent jurisdiction (the Greek court) which held that the HMOD could validly draw on the Greek Letter of Guarantee. Additionally, HMOD's undertaking not to demand payment under the Greek Letter of Guarantee could be validly withdrawn at any time, and thus was no longer in effect when HMOD demanded payment. Taking this into account, HMOD's demand for payment under the Greek Letter of Guarantee was neither fraudulent nor tantamount to fraud; and, even if it were, Eurobank would be innocent of that fraud.

Limitations of Liability in the *Marine Liability Act* Exclude Costs and Interest

By Kim E. Stoll

It was a long time coming, but there is finally clarity regarding whether the monetary limitations of liability contained in the *Marine Liability Act* S.C. 2001 (the "*MLA*") as amended are inclusive or exclusive of costs and interest.

In *Algra v. Comrie Estate*, 2023 ONCA 811, the Ontario Court of Appeal upheld the decision of Munroe, J. in the lower court finding that prejudgment interest and costs are properly calculated in addition to the limitations of liability imposed under the *MLA*.

Facts and the Original Rule 21 Motion Ruling
A fatal boat accident occurred on Lake Erie in 2011. A power boat struck a breakwater near the harbour at Leamington, Ontario. There were three fatalities and two passengers were injured. Several legal actions were commenced naming, as defendants, the owner and operator of the power boat and all levels of government. The actions included claims for damages, costs and prejudgment interest.

The parties brought various Rule 21 motions (*1). Rule 21 of the Ontario *Rules of Civil Procedure* provides for the determination of a question of law before trial. Specifically, the parties bringing the Rule 21 motions asked for a determination of the meaning of S. 29(a) of the *MLA*; that is, was the statutorily provided monetary limitation on certain maritime claims inclusive or exclusive of costs and prejudgment interest?

All the parties to the Rule 21 motion not only agreed that S. 29(a) of the *MLA* applied but also agreed that the claims as made in the legal actions in total exceeded the statutory limitation of liability available (or $1,000,000), pursuant to that section, which reads as follows:

> The maximum liability for maritime claims that arise on any distinct occasion involving a ship of less than 300 gross tonnage, other than claims referred to in section 28, is

> (a) $1,000,000 in respect of claims for loss of life or personal injury; and
>
> (b) $500,000 in respect of any other claims.

Munroe J. reviewed the law on statutory interpretation finding that the preferred approach involves the significant role of context when construing written words of a statute. Quoting Watt J.A. in *R. v. Stipo*, 2019 ONCA 3, His Honour stated, "To discover what Parliament intended, we look at the words of the provision, informed by its history, context and purpose: *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584, at para. 20."

The defendants took the position that the limitation of liability was a statutory hard cap and inclusive of interest and costs. The words "maximum liability" were not ambiguous and thereby included all possible relief. Further, there were other unrelated Articles in Schedule 2 of the *MLA* which specifically provided that interest and costs were excluded from calculation in those sections. Therefore, it was argued, Parliament made a specific intentional omission. Lastly, the object of the associated international treaty was said to create certainty across the world regarding liability in maritime accidents so interpreting S. 29(a) to exclude prejudgment interest and costs would destroy that central objective of certainty.

The plaintiffs argued that claims of prejudgment interest and costs were incentives for resolution and expeditious handling. Removing reasonable indemnification of successful plaintiffs also were said to create an access to justice issue. The plaintiffs countered the defendants' argument that an expansive reading of the limitation would destroy the "certainty" objective of the international treaty by pointing to the unrelated section later in the *MLA* that specifically excludes interest and costs from another limitation of liability cap.

The Court noted that S. 29 (a) is silent on costs and interest. His Honour looked at the words of the statute in the context of the provisions. The words in the section are: "The maximum liability for maritime claims … is … $1,000,000 in respect of claims for loss of life or personal injury …." The "maximum liability" statutory cap is for the maritime claims for loss of life or personal injury.

His Honour stated at paragraph 26, "In my view, a claim for costs and a claim for prejudgment interest each serve a different purpose and seek to protect a different interest than a claim for loss of life or personal injury." This included indemnification of successful parties but also costs could also sanction or penalize a party for unreasonable behaviour. Costs also ensure that litigation is conducted in a fair, efficient and just manner. Further, costs could promote early settlements and could compensate for large expenses spent to vindicate a party's rights.

Munroe J. stated, at paragraph 29, that claims for prejudgment interest also compensated for loss of use of the monies sought from the date of the injury to the date of judgment to fairly compensate an injured party and to restore them as much as possible. This was especially true because the court system cannot render judgment immediately after the date of the injury.

The Court found:

> [30] In my view, the contextual reading of the words of the statute together with an understanding of the function and purposes of costs and interest resolve the interpretation issue. By their very

> nature and function, claims for costs and interest clearly are not claims for loss of life or personal injury. As I have stated, they each have a different objective and serve to protect different interests. As such, inclusion of costs and interest into the liability limitation of s.29(a) of the MLA is an incorrect interpretation of it.

The Appeal

The Ontario Court of Appeal heard various appeals and cross appeals in this matter arising out of the summary judgment motion on liability but also on the Rule 21 motions including the motion regarding the interpretation of S. 29(a) of the MLA, as noted above.

Hourigan J.A. speaking for the Court, agreed with Munroe J.'s "careful review" and finding that Parliament did not intend to include claims for costs and interest in the monetary cap given the different purposes of each and not as part of claims for "loss of life or personal injury." Hourigan J.A. confirmed that costs are to ensure litigation is conducted in an efficient, fair and just manner and that prejudgment interest is levied to account for delay between injury and judgment.

Finally

Therefore, the Section 29 limitation of liability in the *MLA* is calculated as the amount of the cap *plus* prejudgment interest and costs on top (*2). Accordingly, unless there are specific provisions stating otherwise, limitations of liability in the *MLA* for maritime claims of loss of life or personal injury exclude costs and interest.

Endnotes

(*1) 2022 ONSC 4637. There was more than one Rule 21 motion but only the motion regarding costs and interest is reviewed here. The governmental entities were not involved in the Rule 21 motions as Munroe J. had, in an earlier summary judgment motion, dismissed all claims against the government defendants. This finding was also upheld on appeal.
(*2) There was no attempt to obtain leave to appeal to the Supreme Court of Canada.

The Promises and Pitfalls of Implementing the Internet of Things Devices in Trucking

By Jamal Rehman

Introduction

The Internet of Things ("IoT") technologies in the context of trucking refers to the integration of physical assets – such as trucks, trailers, and even cargoes – to the internet in the form of various sensors and devices. Once connected, these IoT devices can enable the collection and transmission of data in real time, which can be used to analyze and monitor various shipment metrics, including a shipment's location, condition, and expected delivery time.

Indeed, the implementation of IoT technologies is transforming the trucking and logistics sector by enhancing connectivity, streamlining automation processes, and facilitating improved data collection and analyses.

The market has made clear that IoT devices are the way of the future and are here to stay. In 2024, the IoT logistics sector is valued at a whopping USD $53.25 billion and is expected to eclipse nearly USD $200 billion by 2030.

The Promise of IoT Technologies

IoT technologies are playing an increasingly important role in the trucking sector, particularly with respect to improving operational efficiency. By establishing what is known as digital infrastructure, IoT technologies promote a variety of benefits across the trucking and logistics sector, which include the following:

1. **Real-Time Monitoring:** IoT

technologies provide carriers with "real time" access to supply chain data and status updates, which grants logistics companies the ability to monitor the location, condition, and status of their assets across the supply chain. This real-time monitoring provides the added benefit of enabling businesses to intervene and rectify situations in a timely manner.

2. **Improved Inventory and Fleet Management**: IoT technologies provide data that can be used to optimize delivery routes, avoid traffic congestion, and reduce overall travel distances. This optimization fosters reduced fuel consumption and improves delivery times. Further, in monitoring the health of motor carrier assets, IoT technologies also facilitate predictive maintenance, which involves addressing maintenance issues before they arise, and in doing so, reduces significant asset downtime and helps avoid costly repairs.

3. **Enhanced Supply Chain Visibility**: In enhancing visibility across the supply chain, IoT devices provide stakeholders and customers with up-to-the-minute information on the status and location of goods. This transparency fosters improved decision-making, increased coordination between those along the supply chain, and fosters the ability to address disruptions in a timely manner. Trucking companies can leverage these benefits to build trust and loyalty with their customers by surpassing customer expectations as it relates to transparency, timeliness, and reliability. A happy customer is a long-term customer.

Trucking-Specific Risks Associated with the Implementation of IoT Technologies

Despite their upside, trucking companies should be mindful of the risks associated with the uninformed implementation of IoT technologies.

In fact, the Verizon Security Mobile Index reported a near 600% increase in IoT-related security breaches in 2020 alone. As it relates to trucking specifically, compromised IoT devices can lead to manipulated traffic signals, vehicle hijacking, and unauthorized access to operational systems, to only name a few.

First and foremost, IoT devices have proven at times to be difficult to monitor. With trucks, trailer, and cargoes generally constantly being on the move, particularly in remote areas or across international borders, with inconsistent or unreliable internet connectivity, monitoring IoT devices can prove challenging. Interruptions in data transmission can lead to gaps in tracking and monitoring.

Moreover, IoT devices have historically been shown to be unsecure at times. Passwords are often generic and can be modified and subsequently overridden by bad actors. The stock firmware embedded within IoT devices are also often rudimentary. This, coupled with the fact that IoT device manufacturers have no protocols or best practices to adhere to in respect of security standards, creates an environment where countless potentially unsecure IoT devices are put into circulation across the trucking sector. Lastly, no honest discussion about IoT technologies can be had without acknowledging the adoption and implementation costs. IoT technologies can be expensive, particularly to small and medium-sized businesses. The cost lies not only in the devices themselves, but in the infrastructure upgrades, maintenance,

and employee training. While the cost of IoT technologies may be deterring to some, equal caution should be given to the costs of foregoing their use altogether.

Preventative Measures and Best Practices
In light of the above, the following is a non-exhaustive list of some of the initiatives that trucking companies should consider adopting so as to safeguard themselves from the risks associated with the implementation of IoT devices in their operations.

1. **Perform Regular Risk Assessments**: Performing routine risk assessments can assist in identifying potential vulnerabilities and threats both within and across your IoT and digital infrastructures and can help inform strategies to mitigate risk and enhance security protocols.

2. **Routine Software Improvements and Data Encryption**: It is not uncommon for IoT devices to come with mediocre "stock" firmware, which is problematic as cyber assailants often exploit known vulnerabilities in outdated firmware. Accordingly, organizations would be wise to routinely update the IoT's firmware and their operating systems generally, with a view of mitigating this risk. Moreover, ensuring that the data stored on or generated from IoT devices is encrypted will help ensure that any information that is compromised will remain "unreadable" even if it falls into the wrong hands.

3. **Training for Employees**: Despite the increasing prevalence of IoT devices across the trucking sector and the transportation sector more broadly, they keystone of any operation at the present time continues to require a human element, and by extension, must account for the risk of human error. Routine training on IoT and best practices in cybersecurity generally provides employees with the technical knowledge of both recognizing pending attacks as well as how to respond to them.

The Future of IoT in Trucking
The implementation of IoT technologies has revolutionized the trucking and logistics sector and will certainly play a more central role as the industry continues to evolve. As IoT technologies evolve, they will undoubtedly integrate with artificial intelligence, machine learning, prescriptive analytics, and other emerging technologies, and in doing so, will only further optimize the carriage of goods along the supply chain.

The promise is clear: IoT, when properly implemented, can serve to increase resource management, flow along the supply chain, reduce cost, and improve safety. Whether we like it or not, IoT devices are the way of the future and are here to stay.

CBSA Delays CARM Release Until October 2024

By Conal Calvert

Once again, the Canada Border Services Agency ("CBSA") has pushed back the implementation of the CBSA Assessment and Revenue Management project ("CARM"). The new system, which emphasizes self-service for importers, is intended to streamline and digitize the import process in Canada and function as the comprehensive

system of record for levying duties and taxes. With the transportation and import/export industries moving increasingly towards electronic shipping documents, the CBSA created CARM to accommodate those developments domestically.

The second phase of CARM was originally slated to begin in October 2023, but was delayed until May 13, 2024. Fears of a strike by government employees has now resulted in a revised October 2024 launch date. Notwithstanding the delay, CARM's implementation is coming and importers, customs brokers, bonded warehousers and other industry players would be wise to avail themselves of the reprieve to make the necessary preparations if they have not yet done so.

Phase 1 – May 2021

Release 1 of CARM (R1) occurred in May 2021 on a voluntary basis and included the introduction of the CARM Client Portal ("CCP"). Under R1, importers who register on the CCP can view account information, apply for customs rulings and track their progress, classify goods and estimate duties and taxes, and make electronic payments. This launch was meant to provide stakeholders with a significant runway to become acquainted with the changes to the system.

All importers of goods into Canada will be required to register under CCP by October 2024. The CCP will function as the hub for accounting and revenue management for importers and the CBSA. The system does not require importers to manage customs matters on their own as the CPP allows importers to delegate access to a service provider such as a customs broker to act on their behalf and manage their accounts.

The CCP is accessed using either a government issued GCKey or through a financial institution sign-in partner. This online registration and sign-in process will be familiar to anyone who has used other Government of Canada secure systems such as that of the Canada Revenue Agency.

Phase 2 – October 2024

Release 2 of CARM (R2) – with a scheduled launch date of October 2024 – will be compulsory for importers. Any importer not registered on the CCP prior to the October 2024 launch will be prohibited from importing goods into Canada until they have done so and satisfied the CARM requirements, notably posting financial security (e.g., a customs bond or cash) with the CBSA to maintain release prior to payment privileges.

CARM will require importers to post their own security in order to participate in the release prior to payment program ("RPP"). Reliance on a broker's security is no longer permitted. This security can take the form of either a financial security instrument for 50% of the importer's highest monthly accounts receivable (inclusive of GST) or a cash deposit of 100% of its highest monthly accounts receivable (inclusive of GST). The security will be calculated automatically by CCP.

The new commercial accounting declaration ("CAD") will replace the current customs coding (B3) and request for adjustment (B2) forms. CARM will automatically calculate those duties and taxes based on the CAD. The system will also introduce harmonized billing cycles with due dates for payments being ten weekdays after the 17th day of the calendar month.

Considerations for Industry Participants in Advance of October 2024

Ahead of the new deadline, industry participants should register under the CCP as soon as possible and familiarize themselves with the system before it becomes compulsory. No innovative government program survives first contact with its user base unscathed, therefore industry participants should be prepared to encounter

problems with implementation and ensure that they understand the system before they must rely on it. If importers and other parties have not already enrolled in the CCP, they should do so well in advance of the October deadline.

As the system anticipates delegation to an importer's agents, importers should discuss the degree of access their customs broker will require to the importer's CCP to continue to provide the same level of service and make those arrangements promptly.

Critically, importers who have not done so should make arrangements with their financial institution for security to satisfy the customs bond requirements of the RPP. Importers who have signed onto the CCP prior to the CARM R2 release date or who have a history of importing goods within the preceding four years and an account in good standing will have a 180-day transition period in which to post that security.

Contact us

If you have a Transportation & Logistics Group matter and are in need of legal advice, please do not hesitate to contact the authors or Rui M. Fernandes, at 416.203.9505 or rfernandes@grllp.com.

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