LEGAL UPDATE / RECENT CASES

Canadian Board of Marine Underwriters

Fall Conference

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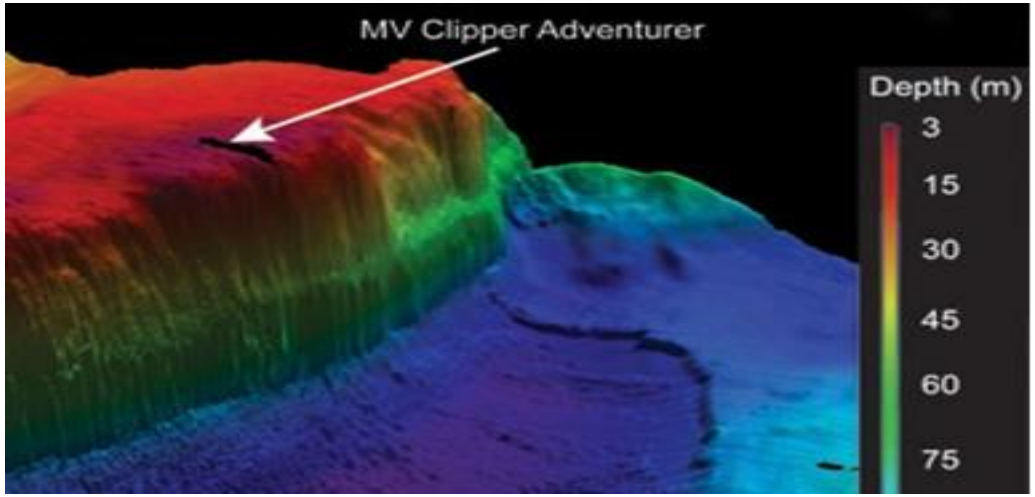
Canada v *Adventurer Owner Ltd.* 2017 FC 105 (The "Clipper Adventurer")

- In 2010, the m/v Clipper Adventurer struck an uncharted shoal in the Coronation Gulf in Nunavut.
- The vessel was proceeding full speed at the time.



The “Clipper Adventurer” Owners’ Arguments

- Under SOLAS, it was incumbent upon the Canadian Hydrographics Service to publish the existence of the shoal as a *Notice to Mariners*.
- The CHS admitted knowing about the shoal since 2007 and had a duty to warn vessels of its existence. Yet it only published the shoal as a *Notice to Shippin*g, and not a *Notice to Mariners*.
- The publication of *Notices to Shi*pping is meant for temporary obstructions such as new jetties and construction barges. The permanent underwater dangers such as shoals should be published in *Notices to Mariners*.
- It is the *Notices to Mariners* that are used to update charts. In fact, the CHS did not issue a chart correction, depriving the bridge team of one source of critical information regarding the existence of a shoal on their planned route.
- The vessel had an up to date chart on board, but which did not reflect the shoal.
- Had the Government fulfilled its obligations to properly publish the existence of the shoal in the *Notices to Mariners*, its location would have been on the up to date chart and the vessel would have been aware of it.
- The owners claimed over US$ 13 million for the costs of both temporary and permanent repairs.

The “Clipper Adventurer” Government’s Arguments

- The Crown had no duty to inform of obstructions, and that, even if it did, the 2007 Notice to Shipping which was sufficient notice.
- The proximate cause of the incident and resultant damages was the failure of the Master of the vessel to update his hydrographic charts according to the available information.
- The *Regulations* adopted under the 2001 Canada *Shipping Act* (S.C. 2001, c. 26) and the *Arctic Waters Pollution Prevention Act* which provide as follows:
  - *7. The master of a ship shall ensure that the charts, documents and publications required by these Regulations are, before being used for navigation, correct and up-to-date, based on information that is contained in the Notices to Mariners, Notices to Shipping or radio navigational warnings.*
- Under Canadian regulations each vessel has the duty to update its charts before venturing off into Canadian waters. The plaintiff vessel had failed to do so. Even if Canada had breached SOLAS, which remains uncertain, the owners would not have had a cause of action against the Crown, as the amendments to SOLAS in which the obligation is encapsulated have not been given force of law in Canada.
- The government counterclaimed for about CA$ 500,000 for costs relating to the removal of the vessel from her stranded position and cost recovery for pollution prevention measures.

The “Clipper Adventurer”
Decision of Mr. Justice Harrington – January 27th, 2017

- Because of a slew of lost internal memos and a *Notice* that remained unpublished for no discernable reason, the hydrographic chart of the area had not been properly updated by the Canadian Hydrographic Service.
- On a balance of probabilities, had the updated charts been issued, the vessel would have been made aware of it through its Canadian chart agent, and the accident would not have occurred.
- Nevertheless, the 2007 *Notice to Shipping* constituted sufficient notice. The failure of the ship’s Master to update his charts according to the 2007 Notice to Shipping was the proximate cause of the accident occurred. Moreover, even if the charts had been updated, the vessel was proceeding at full speed in unknown waters, which constituted reckless behaviour.
- The cavalier attitude and risk-taking of the crew of the vessel caused the accident. The voyage had simply not been properly prepared. Under Canadian regulations each vessel has the duty to update its charts before venturing off into Canadian waters.

De Wolf Maritime Safety BV v. *Traffic-Tech International Inc* 2017 FC 23

- De Wolf contracts with Traffic-Tech for transport of cargo from Canada to The Netherlands.
- No value declared - clean bill of lading issued with no mention that the cargo was to be carried on deck.
- Cargo was swept overboard and lost.
- Issue to be determined:
  - Does the undeclared on-deck carriage of the cargo under the bill of lading deprive the carrier from relying on the *Hague-Visby Rules*, *in particular the limitation of liability* provisions?

De Wolf Maritime Safety BV v. *Traffic-Tech International Inc* 2017 FC 23

- As to whether the deck cargo fell within the definition of goods under the Hague-Visby Rules, the Court found that Article I(c) of the *Rules*:
  - "goods" includes goods, wares, merchandise and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck **and** is so carried.
- Court found: two cumulative conditions must be fulfilled – only one fulfilled here (clean B/L)
- Consequence: Hague Visby applies along with limitation of liability provisions therein.

Kruglov v ZIM et al
unreported Judgement Quebec Superior Court 500-17-097400-173, April 10th, 2017

- Mr. Kruglov shipped his personal effects from Canada to Israel, never custom cleared the goods, and then shipped them back to Canada.
- Rather than picking up his cargo, he allowed the cargo to remain at the terminal for several months, thereby incurring demurrage and storage charges.
- When he finally requested his cargo, the Line insisted on getting paid the outstanding charges.
- Rather than paying the charges, Mr. Kruglov filed for an Injunction and an Order to Zim to release his cargo.
- Superior Court upheld the contractual and common law lien of the carrier.
- Injunction was dismissed because Mr. Kruglov did not show a reasonable chance of success.

Kruglov v ZIM et al
unreported Judgement Quebec Superior Court 500-17-097400-173, April 10th, 2017

- Injunction was dismissed because Mr. Kruglov did not show a reasonable chance of success and no urgency as the container had remained unclaimed for over 7 months.
- The Judge continued, however to say that:
  - In accordance with the principles of Canadian Maritime Law as well as pursuant to the Sea Waybill…, Zim has a possessory lien on the cargo within the container until such time as it has been fully paid. This is a right of retention.
- The Court recognized the Line`s contractual lien on the cargo.

Certain Underwriters at Lloyd's v. Mediterranean Shipping Company S.A., 2017 FC 893

- MSC carried of fruit and shrimp from Ecuador to Montreal.
- The container was picked up by the Third Party, making use of a PIN code to obtain the release of the container from the terminal.
- However, the Third Party had not been instructed by the consignee of the cargo and containers “disappeared”.
- Plaintiffs sued MSC as carrier, holding it liable for wrongful delivery of the cargo.
- MSC’s position: PIN code was provided to the consignee`s agent, and as such this constituted proper delivery.
- MSC then took a Third-Party action against the trucking company that had picked up the container.

Certain Underwriters at Lloyd's v. Mediterranean Shipping Company S.A., 2017 FC 893

- Motion for dismissal of third-party claim on the basis of lack of jurisdiction.
- Court held that land-leg of multimodal transportation does not fall within the definition of Canadian maritime law, "*by any stretch of the imagination*".
- There was no issue as between MSC and the terminal, and the claim did not involve the Line`s obligation as a ship operator or carrier under the Bill of Lading.
- As this was a claim strictly between the Line and the trucker, the third-party action was dismissed because of lack of jurisdiction by the Federal Court.

Glencore v. *Mediterranean Shipping Company*
English Court of Appeal, 2017 EWCA Civ 365

- Glencore shipped drums of cobalt briquettes to Antwerp.
- The Line used the PIN code system to facilitate release and delivery of containers, and provided these PIN codes to the consignee's agents.
- During a shipment in 2013, when the consignee's truckers arrived to take delivery, two containers were missing, having been stolen.

Glencore v. *Mediterranean Shipping Company* English Court of Appeal, 2017 EWCA Civ 365

- The Court held:
  - The Line had an obligation to deliver the cargo to the holder of the bill of lading;
  - The provision of the PIN code did not amount to delivery of possession of the goods;
  - What constituted proper delivery depended upon the context and terms of the contract of carriage;
  - Here, where the parties contemplated either actual delivery upon tendering of OBL`s, or in accordance with a Delivery Order, delivery of the PIN code could not equate and constitute proper delivery;
  - Delivery of a means of delivery is not delivery.

Broadgrain Commodities Inc v *Continental* Casualty Company, 2017 ONSC 4721

- Plaintiff entered into a contract with a buyer for the sale and shipment of 26 containers of sesame seeds.
- The goods were insured by Canada-based defendant under a policy of marine insurance.
- Goods damaged in transit.
- Defendant refused coverage on the basis that Plaintiff did not have an insurable interest in the goods at the time of the loss and that Plaintiff did not sustain any loss because it was paid in full by the buyer for shipment in question.

Broadgrain Commodities Inc v *Continental* Casualty Company, 2017 ONSC 4721

- On a motion to dismiss on a summary basis, the Court found:
  - The contract of sale between Broadgrain and the buyer was on CIF terms, meaning the risk of loss or damage to the goods passed on to the buyer upon loading;
  - The seller was obliged to pay freight and purchase insurance on behalf of the buyer to insure against the buyer's risk of loss or damage to the goods during transit;
  - The contract contained a clause to the effect that risk of loss or damage to the goods was to pass from the seller to the buyer at the time the container was stuffed and sealed;
  - As a result, by the time the goods arrived in China and were found to be damaged, both title and risk for losses to the goods had been transferred to the buyer.

Other cases

- **Ship-Source Oil Pollution Fund v. Canada, 2017 FC 530**
  - The Fund could not insist up obtaining a Release from a claimant as a condition to settlement of the claim under the *Marine Liability Act*
- **Platypus Marine, Inc. v. Tatu (Ship), 2017 FCA 184**
  - An agreement to pay an amount which equated to 59.5% of interest did not violate the Criminal Code provisions for usurious rates
- **Atlantic Container Lines AB v. Cerescorp, 2017 FC 465**
  - On a procedural matter, the Court outlined the basis why proceedings may be amended
- **Moray Channel Enterprises Ltd. v. Gordon, 2017 FC 250**
  - House Boats fall within the ambit of Canadian Maritime Law and the jurisdiction of the Federal Court
- **Avina v. Sea Senor (Ship), 2016 BCSC 2488**
  - In a dispute by co-owners of a vessel, the court refused to order the sale of the vessel

Other cases

- **ING Bank N.V. v. Canpotex Shipping Services, 2017 FCA 47**
  - The rules of Interpleader were confirmed by the Court in a dispute over who is entitled to the payment for bunkers
- **CN Railway Company v. Hanjin Shipping Co. Ltd., 2017 FC 198**
  - The Court held that a claim by a rail carrier against a shipowner for unpaid freight owing to it by the time charterer shipping Line fell within the scope of Canadian Maritime Law, and the jurisdiction of the Federal Court
- **Saam Smit Canada Inc. v. The Hanjin Vienna, 2017 FC 745**
  - The Court had to determine which party has the right to claim the proceeds of sale of the vessel
- **Transport Desgagnes Inc. v. Wärtsilä, 2017 QCCA 1471**
  - Overturning the Superior Court, the Quebec Court of Appeal reaffirmed that contracts for the supply of equipment to be installed on a ship fall to be determined by Canadian Maritime Law, and not Quebec Civil Law

Other cases

- **Offshore Interiors v. Worldspan, 2017 FC 478 & 2017 FC 479**
  - The Court had to deal with procedural issues stemming from the long standing dispute involving the HARRY SARGEANT III
- **Ship-Source Oil Pollution Fund v. Wilson, 2017 FC 796**
  - The Court allowed motions for default judgment brought by the Fund in recovery of expenses reasonably incurred by the Canadian Coast Guard

Questions
(An Arctic Insurance Policy)