Federal Court  Cour fédérale

Date: 20240913

Dockets: T-1553-21
T-1554-21
T-1555-21
T-80-22

Citation: 2024 FC 1358

St. John's, Newfoundland and Labrador, September 13, 2024

PRESENT: The Honourable Madam Justice Heneghan

ADMIRALTY ACTION *IN REM* AND *IN PERSONAM*

CROSBY MOLASSES COMPANY LIMITED, A BODY CORPORATE

Plaintiff

and

THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP M/T "SCOT STUTTGART" AND SCOT STUTTGART S.A., A BODY CORPORATE AND SCOT TANKER HOLDINGS S.A., A BODY CORPORATE AND ALL OTHERS INTERESTED IN THE SHIP M/T "SCOT STUTTGART"

Defendant

CORRECTED REASONS AND ORDER

I. INTRODUCTION

[1] By a Notice of Motion filed on April 11, 2023, Scot Stuttgart S.A. (the "Owners") appealed from the Order of Associate Judge Steele, dismissing its Motion for a stay of the within proceedings in favour of arbitration in New York . The Motion for a stay was based upon subsection 50(1)(a) of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[2] The Owners sought a stay of proceedings on the grounds of an arbitration clause and *forum non conveniens*.

II. BACKGROUND

[3] In her Reasons for Order, Associate Judge Steele provided a detailed factual background. A brief statement of the facts will suffice for the purposes of these Reasons. The details below are taken from the Reasons and the materials filed by the parties upon the Motion for a stay.

[4] Crosby Molasses Company ("Crosby" or the "Plaintiff") makes and sells molasses products. On June 11, 2020, it purchased Blackstrap Molasses from ED & F Man Liquid Products LLC (the "Charterer"). On September 4, 2020, it purchased a quantity of Cane Juice Molasses ("Fancy Molasses") from the same vendor.

[5] On September 4, 2020, the Charterer and the Owners entered into a Charter party (the "Molasses Charter party"). The Defendant Ship "M/T Scot Stuttgart" (the "Ship") was chartered to transport the molasses cargoes.

[6] The cargoes were loaded on board the Ship in Guatemala. Two Bills of Lading were issued by the Owners, one in respect of the cargo of the Blackstrap molasses ("Bill of Lading No. 1") and the other in respect of the cargo of the Fancy Molasses. ("Bill of Lading No. 2").

[7] Crosby is the consignee under Bill of Lading No. 1. It is the "rightful endorsee" under Bill of Lading No. 2.

[8] The Bills of Lading purported to incorporate the Molasses Charter Party. The Conditions of Carriage for each Bill of Lading refer to an arbitration clause as contained in the Charter Party.

[9] The Molasses Charter party consists of the standard form "IMOL 78", the Rider to the "IMOL 78" and the "Recap". The "Recap" is relevant only because it shows that the time limitation in the arbitration clause (the "Arbitration Clause"), clause 25, was extended from sixty (60) to ninety (90) days. The Associate Judge quoted clauses 19 and 25 of the Molasses Charter Party as follow:

> MOLASSES CHARTER PARTY
>
> […]
>
> 19.—This Charter Party shall, so far as possible, be governed by the laws of United States of America, except in cases of general average, which shall be

> settled according to York/Antwerp Rules 1974, an as to the matters not therein provided for according to the usages and customs of the port of New York. If a general average statement is required, it shall be prepared at New York by adjusters appointed by the Owner, subject to approval of Charterer, who shall attend to the settlement and collection of the general average, subject to customary charges. Should the Vessel put into a port of distress or be under average, she is to be consigned to the Owner's agents, paying them the usual charges and commissions.
>
> […]
>
> 25.—ARBITRATION CLAUSE: That should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, N.Y., one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for the purpose of enforcing any award, such decision may be made a rule of the Court. The Arbitrators shall be commercial men. Any claim by Charterer or Owner must be presented within sixty (60) days of completion of discharge of the within mentioned cargo, and if there is any occasion for an arbitration under said Charter Party, the Charterer and Owner agree to appoint their respective arbitrators not later than six (6) months following the date of completion of discharge.
>
> […]

[10] The Associate Judge also quoted from both Bills of Lading. The quote from Bill of Lading No. 1 follows:

> B/L No. 1
>
> […]
>
> Freight payable as per
> CHARTER-PARTY dated 04-SEPTEMBER-2020

BETWEEN SCOT STUTTGART SA AS OWNERS AND
ED&F MAN LIQUID PRODUCTS LLC AS CHARTERER

[…]

BILL OF LADING
TO BE USED WITH CHARTER-PARTIES
CODE NAME: “CONGENBILL”
EDITION 1994
ADOPTED BY
THE BALTIC AND INTERNATIONAL MARITIME COUNCIL
(BIMCO)

Conditions of Carriage

All terms and conditions, liberties and exceptions of the Charter Party, dated 15 February 2016 between Allied Chemical Carriers LLC as T/C Owners and Sucden Geneva as Charters”, including the Law and Arbitration Clause, are herewith Incorporated.

General Paramount Clause

[…]

The quote from Bill of Lading No. 2 follows:

B/L No. 2

[…]

Freight payable as per
CHARTER-PARTY dated 04-SEPTEMBER-2020

BETWEEN SCOT STUTTGART SA AS OWNERS AND
ED&F MAN LIQUID PRODUCTS LLC AS CHARTERER

[…]

BILL OF LADING
TO BE USED WITH CHARTER-PARTIES
CODE NAME: “CONGEBILL”
EDITION 1994
ADOPTED 1994
THE BALTIC AND INTERNATIONAL MARITIME COUNCIL
(BIMCO)

Conditions of Carriage

> All terms and conditions, liberties and exceptions of the Charter Party, including the Law and Arbitration Clause, are herewith Incorporated.
>
> General Paramount Clause
>
> […]

[11] The Associate Judge referred to the Paramount clause, which provides as follows:

> (2) General Paramount Clause.
>
> a) The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels the 25th August 1924 as enacted In the Country of shipment shall apply to this Bill of Lading. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said Convention shall apply.
>
> *b) Trades where Hague-Visby Rules apply.*
>
> In trades where the International Brussels Convention 1924 as amended by the Protocol signed at Brussels on February 23rd 1968 – the Hague-Visby Rules – apply compulsorily, the provisions of the respective legislation shall apply to this Bill of Lading
>
> c) The Carrier shall in no case be responsible for loss of or damage to the cargo, however arising prior to loading into and after discharge from the Vessel or while the cargo is in the charge of another Carrier, nor in respect of deck cargo or live animals.

[12] Following arrival of the Ship in Saint John, New Brunswick on October 16, 2020, the cargoes were discharged between October 17 and October 19, 2020.

[13] Crosby alleged that the cargoes arrived in damaged condition, due to contact with epoxy flakes in the Ship's tanks. It then commenced four actions, on its behalf and on behalf of subrogated insurance underwriters, seeking the recovery of damages. The actions in cause

numbers T-1553-21, T-1554-21, and T-1555-21 were begun on October 14, 2021. The action in cause number T-80-22 was begun on January 14, 2022. All four actions were consolidated by Order issued on May 9, 2022. No Statements of Defence have yet been filed.

[14] On January 13, 2022, counsel for Crosby delivered an "Arbitration Demand" for arbitration in New York, relative to Bill of Lading No. 1. The Arbitration Demand specifically referred to the Molasses Charter Party and further provided that the Demand was issued "under reserve" as to the legality of the incorporation of that Charter Party into Bill of Lading No. 1.

[15] By a Notice of Motion filed on May 23, 2023, the Owners sought an Order staying the proceedings in this Court in favour of arbitration in New York.

[16] In her Reasons, the Associate Judge identified the following as the issues for determination upon the Motion:

- whether there is an enforceable agreement to arbitrate between the parties, and

- whether the Court should exercise its discretion to decline jurisdiction on the grounds of *forum non conveniens*.

[17] The Associate Judge began her discussion with consideration of the text of the Bills of Lading. The cover page of each Bill of Lading refers to a Charter Party dated September 4, 2020, in the clause about the freight payable. She observed that the same language appears on the

reverse page of the Bills of Lading in clause 1 of the "Conditions of Carriage". She concluded that the Bills of Lading refer to the Molasses Charter Party.

[18] The Associate Judge acknowledged that Crosby was not party to negotiating the terms of either the Molasses Charter Party or the Bills of Lading. With respect to the Bills of Lading, she acknowledged section 2 of the *Bills of Lading Act,* R.S.C 1985, c. B-5, which provides as follows:

Right of consignee or endorsee	Droits acquis au consignataire et à l'endossataire
2 Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned passes on or by reason of the consignment or endorsement, has and is vested with all rights of action and is subject to all liabilities in respect of those goods as if the contract contained in the bill of lading had been made with himself.	2 Tout consignataire de marchandises, nommé dans un connaissement, et tout endossataire d'un connaissement qui devient propriétaire de la marchandise y mentionnée par suite ou en vertu de la consignation ou de l'endossement, entrent en possession et sont saisis des mêmes droits d'action et assujettis aux mêmes obligations à l'égard de cette marchandise que si les conventions contenues dans le connaissement avaient été arrêtées avec ce consignataire ou cet endossataire.
R.S., c. B-6, s. 2	S.R., ch. B-6, art. 2

[19] However, the Associate Judge noted that within the "Conditions of Carriage" on the reverse of Bill of Lading No. 1, there is "additional text" referring to a charter party dated February 15, 2016. She further noted that the named parties to that charter party are "apparently

unrelated" to the Molasses Charter Party and are strangers to this litigation. She said that there was no evidence submitted on the Motion before her about the February 15, 2016 charter party.

[20] The Associate Judge proceeded to address the consequences of the reference to the February 15, 2016. She rejected the Owner's submissions that this reference was a "mistake" that could be rectified. She concluded that "in the absence of evidence to the contrary, there is no binding Arbitration Clause" under Bill of Lading No. 1.

[21] The Associate Judge then turned to the question of the incorporation of the Arbitration Clause in Bill of Lading No. 2. For the purpose of her analysis, she proceeded on the basis that clause 1 of the Conditions of Carriage is the same under both Bills of Lading.

[22] The Associate Judge found, on the basis of the decision in *The Rena K*, [1979] 1 All E. R. 397 (Q.B.), that the Arbitration Clause is *prima facie* incorporated in both Bills of Lading. However, she went on to consider whether the Arbitration Clause is binding on Crosby and concluded that it is not.

[23] The Associate Judge turned her mind to the intentions of the Owners and the Charterer to apply the Arbitration Clause to a third party, such as Crosby who was not involved in negotiating the terms of the Molasses Charter Party.

[24] The Associate Judge also addressed the issue of the 90 day time bar for delivering claims, as set out in the Arbitration Clause. Crosby had argued that this time bar conflicted with the *Hague Rules* and the *Hague-Visby Rules*.

[25] The Associate Judge rejected the arguments of the Owners that the time bar is a matter to be left to the arbitral panel. She found that the applicable time bar was an issue that is relevant to whether the Arbitration Clause, as incorporated into the Bills of Lading, is enforceable against Crosby.

[26] The Associate Judge found that the time bar in the Arbitration Clause could neither be severed nor disregarded, that "time bar limits are integral to the arbitration procedure". She referred to judicial "manipulation" and its limits. Referring to the decision in *G. H. Renton & Co. Ltd. v. Palmyra Trading Corporation of Panama* [1955] 3 All E.R. 251 (Q.B.D.), the Associate Judge said that judicial "manipulation" does not allow a Court to "rewrite" the clause. She determined that in effect, the Owners were requesting such a "rewrite".

[27] The Associate Judge concluded that the time bar in the Arbitration Clause was a "clear condition" and inconsistent with the terms of the Bills of Lading. She found that the Arbitration Clause was "null and void", and not binding upon Crosby.

[28] Finally, on the issue of the Arbitration Clause, the Associate Judge considered section 46 of the *Marine Liability Act,* S.C. 2001, c. 6 which provides as follows**:**

Claims	Créances
46 (1) If a contract for the carriage of goods by water provides for the adjudication or arbitration of claims arising under the contract in a place other than Canada, a claimant may institute judicial or arbitral proceedings in a court or arbitral tribunal in Canada that would be competent to determine the claim if the contract had referred the claim to Canada, if	46 (1) Lorsqu'un contrat de transport de marchandises par eau prévoit le renvoi de toute créance découlant du contrat à une cour de justice ou à l'arbitrage en un lieu situé à l'étranger, le réclamant peut, à son choix, intenter une procédure judiciaire ou arbitrale au Canada devant un tribunal qui serait compétent dans le cas où le contrat aurait prévu le renvoi de la créance au Canada, si l'une ou l'autre des conditions suivantes existe:
(a) the actual port of loading or discharge, or the intended port of loading or discharge under the contract, is in Canada;	a) le port de chargement ou de déchargement — prévu au contrat ou effectif — est situé au Canada;
(b) the person against whom the claim is made resides or has a place of business, branch or agency in Canada; or	b) l'autre partie a au Canada sa résidence, un établissement, une succursale ou une agence;
(c) the contract was made in Canada.	c) le contrat a été conclu au Canada
Agreement to designate	Accord
(2) Notwithstanding subsection (1), the parties to a contract referred to in that subsection may, after a claim arises under the contract, designate by agreement the place where the claimant may institute judicial or arbitral proceedings.	(2) Malgré le paragraphe (1), les parties à un contrat visé à ce paragraphe peuvent d'un commun accord désigner, postérieurement à la créance née du contrat, le lieu où le réclamant peut intenter une procédure judiciaire ou arbitrale.
2001, c. 6, s. 46; 2023, c. 26, s. 322.	2001, ch. 6, art. 46; 2023, ch. 26, art. 322

[29] The Associate Judge found that section 46 applies upon the facts of this case. She referred to the decisions in *Mazda Canada Inc. v. Cougar Ace (The)*, 2008 FCA 219 and *T. Co. Metals LLC v. Federal Ems (Vessel)*, 2012 FCA 284. She concluded that, upon these authorities,

the Owners are "caught" by section 46 of the *Marine Liability Act*, *supra* and that arbitration in New York is not available to them.

[30] The Associate Judge then addressed the issue of granting a stay on the basis of *forum non conveniens*, pursuant to paragraph 50(1)(a) of the *Federal Courts Act*, *supra* which provides as follows:

Stay of proceedings authorized 50 (1) The Federal Court of Appeal or the Federal Court may, in its discretion, stay proceedings in any cause or matter (a) on the ground that the claim is being proceeded with in another court or jurisdiction; or […]	Suspension d'instance 50 (1) La Cour d'appel fédérale et la Cour fédérale ont le pouvoir discrétionnaire de suspendre les procédures dans toute affaire: a) au motif que la demande est en instance devant un autre tribunal; […]

[31] The Associate Judge adopted the non-exhaustive list of factors set out in *Spar Aerospace Ltd. v. American Mobile Satellite*, 2002 SCC 78, when considering the arguments on the issue of *forum non conveniens*, as follow:

> 1) the parties' residence, and that of witnesses and experts;
>
> 2) the location of the material evidence;
>
> 3) the place where the contract was negotiated and executed;
>
> 4) the existence of proceedings pending between the parties in another jurisdiction;
>
> 5) the location of the defendants' assets;
>
> (6) the applicable law;

> 7) advantages conferred upon the plaintiff by its choice of forum, if any;
>
> 8) the interests of justice;
>
> 9) the interests of the parties;
>
> 10) the need to have the judgment recognized in another jurisdiction

[32] The Associate Judge reviewed the submissions of the parties on these elements. She acknowledged that the Owners, as the moving party bore the burden to show that the proceedings in this Court should be stayed, in favour of arbitral proceedings in New York. She ultimately concluded that although some factors were more important than others, the Owners had failed to establish that New York was "clearly" the jurisdiction for the resolution of the within actions.

[33] The motion for a stay was dismissed.

III. SUBMISSIONS

[34] The parties provided written submissions in their respective Motion records filed upon their appeal. Following the hearing, Directions were issued, giving the parties the opportunity to file further submissions.

[35] By a Direction issued on June 28, 2023, the parties were given the opportunity to address the decision of the Federal Court of Appeal in *General Entertainment and Music Inc. v. Gold Line Telemanagement Inc*., 2023 FCA 148.

[36] By a Direction issued on January 18, 2024, the parties were given the opportunity to address certain questions as follow:

> 1. If the Court finds that there is an agreement to arbitrate, does the Court have any discretion to refuse a referral to arbitration?
>
> 2. Each Bill of Lading is claused in different language. Can the Court refer the parties to arbitration under one Bill of Lading but not the other?
>
> 3. If the Court decides to refer the parties to arbitration of their disputes under either Bill of Lading or both, is it open to the Court to refer the parties to arbitration in Canada pursuant to the *Commercial Arbitration Act*, R.S.C. 1985, c. 17 (2nd Supp.) and Code, and respect the claimant's rights pursuant to section 46 of the *Marine Liability Act*, S.C. 2001, c. 6?

[37] The Direction also referred the parties to the decision of the Supreme Court of England and Wales in *Herculito Maritime Ltd. and Others v. Gunvor International BV and others*, [2024] UKSC 2, upon the issue of incorporation as discussed in paragraphs 76 to 90. The parties filed further submissions in response to both Directions.

A. *Scot's Submissions*

[38] Scot advances several arguments upon its appeal from the Order of Associate Judge Steele.

[39] First, it submits that the Associate Judge erred when she found that the Arbitration Clause contained in the Charter Party was not properly incorporated into the Bills of Lading, in particular Bill of Lading No. 1. It argues that the Associate Judge wrongly considered the intentions of the parties relative to the Charter Party, rather than in relation to the Bills of Lading.

[40] Scot contends that although the Associate Judge accepted that the reference in Bill of Lading No. 1 to a charter party dated February 15, 2016 is probably a mistake, she erred in applying the legal tests for rectification of a mistake, as discussed by the Supreme Court of Canada in *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56.

[41] Further, Scot argues that the Associate Judge erred in finding that the Arbitration Clause does not bind Crosby on the grounds that "the words used do not appear to reflect an intention of the Owners and Charterers to apply to third parties and/or disputes that arose under the Bills of Lading".

[42] Scot submits that this finding is contrary to the jurisprudence and cites the decisions in *Thyssen Canada Ltd. v. Mariana (The)*, 2000 CanLII 17113 (F.C.A.) and *Nanisivik Mines Ltd. v. F.C. R. S. Shipping Ltd.*, 1994 CanLII 3466 (F.C.A.) to support its arguments that the intention of the parties is to be drawn from the language of the Bills of Lading. It argues that the Associate Judge erred in failing to manipulate the language of the Arbitration Clause in order to give effect to the intention of the parties, that is the Owners and the Charterer.

[43] Further, Scot argues that the Associate Judge erred in finding that had the Owners and Charterer intended that the Arbitration Clause bind any holder of the Bills of Lading, the clause would have been drafted in that way. It submits that this conclusion is contrary to the applicable case-law.

[44] Scot argues that the Associate Judge also erred in finding that the time bar set out in the Arbitration Clause makes that clause null and void. The Associate Judge accepted the submissions of Crosby that the ninety (90) day time bar for commencing arbitration proceedings contravenes the provisions of the *Hague Rules* and/or the *Hague-Visby Rules*, both of which are incorporated into the *Marine Liability Act, supra*.

[45] Scot submits that the Associate Judge should have deferred the issue of any applicable time bar to the arbitral panel. It referred to the decision of the Supreme Court of Canada in *Dell v. Union des consommateurs*, 2007 SCC 34 where that Court recognized that arbitrators should enjoy wide discretion in determining their jurisdiction. The Supreme Court adopted the "absolute nullity" test.

[46] Finally, Scot argues that the Associate Judge misapplied the test in dismissing the motion on grounds of *forum non conveniens*. It submits that the Associate Judge unreasonably dismissed the fact that there are arbitral proceedings in the United States, that the parties contracted for jurisdiction in the United States and that the Molasses Charter Party and the Bills of Lading are subject to the law of the United States. It relies on the decision in the "Cougar Ace", *supra*.

B. *Crosby's Submissions*

[47] Crosby begins its written arguments with a review of the applicable standard of review, that is reasonableness for questions of mixed fact and law and the exercise of discretion. It characterizes the Associate Judge's findings upon the issue of rectification and *forum non*

conveniens as discretionary decisions. It challenged Scot's submissions that the Associate Judge's reasons are in any way reviewable upon the standard of correctness.

[48] Crosby then addresses the errors alleged by Scot.

[49] First, it argues that the Associate Judge did not err in dismissing the motion for a stay on the basis of *forum non conveniens*. It points to the highly discretionary nature of such a decision and contends that the Associate Judge reasonably considered the relevant factors.

[50] Then, it submits that the Associate Judge did not err in declining to apply the remedy of rectification to allow the incorporation of the Arbitration Clause in Bill on Lading No. 1. It noted that the Associate Judge reasonably found that there was no evidence about the charter party that was reference in Bill of Lading No. 1 and that in the circumstances, there was no error by the Associate Judge.

[51] Crosby also argues that the Associate Judge did not err in her interpretation that the Arbitration Clause in the Molasses Charter Party was not binding on third parties. It also submits that the Associate Judge found ambiguity between the time bar in the Arbitration Clause and the Paramount Clause, and reasonably applied the *contra proferantum* rule.

[52] Crosby argues that this finding involves a question of mixed fact and law, reviewable on the standard of reasonableness. It says that the standard is met.

C. *Scot's Further Submissions*

[53] In further submissions filed on July 7, 2023, Scot addresses the recent decision of the Federal Court of Appeal in *General Entertainment, supra*. In that decision, the Federal Court of Appeal reversed the Federal Court and granted the defendant a stay of proceedings in favour of arbitration in Bermuda.

[54] Scot relies on this decision to support its arguments that when an Arbitration Clause is involved it is up to the arbitrator to decide its jurisdiction and issues about the validity of the arbitration agreement.

[55] Scot also filed submissions in response to certain questions raised by way of a Direction that was issued on January 18, 2024.

[56] In respect of the decision in *Iberfreight S.A. v. Ocean Star Container Line A.G.*, (1989), 104 N.R. 164 (F.C.A.), Scot argues that this decision stands for the proposition that once a court finds that there is an agreement to arbitrate and an application for a stay is made, the provisions of the Commercial Arbitration Code, Schedule 1 to the *Commercial Arbitration Act*, R.S.C. 1985, c. 17 (2nd Supp), the matter must be referred to arbitration.

[57] Scot submits that its motion for a stay before the Associate Judge was a “timely request” for arbitration as required by Article 8 of the Arbitration Code.

[58] Scot further argues that should the Court conclude that the Arbitration Clause was not incorporated in Bill of Lading No. 1, then it could allow a stay under Bill of Lading No. 2 and refuse a stay under Bill of Lading No. 1.

[59] However, Scot suggests that a "better alternative" would be to exercise its discretion to grant a stay pursuant to paragraph 50(1)(b) of the *Federal Courts Act, supra* to allow both claims to be heard by the same arbitral panel.

[60] Scot urges the Court to follow the recent decision in *Herculito, supra*, to correct the clerical error referring to the charter party dated February 15, 2016, focusing on the language of Bill of Lading No. 1.

D. *Supplementary Submissions from Crosby*

[61] Crosby responded to Scot's submissions about the decision in *General Entertainment, supra* by arguing first, that this decision and others submitted by Scot, on the matter of leaving the jurisdiction of the arbitration panel to the arbitrator, did not involve section 46 of the *Marine Liability Act, supra*.

[62] Further, Crosby argues that the Associate Judge adequately considered the Arbitration Clause from the facts available on the record and in any event, assessment of that clause is "immaterial" in view of section 46.

[63] In its submissions in response to the Direction of January 18, 2024, Crosby begins by observing that the decision in *Iberfreight, supra* predates the implementation of section 46 of the *Marine Liability Act, supra* and is of limited assistance.

[64] Crosby submits that it has a "statutory presumptive right" to commence proceedings in Canada, notwithstanding any Arbitration Clause, subject only to the invocation of *forum non conveniens*. It relies on the decisions in the "Cougar Ace", *supra* and the *"Federal Ems"*, *supra* in this regard.

[65] Crosby contends that where section 46 of the *Marine Liability Act, supra* applies, the Arbitration Clause is not enforceable in Canada and that in this case, the analysis must proceed on the basis of *forum non conveniens*. It submits that the Associate Judge made no reviewable error in her analysis and disposition of this argument.

[66] Crosby argues that there is no statutory authority to allow this Court to refer the dispute to arbitration in Canada.

[67] As for the decision in *Herculito, supra*, Crosby submits that the issue of the incorporation of the Arbitration Clause into the Bills of Lading is "largely subordinate to the *forum non conveniens* analysis" that section 46 requires.

[68] Crosby acknowledges the guidance provided by the Supreme Court of England and Wales about the incorporation. However, it argues that the "modern approach" to incorporation

presented by that Court could only apply in the present case if the bill of lading identifies a charter party that could be reviewed by a court. In the present case, the Associate Judge found that the reference to a 2016 charter party could not be considered in the absence of its production and of any evidence about its terms.

E. *Scot's Reply to Crosby*

[69] Scot filed brief submissions in response to those of Crosby. It submits that the analysis should begin by determining, pursuant to Article 8 of the Commercial Arbitration Code, if there is a "binding arbitration agreement between the parties".

[70] Next, the Court is to consider if section 46 of the *Marine Liability Act, supra* applies and if so, is the binding arbitration agreement unenforceable in Canada.

[71] Third, the Court is to consider what is the best forum to adjudicate the dispute between the parties.

[72] Finally, Scot argues that the existence of a binding arbitration agreement and the relationship between the parties are relevant issues to the *forum non conveniens* analysis.

[73] Scot maintains that the Associate Judge erred in declining to incorporate the Molasses Charter Party into Bill of Lading No. 1 by failing to properly and reasonably interpret and apply the incorporating language of that Charter Party as applying to Crosby.

IV. DISCUSSION AND DISPOSITION

[74] The first issue for consideration is the applicable standard of review. In *Re/Max LLC v. Save Max Real Estate Inc.*, 2022 FC 1268 at paragraphs 18 to 20, this Court applied the usual appellate standard of "palpable and overriding error" to appeals from an associate judge, as follow:

> [18] The standard of review applicable to a Rule 51 motion appealing a decision of a prothonotary or associate judge is the appellate standard described by the Supreme Court of Canada in *Housen v Nikolaisen*, 2002 SCC 33 at paras 7-36 : *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at paras 63, 65, 79 and 83.
>
> [19] As the Federal Court of Appeal more recently guides, "questions of fact and mixed questions of fact and law are subject to the palpable and overriding error standard while questions of law, and mixed questions where there is an extricable question of law, are subject to the standard of correctness": *Worldspan Marine Inc. v Sargeant III*, 2021 FCA 130 at para 48.
>
> [20] The "palpable and overriding error" standard of review is highly deferential. Palpable means an obvious error, while an overriding error is one that affects the decision-maker's conclusion: *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 at paras 61-64.

[75] The issues in the appeal involve questions of mixed fact and law, and the exercise of discretion. The exercise of discretion was involved in addressing the remedy of rectification and addressing the arguments about *forum non conveniens*. The applicable standard of review is reasonableness, subject to a finding of a "palpable and overriding error".

[76] In *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 at paragraph 27, the Supreme Court of Canada commented on the circumstances that may give rise to intervention in a discretionary decision, as follows:

> [27] A discretionary decision of a lower court will be reversible where that court misdirected itself or came to a decision that is so clearly wrong that it amounts to an injustice: *Elsom v. Elsom*, 1989 CanLII 100 (SCC), [1989] 1 S.C.R. 1367, at p. 1375. Reversing a lower court's discretionary decision is also appropriate where the lower court gives no or insufficient weight to relevant considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, 1992 CanLII 110 (SCC), [1992] 1 S.C.R. 3, at pp. 76-77.

[77] Although Scot argues that this appeal raises errors of law and attracts review on the standard of correctness, I am not persuaded that any "extricable" question of law arises that would merit review on the correctness standard.

[78] Two issues arise from this appeal by Scot: first, whether there is an enforceable arbitration agreement that is binding on the parties to arbitrate in New York, and second, if so, should the consolidated proceedings be stayed in favour of arbitration.

[79] The Associate Judge was dealing with two Bills of Lading and one charter party, the Molasses Charter Party. She acknowledged that Crosby was not privy to negotiating the terms of either the Bills of Lading or the Molasses Charter Party. She found that Crosby is the consignee under Bill of Lading No.1 and the endorsee under Bill of Lading No. 2.

[80] Sections 2 and 4 of the *Bills of Lading Act*, *supra* are relevant to the relationship between the parties here and provide as follows:

Right of consignee or endorsee

2 Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned passes on or by reason of the consignment or endorsement, has and is vested with all rights of action and is subject to all liabilities in respect of those goods as if the contract contained in the bill of lading had been made with himself. R.S., c. B-6, s. 2.

[…]

Evidence by bill of lading

4 Every bill of lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel or train, is conclusive evidence of the shipment as against the master or other person signing the bill of lading, notwithstanding that the goods or some part thereof may not have been shipped, unless the holder of the bill of lading has actual notice, at the time of receiving it, that the goods had not in fact been laden on board, or unless the bill of lading has a stipulation to the contrary, but the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fault of the shipper or of the holder, or of some person under whom the holder claims. R.S., c. B-6, s. 4

Droits acquis au consignataire et à l’endossataire

2 Tout consignataire de marchandises, nommé dans un connaissement, et tout endossataire d’un connaissement qui devient propriétaire de la marchandise y mentionnée par suite ou en vertu de la consignation ou de l’endossement, entrent en possession et sont saisis des mêmes droits d’action et assujettis aux mêmes obligations à l’égard de cette marchandise que si les conventions contenues dans le connaissement avaient été arrêtées avec ce consignataire ou cet endossataire. S.R., ch. B-6, art. 2.

[…]

Le connaissement fait foi du chargement

4 Tout connaissement que détient un consignataire ou un endossataire en contrepartie d’une cause ou considération valable, portant que des marchandises ont été expédiées sur un vaisseau ou par train, constitue, contre le capitaine ou autre personne signataire du connaissement, une preuve concluante de cette expédition, même si ces marchandises ou une partie d’entre elles peuvent n’avoir pas été ainsi expédiées, à moins que ce détenteur du connaissement n’ait été de fait informé, lors de la réception du connaissement, que les marchandises n’avaient pas été véritablement chargées, ou sauf si ce connaissement stipule le contraire. Toutefois, le capitaine ou autre signataire peut dégager sa responsabilité à l’égard de cette fausse déclaration, en démontrant

> que celle-ci n'a pas été causée par un manquement de sa part, mais l'a été entièrement par la faute de l'expéditeur ou du détenteur, ou d'une personne dont ce dernier tient ses droits. S.R., ch. B-6, art. 4.

[81] The Arbitration Clause is found in the Molasses Charter Party, clause 25. The Conditions of Carriage, on the reverse of each Bill, purport to incorporate the "Law and Arbitration Clause". The Associate Judge, referring to the decision in *The Rena K, supra*, found that the Arbitration Clause is *prima facie* incorporated in both Bills of Lading.

[82] I will begin with the Associate Judge's treatment of Bill of Lading No. 1. That Bill of Lading refers, in the Conditions of Carriage, to a charter party dated February 15, 2016.

[83] The consideration of Bill of Lading No. 1 involves both a question of mixed fact and law, and the exercise of discretion. The "question" of mixed fact and law arises from the issue of the incorporation of the Molasses Charter Party into that Bill of Lading. The question of discretion arises from the manner in which the Associate Judge dealt with the equitable remedy of rectification.

[84] Rectification arises because Bill of Lading No. 1 refers to a charter party dated February 15, 2016 which is not the date of the Molasses Charter Party. Scot pleaded that this reference was a "clerical error", a mistake. Although Crosby complains that Scot did not "ask" the

Associate Judge to apply the doctrine of rectification, it is clear from her reasons that she did in fact do so.

[85] This conclusion is important because the Associate Judge had already found, as a fact, that the cover page of both Bills of Lading, in clause 1, referred to the Molasses Charter Party. She had already found, as a fact, that Crosby was not party to negotiating the terms of either the Molasses Charter Party and the Bills of Lading. At issue was the incorporation of the Arbitration Clause in either or both Bills of Lading.

[86] As outlined above, the Associate Judge considered the equitable doctrine of rectification and relevant jurisprudence, that is the decision in *Fairmont Hotels, supra*. She declined to apply the remedy. She found that there was no evidence before her about the terms of that charter party and concluded that there was no binding arbitration clause included in Bill of Lading No. 1.

[87] Although Scot argues that the Associate Judge erred in failing to remedy the mistaken reference in Bill of Lading No. 1, by treating it as a reference to the Molasses Charter Party, I do not agree.

[88] In *Herculito, supra*, the Court dealt with the incorporation of charter party terms into a Bill of Lading.

[89] The facts of that case are distinguishable. At least in that case, the Court had the benefit of a charter party that it could review. Those are not the facts here.

[90] I see no reviewable error in the disposition of Bill of Lading No. 1 by the Associate Judge. There was no evidence before her about the arbitration clause in the charter party dated February 15, 2016. Without evidence, she reasonably concluded that Bill of Lading No. 1 does not contain a binding arbitration clause.

[91] Although the finding of the Associate Judge that Bill of Lading No. 1 does not incorporate the Molasses Charter Party and does not contain the Arbitration Clause in that Bill of Lading, Bill of Lading No. 1 remains relevant to this appeal. I turn now to Bill of Lading No. 2.

[92] The Associate Judge apparently proceeded on the basis that only one contract was before her. This is an error. A "palpable and overriding" error. Each Bill of Lading is a separate contract and must be interpreted as such. The Molasses Charter Party is a "single" contract. That fact does not make the two Bills of Lading a "single" contract.

[93] At paragraph 21 of her Reasons, the Associate Judge said the following:

> It is not disputed that Crosby was not a party to the negotiations regarding the Molasses Charter Party or the Bills of Lading.

[94] With respect, in my view the Associate Judge errs when relying on a "presumption" that Crosby has assumed the "rights and responsibilities" under the Bills of Lading.

[95] Pursuant to section 2 of the *Bills of Lading Act, supra*, Crosby is subject to those rights and responsibilities.

[96] Each Bill of Lading is a separate contract for the carriage of the cargoes. Each Bill of Lading is also evidence of that contract. This is clear from sections 2 and 4 of the *Bills of Lading Act*, *supra* cited above. Further, in the text cited by the Associate Judge, on the same page, the authors say, relative to section 2, that "privity of contract arises statutorily between the carrier and the cargo owner, holder of the bill of lading".

[97] The Associate Judge found that the Bill of Lading No. 2 incorporated the Molasses Charter Party. That contact contains the Arbitration Clause. The Associate Judge referred to the decision in *The Rena K.*, *supra* as authority for the principle that a term in a bill of lading incorporating terms of a charter party is sufficient to show the intention of the parties that such arbitration clause will apply to disputes arising under the bill of lading.

[98] I refer also to the decision of the Federal Court of Appeal in *Thyssen*, *supra* at paragraphs 10 and 14 , as follow:

> [10] With respect to the appellant's contention that neither arbitration clause found in the respective charter parties expressly refers to disputes arising under the bill of lading, no authority was cited for the proposition that an arbitration clause found in a charter party must contain language expressly extending its ambit to bill of lading disputes. Indeed the law is otherwise. An arbitration clause in a charter party will be deemed to be incorporated into a bill of lading in either one of two circumstances.
>
> […]
>
> [14] No authority was cited to this Court to support the proposition that a party cannot rely on a contractual provision, which has been incorporated by reference, unless that party is also a party to the contract which is being referenced. In my opinion, the argument is misconceived. The real question is whether the parties to the bills of lading intended and agreed to be bound by an arbitration clause found in another document. There is no need, for

> example, for the respondent shipowner to be a party to the voyage charter party. It does not seek to sue in contract either Metalexportimport or Hawknet. Nor is either of those parties suing the respondent. The issue is not whether the respondent is a party to the charter party, but whether it is entitled to rely on an arbitration clause which has been incorporated, by reference, into a bill of lading. If, as between the shipper and the shipowner, there is a contract represented by a bill of lading, then the only question is whether that contract has effectively incorporated by reference an arbitration clause set out in another document. Once incorporated into the bill of lading, the consignee is bound by this provision as is the consignor and the shipowner.

[99] The incorporation of the Arbitration Clause in Bill of Lading No. 2 accords with the applicable jurisprudence and is reasonable. As set out in paragraph 14 of *Thyssen, supra* above, the objective intention of the parties is relevant and important.

[100] In *Herculito, supra*, the Supreme Court of England and Wales presented a "modern" approach to the incorporation of charter party clauses.

[101] The facts of that case are unusual, where a shipowner claimed for recovery of a ransom paid to pirates, pursuant to a general average adjustment from holders of bills of lading. The issue was whether the shipowner was obliged to seek reimbursement from the insurers under a policy that the charterer was bound to obtain, and did obtain, under the charter party.

[102] The Supreme Court upheld findings that the charter party terms relevant to obtaining insurance were incorporated but that did not require a commitment from the shipowner to forbear contribution in general average from the holders of the bills of lading.

[103] At paragraph 77, the Supreme Court set out a three step process as follows:

> A helpful and succinct summary of the relevant principles is to be found in Scrutton on Charterparties 24th ed (2020) at paras 6-016 to 6-018, as cited by Males LJ in the Court of Appeal: "It appears that in order to ascertain which, if any, terms of the charter are incorporated into the bills, an enquiry in three stages must be carried out:
>
> > (1) The incorporating clause in the bill of lading must be construed in order to see whether it is wide enough to bring about a prima facie incorporation of the relevant term. General words of incorporation will be effective to incorporate only those terms of the charterparty which relate to the shipment, carriage or discharge of the cargo or the payment of freight. Which of those terms are incorporated into the bill depends on the width of the incorporating provision. Where specific words of incorporation are used, they are effective to bring about a prima facie incorporation even if the term in question does not relate to shipment, carriage or discharge, and even if some degree of manipulation is required. Further, on the modern approach, specific words of incorporation in the bill of lading may be sufficient to incorporate a term in the charterparty which it was clearly intended to incorporate, even if the term does not literally fall within the incorporating words, if it is clear that something has gone wrong with the language. Where the intention is doubtful, the court will not hold that the term is incorporated. If the incorporating clause in the bill of lading is not wide enough of its own to bring about a prima facie incorporation of the relevant term, then (semble) it will not be permissible to have regard to the terms of the charterparty in order to effect an incorporation which would otherwise fail.
>
> > (2) If it is found that the incorporating clause is wide enough to effect a prima facie incorporation, the term which is sought to be incorporated must be examined to see whether it makes sense in the context of the bill of lading; if it does not, it must be rejected. This process should be performed intelligently and not mechanically, and must not be allowed to produce a result which flouts common sense. Where the term relates to shipment, carriage or delivery, some degree of manipulation is permissible to make its words fit the bill of lading, but not where the term relates to other matters. Where the intention to incorporate a specific

> clause is particularly clear, a greater degree of manipulation will be permitted.
>
> (3) Where there is an incorporation which is prima facie effective, the term in question must be examined to see whether it is consistent with the express terms of the bill. If it is not, it will be rejected, although terms of the charterparty which are not incorporated for this reason may nevertheless negate the implication of terms which might otherwise be implied into the bill of lading."

[104] In the present case, Crosby alleges in the Consolidated Statement of Claim that the cargoes were contaminated by the Ship. Its claim is directly related to performance of the contract of carriage which is evidenced by the Bills of Lading.

[105] In my view, the observations of the Associate Judge about "ambiguity" as to the intentions of Scot and Crosby about the incorporation of the Arbitration Clause in Bill of Lading No. 2 are unfounded and of questionable relevance.

[106] The Associate Judge did not stop at the question of incorporation and proceeded to consider whether the Arbitration Clause is enforceable against Crosby.

[107] The Associate Judge found that the ninety day time bar for commencing arbitration proceedings offends the provisions of the *Hague* and *Hague-Visby Rules* by shortening the time limit available to resolve disputes. She found that this short time bar could not have been intended to bind third parties, such as Crosby.

[108] The Associate Judge referred to the Paramount Clause, cited above. The purpose of such a clause is to override any incompatible terms of the Bills of Lading.

[109] The Associate Judge rejected the submissions of Scot that the time bar was a matter best left to the arbitral panel. She found that a time bar is "integral" to the arbitral process and it was not possible to ignore or sever the time bar. She proceeded to find the Arbitration Clause unenforceable against Crosby.

[110] I note that Scot has not agreed to suspend this time bar. According to the affidavit of Mr. Robert Powell, sworn on May 1, 2023, filed by Crosby upon this appeal from the Order of Associate Judge Steele, Scot served an Arbitration Demand upon Crosby on April 13, 2023. In this Arbitration Demand, Scot seeks a Final Award finding that Crosby's claims are time barred pursuant to Clause 25 of the Molasses Charter Party.

[111] The service of this Arbitration Demand by Scot confirms that it is not prepared to waive the time bar in the Arbitration Clause.

[112] Be that as it may, I return to the conclusion of the Associate Judge that the short time bar makes the Arbitration Clause unenforceable against Crosby. In my opinion, this conclusion is unreasonable.

[113] It seems to me that the Paramount Clause means that the time limits in the *Hague* or *Hague-Visby* Rules apply. In any event, that clause can be accommodated by requiring Scot to

file an undertaking not to enforce the time bar in the Arbitration Clause, as happened in *Iberfreight, supra*.

[114] In that case, the shipowner and the charterer were sued. A bill of lading issued by the charterer named it as the "carrier". The terms of the bill of lading included an arbitration clause. The owner and charter sought a stay in favour of arbitration.

[115] The Federal Court of Appeal referred the dispute between the charterer and the claimant to arbitration, and refused to stay the action of the claimant against the owner.

[116] I observe that in *Arc-en-Ciel Produce Inc. v. BF Leticia (Ship)*, 2022 FC 843, the Court ordered the defendant to file a written undertaking not to enforce any time bar or raise it as a defence if proceedings were commenced in the United States District Court, Southern District of New York, when granting a stay of proceedings commenced in this Court.

[117] In finding the Arbitration Clause to be unenforceable against Crosby on the basis of the time bar, the Associate Judge drew an unreasonable conclusion, by ignoring the purpose and effect of the Paramount Clause and applicable jurisprudence.

[118] The next issue for consideration is section 46 of the *Marine Liability Act, supra* which provides as follows:

Claims	Créances
46 (1) If a contract for the carriage of goods by water provides for the adjudication or arbitration of claims	46 (1) Lorsqu'un contrat de transport de marchandises par eau prévoit le renvoi de toute créance découlant du

arising under the contract in a place other than Canada, a claimant may institute judicial or arbitral proceedings in a court or arbitral tribunal in Canada that would be competent to determine the claim if the contract had referred the claim to Canada, if	contrat à une cour de justice ou à l'arbitrage en un lieu situé à l'étranger, le réclamant peut, à son choix, intenter une procédure judiciaire ou arbitrale au Canada devant un tribunal qui serait compétent dans le cas où le contrat aurait prévu le renvoi de la créance au Canada, si l'une ou l'autre des conditions suivantes existe:
(a) the actual port of loading or discharge, or the intended port of loading or discharge under the contract, is in Canada;	a) le port de chargement ou de déchargement — prévu au contrat ou effectif — est situé au Canada;
(b) the person against whom the claim is made resides or has a place of business, branch or agency in Canada; or	b) l'autre partie a au Canada sa résidence, un établissement, une succursale ou une agence;
(c) the contract was made in Canada.	c) le contrat a été conclu au Canada
Agreement to designate	Accord
(2) Notwithstanding subsection (1), the parties to a contract referred to in that subsection may, after a claim arises under the contract, designate by agreement the place where the claimant may institute judicial or arbitral proceedings.	(2) Malgré le paragraphe (1), les parties à un contrat visé à ce paragraphe peuvent d'un commun accord désigner, postérieurement à la créance née du contrat, le lieu où le réclamant peut intenter une procédure judiciaire ou arbitrale.
2001, c. 6, s. 46; 2023, c. 26, s. 322.	2001, ch. 6, art. 46; 2023, ch. 26, art. 322

[119] The Associate Judge found that if wrong in her interpretation of the Bills of Lading, Scot is "caught" by section 46. She referred to the decisions in the *"Cougar Ace", supra* and the *"Federal Ems", supra*.

[120] The Associate Judge, at paragraph 52, set out the grounds upon which she found that section 46 applies to Scot:

> [52] The factors that trigger the application of section 46(1)(a) of the MLA are met in this case: the Bills of Lading are a contract of carriage of goods by water, the contract (Bills of Lading) provide for the adjudication of arbitration of claims arising under the contract in a place other than Canada, i.e. in New York, and the intended and actual port of discharge of the molasses cargoes is St. John, New Brunswick, which is in Canada. Accordingly, notwithstanding any Arbitration Clause incorporated into the Bills of Lading, Crosby is entitled to institute judicial or arbitral proceedings in a court or tribunal in Canada that is competent to determine the claim pursuant to section 46 of the MLA. As stated in Cougar Ace at para 69, the Arbitration Clause is not enforceable in Canada when section 46 of the MLA applies.

[121] In my opinion, the Associate Judge's reliance upon the decision in the *"Cougar Ace"*, *supra* is misplaced. That case deals with a jurisdiction clause whereby all disputes were to be adjudicated in Japan. The Federal Court of Appeal described a two-step process: does the claimant meet the requirements of section 46 and if so, is the litigation before the Court *forum non conveniens*?

[122] Although the Federal Court of Appeal found that the plaintiff met the conditions of section 46, the Federal Court was clearly *forum non conveniens* and a stay was ordered in favour to the proceedings before the Japanese Courts.

[123] The decision in the *"Cougar Ace", supra* is a leading authority in dealing with an issue of *forum non conveniens*. It is not helpful in dealing with an agreement to arbitrate disputes outside Canada.

[124] In my opinion, in finding that the Arbitration clause was incorporated in Bill of Lading No. 2, the Associate Judge overlooked the importance of the *Commercial Arbitration Act, supra* and Article 8 of the Commercial Arbitration Code. Article 8 provides as follows:

Arbitration Agreement and Substantive Claim before Court	Convention d'arbitrage et actions intentées quant au fond devant un tribunal
(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.	1 Le tribunal saisi d'un différend sur une question faisant l'objet d'une convention d'arbitrage renverra les parties à l'arbitrage si l'une d'entre elles le demande au plus tard lorsqu'elle soumet ses premières conclusions quant au fond du différend, à moins qu'il ne constate que la convention est caduque, inopérante ou non susceptible d'être exécutée.
(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.	2 Lorsque le tribunal est saisi d'une action visée au paragraphe 1 du présent article, la procédure arbitrale peut néanmoins être engagée ou poursuivie et une sentence peut être rendue en attendant que le tribunal ait statué.

[125] In the *"Federal Ems", supra*, the Federal Court of Appeal said the following at paragraphs 69 and 70:

> [69] Pursuant to article 8(1) of the Commercial Arbitration Code, included as Schedule 1 to the Commercial Arbitration Act, Canadian courts "shall" stay proceedings in the presence of a valid and enforceable arbitration clause. Obviously, when section 46 of the Act applies, the arbitration clause is not enforceable in Canada (see article 1(3) of the Commercial Arbitration Code).
>
> [70] Nevertheless, the Court should be prudent in construing subsection 46(1), as one should not too readily assume that Parliament has limited the effect of arbitration clauses in respect of

> disputes that have traditionally been the subject of arbitration, like charter party disputes.

[126] The Arbitration Clause, once incorporated into Bill of Lading No. 2, is an agreement to arbitrate. Article 8 of the Commercial Arbitration Code applies. Does section 46, together with Article 8 of the Commercial Arbitration Code, prevent the Court from staying the action in favour of arbitration in Canada?

[127] The parties were invited to address that question. Both Scot and Crosby took the position there is no authority to allow the Court to refer the matter to arbitration in Canada or to stay the litigation in Canada to allow for that.

[128] At paragraph 70 of the "Federal Ems", *supra*, the Federal Court of Appeal opened the door to that possibility. As well, referring the matter to arbitration in Canada will give effect to the intention of the Arbitration Clause.

[129] Such a proceeding would give effect to the terms of the Arbitration Clause which provides for "arbitration", as a means to resolve disputes between the parties. In order to achieve that result, the present proceedings could be stayed.

[130] Had Scot requested arbitration in Canada, the Court would have been required to weigh the propriety of rewriting the Molasses Charter Party to provide for arbitration in Canada.

[131] However, that is not the situation, and Crosby has chosen to enforce its rights under section 46 of the *Marine Liability Act*, *supra*.

[132] The Court is bound to follow the statute. There is no way "around" section 46, and no basis in law for the Court to refer the matter to arbitration in New York. It remains open to the parties to seek arbitration in Canada, should they choose to do so.

[133] Should Crosby seek arbitration in Canada, it will be on condition that Scot waives any time bar defence and files a written undertaking to do so, with the Court within sixty (60) days of receipt of any arbitration demand.

[134] Finally, there is the disposition of the *forum non conveniens* issue by the Associate Judge.

[135] Although Scot alleged many errors on the part of the Associate Judge in dealing with this issue, I am mindful that this issue required the exercise of discretion, and discretionary decisions are entitled to a high degree of deference. Deference is warranted not because the decision was made by a Case Management Judge but due to the "nature" of the decision.

[136] The Associate Judge considered relevant factors, as identified in the jurisprudence. Among other things, she considered a demand for arbitration in New York. She noted that this demand relates only to Bill of Lading No. 1. She found that the arbitral proceedings were at an early stage. She found that this factor favoured continuation of the litigation in Canada.

[137] Upon considering the submissions of the parties and the relevant jurisprudence, I am not persuaded that Scot has shown any reviewable error in the manner in which the Associate Judge dealt with the issue of *forum non conveniens*.

V. CONCLUSION

[138] In the result, the appeal will be allowed in part and the Order of March 31, 2023 will be modified.

[139] Scot has shown no error with respect to the treatment of Bill of Lading No. 1. It has shown no error in the disposition of the *forum non conveniens* issue but that issue is not dispositive.

[140] The Arbitration Clause is validly incorporated in Bill of Lading No. 2. The finding as to unenforceability is unreasonable, and fails to take into account the Commercial Arbitration Code.

[141] The matter cannot be referred to arbitration in New York, in view of section 46 of the *Marine Liability Act*, *supra*.

[142] There is no error by the Associate Judge in her disposition of the *forum non conveniens* issue and in dismissing that part of Scot's motion.

[143] The parties are asked to discuss costs and if unable to agree, a Direction will issue about submissions on costs.

ORDER IN T-1553-21

THIS COURT'S ORDER is that:

1. The appeal is allowed in part and the finding of the Associate Judge with respect to the enforceability of the Arbitration Clause in Bill of Lading No. 2 is reversed.
2. Otherwise, the findings of the Associate Judge are maintained.
3. Should Crosby seek arbitration in Canada, it will be on condition that Scot waives any time bar defence and files a written undertaking to do so, with the Court within sixty (60) days of receipt of any arbitration demand.
4. Should the parties be unable to agree, a Direction will issue about submissions on costs.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-1553-21 T-1554-21 T-1555-21 T-80-22
STYLE OF CAUSE:	CROSBY MOLASSES COMPANYLIMITED, A BODY CORPORATE v. THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP M/T "SCOT STUTTGART" AND SCOT STUTTGART S.A., A BODY CORPORATE ANDSCOT TANKER HOLDINGS S.A., A BODY CORPORATE ANDALL OTHERS INTERESTED IN THE SHIP M/T "SCOT STUTTGART"
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JUNE 12, 2023 Further Submissions were received on July 7, 2023, July 14, 2023. July 21, 2023; further submissions were accepted for filing as of March 1, 2024.
REASONS AND ORDER:	HENEGHAN J.
DATED:	SEPTEMBER 13, 2024

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