Federal Court Cour fédérale

Date: 20191126

Docket: T-1526-12

Citation: 2019 FC 1514

Ottawa, Ontario, November 26, 2019

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

IAMGOLD CORPORATION
AND
NIOBEC INC.

Plaintiffs

and

HAPAG-LLOYD AG, HAPAG-LLOYD (CANADA) INC., and THE OWNERS AND ALL OTHERS INTERESTED IN THE VESSEL M/V "OOCL MONTREAL"

Defendants

JUDGMENT AND REASONS

I. Overview

[1] This decision relates to a motion for summary trial, asking the Court to decide a question of German law, which will determine the quantum of the liability of the Defendant, Hapag-Lloyd AG [Hapag-Lloyd], for loss of the Plaintiffs' cargo.

[2] The Plaintiffs are the owners of a cargo of ferroniobium who contracted with Hapag-Lloyd to transport the cargo in four containers from Montréal to Antwerp, Belgium by ship, and then from Antwerp to Moerdijk, Netherlands by truck. Three of the four containers were stolen from the terminal in Antwerp when an unauthorized trucker provided the terminal operator with the proper pick up numbers [PINs] for these containers and the terminal operator allowed the trucker to leave the terminal with the containers. Hapag-Lloyd has admitted liability for the purposes of this motion, but the parties disagree on the limitation of liability that applies to this loss.

[3] The Court must decide whether, under German law, the loss of the cargo occurred during the ocean leg or the road leg of this multimodal carriage. The effect of German law, the Sea Waybill issued by Hapag-Lloyd governing this carriage [the Sea Waybill], and their respective application of the Hague-Visby Rules [HVR] and the Convention on the Contract for the International Carriage of Goods by Road [CMR], is that different limitation of liability regimes apply to the two legs.

[4] As explained in greater detail below, I find the loss of the cargo occurred on the road leg of the carriage and that the loss is therefore subject to the limitation of liability applicable to road carriage under German law.

II. **Procedural Background**

[5] The parties have distilled the dispute between them sufficiently that it can be resolved by answering the following question [the Question]:

> Under the law of Germany, which of the following limitation of liability applies to the loss of cargo stolen from the terminal at the Port of Antwerp, Belgium and described in the Agreed Statement of Facts dated July 16, 2019:
>
> A. 2 Special Drawing Rights (SDRs) per Kg, by virtue of the provisions of the Hapag-Lloyd Sea Waybill;
>
> OR,
>
> B. 8.33 SDRs per Kg, pursuant to the terms of the CMR and/or provisions of the Hapag-Lloyd Sea Waybill.

[6] As noted in the Question, the parties arrived at an Agreed Statement of Facts [the Agreed Statement], which sets out the factual foundation for their dispute. They then agreed the Plaintiffs would present a motion to the Court under Rule 220(1)(c) of the *Federal Courts Rules*, SOR 98-106 [Rules], asking the Court to determine the answer to the Question stated by the parties in the form of a special case. The Plaintiffs filed that motion on September 23, 2019, and each party filed evidence from an expert in German law, with a view to the experts being cross-examined on their evidence at the hearing of the motion.

[7] In the course of case managing this matter, Prothonotary Steele [the Prothonotary] raised with the parties whether Rule 220(1)(c) was applicable to the circumstances of this motion. Rule 220 is typically employed to seek the answer to a question of law. While the Question involves a determination of German law, the determination of foreign law by this Court is technically a conclusion of fact, which is made based on the expert evidence presented by the parties. To discuss this concern, the Prothonotary convened a further case management conference, in which I participated as the Judge scheduled to hear the motion.

[8] During this conference, I raised the possibility that the Plaintiffs' motion was better conceived as a motion for summary trial under Rules 213 and 216. The parties confirmed that their interest was in achieving an efficient adjudication of their dispute through an answer to the Question and that they had no difficulty with the motion being treated as a motion for summary trial. I therefore confirmed that the motion would be so treated and that my Judgment and Reasons issued following hearing of the motion would reflect this development.

[9] The motion was subsequently argued in Montréal on October 22-23, 2019. The parties' respective experts attended the hearing. Each expert gave brief evidence in chief, based on his report(s) filed with the Court, and was cross-examined by the opposing party's counsel. Each party then presented argument based on the expert evidence.

[10] To the extent that it remains necessary for the Court to conclude formally under Rule 216(6) that this is a suitable case for adjudication by summary trial, in a circumstance where the parties have pursued this approach cooperatively, I so conclude, applying the principles described in *Louis Vuitton Malletier SA v Singga Enterprises (Canada) Inc*, 2011 FC 776 (see also *Cascade Corporation v Kinshofer GmbH*, 2016 FC 1117 at paras 35-36).

III. **Agreed Statement of Facts**

[11] It is not necessary to set out the entire Agreed Statement. Rather, the following is a summary of the agreed facts, surrounding the transport and loss of the Plaintiffs' cargo, which I consider to be material to answering the Question:

A. On August 4, 2011, Hapag-Lloyd issued the Sea Waybill for the transport of the cargo in four containers from the Port of Montreal to an inland warehouse in Moerdijk, Netherlands [the Warehouse] via the Port of Antwerp.

B. The Plaintiffs and Hapag-Lloyd knew and agreed that the cargo would be transported from the Port of Antwerp to Moerdijk by truck.

C. On August 10, 2011, the named consignee on the Sea Waybill gave instructions to Hapag-Lloyd's local agent to deliver the cargo to the Warehouse on August 15, 2011.

D. On August 11, 2011, arrangements for the pick-up of the containers by Hapag-Lloyd's appointed trucker were completed and a work order issued.

E. On August 12, 2011, the cargo was discharged from the vessel at the Port of Antwerp by the terminal operator contracted by Hapag-Lloyd. The cargo stayed at the terminal for a few hours pending road carriage to the Warehouse.

F. On August 12, 2011, an unauthorized trucker arrived at the terminal, provided the PINs required to secure the release of three of the containers, and left with these three containers. On the same day, the remaining container was picked up by a subcontractor of Hapag-Lloyd's authorized trucker from the terminal and subsequently delivered to the Warehouse.

G. Neither the Plaintiffs, nor Hapag-Lloyd, know how the PINs became known to the unauthorized trucker.

H. The Plaintiffs suffered losses totalling USD $1,566,586.90 plus €59,372.43 as a result of the loss of the three containers of their cargo that were stolen. The weight of the stolen cargo was 66,266 kg.

[12] The parties have also agreed that the date of August 12, 2011 be used for the conversion of SDRs (i.e. International Monetary Fund Special Drawing Rights) to Canadian dollars. As such the parties agree that the Plaintiffs are entitled to a judgment against Hapag-Lloyd either:

A. in the principal amount of CAD $209,582.13 (2 SDR per kg, at the rate of 1.581370 per SDR, current on August 12, 2011), if the Court decides the Question in Hapag-Lloyd's favour; or

B. in the principal amount of CAD $872,909.57 (8.33 SDR per kg, at the rate of 1.581370 per SDR, current on August 12, 2011), if the Court decides the Question in the Plaintiffs' favour.

[13] Finally, the parties have agreed that the law of Germany, without *renvoi*, applies to the Question.

IV. **Expert Evidence**

A. ***Qualification of Expert Witnesses***

[14] Each of the parties retained one expert to provide evidence on applicable German law.

[15] The Plaintiffs' expert, Dr. Dieter Schwampe, is admitted to the Hamburg bar and has been practicing law for 34 years, specializing in transport law and marine insurance law. He received a PhD in law in 1984. Dr. Schwampe has taught transport law at the Law Faculty of the University of Hamburg since 2011 and was appointed as a Professor in 2013. His course on transport law includes a section on the German law of multimodal transport. Dr. Schwampe is also the current President of the German Maritime Law Association and is a Vice President of the Comité Maritime International (CMI). He also serves as an arbitrator and has been qualified as an expert witness by other courts. Dr. Schwampe provided two reports, the second being a reply to the report of Hapag-Lloyd's expert, Dr. Jost Kienzle.

[16] Dr. Kienzle has been practicing law since 1989, with a particular emphasis on the maritime industry and transportation law. He completed his doctoral thesis on maritime law in 1993. Dr. Kienzle has previously been qualified as an expert witness on German law by a court in the United Kingdom. He provided one report, which includes a response to the first report by Dr. Schwampe.

[17] Each of the experts also provided a curriculum vitae, detailing his qualifications to provide the expert opinion required by the Court in this matter. Neither party took issue with the qualification of the other's expert as an expert on German transport law. Taking that into account, and applying the test for admitting expert evidence set out in *R v Mohan*, [1994] 2 SCR 9 [*Mohan*], as supplemented by *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 [*White Burgess*], I am satisfied both experts are appropriately qualified as experts in German transport law and their evidence is admissible.

B. ***Areas in Which the Experts Agree***

[18] Before proceeding to analyze the dispute between the parties on the applicable German law, it is useful to canvass certain areas in which there is no dispute, because there is no material difference in the experts' opinions in such areas. Both experts agree on the following principles of German law:

A. In the case of multimodal transport, where it is established that cargo loss or damage occurs on a particular transport leg, the liability of the contractual carrier is to be determined in accordance with the legal provisions that would apply to a hypothetical contract, made between the parties to the multimodal contract, for the carriage of goods on that transport leg only.

B. Unless there are special circumstances (and there are not in this case), German law does not treat the handling of goods at a terminal, after discharge from a ship and before transport by other means, as a transport leg of its own. Rather, such handling is regarded as falling within either the ocean transport leg or the subsequent transport leg.

C. As the parties agree where the loss occurred, on the Antwerp terminal, this case is governed by either the liability regime that applies to the ocean transport leg or the regime that applies to the road transport leg.

[19] I also note the experts' reports use the terms "ocean leg" and "maritime leg" interchangeably, and similarly the terms "land leg" and "road leg". For consistency, I will use the terms ocean leg and road leg.

[20] As will be canvased in more detail in the Analysis section of these Reasons, the principal divergence in the expert evidence relates to whether, applying German law to the agreed facts, the loss is properly characterised as having occurred on the ocean leg or the road leg of the multimodal transport. The experts agree there is no German judicial decision that addresses the precise factual scenario of the present dispute. That is, no German court has had occasion to determine whether a cargo loss occurs on the ocean leg or road leg when a trucker, unauthorized by the multimodal carrier, uses the proper PINs to remove the cargo from a terminal following ocean transport. Therefore, each expert relies on principles derived from German jurisprudence to support his opinion as to the position of German law on this question.

[21] Dr. Schwampe ultimately concludes the loss occurred on the road leg, while Dr. Kienzle concludes it occurred on the ocean leg. However, the expert evidence again demonstrates no disagreement on the limitation of liability regime that applies to each of the ocean leg and the road leg.

[22] Dr. Schwampe provides an opinion on the interaction of German domestic law, the CMR, and the Sea Waybill, the result of which is that, in the case of that loss occurring on the road leg, Hapag-Lloyd's liability is limited to 8.33 SDRs per kg. Dr. Kienzle does not comment on Dr. Schwampe's analysis of the limitation of liability regime applicable to the road leg. Rather, as he

concludes that the subject loss occurred on the ocean leg, he provides an opinion on the interaction of German domestic law, the HVR, and the Sea Waybill, the result of which is that Hapag-Lloyd's liability for loss on the ocean leg is limited to 2 SDRs per kg. While Dr. Schwampe provided a reply report, it does not engage with Dr. Kienzle's analysis of the limitation of liability regime applicable to the ocean leg.

[23] In other words, each expert speaks only to the limitation of liability regime applicable to the transport leg on which he concludes the loss occurred, and neither challenges the other's opinion on this issue. Moreover, the parties confirmed at the hearing that this issue is not in dispute. The Court therefore accepts the evidence of each expert on the limitation of liability regime applicable to the particular transport leg to which that evidence relates.

C. ***Contested Issue***

[24] While the Question to be answered by the Court in this motion is the one articulated by the parties, the answer to that question turns on whether, under German law, the loss of the Plaintiff's cargo is properly characterized as a loss that occurred on the ocean leg or the road leg of the multimodal transport.

D. ***Dr. Dieter Schwampe***

[25] In addition to Dr. Schwampe providing his two written reports, which constitute his principal evidence in chief, the Plaintiffs' counsel conducted a limited direct examination of Dr. Schwampe, and he was subjected to cross-examination.

[26] In support of his opinion that the loss of the Plaintiffs' cargo occurred on the road leg of the multimodal transport, Dr. Schwampe relies on four decisions of the German Federal Court of Justice [FCJ], which he explains is the highest court of applicable jurisdiction in Germany. He describes these decisions and their significance as follows (referencing the decisions by year, as was the convention adopted by counsel at the hearing of this matter).

(1) 2005 Decision

[27] This case involved damage to cargo caused at an ocean terminal, in the course of multimodal transport, between discharge from the ship and loading onto a truck. The FCJ first concluded that handling of goods on a terminal after discharge from a ship is generally not a transport leg of its own, in the absence of special circumstances.

[28] The FCJ then considered the criteria for establishing the boundary between the ocean leg and the road leg and concluded the damage occurred on the ocean leg. In arriving at that conclusion, the FCJ reasoned the ocean leg ends with loading cargo onto the on-carrying truck. The earlier steps of unloading the cargo from the ship, storage, and possible relocation in the port area were considered characteristic of ocean transport and therefore to have a close relationship with the ocean leg.

(2) 2007 Decision

[29] This case involved damage to goods at an ocean terminal, while the crate containing the goods was on a Mafi trailer that the terminal was repositioning in order to lift the crate onto the

on-carrying truck. The crate fell off the trailer, damaging the goods, because the terminal had removed securing chains in order to facilitate the repositioning.

[30] The FCJ confirmed the conclusion in the 2005 Decision, that handling of goods on a terminal is generally not a transport leg of its own. It also held the loss occurred during the road leg of the multimodal transport, because it occurred during the process of loading the cargo onto the truck. In reaching this conclusion, the FCJ clarified that "loading", described in the 2005 Decision as the end of the ocean leg, refers to the commencement of the loading process, not the completion of this process. Repositioning the Mafi trailer, prior to actually lifting the cargo onto the truck, was considered part of the loading process, and thus the road leg.

[31] Dr. Schwampe emphasizes that the FCJ considered decisive that the loss, resulting from the release of the securing chains, represented the materialization of a risk relating to the loading process.

(3) 2013 Decision

[32] This decision addressed a loss at an ocean terminal in Savannah, Georgia, in the US, following ocean transport from Germany, and prior to on-carriage by road. The cargo was a machine that had been transported in a wooden crate. US authorities did not allow the cargo to be on-carried in the crate, because the specifications of the wood forming the crate did not comply with US regulations. Therefore, the machine was removed from the crate at the terminal, so that it could be on-carried by road without its packaging. In the course of unpacking the machine from the crate and loading it onto the truck, the machine was damaged. It could not be

established whether the damage occurred during the unpacking or during the loading onto the truck.

[33] The FCJ described the process of unpacking the machine from its crate as a preparatory act for the road transport. Similar to the 2007 Decision, the FCJ also described the loss as representing materialization of a risk of damage connected with the loading process. Dr. Schwampe emphasizes that, in finding the loss occurred during the road leg, the FCJ linked the unpacking of the crate to the land transport of the cargo, which is broader than just the loading of the cargo.

(4) 2016 Decision

[34] Dr. Schwampe describes this decision as the first in which the FCJ dealt with ocean transport following land transport. The carrier had undertaken multimodal transport of eight wooden crates from Germany to Shanghai. It first brought the crates to a container packing company in Bremen. Due to a loading port change from Bremen to Hamburg, the crates were then carried by road between those ports. However, when the container stuffing operation commenced in Hamburg, the packing company realized two crates were missing. At Bremen, the two missing crates had erroneously remained in a container destined for, and were actually carried to, Guatemala.

[35] The FCJ concluded the loss occurred on the ocean leg of the multimodal transport, as the packing of containers in Bremen was closely tied to ocean transport.

(5) Application of FCJ Decisions to the Present Case

[36] Dr. Schwampe recognizes that none of the four FCJ decisions canvassed in his evidence dealt with a loss by theft, misappropriation, or fraud. He therefore offers an opinion on the application of the principles derived from those decisions to the facts of the present case. In his main report, he describes these principles as follows:

> The starting point here is that the presence of the goods on the terminal does not qualify as a transport leg of its own, with the result that the loss must be allocated to either the preceding or following transport legs. The decisive criteria are whether the process is characteristic of one or the other leg; whether the risk materialized is one of a particular leg; and whether the process is more closely related to one or the other leg. There is no general solution applicable in all cases. Rather, the assessment depends on the facts of each case.

[37] Dr. Schwampe then applies what he describes as the decisive criteria to the facts in the Agreed Statement, in particular an unauthorized trucker employing the correct PINs to obtain the subject cargo from the terminal. Dr. Schwampe reasons that PINs are not needed for goods coming by sea to arrive safely at the port terminal, and thus they have no relationship with the ocean leg. Rather, they have a close relationship with the road leg because they are the means to allow the terminal to hand over the goods to road carriers. Dr. Schwampe also describes the risk related to deceit by someone pretending to be the road carrier as one pertaining to road transport. He therefore concludes that the loss occurred on the road leg of this multimodal transport.

[38] In his principal report, Dr. Schwampe also expresses the opinion that possession, custody, or control of the cargo, by the multimodal carrier or the terminal as its agent, is irrelevant to

determining the transport leg during which the loss occurred. He relies on the 2007 and 2013 Decisions, in which the FCJ found, respectively, manoeuvring a Mafi trailer and unpacking a machine from its wooden crate were part of the road leg. Dr. Schwampe notes that both those processes were conducted under the possession, control, and custody of the terminal, not of the subsequent road carrier. Therefore, he says, the identification of the leg on which the loss occurred did not turn on who had possession of the cargo at the time of the loss.

E. ***Dr. Jost Kienzle***

[39] Dr. Kienzle issued one report, which constitutes his principal evidence in chief and includes a response to Dr. Schwampe's report. Hapag-Lloyd's counsel conducted a limited direct examination of Dr. Kienzle, and he was subjected to cross-examination.

[40] Like Dr. Schwampe, Dr. Kienzle's report canvasses the four FCJ decisions that address the delineation between the ocean and land legs of multimodal transport. He opines that the ocean leg terminates when loading onto the subsequent means of transport begins. Speaking to the 2013 Decision, he highlights the FCJ's finding that the process at issue—unpacking a machine from a wooden crate—was a preparatory measure for loading the cargo onto the *designated* truck for subsequent transport.

[41] Dr. Kienzle emphasizes that none of the FCJ judgments dealt with circumstances where cargo had been stolen during multimodal transport. However, he still considers these judgments important because they hold that, in multimodal transport, the ocean leg does not terminate with the discharge of the cargo from the vessel, but rather at a later stage, when loading onto the

subsequent means of transport commences. He therefore describes the crucial question to be answered as whether the theft, and thus the loss of the stolen cargo, is attributable to the ocean leg of transport or to the subsequent road leg.

[42] Dr. Kienzle then turns to consideration as to the stage at which the loss of the cargo occurred. He notes that the cargo was in the custody of the terminal operator, in its capacity as agent of the carrier Hapag-Lloyd, until the cargo was released to the unauthorized trucker. Dr. Kienzle concludes that the loss took place when the cargo was so released.

[43] Turning to whether that loss took place on the ocean or road leg, Dr. Kienzle opines that the theft could not have taken place on the road leg. Specifically, it was not committed during, or in preparation for, loading the cargo onto an *authorized* means of road transport. He distinguishes the FCJ Decisions because the damage in these cases occurred during loading onto the next intended or designated means of transport for purposes of executing same. In the present case, Dr. Kienzle asserts that loading the cargo onto the unauthorized trucker's vehicle does not qualify as loading, for purposes of terminating the ocean leg, because that trucker was not authorized to perform the on-carriage and therefore does not qualify as the next designated means of transport within the meaning of the FCJ jurisprudence. Rather, the unauthorized trucker's vehicle is merely the means by which the theft was committed. Dr. Kienzle opines the analysis that would be no different if the cargo had been stolen using an inland motor vessel, a railway, or even a helicopter.

[44] Based on this analysis, Dr. Kienzle's opinion is that the road leg for the subject cargo had not commenced at the time it was lost. Therefore, the loss occurred on the ocean leg.

[45] In support of his opinion, Dr. Kienzle relies on additional authority that Dr. Schwampe does not reference in his principal report: a 2008 decision of the Hanseatic Court of Appeal of Hamburg. This is a lower court than the FCJ; however, the 2008 Decision was not appealed to the FCJ. Dr. Kienzle refers to the 2008 Decision because, unlike the FCJ Decisions, it addressed the delineation between the road and ocean legs of multimodal transport in the context of a cargo theft.

[46] The 2008 Decision involved multimodal transport of five concrete truck mixers from Germany to India. The mixers were intended to be driven from Germany to the Port of Antwerp and then shipped by sea to India. After being driven to the Antwerp terminal, the mixers were stolen by thieves who drove them out of the terminal. The Court concluded that storage of the mixers at the terminal at the time of their theft was attributable to the intended ocean leg of transport. Dr. Kienzle explains the Court reached this conclusion relying on the fact the terminal operator, which had custody of the cargo at the time of the loss, had contracted storage on behalf of the ocean carrier.

[47] Dr. Kienzle emphasizes that, notwithstanding the mixers were stolen by driving them away, the Court did not consider the theft to be the commencement of a new road leg or continuation of the previous road leg. Applying the 2008 Decision to the present case, he opines that the circumstances giving rise to the theft of the Plaintiffs' cargo did not represent

commencement of the road leg, because the unauthorized trucker was not an agent of Hapag-Lloyd.

[48] In his direct examination at the hearing, Dr. Kienzle explained he disagrees with Dr. Schwampe on whether custody of the cargo is important in identifying the leg on which the loss occurred. He notes that, in all the FCJ Decisions, the on-carrier was an authorized agent of the multimodal carrier. Therefore, the multimodal carrier, through its agents, always had custody of the cargo. In Dr. Kienzle's opinion, custody by an authorized on-carrier was fundamental to the FCJ concluding, where it did so, that the subsequent carriage leg had commenced by the time of the loss.

F. *Dr. Schwampe's Reply Report*

[49] In responding to Dr. Kienzle's opinion, Dr. Schwampe distinguishes the circumstances of the present case from a traditional theft, in which goods are taken from someone by force. He observes that the terminal, acting as Hapag-Lloyd's agent, voluntarily surrendered the cargo to the trucker, because the trucker presented the correct PINs. In that sense, Dr. Schwampe opines that, from the perspective of the terminal, the trucker was authorized to receive the cargo.

[50] Dr. Schwampe agrees with Dr. Kienzle that none of the FCJ Decisions involved cargo losses occasioned by criminals. However, he opines that principles derived from those Decisions were not dependent on the on-carrier being authorized by the multimodal carrier. By way of example, Dr. Schwampe refers to the 2007 Decision, when the cargo, still loaded on the terminal's Mafi trailer, fell off the trailer during repositioning for loading onto the truck. The

FCJ held the damage occurred on the road leg, reasoning that the risk that materialized was one of the loading process. Dr. Schwampe opines that this reasoning and result would have been the same if the driver of the waiting truck had been a criminal.

[51] Dr. Schwampe also relies on the 2013 Decision, which found that loss resulting from handling the cargo without its wooden crate occurred on the road leg. The FCJ reasoned that the activity that led to the damage (the removal of the cargo from its crate) was a preparatory act for the land transport. Dr. Schwampe draws a parallel with the terminal's release of containers against the PINs in the present case. He opines this release was a step in preparation for the road transport and that the risks involved with this release practice were characteristic of on-carriage by road—not the previous carriage by ocean.

[52] During his testimony, Dr. Schwampe stated the 2008 Decision relied upon by Dr. Kienzle does not alter his opinion. He draws a distinction between the theft underlying the 2008 Decision and the circumstances of the present case, in which the terminal voluntarily released the cargo to the criminals against presentation of the PINs. He also opines the 2008 Decision did not alter or supplement the principles developed by the FCJ discussed above. Rather, the Court applied the 2005 and 2007 Decisions, concluding the theft occurred on the ocean leg because storing the concrete truck mixers at the ocean terminal was characteristic of ocean transport.

V. **Analysis**

[53] With the benefit of the expert opinions on the principles of German law and their application to the facts of this case, my role is to decide the state of applicable German law as a

matter of fact. In doing so, I may consider not only the expert opinions, and potential bases for preferring one opinion over the other, but also whether the case law relied upon by the experts supports their respective interpretations of the law (see *Allen v Hay*, [1922] 69 DLR 193 at 196, 64 SCR 76; *Drew Brown Ltd v The "Orient Trader"*, [1974] SCR 1286; *World Fuel Services Corporation v The Nordems* [2012] FC 332, 366 FTR 118). To support that process, the parties have filed certified and agreed English translations of the five German decisions upon which their experts rely.

A. ***Weight Afforded to the Expert Evidence***

[54] First, I wish to address the Plaintiffs' argument that Dr. Schwampe's evidence should be preferred over that of Dr. Kienzle, because Dr. Kienzle is a less objective witness. The Plaintiffs note that Dr. Kienzle admits he has represented the Defendant, Hapag-Lloyd, on other matters for about 15 years, and that he provided Hapag-Lloyd with a legal opinion on this matter in 2012. Dr. Kienzle acknowledged in cross-examination that he considers Hapag-Lloyd an important client. He also explained that he was originally retained in this matter directly by Hapag-Lloyd or their insurers, not by Hapag-Lloyd's Canadian counsel.

[55] In re-direct, Dr. Kienzle confirmed signing, in conjunction with the preparation of his report, the Certificate concerning the Code of Conduct for Expert Witnesses prescribed by Form 52.2 of the Rules. Dr. Kienzle thereby agreed to be bound by the Code of Conduct for Expert Witnesses set out in the schedule to the Rules, which, among other things, explains an expert witness' duty to be independent and objective and not to be an advocate for a party.

[56] I note that an issue developed at the beginning of closing argument in this matter, when the Defendants' counsel advised that he wished to correct what he described as a typographical error in Dr. Kienzle's report and a restatement of that error in his testimony. Dr. Kienzle states in his report that he was first made aware of this case in February 2012 and then provided his opinion on the legal issues covered by his report. He states that the matter then went dormant as far as he was concerned and was only revived in May 2018, apparently because the Federal Court proceedings were progressing. In cross-examination, having been referred to the February 2012 date in his report, Dr. Kienzle confirmed that he was retained at that time. At the beginning of the next day of the hearing, the Defendants' counsel advised it had been determined overnight that this date was an error and that Dr. Kienzle had not been retained until September 2012.

[57] The Plaintiffs' counsel objected to what he described as an effort by the Defendants to alter Dr. Kienzle's evidence through submissions after the evidence at trial was closed. The Plaintiffs' counsel advised that he would explain, in the course of his closing submissions, the reason the date of Dr. Kienzle's retention was significant. I therefore reserved my decision on this point and advised the parties that I would address it in my Judgment and Reasons, with the benefit of both parties' submissions.

[58] In his subsequent closing argument, the Plaintiffs' counsel identified that this action was commenced in August 2012. As such, he argued it was significant that Dr. Kienzle was retained before commencement of the action, as this enhances the Plaintiffs' position that Dr. Kienzle was serving as an advocate rather than as an impartial expert witness.

[59] I agree with the Plaintiffs' position. It was not available to the Defendants to alter Dr. Kienzle's evidence through submissions following the close of evidence at trial. I accept the representation by the Defendants' counsel that his intention was to ensure the Court had the benefit of accurate information. However, as the Plaintiffs submit, the Defendants had an opportunity to correct what they describe as an error in Dr. Kienzle's report through direct examination or, after the point was again raised in cross-examination, through the Defendants' re-examination of the witness. As the timing of Dr. Kienzle's retention is a point material to one of the Plaintiffs' arguments, the Plaintiffs are entitled to insist the Court consider their argument based on the evidence. That having been said, as explained below, my decision in this matter is not based on lack of objectivity on the part of Dr. Kienzle, and so nothing turns on this particular evidence.

[60] Dr. Kienzle's role as counsel for Hapag-Lloyd, and in particular his retention by Hapag-Lloyd or their insurers in this particular matter, could have represented an impediment to his qualification as an expert witness and the admission of his evidence in this matter. The *Mohan* test for admitting expert evidence includes consideration whether the expert has fulfilled their duty of independence and impartiality when determining if they are a "qualified expert" and whether otherwise admissible evidence should be excluded because its probative value is overborne by its prejudicial effect (see *White Burgess* at paras 19, 53-54). These considerations can also affect the Court's weighing of expert evidence that has been found admissible.

[61] In the present case, the Plaintiffs did not object to Dr. Kienzle's qualification as an expert and the admission of his evidence. The Plaintiffs can nevertheless challenge the weight to be

afforded to Dr. Kienzle's evidence based on arguments about his objectivity. As will be explained below, I do afford more weight to Dr. Schwampe's evidence than to that of Dr. Kienzle. However, this is based on my conclusion that Dr. Schwampe's opinion is more consistent with the principles expressed in the foreign jurisprudence. I find no basis in the substance of Dr. Kienzle's opinion to conclude that he was not respecting his duty to the Court. Nor does his demeanor as a witness give rise to such a conclusion. Notwithstanding the risk to a party in relying on an expert who also acts as counsel for the party in another jurisdiction, those circumstances do not affect my decision in this particular case.

[62] Similarly, I have considered but rejected the Plaintiffs' argument that Dr. Schwampe's evidence should be preferred because his credentials are superior to those of Dr. Kienzle. While Dr. Schwampe's credentials are extensive, both experts are qualified to express the opinions they presented to the Court. There is no particular aspect of their respective credentials that would lead me to prefer one opinion over the other.

B. ***Findings on the Expert Evidence and Application to the Question***

[63] As noted above, my decision to prefer the evidence of Dr. Schwampe is based on my conclusion that it is more consistent with the German case law. I have reviewed the English translations of the FCJ Decisions and conclude they support Dr. Schwampe's interpretation of the principles to be derived therefrom.

[64] The determination whether a particular loss occurred on the ocean or road leg of a multimodal transport turns on whether the activity giving rise to the loss was characteristic of or

attributable or closely tied to a particular leg. Stated otherwise, the FCJ considers whether the risk that ultimately materialized and caused the loss is inherent in or associated with a particular leg. The FCJ followed these principles in the cases described above to find that particular activities were attributable to a particular leg and to conclude, on the facts of particular cases, that losses occurred on the road leg when they had materialized from risks related to activities performed in preparation for loading for such land transport or in preparation for such transport itself. Contrary to Dr. Kienzle's opinion, I do not read the cases as restricting such a conclusion to circumstances involving loading or preparing to load cargo upon the authorized vehicle of the multimodal carrier's agent. I make that observation from two perspectives.

[65] First, I do not regard the principles derived from the FCJ decisions as restricted to situations involving the loading process for the subsequent means of transport. Such a conclusion would be inconsistent with, for instance, the 2016 decision, in which the error resulting in the loss related not to loading but to the process of sorting cargo for allocation to particular vessels. I agree with Dr. Schwampe's opinion that there is nothing in the analyses of the FCJ Decisions suggesting that the principles would not be applicable to a loss caused by a category of activity not yet considered by the FCJ, such as the process involving release of containers against the provision of PIN numbers.

[66] Applying the FCJ principles to that activity, I again agree with Dr. Schwampe that there is no connection between the activity at issue in this case and the storage of cargo following an ocean voyage. Rather, that activity is characteristic of or attributable to road transport, as it represents a security feature (albeit unsuccessful in the present case) intended to ensure transfer

of the cargo to the correct road carrier. Therefore, as the present loss arose from an activity characteristic of road transport, I accept that German law would regard the loss as having occurred on the road leg of the multimodal transport.

[67] Second, I do not regard that analysis to be undermined by the fact that the cargo was not delivered to an on-carrier retained by the multimodal carrier. Indeed, it was precisely because the cargo was released to the unauthorized trucker that the loss occurred. The FCJ jurisprudence focuses on the materialization of risk and the allocation of that risk as between the different transport legs. In the present case, the risk that materialized was the risk that the cargo would be released to a party that was not entitled to have it. The PIN process was intended to mitigate this risk and ensure that only the on-carrier in the contractual chain from Hapag-Lloyd received the cargo. That process failed for reasons unknown to the parties, but the risk of such failure is surely a risk associated with the road leg, not the ocean leg.

[68] In this respect, I agree with Dr. Schwampe's opinion that there is a relevant difference between a loss caused by criminals breaking into a terminal and stealing cargo and the means by which the cargo was taken in the present case. I note that Dr. Schwampe's evidence identifies the differences under German law among theft, misappropriation, and fraud, opining the present case is best characterized as a fraud perpetrated upon the parties. In my view, the precise characterization of the illegal act is not important. However, the distinction Dr. Schwampe draws, between criminals breaking into the terminal and criminals obtaining the cargo through the proper PIN numbers, is significant. In the former situation, the loss occurs as a result of failure of the terminal's security to protect the cargo it is storing following the ocean transport.

Unlike the PIN process, designed to release the cargo for the anticipated road transport, that storage activity and its related risks are not characteristic of the road leg.

[69] The Defendants attempt to distinguish the FCJ Decisions on the basis that, in those cases in which activities in preparation for on-carriage of the cargo were found to be characteristic of that next leg of carriage, that carriage was being performed under the authority of the multimodal carrier. They note in particular the language at paragraph 25 of the English translation of the 2013 decision, in which the FCJ held as follows:

> 25 The appeals court rightly found that, in an evaluative appraisal, unpacking the PW 25 machine from the wooden crate constituted a preparatory act for the land transport that was now to be carried out differently than originally planned. The damage sustained constitutes the realization of the very risk of damage associated with the loading process. This is because according to the findings reached, the damage has resulted from the fact that the machine was directly lifted on and raised with the forklift's arms, without the mandatory bottom guard. This operation was no longer related to any storage of the goods in the port facility, but was carried out in preparation for loading the machine onto the vehicle intended for carriage by land. Accordingly, the appeals court rightly found that defendant's liability for the damage in dispute is to be assessed in accordance with Secs. 407 et seqq. HGB.
>
> [Emphasis added]

[70] The Defendants emphasize the use of the word "intended" in the above passage, which they submit refers to the particular vehicle authorized by the multimodal carrier. The Plaintiffs disagree with this interpretation, arguing this is a reference to the intended means of transport, as opposed to the particular vehicle. In my view, there is little to be gained by scrutinizing the use of this word. In the 2013 Decision, there was no issue of an unauthorized trucker. The word "intended" therefore referred both to the intended means and to the intended vehicle. However,

no jurisprudential significance can be attributed to the latter meaning, given that the FCJ was not engaged with analyzing the relevance of involvement by an unauthorized vehicle.

[71] The same can be said of the FCJ Decisions generally. I disagree with the Defendants' position that the application of these decisions can be restricted to circumstances where there is no issue surrounding unauthorized parties. Nothing in the FCJ's analyses in these decisions suggests that the principles derived therefrom are so restricted.

[72] Indeed, as the Plaintiffs submit, the difficulty with Dr. Kienzle's opinion is that it fails to engage with the principles from the FCJ Decisions, involving analysis of the allocation of risk as between the successive legs of the multimodal transport. Dr. Kienzle relies significantly on the 2008 decision to support his opinion that the loss occurred on the ocean leg. However, having read the English translation of the 2008 decision, I do not regard that decision as departing from the principles developed by the FCJ by that time. Rather, I agree with Dr. Schwampe's opinion that the 2008 decision applies those principles, analyzing which transport leg the storage of the cement mixer trucks was characteristic of or attributable to at the time they were stolen.

[73] I should note that, based on the analysis in the 2008 Decision, I have difficulty with Dr. Schwampe's opinion that possession, custody or control is irrelevant to identification of the transport leg to which a loss is attributable. As emphasized by the Defendants, the analysis in the 2008 Decision focuses at least in part on the fact that the trucks were in the custody of the terminal, with the terminal having been contracted by the ocean carrier. Based thereon, the Court

concluded the storage was attributable to the downstream ocean leg of the transport. On the facts of that case, custody was clearly relevant to the analysis.

[74] However, I do not read the analysis in the 2008 Decision as a departure from the FCJ jurisprudence or suggesting that cases involving loss of cargo to criminal elements are governed by different principles than other cargo losses. I read the German case law as indicating that custody may be relevant to the required analysis, depending on the facts of the particular case, but it is not determinative. I do agree with Dr. Schwampe's opinion that, in the FCJ jurisprudence, identification of the leg on which the loss occurred did not turn on who had possession of the cargo at the time of the loss. Nothing in the 2008 Decision suggests that the loss of the cargo in the present case, through the terminal releasing the cargo against improperly obtained PINs, should be attributed to the ocean leg rather than to the land leg to which the cargo release process related.

[75] Before leaving the parties' arguments surrounding custody of the cargo, I note Dr. Kienzle's opinion that Hapag-Lloyd, as the multimodal carrier, is liable for its contractors and subcontractors, but that the acts or omissions of the unauthorized trucker cannot be attributed to it. While I accept that opinion, I do not understand the Plaintiffs' assertion to be that Hapag-Lloyd is liable for the acts of the unauthorized trucker. Rather, the Plaintiffs' position, uncontested by Hapag-Lloyd, is that Hapag-Lloyd is liable for the Plaintiffs' loss because the terminal, acting as Hapag-Lloyd's agent, released the cargo to the unauthorized trucker. To the extent the Defendants are arguing that the Plaintiffs must show the cargo was in the custody of Hapag-Lloyd or its agents at the time of the loss, they have clearly done so. The cargo was in the

custody of the terminal and was lost when the terminal surrendered that custody to the unauthorized trucker, an activity characteristic of the road transport leg.

[76] Incidentally, I note the experts offered differing opinions on the precise stage at which the loss occurred, including: (a) the unauthorized truck entering the terminal through use of the PIN; (b) the truck being connected with the relevant containers; or (c) the truck exiting the terminal gates with the containers. It is difficult to arrive at a conclusion on this point, as the Agreed Statement does not speak with sufficient granularity to the precise process through which the PINs are employed to obtain release of the cargo. However, the lack of a detailed understanding of the process does not detract from the conclusion that the process is characteristic of the road leg.

[77] In arriving at my decision to prefer the opinion of Dr. Schwampe over that of Dr. Kienzle, I have considered each party's argument that the opinion of the other's expert, when applied to certain hypothetical fact scenarios, would generate absurd results. Dr. Schwampe raises the facts considered in the 2007 Decision, involving pre-loading damage to the cargo on the Mafi trailer, but hypothesizes a variation in which the truck that was awaiting loading of the cargo was a rogue, unauthorized by the multimodal carrier. Dr. Schwampe opines that the analysis the FCJ would apply to such a scenario would necessarily be the same it applied to the actual facts of the 2007 Decision. Based on Dr. Kienzle’s opinion that the road leg cannot have commenced in the absence of an authorized on-carrier, Hapag-Lloyd expressly disagrees with this opinion.

[78] I find Dr. Schwampe's opinion logically the more compelling. The FCJ principles involve allocation of risk. The risk that materializes when the unsecured cargo is damaged on the Mafi trailer, prior to being lifted by the terminal onto the awaiting truck, is the same regardless of whether the operator of that truck has a mandate from the multimodal carrier.

[79] In contrast, the Defendants ask the Court to consider a hypothetical scenario in which cargo arrives at an ocean terminal following a port-to-port shipment and is then mistakenly loaded onto a truck, which was waiting for some other consignee's cargo, and sustains damage. The Defendants argue that, under Dr. Schwampe's analysis, the carrier's liability to cargo interests would be subject to the road carriage liability regime, even though no road carriage was ever contemplated for that cargo. I do not find this argument compelling, as the Defendants' hypothetical scenario does not involve a multimodal contract of carriage. While I take their point that it would be strange to apply a liability regime that was never in the contemplation of the parties, this concern does not arise in a situation like the present case, where the parties contracted for multimodal transport involving an ocean and a road leg. Where the parties contemplate that portions of the carriage will be subject to each of the ocean and road liability regimes, it is consistent with their expectations that risks associated with the road carriage will be subject to the latter regime.

[80] Finally, I note each of the parties takes the position that, if Canadian law applied to this loss, certain Canadian jurisprudence upon which it relies would favour its position. However, resort to Canadian law is only appropriate in the event that I find the relevant German law has not been proven. I do not understand either of the parties to be taking the position that the expert

evidence is insufficient to prove the necessary German law. I find the expert evidence is sufficient to allow me to determine the relevant principles of German transport law and their application to the agreed facts. I am therefore able to answer the Question without recourse to Canadian law.

VI. **Conclusion**

[81] For the above reasons, my conclusion is that the Question must be answered in favour of the Plaintiffs. That is, under the law of Germany, the limitation of liability that applies to the loss of cargo stolen from the terminal at the Port of Antwerp, Belgium and described in the Agreed Statement of Facts dated July 16, 2019, is 8.33 SDRs per Kg. I will therefore issue Judgment for the Plaintiffs against Hapag-Lloyd in the principal amount of CAD $872,909.57. The parties have agreed that the other Defendant, the agency Hapag-Lloyd (Canada) Inc., has no liability for the Plaintiffs' loss. My Judgment will therefore dismiss the action against that Defendant.

[82] The issues of pre-judgment and post-judgment interest, as well as costs, remain to be determined. The parties have agreed to make efforts to reach agreement on these issues, failing which they will return to the Court for their adjudication. My Judgment will so provide, affording the parties 30 days either (a) to advise the Court that they have reached agreement on these issues; or (b) to propose a process for adjudication of whichever of these issues remain unresolved.

JUDGMENT IN T-1526-12

THIS COURT'S JUDGMENT is that:

1. The Plaintiffs' motion is treated as a motion for summary trial.

2. The Plaintiffs shall have judgment against the Defendant, Hapag-Lloyd AG, in the principal amount of $872,909.57.

3. Within 30 days of the date of this Judgment, the parties shall write to the Court, either:

    a. Advising that they have reached agreement on the disposition and amounts of pre-judgment interest, post-judgment interest, and costs, and requesting issuance of a Supplementary Judgment reflecting those amounts; or

    b. Proposing a process for adjudication of whichever of pre-judgment interest, post-judgment interest, and costs remain unresolved.

4. The Plaintiffs' action against the Defendant, Hapag-Lloyd (Canada) Inc., is dismissed.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1526-12
STYLE OF CAUSE:	IAMGOLD CORPORATION AND NIOBEC INC. v HAPAG-LLOYD AG, HAPAG-LLOYD (CANADA) INC., and THE OWNERS AND ALL OTHERS INTERESTED IN THE VESSEL M/V "OOCL MONTREAL"
PLACE OF HEARING:	MONTREAL, QUEBEC
DATE OF HEARING:	OCTOBER 23, 2019
JUDGMENT AND REASONS:	SOUTHCOTT J.
DATED:	NOVEMBER 26, 2019

APPEARANCES:

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