



Robinson Sheppard Shapiro

Ship Owners' / Carriers' Remedies in Canada

Per: Louis Buteau for the International Law Seminar 2009



What's in the toolbox?

- The good old strongly worded demand letter;
- Notice of lien / right of retention;
- Arrest of cargo, freight or bunkers;
- *Mareva* injunction / Seizure before judgment;
- Attachment?

The demand letter

- When the business is good, it might do the trick;
- When the business is bad, it tends to be ignored.
- Always advisable to start with it though, to minimize the risks of unpleasantries such as claims of abuse of process, wrongful arrest, *etc.*

Notice of lien over freight or sub-freight

- If the charter party (“**C/P**”) allows it;
- legally speaking, it is in fact treated as an assignment such that the C/P granting the lien over a payment to be made to the Ship Owner (“**S/O**”) must be sent to both the defendant and its debtor from which the S/O wants to be paid directly;
- Just too bad for the S/O if payment was validly made by the recipient of the notice prior to its receipt or if sent to the wrong person (shipper, consignee or other?);
- Remedy as efficient as reputable, reachable and solvent the debtor of the S/O’s debtor is.

Lien / right of retention over cargo

- Limited to the freight or charges owed in respect of the cargo withheld unless the governing bill of lading (“**B/L**”) extends the lien to all amounts due to the S/O;
- The transmission of a “*notice of lien and enforcement of security*” meeting the requirements of the Canadian *Bankruptcy Act* provides some (limited) protection after 10 days of its transmission against a notice of intent by the defendant to make a proposal under the *Bankruptcy Act*;
- Such notice is, however, of no effect as against insolvency proceedings under the Canadian *Companies’ Creditors Arrangement Act*;
- An arrest provides a far better protection and may even avoid the jurisdiction of the Canadian or foreign bankruptcy Court over the arrested cargo or bunkers.

Arrest of Marine Property (Competent Court(s))

- Federal Court (“FC”): the maritime / admiralty jurisdiction is not limited to listed items but is fairly open ended and, in fact, only subject to the constitutional jurisdiction of the Canadian federal government over “navigation & shipping”;
- Provincial High/Superior Courts: Concurrent jurisdiction with FC over *in personam* shipping matters but no *in rem* jurisdiction to arrest except perhaps in the Provinces of Newfoundland & Labrador and British Columbia (constitutional issue there though).

Arrest of Marine Property (Advantages)

- **No prior authorization from a Judge required:** Provided that a proper Statement of Claim and Affidavit to Lead Warrant are filed at anyone of the Federal Court registries;
- **Flexibility and speed:** Arrest documentation may be filed in Montreal and issued in St-John's (NFLD) or Vancouver (B.C.) for local pick up and service by bailiff or sheriff. The Affidavit to Lead Warrant may be filed by fax;
- **Relatively Inexpensive:** Filing fee of CDN \$150 + bailiff charges + lawyer's fees;
- **No custody charges to be paid by the arresting party:** the defendant remains the owner & person responsible for damage the arrested property might cause;
- **Not overly risky:** An arrest is not a *Mareva* injunction such that the dismissal of the underlying claim does not *per se* entitle the defendant to claim damages for wrongful arrest unless such arrest was clearly made in bad faith;
- **No security required:** for costs / potential damages to the defendant / third parties (fairly small security for potential taxable costs may be required if foreign plaintiff & only after the defendant has appeared in the proceedings).

Arrest of Marine Property (subject matters other than a ship)

- Cargo
- Freight payment
- Bunkers
- Aircraft(!!!)
- Marine Insurance indemnity?

Arrest of Marine Property (Main Restrictions)

- The arrested property must be “*the subject of the action*” or part of the subject of the action (section 43 of the *Federal Court Act*)
- The defendant must be the Owner of the arrested property except if the claims benefits from a maritime lien status (such as cargo still in possession of the carrier, salvage of floating cargo, aircraft,...)

Arrest by the S/O or Carrier (Examples & Potential Issues)

In the late nineties, it became more and more frequent to have arrests set aside on the basis of an insufficient nexus between the cause of action and the arrested property. For instance:

- Arrest of Cargo: In the absence of lien clause covering it, the mere fact that there was charterer's cargo onboard a ship did not entitle its arrest for a claim totally unrelated to it (*TradeArbed v. Toles*, T-636-99);
- Arrest of Freight & Bunkers: The arrests of freight and bunkers for unpaid brokerage commissions, by the chartering broker, not pertaining to the subject voyage were set aside *Scandia Shipping Agencies Inc. v. "Alam Veracruz" (The)* (1997), 148 F.T.R. 161 (T.D.).

Arrest by the S/O or Carrier (Examples & Potential Issues)

Arrest of the cargo of an illegally cancelled or diverted shipment by the shipper or voyage charterer:

- Possible whether on loading dock, upon loading onboard the third party vessel to which it had been diverted to or further to its discharge at destination;
- Based upon an interpretation influenced by the narrower wording of section 21 of the U.K, *Supreme Court Act 1981*, The Federal Court of Appeal first held that cargo arrest was not available in such instances. The Supreme Court of Canada and Federal Court of Canada rectified the situation in their decisions in the *Swift Fortune* matter in 2007 & 2008;
- The arrested cargo must be the subject of the action though and ascertainable, such as a definite stock pile or once in the hold of the other ship used in the case of a FOB sale of a bulk cargo.
- There must at least be a good arguable case that the arrested shipment is owned by the defendant to avoid having the arrest set aside at a preliminary stage.

Arrest of Cargo for unpaid freight



Arrest of Cargo for unpaid freight

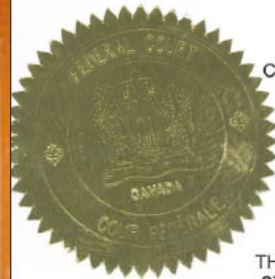


Court File No. T-428-08

FEDERAL COURT OF CANADA – TRIAL DIVISION

ADMIRALTY ACTION *IN REM*

BETWEEN:



AGI LOGISTICS USA, LLC
and
CARSON FREIGHT SERVICES, division of CARSON
CUSTOMS BROKERS LTD.
and
DIPEX DIRECT EXPRESS SERVICES

Plaintiffs

AND

THE CARGO EX THE SHIP "MSC MATILDE", Voy. 16
STOWED WITHIN CONTAINER NO. MSCU7795081
and
THE OWNERS AND ALL OTHERS INTERESTED
IN THE CARGO EX THE SHIP "MSC MATILDE", Voy. 16
STOWED WITHIN CONTAINER NO. MSCU7795081
and
THE CARGO EX THE SHIP "MSC MATILDE", Voy. 16
STOWED WITHIN CONTAINER NO. MSCU8782216

Defendants

WARRANT

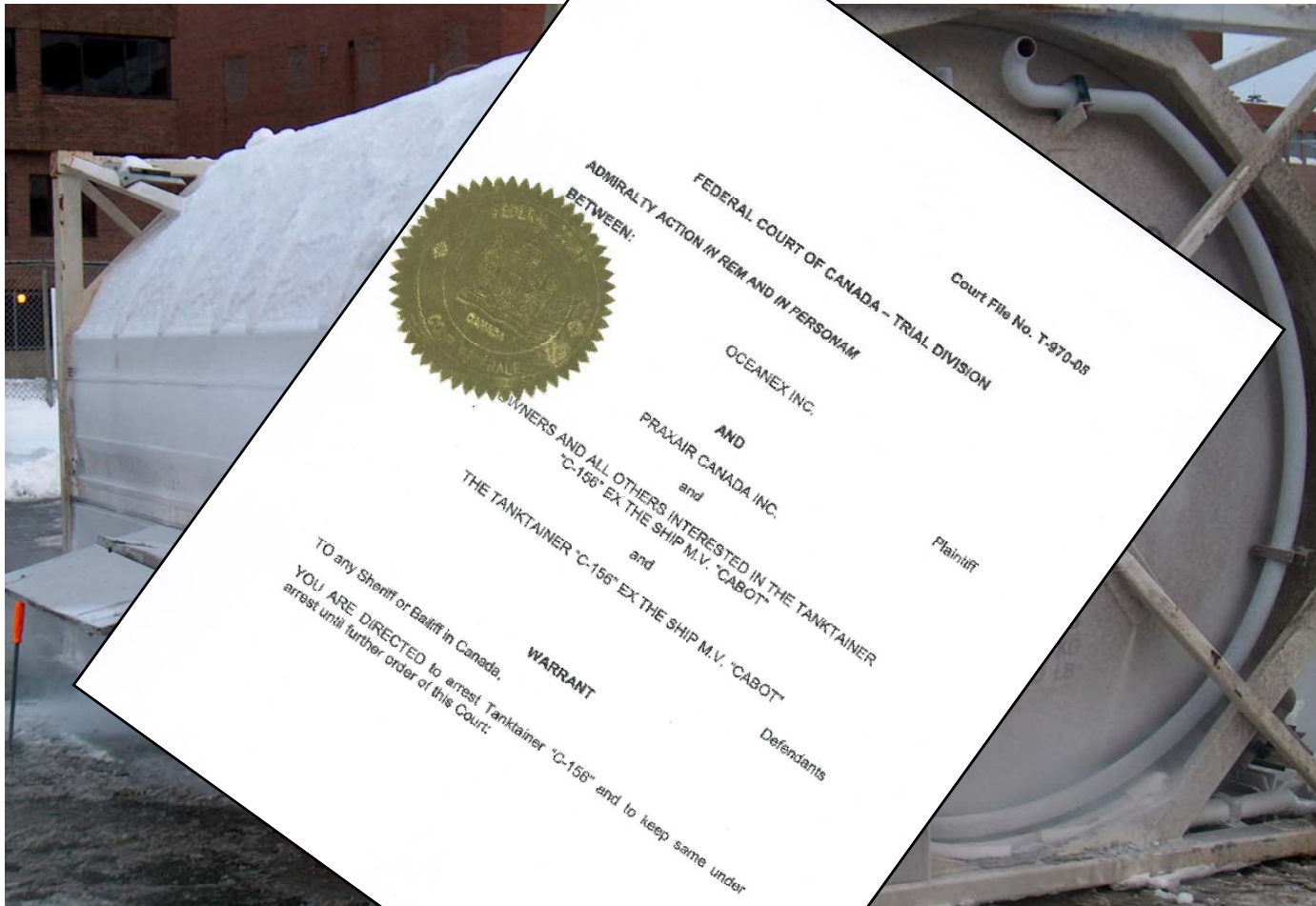
TO any Sheriff or Bailiff in Canada,

YOU ARE DIRECTED to arrest the Cargo Ex the Ship "MSC MATILDE", Voy. 18
stowed within Container No. MSCU7061874 and to keep same under arrest until
further order of this Court.

Arrest of cargo for damage to the ship



Arrest of cargo for damage to the ship by the cargo



Arrest of cargo for an indemnity
for stevedores' claim for damage to their equipment by
contaminated cargo



Arrest of cargo for an indemnity for stevedores' claim for damage to their equipment by contaminated cargo



Mareva injunction / Seizure before judgment

- The *Mareva* injunction is available in the Federal Court of Canada and in the provincial Superior / High Court of all Provinces;
- The Seizure before judgment is also available in the Quebec Superior Court (it is, legally speaking, the equivalent of attachment);
- Both requires the prior authorization from a Judge plus some proof that the claim is in jeopardy. Evidence that the defendant is a foreign entity is not sufficient;
- Both require more paperwork; and
- The posting of security may be ordered by the Court as a condition precedent.

Attachment?

Not available in Canada!

Unlike with our immediate neighbor to the South of the Canadian border, torture was officially and effectively abolished a long time ago 😊😊😊

Thank you for your patience!

Montreal



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