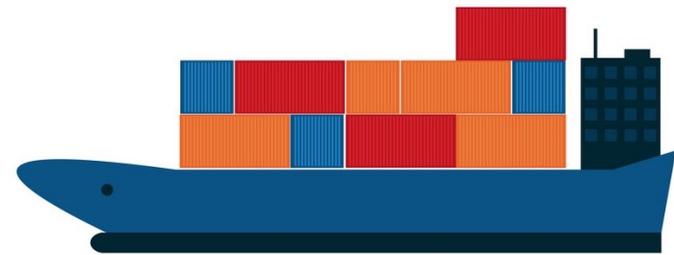


Cargo Claims in Canada → a Cargo Lawyer's Perspective

- Review Contract of Carriage
 - Nature of contract of carriage
 - Bill of Lading? Sea Waybill? Other?
 - Identify who to sue
 - Who is the carrier?
 - Jurisdiction
 - Jurisdiction clause?
 - s.46 *MLA* considerations
 - Time bar
 - Applicable law.
- Other claim documents



Cargo Claims → Carrier Considerations

- Inspection of damages and mitigation efforts
- Collect statements and ship's documents
- De-escalation measures
- Investigate pre-loading condition of cargo
- Contractual framework and Ts & Cs



Arc-en-ciel Produce Inc. v. MSC Belle (Ship), 2020 FC 23; rev. on appeal
Great White Fleet v. Arc-en-ciel Produce Inc., 2021 FCA 70

- Facts:
 - AEC and GWF enter into a service contract which incorporates GWF's Bill of Lading.
 - AEC contracts with GWF for the door-to-door carriage of 6 containers of fresh produce from Costa Rica to Ontario, Canada.
 - For each shipment GWF issues one document entitled "International Bill of Lading". They are all unsigned.
 - The shipments arrived in Canada exhibiting various forms of damage.
 - AEC brought claims in the FC against GWF seeking compensation for the damaged shipments.
 - GWF brought forward Motions to stay the proceedings on the basis of the jurisdiction clause in its Bill of Lading.

Arc-en-ciel Produce Inc. v. MSC Belle (Ship), 2020 FC 23; rev. on appeal *Great White Fleet v. Arc-en-ciel Produce Inc.*, 2021 FCA 70

Defendant / Appellant Great White Fleet's Arguments

- Shipments are subject to a volume service contract;
- Valid jurisdiction clause calling for the adjudication of disputes in the United States District Court, Southern District of New York;
- Shipping document does not constitute a “contract for the carriage of goods” within the meaning of S. 46 MLA;
- Plaintiff cannot demonstrate sufficiently strong reasons to satisfy the strong cause test.

Arc-en-ciel Produce Inc. v. MSC Belle (Ship), 2020 FC 23; rev. on appeal
Great White Fleet v. Arc-en-ciel Produce Inc., 2021 FCA 70

- Summary of AEC's arguments:
 - The contractual arrangements between the parties fall within the scope of s.46 *MLA*;
 - The Service Contract
 - The International Bills of Lading
 - However, if it was found that s.46 *MLA* was not triggered, the “strong cause test” outlined by the Supreme Court in *Z.I. Pompey* is met;
 - Location of witnesses and evidence
 - Time-bar
 - Public policy considerations

Arc-en-ciel Produce Inc. v. MSC Belle (Ship), 2020 FC 23; rev. on appeal
Great White Fleet v. Arc-en-ciel Produce Inc., 2021 FCA 70

- Order and Reasons of Heneghan J.
 - Determination of the nature of the contractual arrangements between the parties to be left to the trial judge;
 - There is a contract for the carriage of goods by water as represented by the Service Contract which incorporates by reference the terms and conditions of the GWF Bill of Lading;
 - s.46 *MLA* is met;
 - s. 50 *FCA* confers discretion on the Court to stay a proceeding on the basis of a jurisdiction clause;
 - Plaintiff has shown strong cause to set aside the jurisdiction clause, namely because any action commenced in the United States would be time-barred;

Great White Fleet v. Arc-en-ciel Produce Inc., 2021 FCA 70

Key findings of the Federal Court of Appeal

- S. 46 *MLA* determines the test to be applied on a motion to stay (paragraph 11);
- A plaintiff who is entitled to the benefit of section 46 should not have to also meet the burden of establishing strong cause (paragraph 12);
- The *forum non conveniens* test and the strong cause test have different evidential burdens (paragraph 14);
- A bill of lading is a standard form contract and is therefore subject to a standard of review of correctness (paragraph 19);
- For S. 46 *MLA* to apply, a determination on whether the shipping document in question constitutes a contract for the carriage of goods by water is necessary (paragraphs 19 and 20).

Kore Meals LLC v. Freshii Development LLC
2021 ONSC 2896

*“In the age of Zoom, is any forum more non conveniens than another?
Has a venerable doctrine now gone the way of the VCR player or the
action in assumpsit?”*

- Franchise dispute between Kore Meals, a Texas company and Freshii Development, a Chicago company arising out of a Development Agent Agreement (the “DAA”)
- DAA has an arbitration clause that requires arbitration in Chicago. Plaintiff takes suit in Toronto, where Freshii’s parent corporation, Freshii Inc., also a Defendant, is based
- Defendants move for a stay of proceedings

Kore Meals LLC v. Freshii Development LLC
Cont'd

- Record contains evidence casting doubt on whether the Defendants carry on any business at all in Chicago, only a post office.
- Factors to be considered in granting or refusing a stay of arbitral proceedings include the *forum non conveniens*-type analysis of whether the forum/venue identified in the arbitral agreement is unfair or impractical for one or another of the parties.
- Considers the forum non conveniens factors.
- The arbitration hearing would be online.

Kore Meals LLC v. Freshii Development LLC
Cont'd

[29] All of which undermines the majority of forum non conveniens factors. If hearings are held by videoconference, documents filed in digital form, and witnesses examined from remote locations, what is left of any challenge based on the unfairness or impracticality of any given forum? To ask the question is to answer it. Freshii Developments may have a miniature post office box or an entire office tower in Chicago, and witnesses or documents may be located in Canada's Northwest Territories or in the deep south of the United States, and no location would be any more or less convenient than another.

Kore Meals LLC v. Freshii Development LLC
Cont'd

[31] It is by now an obvious point, but it bears repeating that a digital-based adjudicative system with a videoconference hearing is as distant and as nearby as the World Wide Web. With this in mind, the considerable legal learning that has gone into contests of competing forums over the years is now all but obsolete. Judges cannot say forum non conveniens we hardly knew you, but they can now say farewell to what was until recently a familiar doctrinal presence in the courthouse.

- The arbitration provision in the DAA is held valid and enforceable. The motion for a stay of proceedings is granted.

Forum Non Conveniens Implications of Kore Meals

Factors Affected Digital Hearings

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;

Factors Not Affected Digital Hearings

1. the existence of proceedings pending in another jurisdiction
2. the applicable law;
3. advantages conferred upon the plaintiff by its choice of forum, if any;
4. the need to have the judgment recognized in another jurisdiction.

Jurisdiction and Forum Considerations in Cargo Claims

