Québec Superior Court dots the “i”s on limitation of liability for railway carriers

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Under the *Canada Transportation Act* (S.C. 1996, c. 10) (“Act”), a railway carrier is required to publish the tariffs it generally applies to all shipments, except where the shipper has concluded a so-called “confidential agreement” with the railway carrier, which can include limitations on the railway carrier’s liability. The Superior Court of Québec, in *Ace European Group Ltd. v. Canadian National Railway Company*, 2017 QCCS 2531, recently declared that a clause limiting the railway carrier’s liability to “*US$0,00 (zero dollars)*” is invalid under the Act.

Background

Since 2003, Bombardier had been transporting between 50 and 100 metro cars with CN annually. Early in 2009, CN accepted two metro cars in New York for transport to Québec. The metro cars derailed in CN’s railway yard in Taschereau, Québec. Bombardier’s insurer paid close to US$600,000 in indemnity to Bombardier and brought an action against CN for recovery.

CN did not contest the amount claimed, but argued that it could not be held liable for the consequences of the derailment and that in any event its liability was limited to “*zero dollars*” under the confidential agreement with Bombardier. The Plaintiff argued that the contract could not be invoked against it and that the limitation clause was illegal.

Decision

The Court first reviewed the contract negotiations leading to the confidential agreement. It found that Bombardier had been duly made aware during the negotiations that CN would not accept any liability for the transport of the metro cars because of the exceptional nature of the goods transported. The contract clearly stated that the rate was subject to “*zero liability*” and was explicit in limiting CN’s liability to “*US$0,00 (zero dollars)*” (the “Clause”).

The Court then had to decide on the validity of the Clause under section 137 of the Act. For the benefit of readers, section 137 of the Act, as it read in 2009, provided that:

137 (1) A railway company ***shall not limit or restrict its liability*** to a shipper for the movement of traffic ***except by means of a written agreement*** signed by the shipper or *by an association or other body representing shippers.*

Section 137 was amended in 2015 and now reads as follows:

137 (1) The railway company's liability, including to a third party, in respect of the movement of a shipper's traffic shall be dealt with between the company and the shipper *only by means of a written agreement that is signed by the shipper or by an association or other body representing shippers.*

The Court made a distinction between "limitation clauses", which set a maximum dollar amount if liability is found, and "exclusion clauses", which exclude liability altogether. The Court found that the Clause was a hybrid between the two, but that fundamentally, it had the effect of excluding all liability for CN. It held that the Clause was invalid, as section 137 of the Act allows for the parties to agree to a *limitation* or *restriction* of liability only, not to an *exclusion* of liability. A clause limiting the liability of CN to "*zero dollars*" is an exclusion clause, which is not permitted under the Act.

Therefore, because the Court also found that CN had failed to show that it did not commit any errors or faults at the time of the derailment, the Court concluded that CN was liable to pay the Plaintiff the full amount claimed. CN has lodged an appeal before the Québec Court of Appeal, which is pending at the time of writing.

Comment

This is an important case for anyone active in the transportation industry in Canada. If this decision is confirmed at the appeal level, it could have consequences for similar existing confidential agreements and the apportionment of liability between parties, as long as those contracts were executed prior to the amendment of section 137 on June 18, 2015.[1] Furthermore, section 137 has been amended in a manner that appears to expand the ability of railway carriers to "deal with" their liability by way of agreement. This decision does not clarify how courts might apply the new wording of section 137 to "zero liability" clauses in confidential agreements in the future, other than commenting that the new wording of section 137 appears to grant larger contractual liberty to the parties to a confidential agreement.

[1] Section 137 of the Act was amended by means of article 9 of the Act to amend the *Canada Transportation Act* and the *Railway Safety Act*, S.C. 2015, c. 31.

By

Nils Goeteyn, Robin Squires

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749