SUPERIOR COURT
(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-11-036133-094

DATE: NOVEMBER 24, 2009

PRESENT: THE HONOURABLE DANIÈLE MAYRAND, J.S.C.

IN THE MATTER OF THE PLAN OF ARRANGEMENT OF:

ABITIBIBOWATER INC.
and
ABITIBI-CONSOLIDATED INC.
and
BOWATER CANADIAN HOLDINGS INC.
and
The other Respondents listed on Schedules “A”, “B”, “C”
Respondents
vs.
SPLIETHOFF TRANSPORT B.V.
Petitioner
and
ERNST & YOUNG INC.
Monitor-Intervener

JUDGMENT

PREFACE

1 Under the protection of the *Companies' Creditors Arrangement Act*[1] ("CCAA"), Abitibi Consolidated Inc. ("ACI") took advantage of paragraph 46(f) of the Initial Order which this Court rendered on April 17, 2009 and repudiated the marine transport contracts entered into with Spliethoff Transport B.V. ("Spliethoff").

2 The contracts in question involve the carriage of paper on Spliethoff's vessels to ports located in the Caribbean and the Mediterranean.

3 The repudiation of the contracts is part of the review and negotiation of all the marine transport contracts of AbitibiBowater Inc. ("ABH") and its subsidiaries ("ABH Group"); in connection therewith, it asked all the carriers to submit new proposals to it in order to reduce its costs.

4 In this context, ACI decided to entrust the Caribbean and Mediterranean transport lines to Wagenborg Shipping B.V. ("Wagenborg") and to terminate its contracts with Spliethoff.

5 Spliethoff acted on the "return clause" set out in the Initial Order and asked the Court to intervene to cancel the notice of repudiation of the contracts and order ACI to resume, under the supervision of ACI's monitor, the tender process for the commercial transport lines in the Caribbean and Mediterranean.

THE ISSUES

I. What criteria apply to the termination of the contracts under the CCAA?

II. Is it appropriate to intervene to cancel the repudiation of contracts R-1 and R-2 which ACI entered into with Spliethoff?

III. In the affirmative, should the Court intervene to order ACI to conduct a formal call for tenders with all the carriers in order to re-allocate the Caribbean and Mediterranean commercial routes?

LEXICON

6 To facilitate the understanding of this judgment and the documents to which it refers, it is advisable to present those involved and define certain expressions used in the marine transport business.

[1] R.S.C. [1985], c. C-36.

Parties involved

Companies	***Persons***	***Duties***
ABH ACI	**John Robb** (“Robb”)	Head of the strategic supply and transportation team at ABH and ACI (the “Team”).
	Régis Gama (“Gama”)	Very involved in the marine transport operations; he developed the scenarios and synopses in the context of the contract review.
	Dwyane Spence (“Spence”)	International logistical specialist and direct contact with the various marine carriers.
Ernst & Young	**Martin Daigneault**	Representative of monitor Ernst & Young.
Spliethoff	**John Sveistrup** (“Sveistrup”)	From Pompeii, he is the authorized agent of Spliethoff in Montreal and its spokesperson with whom the Team deals. References to Sliethoff *(sic)* in this judgment include John Sveistrup.
Trealmont Trade Lane	**James Allen and Rob Rabnat**	Representatives of Trealmont Trade Lane, they act as marine agents for ACI.
GriegStar, Transatlantic and Gearbulk		Other marine carriers which do business with ABH and ACI.

Marine terms

Words	***French translation***	***Meaning***
Ballast Bonus	**Prime de ballast**	Compensation given to the carrier for a relatively long trip of a vessel travelling empty. This compensation, which is not part of the rent (freight), is net of commission, unless indicated otherwise.
Baltic Dry Index (BDI)		Price index for bulk marine carriage of dry goods. This index is managed by the British company Baltic Exchange in London.
Break Bulk	**Cargo en vrac**	Cargo which is not placed in containers.
Bunker	**Combustible or**	Fuel consumed by a ship.

	mazout	
Bunker Adjustment Factor (BAF)		Freight gross-up for increased energy costs.
Change Adjustment Factor (CAF)		Currency adjustment factor. In this case, it is the variation between the European and American currencies.
Charter-Party	**Charte-partie**	Vessel charter contract.
Freight	**Fret**	Carriage of goods and, by extension, the cost thereof.
Laycan/Laydays		Represents the period mutually agreed upon by the ship-owner and the charterer during which the ship is to be delivered on time to the charterer.
Less than minimum volume contract	**LMVC**	Volume less than the minimum required in the contract.
M-Type Vessel		Traditional M-type vessel. Both Wagenborg and Spliethoff own this type of vessel.
S-Type Vessel		More modern that the traditional M-type vessel, the S-type vessel has doors on the sides for loading and unloading cargo. Spliethoff owns this type of vessel.
Tonnage	**Jauge**	Volume of interior capacities of ships expressed in metric tonnes per cubic foot.
Trade Lane		Commercial route used by a carrier.

ANALYSIS

I. WHAT CRITERIA APPLY TO THE TERMINATION OF THE CONTRACTS UNDER THE CCAA?

7 In order to emerge from the proceedings taken under the CCAA, ACI must make arrangements regarding its debt and reorganize its business.

8 The right to terminate the contracts is expressly set out in paragraph 46(f) of the Initial Order dated April 17, 2009.

9 The termination of overly onerous contracts is one of the tools available to ACI and forms an integral part of all the measures which will be taken to promote its restructuring.

10 The Court reiterates the standard retained in the SFK Pulp decision[2] rendered in this restructuring matter for the termination of contracts:

> [Translation]
> 23 That being said, the standard accepted by the courts allows the debtor to repudiate contracts as long as such repudiation is advantageous and beneficial for its reorganization without having to establish that it is an essential part of it.
>
> 24 Since the judgment in the PCI case which endorsed this standard and the Court of Appeal judgment in the *Mine Jeffrey* case, which confirmed the principles, the state of the law has remained the same, subject however to the following comments.
>
> 25 The power to repudiate contracts arises from the statutory discretion given by the CCAA and not from the inherent jurisdiction used by the courts that are called upon to deal with issues, the novelty of which is limited only by lawyers' imagination.
>
> 26 The exercise of this statutory discretion, including the one allowing the repudiation of contracts, is subject to the analysis of the criteria of fairness and reasonableness that is essential to every decision taken by the judge under the CCAA.
>
> (Emphasis added)

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[2] AbitibiBowater Inc. (RE) et SFK Pâtes [2009] QCCS 2188, paragr. 23 to 26.

11 Judicial discretion must also be exercised in compliance with the business judgment rule, which means that, in appreciating the criteria of equity and reasonableness, the Court may not become involved in the business activities of the debtor or substitute its own business decisions.

12 In the Stelco case[3], the Ontario Court of Appeal applied to restructurings under the CCAA the business judgment rule which the Supreme Court of Canada had defined in the People case[4]:

> *65 […] It is well-established <u>that judges supervising restructuring proceedings</u> – and courts in general – <u>will be very hesitant to second-guess the business decisions</u> of directors and management. As the Supreme Court of Canada said in People, supra, at par. 67:*
>
> > *Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making…*
>
> (Emphasis added)

13 In short, the repudiation of contracts must be beneficial without being essential to the business restructuring. Judicial discretion is exercised based on the criteria of equity and reasonableness, in compliance with the business decisions of the debtor.

II. <u>IS IT APPROPRIATE TO INTERVENE TO CANCEL THE REPUDIATION OF CONTRACTS R-1 AND R-2 WHICH ACI ENTERED INTO WITH SPLIETHOFF</u>?

- ***Background of relationship between Spliethoff and ACI***

14 Spliethoff had been doing business with ACI since 2001 for the transportation of newsprint from its plants in eastern Canada. As of the spring of 2009, the port of origin was Baie-Comeau.

15 The Caribbean contract (R-1) and the Mediterranean contract (R-2) were entered into in November 2004 for an eight-year period beginning on January 1, 2005 and expiring on December 31, 2012.

(a) <u>The Caribbean contract (R-1)</u>

16 Under the Caribbean contract, Spliethoff provided ACI with vessels for two types of trips:

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[3] Stelco Inc., (RE) [2005] Carswell, Ont. 1188, paragr. 65 to 68.
[4] *People Department Store Inc. (Trustee of)* v. *Wise*, [2004] 3 S.C.R. 461.

i. the lease of an entire ship (chartered time);

ii. the lease of space on a ship (freighting) when the quantity of newsprint to be shipped represents less than 7,500 metric tonnes.

i. Terms for the lease of an entire ship

17 When ACI rented an entire ship (80% of the time under the Caribbean contract), it had to pay Spliethoff, among other amounts:

- a fixed rent of US$14,500 per day;
- a ballast bonus set at US$70,000 if the ship was delivered to the gateways "Cape Ray NL" or "1,300 nautical miles from Cape Ray" within the specified time;
- an amount related to the exchange rate fluctuation based on the relationship between the euro and the U.S. dollar (CAF)[5].

ii. Terms for freighting

18 In the case of the lease of space on a ship, ACI paid Spliethoff:

- an amount per metric tonne varying according to the quantity of paper carried and the port of destination;
- an amount for fuel which took adjustments into account (BAF)[6];
- an amount related to the exchange rate fluctuation (CAF).

(b) The Mediterranean contract (R-2)

19 The Mediterranean contract was for freighting only. It covered the carriage of newsprint from the port of origin to the ports of destination of Gandia (Spain), Civitavecchia (Italy) and Alexandria (Egypt).

20 In this case, ACI had to pay Spliethoff:

- an amount per metric tonne varying according to the quantity of paper transported and the port of destination;
- an amount for fuel (BAF);
- an amount related to the exchange rate fluctuation (CAF).

[5] Change Rate Adjustment Factor.
[6] Bunker Adjustment Factor.

21 ACI also paid various costs, including loading and unloading charges, commissions to its marine agent, harbour fees, cargo fees, etc.

22 ACI also did business with other marine carriers and the value of all the contracts was in excess of 70M.

- ***Review of marine transport contracts***

23 In the context of its restructuring, ACI must reduce its marine transport costs. The members of the Team assigned to this task are Robb, Spence and Gama[7].

24 ACI knew that marine transport rates had radically dropped over the past year and that, under the terms of the contracts at issue here, it was paying rates much higher than market. Its consultations with Trealmont Trade Lane and of the Baltic Dry Index confirmed this.

25 It therefore decided to review all the marine transport (break bulk) contracts and found that they were in fact much too onerous.

26 In this context, ACI initiated an information and negotiation process with its carriers. Its purpose was to give them the opportunity to continue to do business with it, but on different terms.

27 At the beginning of July 2009, ACI called all the carriers to an initial information session on August 3, 2009. Other than the carriers or their authorized agents, Martin Daigneault, Robb, Spence and Gama also attended.

28 Everyone was informed of the restructuring process ACI had undertaken and the ins and outs of the CCAA. ACI pointed out the importance of reducing its transportation costs if it wished to emerge from the process quickly and also told them of its expectations regarding the new contract terms, i.e.:

1. a five-year agreement;
2. a significant rate reduction;
3. payment terms;
4. the possibility of carrying goods by container rather than bulk;
5. flexibility regarding the loading ports and ports of destination;
6. the exchange risk would henceforth have to be borne by the carriers;
7. a late penalty for the carriers (the agreements in effect at the time only provided for a penalty against ACI in such cases).

[7] They all testified out of court and at the hearing.

29 Robb gave the following message: ACI would give them the opportunity to keep their business if they were able to give it what it was looking for. If they did not, the carriers would lose business[8].

30 As time was of the essence, ACI told them that the agreements had to be signed no later than August 11, 2009.

31 At the end of that meeting, Spence gave each carrier a sealed envelope containing draft agreements setting out the terms sought by ACI for the regions they served.

32 On August 4 and 5, 2009, ACI met individually with each of its carriers so they could talk freely with it, outside the presence of their competitors:

- August 4, 8:30 a.m.: Transatlantic;
- August 4, 11:00 a.m.: Gearbulk;
- August 4, 1:00 p.m.: Grieg Star;
- August 4, 3:00 p.m.: Wagenborg (Marco Renzelli);
- August 5, 10:30 a.m.: Sveistrup from Pompeii, Spliethoff's agent.

33 During the individual meetings, Wagenborg and Spliethoff each asked ACI if they could submit a proposal for the regions other carriers were serving at the time. ACI told them that all options were open.

34 Spliethoff even asked ACI whether other carriers had shown such an interest. ACI confirmed that one of them had. We now know that it was Wagenborg.

35 In this context, Spliethoff therefore asked for data on the estimated quantities of newsprint which would be transported in 2009 to the following ports: Continent, England-Ireland, Caribbean Basin and the Mediterranean. On August 5, 2009, Spence sent it the information, which he also provided to Wagenborg.

36 On August 8, 2009, Wagenborg made a verbal proposal to ACI for the routes it was already serving and told it that it was looking at the possibility of submitting another one for other regions.

37 On August 11, 2009, Spliethoff submitted a proposal (R-9) to ACI which only covered the regions it served. However, ACI was disappointed with its contents, which only included minimum and insignificant reductions. In addition, the freight tariff reductions were cancelled if ACI became profitable.

[8] Out-of-court testimony of Robb on October 20, 2009, pages 87 and 88 and testimony at the hearing; examination out of court of Spence on October 21, 2009, page 41.

38 Although all the carriers submitted a proposal to ACI, none of them complied with the August 11, 2009 deadline to enter into new agreements. On August 12, 2009, Spence informed the carriers that the deadline was postponed to the week of August 24, 2009.

39 On August 24, 2009, Wagenborg submitted a second proposal (JR-5) to ACI which covered the regions it was already serving and those which were served by other carriers, including Spliethoff.

40 The analysis of the proposals by the management team went on for several weeks and took more time than expected. The late receipt of the offers, summer vacations and the Team's workload contributed to this situation.

41 To evaluate the offers received, Gama prepared synopses which included different projected five-year scenarios and compared the ongoing contracts with the proposals by Spliethoff and Wagenborg.

42 The scenarios take into account all the components relating to the costs borne by ACI. Some are provided for in the compared contracts whereas others are based on assumptions since the scenarios are projected over the next five years. For example, the CAF and BAF costs in effect during the month of August 2009 were used for the 2010 to 2014 calculations[9]. Other costs, such as those relating to unloading the ships, come from the historical costs paid by ACI.

43 Certain other data were taken into account in calculating the scenarios, such as the type of vessel, namely the M-type or S-type, the latter being a more modern ship used by Spliethoff which influenced the cruising speed and number of travel days. The scenarios also covered the tonnage estimated by ACI over the next five years to different ports of destination.

44 The projections for the Caribbean were:

- 110,000 tonnes in 2010
- 115,500 tonnes in 2011
- 121,275 tonnes in 2012
- 127,339 tonnes in 2013
- 133,706 tonnes in 2014

45 Those for the Mediterranean were:

- 25,000 tonnes in 2010
- 26,250 tonnes in 2011
- 27,563 tonnes in 2012

[9] Gama referred to the Daily Report of Platts Bunker Wire Lologram for the price of fuel in various ports.

- 28,941 tonnes in 2013
- 30,388 tonnes in 2014.

46 The exercise was tedious and complex, but it allowed ACI to compare the value of the various contracts as well as the savings or additional costs arising therefrom[10].

47 Spliethoff's proposal, spread over five years, resulted in additional costs rather than cost reductions. The savings realized per metric tonne were as follows:

- For the Caribbean:	2010 =	$3.15
	2011 =	$0.97
	2012 =	(-$1.22)
	2013 =	(-$3.76)
	2014 =	(-$6.30)
- For the Mediterranean:	2010 =	$10.27
	2011 =	$8.30
	2012 =	$6.22
	2013 =	$4.15
	2014 =	$2.07

48 Accordingly, for the 2010-2014 period, ACI had to pay additional costs of $1,010,067 for the Caribbean, but benefited from savings of $831,570 for the Mediterranean. In short, when we combine the results for the two commercial lines[11], we have to conclude that ACI did not benefit from any savings over a five-year period but, on the contrary, was facing $178,497 in additional costs.

49 Wagenborg's proposal contains advantageous rate reductions and integrates the main commercial terms ACI was looking for.

[10] Tables JR-6b, JR-7, JR-8b, JR-17, JR-18 and JR-19 show and compare contracts R-1 and R-2 with the rate reductions submitted by Spliethoff and Wagenborg under the new proposals for the Caribbean and Mediterranean commercial lines.
[11] JR-8b

50 Expressed as a cost reduction per metric tonne, the results are the following:

- <u>For the Caribbean</u>:	2010 =	$14.00
	2011 =	$14.00
	2012 =	$12.50
	2013 =	$12.50
	2014 =	$12.50
- <u>For the Mediterranean</u>:	2010 =	$30.00
	2011 =	$30.00
	2012 =	$30.00
	2013 =	$30.00
	2014 =	$30.00

51 Accordingly, over a five-year period, ACI benefited from savings of $7,935,993 for the Caribbean and $4,144,223 for the Mediterranean, for a total of $12,080,216[12].

52 The thorough and transparent analysis which Gama conducted and to which the Court gives great credibility provides an in-depth discussion of the economic value of all the contracts which were prepared.

53 The synopses he prepared warranted ACI repudiating its contracts with Spliethoff and entering into new agreements with Wagenborg.

54 On September 11, 2009, ACI and Wagenborg thus finalized a letter of agreement. Before September 14, 2009, ACI sent Spliethoff the notice repudiating the contracts.

55 That said, it is appropriate to respond to certain claims made by Spliethoff.

➢ ***Spliethoff's true interest***

56 The conclusions sought by Spliethoff are contradictory. While it asks for the cancellation of the notice repudiating the contracts, it also asks that a new call for tenders be held for all carriers when the dice are already thrown and all the information is on the table. In reality, Spliethoff is not asking to reinstate contracts R-1 and R-2, but rather to be able to bid again in order to have "another kick at the can".

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[12] JR-7

57 Spliethoff is confusing the role of the Court under the CCAA. Although it has an oversight role, it certainly does not include that of managing the business affairs of the debtor. In the Stelco case[13], the Ontario Court of Appeal reiterated this principle which it had already stated in the KeepRite matter:

> 66 *In* Brant Investments Ltd. *v.* KeepRite Inc. *(1991), 3 O.R. (3d) 289 (Ont. C.A.) at 320, this court adopted the following statement by the trial judge, Anderson J.:*
>
> > *Business decisions, honestly made, should not be subjected to microscopic examination. There should be no interference simply because a decision is unpopular with the minority." (6)*
>
> 67 *McKinlay J.A. then went on to say:*
>
> > *There can be no doubt that on an application under s. 234(7) the trial judge is required to consider the nature of the impugned acts and the method in which they were carried out. That does not mean that the trial judge should substitute his own business judgment for that of managers, directors, or a committee such as the one involved in assessing this transaction. Indeed, it would generally be impossible for him to do so, regardless of the amount of evidence before him. He is dealing with the matter at a different time and place. It is unlikely that he will have the background knowledge and expertise of the individuals involved; he could have little or no knowledge of the background and skills of the persons who would be carrying out any proposed plan; and it is unlikely that he would have any knowledge of the specialized market in which the corporation operated. In short, he does not know enough to make the business decision required.*
>
> 68 *Although a judge supervising a CCAA proceeding develops a certain "feel" for the corporate dynamics and a certain sense of direction for the restructuring this caution is worth keeping in mind. […] The court is not catapulted into the shoes of the board of directors, or into the seat of the chair of the board, when acting in its supervisory role in the restructuring.*
>
> (Emphasis added)

[13] *Supra*, footnote 2.

➢ ***The allegations of bad faith***

58 The allegations by Spliethoff that ACI is in bad faith and that it acted abusively in preferring to sign an agreement with Wagenborg, planned from the outset, do not hold sway.

59 Article 2805 C.C.Q. provides that *good faith is always presumed, unless the law expressly requires that it be proved*. Spliethoff not only failed to show that ACI was in bad faith but, on the contrary, its conduct raises doubts.

60 In this regard, Spence's version to the effect that Spliethoff wanted to circumvent the procedure put forward by ACI is much more realistic. Immediately upon receipt of the July 3, 2009 notice of meeting, Spliethoff showed its interest in negotiating outside the process, as its representative could not attend the meeting ACI wanted to hold in mid-July. Pressed for time but at the same time wishing to accommodate the representatives of Spliethoff, ACI agreed to delay the presentation to the carriers.

61 Once again, on July 6, 2009, Spliethoff's representative informed ACI that he could not attend on August 3, 2009, but that he was available to negotiate outside the formal procedure, which Spence refused because the negotiation procedure had to be the same for all the carriers. Spliethoff then hired Sveistrup for the August 3, 2009 meeting.

62 Spliethoff also cannot claim that ACI acted abusively because it negotiated with Wagenborg after the first proposals were submitted.

63 Spliethoff knew very well that its proposal would not satisfy ACI. Furthermore, it clearly stated this when it submitted its proposal:

> *We realize that the rate reductions we have proposed above <u>are far from</u> what you have asked for, however please consider that Abitibi always enjoyed very low rates.*
>
> (Emphasis added)

64 Spliethoff could also not have been unaware of the advantages its competitors could offer ACI, especially since it knew that another carrier was asking for its commercial lines and that ACI was disappointed with its proposal[14].

65 The strategy adopted by the parties must be distinguished from their reciprocal obligations. ACI was not obliged to continue to negotiate with

[14] On August 31, 2009, Spence told Sveistrup how disappointed he was with the weakness of Spliethoff's proposal in that it did not meet ACI's minimum expectations.

Spliethoff when its proposal showed a lack of real interest in signing an agreement with ACI.[15]

66 The words of the Court of Appeal in *Wolofsky* vs. *Trust général Inc.[16]* apply here:

> Needless to say, I do not for a moment attribute bad faith, in either the legal or colloquial sense of that phrase, to Salette. My point, on the contrary, is that this case does not in my view turn on the "good" or "bad" faith of either Salette or appellants. It is essentially a matter of distinguishing between **obligations** and **strategies**.
>
> > I fail to see in its terms, express or implied, the source of any legal duty on the part of appellants to negotiate in any particular way with Salette, whose offer they found to be unacceptable, or to refrain from negotiating with the eventual purchaser, whose offer they found satisfactory.
> >
> > […]
> >
> > In any case, I do not believe they had any obligation to pursue and conclude a deal which was not satisfactory to them, even if its terms might seem "reasonable" to another **owner**.
>
> (Underlining and bold type added)

67 Spliethoff took a calculated risk in submitting a bid not in keeping with the requirements given by ACI. It cannot complain after the fact.

68 The saying: "*Vigilantibus non dormientibus jura inveniunt* (or *subveniunt)*": "The laws aid those who are vigilant, not those who sleep (upon their rights)" applies in this case.

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[15] J. PINEAU, D. BURMAN, S. GAUDET, Théorie des obligations, 4th ed., Montreal, Les Éditions Thémis, 2001, p. 40 to 42 [Translation] "Negotiations can be hard and tough but they must be carried out with loyalty and fair-play: the parties are not obliged to agree and may strenuously and aggressively defend their respective interests, but they cannot be unfair. This applies to a party who begins negotiating with no intent to see the negotiations through, or who continues negotiations knowing that it no longer wants to complete them, causing the other party to lose time and money, and giving it false hope. In some cases, good faith requires that negotiations be cut off. More frequently, disloyalty comes from the abusive breaking off of negotiations. […]
As our economic system is based on free competition, the duty of loyalty in negotiating does not, however, require that negotiations be exclusive; unless the parties agree otherwise or under very special circumstances, each party to the negotiation remains free to receive proposals from other parties or even to institute parallel negotiations itself; to do otherwise could have an undesirable impact on competition.

[16] AZ-90011267

69 While it may be true that ACI only gave Spliethoff its written position on September 14, 2009, under the circumstances it cannot be blamed for wanting to first be assured of a new contract with Wagenborg.

70 It was only on September 11, 2009 that that agreement, which incorporated the two new Caribbean and Mediterranean lines, was signed with Wagenborg. The repudiation notice which was prepared on September 11, 2009 was only sent to Spliethoff on September 14, 2009 because the monitor, who approved it, asked for additional information.

71 Accordingly, ACI dealt fairly with all the carriers and granted them the same opportunity to submit a proposal which would be satisfactory.

- ***Approval of repudiation of the contracts by the monitor***

72 The monitor had sufficient information[17] to approve the repudiations in question. The monitor must not substitute its opinion for that of ACI and did not have to check the procedure for reviewing and negotiating contracts.

73 Instead, it had to ensure that the repudiation was advantageous and that the analysis conducted by ACI was serious. The financial data, which were sent to it by ACI, warranted its approving the repudiation of the contracts.

- ***Cancellation of the 95 N.M. Statengracht trip***

74 Spliethoff's motion devotes a large portion of its allegations to the circumstances surrounding the cancellation by ACI of a charter-party trip from Baie-Comeau to the Caribbean which ACI had ordered from Spliethoff. On September 14, 2009, ACI cancelled that trip, claiming non-compliance with the lay-days for delivery of the ship. This argument was dropped during the pleadings, and Spliethoff reserved its rights to eventually claim damages. It is therefore not necessary to comment on this issue.

- ***Spliethoff's cost analyses***

75 The analyses filed by Spliethoff[18] mentioning the economic disadvantages of Wagenborg's proposal warrant the following comments.

76 Firstly, as mentioned above, it is not up to the Court to substitute its business judgment for that of ACI.

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[17] On September 11, 2009, it received Exhibit JR-16 from ACI: "The business case, cancellation of contracts" prepared by ACI and the first part of JR-18 illustrating the scenarios under contracts R-1 and R-2. Furthermore, there were several exchanges of information with the Team members. At its request, additional information was sent to it on September 14, 2009, including the first section of JR-17 for the years 2010 and 2011.

[18] Affidavit of Georges Black and R-20, R-21, R-22b and R-23.

77 Furthermore, these analyses are incomplete and not forward-looking. The explanations provided by Gama, and in particular the fact that the loading and unloading costs relating to the use of M-type vessels rather than S-Vessels, which are more recent and more modern, also show that they do not have significant benefits for ACI. Similarly, the payment to Wagenborg of a $75,000 ballast premium per trip was warranted, as the ship was delivered to Baie-Comeau rather than Cape Ray NL or 1,300 nautical miles from Cap Ray, the place of delivery by Spliethoff, which constitutes savings of four days of rent, fuel and other related costs.

➢ ***Conclusion***

78 ACI has just received a second interim financing. The judgment rendered in this regard on November 16, 2009 recounts the fragile and neuralgic situation of the entire ABH Group[19]. ACI has an obligation to do everything it can to make its restructuring a success.

79 The business decision to prefer Wagenborg's offer is up to ACI and the repudiation of the contracts which ACI entered into with Spliethoff was done in the best interests of ACI and all the parties involved in the restructuring. It is therefore not appropriate to intervene.

WHEREFORE, THE COURT:

DISMISSES the Amended Motion to Introduce Proceedings for an Order Declaring Null and Void the Repudiation of Certain Contracts and for a Safeguard Order (297/239);

WITH COSTS.

(signed)
Danièle Mayrand, J.S.C.

Mtre. Alain R. Pilotte and Mtre. Catherine Lafontaine
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[19] Judgment rendered by Gascon, J. in this matter, and more specifically at paragr. 29.

FISHMAN FLANZ MELAND PAQUIN
Attorney for the Monitor – Intervener

Hearing date: November 4, 5, 6, 11, 12 and 13, 2009