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The Canmar Fortune: The Supreme Court of Canada Puts Jurisdiction Agreements Back on Course

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CASE COMMENTARY | ANALYSEDECAS

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Effective support for dispute resolution in commercial matters depends upon reserving the exercise of the coercive authority of the civil justice system for situations in which the parties have failed to agree on other means to resolve their disputes. In local commercial matters parties are encouraged to pursue consensual means of dispute resolution, and their agreements on dispute resolution are generally upheld. It is no less important in international commercial matters to provide similar support. This includes situations where the parties have agreed that litigation could be a suitable means for resolving their disputes, but they have bargained for the exclusive jurisdiction of the courts of a particular forum. Under these circumstances the measure of the commitment of a legal system to consensual dispute resolution in commercial matters may be gained when a request is made for a stay of proceedings that have been commenced in breach of a jurisdiction agreement.

This is what happened in *ZI Pompey Industrie v ECU-Line NV "The Canmar Fortune"*[1] when the owners of cargo shipped on *The Canmar Fortune* commenced proceedings in the Federal Court of Canada in breach of a clause in the bill of lading providing that "any claim or dispute arising hereunder or in connection herewith shall be determined by the courts in Antwerp and no other Courts." The cargo owners had arranged for their photo-processing equipment to be shipped by sea from Anvers, Belgium to Seattle, Washington because they were concerned that it might be damaged in a land journey across North America. Despite this, the defendant carrier unloaded the equipment in Montreal and shipped it onwards by rail. The equipment was damaged and the cargo owners sued in the Federal Court in Vancouver.

It was never in doubt that the principles set out in *The Eleftheria*[2] would ordinarily apply, and that it would ordinarily be necessary for the cargo owners to show "strong cause" to be excused from their agreement to seek relief only in the courts in Antwerp. However, the cargo owners persuaded the Prothonotary that the overland journey represented a deviation from the agreed mode of carriage and that this constituted a fundamental breach of the contract. This, they said, provided the necessary excuse. The

L'affaire « *Fortune Canmar* » : la Cour suprême du Canada a remis au goût du jour les clauses d'élection de for

La décision que vient de rendre la Cour suprême du Canada dans cet arrêt confirme la force exécutoire des clauses d'élection de for. Selon cette décision, ce type de clauses est exécutoire à moins que des « motifs sérieux » puissent être invoqués à l'effet contraire. Des « motifs sérieux » exigeraient, dans ce contexte, que l'entente visée contrevienne à une politique d'intérêt public, soit le fruit d'une fraude ou de positions de négociation nettement inégales et irrégulières entre les parties. Les raisons invoquées par la Cour fédérale d'appel pour comparer le test applicable au caractère exécutoire des clauses d'élection de for à celui réservé aux injonctions interlocutoires ont été rejetées de même que l'opinion selon laquelle seule une « inexécution fondamentale » justifierait qu'une partie néglige de respecter une clause de cette nature. Selon la prépondérance des ententes contractuelles, le test pertinent est celui-ci « la prémisse de base est que les parties devraient s'en tenir au marché conclu et le plaignant est tenu de démontrer pourquoi une suspension ne devrait pas être accordée.»

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Federal Court, Trial Division, upheld the Prothonotary's exercise of discretion. The Federal Court of Appeal agreed, and further muddied the waters by adding that the proper test to apply in stay applications is the tripartite test employed in cases of applications for interlocutory injunctions that was enunciated in *American Cyanamid Co v Ethicon Ltd.*[3]

Both the application of the doctrine of fundamental breach to commercial agreements in general, and to jurisdiction agreements in particular, were surprising directions for the law to take. So too was the use of the tripartite interlocutory injunction test to determine applications for stays of proceedings. Indeed, to some, these might even have seemed to amount to deviations from the anticipated course of the law. Therefore, it was with considerable apprehension that those engaged in international commercial dealings involving jurisdiction selection agreements awaited the outcome of the appeal to the Supreme Court of Canada to see how the law relating to such agreements would fare. Fortunately, the Supreme Court navigated the confusion caused by interposing these considerations into the fairly settled law of jurisdiction agreements, and the Court put the law back on the course set by the "strong cause" test.

On behalf of a unanimous court, Bastarache J. delivered a judgment that acknowledged the high threshold required to disturb an exercise of discretion by a prothonotary, but that held that in this case the threshold was met. The decisions below were clearly wrong.

In particular, it was wrong to apply the tripartite *American Cyanamid* test for interlocutory injunctions to motions for stays of proceedings to enforce forum selection clauses. This test, as endorsed by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*,[4] requires: "First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits."

Beyond the awkwardness of requiring a preliminary assessment of the merits, Bastarache J. opined that he could "think of no instance where a defendant would suffer irreparable harm by being required to defend a lawsuit in a Canadian court." While some might regard this as unarguable, it underscored the fact that the application of this test missed the point about upholding the parties' bargain: it would be unlikely that a jurisdiction agreement would ever be upheld if the granting of a stay depended on a finding of the likelihood of irreparable harm by the court accused of being likely to cause it. The tripartite test was developed in a different context and it was not an appropriate means of determining whether there was "strong cause" for relieving a party of the obligation to commence proceedings only in some other forum. On whether a fundamental breach could excuse a party from the obligation to refrain from commencing proceedings in all but the nominated forum, Bastarache J. relied on *Mackender v Feldia AG*[5] in concluding that this would render forum selection clauses illusory. It was unnecessary to determine whether deviation amounted to fundamental breach in this case because more than an allegation of wrongful conduct, however significant, would be needed to remove a dispute from the reach of a widely framed forum selection clause. As Bastarache J. observed, the parties should be regarded as free of the obligation to comply with a jurisdiction agreement only where, for instance, the agreement offended public policy or was the product of fraud or of grossly uneven bargaining positions.

This observation is critical, not only to putting the law on jurisdiction agreements back on course, but also to moving it forward. This forward momentum depends also upon the observation in *obiter* that the presence of a forum selection clause in an application for a stay warrants a different test from an application for a stay based on *forum non conveniens*. As Bastarache J. explained, the appropriate test is "one where the starting point is that parties should be held to their

bargain, and where the plaintiff has the burden of showing why a stay should not be granted."

Despite the general sense of relief with which the Supreme Court's simple reaffirmation of the "strong cause" test will be greeted, it is important not to overlook this subtle, but significant step forward. It could clarify the common law on exclusive jurisdiction clauses and bring it into harmony with the law on other dispute resolution agreements and with the approach taken in the civil law. In cases involving valid and operative *arbitration* clauses, the response to a request for a stay of a proceeding commenced in breach of the parties' agreement that is mandated by legislation implementing the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1959* ("The New York Convention") is clear: the court must stay the proceeding that is the subject of the arbitration clause. In cases involving exclusive jurisdiction clauses, the response in many civil law countries is equally clear. For example, Article 23 of the Brussels I Regulation[6] provides for the court nominated to have exclusive jurisdiction where the parties have so agreed; and Article 3148 of the Québec Civil Code provides that "a Québec authority has no jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a specified legal relationship to a foreign authority...".

The response in common law courts, however, has been somewhat less clear. In *The Eleftheria*, Brandon J. held that the court retained a discretion not to stay proceedings brought in breach of an exclusive jurisdiction clause, but that this should be exercised only where there was "strong cause" for doing so. Among the factors listed for consideration were the factors relevant to determining the appropriate forum in the absence of a jurisdiction agreement. It may still be as important as it was in 1969, when *The Eleftheria* was decided, for common law courts to retain a discretion to hear cases brought before them and not to allow their inherent jurisdiction to be ousted by the parties' agreement. However, much has changed. Judicial chauvinism has been replaced by judicial comity; it is no longer necessary to show abuse in order to obtain a stay in the absence of a jurisdiction agreement; and ceding jurisdiction to a foreign court is not routinely seen as subjecting the parties to an inferior determination of their dispute. Accordingly, it is suggested that jurisdiction agreements should no longer be treated with any more suspicion than any other contractual apportionment of risk, or any other allocation of rights and obligations in a contract. Their enforceability should be determined accordingly.

To be sure, there will continue to be a need to review jurisdiction agreements to determine whether they bind the parties who are before the court and whether they apply to the proceedings that are sought to be stayed. There will also continue to be reasons to strike down jurisdiction agreements — fraud, duress, unconscionability, and the like — just as there are reasons to strike down other agreements. However, the factors identified in *The Eleftheria* that are relevant to determining the appropriate forum in the absence of an agreement between the parties should be considered only in terms of the way in which they inform the court of the reasonably foreseeable consequences of the bargain, and of the possibility that circumstances have so changed since the bargain was made that the parties should be discharged from the obligation to perform it.

Now that the Supreme Court of Canada has committed itself to taking "a separate approach to applications for a stay of proceedings involving forum selection clauses", it will be important for the law to progress along this course by treating the requirements for stays in cases involving jurisdiction agreements not as a difference in degree from the requirements for stays based on the doctrine of *forum non conveniens,* but as a difference in kind. Where a proceeding has been commenced in breach of a jurisdiction clause, a stay should be granted unless the prejudice to the party wishing trial in the forum is sufficient to indicate that the party could not reasonably have foreseen and agreed to the risk of such prejudice, or unless the prejudice is sufficient to warrant treating the party as discharged from the obligation to perform it. Moreover, to the extent that the jurisdiction agreement is understood as a feature of the contract for which the parties have bargained, the strength of the cause needed to overcome the parties' bargain is perhaps best measured in terms of the loss suffered by the

party deprived of its benefit. Ironically, where that loss encompasses the possibility of a different outcome for the dispute, absent reasons of public policy, this should serve as reason enough to uphold the parties agreement rather than to strike it down.

ENDNOTES

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[1] 2003 SCC 27.

[2] [1970] P. 94, [1969] 2 All E.R. 641 (Q.B.D.).

[3] [1975] A.C. 396, [1975] 1 All E.R. 504 (HL).

[4] [1994] 1 S.C.R. 311 at 334, 111 D.L.R. (4th) 385.

[5] [1967] 2 Q.B. 590, [1966] 3 All E.R. 847 (C.A.).

[6] (Council Regulation (EC) 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters OJ L12/1).