JURISDICTION CLAUSES IN CANADIAN MARITIME LAW

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Jurisdiction or arbitration clauses (for the sake of convenience, I will from time to time refer to both generically as jurisdiction or forum selection clauses) have long been a common feature of a wide variety of commercial contracts. This is all the more true in the age of globalization where parties, often dealing across, seek significant jurisdictional and cultural divides, and seek to inject as much commercial certainty as they can into their contractual arrangements and into their dispute resolution mechanisms. This has been particularly true of the most international of all contracts, namely maritime contracts, and in particular contracts of carriage in the form of charter parties and bills of lading.

The prevalence of jurisdiction clauses in maritime contracts has become the bane of Canadian exporters, importers and their insurers - not to mention Canadian maritime lawyers who have developed a collective case of litigation envy, more often than not expressed towards their American and English colleagues! They have been increasingly and consistently forced to litigate claims, that would normally be subject to the jurisdiction of Canadian courts, before foreign courts or arbitration panels sitting in countries having little or no connection with the parties and/or the dispute itself.

By the late 1990's, serious concerns were being voiced in Canada that small to medium-sized Canadian businesses were being placed at a significant disadvantage by jurisdiction clauses, inasmuch as these parties do not have as much bargaining power as large shipping lines in the negotiation of the terms of contracts of carriage. In this respect it has been the

commonly held perception in the Canadian shipping community that jurisdiction clauses are normally inserted in contracts of carriage in the interests of foreign carriers and that they place cargo litigants at a serious disadvantage, especially in advancing low or medium-sized claims, by forcing them into either abandoning meritorious claims or pursuing them at great inconvenience and disproportionate expense in a foreign jurisdiction. Rightly or wrongly, the belief in Canadian circles has been that the high cost and inconvenience of litigating a claim for cargo loss in a foreign forum is often used as a means of forcing Canadian interests to either abandon remedies for breach of contract by the carrier or to accept settlements on terms favorable to the carrier.

The perception of unfair treatment has been compounded over the last decade as Canadian courts have consistently enforced forum selection clauses in shipping contracts, even in instances where claims have significant connection to the Canadian jurisdiction, and conversely, minimal connection with the foreign forum. The fact that Canadians might suffer significant commercial disadvantage, and even hardship, if they were obliged to litigate their claims in a foreign jurisdiction cut little ice with the courts who have traditionally held parties to their bargains.

The following extract from a speech given to the Canadian House of Commons in the spring of 2001 best captured the Canadian angst over jurisdiction clauses:

> **Indeed, a culture has grown up that sees most of these disputes resolved in British boardrooms and in British courts. That suits the shipping lines and the British legal profession just fine. However, I would submit that a small Canadian exporter would be badly outclassed going up against the big boys in that kind of settlement.**

While there was little danger that the imposition of jurisdiction clauses would spark a modern day version of the Boston Tea Party north of the 49th parallel, the frustrations voiced by the Canadian maritime community over the unfairness that resulted when essentially homegrown disputes were deported overseas, led Parliament to enact subsection 46(1) of the ***Marine Liability Act***, S.C. 2001, c.6 (the "**Act**") which came into force on August 8, 2001. Subsection 46(1) disposes that:

> **46. (1) If a contract for the carriage of goods by water to which the Hamburg Rules do not apply provides for the adjudication or arbitration of claims arising under the contract in a place other than Canada, a claimant may institute judicial or arbitral proceedings in a court or arbitral tribunal in Canada that would be competent to determine the claim if the contract had referred the claim to Canada, where**
> **(a) the actual port of loading or discharge, or the intended port of loading or discharge under the contract, is in Canada;**
> **(b) the person against whom the claim is made resides or has a place of business, branch or agency in Canada; or**
> **(c) the contract was made in Canada.**

As the Supreme Court of Canada described in its 2003 decision in ***Z.I. Pompey Industrie v ECU-Line N.V.***, (2003) 1 S.C.R. 450, the Act was intended "…to limit the scope of forum selection clauses by facilitating the litigation in Canada of claims related to the carriage of goods by water having a minimum level of connection to this country."

It is clear that subsection 46(1) of the Act confers jurisdiction on Canadian courts - usually the Federal Court (a statutory court that hears cases dealing with matters relating to the federal government's legislative authority), which rules on most shipping cases in Canada - irrespective of the existence of a forum selection clause, in those cases where the statutory factors connecting the dispute with Canada are satisfied.

There has been relatively limited case law dealing with subsection 46(1). This is most likely due to the fact that the provision's terms are clear and there appears to be little doubt that where the legislative criteria are met, Canadian courts will retain jurisdiction over maritime disputes even in the face of the most clearly drawn of forum selection clauses (see in this regard, ***Nestle Canada Inc. v The "Vijljandi" et al***, (2003) F.C.T 28 (TD)).

When it comes to subsection 46(1) of the Act, the courts have typically been called upon to focus on two issues, namely, whether the Act applies retrospectively and to what extent subsection 46(1) modifies private international law principles regarding the Federal Court's discretion to decline its jurisdiction on the grounds that some other forum is more appropriate.

One decision dealing with the scope of subsection's 46(1) application was handed down by the Federal Court in 2004 in the case of ***Dongnam Oil & Fats Co. v Chemex Ltd. et al***, (2004) FC 1732. That case arose out of damage to a shipment of bleached tallow that was to be carried from Newark, New Jersey to Inchon, Korea aboard the ship TUAPSE, owned by a company called Novoship but chartered to Chemex. The head charter party between Novoship and Chemex provided for London arbitration. Chemex and the Plaintiff Dongnam entered into a voyage charter party that likewise called for London arbitration.

The cargo was loaded at Newark and bills of lading incorporating the terms of the voyage charter party were issued. The cargo was carried aboard the TUAPSE from Newark to

Nanaimo, British Columbia where it was transshipped aboard another vessel for carriage to Korea. The cargo was allegedly damaged during transshipment and Dongnam brought suit against both Novoship and Chemex in Canada before the Federal Court. Both defendants brought motions to stay the Canadian proceedings in favour of London arbitration.

Dongnam opposed the stay motions arguing that the Act applied making arbitration inapplicable. The Federal Court disagreed ruling that a transshipment from one vessel to another was not loading or discharging at a Canadian port within the meaning of subsection 46(1) and that this provision should be narrowly construed inasmuch as it constituted a restriction on the freedom to contract. With respect to the dispute between Dongnam and Chemex, the court found that there was a clear arbitration clause in the voyage charter party and therefore concluded that a stay of the proceedings against Chemex should be granted. With respect to the dispute between Dongnam and Novoship, the court found that there was no direct contractual relationship between the parties and that it had to consider the effect of the bills of lading. In this regard the Federal Court noted that if the bills of lading had specifically referred to the arbitration clause contained in the voyage charter party, then Novoship would be entitled to a stay. In this case, however, the court found that the charter party did not provide that the arbitration clause applied to disputes under the bills of lading and that the bills of lading did not specifically refer to arbitration. Accordingly, Novoship was not entitled to a stay of the Federal Court action instituted by Dongnam.

With respect to the retrospective application of the Act, Canadian courts have consistently held that subsection 46(1) did not apply to actions commenced before the statute came into

force. The cases of ***Incremona-Salerno v The "Castor"***, (2002) F.C.A. 479 and ***Incremona-Salerno v The "Katsuragi,"*** (2002) F.C.A. 479 involved actions arising out of a contract for the carriage of goods by water from Italy to Canada in 1999. These actions were instituted before the Act came into force. The carriers brought motions to stay the proceedings based on a bill of lading clause that gave exclusive jurisdiction over disputes to the courts of Hamburg. The motions, however, were not heard until after the coming into force of the Act. On this basis, Incremona-Salerno argued that subsection 46(1) applied and that a stay of the Canadian proceedings should be refused. At first the motions judge agreed with the plaintiff and dismissed the stay applications. The Federal Court of Appeal disagreed and held that section 46(1) was not retroactive and did not apply to actions commenced before August 8, 2001. Accordingly, the carriers' motions for a stay were granted on appeal.

As to whether subsection 46(1) oust's the court's discretion to order a stay of proceedings on the grounds of *forum non conveniens*, it now seems to be settled law that notwithstanding the Act, a Canadian court may decline to exercise its jurisdiction on the ground that some other forum is more convenient. Moreover, the Federal Court of Appeal, in a decision released this past summer in ***OT Africa Line et al v Magic Sportswear Corp et al***, (2006) F.C.A. 284 has held that in making that determination, the court may take into consideration foreign judgments and exclusive forum clauses.

The Magic Sportswear case involved an action by cargo insurers for damages arising out of the short shipment of goods carried from New York to Liberia pursuant to a bill of lading

issued in Canada. The freight was payable in Canada and the carrier had an office there as well. The bill of lading contained a jurisdiction clause granting exclusive jurisdiction to the High Court of England. One month after the plaintiff commenced proceedings in Canada before the Federal Court, the defendant commenced proceedings in England for a determination that it was not liable to the plaintiff. It obtained an anti-suit injunction against the plaintiff as well calling upon it to desist from the Federal Court action. The defendant then brought an application in the Federal Court to stay the Canadian proceedings on the basis of the jurisdiction clause and on the basis of the doctrine of *forum non conveniens*.

The motions court refused a stay and dismissed the defendant's motion on the grounds that where the conditions of subsection 46(1) are met, the court has no discretion to stay proceedings on the basis of a jurisdiction or arbitration clause in a bill of lading. However, the court did find that subsection 46(1) did not prevent a court from granting a stay on the basis of *forum non conveniens*. The motions court considered the relevant factors and held that Canada, not England, was the convenient forum and the defendant's motion was dismissed.

The Federal Court of Appeal overruled the lower court and granted a stay of the proceedings. It found, as a matter of first principles, that subsection 46(1):

> **…does not state, that once the jurisdictional criteria in subsection 46(1) are present, the court in which the claimant has elected to proceed must exercise its jurisdiction. The subsection merely provides that, when it applies, a claimant may institute proceedings in a court in Canada that would have jurisdiction if the contract had referred the claim to Canada. It gives no directive to the court in Canada in which the claimant elects to proceed respecting the court's exercise of its jurisdiction.**

> **…[it] does not expressly remove the broad discretion of the Federal Court and Federal Court of Appeal…to stay a proceeding over which they have jurisdiction, but where "the claim is being proceeded with in another jurisdiction" or a stay "is in the interests of justice." In my opinion, it requires more specific language than that in section 46 to remove from the Courts a power fundamental to their ability to control their own process.**

The Federal Court of Appeal also held that it was appropriate to take the English judgments into account when conducting a *forum non conveniens* analysis on the grounds of international comity, the avoidance of parallel proceedings on the same matter and problems of recognition in the event that parallel proceedings produce different results. As the Federal Court of Appeal noted, "[m]inimizing litigation, with its attendant costs and complications, is good public policy."

The court also held that affording some respect to the English courts' judgments and staying the proceedings, on the facts of the case before it, on the grounds of *forum non conveniens* would not frustrate the policy underlying subsection 46(1):

> **The principal policy objective of section 46 is the protection of the interests of Canadian exporters and importers, and, I would add, their insurers, by diminishing or eliminating the legal effect of a contractual clause requiring them to litigate any dispute in a foreign forum. The legislative record does not suggest that Parliament was also concerned to protect the interests of Canadian insurers when insuring non-Canadian goods shipped from and to ports outside Canada by non-Canadian shippers.**
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> **While section 46 preserves the jurisdiction of Canadian courts in proceedings brought by foreign shippers and consignees, it does not follow that, in deciding whether to exercise its jurisdiction, a court should depart from its normal practise of affording respect to foreign judgments. On the facts of the present case, including the dominant role being played in the litigation by the Canadian insurers of the cargo, it would not frustrate Parliament's purpose to take the English judgments**

> **into account in the course of determining the more convenient forum.**
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> **In short, section 46 does not expressly provide that, when determining whether it is the more convenient forum, a Canadian court in which a claimant elects to proceed should assign no weight to the assertion of jurisdiction by a foreign court, which it has supported by an anti-suit injunction. Nor can it be said that Parliament implicitly so directed in a fact situation such as this, where, to give a foreign judgment weight, would not frustrate the policies underlying section 46.**

After carrying out its own *forum on conveniens* analysis, including a consideration of the English decisions and the forum selection clause contained in the bill of lading, the court concluded that the Federal Court was a less convenient forum then the High Court in London, and the Canadian proceedings were, accordingly, stayed.

It can be expected that Canadian courts will continue to treat subsection 46(1) of the Act as an infringement on the time-worn principle of freedom of contract and will interpret the provision as narrowly as circumstances permit. This being said, however, subsection 46(1) will now afford some measure of relief to Canadian shippers and exporters by providing claimants with the option to sue or arbitrate in Canada in circumstances in which there is a substantial connection with Canada. In this respect, the Act will provide an advantage to Canadian shippers whose only other option, in the past, had been to abandon their claims or sue or arbitrate them, at great cost and inconvenience, in a foreign jurisdiction.