ANNUAL PROFESSIONAL DEVELOPMENT – CBA NS

CASES ON JURISDICTION AND FORUM SELECTION CLAUSES

JANUARY 27, 2012

WRITTEN BY:

DANIELA BASSAN (PARTNER)

MICHELLE BLACK (ARTICLED CLERK)

STEWART McKELVEY
LAWYERS • AVOCATS

CASES ON JURISDICTION AND FORUM SELECTION CLAUSES – JAN. 2012

CONTRACTUAL CLAUSE	JURISDICTIONS	SUMMARY OF DECISION
***BC Rail Partnership v. Standard Car Truck Co.,* 2003 CarswellBC 2743 (C.A.)**		
"Section 19(g) This Agreement shall be governed in all respects, whether as to validity, construction, capacity, performance or otherwise, by and under the laws of Nova Scotia, Canada (without giving effect to principles of conflicts of laws). Lessee irrevocably and unconditionally submits to the jurisdiction of and venue in, federal and provincial courts located in Nova Scotia, Canada for any proceeding arising under this Agreement, and TO THE EXTENT PERMITTED BY APPLICABLE LAW, LESSOR AND LESSEE EACH WAIVES ALL RIGHTS TO TRIAL BY JURY IN ANY LITIGATION ARISING HEREFROM OR IN RELATION HERETO." (at para. 5)	Plaintiff – British Columbia Defendant – Nova Scotia	**Held**: Forum selection clause upheld. It was decided on objective interpretation that this was an exclusive jurisdiction clause and not just an attornment clause. The phrase "any proceeding" in the forum clause should be interpreted as proceedings that are commenced by any party. Looking at the lease as a whole, the Court decided it was unlikely that parties intended to limit the jurisdiction clause only to proceedings commenced by the Defendant. Once it was determined that the clause was indeed a forum selection clause, the "strong cause" test was applied and could not be met. There was no reason *not* to give effect to the clause.
***Check Group Canada Inc. v. Icer Canada Corp.,* 2010 NSSC 463**		
"This agreement shall be governed by and construed in accordance with the laws prevailing in the Province of Québec." (at para. 8)	Plaintiff – Nova Scotia Defendants – Québec	**Held**: Choice of law clause rejected. Court recognized *Pompey* as standing for the proposition that if there is a forum selection clause in the agreement then the regular forum *non conveniens* analysis will not apply. Instead, the burden falls to the Plaintiff to prove that it need not be held to the contract (thus, the strong cause test should be used). Before that can happen, there has to be a "validly-concluded binding contract between the parties, which includes a choice of jurisdiction clause." (at para. 39) The Court found that there was no binding choice of jurisdiction clause and no binding contract in this case.

CONTRACTUAL CLAUSE	JURISDICTIONS	SUMMARY OF DECISION
***CKF Inc. v. Huhtamaki Americas et al*, 2009 NSSC 21**		
"This agreement shall be construed in accordance with the laws of the State of Maine, U.S.A., and each of the parties hereby submits itself to the jurisdiction of the Courts of Maine for the adjudication of all matters arising herefrom." (at para. 11)	Plaintiff – Nova Scotia Defendants – Ontario and Maine	**Held:** Forum selection clause rejected. The factual matrix of the case involved trade-mark and technology issues. Plaintiff started a proceeding in Nova Scotia regarding all disputed issues. Defendants started proceedings in Ontario (for trade-mark issues) and in Maine (for technology issues). The contractual clause was not shown to be exclusive and also did not apply to all matters in dispute. Under section 12(2) of the *Court Jurisdiction and Proceedings Transfer Act*, Nova Scotia was the more appropriate forum and more convenient than Ontario or Maine. The greatest chance of avoiding a multiplicity of proceedings was for the Nova Scotia Court to exercise jurisdiction over all issues between all parties. Nova Scotia was the forum with the closest and most natural connection to all disputed matters.
***Curves International Inc. v. Archibald*, 2011 NSSC 217**		
"**M. Governing Law and Jurisdiction.** Franchisee agrees that the relationship, rights and obligations of the parties of this Franchise Agreement shall be governed by the internal laws of the state of Texas, except to the extent governed by the United States Trademark Act of 1946 (Lanham Act, 15 U.S.C. Section 1051 et seq.) and *The Canadian Trade-Marks Act*, (R.S.C.	Plaintiff – Texas Defendant – Nova Scotia	**Held**: Forum selection clause rejected. Plaintiff could show "strong cause" to prevent the granting of a stay of proceedings. Curves had the burden of showing why it should not be bound by the forum selection clause. It was determined that the Court had territorial competence because the Defendants lived in or were

CONTRACTUAL CLAUSE	JURISDICTIONS	SUMMARY OF DECISION
c. T-10) and any provincial or federal legislation governing franchising which now exists or which may become law. Franchisee agrees that any action arising out of or relating to the relationship, rights, or obligations of the parties herein shall be brought in the Province or in any State or U.S. Federal court of general jurisdiction where Franchisor's principal business address is then located and Franchisee irrevocably submits to the jurisdiction of such courts and waives any objection it may have to either the jurisdiction or venue of such court." (at para. 8)		incorporated under the laws of Nova Scotia and the agreement dealt with contractual obligations to be performed in Nova Scotia. The proceeding had a substantial connection to Nova Scotia. Strong cause was shown because all the Defendants were residents of Nova Scotia; none of them had a real and substantial connection to Texas. Furthermore, the witnesses were residents of Nova Scotia or other Canadian provinces. Overall, it would be less costly to have the trial in Nova Scotia rather than Texas. There was also a claim in tort in this particular case and since the forum selection clause only dealt with claims arising out of the agreement, the tort issue could and should be dealt with in the place where the activity occurred (Nova Scotia).
***Expedition Helicopters Inc. v. Honeywell Inc*., 2010 ONCA 351**		
"CHOICE OF LAW. THIS AGREEMENT SHALL BE GOVERNED, CONTROLLED AND INTERPRETED UNDER THE LAW OF THE STATE OF ARIZONA, EXCLUDING ITS CONFLICT OR CHOICE OF LAW PROVISIONS. The parties (i) agree that any state or federal court located in Phoenix, Arizona shall have exclusive jurisdiction to hear any suit, action or proceeding arising out of or in connection with this Agreement, and consent and submit to the exclusive jurisdiction of any such court in any such suit, action or proceeding and (ii) hereby waive, and agree not to assert, by way of motion, as a defense, or otherwise, in any such suit, action or proceeding to the extent permitted by the	Plaintiff – Ontario Defendant – Delaware	**Held**: Forum selection clause upheld. Full weight must be given to a forum selection clause, particularly in the commercial context. The Plaintiff had the burden of showing "strong cause" why the forum selection clause should *not* be enforced, but did not discharge this burden. There are minimal factors which may justify departure from a forum selection clause in a commercial agreement: (i) fraud or improper inducement; (ii) the Court in the designated forum refuses to accept jurisdiction or is unable to deal with the claim; (iii) the claim or the circumstances are

CONTRACTUAL CLAUSE	JURISDICTIONS	SUMMARY OF DECISION
applicable law, that the suit, action or proceeding is brought in an inconvenient forum, that the venue of the suit, action or proceeding is improper, or that this Agreement or any of the transactions contemplated hereby may not be enforced in or by such courts." (at para. 5)		outside what was reasonably contemplated by the parties; (iv) a fair trial is no longer expected in the selected forum due to subsequent, unanticipated events; or (v) public policy considerations. (at para. 24)
***Fujitsu Consulting (Canada) Inc. v. Themis Program Management & Consulting Limited*, 2007 BCSC 1376**		
"This Agreement shall be governed and construed in accordance with the laws of the Province of British Columbia, without regard to choice of law principles. The parties agree that the sole venue for legal actions related to this Agreement shall be the Supreme Court of British Columbia." (at para. 19)	Plaintiff – British Columbia Defendant – Ontario	**Held**: Forum selection clause upheld. The clause was a true forum selection clause (as opposed to a non-exclusive attornment clause). There was no reason to deny enforcement under the *Court Jurisdiction and Proceedings Transfer Act*. There was no public interest issue because either party could enforce a judgment in either province. The parties' intentions were clear when they made the contract. The Court set out factors to consider under the "strong cause" test as follows: "[1] where the evidence on the issues of fact is situated or more readily available…; [2] to what jurisdiction either party has the greatest connection …; [3] whether … there are any procedural or substantive issue[s] that the parties want to take advantage of …; and [4] whether either party would be prejudiced by having to conduct the litigation in other than its preferred jurisdiction." (at paras. 32-35)

CONTRACTUAL CLAUSE	JURISDICTIONS	SUMMARY OF DECISION
***Maritime Telegraph & Telephone Co. v. Pre Print Inc*., 1996 CarswellNS 12 (C.A.)**		
"**19. Governing Law:** This License Agreement shall be interpreted in accordance with the local domestic law of the province of Alberta, Canada. If any part of this License Agreement is invalidated by Court or legislated action of competent jurisdiction, the remainder of this License Agreement shall remain in binding effect. **19.1 Attornment:** Pre Print and the licensee agree to attorn to the jurisdiction of the Courts of the Province of Alberta with respect to any claim or dispute arising out of this License Agreement." (at para. 8)	Plaintiffs – Nova Scotia Defendant – Alberta	**Held:** Attornment clause rejected. The question was whether the contract contained an attornment clause (non-exclusive jurisdiction) or a forum selection clause (exclusive jurisdiction). It was found to be an attornment clause. The Plaintiff had to show "strong cause" to prevent the granting of the stay. The Plaintiff was able to adduce sufficient evidence to show that overall, there was a more substantial connection with Nova Scotia than with Alberta. A stay of proceedings was not granted. The balance in the case was between the right of the Plaintiff to choose its forum and the ability of the Defendant to enforce the agreement entered into by the parties.
***SimEx Inc. v. IMAX Corp*., 2005 CarswellOnt 7297 (C.A.)**		
"6. **Choice of Law (Section 8.01):** The agreement was to be governed by the laws of Ontario and any legal action was to [be] brought in the courts of Ontario." (at para. 7)	Applicant – Ontario Respondent – California	**Held**: Forum selection clause upheld. The defendant was bound by the forum selection clause in the governing agreement because the defendant failed to show "strong cause" or "good reason" why it should not be bound by the provision. The contractual language agreed to by the parties was not ambiguous.

CONTRACTUAL CLAUSE	JURISDICTIONS	SUMMARY OF DECISION
***Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 CarswellNat 1031 (S.C.C.)**		
"The contract evidenced by or contained in this bill of Lading [*sic*] is governed by the law of Belgium, and any claim or dispute arising hereunder or in connection herewith shall be determined by the courts in Antwerp and no other Courts." (at para. 4)	Appellant – Antwerp, Belgium Respondents – France (However, Respondents took position that the Bill of Lading had come to an end in Montreal so that proceedings could take place in Canada.)	**Held**: Forum selection clause upheld. The Appellants brought a motion seeking a stay of proceedings in Canada because the Bill of Lading required that disputes be determined exclusively by the Courts of Antwerp. Forum selection clauses are often found in Bills of Lading and Courts encourage these provisions. There is no reason to suggest that the "strong cause" test is no longer relevant and effective. The "strong cause" test puts the burden on the Plaintiff to establish why it should *not* be bound by a forum selection clause, and Courts must give full weight to the desirability of holding contracting parties to their agreements. Leeway is built into the "strong cause" test so as to prevent Defendants from improperly or unfairly relying on forum selection clauses. The "strong cause" test should be upheld for public policy reasons. Here the parties were both experienced corporations with the ability to negotiate a forum selection clause. Overall the "strong cause" test is, absent applicable legislation such as the *Marine Liability Act*, the proper test for a stay of proceedings to enforce a forum selection clause in a Bill of Lading.