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# THE SINKING OF THE *ELEFTHERIA*

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## ABSTRACT

*This note details recent common law and statutory developments in Canadian law relating to the use of choice of forum clauses in bills of lading and other contracts for carriage used in international trade. This includes a focus on the new approach for the exercise of judicial discretion advanced by the Federal Court of Appeal in Ecu-Line N.V. v. Z.I. Pompey Industrie, which is currently under review by the Supreme Court of Canada. To provide a contextual framework for these developments, an overview of the historical development of private international law relating to choice of jurisdiction is included. This framework involves an examination of the House of Lords decision in The Eleftheria, which served as the international benchmark for choice of forum and was the foundation for both American and Canadian precedent in the area.*

## I. INTRODUCTION

The learned justices of the Supreme Court of Canada are at this moment pondering the fate of the good ship *Eleftheria*.[1] The sturdy vessel recently ran aground in the Federal Court of Appeal after competently traversing the oceans of Canadian jurisprudence for decades. On appeal of *Z.I. Pompey Industrie v. Ecu-Line N.V.*[2] the Supreme Court of Canada

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[1] The ship involved in *The "Eleftheria"* [1969] 1 Lloyd's Rep. 237. [*Eleftheria*]

[2] [1999] F.C.J. No. 1584 [*Z.I. Pompey*]. Only the case name will be referenced, as the levels of court are separated in this paper. If a quotation is taken from a different level of court, it will be specified in the note.

has reserved its decision, so they stand poised to either salvage the injured vessel, or let it sink into the murky abyss of rejected *stare decisis*.

The lower courts and the Federal Court of Appeal made radical departures from the established course set by the *Eleftheria* regarding interpretation and application of bills of lading and other standard documents used in the international trade and carriage of goods. This departure from precedent not only jeopardizes the freedom for parties to contract according to their preferences regarding the resolution of disputes arising from the agreement, but the decision also creates uncertainty in this area of the law and requires remedy by the Supreme Court of Canada. Statutory developments have also muddied the waters regarding the traditional discretion of courts in their consideration of stay proceedings related to jurisdiction clauses in bills of lading. The *Z.I. Pompey*[3] decision of the Supreme Court of Canada should incorporate both statutory and jurisprudential changes in Canada, but measure them against the established international precedent rooted in *Eleftheria*. The outcome of this decision could have substantial ramifications on the international carriage of goods in and out of Canada.

## 1. Development of Choice of Forum

The bill of lading promotes the efficient and effective delivery and transfer of goods from buyer to seller and remains the linchpin of global commerce. It not only functions as a receipt for the goods throughout the shipment process, but the bill itself also becomes a document of title and provides evidence of the contractual arrangement between shipper and carrier.[4] The bill contains terms and conditions dealing with the rights and obligations of each party, as well as their *consensus ad idem* regarding the forum for adjudication of disputes and the choice of law that is to be applied to these disputes.

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[3] *Ibid.*

[4] Taken from, J.G. Castel, ed., *The Canadian Law and Practice of International Trade*, (Toronto: Emond Montgomery Publications Limited, 1997) at 253. For a full description of the legal characteristics of Bills of Lading and their evolution see P. Todd, *Bills of Lading and Bankers' Documentary Credits*, (London: LLP Reference Publishing, 1998).

Choice of forum clauses developed with two distinct principles. The concept of prorogation developed in the common law, and allowed for a contractually specified court to have "jurisdiction by submission".[5] Essentially this meant that the defendant in a dispute submitted to the jurisdiction of their agreement, even though this forum may not have had any connection with either party or any other element of the transaction. By submitting to this jurisdiction the party responding to the claim forgoes their natural forum, whether that would be their domestic court or another jurisdiction connected with the dispute.

The second principle of choice of forum is derogation.[6] This appears to be the obvious result of prorogation, but derogation actually has greater ramifications. With the parties "opting in" to a specific forum in their agreement, this has the effect of "opting out" of the jurisdiction that would have been normally associated with the dispute. The effect of derogation was to exclude a specific jurisdiction, either by express reference or implied derogation. This would oust the forum that would most naturally flow from the dispute at issue, were it not for the agreement evidenced by the bill of lading.

The freedom for parties to contract into a jurisdiction or choice of forum clause began to achieve acceptance by English courts in the mid-nineteenth century, and the principle was recognized by statute in 1854. The *Common Law Procedure Act 1854*[7] gave courts discretion over the granting of a stay, where the contract provided for arbitration of disputes.

## 2. The *Eleftheria*

By the late nineteenth century, the common law recognized the freedom for parties to contract into an express choice of forum in their agreements. If a matter was raised with a court, it was to give effect to the choice of forum clause and stay the proceedings, unless the court had statutory discretion to refuse the stay. Eventually, the common law developed to allow courts to retain inherent discretion in the interests of

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[5] P. Nygh, *Autonomy in International Contracts*, (Oxford: Clarendon Press, 1999) at 15.
[6] *Ibid.* at 19.
[7] *Ibid.*

fairness or justice apart from express statutory authority.[8] This enhancement of judicial discretion was fully elaborated upon by the English Admiralty court in the seminal case of *Eleftheria*.[9]

In this case, the court was faced with a dispute arising out of a bill of lading, which involved the carriage of a cargo of beech plywood from Romania to the United Kingdom. The bill of lading contained an express jurisdiction or choice of forum clause. Clause 3 of the bill provided that disputes would be "decided in the country where the Carrier has his principal place of business",[10] which was a relatively common choice of forum concept in international trade.

The motor vessel "Eleftheria" was owned by a Greek shipping company. Being based out of Athens, this served as its "principal place of business". The vessel had discharged its plywood cargo at Rotterdam instead of the specified U.K. ports due to labour disruptions at those ports. Another clause in the bill of lading seemed to allow for this alteration in the port of discharge. This change in the port of delivery and the application of this alteration provision in the bill of lading were at the heart of the dispute. The Greek ship-owners applied to the British court to stay the action brought against them by the cargo-owners. They claimed that the bill of lading, as contract for carriage of the goods, expressly provided for all disputes to be deferred to the courts of Greece.

After a careful consideration of the evidence provided by both sides in the stay application, Justice Brandon stated the law as it applies to the application of a choice of forum clause expressly derogating the jurisdiction at hand. He established an approach that would have courts give deference to the agreement of the parties and "not just pay lip service"[11] to contractual freedom. The court was to *prima facie* grant the stay unless the other party could "show good cause"[12] to deny the stay. The grounds to be considered by the court in the exercise of their discretion in denying the stay were articulated by Justice Brandon in his oft-quoted passage at page 242:

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[8] *Ibid.* at 20.

[9] *Eleftheria, supra* note 1.

[10] *Eleftheria, supra* note 1 at 238.

[11] *Eleftheria, supra* note 1 at 245.

[12] *Eleftheria, supra* note 1 at 242. Justice Brandon again used this term "good cause" in the concluding paragraph of his judgment at page 246. Subsequent courts used the "good cause" examination outlined by Brandon J. to create what has become a "strong reasons" burden on the party opposing the stay. See *The Sea Pearl, infra* note 17 at 681.

The principles established by the authorities can, I think, be summarized as follows:

(1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign Court, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within the jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.

(2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.

(3) The burden of proving such strong cause is on the plaintiffs.

(4) In exercising its discretion the Court should take into account all the circumstances of the particular case.

(5) In particular, but without prejudice to (4), the following matters, where they arise, may be properly regarded:

  (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts.

  (b) Whether the law of the foreign Court applies and, if so, whether it differs from English law in any material respects.

  (c) With what country either party is connected, and how closely.

  (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.

  (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would

    (i) be deprived of security for that claim;

    (ii) be unable to enforce any judgment obtained;

    (iii) be faced with a time-bar not applicable in England; or

    (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.[13]

With this clear enunciation of the factors for the court to consider in a stay application, Justice Brandon set the parameters for judicial discretion with regard to choice of forum clauses in bills of lading and other contracts for the carriage of goods by sea.

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[13] *Eleftheria, supra* note 1 at 242.

## II. The *Eleftheria* – Fair Winds and Following Seas

### 1. Fair Winds

The effect of the decision in *Eleftheria* was immediate as common law jurisdictions eagerly gave the decision a fair reception. The decision ushered in an articulate and regimented approach to follow when faced with stay applications involving choice of forum clauses that expressly prorogated a foreign jurisdiction. By this time it had become established practice in the international shipment of goods to provide for a choice of forum clause in the bill of lading, so this decision had immediate resonance for the industry.

The decision also had a profound effect on the common law of the United States, where courts were still reticent to give effect to derogation clauses or choice of law clauses. *Eleftheria* had a serious impact on the American approach to private international law. This impact was apparent in its consideration by the United States Supreme Court in *M/S Bremen v. Zapata Off-Shore Co.*[14] This was the first case in the United States to recognize the ability of parties to agree to a choice of forum clause in their contract, even where this clause would have the effect of limiting the jurisdiction of American courts. The court seemed to allow for the *prima facie* granting of the stay unless it could be shown that to do so was "unreasonable under the circumstances".[15] The American Restatement on Conflicts of Law has codified this approach as being one of *prima facie* acceptance of the clause, unless it is "unfair or unreasonable"[16] to do so. Prior to the *Bremen* decision, derogation clauses were considered to be a violation of public policy in the United States and courts treated such clauses as invalid.

Canadian courts also embraced the approach advanced by Justice Brandon in *Eleftheria*. The Federal Court of Appeal, in *Ship M/V "Sea Pearl" et al. v. Seven Seas Dry Cargo Shipping Corporation*[17] adopted the British approach to stay applications arising out of a choice of forum clause. In this case, a charter was arranged in Germany for a voyage

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[14] [1972] 92 S.Ct. 1907 [*Bremen*].

[15] Taken from, D.L. Shapiro, ed. *Conflicts of Laws: Cases and Materials*, 10th ed. (Westbury: The Foundation Press Inc., 1996) at 170.

[16] *Ibid.* at 168.

[17] (1982) 139 D.L.R. (3d) 669 [*The Sea Pearl*].

from Chile to Canada. The charter contract was made between the vessel owners, a Cypriot company, and the Cargo shippers, a Chilean company. The contract contained a clause providing for arbitration of disputes in London, England. The owners of the Sea Pearl came to the federal court with an application for a stay in the Canadian proceedings in favour of the choice of forum clause. As it stood then, Section 50(1)(b) of the *Federal Court Act*[18] provided the court with the discretion to stay proceedings "in the interest of justice".[19] The court affirmed the appeal and allowed the stay to be granted. In his decision, Justice Pratte cited positively the effect of the *Eleftheria* decision on the common law, particularly in the United Kingdom and the United States. He rejected the lower courts approach to the issue and summarized the Canadian approach to granting a stay in circumstances involving an express choice of forum clause.

> In other words, the judge decided on a mere balance of convenience. In so doing, the learned judge applied what I consider to be a wrong principle. Prima facie, an application to stay proceedings commenced in the Federal Court in defiance of an undertaking to submit a dispute to arbitration or to a foreign court must succeed because, as a rule, contractual undertakings must be honoured. In order to depart from that prima facie rule, *"strong reasons"* are needed, that is to say, reasons that are sufficient to support the conclusion that it would not be reasonable or just, in the circumstances, to keep the plaintiff to his promise and enforce the contract he made with the defendant.[20]

It is evident from the language used that Pratte J. applied the *Eleftheria* approach regarding *prima facie* enforcement of choice of forum clauses, and that he also incorporated elements of the *Bremen* decision and subsequent British case law in articulating the approach for courts to follow in their consideration of the use of discretionary powers to deny the stay and retain jurisdiction. Justice Pratte advanced a Canadian approach requiring "strong reasons" to be found by the court to support the denial of the stay. The effect of the "strong reasons" standard was essentially the creation of a burden on the opposing party, to apply the considerations from the *Eleftheria* in a manner considerably more detailed than a simple *conveniens* examination.

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[18] R.S.C. 1970, c. 10 (2nd Supp.).

[19] *The Sea Pearl, supra* note 17 at 681.

[20] *The Sea Pearl*, supra note 17 at 681 [emphasis added].

## 2. Following Seas

*Eleftheria* has received considerable judicial treatment by all levels of the Federal Court in Canada in the years since *The Sea Pearl*. Courts followed the Brandon J. approach very rigidly in their assessment of stay applications, and used their judicial discretion quite sparingly in retaining jurisdiction in matters where the parties had agreed to derogation by express choice of forum.

In the limited instances where the court did deny applications for a stay of proceedings, the grounds for the exercise of such discretion was usually due to some form of uncertainty in the bill of lading jurisdiction clause, or when a careful examination of the circumstances satisfied the "strong reasons" standard to deny a stay. In *Jian Sheng Co. v. Great Tempo S.A. (C.A.)*,[21] the Federal Court of Appeal denied the application for a stay of proceedings because the applicants "failed to establish that their principal place of business was Hong Kong,"[22] in accordance with the choice of forum clause. In *Jian Sheng*, the court cited with approval the elements of the *Eleftheria* standard, but felt that the "primary place of business" was not clear in the circumstances of the case. The choice of forum clause was not express, but used the "primary place of business" description in reference to jurisdiction. After considering the unique circumstances of the case, the court found that some uncertainty remained and that they could not ascertain that the parties had agreed to Hong Kong as the proper forum to satisfy the reference in the bill of lading. In the words of Décary J.A., at para. 40:

> To allow the carrier to get away with so little evidence, not even its own, would make a mockery of the jurisdiction clause...The respondent Great Tempo S.A. having failed to establish that its principal place of business was in Hong Kong, the jurisdiction clause could simply not be found to be applicable.[23]

The court refused the stay in these unique circumstances, as they found that the carrier had not met the simple burden of satisfying the very jurisdiction clause that they incorporated into the bill of lading and were now relying upon.

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[21] [1998] 3 F.C. 418 [*Jian Sheng*].
[22] *Ibid.* at para 6.
[23] *Ibid.* at para. 40, 42.

While courts did utilize their discretion in denying stay applications on occasion, a vast majority of the decisions recognized the reticence of courts to deny an application if there was no ambiguity in the choice of forum clause. This reticence was partly due to the fact that most contracts for carriage and bills of lading contained express provisions relating to jurisdiction, so as not to provide the uncertainty that existed in the *Jian Sheng* decision. Several cases went so far as to warn against a softening of the standards adopted in *Eleftheria* in favour of an easier *conveniens* argument.[24]

One such example is the decision of *Anraj Fish Products Industries Ltd. v. Hyundai Merchant Marine Co.*,[25] where the Federal Court of Appeal reasserted the importance of respecting the contractual freedom of the parties regarding choice of forum and again clearly recited the importance of following the approach adopted in *Eleftheria*. In this case, an Ontario company brought an action in federal court regarding the spoilage of a shipment of fish that they had purchased from Anraj, a Bangladeshi company. Anraj had contracted with Hyundai to ship the cargo to New York. Hyundai was successful at obtaining a stay from a prothonotary due to the existence of a Korean jurisdiction clause in the bill of lading. An appeal to the motions court overturned the stay on the grounds that the prothonotary had not properly applied *Eleftheria* to the circumstances of the case, and did not properly consider a jurisdiction that would be less expensive and from where evidence would be more readily available.

In clearly rejecting this seemingly *forum non conveniens* approach, Justice Sexton reversed the decision of the motions judge and ordered a stay of proceedings. More importantly, Sexton J. mildly rebuked the decision of the motions court by declaring that the court, in fact, erred in its interpretation and application of *Eleftheria*. At para. 6:

> I am of the view that while the Motions Judge accurately described the factors outlined by Brandon J. in the Eleftheria case, she neglected his pivotal premise...[26]

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[24] Most recently in *Cerco Industries Ltd. v. The "OOCL Canada"* (1999), Vancouver Registry No. 990101 (B.C.S.C.).

[25] [2000] F.C.J. No. 944 [*Anraj Fish Products*].

[26] *Ibid.* at para. 6.

The court then referred to the passage from *Eleftheria*, where Justice Brandon warned the court to not simply pay "lip service" to the contractual freedom of the parties by recognizing the choice of forum clause and then simply rejecting it on a simple balance of convenience.[27] With this decision, Justice Sexton seemed to shore up Canadian adherence to the *Eleftheria* precedent by reasserting its *prima facie* principle and rejecting a slide into a mere *conveniens* approach.

## III. The *Eleftheria* Runs Aground

While the *Eleftheria* approach to consideration of choice of forum clauses in stay applications seemed to be "ship shape" as recently as the June, 2000 Federal Court of Appeal decision in *Anraj Fish Products*, it is important to note that the motions judgment at issue in that appeal was given in December, 1999. Around the same time, a British Columbia prothonotary decision in September, 1999 seemed to thrust the mighty *Eleftheria* aground on a rocky shoal.

### 1. Prothonotary

In *Z.I. Pompey Industrie v. Ecu-Line N.V.*,[28] the court was faced with a port-to-port bill of lading emanating from the carriage of a photo processor and its four sub-assemblies from Anvers, Belgium to Seattle, Washington. A clause in the bill of lading provided that:

> The contract evidenced by or contained in this Bill of Lading is governed by the law of Belgium, and any claim of dispute arising hereunder or in connection herewith shall be determined by the courts in Antwerp and no other Courts.[29]

This choice of forum clause was express and without any possible ambiguity, as it clearly prorogated in favour of a court in Antwerp, and

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[27] *Eleftheria, supra* note 1 at 242.

[28] *Z.I. Pompey, supra* note 2.

[29] Taken from the trial division decision of *Z.I. Pompey*. [1999] F.C.J. No. 2017 at para. 4 [*Z.I. Pompey* - Trial Division].

expressly derogated all "other courts". Far from being contentious or ambiguous, this bill of lading advanced clear expressions of choice of forum and choice of law, but the unique circumstances of this case have caused the current uncertainty in the law.

The photo processor was a delicate cargo and it arrived at its destination damaged to the amount of $60,000. Being a sensitive piece of equipment, carriage by sea was the most effective mode of transport to avoid damage to the cargo, and the owners specified that it must be shipped "by ocean". When the prothonotary was considering the stay application of the defendant carrier, the plaintiffs provided information that there had been a deviation from the bill of lading and that a portion of the carriage had been executed by rail from Montreal, Québec to Seattle, Washington. The plaintiffs believed that the damage had occurred during the rail portion of the trip and claimed that the contract for carriage actually came to an end in Montreal, when there was a deviation from the bill of lading. The defendants challenged this claim, the facts regarding damage, and also provided evidence that the bill of lading actually allowed for a deviation. Clause 12 of the bill was sufficiently broad enough to permit such a deviation.[30]

Justice Hargrave began his consideration of the stay application with an immediate recognition of the express jurisdiction clause contained in the bill of lading and proceeded to an analysis based on an *Eleftheria* approach. The court carefully considered the "strong reasons" portion of the *Eleftheria* analysis and concluded at para. 5 that:

> Taken as a whole these factors are substantial, but in this instance are *just short of the strong case* which, by The Eleftheria, the Plaintiffs must present in order to override the jurisdiction clause.[31]

It is at this point that Justice Hargrave decided to part from the common law and with his next sentence carved a sharp judicial turn, which ripped a large hole in the hull of the *Eleftheria*. He continued:

> However the matter does not end here, for the Plaintiffs present a persuasive case that the contract between the Plaintiffs and ECU-Line N.V. came to an end in Montréal and thus there is no jurisdiction clause to apply.[32]

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[30] The clause is reprinted in the trial division decision. *Ibid.* at para. 14.

[31] *Z.I. Pompey, supra* note 2 at para. 5 [emphasis added].

[32] *Z.I. Pompey, supra* note 2 at para. 5.

What is most perplexing is that from this point forward in his decision, Justice Hargrave proceeded to decide the merits of the case by an examination of awkward notions of fundamental breach and a complete consideration of the merits of reliance on the deviation clause. Justice Hargrave looked beyond the application for a stay of proceedings and appeared to make findings of fact and law regarding the dispute arising out of the contract. Justice Hargrave justifies this departure from *stare decisis* in a simple statement at paragraph 8:

> ECU-Line submits I ought not to deal with fundamental breach or deviation, for those are factual issues to be determined on the merits by the trial judge. The answer to this is not complex. An interim injunction, obtained on an interlocutory application, which requires a testing of the waters by looking at the strength of the case, the harm being caused and the balance of convenience, is analogous to a denial of a stay on the basis of a strong case that the jurisdiction clause is just not applicable.[33]

This departure from *Eleftheria* and the rationale advanced by Justice Hargrave with respect to the stay proceeding being "analogous" to an interlocutory injunction is the crux of the uncertainty that currently exists in the law, and forms the primary issue facing the Supreme Court of Canada.

## 2. Trial Division

The *Z.I. Pompey*[34] advanced to the trial division of the federal court on appeal by the defendants, ECU-Line. Of the numerous grounds of appeal, almost all of them stemmed from the departure from *Eleftheria* and the fact that the lower court appeared to decide the merits of the case in their determination of the stay application. ECU-Line brought nine separate grounds of reversible error on the part of the prothonotary. In addition to these grounds, ECU-Line submitted that their deviation was also permissible under both the *Hague Rules*[35] and *Hague-Visby Rules*,[36]

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[33] *Z.I. Pompey, supra* note 2 at para. 8.

[34] *Z.I. Pompey* – Trial Division, *supra* note 29.

[35] *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading,* 25 August 1924, 120 L.N.T.S. 155, 51 Stat. 233 (entered into force 2 June 1931) [*Hague Rules*].

which could apply to the transaction. ECU-Line also claimed that the doctrine of separability required that the jurisdiction clause be enforced regardless of whether other provisions of the contract failed. As was the case at the prothonotary, ECU-Line continued to challenge the owner's account of the "special request" regarding transport of the cargo.

In dismissing the appeal, Justice Blais began as so many courts have, with the famous dictum of Brandon J. from page 242 of *Eleftheria*. From this established approach, the motions court then examined the reasoning provided by the prothonotary for his conclusion that the contract, as evidenced by the bill of lading, had come to an end. Justice Blais justified this determination using elements of *Eleftheria* procedure, while omitting the fact that the prothonotary actually concluded that the circumstances of the case were "just short of the strong case"[37] required by *Eleftheria* standard.

> The decision to stay a proceeding is a question of facts of each case and the Prothonotary had the discretion to render the decision he had, based on the facts before the Court after addressing the criteria established by The Eleftheria case.[38]

With this judgment the trial division of the Federal Court found that the prothonotary had not erred in their exercise of discretion, but Justice Blais' reasoning leaves the impression that the prothonotary had exercised this discretion in full accordance with the approach outlined in *Eleftheria*. This fact is difficult to reconcile with the lower ruling, which indicated that the circumstances of the case were "just short" of the *Eleftheria* standard regarding judicial discretion in a stay application.

## 3. Federal Court of Appeal

The consideration of *Z.I. Pompey* by the Federal Court of Appeal[39] in December, 2000 confirmed the current state of uncertainty in the com-

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[36] *Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*, 23 February 1968, 1412 U.N.T.S. 121 (entered into force 23 June 1977) [*Visby Rules*].

[37] Taken from the prothonotary decision. *Z.I. Pompey, supra* note 2 at para. 5.

[38] *Z.I. Pompey* - Trial Division, *supra* note 29 at para. 32.

[39] [2001] F.C.J. No. 96. [*Z.I. Pompey* - Federal Court] The judgment of the court was not released until January, 2001.

mon law and the scuttling of the good ship Eleftheria. The bridge captain for the scuttling order was Justice Issac, and he was ably assisted by first mates Justices Linden and Sharlow.[40]

After a review of the judicial history of the matter and a review of the facts giving rise to the dispute, the court recognized the three main issues of contention brought by the appellants for their determination. The first dealt with fundamental breach and unreasonable deviation. The appellant claimed that even if one of these notions occurred it would not render the jurisdiction clause unenforceable. The second issue concerned whether the court had jurisdiction to consider the merits of the case in light of the jurisdiction clause. The final issue was the claim that the prothonotary had "erred in inquiring into the merits of the dispute in the context of a stay application".[41]

Leaving aside the tests and standards required for judicial review, which also formed an important part of this appeal, the central issue in the eyes of the court turned on a determination of whether the prothonotary's use of discretion had given "sufficient weight to all relevant considerations".[42] This sufficient weight inquiry formed an important part of the consideration of the findings of the motions court regarding the prothonotary decision. In this inquiry into issues of discretion of the motions court, the Federal Court of Appeal made three important findings, which face the Supreme Court of Canada currently.

First, the court found that the motions judge properly reviewed the reasons of the prothonotary and concluded that *Eleftheria* "did not govern the case".[43] This is a troublesome finding, as the prothonotary determined that the circumstances of the case failed an *Eleftheria* analysis by falling "short" of the requirements. That court actually ruled that the contract for carriage had come to an end in Montreal. The motions court then seemed to approve of the prothonotary decision, but on the basis that the lower court had properly exercised its discretion within the context of a broad *Eleftheria* approach to a stay application. By declar-

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[40] At this point of my treatise, I will attempt to curtail the continuation of my maritime metaphor somewhat, at risk of making the reader seasick.

[41] *Z.I. Pompey* - Federal Court, *supra* note 39 at para. 18. The other grounds were contained in paragraphs 16 and 17.

[42] Taken from a passage from the Supreme Court of Canada decision in *Reza v. Canada* [1994] 2 S.C.R. 394, which was cited with approval by the court at *Z.I. Pompey* - Federal Court, *supra* note 39 at para. 24.

[43] *Z.I. Pompey* - Federal Court, *supra* note 39 at para. 26.

ing that the *Eleftheria* "did not govern", the Federal Court of Appeal does not appear to resolve the ambiguity between the two lower court rulings in this regard.

Second, Justice Issac made reference to *Jian Sheng* in terms of an example of an earlier departure from the *Eleftheria* precedent. With this reference, it appears that the court may have obfuscated the findings of the court in *Jian Sheng*. He claims that *Jian Sheng* deviated from *Eleftheria* by allowing refusal of a stay "where the appellant had not led sufficient evidence to support the existence of jurisdiction elsewhere than Canada".[44] The refusal in *Jian Sheng* flowed from the uncertainty contained in the jurisdiction clause itself, as it was not an express prorogation, but simply a "primary place of business" clause. This clause was found to be too vague to be enforceable in the circumstances, particularly due to the fact that the carrier seeking to rely on the clause had not presented sufficient evidence to resolve any of the uncertainties regarding its "primary place of business". While a stay was indeed denied in *Jian Sheng*, the decision did not seem to do so in a manner that was offensive to the *Eleftheria* precedent.

Third, the court used the approach toward interlocutory injunctions advanced by the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*[45] and applied it to the application for a stay of proceedings. This jurisprudential leap was justified by reference to a Supreme Court of Canada decision that declared that interlocutory injunctions and stay of proceedings were "remedies of the same nature".[46]

The Federal Court of Appeal concluded by dismissing the appeal and declaring that the tripartite test used for interlocutory injunctions was "the proper test to apply in stay applications".[47] This new test requires the court to make a preliminary assessment of the merits in order to consider a balance between the harm of granting the stay against the harm of denying the stay. In advancing this new test, the Federal Court of Appeal recognized that the lower court "did not refer to these authorities",[48] but felt that the spirit of this approach was outlined by the motions court.

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[44] *Z.I. Pompey* - Federal Court, *supra* note 39 at para. 27.

[45] [1975] 1 All E.R. 504.

[46] *Z.I. Pompey* - Federal Court, *supra* note 39 at para 29. Taken from *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.* [1987] 1 S.C.R. 110.

[47] *Z.I. Pompey* - Federal Court, *supra* note 39 at para. 31.

[48] *Z.I. Pompey* - Federal Court, *supra* note 39.

The validity of this new test is a matter that will be determined by the Supreme Court of Canada, when it clarifies the law in regard to the application for a stay of proceedings.

## IV. Statutory Currents

As was indicated at the outset, there have also been statutory developments that affect bills of lading, contracts for carriage, and related documents concerning the international trade of goods. Historically, the Canadian parliament has created legislation to recognize international developments in the carriage of goods by sea from the 1924 *Hague Rules*[49] to the 1968 *Hague-Visby Rules*,[50] and finally the latest evolution found in the 1978 *Hamburg Rules*.[51] The most recent example of this evolution was the recognition of the *Hamburg Rules* by Canadian law with the passage of the *Marine Liability Act*[52] in 2001. While this recognition fell short of fully adopting the rules, the legislation contained a review provision to allow for regular consideration of adoption of the convention. The act re-asserts the application of the *Hague-Visby Rules* in Canada. Section 43 applies these rules to Canadian law and to the carriage of goods by water within Canada when a bill of lading is used. Section 45, however, applies the *Hamburg Rules* in some limited circumstances prior to their full adoption by parliament. Section 45 of the *Marine Liability Act* states:

> 45(1) The Hamburg Rules have the *force of law* in Canada in respect of contracts for the carriage of goods by water between different states as described in Article 2 of those Rules. [emphasis added]

Article 2 of the *Hamburg Rules* is entitled "Scope of Application" and applies the provisions of the convention in circumstances where the "port of loading...port of discharge...or optional port of discharge" are located in a contracting state, or if the bill of lading or other contractual

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[49] *Hague Rules, supra* note 35.
[50] *Visby Rules, supra* note 36.
[51] *United Nations Convention on the Carriage of Goods by Sea*, 31 March 1978, U.N. Doc. A/CONF.89/13, 17 I.L.M. 608 (entered into force 1 November 1992) [*Hamburg Rules*].
[52] S.C. 2001, c. 6.

document "is issued in a contracting state" or expressly provides that the rules "govern the contract".[53] Canada is not a contracting state to the convention, but the *Marine Liability Act* gives effect to the *Hamburg Rules* in Canada for bills of lading, which relate to contracting states in a manner provided for in Article 2.

Of considerable importance to the context of jurisdiction clauses in bills of lading and their application in Canada is section 46 of the *Marine Liability Act*, which appears to limit the ability of courts to exercise their discretion to retain jurisdiction in the presence of a derogation of Canadian courts. The section applies to contracts for carriage of goods by water not bound by the *Hamburg Rules*:

> 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 the contracts 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.
>
> [emphasis added]

The effect of section 46(1) appears to provide express statutory authority for courts to retain jurisdiction in a stay application if one of the three grounds are satisfied. These tangible "connections" to Canada outlined in the three-part list appear to justify the intrusion of a Canadian court into the agreement of the parties, and permits the court to ignore the choice of forum clause that derogated Canadian courts.

Essentially, this section of the *Marine Liability Act* appears to overrule a traditional *Eleftheria* approach to stay applications, when the plaintiff can demonstrate that the contract was made in Canada, that the party applying for a stay has a place of business or branch office in Canada, or if the port of loading or discharge was a Canadian port. It would appear that by expressly providing for jurisdiction to be retained according to the s. 46 three-part connection examination, that the legis-

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[53] *Hamburg Rules, supra* note 51 at Art. 2(1).

ature intended for the common law to continue to apply to circumstances falling outside the scope of the section. In these cases, the discretion remains in the hands of the court to stay proceedings or retain jurisdiction according to the traditional *Eleftheria* standards. It will be interesting to see if the Supreme Court of Canada considers this recent manifestation of legislative intent in regard to jurisdiction and bills of lading. It is difficult to fully address how the *Marine Liability Act* provisions would affect the circumstances found in *Z.I. Pompey*. It is also not certain that this legislation would even apply, as it came into effect after the stay was denied.

However, a *prima facie* examination would conclude that s. 46(1) of the *Marine Liability Act* may not apply to the facts of the case. Belgium is governed by the *Hague-Visby Rules* and the United States is governed by the *Hague Rules*, so while it does seem like the *Hamburg Rules* would not apply to the transaction, it would be difficult to satisfy one of the "connections" with Canada required by s. 46(1). It does not appear that the carrier has a Canadian office, but this might apply if more information was available. It appears that the plaintiff's only avenue would be a continuation of their argument that Montreal was the port of "discharge" in the circumstances, which is again troublesome, as it possibly delves into an examination of the merits of the case. Reference to "loading" and "discharge" appear to refer to the start and finish of the contract. Unless the court is prepared to take a broad approach to the concept of "discharge", it appears that the contract began in Belgium and was completed in the United States. This would make the matter fall outside the scope of s. 46(1).

## V. Will the Supreme Court Save a Sinking Ship?

### 1. While the Eleftheria Flounders

The wheels of justice have continued to grind in the period between the initial treatment of *Z.I. Pompey* in 1999 and the time it has taken to reach the Supreme Court of Canada. With bills of lading being the backbone of contracts for carriage in the world of international trade, it is not surprising that disputes have continued to surface regarding the use of

choice of forum clauses. From an examination of these cases that have been decided during the *Z.I. Pompey* appeal process and have considered the effect of the *Marine Liability Act*, it appears that *Eleftheria* is still assisting courts in their consideration of stay applications.

In *Incremona-Salerno Marmi Affini Siciliani (I.S.M.A.S.) s.n.c. v. Castor (The) (T.D.)*[54], the Federal Court dealt with an application by the carrier for a stay of proceedings in favour of the choice of forum clause in the bill of lading, which specified for the matter to be decided in Germany. At issue in this case was whether s. 46(1) of the *Marine Liability Act* applied to the facts, even though it came into force after the carrier had applied for a stay. The court ruled that the section did apply to the facts of the case, as the intended port of discharge was in Canada. The court ruled that this effectively removed the court's discretion under s. 50(1) of the *Federal Court Act*.

> Clearly, subsection 46(1) does limit the discretion of this Court to stay proceedings in the interest of justice where there is a jurisdiction clause, such as on the facts before me, in a bill of lading.[55]

This judgment by the Federal Court in December, 2001 makes it clear that s. 46(1) of the *Marine Liability Act* directly limits the discretion of the court in a stay of proceedings application under s. 50(1) of the *Federal Court Act*. If the bill of lading, or the circumstances surrounding the carriage of goods itself have a connection with Canada in accordance with the three principles of the section, the court is provided statutory authority to retain jurisdiction.

As recently as September, 2002 the Federal Court considered the application of an exclusive jurisdiction clause, which expressly provided for arbitration of disputes in New York, in *Nestlé Canada Inc.* c. *Viljandi (Le)*.[56] The plaintiff claimed to not have sufficient knowledge of a second bill of lading involved in the carriage of evaporated milk from Sherbrooke, Quebec to San Juan, Puerto Rico. The goods were damaged upon arrival and the defendant carrier sought to stay the action in Canada in favour of the jurisdiction clause. This case serves as an important indication of the current position of courts in Canada, and that the judicial approach to a stay of proceedings application may be in

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[54] [2002] 3 F.C. 447 [*The Castor*].
[55] *Ibid.* at para. 9.
[56] [2002] A.C.F. no. 1315.

transition.

> On doit noter en aparté que bien que le procureur de Nestlé ait soulevé dans ses représentations écrites que la décision de la Cour d'appel fédérale dans l'arrêt Pompey (Z.I.) Industrie et al. *v.* Ecu-Line N.V. et al., [2001] F.C.J. No. 96, ait pu énoncer un test qui écarterait le test traditionnel de l'arrêt Eleftheria, ce dernier n'a pas en plaidoirie orale insisté sur cette décision de la Cour d'appel fédérale et a entrepris de revoir la situation en fonction du test de l'arrêt Eleftheria. C'est donc en fonction de ce dernier test, tel que repris par cette Cour à de nombreuses reprises, que l'on poursuivra notre étude.[57]

Loosely translated, Prothonotary Morneau noted "en aparté " (as an aside) that Nestlé could have raised the Federal Court of Appeal decision from *Z.I. Pompey*, which may have permitted a departure from the *Eleftheria* test. They chose to argue under the traditional *Eleftheria* approach, so that is how the court reviewed the application. The *Z.I. Pompey* was raised in passing by the prothonotary, but he did not indicate a preference for the new approach, or the *Eleftheria* precedent. The court also recognized that in this instance, the matter of tests were essentially a moot point due to the fact that the stay application was directly affected by the *Marine Liability Act*. In his concluding paragraph:

> Partant, si je n'avais pas eu à considerer l'application de l'article 46 de la Loi, j'aurias conclu sous la troisième question que Nestlé n'a pas démontré des *motifs forts* pour amener la Cour à conclure qu'il serait déraisonnable ou injuste to tenir Nestlé au respect de la Clause.[58]

The court recognized the application of statutory developments on the application of choice of law clauses, and in this case denied the stay according to the *Marine Liability Act*. The court did make reference to the possibility of an abandonment of the *Eleftheria*, but chose to make findings according to the "strong reasons" ("motifs forts") approach governing use of discretion.

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[57] *Ibid.* at para. 28.
[58] *Ibid.* at para. 41 [emphasis added].

## VI. Conclusions

The Supreme Court of Canada stands in judgment over several crucial issues in the final appeal in *Z.I. Pompey*. Most have a potentially serious impact on the sanctity of contract and the ability for parties to prorogate and derogate jurisdiction by agreement. The dispute arises out of the possible application of a deviation clause, or whether there was actually *consensus ad idem* in the contract for carriage. These issues require determinations on their merit, which should not form part of the considerations of a stay application.

The Supreme Court does not need to look any further than the circumstances of *Eleftheria* itself. Too often courts have become exceedingly familiar with the popular Brandon J. quotation from page 242 of the Lloyd's Law Report, but are less so with the original facts facing Justice Brandon. History often repeats itself. Like *Eleftheria*, the prothonotary in *Z.I. Pompey* was faced with a dispute arising out of a bill of lading, which contained an express choice of jurisdiction. Like *Eleftheria*, there was disagreement between the party applying for the stay and the party attempting to avoid application of the choice of forum clause. Like *Eleftheria*, there was a deviation from the voyage as described by the bill of lading, but in circumstances where the carrier believed this deviation to be justified by their contract. Unlike *Eleftheria*, however, the Canadian prothonotary embarked on an examination of fundamental breach and consideration of the deviation clause in a manner that evinced a consideration of the merits of the dispute and contract itself. This is the very examination that the express choice of forum clause prohibits by agreement of the parties to derogate all other jurisdictions.

The court may consider the legislative intent of the *Marine Liability Act*, as it limits the discretion of the court to a narrow range of connecting factors in their ability to retain jurisdiction. It makes no reference to a balancing of harm, or consideration of the strengths of the case in the manner that a court would adopt towards an interlocutory injunction or a pre-trial remedy like a Mareva injunction. Parliament clearly articulated a limited number of factual connections to Canada that would warrant the courts intrusion into the bill of lading.

The court should overturn the decision of the Federal Court of Appeal and rescue the Eleftheria from its watery grave. The approach advocated by Justice Brandon in *Eleftheria* has served the common law well over the last few decades by allowing the court to retain some discretion regarding jurisdiction clauses, but first and foremost, by respecting the agreement reached between the parties. As was stated in *Eleftheria* and repeated approvingly as recently as *Anraj Fish Products*, courts must endeavour "not just to pay lip service"[59] to the agreement of the parties, but respect their agreement regarding possible disputes and the method of settlement. The new tripartite test enunciated by the Federal Court of Appeal would not respect the freedom for parties to contract into or out of a jurisdiction, which has become an established practice in the international sale and carriage of goods.

It would require courts to assess the merits of the case, even though the parties involved had agreed to only have the merits assessed in an express jurisdiction. Connectivity to the Canadian jurisdiction outside of express statutory provisions should have no effect on the application of an express term of the bill of lading or contract for carriage. Nor should considerations of issues of *conveniens* or a balancing of harms allow a party not to be held to its agreement. As that old legal adage warns, "[c]hancery mends no mans bargain".[60] The Supreme Court of Canada should begin the bailing out of the good ship Eleftheria and restore some certainty to the flow of goods as expressed by bills of lading and other contracts for carriage. If they do not, international carriers may desire to have less and less connection with Canada, in exchange for some certainty in their operations.

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[59] *Eleftheria, supra* note 1 at 245; *Anraj Fish Products, supra* note 25.

[60] Lord Nottingham in *Maynard v. Moseley* (1676), 3 Swans. 651 at 655, 36 E.R. 1009, as quoted in S.M. Waddams, *The Law of Contracts*, 4th ed. (Aurora: Canada Law Book, 1999) at 319.