

## cross-border litigation bulletin

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### Ontario Court of Appeal clarifies enforceability of exclusive jurisdiction clauses

Parties to commercial contracts are generally held to the bargains they have made. One exception has often been the enforcement of exclusive jurisdiction clauses where courts have applied a different standard. In a recent decision, the Ontario Court of Appeal clarified that such clauses should be enforced in all but a few circumstances.

#### background

In *Expedition Helicopters Inc. v. Honeywell Inc.*,<sup>1</sup> the plaintiff sued for breach of contract under an agreement which provided that:

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....

Notwithstanding the presence of this exclusive jurisdiction clause in favour of Arizona, the plaintiff sued in Ontario. Relying on the clause, the defendant sought to stay the plaintiff's action on the basis that Ontario was without jurisdiction.

#### decision of the Motions Judge

The law relating to exclusive jurisdiction clauses was recently set out by the Supreme Court of Canada in *Z.I. Pompey Industrie v. ECU-Line N.V.*<sup>2</sup> In that case, the SCC held that where an exclusive jurisdiction clause exists, the burden lies with the plaintiff to show "strong cause" that to enforce it would be unreasonable or unjust.

Despite the clear terms of the exclusive jurisdiction clause, the motions Judge conducted a typical jurisdiction analysis to decide in which jurisdiction, Arizona or Ontario, it would be most convenient for the matter to be heard. The exclusive jurisdiction clause was considered only as one of many factors. As a result of the connections between the matter and Ontario, the motions Judge held that the plaintiff had shown sufficiently strong reasons to support the conclusion that it would be neither just nor reasonable to require that the plaintiff be bound by the exclusive jurisdiction clause.

<sup>1</sup> 2010 ONSC 732, rev'd 2010 ONCA 351 [*Expedition*].

<sup>2</sup> 2003 SCC 27.

## decision of the Court of Appeal

The Ontario Court of Appeal ruled that the motions Judge erred by conducting an analysis in which the exclusive jurisdiction clause was but one factor, and narrowed the “strong cause” test to include situations where:

- the plaintiff was induced to agree to the clause by fraud or improper inducement or the contract is otherwise unenforceable;
- the court in the selected forum does not accept jurisdiction or otherwise is unable to deal with the claim;
- the claim or the circumstances that have arisen are outside of what was reasonably contemplated by the parties when they agreed to the clause;
- the plaintiff can no longer expect a fair trial in the selected forum due to subsequent events that could not have been reasonably anticipated; or
- enforcing the clause in the particular case would frustrate some clear public policy.

## the terms of the contract are the terms of the contract

The Ontario Court of Appeal’s decision in *Expedition* to enforce the exclusive jurisdiction clause and stay the Ontario proceeding in favour of Arizona demonstrates that no special rules of contractual interpretation apply when it comes to enforcing an exclusive jurisdiction clause. If a sophisticated commercial party accepts a contract, it will be held to the terms of the contract including a term setting out where disputes arising out of the contract will be heard.

If suing in a foreign jurisdiction would be burdensome for your business, focus on the language of the forum selection clause found in most commercial agreements before executing a contract. You will likely be forced to comply with any such clause, often with unexpectedly expensive consequences.

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### a cautionary note

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