Appeal court offers guidance in jurisdictional battles

BY ROBERT TODD
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The Ontario Court of Appeal's decision to hold a company to its "bargain" and enforce a forum selection clause in a bailment agreement has offered some much-needed clarity in jurisdictional battles.

In *Expedition Helicopters Inc. v. Honeywell Inc.*, Honeywell appealed Ontario Superior Court Justice Louise Gauthier's January decision to deny its motion to enforce a forum selection clause by striking a court action filed by Expedition.

The clause, which was to direct proceedings to Arizona courts, was part of a bailment agreement between the parties over a helicopter engine that Honeywell, a Delaware company, leased to Cochrane, Ont.-based Expedition. It became a point of contention when the helicopter was destroyed in a crash in Saskatchewan that killed the pilot and a passenger.

In a decision written by Justice Russell Juriansz, the appeal court ruled that the motions judge took the wrong approach in her analysis. In doing so, Juriansz referenced the principles laid out by former Supreme Court of Canada justice Michel Bastarache in 2003's *Z.I. Pompey Industrie v. ECU-Line N.V.*

As Juriansz pointed out, *Pompey* maintains that the courts should give priority to the enforcement of forum selection clauses. "These clauses are generally to be encouraged by the courts as they create certainty and security in transaction, derivatives of order and fairness, which are critical components of private international law," Bastarache wrote in *Pompey*. Moreover, it's up to the plaintiff to demonstrate "strong cause" that exceptional circumstances exist in the case at hand to justify jettisoning the forum selection clause.

Juriansz noted as well that the motions judge conducted a *forum non conveniens* analysis in which the clause was considered only a minor factor.

"For example, she considered the location of witnesses and the procedures of the Arizona courts without taking into account that Expedition, by agreeing to the clause, had accepted at the time it entered into the contract that it would have to transport its witnesses to Arizona and resolve any claim it might bring according to the law and procedures of Arizona," Juriansz wrote. "In *Pompey*, Bastarache J. was not satisfied that even litigation costs disproportionate to the amount of the claim was reason enough to refuse to enforce a forum selection clause."

The *Expedition* ruling is good news for U.S.-based clients, says Brett Harrison.

The judge later added, "In this case, there is no reason to depart from the presumption that Expedition should be held to the bargain that it made."

Juriansz went on to list the few factors that could prompt a court to ignore a forum selection clause:

- The plaintiff agreed to the clause due to fraud or improper inducement or the contract is otherwise unenforceable.
- The court in the selected forum doesn't accept jurisdiction or is otherwise unable to deal with the claim.
- The claim or circumstances that have arisen are outside of what the parties had reasonably contemplated when they agreed to the clause.
- The plaintiff can no longer expect a fair trial in the selected forum due to subsequent events it couldn't have reasonably anticipated.
- Enforcing the clause in the particular case would frustrate some clear public policy.

Brett Harrison, a partner with a commercial litigation practice at McMillan LLP in Toronto, suggests the decision helps move the law closer to certainty regarding judicial jurisdiction clauses. That's good news for his many U.S.-based clients, who are used to a system in which contracts are enforceable between commercial parties on their terms.

"That's sort of their expectation, and it's difficult to explain why certain types of provisions aren't enforceable in the same manner as others are," says Harrison.

At the same time, he believes the best way to solve the problem is through legislative reform, perhaps through the adoption of the Court Jurisdiction and Proceedings Transfer Act, which the Uniform Law Conference of Canada has adopted and some provinces have implemented.

While a uniform standard across Canada is also key, Harrison suggests a more sensible approach in general is necessary and notes that the jumbled law that exists has led to misinterpretations and inconsistencies in the courts, such as Gauthier's decision in *Expedition*.

"To have different tests doesn't make sense," he says. "They're all provisions of a contract, which should otherwise be enforceable."

Susan Brown, an Ottawa-based Fraser Milner Casgrain LLP partner who acted for Honeywell, says it's important that the courts enforce forum selection clauses in order to provide "commercial certainty, especially in the situation of international contracts. Essentially, a party is contracting for any dispute to be regulated in a jurisdiction that it chooses."

Meanwhile, the battle in *Expedition* may not be over. The company's lawyer, David Steinberg of Pape Barristers Professional Corp., says it's seeking leave to appeal from the Supreme Court of Canada. He suggests the appeal court has misinterpreted the case law.

"This is somewhat troubling because it runs counter to what the Supreme Court of Canada said in *Pompey*," says Steinberg. "From a very practical perspective, it implies that words in fine print in some standard-form contract dictate whether or not Ontario courts can exercise jurisdiction." LT