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cross-border litigation bulletin

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staying foreign parallel proceedings just got tougher

You bring an action in the US only to have the defendant commence a parallel proceeding in a Canadian court. Even if the US court has already claimed jurisdiction, staying the Canadian action just got a little tougher thanks to new legislation and the recent decision of the Supreme Court in *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*.[1]

background

In 2004, Teck was sued in Washington State for environmental property damage allegedly caused by pollutants originating from Teck's operations in British Columbia. Teck commenced an action in the US against its insurers, seeking a declaration that it was entitled to coverage under various insurance policies. Teck's insurers subsequently brought similar actions in British Columbia (B.C.), seeking declarations that there was no such obligation.

In response to the parallel actions, each party filed a motion to have the opposing court stand down on the basis that the other jurisdiction was a more convenient forum. In 2006, the US court maintained its claim to jurisdiction over the issue, denying the insurers' motion. The US court stayed the effect of its decision pending disposition of Teck's motion in B.C.

inconvenient forum test

In 2003, B.C. adopted the *Court Jurisdiction and Proceedings Transfer Act* (CJPTA). Though Ontario has yet to follow suit, the CJPTA is currently being examined by the Law Commission of Ontario with a view to reforming cross-border litigation and courts have commented that its principles generally align with the common law in this province.

Subsection 11(1) of the CJPTA requires that, on a motion to stay an action based on the existence of a more convenient forum, the court consider a number of factors including the comparative convenience and expense presented to the parties by each proposed forum, which jurisdiction's law is to be applied to issues in the proceeding and the desirability of avoiding multiple legal proceedings.

[1] [2009] S.C.J. No. 11

no deference

Teck argued that the US court's assertion of jurisdiction merited a deferential stance from the B.C. court. The Canadian Supreme Court, upholding the B.C. motion judge and Court of Appeal, disagreed. It held that a foreign court's prior assertion of jurisdiction was not an overriding and determinative factor within the inconvenient forum analysis, worrying that elevating such considerations would result in a "first-to-file wins" system.

However, if assertion of jurisdiction by a foreign court in a parallel proceeding does not merit special consideration, how will courts address conflicting findings on the same issue from different courts? The Supreme Court fell short of addressing this question. While it outlined three possible options (a race where the first judgment handed down prevails, an absolute preference for local proceedings, or a policy that steers a middle ground between the two), it ultimately refused to opine on any of them. It will be up to future cases to bring clarity to this important issue.

Until then, the task for litigants seeking a stay of a parallel proceeding just got a little tougher.

avoiding multiple actions

Careful attention to choice of law and choice of jurisdiction clauses will remain the most cost-effective manner of avoiding multiple parallel actions. Before commencing any action, clients should also thoroughly consider whether their case meets the CJPTA and common-law requirements of having a "real and substantial connection" to their preferred jurisdiction. Such consideration may mean the difference between clients litigating their case once in a jurisdiction of their choosing versus needlessly duplicating their legal costs in an unfriendly and inconvenient foreign forum.

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a cautionary note