Date: 20070914

Docket: T-1844-06

Citation: 2007 FC 916

Ottawa, Ontario, September 14, 2007

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

MAZDA CANADA INC.

Plaintiff

and

MITSUI O.S.K. LINES CO. LTD.
MOB COUGAR (PTE) LTD.
THE SHIP "COUGAR ACE", HER OWNERS
AND ALL OTHERS INTERESTED IN HER,
NYI NYI TUN, YUE YEW LOON
AND THAUNG HTUT MAUNG

Defendants

REASONS FOR ORDER AND ORDER

[1] The Cougar Ace, belonging to the Port of Singapore, set sail from Yokohama 19 July 2006 with a cargo of 4,813 Mazda automobiles and 110 Isuzu trucks, bound for New Westminster, British Columbia, Tacoma, Washington and Port Hueneme, California. All went well until 6 days later, when some 350 kilometres south of the Aleutian Islands and while engaged in a routine ballasting operation, the ship took on a violent and severe list of 60 degrees to port. The crew, the ship and her cargo were in imminent peril. With the exception of two broken legs, the crew escaped unscathed, rescued by the United States Coast Guard.

[2] The shipowner, MOB COUGAR (PTE) LTD., through the agency of the time charterer, Mitsui O.S.K. Lines Co. Ltd., entered into a Lloyd's standard form of salvage agreement with Titan Marine LLC of Fort Lauderdale, Florida. The ship and cargo were successfully redelivered at Dutch Harbor, Alaska. There the ship was righted. Her owner and time charterer decided to tow her to Portland, Oregon where the ship was to be repaired and all cargo was to be discharged and forwarded to their respective final destinations. Later, Mazda Canada Inc., owner of the 1,563 automobiles bound for New Westminster, and holder of the covering bill of lading, together with Mazda Motors of America Inc. (Mazda U.S.A.), likewise interested in the Tacoma and Port Hueneme cargo, decided to take delivery at Portland, where they would inspect, test, and if appropriate carry out repairs. Mazda Canada's loss is extensive, perhaps in excess of $20,000,000 as the cargo may have lost its merchantable quality. The damage suffered by Mazda U.S.A. may be more than twice that.

[3] Mazda Canada has taken action in this Court for loss and damage to the New Westminster bound cargo, and for indemnity with respect to salvage. The action is styled *in rem* against the ship Cougar Ace and *in personam* against her owner, MOB COUGAR (PTE) LTD of Singapore; her time charterer, Mitsui O.S.K. Lines Co. Ltd. of Japan; the Master and Second Engineer of the Cougar Ace who hail from Myanmar, and her Singaporean Chief Engineer. The action *in rem* has not been served, and the Cougar Ace has not been arrested here, as she has not called at a Canadian port since the casualty. The owner and the Chief Engineer were served in Singapore, and the time charterer in Japan. The Master and Second Engineers have not been served.

[4] The defendant shipowner and time charterer, supported by Chief Engineer Loon, have moved to have the Canadian action stayed in favour of Japanese jurisdiction – the jurisdiction and law agreed in the bill of lading – and the jurisdiction they say has the closest connection with the dispute.

[5] Two other actions with respect to the Mazda automobiles have been taken. Mazda U.S.A. and its cargo underwriters have sued in the United States District Court for the District of Oregon. While this motion was being argued, that action was dismissed in light of the Japanese jurisdiction clause contained in the bills of lading, identical in form to the bill of lading before me. I was informed that there is a right of appeal, but I am not aware if it has been exercised.

[6] In the second action, Mitsui has sued in Japan for a declaration that it is not liable for loss and damage to the Canadian and American bound Mazda cargo. The action makes no mention of the 110 Isuzu trucks. Counsel had no instructions as to whether Isuzu is pursuing the matter or not. Mitsui alleges that the Chief Officer made a mistake during the ballasting operation, which it characterizes as an error in the management of the ship. An error in the management of the ship not caused or contributed to by a failure to properly train the officers and crew constitutes a complete defence under the applicable *Hague-Visby Rules*. However, when the stay motion came before me that action had not yet been served. Although not named as a plaintiff, for the purposes of the following analysis, I will treat the Japanese action as if the shipowner were also party thereto.

[7] There is no easy resolution to this issue. Although the case law on motions for stays supported by forum selection clauses has been constant, Canada's public policy changed with the coming into force of the *Marine Liability Act* in 2001. Furthermore, the case law with respect to stays not supported by forum selection clauses has evolved dramatically over the past few decades with the notion of *forum non conveniens* now in full bloom, and the need to obtain judicial leave to serve notice of an action out of the jurisdiction abolished.

FORUM SELECTION CLAUSES

[8] Although a bill of lading is not the contract of affreightment, it may serve as evidence of same. The parties in this case agree that it contains all the relevant terms and conditions. It was issued on Mitsui's letterhead to Itochu Corporation of Tokyo who shipped 1,563 Mazda vehicles, said to weigh 1,955,890 kilos, at Nakanoseki for discharge at New Westminster. The bill of lading was consigned to the shipper's order. Mazda Canada was the notify party. For the purposes of this motion it must be presumed that Itochu sold the cargo to Mazda Canada and endorsed the bill of lading over to it.

[9] The bill of lading identifies Mitsui as the "carrier", but "sub-contractor(s)" are defined as including the shipowner. By means of the "Himalaya Clause", all bill of lading benefits were extended to it.

[10] Mitsui and Itochu have a long term charter between themselves, which calls for Tokyo arbitration. However, there is no evidence that Mazda Canada was aware of it, and in any event it does not form part of the contract endorsed over.

[11] Clause 28 of the governing bill of lading provides:

> **28. LAW AND JURISDICTION**
> The contract evidenced by or contained in this Bill of Lading shall be governed by Japanese law except as may be otherwise provided for herein.
> Unless otherwise agreed, any action against the Carrier thereunder must be brought exclusively before the Tokyo District Court in Japan. Any action by the Carrier to enforce any provision of this Bill of Lading may be brought before any court of competent jurisdiction at the option of the Carrier.

[12] Section 50 of the *Federal Courts Act* confirms this Court's discretionary power to stay proceedings on the ground that the claim is proceeding in another jurisdiction or if for any other reason it is in the interests of justice to do so. However, the aforesaid section 46 of the more recent *Marine Liability Act* goes on to say that notwithstanding a foreign jurisdiction clause, a cargo action may be instituted here if, among other things, the intended port of discharge is Canadian.

[13] Were it not for section 46, I would have granted the stay without hesitation. The starting point is the decision of Mr. Justice Brandon, as he then was, in the *Eleftheria*, [1969] 1 Lloyd's Rep. 237, [1969] 2 All E.R. 641, fully approved by our Supreme Court in *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450.

[14] Under the *Eleftheria* principle, a court which otherwise has jurisdiction is not bound to grant a stay in light of a foreign forum selection clause, but in its discretion should do so unless there is "strong cause" otherwise. In exercising its discretion, the court should take into account all the circumstances including: a) where the evidence is available and the effect of that on the relative convenience and expense of trial; b) whether the law of the foreign court applies and if so, whether it differs from our law in any material respect; c) to which country the parties are connected, and how closely; d) whether the defendants generally desire trial in the foreign country, or are only seeking procedural advantages; and e) whether the plaintiff would be prejudiced in the foreign court because i) it would be deprived of security; ii) be unable to enforce any judgment obtained; iii) be faced with a time bar not otherwise applicable; or iv) for political, racial, religious or other reasons be unlikely to get a fair trial. In this case, the defendants realize a stay of the Canadian action would be conditional on their waiving time bar in Japan.

[15] As Mr. Justice Bastarache noted in *Z.I. Pompey* at paragraph 29: "bills of lading are typically entered into by sophisticated parties familiar with the negotiation of maritime shipping transactions who should, in normal circumstances, be held to their bargain." There has been a long history of Mazda automobiles being shipped to Canada under the same bill of lading form. Mazda Canada was certainly aware that the bill of lading purported to give the Tokyo courts exclusive jurisdiction.

MARINE LIABILITY ACT

[16] In 2001, our *Marine Liability Act* came into force. Section 46 provides:

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 contract had referred the claim to Canada, where	**46.** (1) Lorsqu'un contrat de transport de marchandises par eau, non assujetti aux règles de Hambourg, prévoit le renvoi de toute créance découlant du contrat à une cour de justice ou à l'arbitrage en un lieu situé à l'étranger, le réclamant peut, à son choix, intenter une procédure judiciaire ou arbitrale au Canada devant un tribunal qui serait compétent dans le cas où le contrat aurait prévu le renvoi de la créance au Canada, si l'une ou l'autre des conditions suivantes existe :
(*a*) the actual port of loading or discharge, or the intended port of loading or discharge under the contract, is in Canada;	*a*) le port de chargement ou de déchargement — prévu au contrat ou effectif — est situé au Canada;
(*b*) the person against whom the claim is made resides or has a place of business, branch or agency in Canada; or	*b*) l'autre partie a au Canada sa résidence, un établissement, une succursale ou une agence;
(*c*) the contract was made in Canada.	*c*) le contrat a été conclu au Canada.
(2) Notwithstanding subsection (1), the parties to a contract referred to in that subsection may, after a claim arises under the contract, designate by agreement the place where the claimant may institute judicial or arbitral proceedings.	(2) Malgré le paragraphe (1), les parties à un contrat visé à ce paragraphe peuvent d'un commun accord désigner, postérieurement à la créance née du contrat, le lieu où le réclamant peut intenter une procédure judiciaire ou arbitrale.

[17] It has already been held that section 46 does not override the court's discretion to grant a stay pursuant to section 50 of the *Federal Courts Act.* Yet, the question remains whether the bill of lading should be construed as if it contained no forum selection clause, or whether that clause is still a factor the Court should take into account in exercising its discretion.

FORUM NON CONVENIENS

[18] Although an anti-suit injunction case, the decision of the Supreme Court in *Amchem Products Inc. v. British Columbia (Workers' Compensation Board),* [1993] 1 S.C.R. 897, 150 N.R. 321, has been constantly cited, including by that Court itself, in the context of motions for interlocutory stays of proceedings. In turn, *Amchem* rendered homage to English cases, particularly *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] A.C. 460, [1987] 1 Lloyd's Rep. 1.

[19] As noted by Lord Goff in the *Spiliada*, the fundamental principle was expressed long ago by Lord Kinnear in *Sim v. Robinow* (1892) 19 R. 665 at page 668:

> The plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interest of all the parties and for the ends of justice.

[20] The jurisprudence led Lord Goff to conclude at [1987] 1 Lloyd's Rep. 11:

> In my opinion, the burden resting on the defendant is not just to show England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum.

[21] In *Amchem*, Mr. Justice Sopinka recognized that modern business transactions and the resolution of disputes arising therefrom transcend domestic jurisdictions:

> [20] […] Meanwhile, the business of litigation, like commerce itself, has become increasingly international. With the increase of free trade and the rapid growth of multi-national corporations it has become more difficult to identify one clearly appropriate forum for this type of litigation. The defendant may not be identified with only one jurisdiction. Moreover, there are frequently multiple defendants carrying on business in a number of jurisdictions and distributing their products or services world wide. As well, the plaintiffs may be a large class residing in different jurisdictions. It is often difficult to pinpoint the place where the transaction giving rise to the action took place. Frequently, there is no single forum that is clearly the most convenient or appropriate for the trial of the action but rather several which are equally suitable alternatives.

[22] He continued at paragraph 33:

> […] I agree with the English authorities that the existence of a more appropriate forum must be clearly established to displace the forum selected by the plaintiff.
> [His emphasis]

[23] The factors to be considered are fact-driven. There has been no attempt, and indeed it would be quite inappropriate, to set out an exhaustive list of factors which should be weighed. In *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, [2002] 4 S.C.R. 205, the Supreme Court listed the ten factors set out by the Quebec Court of Appeal in *Lexus Maritime Inc. v. Oppenheim Forfait GmbH*, [1998] A.Q. No. 2059, 82 A.C.W.S. (3d) 46 which are:

a) the parties' residence, and that of witnesses and experts;

b) the location of the material evidence;

c) the place where the contract was negotiated and executed;

d) the existence of proceedings pending between the parties in another jurisdiction;

e) the location of the defendants' assets;

f) the applicable law;

g) advantages conferred upon the plaintiff by its choice of forum, if any;

h) the interests of justice;

i) the interests of the parties;

j) the need to have the judgment recognized in another jurisdiction.

[24] This list was considered by Mr. Justice Evans in the case most on point, *Magic Sportswear Corp. v. OT Africa Line Ltd.*, 2006 FCA 284, [2007] 2 F.C.R. 733. In addition, in contracts of affreightment by sea one must now take into account the public policy of Canada as expressed in section 46 of the *Marine Liability Act,* forum selection clauses and that unique feature of maritime law, the action *in rem* with its accompanying warrant of arrest.

JURISDICTION *RATIONE MATERIAE* AND *PERSONAE*

[25] I think it appropriate to jurisdictionally situate section 46 of the *Marine Liability Act* before weighing the factors which should be taken into account in determining whether a stay should be granted in this particular case. The Federal Court has jurisdiction over the subject matter of this claim by virtue of Canadian Maritime Law, more particularly section 22(2)(h) of the *Federal Courts Act* as it is for "loss of or damage to goods carried in or on a ship…". There is no geographical limitation on this subject matter jurisdiction. This Court would have jurisdiction even if the shipment were from one Japanese port to another (*United Nations v. Atlantic Seaways Corp.*, [1979] 2 F.C. 541, 99 D.L.R. (3d) 609 (Fed. C.A.)). It matters not that

Japanese law is applicable. Canadian Maritime Law includes conflict of law rules (*Tropwood A.G. v. Sivaco Wire & Nail Co.*, [1979] 2 S.C.R. 157).

[26] Historically, courts took jurisdiction over defendants who were personally served within the country. See rule 127 and following of the *Federal Court Rules*. In certain circumstances, service upon an agent in Canada is deemed to be personal service.

[27] If the defendant could not be served within Canada, leave to serve notice of the action elsewhere had to be obtained from the Court. Not to put too fine a line on it, but the plaintiff had to show a reasonably arguable case on the merits, and a real and substantial connection between that case and Canada. As noted by Mr. Justice Sopinka in *Anchem*, most provinces have done away with the need to obtain leave. The *Federal Courts Rules* have been amended to the same effect.

OT AFRICA

[28] Section 46 does not expressly override the Court's discretion to stay under section 50 of the *Federal Courts Act*, and the two can be read together. As Mr. Justice Evans stated in *OT Africa* at paragraph 36, it "…removes the Court's discretion to stay solely on the ground that the parties have selected an exclusive forum outside Canada" (emphasis added). In reaching that conclusion, he held that certain *obiter* remarks of Mr. Justice Bastarache in *Z.I. Pompey*, above, and by Mr. Justice Nadon in *Incremona–Salerno Marmi Affini Siciliani (I.S.M.A.S.) s.n.c. v.*

"Castor" (The), 2002 FCA 479, [2003] 3 F.C. 220, do not stand for the proposition that section 46 requires Canadian courts to hear the case on the merits.

[29] In *OT Africa*, the Canadian agent of the English carrier issued a bill of lading covering a shipment from New York to Monrovia, Liberia via Le Havre. The cargo out-turned in damaged condition. The connections with Canada were that the carrier had an agency here and that the contract was made here. The cargo underwriters were also here. These are not the connecting factors before me. I am basing myself on the fact that the intended port of discharge, New Westminster, is in Canada. It could possibly have been argued that the defendants have an agency here. However, I think it right that Mazda did not take up that point.

[30] OT Africa responded to the Canadian action by obtaining an anti-suit injunction in the United Kingdom. That anti-suit injunction weighed heavily in Mr. Justice Evans' reasons for granting a stay. He held that section 46 did not rule out considerations of comity and the practical problems to which parallel proceedings may give rise.

[31] He said at paragraphs 79 through 81:

> [79] The principal policy objective of section 46 is the protection of the interests of Canadian exporters and importers, and, I would add, their insurers, by diminishing or eliminating the legal effect of a contractual clause requiring them to litigate any dispute in a foreign forum. The legislative record does not suggest that Parliament was also concerned to protect the interests of Canadian insurers when insuring non-Canadian goods shipped from and to ports outside Canada by non-Canadian shippers.

> [80] While section 46 preserves the jurisdiction of Canadian courts in proceedings brought by foreign shippers and consignees, it does not follow that, in deciding whether to exercise its jurisdiction, a court should depart from its normal practice of affording respect to foreign judgments. On the facts of the present case, including the dominant role being played in the litigation by the Canadian insurers of the cargo, it would not frustrate Parliament's purpose to take the English judgments into account in the course of determining the more convenient forum.
>
> [81] In short, section 46 does not expressly provide that, when determining whether it is the more convenient forum, a Canadian court in which a claimant elects to proceed should assign no weight to the assertion of jurisdiction by a foreign court, which it has supported by an anti-suit injunction. Nor can it be said that Parliament implicitly so directed in a fact situation such as this, where, to give a foreign judgment weight, would not frustrate the policies underlying section 46.

[32] However, he went on to speculate that the assumption of jurisdiction by a foreign court, the court chosen in the contract, might not be a relevant factor in a *forum non conveniens* analysis if the shipper, the consignee or the goods were Canadian. He said at paragraph 88:

> [88] For the purpose of disposing of this appeal, I need not decide whether the assumption of jurisdiction by the English courts and the parties' choice of an exclusive forum should be regarded as not only relevant factors in the *forum conveniens* analysis, but also virtually conclusive. Nor do I have to decide whether these factors should be given weight when the shippers, the consignees or the goods are Canadian. However, I am inclined to think that they should not, since that would permit litigants to frustrate the policy of section 46 of protecting Canadian exporters and importers, by instituting proceedings in the forum specified in the contract.

FACTORS TO BE CONSIDERED

[33] In addition to such factors as set out in the *Eleftheria* and *Spar Aerospace*, the decisions in *OT Africa* and in *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, 2001 SCC

90, [2001] 3 S.C.R. 907, require me to consider Canadian public policy. Although falling within the heading of the location of the defendants' assets, the action *in rem* also deserves special mention. Finally, after reflecting upon the decision of the House of Lords in the *Morviken*, [1983] 1 Lloyd's Rep. 1, I will also take the Tokyo jurisdiction clause into account.

[34] The first step is to determine whether there is a natural forum. In my opinion there is not. There are three, if not four, jurisdictions that have a real and substantial connection with this case: Canada, Japan, Singapore, and perhaps the United States.

[35] The next question is whether Japan is clearly a more appropriate forum than Canada. I consider the following factors fairly neutral:

a. the residence of the parties and their witnesses
b. the location of the evidence;
c. the place where the contract was negotiated and executed;
d. the location of the defendants' assets
e. the applicable law; and
f. the need to have the judgment recognized in another jurisdiction.

[36] Both Mazda and Mitsui are multi-national Japanese controlled enterprises. Mazda has at least 58 foreign subsidiaries. Mazda Canada, a Canadian corporation, is one of them. Sixty percent of its shares are held by Mazda Motor Corporation of Japan (Mazda Japan), and the other 40% by the Japanese shipper, Itochu. The fact that some 30% of Mazda Motor Corporation is in

turn owned by the Ford Motor Company shows just how international the automotive business is. Mazda Canada's underwriters are American, based in Philadelphia. However, insurance does not cover the full extent of the loss.

[37] Mitsui is no less international. Through a Singaporean subsidiary, it owns 70% of the shares of the shipowning company MOB COUGAR (PTE) LTD. The other 30% are owned by Singapore Shipping Corporation, an independent Singaporean company. The owners have a ship management agreement with Seatrade Ship Management (PTE) Ltd. also of Singapore. Seatrade provides, among other things, crew management services and hired the Cougar Ace's Master, officers and crew. The crew is all non-Japanese, comprising citizens of Singapore, Myanmar and the Philippines. In other words, Mitsui flagged out.

[38] Mazda's and Mitsui's international business arrangements are perfectly legitimate. There is no reason for me to pierce the corporate veil.

[39] Although the contract was made in Japan, it was largely carried out on the high seas.

[40] The Cougar Ace was built in Japan to the standards of the Japanese Classification Society, Nippon Kaiji Kyokia, and is maintained in that class. Both her hull and machinery and protection and indemnity underwriters are Japanese. She underwent a dry docking in Japan shortly before the fateful voyage.

[41] The working language of the Cougar Ace is English. Although built in Japan, all ship drawings and manuals are in English. None of the crew speaks Japanese. They would likely testify in a number of languages including English and Burmese.

[42] Mazda Canada would have few witnesses of its own. Once it proves its interest in the goods and its damages, the burden shifts to the defendants. Damages would be proved by engineers in the employ of Mazda U.S.A. and Mazda Japan, American quality control experts and Canadian and American surveyors.

[43] The defendants will have to deal with the seaworthiness of the Cougar Ace, and the diligence which was exercised to make her so. To the extent the physical condition of the ship is in issue; as to her construction, maintenance and recent dry docking, evidence would be led from both Japan and Singapore. Following the loss, the ship was inspected by experts from Japan, Singapore, the United States and the United Kingdom. To the extent salvage is in issue, the salvors are based in the United States.

[44] If the mishap occurred as a result of crew error, the witness base is definitely in Singapore. Mitsui has pointed the finger at the chief officer, who is Singaporean. As aforesaid, to the extent the crew is not from Singapore, it is from Myanmar and the Philippines, not Japan.

[45] The material evidence is in documentary form, and can be transported anywhere.

[46] Although Mitsui obviously has assets in Japan, there is no evidence that it does not have assets elsewhere. Mazda Canada was in position to arrest the Cougar Ace in Portland. In consideration of it not doing so it was given a P&I Club Letter of Undertaking, a letter it chose not to act upon. There is no evidence that it would be unable to execute judgment in Canada, or in the United States.

[47] Although the applicable law is Japanese, as Mr. Justice Brandon noted in the *Eleftheria*, above, the real question is whether that law differs from Canadian law. The parties filed affidavits from prominent Japanese attorneys. Japan gives effect to the *Hague-Visby Rules*; so does Canada. Japan gives effect to the *Convention on Limitation of Liability for Maritime Claims*, 1976; so does Canada. However, and this is most important, at the time of the casualty Japan did not give effect to the 1996 *Protocol;* Canada did. Japan does so now, but the uncontested evidence is that the Japanese Court would apply the 1976 *Convention.* Canada, however, would apply the 1996 *Protocol*, which more than doubles the limit of liability.

[48] This leads me to the remaining factors: the advantages conferred upon the plaintiff by its choice of forum, the interests of justice including international comity and public policy, the action *in rem*, the interests of the parties and the forum selection clause.

JURIDICAL ADVANTAGE

[49] Mazda Canada gains a potential financial advantage of about $1,500,000 if the action continues here. Under both the *Hague-Visby Rules* and the 1976 *Limitation Convention*, the

defendant owner and charterer will be entitled to limit their liability, if any, unless it is "…proved that the loss resulted from [their] personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result." The burden falls upon the cargo interests, and it is a most difficult burden to overcome.

[50] In both Canada and Japan, if the defendants are liable at all, that liability would likely be limited by application of the *Hague-Visby Rules*. However, in Japan, unlike Canada, that limited liability would be further reduced by application of the 1976 *Convention.*

[51] The *Hague-Visby Rules* would likely limit Mazda Canada's recovery to US$5,985,023. Damages are limited to two Special Drawing Rights of the International Monetary Fund per kilo, or currently about US$3.06 per kilo, for each of the 1,955,890 kilos. By the same token, the Mazda USA cargo weighed 5,249,560 kilos, which gives a *Hague-Visby* limit of US$16,063,653. Leaving aside the Isuzu trucks, the Defendants' potential liability with respect to the full cargo of 4,813 Mazda automobiles is thus limited to US$22,048,676 ($5,985,023 plus 16,063,653).

[52] The Convention Limitation Fund is calculated on the tonnage of the ship and places a global limitation on liability with respect to all cargo claims arising from the same incident.

[53] Mazda Canada calculated the Cougar Ace's tonnage limitation fund in Canada as US$29,190,916 under the 1996 *Protocol*, while in Japan it would only be US$12,178,302. Although the fund can only be calculated with precision once a limitation action has been taken,

and none has, the point is that in Canada, Mazda's recovery would only be restricted by the *Hague-Visby Rules*. The principal amount of its recovery, subject to proving damages, would be US$5,985,023. In Japan, however, that limited recovery would in turn be pro-rated down by application of the 1976 *Convention* to approximately US$4,537,412, a shortfall approaching $1,500.000.

[54] However, I do not infer that the defendants are looking to Japan simply in order to lessen their liability. On the contrary, their position is that the *Hague-Visby Rules* fully exonerate them from liability irrespective of the forum in which the case is heard.

[55] The weight to be given to juridical advantages has been the subject of considerable commentary over the past 30 years. In *MacShannon v. Rockware Glass Ltd.*, [1978] A.C. 795, [1978] 1 All E.R. 625, Lord Diplock said two conditions had to be met to justify a stay; one positive, the other negative. The first was that the defendant had to satisfy the Court that there was a more appropriate forum. The second was that the stay must not deprive the plaintiff of a legitimate personal or juridical advantage. However, in both the *Spiliada* and *Anchem*, above, it was held that personal and juridical advantages did not have pride of place, and were not necessarily more important than other factors.

[56] However, a financial advantage should not be downplayed, particularly in actions *in rem*. Although the action *in rem* has not been perfected by service, that is because the Cougar Ace has not called at a Canadian port. Although Mazda Canada casts no aspersions upon the defendants

in this regard, the fact remains that the decision to proceed from Dutch Harbor to Portland, rather than to New Westminster, deprived it of Canadian security.

INTERNATIONAL COMITY AND THE ACTION *IN REM*

[57] This brings me to *Holt Cargo Systems Inc.*, above, which is instructive both in terms of the classic admiralty action *in rem* and international comity. In that case, an American necessaries man brought an *in rem* action in the Federal Court against a Belgian ship, and arrested her in Halifax. Shortly thereafter, the Belgian shipowner made an assignment in bankruptcy in Belgium. This case, as well as the related case of *Antwerp Bulkcarriers, N.V. Re*, 2001 SCC 91, [2001] 3 S.C.R. 951, gave rise to a myriad of proceedings in Canada. What interests us, however, is the trustees' application for a stay of Holt's action on the ground of *forum non conveniens*.

[58] The only connection with Canada was the presence of the ship here. Belgium, on the other hand, was where the shipowner was headquartered. In no way could it have been considered a flag of convenience.

[59] The advantage to Holt in Canada was that its claim would likely be treated as a maritime lien, which would give it secured status unaffected by the bankruptcy. In Belgium the claim would be treated as an ordinary claim with the prospects of a dividend being dim indeed. Mr. Justice MacKay refused to grant a stay. His decision was upheld both by the Federal Court of Appeal and by the Supreme Court.

[60] Speaking for that Court, Mr. Justice Binnie said at paragraphs 93 and 94 that the: “real and substantial connection” test must take into account the special lifestyle of ocean-going freighters. As to the allegation that Holt was engaged in “forum shopping”, he referred to the following passage from Lord Simon in the *Atlantic Star (The),* [1974] A.C. 436, [1973] 2 All E.R. 175, quoted by Mr. Justice Ritchie in *Antares Shipping Corp. v. “Capricorn”*, [1977] 2 S.C.R. 422;

> ‘Forum-shopping’ is, indeed, inescapably involved with the concept of maritime lien and the action in rem. Every port is automatically an admiralty emporium. This may be very inconvenient to some defendants; but the system has unquestionably proved itself on the whole as an instrument of justice.

[61] In *Holt*, unlike *Antares* and *Anchem*, there were public policy concepts at stake. The Court had to consider the level of “deference and respect” which was owed to the Belgian Bankruptcy Court. There were three approaches to international bankruptcies: universalism, pluralism and territorialism. The trustees advocated a “universalist approach” because it was in their interest to do so, acting on behalf of the unsecured creditors. Obviously Holt had to take up the “territorialist approach” if it was going to be paid in full, or perhaps at all. This led Mr. Justice Binnie to say at paragraph 88: “the dollars and cents issue in this case should not be obscured entirely by the scholarly debate between universalists, pluralists and territorialists.”

[62] There are public policy issues at stake in this case as well. Freedom of contract is subordinated to the will of the state. A domestic carrier doing business within Canada, or a foreign carrier doing business with Canada, cannot circumvent Canadian law simply by inserting

a foreign forum selection clause in the bill of lading, and then moving that foreign court for a negative declaration of liability.

[63] Mitsui suggests that section 46 flies in the face of international comity. I disagree. The *Hague-Visby Rules* do not deal with jurisdiction. The *Hamburg Rules*, a convention designed to replace *Hague-Visby*, do. The *Hamburg Rules* were enacted and form part of the *Marine Liability Act*, but have not been proclaimed in force. It may well be, as Mitsui suggests, that the *Hamburg Rules* may never gain general acceptation and may never come into force here. Nevertheless, a number of countries, including Canada, which do not give effect thereto have enacted jurisdictional provisions inspired therefrom. Mr. Justice Evans surveyed the field in *OT Africa*. He pointed out that Australia, New Zealand, South Africa, Denmark, Finland, Norway, Sweden and The People's Republic of China have enacted provisions similar to section 46. Indeed, the *Australian Carriage of Good by Sea Act, 1991* and the *New Zealand, Maritime Transport Act, 1994* strike down exclusive foreign jurisdiction clauses as null and void.

[64] All this is to say that section 46 of the *Marine Liability Act* does not make Canada an international pariah. Before leaving the topic of international comity, it should be emphasized that in this case, unlike *OT Africa*, the Japanese courts have not issued an anti-suit injunction. Although the opinion has been offered that the Japanese courts will take jurisdiction, they apparently will do nothing to impede the Canadian action. Nor is Mazda seeking an anti-suit injunction.

[65] These last mentioned factors all weigh in favour of Canada, the plaintiff's choice of forum. The discovery process may be better here, but I will simply say it does not favour Japan.

[66] I do not consider it particularly relevant whether the Mazda U.S.A. claim continues in the U.S.A. or proceeds in Japan. It is noteworthy that the U.S. does not have a section 46. As a matter of interest, Canada and the United States have changed positions. Their position is akin to ours before the *Marine Liability Act*, and ours is like theirs before the decision of their Supreme Court in *Vimar Seguros y Reaseguros S.A. v. M/V Skey Reffer*, 515 U.S. 528 (1995); 1995 AMC 1817.

THE JURISDICTION CLAUSE

[67] I turn now to the jurisdiction clause. The contract cannot be read as if it were not there. Indeed, it might be that if the other factors taken as a whole favoured Japan, a Japanese jurisdiction clause, as opposed to some other foreign jurisdiction clause, might clearly make Japan the more appropriate forum. However, for the reasons aforesaid, that is not the case here.

[68] The situation before me differs from that before the House of Lords in the *Morviken*, above. Cargo had been taken onboard in the United Kingdom for through carriage to the Netherland Antilles. The bill of lading called for Netherlands law and jurisdiction. At the time the United Kingdom had given effect to the *Visby* amendments to the *Hague Rules* while the Netherlands had not yet. Under the laws of the United Kingdom, the *Hague-Visby Rules* were compulsory applicable. The limitation of liability under the *Hague-Visby Rules* was much higher

than under the *Hague Rules*. Lord Diplock held that the bill of lading was to be read as if it contained neither a proper law, nor a forum selection clause. However, in this case, unlike in the *Morviken,* section 46 of the *Marine Liability Act* does not have the effect of rendering either the proper law clause or the forum selection clause null and void.

[69] Since the jurisdiction clause is not illegal here, it should not be ignored, but little weight can be given to it in the light of Canada's public policy as enunciated in section 46. Certainly, it does not tip the scales in Japan's favour.

[70] In summation, the effect of section 46 of the *Marine Liability Act* is to deem that a case has a real and substantial connection with Canada should one of the factors therein be present. Canada has a real and substantial connection with this case because New Westminster was the intended port of discharge. The plaintiff is entitled to select its forum. It has not been clearly established that Japan would be a more appropriate forum.

ORDER

THIS COURT ORDERS that the motion of Mitsui O.S.K. Lines Co. Ltd. and MOB Cougar (PTE) Ltd. to stay this action is dismissed with costs.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1844-06
STYLE OF CAUSE:	*MAZDA CANADA INC. v. MITSUI O.S.K. LINES CO. LTD. MOB COUGAR (PTE) LTD., THE SHIP "COUGAR ACE", HER OWNERS AND ALL OTHERS INTERESTED IN HER, NYI NYI TUN, YUE YEW LOON AND THAUNG HTUT MAUNG*
PLACE OF HEARING:	Vancouver, British Columbia
DATES OF HEARING:	August 15-16, 2007
REASONS FOR ORDER AND ORDER:	HARRINGTON J.
DATED:	September 14, 2007

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