Federal Court  Cour fédérale

Date: 20100827

Docket: T-2152-09

Citation: 2010 FC 853

Vancouver, British Columbia, August 27, 2010

PRESENT: The Honourable Mr. Justice Harrington

SIMPLIFIED ACTION

ADMIRALTY ACTION *IN PERSONAM* AGAINST DOLPHIN LOGISTICS COMPANY LTD., BLUE ANCHOR LINE, A DIVISION OF TRANSPAC CONTAINER SYSTEM LTD., KUEHNE & NAGEL LTD. AND KUEHNE & NAGEL INC.

BETWEEN:

HITACHI MAXCO LTD. and RICH PALM ENTERPRISE CORPORATION LTD.

Plaintiffs

and

DOLPHIN LOGISTICS COMPANY LTD., BLUE ANCHOR LINE, A DIVISION OF TRANSPAC CONTAINER SYSTEM LTD., KUEHNE & NAGEL LTD. and KUEHNE & NAGEL INC.

Defendants

REASONS FOR ORDER AND ORDER

[1] The issue before the Court is whether an admiralty action instituted in Canada *in personam* by two foreign corporations against four foreign corporations for loss overboard of cargo shipped

from one foreign port and intended for discharge and delivery in another foreign jurisdiction should be stayed in favour of still another jurisdiction, the jurisdiction stipulated in the Bill of Lading. In my opinion, the Defendants have not made out that there is a more convenient forum and so I dismiss their motion with costs.

[2] This is the latest in a series of cases dealing with the power of this Court to stay actions in accordance with s. 50 of the *Federal Courts Act* and the extent to which that discretion was affected by Parliament's enactment of s. 46(1) of the *Marine Liability Act* in 2001.

[3] Briefly put, s. 50(1) of the *Federal Courts Act* authorizes this Court in its discretion to stay proceedings on the ground that the claim is being proceeded with in another jurisdiction or for any other reason in the interest of justice. Section 46(1) of the *Marine Liability Act* provides that:

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	a) le port de chargement ou de déchargement — prévu au contrat ou effectif — est

under the contract, is in Canada;	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.

[4] Hence, in contracts of affreightment to which the *Hamburg Rules* do not apply (as in this case), the claimant may institute proceedings in Canada notwithstanding a foreign jurisdiction clause if the actual or intended port of loading or discharge is in Canada, if the defendant resides, has a place of business, branch or agency in Canada, or if the contract was made here.

I. The Facts

[5] The Record which is somewhat sparse, and perhaps understandably so, considering that this is a Simplified Action with respect to a claim for less than $50,000, is that the plaintiff Rich Palm Enterprise Corporation Ltd. of Taiwan sold a cargo of what is described as roller chains and parts to its co-plaintiff Hitachi Maxco Ltd. of Kennesaw, Georgia, U.S.A. The invoice indicates that the goods were intended to be shipped on the YM Prosperity from Kaohsiung City, Taiwan to Portland, Oregon.

[6] Kuehne & Nagel Ltd., said by the Moving Parties to be a Taiwanese company, but with evidence on file that it also has an office in Montréal, as agent for Blue Anchor Line, issued a non-

negotiable Bill of Lading in Taiwan which identifies the shipper as Rich Palm Enterprise Corporation Ltd. and the consignee as Hitachi Maxco Ltd. The cargo was described as 168 cartons of roller chains and parts contained within 8 pallets and loaded in a container. This was a combined transport Bill of Lading indicating that the port of loading was Kaohsiung City, the port of discharge Tacoma, Washington and the place of delivery Portland.

[7] The terms and conditions of a bill of lading are not necessarily the terms and conditions of the contract of affreightment as the bill is issued after that contract was made. However absent evidence to the contrary, there is a presumption that the bill evidences the terms and conditions of the contract. The only other possibility in this case would be the terms and conditions of a subsequent freight invoice on which more will be said. In my opinion, the bill of lading trumps.

[8] The Bill of Lading identifies Blue Anchor Line, a division of Transpac Container System Ltd., of Hong Kong as the carrier.

[9] Blue Anchor Line did not hold itself out as being the owner of the YM Prosperity. Indeed it undertook either to perform or to procure the performance of transport, and apparently did the latter. This is a clear indication that it was acting as a Non-Vessel Owning Common Carrier (NVOCC).

[10] The Bill of Lading calls for the application of Hong Kong law and for Hong Kong jurisdiction, except as regards the performance of carriage itself. The Bill of Lading was obviously designed to cover worldwide trade. It stipulates that liability is to be determined in accordance with

any national law making the *Hague Rules*, or the *Visby Protocol* thereto, compulsory applicable or if no such law is compulsory applicable then in accordance with the *Hague Rules* as contained in the *Brussels Convention* of 1924. No evidence was led as to the state of Hong Kong or Taiwanese law. However, more specifically in the event of a shipment to or from the United States, the shipment was contractually, if not legally, subject to the *Hague Rules* as enacted in the U.S. *Carriage of Goods by Sea Act, 1936* (COGSA).

[11] Kuehne & Nagel Ltd. in turn confided the cargo to co-defendant Dolphin Logistics Company as carrier. Its Bill of Lading shows Kuehne & Nagel Ltd. as shipper and Kuehne & Nagel Inc. of the United States as consignee. These two companies are described as agents of Blue Anchor Line. The face of the Dolphin Bill of Lading goes on to provide that application for delivery of the cargo should be made to Shipco Transport Inc. of Tukwila, Washington. The terms and conditions of that Bill are not in the motion record before me.

[12] Later, Kuehne & Nagel Inc. invoiced Hitachi Maxco Ltd. for freight and related charges. According to the terms and conditions pertaining thereto, Kuehne & Nagel Inc. was purportedly acting as agent for Hitachi Maxco Ltd. for the purpose of performing duties in connection with the customs entry and release of goods. The terms and conditions of this contract are to be construed according to the laws of the State of New York with irrevocable jurisdiction given to the U.S. District Court and the State Courts of New York.

[13] To round out the relevant documents, Hanjin Shipping Co. Ltd. (a well-known firm whose precise role in this affair is not set out) wrote to Shipco Transport Inc. to say that it had been informed by Yang Ming Marine Transport, "the owners/operators" of m/v YM Prosperity, that the ship had encountered heavy weather and that the container in which the cargo was stowed was lost overboard or heavily damaged. Shipco Transport Inc. passed on that message the following day. In their affidavit in support of the stay, the Defendants state that the container was lost overboard.

[14] Thereafter, Hitachi Maxco Ltd. and Rich Palm Enterprise Corporation Ltd. filed a Statement of Claim in the Federal Court against Dolphin Logistics Company Ltd., Blue Anchor Line, Kuehne & Nagel Ltd. and Kuehne & Nagel Inc., alleging that all of them were the "operators, managers, charterers and utilisers" of the YM Prosperity and carriers. The usual allegations that the defendants had failed to safely load, stow, handle, carry, care for, discharge, store and deliver the plaintiffs' cargo were advanced. They also alleged that they were in breach of contract, obligations imposed by law and were concurrently liable in tort.

[15] Dolphin Logistics was served at Shipco Transport Inc.'s offices in Lachine, Quebec. It did not cause a Statement of Defence to be entered, and judgment was rendered against it by Prothonotary Morneau. Presumably, the plaintiffs have not collected.

[16] The other defendants, the Moving Parties in the motion before me, were all served at the offices of Kuehne & Nagel Ltd. in Montréal. The service on Kuehne & Nagel Ltd. was service effected at one of its offices and is clearly valid. The plaintiffs claim that Kuehne & Nagel Ltd.

is the agent of Kuehne & Nagel Inc. and of Blue Anchor Line, neither of whom it must be said is Canadian. Federal Courts Rule 130 allows personal service on a corporation by leaving the document with the person apparently in charge of the branch or agency in Canada where service was effected. The validity of that service is not before me. As the Moving Parties state in their Notice of Motion "notwithstanding the issue of whether or not service of the Statement of Claim was properly effected on all the defendants, these defendants wish to object to the jurisdiction of the Federal Court." They seek a stay in favour of Hong Kong, or alternatively New York.

II. Jurisdiction of the Federal Court

[17] The Federal Court, unlike the Provincial Superior Courts, is a statutory Court organized by Parliament pursuant to s. 101 of the *Constitution Act, 1867*. It has jurisdiction over the subject matter of an action only if the dispute pertains to a federal, as opposed to a provincial, legislative class of subject, there is federal law on point, be it statute, regulation, common law, Canadian maritime law or otherwise, and the administration of that law has been conferred upon it (*ITO – International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752 (The Buenos Aires Maru)).

[18] It is not disputed that a claim for loss or damage to cargo pertains to the federal legislative class of subject of navigation and shipping (*Constitution Act, 1867*, s. 91(10)), that both subject matter and juridical jurisdiction have been confided upon the Federal Court in accordance with the definition of Canadian Maritime Law and s. 22(2) of the *Federal Courts Act*, and that there is

federal law to administer (*Sivaco Wire & Nail Co. et al. v. Tropwood A.G. et al.*, [1979] 2 S.C.R. 157).

[19] There is no geographical limitation on this subject matter jurisdiction. It matters not that the cargo was not shipped from, nor intended to be shipped from, nor received at, nor intended to be received at a Canadian port (*United Nations and Food and Agriculture Organizations of the United Nations v. Atlantic Seaways Corporation and Unimarine S.A.*, [1979] 2 F.C. 541 (FCA)).

[20] Thus, without taking into account s. 46 of the *Marine Liability Act*, this Court has jurisdiction over the defendants if they were properly served. The *Federal Courts Rules* provide that a Statement of Claim is to be personally served. They were purportedly personally served within Canada. Despite their mumblings, the Defendants have not moved to have the service set aside and so I shall act on the assumption that service was valid. Certainly if defects of this nature are to be relied upon they should be acted upon promptly.

[21] The jurisdiction of this Court both over the subject matter of the action and over the defendants does not in any way derive from s. 46(1) of the *Marine Liability Act*. One may always institute an admiralty action in the Federal Court which has absolutely no connection with Canada save that the defendants were served in Canada *in personam* or *in rem* (*Antares Shiping Corp. v. The Ship "Capricorn" et al.*, [1980] 1 S.C.R. 553; *Holt Cargo Systems Inc. v. ABC Container Line N.V. (Trustees of)*, 2001 SCC 90, [2001] 3 S.C.R. 907). The issue is whether the Court should maintain jurisdiction and hear the case on the merits or rather defer to some other Court. It is in that

context that s. 46(1) must be considered and read in conjunction with s. 50(1) of the *Federal Courts Act*.

[22] The international regime covering carriage of cargo under bills of lading to which Canada adheres is the *Hague Rules* with the *Visby Protocol*. These rules are set out in Schedule 3 of the *Marine Liability Act*. They do not compulsorily apply to import shipments. The *Hamburg Rules* have also been enacted in Canada and are to be found in Schedule 4 of the Act. However they have not been proclaimed in force. The *Hague-Visby Rules* have no jurisdictional provisions. The *Hamburg Rules* do, as set forth in article 21 thereof. However since no evidence has been led that they are applicable in the other jurisdictions to which this case has some contact, Taiwan, Hong Kong and the United States, I will not consider whether Canada would maintain jurisdiction over the defendants if they were applicable.

[23] It must be remembered that this Court in its discretion always had jurisdiction to proceed to hear a case on the merits notwithstanding a foreign forum selection clause. On this point see *The Eleftheria*, [1969] 1 Lloyd's Rep. 237, [1969] 2 All E.R. 641, fully approved by the Supreme Court of Canada in *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450. However, the jurisprudence, particularly in Canada, had developed such that a Court which otherwise had jurisdiction should in its discretion grant a stay in the light of a foreign forum selection clause. In reality Canadian proceedings would almost automatically be stayed unless the plaintiff would be unlikely to get a fair trial for political, racial, religious or other reasons. There is no suggestion that the plaintiffs would not get a fair trial in Hong Kong or in the United States.

[24] In *Amchem Products Incorporated v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, at pages 911-912, Mr. Justice Sopinka recognized that modern business transactions and the resolution of disputes arising therefrom often transcend domestic jurisdictions:

> 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.

[25] He continued at page 921:

> [...] 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.

[26] The plaintiffs submit that since the defendants invoke Hong Kong and New York jurisdiction in the alternative, there clearly is no more suitable forum than Canada. However, I place little value on the New York jurisdiction clause set out in the freight invoice. It was issued after the Bill of Lading and covers Kuehne & Nagel Inc.'s activities as an agent for the cargo interests. It is being sued, rightly or wrongly, as a carrier. Furthermore, that jurisdiction clause would not benefit the other Moving Parties.

[27] In this case, based on the allegations that the defendants are carriers, and given that the cargo was not delivered in sound order and condition, the burden of proof to establish absence of liability falls upon them.

[28] They have not identified the evidence they wish to bring forward in defence, or the witnesses they need. The Court has not been told who owns the ship and whether it was on charter. If on charter, is there a charter party by demise, one or more time charters, and who was responsible for stowage? Where are the crew members to be located? How was the container secured on deck? Did eye-pads give way? Is there any evidence left? Have master mariners, naval architects, metallurgists, surveyors and weather experts been retained? If so, by whom, and where are they to be found? Are there any gaps or unexplained areas in Hong Kong law, or in the *Hague Rules* as applied by U.S. courts? Both jurisdictions are in the common law tradition. There is no evidence that anyone involved in the loading, stowing or carriage of the cargo lives in Hong Kong. Indeed as a NVOCC, presumably Blue Anchor Line had no physical involvement whatsoever. At most it may have retained an agent to stuff the container in Taiwan.

III. Section 46 of the *Marine Liability Act*

[29] The language of s. 46 is somewhat convoluted. On the facts of this case, it provides that notwithstanding a foreign jurisdiction clause, the plaintiffs may institute proceedings in Canada, as if the contract had referred the claim to Canada, since the defendants have an agency here. However, as previously discussed, the real issue is whether the Federal Court should maintain jurisdiction, *i.e.*, to use the words of s. 46, to "determine" the claim on its merits.

[30] Section 46 first came to the attention of the Federal Court of Appeal 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. That case dealt with a shipment from Italy to Canada under a Bill of Lading which provided for German jurisdiction. The section came into force after the cause of action arose, but before the defendants' stay motion was heard. It was held that the section did not have retroactive effect. However, Mr. Justice Nadon opined at paragraph 13:

> The effect of the subsection is to remove from this Court its discretion under section 50 of the Federal Court Act to stay proceedings on the ground of a jurisdiction or arbitration clause where the requirements of paragraphs 46(1)(a), (b) or (c) are met. In the case at bar, if the Motion judge is correct in his view of the matter, paragraph 46(1)(a) would prevent the appellants from obtaining a stay based on clause 25 of the bill of lading, since the port of discharge was the port of Halifax. Consequently, if subsection 46(1) applies to these proceedings, the appellants' stay applications will likely be dismissed.

[31] In the *ECU-Line* case referred to above, Mr. Justice Bastarache in another *obiter* statement was also of the view that s. 46(1) had the effect of removing from the Federal Court its power under s. 50 of the *Federal Courts Act* to stay proceedings in light of a forum selection clause if the requirements of s. 46(1) were met. He stated at paragraph 38:

> Indeed, s.46(1) would appear to establish that, in select circumstances, Parliament has deemed it appropriate to limit the scope of foreign selection clauses by facilitating the litigation in Canada of claims related to the carriage of goods by Canada having a minimum level of connection to this country.

[32] However by the time the Federal Court of Appeal came to grips with a shipment subsequent to the enactment of s. 46, these *obiter* remarks were not followed. In *Magic Sportswear Corp. v. OT*

Africa Line Ltd., 2006 FCA 284, [2007] 2 F.C.R. 733, the Court was dealing with a claim for damage to cargo carried from New York to Liberia under a Bill of Lading calling for English jurisdiction, the jurisdiction where the defendant had its principal place of business. The Canadian connection was that the contract was made here, where the carrier had a branch office. The Court was also faced with the fact that the carrier had commenced proceedings in the High Court in London claiming damages for breach of the jurisdiction clause and had obtained an anti-suit injunction.

[33] At paragraphs 33 and 34, Mr. Justice Evans distinguished *ECU-Line* and *The Castor* as follows:

> Although the meaning of these passages may not be beyond dispute, I do not agree with counsel's interpretation of them. In my view, Justice Bastarache was saying that, when one of the statutory conditions for jurisdiction is satisfied, subsection 46(1) removes the court's discretion to stay proceedings solely because of a foreign forum selection clause. Justice Bastarache was thus not addressing the question in our case, namely, whether subsection 46(1) also removes the Court's discretion to order a stay when, taking all relevant considerations into account, it is not the more convenient forum.
>
> I interpret in the same manner the passage in the reasons given for this Court by Nadon J.A. *in Incremona-Salerno Marmi Affini Siciliani (I.S.M.A.S) s.n.c. v. Castor (The)*, [2003] 3 F.C. 220, 2002 FCA 479 at para. 13 and referred to above by Justice Bastarache.

[34] Taking into account that the shippers, consignees, the cargo and the ports of loading and discharge had no connection with Canada and that some respect had to be given to the English courts anti-suit injunction, he granted a stay. He also referred to the principal policy objective

of s. 46 as being the protection of the interest of Canadian exporters and importers, a policy not stated in the section itself. He concluded at para. 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.

[35] There is no evidence before me that the defendants have instituted proceedings in Hong Kong, New York or anywhere else for that matter.

[36] The most recent decision of the Federal Court of Appeal is *Mazda Canada Inc. v. Mitsui O.S.K. Lines, Ltd.*, 2008 FCA 219, [2009] 2 F.C.R 382 (*The Cougar Ace*). That case concerned a shipment of automobiles from Japan intended for discharge in New Westminster, British Columbia. *The Cougar Ace* suffered a severe list during the voyage. The cargo was never actually delivered in Canada but rather was delivered in the United States.

[37] The Canadian connections were that the plaintiff cargo owner was Canadian, which is not one of the Canadian factors listed under s. 46(1), and that the intended port of discharge was Canadian. The Bill of Lading was issued in Japan and called for Japanese law and jurisdiction. Both I, as the motion judge, who dismissed the carriers motion for a stay, and the Federal Court of Appeal which came to a different conclusion (perhaps to some extent based on additional

evidence of Japanese law which was not before me) considered non-exhaustive *forum non conveniens* factors recognized by the Supreme Court of Canada, as well as other factors. As Mr. Justice Linden noted at para. 11:

> The trial Judge correctly understood these principles and sought to apply them, taking into account the established law governing the issue of forum non conveniens derived from *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [2002] 4 S.C.R. 205 (relying on the Quebec Court of Appeal decision *Lexus Maritime Inc. c. Oppenheim Forfait GmbH*, [1998] A.Q. No. 2059 (QL)). That case set out a non-exhaustive list of 10 factors to be weighed by the Court in making this determination [at paragraph 18]:
>
> > (1) the parties' residence, and that of witnesses and experts;
> > (2) the location of the material evidence;
> > (3) he place where the contract was negotiated and executed;
> > (4) the existence of proceedings pending between the parties in another jurisdiction;
> > (5) the location of the defendants' assets;
> > (6) the applicable law;
> > (7) advantages conferred upon the plaintiff by its choice of forum, if any;
> > (8) the interests of justice;
> > (9) the interests of the parties;
> > (10) the need to have the judgment recognized in another jurisdiction.

[38] However, the Court of Appeal was of the view that the motion judges' discretion was flawed by undervaluing the parties' residence and that of witnesses and experts, the existence of proceedings in another jurisdiction and the applicable law.

[39] It was held that the motion judge should have taken into account that the carrier had instituted proceedings in Japan for a declaration of non-liability. This was identified as "the most

significant factor that affects this Court's decision." The residence of the parties, witnesses and experts was also undervalued. Those witnesses would be from Japan, the United States, Singapore, Myanmar and the Philippines, not from Canada. Most of the witnesses would likely be from Japan. The motion judge played down foreign law on the basis that he was unaware of any differences between Japanese and Canadian law (both of which gave effect to the *Hague-Visby Rules*). However as noted by Mr. Justice Linden at para. 19:

> […] There are, in this case, complicated legal questions that have not yet been resolved in Japan that should be decided in this litigation: the issue of due diligence in relation to the seaworthiness of the vessel prior to the voyage and its relationship to the issue of the defence of error in the management of the vessel under the Hague-Visby Rules. The legal treatment of the limitation clause with regard to the amount of damages must be unravelled. By handling these issues in Japan in Japanese by Japanese judges and lawyers a more accurate picture of the complex legal issues of Japanese law will emerge. This would be preferable to dealing with these matters by affidavits translated into English, by Judges totally unaware of the actual Japanese jurisprudence and its legal system. […]

[40] Thus it was found that there was a wealth of evidence in *The Cougar Ace* pointing to Japan. In the present case, Blue Anchor Line has not set out any advantage to proceeding in Hong Kong (I discount New York) other than it is its home jurisdiction. Furthermore, a fresh action would likely be time barred in virtue of the one-year limitation set forth in the *Hague Rules.* Certainly there is no offer in the record to extend time.

[41] As stated in the Bill of Lading, U.S. COGSA gives effect to the *Hague Rules*. So does Canada but now with the addition of the *Visby Protocol*. There is no evidence in this case, unlike in *The Cougar Ace*, that U.S. law is undeveloped when it comes to applying the *Hague Rules*. If U.S.

COGSA has to be proved as a fact, it has to be proved just as much in Hong Kong as in Canada. No suggestion has been led that U.S. law differs from Canadian law except for the customary freight unit limitation of liability as indeed expressly stated in the Bill of Lading. Both Canadian and U.S. law derive from the *Brussels Convention* of 1924.

[42] As noted by Lord Macmillan in *Stag Line Ltd. v. Foscolo, Mango & Co. Ltd.*, [1932] A.C. 328 at page 350:

> It is important to remember that the Act of 1924 was the outcome of an International Conference and that the rules in the Schedule have an international currency. As these rules must come under the consideration of foreign Courts it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptation.

[43] The basic rule, which should not be forgotten, is that the choice of forum rests with the plaintiff. The Court so chosen may decline to proceed with the case; in this instance on the ground of *forum non conveniens*. However the factors connecting this case to Hong Kong, or for that matter New York, are not clearly more significant than those connecting it with Canada. Given that the impact of a foreign forum selection clause has been significantly reduced by s. 46 of the *Marine Liability Act* and that there has been no allegation of proceedings in any other Court, unlike in both the *OT Africa* and *The Cougar Ace* cases, in the exercise of my discretion under s. 50 of the *Federal Courts Act*, I dismiss the motion for a stay. The Moving Parties shall have 30 days to file their Statement of Defence.

ORDER

THIS COURT ORDERS that:

1. The motion by the Defendants Blue Anchor Line, a division of Transpac Container System Ltd., Kuehne & Nagel Ltd. and Kuehne & Nagel Inc. for a stay of proceedings is dismissed with costs;

2. They have thirty (30) days herefrom to file their Statement of Defence.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2152-09
STYLE OF CAUSE:	Hitachi Maxco Ltd. et al. v. Dolphin Logistics Company Ltd. et al.

MOTION IN WRITING CONSIDERED PURSUANT TO RULE 369 WITHOUT PERSONAL APPEARANCE OF THE PARTIES

REASONS FOR ORDER AND ORDER:	HARRINGTON J.
DATED:	August 27, 2010

WRITTEN REPRESENTATIONS:

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Rui M. Fernandes	FOR THE DEFENDANTS

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