



T-462-97

ACTION *IN REM* AND *IN PERSONAM*

BETWEEN

TRANSCONTINENTAL SALES INC

Plaintiff

AND

ZIM CONTAINER SERVICE,

-and-

ZIM ISRAEL NAVIGATION COMPANY LTD

-and-

THE OWNERS, CHARTERS AND ALL THOSE HAVING  
AN INTEREST IN THE VESSEL "ZIM KEELUNG"

-and-

THE VESSEL "ZIM KEELUNG"

-and-

THE OWNERS, CHARTERS AND ALL THOSE HAVING  
AN INTEREST IN THE VESSEL "ZIM KOREA"

-and-

THE VESSEL "ZIM KOREA"

-and-

THE OWNERS, CHARTERS AND ALL THOSE HAVING  
AN INTEREST IN THE VESSEL "ZIM HONG KONG"

-and-

THE VESSEL "ZIM HONG KONG"

-and-

THE OWNERS, CHARTERS AND ALL THOSE HAVING  
AN INTEREST IN THE VESSEL "ZIM ODESSA"

-and-

THE VESSEL "ZIM ODESSA"

-and-

THE OWNERS, CHARTERS AND ALL THOSE HAVING  
AN INTEREST IN THE VESSEL "ZIM PUSAN"

-and-

THE VESSEL "ZIM PUSAN"

Defendants

REASONS FOR ORDER

97 204 002

**RICHARD MORNEAU, ESQ.,**  
**PROTHONOTARY:**

This is a motion by the defendant Zim Israel Navigation Company Ltd (hereinafter "Zim") under section 50 of the *Federal Court Act* and rule 401 of the *Federal Court Rules* for a stay of the proceedings herein which it submits ought to be heard by a court in Haifa, Israel, by virtue of a jurisdiction clause found in the various Bills of Lading pertaining to the matter

**Facts**

Zim is involved in the carriage of goods in containers from Mediterranean and Black Sea ports to Canada. As alleged in the statement of claim, the present action relates to containerized shipments of men's flannel shirts carried, at least for the marine transport, from the port of Odessa (Ukraine) to Montreal

It would appear that when the containers were opened in Montreal it was observed that there were empty spaces on the top of the cargo towards the back of the containers where cargo should have been stowed. As the container seals apparently had not been interfered with, the ineluctable conclusion would be that the missing cartons were not loaded into the containers

The identity of the party who filled the containers as well as where the containers were filled are further contentious issues between the parties in addition to whether Zim is to be held responsible for the inland transport of the cargo from the shipper's premises in Tiraspol (Moldova) to Odessa

**Analysis**

In an affidavit filed in opposition to the granting of the requested stay, a representative of the plaintiff offers his perspective as to what might be the surrounding circumstances of the loss at stake in the following terms

9 It would appear that Defendants in fact received cartons, as opposed to sealed containers under a shippers, load and count, as alleged by Defendants,

10 There were various unexplained delays from the time that Defendants received the cargo, issued the aforementioned Roadbills, and issued the aforementioned Bills of Lading,

11 These Bills of Lading covered inland transportation from the shipper's premises, in addition to the marine carriage,

12 In Mr Ferguson's affidavit of April 11, 1997, he states at paragraph 10 that Defendants received the cargo at Odessa, when in fact the cargo was received by Defendants at the shipper's premises for inland transportation,

13 Defendants issued these Bills of Lading at Odessa, while the cargo was received at the shipper's premises,

14 These Bills of Lading appear to have issued after the losses would have occurred,

15 The Bills of Lading are defective, and their integrity is in doubt and questionable,

Therefore, according to paragraph 11 quoted above, the Bills of Lading are to govern the whole transport of the cargo, both inland and marine. Consequently, the issues as to whether Zim, or Zim's agent, is to be held responsible for the inland transport from Tiraspol to Moldova and whether the said transport involved loose cartons or sealed containers are in my opinion issues falling under the Bills of Lading referred to by the plaintiff.

Each said Bill of Lading contains the following jurisdiction clause

"**LAW AND JURISDICTION** All and any claims and/or disputes arising under this bill of lading shall be brought exclusively before and determined by the courts and in accordance with the law at the place where the carrier has its head office namely, Haifa, Israel, or, if it is compulsory to litigate in the USA, by the United States District Court for the Southern District of New York, N Y , USA. No proceedings shall be brought before other courts unless the parties expressly agree on both the choice of another court and the law to be then applicable."

As reaffirmed by my colleague Hargrave in *Trans-Continental Textile Recycling v Flairius Enterprises* (1995), 106 F T R 278, at 281, in the presence of an undertaking clause to submit a dispute to a foreign court

There is a substantial body of law as to how a court should exercise its discretion, including *Burrard-Yarrows Corp v Ship Hoegh Merchant*, [1982] 1 F C 248 (T D ), *Ship M/V Sea Pearl and Patmos Navigation Co v Seven Seas Dry Cargo Shipping Corp* (1982), 43 N R 517, 139 D L R (3d) 669 (F C A ) and *Mountambell Co et al v W.T.C Air Freight (H K ) Ltd.* (1988), 20 F T R 57 (T D )

In the *Sea Pearl* (supra) Mr Justice Pratte, speaking for the Court of Appeal, pointed out that, 'Prima facie, an application to stay proceedings commenced in the Federal Court in defiance of undertaking to submit a dispute to arbitration or to a foreign court must succeed because, as a rule, contractual undertakings must be honoured' (at p 681). He went on to point out that to depart from the prima facie rule there must be strong reasons to enable a court to conclude that it would not be just or reasonable, in the circumstances, to enforce the contractual obligation.

In all three of the cases, *The "Hoegh Merchant"*, *The "Sea Pearl"* and *Mountambell Co*, the courts either considered or quoted from the leading case in the area of an application for a stay grounded upon a jurisdiction clause in a bill of lading, *The "Eleftheria"*, [1969] 1 Lloyd's Rep 23, a decision of Mr Justice Brandon (as he then was) [footnote omitted]. The much quoted passage is at p 242.

"The principles established by the authorities can, I think, be summarized as follows (1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within the jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown (3) The burden of proving such strong cause is on the plaintiffs (4) In exercising its discretion the court should take into account all the circumstances of the particular case (5) In particular, but without prejudice to (4), the following matters, where they arise, may be properly regarded (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects (c) With what country either party is connected, and how closely (d) Whether the defendants genuinely desire trial in the foreign, or are only seeking procedural advantages (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would (i) be deprived of security for that claim, (ii) be unable to enforce any judgment obtained, (iii) be faced with a time-bar not applicable in England, or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial "

The "*Eleftheria*" involved a Greek jurisdiction clause in a bill of lading for carriage of plywood from Galatz in Romania to the United Kingdom Mr Justice Brandon began his consideration of the arguments by the parties by pointing out

"First, as to the prima facie case for a stay arising from the Greek jurisdiction clause I think that it is essential that the court should give full weight to the prima facie desirability of holding the plaintiffs to their agreement In this connection I think that the Court must be careful not just to pay lip service to the principle involved, and then fail to give effect to it because of a mere balance of convenience "

These cautions, against only paying lip service to the principle, and against the granting of a stay, where there is a contractual obligation as to jurisdiction, on the basis of a "mere balance of convenience" is the corollary to the general proposition that there must be a strong reason to deny a contractual jurisdiction clause

Counsel for the plaintiff argued that by resorting to the jurisdiction clause referred to earlier, Zim was only seeking procedural advantages This argument is a matter which a court, according to Mr Justice Brandon in the case of *Eleftheria, supra*, might see as a strong reason or cause not to give effect to a contractual clause

Taking into account all the circumstances of the present case, I cannot come to such a conclusion even though, as asserted in evidence by the plaintiff, countless claims between the parties in the past were resolved in Canada The fact that all legal proceedings in Israel are allegedly drafted in Hebrew, that the language of the Israeli courts is Hebrew and that several witnesses will have to be moved to Haifa are all reasons which jointly or separately do not, in my

respectful view, constitute sufficiently strong reasons not to enforce the contractual obligation under study

As I have decided to hold the plaintiff to his contractual agreement, I do not consider that I have to otherwise consider here the doctrine of *forum conveniens*

For the above reasons, I will order a stay of the proceedings herein pending the final judgment of the Court in Haifa, Israel, conditional upon the defendant undertaking in writing, within sixty (60) days from the date of the order, to waive any defence based on an allegation that the plaintiff's claims are prescribed and time barred under the jurisdiction clause

**Richard Morneau**

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Prothonotary

Montreal, Quebec  
June 26, 1997

**Federal Court of Canada**

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T-462-97

Court No \_\_\_\_\_

**ACTION *IN REM* AND *IN PERSONAM***

**BETWEEN**

**TRANSCONTINENTAL SALES INC  
Plaintiff**

*— and —*

ZIM CONTAINER SERVICE, -and- ZIM ISRAE  
NAVIGATION COMPANY LTD -and- TH  
OWNERS, CHARTERS AND ALL THOS  
HAVING AN INTEREST IN THE VESSEL "ZIM  
KEELUNG" -and- THE VESSEL "ZIM KEELUNG  
-and- THE OWNERS, CHARTERS AND AL  
THOSE HAVING AN INTEREST IN THE VESSE  
"ZIM KOREA" -and- THE VESSEL "ZIM KOREA  
-and- THE OWNERS, CHARTERS AND AL  
THOSE HAVING AN INTEREST IN THE VESSE  
"ZIM HONG KONG" -and- THE VESSEL "ZIM  
HONG KONG" -and- THE OWNERS, CHARTER  
AND ALL THOSE HAVING AN INTEREST II  
THE VESSEL "ZIM ODESSA" -and- THE VESSE  
"ZIM ODESSA" -and- THE OWNERS, CHARTER  
AND ALL THOSE HAVING AN INTEREST II  
THE VESSEL "ZIM PUSAN" -and- THE VESSE.  
"ZIM PUSAN"

**Defendants**

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**REASONS FOR ORDER**

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FEDERAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT NO.: T-462-97

STYLE OF CAUSE: ACTION *IN REM* AND *IN PERSONAM*

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Defendants

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: May 26, 1997

REASONS FOR ORDER BY: Richard Morneau, Esq , Prothonotary

DATE OF REASONS FOR ORDER: June 26, 1997

APPEARANCES:

Mr Lionel Liber for the Plaintiff

Mr David G Colford for the Defendant Zim Israel Navigation Company Ltd

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