CITATION: JLPM v. Ferrovial Services Canada Limited, 2024 ONSC 6404
COURT FILE NO.: CV-22-87
DATE: 2024/11/18

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:		
JLPM and Dwight Anthony Jr.	Plaintiffs	*B. Jackson*, for the Plaintiff
– and –		
Ferrovial Services Canada Limited	Defendant	*K. Santini*, for the Defendant
		HEARD: July 23, 2024

REASONS FOR DECISION

WILCOX, J.

INTRODUCTION

[1] The Defendant brought a motion to have the Plaintiffs' action dismissed or permanently stayed. For the reasons that follow, the motion is dismissed.

BACKGROUND

[2] This action involves a sub-contract (the contract) between the Plaintiffs (JLPM) and the Defendant, (Ferrovial).

[3] The Plaintiff, JLPM, is a sole proprietorship registered pursuant to the laws of the Province of Ontario with its office located in North Bay, Ontario. The Plaintiff, Dwight Anthony Jr., is the registered owner of JLPM. The Defendant, Ferrovial Services Canada Limited is a corporation registered pursuant to the laws of the Province of Alberta.

[4] In January, 2019, the Ontario Ministry of Transportation (MTO) contracted with Ferrovial[1] for the latter to provide highway maintenance.

[5] In or around April 2019, JLPM entered into an agreement with Ferrovial to provide vegetation and maintenance work for five picnic sites and rest areas along Highway 17 for a seven-year term. That work began in or around May, 2019.

[6] The formal contract between Ferrovial and JLPM, effective May 1, 2019, was not signed until October 9, 2019.

[7] The contract contained a termination provision that provided Ferrovial the option to terminate or suspend the contract due to, among other things, its convenience or when it was deemed to be in the best interest of Ferrovial to do so. On February 25, 2021, Ferrovial terminated its agreement with JLPM.

[8] The contract also contained a "Law and Venue" provision, which stipulates that the venue of any judicial proceeding arising from the contract shall be Travis County, Texas. The contractor (JLPM) waived any and all defences to a change of venue based upon forum non convenience or any other procedural theory.

[9] The Plaintiffs commenced an action in Ontario in which they seek damages for breach of contract, negligence, negligent misrepresentation and/or unjust enrichment. Their allegations include that there was an express or implied term that the parties would perform their duties and exercise their rights reasonably, in good faith and with honesty, that the defendant failed to do so, and that the termination is unenforceable at law.

[10] Ferrovial disputes the merits of the action. However, it has not yet served a Statement of Defence. Instead, it has brought a motion for an order pursuant to s. 106 of the *Courts of Justice Act* and Rule 21.01(3) of the *Rules of Civil Procedure* for a permanent stay or dismissal of the action on the ground that it was brought in Ontario contrary to the contract's Law and Venue provision, also referred to as a forum selection clause (FSC).

[11] JLPM opposed the motion.

LAW RE FORUM SELECTION CLAUSES

[12] Section 106 of the *Courts of Justice Act*, dealing with stays of proceedings, says that a court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

[13] Rule 21.01(3) of the *Rules of Civil Procedure* then states:

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[1] Now known as Webber Infrastructure Management Canada Limited

> (3) To defendant - A defendant may move before a judge to have an action stayed or dismissed on the ground that,
>
> **Jurisdiction**
>
> (a) the court has no jurisdiction over the subject matter of the action;
>
> **Capacity**
>
> (b) the plaintiff is without legal capacity to commence or continue the action or the defendant does not have the legal capacity to be sued;
>
> **Another Proceeding Pending**
>
> (c) another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter; or
>
> **Action Frivolous, Vexatious or Abuse of Process**
>
> (d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court, and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (3).

[14] The leading Canadian case dealing with the enforcement of FSCs was *Zi Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27.[2] It drew from the English case the "*Eleftheria*"[3]. These cases arose in commercial contexts. The 2017 Supreme Court of Canada case of *Douez v. Facebook Inc.*,[4] then dealt with FSCs in the consumer context.

[15] *Pompey* set out the two-part "strong cause" test. It went on to say that FSCs 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 or private international law. This test rightly imposes the burden on the plaintiff to satisfy the court that there is good reason it should not be bound by the FSC. It is essential that courts give full weight to the desirability of holding contracting parties to their agreements.

[16] The test was well summarized by the Ontario Court of Appeal in *Loan Away Inc. v. Facebook Canada Ltd.* [5]

> [21] Courts apply a two-step approach in determining whether to enforce a Forum Selection Clause and stay an action brought contrary to it:
>
> 1) At the first step, the party seeking a stay must establish that the forum selection clause is valid, clear, and enforceable, and that it applies to

[2] *Aureus Solutions Inc. v. Canadian Pacific Railway Co*., para. 12
[3] [1969] 1 Lloyd's Rep. 237
[4] 2017 SCC 33
[5] 2021 ONCA 432, para. 21.

> the cause of action before the court. The court makes this determination based on the principles of contract law. The plaintiff may resist the enforcement of the Forum Selection Clause by raising defences such as, for example, unconscionability, undue influence, or fraud. If the party seeking the stay establishes the validity of the forum selection clause, the onus shifts to the plaintiff: *Douez*, at paras. 28-29, *Pompey*, at para. 39.
>
> 2) At the second step, the plaintiff must establish "strong cause" not to enforce the Forum Selection Clause. A court exercising its discretion at this step must consider all the circumstances, including the convenience of the parties, fairness between the parties, the interests of justice, and public policy. The list of "strong cause" factors is not closed and provides a court with some flexibility in exercising its discretion. In the commercial context, the "strong cause" factors have been interpreted and applied restrictively. Forum Selection Clauses are encouraged and generally enforced because they promote order and fairness by providing stability and foreseeability to international commercial relations: *Douez*, at paras. 29-31; *Pompey*, at paras. 19, 30-31; and *GreCon Dimter Inc. v. J.R. Normand Inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401, at para. 22.

Issue #1a: Is the FSC operative, or was it no longer in effect once the contract was terminated?

[17] The contract contained a "Surviving Clauses" provision which stated that the provisions of the contract related to warranty, indemnity, audit and confidentiality would survive its termination. JLPM submitted that the terms of the contract were no longer operative once it was terminated by Ferrovial, save and except for those provisions that were expressly contained in the "Surviving Clauses" term, that it is clear and unambiguous as to which sections of the contract would survive its termination, and that these did not include the Law and Venue clause. Furthermore, it submitted, any ambiguity would be read in favour of JLPM on the basis of contra proferentum as it was Ferrovial that had drafted the standard form contract.

[18] Ferrovial submitted that, although it had terminated the contract, a forum selection clause is not abrogated because the contract has been terminated. In support, it relied on the following from the *Instrument Concepts-Sensor Software Inc. v. Geokinetics Acquisition Company*.[6]

> I do not accept the applicant's assertion that the application cannot be related to the TSA because the TSA was terminated. A forum selection clause can survive the termination of a contract. In *Mackender v. Feldia*, [1967] 2 QB 590 at 598 (CA), the Court of Appeal held, per Denning MR:

[6] 2012 NSSC 62 at para. 32

> I can well see that if the issue was whether there ever had been any contract at all, as for instance, if there was a plea of non est factum, then the foreign jurisdiction clause might no apply at all. But here there was a contract, and when it was made, it contained the foreign jurisdiction clause. Even if there was non-disclosure, nevertheless non-disclosure does not automatically avoid the contact. It only makes it voidable. It gives the insurers a right to elect. They can either avoid the contract or affirm it. If they avoid it, it is avoided in this sense, that the insurers are no longer bound by it. They can repudiate the contract and refuse to pay on it. But things already done are not undone. The contract is not avoided from the beginning but only from the moment of avoidance. In particular, the foreign jurisdiction clause is not abrogated. A dispute as to non-disclosure 'is a dispute arising under' the policy and remains within the clause: just as does a dispute as to whether one side or other was entitled to repudiate the contract.

So, it argued, it would be illogical for JLPM to argue both that the contract was wrongfully terminated causing actionable damages, but that the FSC is inapplicable due to that termination. Rather, the binding and exclusive FSC clearly captured the Plaintiffs' action, given that it is a judicial proceeding that claims relief in relation to the contract at issue.

[19] I find the Instrument case itself to be distinguishable. At issue there was whether an explicit FSC in the parties' initial contract carried over implicitly into their subsequent agreement. Nevertheless, the quote from *Mackender v. Feldia* stands.

[20] The leading Canadian authority and the enforcement of FSCs is the Supreme Court of Canada's decision in *Z.I. Pompey Industrie v. ECU-Line N.V.*[7]. It set out the "strong cause" test for determining whether an FSC will be enforceable, more about which will be said below. For present purposes, I note that the court stated at paragraph 31:

> 31 Issues respecting an alleged fundamental breach of contract or deviation therefrom should generally be determined under the law and by the court chosen by the parties in the bill of lading. The "strong cause" test, once it is determined that the bill of lading otherwise binds the parties (for instance, that the bill of lading as it relates to jurisdiction does not offend public policy, was not the product of fraud or of grossly uneven bargaining positions), constitutes an inquiry into questions such as the convenience of the parties, fairness between the parties and the interests of justice, not of the substantive legal issues underlying the dispute. See *Mackender v. Feldia A.G.*, [1966] 3 All E.R. 847 (C.A.), *per* Lord Denning, at pp. 849-50, and *per* Lord Diplock, at

[7] 2003 SCC 27

> p. 852. Put differently, a court, in the context of an application for a stay to uphold a forum selection clause in a bill of lading, must not delve into whether one party has deviated from, or fundamentally breached an otherwise validly formed contract. Such inquiries would render forum selection clauses illusory since most disputes will involve allegations which, if proved, will make the agreement terminable or voidable by the aggrieved party. Moreover, while the choice of forum for the determination of the existence of the agreement would be made without reference to the forum selection clause in the contract, if the agreement were found to remain intact, resort to the said clause would presumably be necessary to decide the appropriate forum in which to settle the rights of the parties under the agreement.

[21] I agree with Ferrovial's submission on this point. In view of the statements in *Mackender* and in *Pompey*, I find that the FSC has survived the alleged termination of the contract.

Issue # 1(b) – Is the Law and Venue Clause Unconsionable?

[22] Even if the "Law and Venue" clause was not rendered inoperative and conferred exclusive jurisdiction on Travis County, Texas, the Plaintiff submitted, the clause is unconscionable and therefore invalid and should not be enforced. It relied on the recent Supreme Court of Canada case of *Uber Technologies Inc. v. Heller*[8]. Reading from the headnote:

> Unconscionability is an equitable doctrine that is used to set aside unfair agreements that resulted from an inequality of bargaining power. When the traditional assumptions underlying contract enforcement lose their justificatory authority, this doctrine provides relief from improvident contracts. The purpose of unconscionability is the protection of those who are vulnerable in the contracting process from loss or improvidence in the bargain that was made.
>
> Unconscionability requires both an inequality of bargaining power and a resulting improvident bargain. An inequality of bargaining power exists when one party cannot adequately protect its own interests in the contracting process. A bargain is improvident if it unduly advantages the stronger party or unduly disadvantages the more vulnerable. Improvidence is measured at the time the contract is formed and must be assessed contextually. The question is whether the potential for undue advantage or disadvantage created by the inequality of bargaining power has been realized. Although one party knowingly taking advantage of another's vulnerability may provide strong evidence of inequality of bargaining power, it is not essential for a finding of unconscionability. Unconscionability does not require that the transaction was grossly unfair, that the

[8] 2020 SCC 16

> imbalance of bargaining power was overwhelming, or that the stronger party intended to take advantage of a vulnerable party.
>
> The doctrine of unconscionability has particular implications for standard form contracts. The potential for such contracts to create an inequality of bargaining power is clear, as is the potential to enhance the advantage of the stronger party at the expense of the more vulnerable one, particularly through choice of law, forum selection, and arbitration clauses that violate a party's reasonable expectations by depriving them of remedies.

[23] The test for unconscionability was not in dispute.

[24] Concerning an inequality in bargaining power, the Plaintiff listed the following points from the present case which is related to the SCC's observations in Uber:

i) JLPM is a small, locally operated, unsophisticated, sole proprietorship. Its workforce consisted of Mr. Anthony, and one other employee, when the agreement was first made, with two additional employees when the written subcontract was signed. Ferrovial was part of a multi-billion dollar global conglomerate company, with 24,000 employees in 2022, and even its own legal team for contract review.

ii) In addition to the factual circumstances mentioned above, Mr. Anthony's evidence was that he would not have appreciated the consequences of a "Law and Venue" clause and he had never been involved in litigation, prior to this action. His business experience was limited to an ice cream bike business when he was 18 years old and his current business.

iii) In August of 2019, Mr. Anthony became increasingly concerned that his business was continuing to perform the subcontract without a written agreement to secure his seven-year term. He had hired two additional employees, purchased vehicles and equipment, and had been performing the work since May 2019. As of October 8, 2019, his August invoice had still not been paid; his emails to Ferrovial throughout that period indicate that he was becoming desperate.

iv) Mr. Anthony, on behalf of JLPM, had been performing subcontract work for Ferrovial for nearly a decade at the time that the subcontract was signed, without incident. Mr. Anthony believed that he could trust his relationship with Ferrovial, and that he did not have reason to believe that this dispute would occur.

v) Again, the level of discrepancy in sophistication between the two parties was extreme and Mr. Anthony would not have

> appreciated the impact of a "Law and Venue" clause as noted above. It was a standard form contract, 24 pages in length. The face of the subcontract also reflects all parties being situated in Ontario, Canada. There was less than one day between Mr. Anthony receiving the corrected version and signing the hardcopy.

[25] Ferrovial denied that there was an inequality of bargaining power. Responding to JLPM's points, it submitted:

- JLPM had been in business for nearly two decades. The average maintenance contract was about one half million dollars.
- The contract was a template, not a contract of adhesion. Ferrovial was open to negotiating terms or using a subcontractor's form. Indeed, JLPM had requested and obtained a change to the contract's length.
- The situation is to be distinguished from a consumer contract.
- JLPM did not read the whole contract.
- JLPM had an opportunity to seek legal advice, but did not.

[26] I do not find the Law and Venue clause to be unconscionable and therefore invalid and unenforceable at this stage. I note that FSCs are not inherently unconscionable. In fact, they are common and are encouraged. [9] Mr. Anthony had the opportunity to review the draft contract regarding more than its term, and to get legal advice, but did not. Additionally, he is a businessperson, as compared to a consumer, and had done business with Ferrovial for about ten years. So, this was not new to him.

Issue #2: Is the FSC valid, clear and enforceable?

[27] The law and venue provision of the contract reads:

> The Contractor shall comply with all applicable Federal, State and Local statutes, laws, ordinances, rules and regulations. The venue of any judicial proceedings arising from this Contract shall be Travis County, Texas. The Contractor waives any and all defenses to a change of venue based upon forum non convenience or any other procedural theory.

[28] Despite the Plaintiff's argument that the FSC does not preclude other forums, I find that the FSC here is valid, clear and enforceable. It concisely and clearly refers to "any judicial proceedings arising from this contract", makes Travis County, Texas the mandatory venue, and forecloses the use of other venues. Indeed, Mr. Anthony, in his examination for discovery, reportedly said that he understood the FSC to mean that any disputes would be tried in Texas.

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[9] *Pompey* at paragraph 20.

Re: Issue #3: - Is there a "strong cause" not to enforce the FSC?

[29] If, at the first step of the strong cause test, the FSC has been found to be valid, clear and enforceable and to apply to the cause of action before the court, the burden is then on the plaintiff "to satisfy the court that there is good reason it should not be bound by the FSC".[10] This "constitutes an inquiry into all of the circumstances of the case, including the convenience of the parties, fairness between the parties and the interests of justice, not of the substantive legal issues underlying the dispute".[11] The court in *Pompey* said at para. 19, quoting from the *Eleftheria* at para. 242:

> Pursuant to s. 50(1) of the *Federal Court Act*, the court has the discretion to stay proceedings in any cause or matter on the ground that the claim is proceeding in another court or jurisdiction, or where, for any other reason, it is in the interest of justice that the proceedings be stayed. For some time, the exercise of this judicial discretion has been governed by the "strong cause" test when a party brings a motion for a stay of proceedings to enforce a Forum Selection Clause in a bill of lading. Bradon J. set out the test as follows in *The "Eleftheria*", at p. 242:
>
> > (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 country, 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

[10] *Pompey* at para. 20
[11] *Pompey* at para. 31 and 39

> political, racial, religious or other reasons be unlikely to get a fair trial.

[30] The factors to be considered when applying a strong cause test have been addressed in cases following *Pompey*. In their respective factums, JLPM applied the factors as set out in the case of *Kozlik's Mustard v. Acasi Machinery Inc.*[12] while Ferrovial referenced *Expedition Helicopters Inc. v. Honeywell Inc*. [13] In submissions, Ferrovial said the list of factors in those cases were similar with slightly different wording. So, it was content to address the factors as set out by JLPM based on *Kozlik's*. I noted that these are indeed the factors listed in the *Eleftheria* and adopted in *Pompey*.

(a) Where is the evidence?

Each side submitted that the evidence, in the form of key witnesses, was in its chosen venue. Each also questioned the necessity of at least some of the others' proposed witnesses. In *Kozlik's* (para. 25), the court found that the significance of this factor has been greatly reduced by the use of Zoom trials. The indication was that virtual proceedings are possible and available in Texas, as they are in Ontario. Consequently, this factor carries little weight.

(b) Whether the law of the foreign court applies

[31] The Law and Venue clause of the contract says only, on the topic of applicable laws, that the contractor (here, JLPM) shall comply with all federal, state and local statutes, laws, ordinances, rules and regulations. Clearly, from its terminology, that is written in an American context. However, other parts of the contract explicitly refer to Ontario legal requirements. Although the specified venue is Travis County, Texas, there is no statement, of the sort sometimes seen, that Texas or any jurisdiction's law shall apply. Consequently, as the contract was entered into and implemented in Ontario, Ontario's laws would apply. Indeed, both Mr. Filer, Ferrovial's president, and Ferrovial's counsel indicated that Ontario law would apply.

(c) With which jurisdiction is each party connected, and how closely?

[32] JLPM submitted that the parties are both connected to Ontario. JLPM is a local North Bay business and Mr. Anthony resides there. The subsidiary of Ferrovial that is the named party in the subcontract and the Statement of Claim is a Canadian extra provincial domestic corporation with a head office located in Alberta, Canada. At all material times, it was conducting business in Ontario as its prime contract was issued by the MTO for maintenance work to be done along Ontario highways. Its office in Ottawa, Ontario was recorded as its office address on the subcontract with JLPM.

[33] Ferrovial acknowledged that the work done under the contract was in Ontario. However, that the president, directors and legal director of Ferrovial all reside in Travis County, Texas, and the business director of Ferrovial who signed the contract with JLPM resides in Tampa, Florida was said to connect Ferrovial to Texas.

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[12] 2022 ONSC 2356
[13] 2010 ONCA 351

[34] I note that Mr. Filer's affidavit, filed for the motion, says Ferrovial's employees are located in Texas and throughout Canada. More particularly, Ferrovial's employees who are directly involved on a day-to-day basis reside in Ottawa.

[35] In view of the above, it can be said, that, while JLPM is only connected to Ontario, Ferrovial has connections to Texas and elsewhere, including to Canada and, more specifically, with respect to the contract in question, to Ontario. The Texas connection, to the extent that it has any relevance to the case, is further weakened by the business director involved being a resident in Florida.

[36] Overall, the people most involved in the case are more closely connected to Ontario.

(d) Whether the defendants genuinely desire trial in Texas or are only seeking procedural advantage?

[37] JLPM submitted that the defendant is clearly seeking a procedural advantage as there is no true nexus to Travis County, Texas, apart from some of the directors who reside there. It is questionable whether these directors have any relevant evidence at all. Mr. Filer was said to know virtually nothing about JLPM or its subcontract, apart from second-hand information and the other directors have provided no evidence on this motion.

[38] Ferrovial responded that there is no evidence that it is seeking a procedural advantage and that JLPM had acknowledged that Ferrovial might simply be seeking to enforce its contractual rights. It also distinguished between a procedural advantage and convenience, acknowledging that the Texas forum was certainly more convenient for Ferrovial.

[39] I see no indication of what, if any, procedural advantage Ferrovial would be seeking. I agree that Texas would be a more convenient forum for Ferrovial, just as Ontario would be a more convenient forum for JLPM. In *Rose v. Carnival Corporation* [14] the court said:

> Second, the assessment of whether or not to enforce a Forum Selection clause is not to be conflated with an analysis of which venue is the more convenient forum: *Pompey*; *Expedition Helicopters*, at paras. 9-14. Public policy does not demand that Forum Selection Clause be ignored simply because an Ontario Court considers this to be a more convenient jurisdiction. I also note that Ms. Rose has only assessed her own case when assessing the convenience of the forum, not the defendant's case.

[40] In the present case, I find that this factor is neutral.

(e) Whether JLPM would be prejudiced by having to sue in Texas

[41] JLPM submitted that, because the subsidiary defendant is domiciled in Canada and has offices and operations in Alberta and Ontario, there is a real risk that a judgment obtained in Texas would have little enforcement effect in that jurisdiction.

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[14] 2022 ONSC 6506, para. 30

[42] Ferrovial responded that there is no evidence or law on that point. I agree, although I would be surprised if there was no enforcement mechanism available.

[43] Ferrovial also addressed the possibility, referred to in *Pompey*, para. 19 (quoting from the *Eleftheria)*" and in *Koslik's*, at para. 24, that the case might be time barred in Texas. JLPM, the evidence showed, had been aware of the FSC by at least as early as October, 2021. The Ontario Court of Appeal has held "that a party should not be able to take advantage of its own failure to bring an action in the proper jurisdiction in a timely way to create prejudice that would justify excusal from the Forum Selection Clause". Consequently, I find this factor to be neutral.[15]

(f) Imbalance of Power

[44] JLPM also submitted that there was an extreme imbalance in negotiating power in favour of Ferrovial. Ferrovial relied on its submissions with respect to unconscionability to refute this.

[45] Care must be taken here to differentiate between commercial and consumer situations involving FSCs. In the former, "the strong cause factors have been interpreted and applied restrictively".[16] It is in the consumer context that the unequal bargaining power of the parties and other considerations "may provide compelling reasons for a court to exercise its discretion to deny a stay of proceedings".

[46] As I stated above when dealing with unconscionability, Mr. Anthony is a businessperson who did not take the opportunity to read the draft contract fully nor to get legal advice before entering into it. That would have gone some distance towards addressing any imbalance of power. Mr. Anthony appears to have been content to sign once the contract gave him the duration that he wanted. Otherwise, any imbalance was not a factor.

CONCLUSION

[47] Taking into account the factors that have been found to apply even where, as with the location of the potential witnesses, they have only a little weight, I find that the plaintiffs have shown that there is a good reason that they should not be bound by the FSC.

FORUM CONVENIENS

[48] In case I am wrong in finding that the FSC is operative here despite the surviving clauses provision of the contract not explicitly identifying it, I will address whether Ontario would have jurisdiction in the matter. The law on point was summarized recently by Perrell J. in *Gebien v. Apotex Inc.* [17]. Based on it, I have no reservations about finding that Ontario has jurisdiction simpliciter as the parties were carrying on business and entered into the contract in Ontario.

[49] The next question is whether Ontario is the convenient forum for the action. The court in *Pompey* found that, "there is a similarity between the factors which are to be taken into

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[15] *Expedition Helicopters Inc.*, *Honeywell Inc.* 2010 ONCA 361, para. 15

[16] *Douez v. Facebook* 2017 SCC 33, para. 31

[17] 2023 ONSC 6792, at paras. 117-186

account when considering an application for a stay based on a Forum Selection Clause and those factors which are weighed by a court considering whether to stay proceedings in "ordinary" cases applying the forum non-conveniens doctrine. … In the latter inquiry, the burden is normally on the defendant to show why a stay should be granted …". Having gone through that analysis with respect to the FSC, I find that Ontario would be the convenient forum.

Wilcox, J.

Released: November 18, 2024

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