

**Z.I. Pompey Industrie v. ECU-Line N.V.**  
**(The Strong Test and Fundamental Breach with respect to Bill of Lading Forum  
Selection Clauses)**

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**I      Introduction**

The recent Supreme Court of Canada decision in *Z.I. Pompey Industrie v. ECU-Line N.V.*<sup>1</sup> has raised three important issues.

First of all, the Court makes it clear that the “strong test” must be used in deciding applications to stay proceedings under sect. 50 of the *Federal Court Act*<sup>2</sup> in the presence of jurisdiction clauses.

Secondly, the Court reiterated that fundamental breach is a question of construction rather than a question of substance.

Finally, the Court decided that the issue of fundamental breach should be determined after determination of the appropriate court to hear the case in the light of the jurisdiction clause. And the court so chosen, would only then decide if there had been a fundamental breach.

It would appear, however, that the Court failed to address the substantive nature of fundamental breach in geographic deviation cases and in cases involving a specific statute, i.e. the *Marine Liability Act*<sup>3</sup> or its international equivalent - the Hague-Visby Rules.<sup>4</sup> It is suggested, therefore, that the Court should revisit the question of substantive fundamental breach in the specific context of geographic deviation. It is also suggested that the Court should address the notion that under the Hague-Visby Rules, an unreasonable deviation may cause the carrier to lose the benefit of rights under the Rules and under the bill of lading contract, including the right to rely on a forum selection clause.

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<sup>1</sup> [2003] 1 S.C.R. 450; (2003) 224 D.L.R. (4th) 577; 2003 AMC 1280 (S.C.C.) [hereafter *Z.I. Pompey*].

<sup>2</sup> R.S.C. 1985, c. F-7 (now called the *Federal Courts Act*, pursuant to the *Courts Administration Service Act*, S.C. 2002, c. 8, sect.14).

<sup>3</sup> S.C. 2001, c. 6.

<sup>4</sup> International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading signed at Brussels, August 25, 1924 and entered into force June 2, 1931. Protocol to Amend the 1924 Convention, signed at Brussels, February 23, 1968 and entered into force June 23, 1977. Protocol in respect of Special Drawing Rights, signed at Brussels, December 21, 1979 and entered into force February 14, 1984. The Hague Rules and the subsequent amendments are known as the “Hague/Visby Rules”.

## **II Brief Summary of the Supreme Court Decision**

### **1) The English Strong Test**

The Court declared that in the absence of applicable legislation on jurisdiction, the “strong test”<sup>5</sup> was the appropriate rule for determining whether to order a stay in respect of forum selection clauses. In upholding the “strong test” in Canadian law, the Court emphasized the importance of “order and fairness” in international commerce.<sup>6</sup>

### **2) Definition of the Strong Test**

The “strong test” was set out by Brandon J. (as he then was) in *The Eleftheria*.<sup>7</sup>

“(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 properly be 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 political, racial, religious or other reasons be unlikely to get a fair trial.”

### **3) Section 46(1) of the Marine Liability Act**

Canada's *Marine Liability Act*,<sup>8</sup> by its sect. 46(1), permits a claimant in a contract for the carriage of goods by water to which the Hamburg Rules do not apply, to opt for suit or arbitration of the claim in Canada, under certain conditions, even if the contract of carriage requires the claim to be tried or arbitrated elsewhere. The conditions are that: a) the actual or intended port of loading or port of discharge, under the contract, is in Canada; or b) the person against whom the claim is made resides or has a place of business, branch or agency in Canada; or c) the contract was made in Canada. Canada, like many other countries, has thus legislated to limit the effect of foreign jurisdiction and foreign arbitration clauses in contracts of carriage of goods by water. These conditions

<sup>5</sup> *Supra*, note 1, [2003] 1 S.C.R. at 463; 224 D.L.R. (4th) at 586-587; 2003 AMC at 1288.

<sup>6</sup> *Ibid.* [2003] 1 S.C.R. at 463; 224 D.L.R. (4<sup>th</sup>) at 587; 2003 AMC at 1288.

<sup>7</sup> *Ibid.*, [2003] 1 S.C.R. at 462; 224 D.L.R. (4<sup>th</sup>) at 586-587; 2003 AMC at 1287-1288, citing [1969] 1 Lloyd's Rep. 237 at 242.

<sup>8</sup> *Supra*, note 3.

are roughly based on the Hamburg Rules at arts. 21 and 22. In addition, the Canadian court or arbitral tribunal must be one that would be competent to determine the claim if the contract had referred the claim to Canada. Other nations similarly restrict, or even prohibit, foreign jurisdiction and arbitration clauses (e.g. Australia, China, the Nordic countries, New Zealand, South Africa).<sup>9</sup>

Bastarache J., speaking for the Court, noted that Parliament, in adopting sect. 46(1) on jurisdiction and arbitration, had not intended to alter the general principles of validity of forum selection clauses. He added that courts should "give full weight to the desirability of holding contracting parties to their agreements."<sup>10</sup>

#### **4) The impact of sect. 46(1) on the Federal Court's discretion to stay proceedings**

The Supreme Court recognized the impact that sect. 46(1) would have on the exercise of the Federal Court's discretion under sect. 50 of the *Federal Court Act*<sup>11</sup> 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. Bastarache noted that sect. 46(1) has the effect of removing the Federal Court's discretion under sect. 50 to stay proceedings because of a forum selection clause where the requirements of sect. 46(1) are met.<sup>12</sup> Bastarache then went on to acknowledge that in the case at hand, had sect. 46(1) been in force, there would have been no question that the Federal Court would have been an appropriate forum to hear the case.<sup>13</sup>

#### **5) Section 46(1) is not retroactive**

En passant, the Court affirmed *Incremona-Salerno Marmi Affini Siciliani (I.S.M.A.S.) s.n.c. v. The Castor*,<sup>14</sup> which had stated that sect. 46(1), (the new jurisdiction and arbitration provision) of the *Marine Liability Act*<sup>15</sup>, was not retroactive.<sup>16</sup> Sect. 46, it will be remembered, applies only to contracts for the carriage of goods by water.

#### **6) Fundamental breach – constructive not substantive**

The Court also held that fundamental breach was a question of construction of the contract and was not a substantive right.

#### **7) Fundamental breach – a matter for the forum having jurisdiction on the merits**

Finally, the Supreme Court further found that, in any event, fundamental breach was to be decided by the court which had jurisdiction on the merits, after the forum selection clause issue had been decided.

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<sup>9</sup> See W. Tetley, "Arbitration & Jurisdiction in Carriage of Goods by Sea and Multimodal Transport - Can we have International Uniformity?" [1998] ETL 735-765; W. Tetley, *International Maritime and Admiralty Law*, 2003 at pp. 110-111; W. Tetley, *Marine Cargo Claims*, 4 Ed., Chap. 37 "Jurisdiction Clauses - Forum Non Conveniens", preliminary version available on-line at <http://tetley.law.mcgill.ca/maritime/ch37.pdf>, at sections IV and V.

<sup>10</sup> *Supra*, note 1, [2003] 1 S.C.R. at 463; 224 D.L.R. (4<sup>th</sup>) at 587; 2003 AMC at 1288.

<sup>11</sup> *Supra*, note 2, sect. 50(1).

<sup>12</sup> *Supra*, note 1, [2003] 1 S.C.R. at 472; 224 D.L.R. (4<sup>th</sup>) at 594; 2003 AMC at 1295.

<sup>13</sup> *Ibid*, [2003] 1 S.C.R. at 472; 224 D.L.R. (4<sup>th</sup>) at 594-595; 2003 AMC at 1295.

<sup>14</sup> (2002) 297 N.R. 151; 2003 AMC 305 (Fed C.A.) [hereafter *Incremona-Salerno*].

<sup>15</sup> *Supra*, note 3.

<sup>16</sup> *Supra*, note 1, [2003] 1 S.C.R. at 472; 224 D.L.R. (4<sup>th</sup>) at 594-595; 2003 AMC at 1295.

### III Summary of the Four Court Decisions

#### 1) The motion for stay

The defendant/appellant sought a stay of proceedings under sect. 50 of the *Federal Court Act*<sup>17</sup> of a claim for damage to cargo carried from Antwerp, Belgium, to Seattle, Washington, in favour of litigation in Antwerp, pursuant to an exclusive jurisdiction clause in the bill of lading. The cargo was discharged in Montreal and forwarded to destination by rail, contrary to the provisions of the booking note and the port-to-port bill of lading calling for transport by water exclusively.

#### a) Hargrave P.

Prothonotary Hargrave<sup>18</sup> accepted and applied the “strong test” governing stay of proceedings applications, as set out in the *The Eleftheria*,<sup>19</sup> finding that the factors raised by the plaintiffs, while substantial, were just short of the strong case which the plaintiffs had to present in order to override the forum selection clause. The defendants’ willful deviation from the agreed upon mode of carriage, however, was an unreasonable deviation and amounted to a fundamental breach of the contract of carriage, thus rendering the limitation and exclusion clauses of the bill of lading – and, in particular, the Antwerp jurisdiction clause – unenforceable.<sup>20</sup> The motion for a stay was therefore denied.<sup>21</sup>

#### b) Blais J.

On appeal,<sup>22</sup> Blais J. held that Hargrave P. had not erred in law. A decision to stay a proceeding was a question of fact, and the Prothonotary had the discretion to render the decision he had, based on the facts and criteria established by *The Eleftheria*. The motion for the stay was dismissed.

#### c) Federal Court of Appeal

On further appeal,<sup>23</sup> the Federal Court of Appeal, affirmed the ruling of Blais J., holding that the proper test to apply in a stay proceedings was not the “strong test” as set out in *The Eleftheria*, but rather the “tripartite test” employed for the purposes of obtaining interlocutory injunctions; namely: (a) whether there was a serious issue to be tried; (b) whether the defendant would suffer an irreparable injury if the injunction (or the

<sup>17</sup> *Supra*, note 2. Sect. 50 of the *Federal Court Act* provides: “50. (1) The [Federal] Court may, in its discretion, stay proceedings in any cause or matter, (a) on the ground that the claim is being proceeded with in another court or jurisdiction; or (b) where for any other reason it is in the interest of justice that the proceedings be stayed.”

<sup>18</sup> (1999) 179 F.T.R. 254; 2000 AMC 145 (Can F.C. *per* Hargrave, P).

<sup>19</sup> *Supra*, note 7 at 242.

<sup>20</sup> In deciding that a fundamental breach rendered a foreign jurisdiction clause of the bill of lading unenforceable, Hargrave P. accepted the view of the effect of fundamental breach espoused by W. Tetley, *Marine Cargo Claims*, 3 Ed., Les Éditions Yvon Blais, Inc., Montreal, 1988 at 99 *et seq.*, a view which the Supreme Court of Canada has now rejected.

<sup>21</sup> Hargrave P., having concluded that the forum selection clause was unenforceable, then applied the tripartite test used for interlocutory injunctions, which places the onus of proof on the defendant, but dismissed the motion on that basis as well.

<sup>22</sup> (1999) 182 F.T.R. 112; 2000 AMC 851 (Can F.C. *per* Blais J.).

<sup>23</sup> (2001) 268 N.R. 364 (Fed. C.A. *per* Linden, Isaac and Sharlow JJ.A.).

stay) was granted; and (c) the balance of convenience of granting or refusing the injunction (or the stay).<sup>24</sup>

## 2) The Supreme Court of Canada - the strong test

The Supreme Court of Canada,<sup>25</sup> however, reversed Hargrave P. and the two courts below. Reversing the Federal Court of Appeal as to the proper test of enforceability of foreign jurisdiction clauses, Bastarache J. held that the “strong test” of *The Eleftheria* was still the appropriate test in Canada for adjudicating a motion for a stay of proceedings in a case where the relevant contract contained an exclusive foreign forum selection clause.<sup>26</sup> Such a test reflected the desirability that parties honour their contractual commitments and was consistent with the principles of order and fairness at the heart of private international law, as well as those of certainty and security of transaction at the heart of international commercial transactions.<sup>27</sup> Bastarache J. found that there were compelling public policy reasons for rejecting the tripartite test in respect of jurisdiction clauses in bills of lading, because under that test most forum selection clauses would be rendered unenforceable, thus creating commercial uncertainty by unduly minimizing the importance of contractual undertakings.<sup>28</sup> He rejected the argument that the clause should be given little weight because bills of lading are generally contracts of adhesion, devised unilaterally by carriers and issued on pre-printed forms.<sup>29</sup>

## IV No Retroactivity of Sect. 46 (1) of the Marine Liability Act, 2001

The Supreme Court has recognized that Canada could have kept jurisdiction over the suit pursuant to sect. 46(1) of the *Marine Liability Act*,<sup>30</sup> because the actual port

<sup>24</sup> The “tripartite test” for interlocutory injunction applications was established by the House of Lords’ decision in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] 1 All E.R. 504 (H.L.).

<sup>25</sup> *Supra*, note 1.

<sup>26</sup> *Ibid.*, [2003] 1 S.C.R. at 463 and 473; 224 D.L.R. (4<sup>th</sup>) at 580 and 595-596; 2003 AMC at 1288 and 1296.

<sup>27</sup> *Ibid.* [2003] 1 S.C.R. at 468; 224 D.L.R. (4<sup>th</sup>) at 591; 2003 AMC at 1291.

<sup>28</sup> Bastarache J. (*ibid.*, [2003] 1 S.C.R. at 467-468; 224 D.L.R. (4<sup>th</sup>) at 590-591; 2003 AMC at 1291-1292) further held that, unlike the “tripartite test” used for injunction applications, the “strong cause” test rightly places the onus of proof on the plaintiff who commences a suit contrary to the terms of a forum selection clause. He also found that a rule governing stay applications could not be based on the tripartite test, the first part of which requires the court to evaluate the likelihood of success on the merits of the case, because normally no such determination on the merits is made on stay applications. In addition, the tripartite test would make it difficult to establish harm in the context of a stay application based on a forum selection clause, because a defendant does not normally suffer “irreparable harm” by being required to defend a lawsuit in a Canadian court.

<sup>29</sup> The Court (*ibid.*, [2003] 1 S.C.R. at 468; 224 D.L.R. (4<sup>th</sup>) at 591-592; 2003 AMC at 1292-1293), citing the U.S. Supreme Court in *Carnival Cruise Lines, Inc. v. Shute* 499 U.S. 585; 1991 AMC 1697 (1991) and *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer* 515 U.S. 528; 1995 AMC 1817 (1995), observed that 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. Bastarache J. noted that the respondents in this case were aware of industry practice, could have expected that the bill of lading would contain a forum selection clause, and could have negotiated with the appellant; and that there was no evidence that the bill was the result of “grossly uneven bargaining power” (*ibid.*, [2003] 1 S.C.R. at 468-469; 224 D.L.R. (4<sup>th</sup>) at 592; 2003 AMC at 1293).

<sup>30</sup> *Supra*, note 3.

of discharge was in Canada, but reaffirmed that the provision was not retroactive so as to apply to proceedings such as these, instituted prior to its coming into force on 8 August 2001, as decided by the Federal Court of Appeal in *Incremona-Salerno*.<sup>31</sup>

## **V Section 46 (1) Did Not Signal an Intention of Parliament**

The Supreme Court also rejected the argument that sect. 46(1) signaled an intention by Parliament to change the general principles regarding forum selection clauses, holding that “Such a legislative development [sect. 46(1)] does not, however, provide support for the fundamental jurisprudential shift made by the Court of Appeal in the case at bar.”<sup>32</sup>

Bastarache J. accordingly allowed the appeal and, applying the “strong cause” test, issued a stay of proceedings in favour of the appellant, sending the case to be tried in Belgium.

## **VI The “Strong Test” and Predictability of Result**

Until the ruling by the Supreme Court in *Z.I. Pompey*, the jurisprudence with regard to forum selection clauses in Canada was still in the process of development.<sup>33</sup> This is evident by the Court of Appeal decision itself<sup>34</sup> and the commentary of M.P. Mitchell, who noted the capriciousness of the law as to forum selection clauses and argued that the test should be settled in principle and be predictable in result.<sup>35</sup> The Supreme Court has now settled the principle and ensured predictability of result, with regards to the appropriate test to be employed by the courts when faced with a forum selection clause in a contract.

## **VII The “Strong Test” and Canadian Private International Law**

The decision in the *Z.I. Pompey* also brought the jurisprudence in line with other major developments in Canadian private international law, in particular the importance of “order and fairness”.<sup>36</sup> Bastarache J., noted that order and fairness are critical components of the conflict of laws, and reasoned that the “strong test” is the appropriate rule to achieve these ends.<sup>37</sup> Holding parties to their forum selection bargain, in the absence of applicable legislation on jurisdiction, reinforces the importance of certainty, order and fairness espoused by the Supreme Court in the past.<sup>38</sup>

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<sup>31</sup> *Supra*, note 14.

<sup>32</sup> *Supra*, note 1, [2003] 1 S.C.R. at 472; 224 D.L.R. (4<sup>th</sup>) at 595; 2003 AMC at 1296.

<sup>33</sup> W. Tetley, *Marine Cargo Claims*, 3 Ed., Les Éditions Yvon Blais, Inc., Montreal, 1988 at 806.

<sup>34</sup> *Supra*, note 23.

<sup>35</sup> M. Paul Mitchell, “Forum Selection Clauses and Fundamental Breach: *Z.I. Pompey Industrie v. ECU-Line N.V.*, *The Canmar Fortune*” (2002) 36 Can Bus. L.J. 453 at 454.

<sup>36</sup> *Tolofson v. Jensen* [1994] 3 S.C.R. 1022 at 1058; *Morguard Investments Ltd. v. De Savoye* [1990] 3 S.C.R. 1077 at 1096-97; *Holt Cargo Systems Inc. v. ABC Containerline N.V.* [2001] 3 S.C.R. 907 at 940.

<sup>37</sup> *Supra*, note 1, [2003] 1 S.C.R. at 463; 224 D.L.R. (4<sup>th</sup>) at 587; 2003 AMC at 1288.

<sup>38</sup> *Supra*, note 36.

## VIII The Fundamental Breach

### 1) Hargrave P.

Hargrave P. had held that the forum selection clause was void because of the blatant and intentional geographic deviation stemming from the discharge of the cargo in Montreal, rather than Seattle.

### 2) Bastarache J.

Bastarache J. decided that Hargrave P. had erred in law in so determining. The Supreme Court held that the application of the “strong test” constituted an inquiry into questions such as convenience of the parties, fairness between the parties and the interests of justice, but precluded delving into the substantive legal issues underlying the dispute, such as fundamental breach.<sup>39</sup> Such issues, Bastarache J. held, should generally be determined under the law and by the court chosen by the parties in the bill of lading, and should not be considered in determining whether to give effect to the bill’s forum selection clause -- a conclusion supported by the “construction approach to fundamental breach” taken by the Supreme Court in previous cases.<sup>40</sup> It was therefore unnecessary, according to Bastarache, to determine whether there had been a fundamental breach or a deviation, because the forum selection clause clearly covered such a dispute, and the parties’ bargain was neither unconscionable nor unreasonable.<sup>41</sup> Excluding consideration of fundamental breach in ruling on motions for stays was also upheld on policy grounds, because stay applications should be adjudged quickly after commencement of the suit, when parties have limited knowledge and information as to the strength of their opponents’ case, and issues as to whether or not an unreasonable deviation has occurred raise “complicated questions of fact that require a consideration of all the circumstances giving rise to the alleged deviation.”<sup>42</sup>

### 3) Is fundamental breach always a question of construction?

My own view is that fundamental breach is not always a question of construction. Although the common law courts in the United Kingdom and Commonwealth have generally held that fundamental breach is purely a matter of construction, rather than a substantive rule of law,<sup>43</sup> the adoption of this approach with respect to maritime law and carriage of goods cases, and in particular geographic deviations, requires much more thought and reflection.

<sup>39</sup> *Supra*, note 1, [2003] 1 S.C.R. at 469-470; 224 D.L.R. (4<sup>th</sup>) at 592-593; 2003 AMC at 1293.

<sup>40</sup> *Ibid.*, [2003] 1 S.C.R. at 471; 224 D.L.R. (4<sup>th</sup>) at 593; 2003 AMC at 1294, citing *Hunter Engineering Co. v. Syncrude Canada Ltd.* [1989] 1 S.C.R. 426; *Guarantee Co. of North America v. Gordon Capital Corp.* [1999] 3 S.C.R. 423. In those cases, the question of whether fundamental breach precluded reliance on an exclusion clause and a time limitation clause, respectively, was held to be a question of construction of the contract in question, rather than a rule of law, unless the exclusion or time bar was found to be “unconscionable” (as *per* Dickson C.J. in *Hunter Engineering*) or “unfair, unreasonable or otherwise contrary to public policy” (as *per* Wilson J. in the same decision). Bastarache J. stated that in his view the policy supporting this “construction approach” applied equally to forum selection clauses in bills of lading as to exclusion and time limitation clauses.

<sup>41</sup> *Ibid.*, [2003] 1 S.C.R. at 471; 224 D.L.R. (4<sup>th</sup>) at 594; 2003 AMC at 1295.

<sup>42</sup> *Ibid.*, [2003] 1 S.C.R. at 472; 224 D.L.R. (4<sup>th</sup>) at 594; 2003 AMC at 1295.

<sup>43</sup> See Tetley, “Chapter 5: Fundamental Breach, Deviation, Quasi-Deviation, and Rupture of the Contract”, *Marine Cargo Claims*, 4<sup>th</sup> ed. Available online at <http://tetley.law.mcgill.ca/maritime/ch5.pdf>.

There is still considerable debate, for example, as to whether geographic deviations or related breaches under maritime law, (e.g. unauthorized deck carriage) should not automatically deprive the carrier of goods by sea of the protection of exclusion and limitation clauses.<sup>44</sup> Historically, carriage of goods cases have been recognized as distinct from the general contractual sphere. Lord Wilberforce, in *Photo Production Ltd. v. Securicor Transport Ltd.*, observed: “It may be preferable that they [deviation cases] should be considered as a body of authority *sui generis* with special rules derived from historical and commercial reasons.”<sup>45</sup>

More recently some English and Commonwealth courts, although paying lip-service to the construction doctrine, are *construing* contracts of carriage to deny carriers the protection of exclusion and limitation clauses in situations (particularly unjustified deck carriage) where the same result would have been obtained under the old *substantive* maritime law rule of deviation and the *substantive* fundamental breach doctrine of the 1950’s and 1960’s.<sup>46</sup> “Constructive” fundamental breach in the context of deviation and deck carriage now appears to be performing much of the same function as the old maritime law doctrine of deviation and the “substantive” fundamental breach doctrine, which was officially discredited in *Photo Production*.<sup>47</sup> Although depriving the carrier of the benefit of exclusion and limitation clauses for unauthorized deck carriage is a rule that has been challenged in some recent English decisions,<sup>48</sup> its application to unreasonable geographic deviation has not been definitively abandoned.<sup>49</sup>

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<sup>44</sup> N.E. Palmer, *Bailment*, 2 Ed., 1991 at 1539-1540. See Tetley, “Chapter 5: Fundamental Breach, Deviation, Quasi-Deviation, and Rupture of the Contract”, *Marine Cargo Claims*, 4<sup>th</sup> ed. Available online at <http://tetley.law.mcgill.ca/maritime/ch5.pdf>.

<sup>45</sup> [1980] A.C. 827 at 845, [1980] 1 Lloyd’s Rep. 545 at 560 (H.L.). Lord Wilberforce also approved of the deviation cases in *Suisse Atlantique Societe d’Armement Maritime SA v. NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 434; [1966] 2 All E.R. 61 at 93; [1966] 1 Lloyd’s Rep. 529 at 563-564 (H.L.), where he cited Lord Russell of Killowen in *Stag Line Ltd. v. Foscolo, Mango & Co. Ltd.* [1932] A.C. 328 at 347 (H.L.): “It was well settled before the Act [the U.K.’s *Carriage of Goods by Sea Act, 1924*, giving effect to the Hague Rules 1924] that an unjustifiable deviation deprived a ship of the protection of exceptions. They only applied to the contract voyage.” He further cited Scrutton L.J. in *Gibaud v. Great Eastern Railway Co.* [1921] 2 K.B. 426 at 435 (C.A.): “... if you undertake to do a thing in a certain way or to keep a thing in a certain place, with certain conditions protecting it, and have broken the contract by not doing the thing contracted for in the way contracted for, or not keeping the article in the place in which you have contracted to keep it, you cannot rely on the conditions which were only intended to protect you if you carried out the contract in the way which you had contracted to do it.”

<sup>46</sup> See *The Chanda* [1989] 2 Lloyd’s Rep. 494; *The Pembroke* [1995] 2 Lloyd’s Rep. 290 (N.Z. High Ct.).

<sup>47</sup> [1980] A.C. 827, [1980] 1 Lloyd’s Rep. 545 (H.L.).

<sup>48</sup> See *Daewoo Heavy Industries Ltd. v. Klipriver Shipping Ltd. (The Kapitan Petko Voivoda)* [2003] 2 Lloyd’s Rep. 1 (C.A.), where unauthorized deck stowage was held not to deprive the carrier of the Hague Rules package limitation, and where it was held (at p. 15) that *The Chanda*, *supra*, note 46, should be overruled.

<sup>49</sup> Longmore L.J., in *The Kapitan Petko Voivoda*, *ibid.*, acknowledged (at p. 10) that: “It has not yet been conclusively decided whether what I may call the deviation cases and the warehouse cases must be regarded as dead and buried along with the doctrine of fundamental breach”. He further held (at p. 12) that: “This is not an appropriate case to decide whether what Lord Wilberforce called ‘a body of authority *sui generis* with special rules’ is consistent with the law as expounded in *Photo Production Ltd. v. Securicor Transport Ltd.*...” See also the decision of Judge

The acceptance of substantive fundamental breach in maritime law would ensure that the carrier is held responsible for flagrant deviations from the contract, and would eliminate the need for courts on occasion to manipulate the “construction” approach in order to achieve the desired result.

In other jurisdictions, notably the United States and France, unreasonable geographic deviation still deprives carriers of goods by sea of the right to invoke the protection of exceptions and limitations in the Rules and the bill of lading contract.<sup>50</sup>

#### **4) Geographic deviation, fundamental breach and article 4(4) of the Hague/Visby Rules.**

An option not explored in the *Z.I. Pompey* is the carrier’s responsibility for the geographic deviation under the Hague/Visby Rules.<sup>51</sup> When the Supreme Court addressed the fundamental breach argument, the Court neglected to note that an unreasonable change in the geographic route of the contract voyage constitutes a breach of both the Hague/Visby Rules and the contract of carriage, and can therefore result in the carrier’s loss of the benefit of all the provisions of both the Rules and the bill of lading, including not only exclusion and limitation clauses in the contract and under the law, but also all other contractual terms, including, *inter alia*, jurisdiction clauses.<sup>52</sup> The Hague/Visby Rules, therefore, provide a statutory rule on fundamental breach with regards to geographic deviation, entailing far-reaching sanctions in the event of infringement.

Article 4(4) states that: “Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this Convention or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.” (Emphasis mine.)

Article 4(4) thus sets out what is not an unreasonable deviation. A reasonable deviation therefore is “a deviation whether in the interests of the ship or the cargo-owner

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L.J., at p. 16, who distinguishes the geographic deviation case law from the case law dealing with unauthorized deck carriage.

<sup>50</sup> See, for example, *The Willdomino v. Citro Chemical Co. of America*, 272 U.S. 718, 727; 1927 AMC 129, 132 (1927); *General Electric Co. v. S.S. Nancy Lykes*, 706 F.2d 80, 1983 AMC 1947 (2 Cir. 1983), cert. denied, 464 U.S. 849, 1984 AMC 2403 (1983); *Sedco, Inc. v. S.S. Strathewe* 800 F.2d 27 at 31; 1986 AMC 2801 at 2806 (2 Cir. 1986); *Caterpillar Overseas, S.A. v. Marine Trans. Inc.* 900 F.2d 714 at 721; 1991 AMC 75 at 85 (4 Cir. 1990); *Constructores Tecnicos S. de R.L. v. Sea-Land Serv., Inc.* 945 F.2d 841 at 845; 1992 AMC 1284 at 1290 (5 Cir. 1991); *Heli-Lift Ltd. v. M/V OOCL Faith* 2003 AMC 30 at 38 (C.D. Cal. 2001); *Cour de Cassation*, February 3, 1998 (*The Anyna and The Balkan*), DMF 1998, 594, [1999] ETL 203; *Cour de Cassation*, May 14, 2002 (*The Ethnos*), DMF 2002, 620, and on remand, *Cour d'Appel d'Orléans*, April 9, 2004, DMF 2004, 549. See generally Tetley, *Marine Cargo Claims*, 4<sup>th</sup> Ed, chap. 35: “Geographic Deviation”. Available on-line at <http://tetley.law.mcgill.ca/maritime/ch35.htm>.

<sup>51</sup> *Supra*, note 4.

<sup>52</sup> Bastarache J. (*supra*, note 1, [2003] 1 S.C.R. at 469; 224 D.L.R. (4<sup>th</sup>) at 592; 2003 AMC at 1293) merely referred to the fact that the respondents had raised this argument, relying in part on Tetley, *Marine Cargo Claims*, 3 Ed., 1988 at p. 99. See *Thiess Bros. Ltd. V. Australian Steamship Ltd.* [1955] 1 Lloyd’s Rep. 459 at 464 (N.S.W. S.C.): “The result of an unjustified deviation is to abrogate the contract at once, and to deprive the shipowner of all rights and liberties to which he was entitled under the contract so long as it subsisted, and of the protection conferred by Art. IV.”

or both, which no reasonably minded cargo-owner would raise any objection to.”<sup>53</sup> Because art. 4(4) states that a reasonable deviation is not “an infringement or breach of this Convention or of the contract of carriage”, it follows that an unreasonable deviation does contravene the Convention and the contract, meaning that the carrier may lose rights under the Hague/Visby Rules, for example the delay for suit, as well as its rights under the contract; such as limitations, exculpatory provisions and forum selection clauses.<sup>54</sup> In the event of a geographic deviation, therefore, the carrier cannot invoke its rights under the Hague/Visby Rules or in the contract evidenced by the bill of lading, which latter contains the forum selection clause.

### 5) Fundamental breach and the termination of the contract

In his decision, Hargrave P. recognized that, in the event of a geographic deviation, the carrier cannot invoke its rights under the Hague/Visby Rules or in the contract of carriage of goods by sea. Hargrave P. referred to *Captain v. Far-Eastern Shipping Co.*,<sup>55</sup> in which the plaintiff’s cargo was damaged by rain in Singapore, whilst on a dock, where it had been discharged and stored temporarily during shipment from India to Vancouver, contrary to the contract of carriage. The Prothonotary noted:<sup>56</sup>

“In *Captain* the Hague Rules were held to be suspended while the goods were on the dock in Singapore, by reason of a fundamental breach. Assuming that *Captain* applied in the present instance a contract, in the port-to-port bill of lading issued by ECU-Line, would have come to an end at Montreal. Indeed, it might even follow that the Commercial Tribunal in Antwerp would find itself without jurisdiction.”

The principle that a contract of carriage of goods by sea is infringed to the point of being terminated by a fundamental breach such as unreasonable geographic deviation, thus in effect rendering the foreign forum selection clause of the bill of lading inapplicable or unenforceable, was seemingly not considered by the Supreme Court.

### 6) Article 4(5)(e) of the Hague/Visby Rules and fundamental breach

Article 4(5)(e) of the Hague/Visby Rules is another statutory rule on fundamental breach. It stipulates that in the event of an unreasonable deviation, the carrier only loses the package limitation if the deviation was “done with intent to cause damage, or

<sup>53</sup> *Stag Line v. Foscolo, Mango & Co.*, [1931] 2 K.B. 48 at 69 (C.A. per Greer, L.J.).

<sup>54</sup> The principle was stated by Lord Atkin in *Stag Line Ltd. v. Foscolo, Mango & Co.*, [1932] A.C. 328 at 340; (1931) 41 Ll. L. Rep. 165 at 170 (H.L.), where he said: “I pause here to say that I find no substance in the contention faintly made by the defendants that an unauthorized deviation would not displace the statutory exceptions contained in the Carriage of Goods by Sea Act. I am satisfied that the general principles of English law are still applicable to the carriage of goods by sea except as modified by the Act, and I can find nothing in this Act which makes its statutory exceptions apply to a voyage which is not the voyage the subject of ‘the contract of carriage of goods by sea’ to which this Act applies.” Greer L.J., too, had seized upon the true nature of the Hague Rules and the meaning of a deviation, when he declared in the Court of Appeal, supra note 53 at 69: “The provisions of the Act import into the agreement compulsorily certain exceptions, but there is nothing in the Act to show that these exceptions can be relied upon while the vessel is not pursuing the contract voyage, but is pursuing a voyage, or part of it which is not covered by the contract at all.”

<sup>55</sup> [1979] 1 Lloyd’s Rep. 595; (1980) 97 D.L.R. (3d) 250 (B.C. S.C.) [hereafter *Captain*].

<sup>56</sup> *Supra*, note 18, 179 F.T.R. at 259; 2000 AMC at 150.

recklessly and with knowledge that damage would probably result.” An unreasonable deviation without intent *to cause damage*, but only with intent to do the act, will, nevertheless, cause the carrier to lose the benefit of the other defences in the contract and the Hague/Visby Rules under art 4(4).<sup>57</sup>

Thus article 4(5)(e) is not pertinent to our case, because article 4(4) is unaffected by article 4(5)(e), except for the package limitation, which is not involved here. The carrier, therefore, in the case at hand may still not invoke the forum selection clause. That clause, together with the rest of the contract, arguably ceased to be effective when the carrier clearly and intentionally deviated from the terms of the bill of lading by discharging the goods in Montreal, contrary to the bill’s term expressly requiring carriage of the cargo to destination by water exclusively.

### **7) Conclusion: Geographic deviation particularly under a statute.**

The geographic deviation in the *Z.I. Pompey* could not be considered reasonable because the booking arrangement called for carriage by sea only, and yet the carrier discharged the cargo from the ship halfway into the voyage and sent it by train to destination. The carrier intended to deviate, although arguably not to cause the damage. Under the Hague/Visby Rules, therefore, the carrier does not lose the package limitation but loses the benefit of the forum selection clause in the contract.

En passant, may I suggest that in any fundamental breach case, not merely of a geographic nature, the breach itself overcomes the right of the offending party to claim the benefit of a clause such as a forum selection clause.

## **IX Conclusion**

The Supreme Court of Canada, in *Z.I. Pompey*, reiterates the importance of order and certainty in private international law, in holding that the “strong test” is the relevant general test of enforceability of forum selection clauses in bills of lading, when sect. 46(1) of the *Marine Liability Act*<sup>58</sup> does not apply.

Sect. 46(1) is seen by the Supreme Court to apply only in very particular instances<sup>59</sup> and thus the Court reinforced the acceptance of forum selection clauses and the desirability of holding parties to their agreements. The affirmation of the “strong test” by the Supreme Court thus resolves the previous uncertainty in the law.

Finally, the Supreme Court held that matters such as fundamental breach are not to be decided by the court choosing the appropriate forum on an application for a stay of proceedings, but only by the foreign court designated by the jurisdiction clause. The Supreme Court also took the position that fundamental breach is solely a question of construction and not one of substance.

In consequence, the Court failed to address the issues of whether the breach of contract resulting from the discharge of the cargo in Montreal in plain and deliberate

<sup>57</sup> Tetley, “Chapter 35: Geographic Deviation”, *Marine Cargo Claims*, 4<sup>th</sup> ed. Available online at: <http://tetley.law.mcgill.ca/maritime/ch35.htm>.

<sup>58</sup> *Supra*, note 3.

<sup>59</sup> *Supra*, note 1, [2003] 1 S.C.R. at 472-473; 224 D.L.R. (4<sup>th</sup>) at 595; 2003 AMC at 1296.

violation of the bill of lading, was a fundamental breach, and, if so, whether such a breach rendered the forum selection clause inapplicable or unenforceable.

May I conclude respectfully that whether fundamental breach is solely a question of construction should be revisited by the Court. May I also respectfully note that fundamental breach under maritime law has been of substance, while the Hague/Visby Rules and Canada's equivalent (the Marine Liability Act), specifically define fundamental breach so that the substance/construction debate under the Rules is not pertinent.

Finally, it is my view that in any fundamental breach case, not merely of a geographic nature, the breach itself overcomes the right of the offending party to claim the benefit of a clause such as a forum selection clause. This proposition, I accept, is not likely to be received with approval in most Commonwealth jurisdictions at least.

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