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QUEBEC ADMIRALTY DISTRICT

BETWEEN:

R. J. POLITO ..... PLAINTIFF;

AND

GESTIONI ESERCIZIO NAVI }  
 SICILIA GENS ..... } DEFENDANT.

1959  
 {  
 Sept. 22  
 1960  
 {  
 Jan. 18  
 —

*Shipping—Practice—Stay of action—Damage to cargo—Claim by cargo-owners against ship-owners—Provision in bill of lading that any suit be brought before Italian court—Jurisdiction.*

The defendant moved for the dismissal of plaintiff's action or a stay of proceedings because of a clause in the bill of lading which provided that any action arising thereunder should be brought before the Italian Court of Genoa.

*Held:* That as it was apparent that the trial of the case before the Italian court would involve very considerable inconvenience and greatly increase the costs the Court would not be justified in giving effect to the clause. Motion dismissed accordingly.

MOTION to have action dismissed or stayed.

The motion was heard before the Honourable Mr. Justice Arthur I. Smith, District Judge in Admiralty for the Quebec Admiralty District at Montreal.

*Roland Chauvin* for the motion.

*A. K. Paterson contra.*

A. I. SMITH, D.J.A. now (January 18, 1959) delivered the following judgment:

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The defendant moves for the dismissal of plaintiff's action or alternatively a stay of proceedings.

By his action the plaintiff claims the alleged loss sustained by him as a consequence of defendant's failure to deliver a cargo of onions in accordance with its obligations under a bill of lading issued at Valencia, Spain, on January 27, 1958.

It appears that this merchandise which was shipped on the defendant's vessel *M/V Maria Fausta G.* at Valencia for delivery at Halifax was found on its arrival at destination to be in a damaged condition.

The present action was instituted on August 3, 1959, in the Ottawa Registry of the Exchequer Court in Admiralty, but, with the consent of the parties, was transferred later to the Montreal Registry.

The defendant's present motion is based upon the following clause which is contained in the bill of lading:

26. Any legal action, suit or proceedings that the shipper, receiver or their assignees should intend to bring against the Carrier or his Agents in connection with or consequent upon this carriage shall have to be brought before the Italian Court of Genoa empowered to pass judgment, departing expressly from the jurisdiction of any other Italian or foreign Court, also in case of consolidation or actions.

*The Fehmarn*<sup>1</sup>, Lord Denning at page 555:

Then, the next question is whether the action ought to be stayed because of the provision in the bill of lading that all disputes are to be judged by the Russian Courts. I do not regard this provision as equal to an arbitration clause, but I do say that the English Courts are in charge of their own proceedings; and one of the rules which they apply is that a stipulation that all disputes should be judged by the tribunals of a particular country is not absolutely binding. It is a matter to which the courts of this country will pay much regard and to which they will normally give effect, but it is subject to the overriding principle that no one, by his private stipulation, can oust these Courts of their jurisdiction in a matter that properly belongs to them.

\* \* \*

I do not regard the choice of law in the contract as decisive. I prefer to look to see with what country is the dispute most closely concerned. Here the Russian element in the dispute seems to me to be comparatively small. The dispute is between the German owners of the ship and the English importers. It depends on evidence here as to the condition of the goods when they arrived here in London and on evidence of the ship, which is a frequent visitor to London. The correspondence leaves in my

<sup>1</sup>[1957] 2 L.L.R. 551.

mind, just as it did in the learned Judge's mind, the impression that the German owners did not object to the dispute being decided in this country but wished to avoid the giving of security.

I think the dispute is more closely connected with England than Russia, and I agree with the Judge that sufficient reason has been shown why the proceedings should continue in these Courts and should not be stayed. I would therefore dismiss the appeal.

*The Athenee*<sup>1</sup>, Lord Justice Banks, at page 6

I think the learned Judge was justified, upon the materials before him, in refusing to exercise his discretion. It is not disputed that this contract is one of the class in which a judge of the Courts of this country has a discretion as to whether he will or will not stay the action to enable the parties to go to the tribunal which they selected. The learned Judge, in my opinion, is entitled to take all the circumstances into account, particularly the fact that the vessel is under arrest, and the fact of the dispute being in reference to the condition of the onions on arrival, and the fitness of the ship to carry them. Apparently there has been a survey at which both parties were represented; and the witnesses of the material facts are all in this country. I think there was an abundance of material upon which the learned Judge, if he thought right, could have exercised his discretion in the way he did.

Lord Justice Atkin:

I think that applies to a case of this kind. The question arises in respect of a clause to refer to a foreign tribunal as to a clause to refer to a domestic tribunal, whether there are proper reasons for not enforcing it. To my mind there were ample reasons for the learned President not enforcing it in this case. I think the balance of convenience and the substantial advantage which the plaintiffs have by suing in this country (and which they lose by not being able to proceed *in rem* against this ship), and many other advantages such as in respect of proof of loss, a matter which any commercial tribunal would wish should be decided, if possible, having regard to the evidence obtained at the time by inspection of the vessel and so on—all those grounds seem to me to afford ample reason for the learned President coming to the conclusion that, in the circumstances of this particular case, the clause in the contract should not be given effect to.

*The Vestris*<sup>2</sup>, Lord Merrivale, page 86.

In the present case Italy is in no way involved, save that the company defendant has its head office in that country. The contract of affreightment was entered into in Spain from which country the merchandise was shipped to Halifax. It is noteworthy that the clause above-quoted does not include a provision that it is the law of Italy which is to be applicable.

It is apparent therefore that the trial of the case before the Italian Court would involve very considerable inconvenience and greatly increase the costs, since in that event,

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<sup>1</sup>(1922) 11 Ll.L.R. 6.

<sup>2</sup>(1932) 43 Ll.L.R. 86.

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all witnesses, who might be required to prove the condition of the cargo at the time of shipment, would have to be brought from Spain to Italy and all witnesses, having knowledge of the condition of the goods on their arrival at Halifax, would have to be brought from Canada, in addition to which it is not improbable that proof would have to be made of the law of one, if not both, of these countries.

In my view the circumstances of the present case are such as to bring it within the application of the principles laid down in the cases above cited, and to justify the refusal by this Court to give effect to the clause above-quoted and decline to either dismiss or stay the present action.

The Court was referred by counsel for defendant to the case of *The Stromboli*<sup>1</sup>, where the Court dealt with a similar motion. In that case the clause in the bill of lading obligated the parties "to litigate any dispute arising thereunder by Italian law and before the judicial authority of Genoa, Italy, and not otherwise" and the learned judge decided on the authority of the *Cap Blanco* case<sup>2</sup> that, in the circumstances, it was "more convenient and much more inexpensive that the dispute should be determined by the Hamburg Court and therefore decided in favour of the motion. *The Stromboli* case therefore does not depart from the principles laid down in the other cases above cited or necessarily support the argument of counsel for defendant in the present case.

I conclude therefore that in the circumstances of the present case, I would not be justified in giving effect to the said clause and accordingly the defendant's motion is dismissed, with costs.

*Judgment accordingly.*