Federal Court  Cour fédérale

Date: 20231026

Docket: T-247-23

Citation: 2023 FC 1429

Ottawa, Ontario, October 26, 2023

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

QSL CANADA INC.

Plaintiff/Defendant by Counterclaim/Applicant

and

CLIFFS MINING COMPANY

Defendant/Plaintiff by Counterclaim/Respondent

and

UNITED STATES STEEL CORPORATION

Defendant/Respondent

JUDGMENT AND REASONS

I. Overview

[1] At its core, the present dispute involves stevedoring services provided at the Port of Quebec by the plaintiff QSL Canada Inc. [QSL] to both defendants, Cliffs Mining Company

[Cliffs] and United States Steel Corporation [US Steel]. With the present motion, US Steel seeks an Order to enforce what it claims to be the applicable forum selection clause binding the company and QSL, which calls for the litigation of any dispute between the parties in relation to their governing stevedoring contract to be brought before the courts in Pennsylvania.

[2] For the reasons that follow, I am dismissing the present motion. In short, I have not been convinced that the contractual forum selection clause proffered by US Steel is binding upon the parties, nor have I been convinced, pursuant to the principles of *forum non conveniens*, that the courts of Pennsylvania are a more appropriate forum to litigate the underlying dispute. Finally, I also cannot agree with US Steel that the nature of the remedy sought by QSL in the form of declaratory relief is inappropriate in this case.

II. Background

[3] QSL provides stevedoring and logistics services, in particular at sections Q-52B and Q-53 of QSL's Beauport terminal at the Port of Quebec; the company's services include, amongst other things, the handling of bulk commodities including the loading and discharging of marine vessels, and the storage of such commodities at their terminal.

[4] In late July 2022, about 30,000 metric tons of Flex iron ore pellets in bulk [the Flex pellets] for the account of US Steel and about 91,000 metric tons of Hibbing iron ore pellets in bulk [the Hibbing pellets] for the account of Cliffs were stockpiled adjacent to each other on the dock at section Q-52B, with part of the Hibbing pellets also stored in hoppers at section Q-53; the commodities had arrived at the Port of Quebec during the course of that month aboard a

series of Canadian lakers. QSL had handled the discharging and stockpiling of the cargoes onto the terminal and into the hoppers. On July 31, 2022, the ocean-going vessel MAGIC THUNDER arrived at the Port of Quebec intending to load just under 82,000 metric tons of the Hibbing pellets destined for Cliffs' customer in Hamburg. However, what was actually loaded by QSL aboard the vessel was about 61,000 metric tons of the Hibbing pellets along with about 21,000 metric tons of US Steel's Flex pellets; the error in the commingling of the iron ore cargoes – leading to what is ostensibly, from US Steel's perspective, the misappropriation of its Flex pellets – was discovered by QSL in early August, with the defendants being so advised shortly thereafter.

[5] Following what must have been a series of exchanges and discussions, the gloves came off. In late January 2023, QSL received a demand letter from Cliffs seeking damages in the amount of CA $7,839,447.98 resulting from the commingling of its cargo with that of US Steel, with the threat of legal action if QSL refused to pay the claim within 15 days of receipt of the letter. Not waiting around to be sued, QSL instituted the underlying action against Cliffs before this Court on February 7, 2023, seeking amongst other things, declaratory relief by way of an order that, pursuant to the terms of its stevedoring contract with Cliffs, QSL is not liable for the damages resulting from the commingling of the cargoes and, alternatively, that QSL was contractually entitled to limit its liability towards Cliffs to CA $17,022.60; Cliffs has filed its defence and counterclaim seeking damages from QSL.

[6] In late February 2023, QSL received a demand letter from US Steel seeking damages in the amount of US $4,629,211.47, also with the threat of legal action if the matter was not

resolved by March 15, 2023. On February 24, 2023, QSL amended its statement of claim in the underlying action to include US Steel as a co-defendant, and similarly sought a declaratory order that QSL was entitled to limit its liability towards US Steel to CA $17,022.60 pursuant to the terms of their stevedoring contract. At the request of QSL, the underlying action is presently moving forward as a specially-managed proceeding pursuant to Rule 384 of the *Federal Courts Rules*, SOR/98-106, with the appointment of a case management judge on September 6, 2023.

[7] Not to be outdone, US Steel proceeded to do two things; first, it filed the present motion on April 21, 2023, seeking the dismissal of the underlying action as against it on the basis that its Governing Law clause – which contains a forum selection component calling for Pennsylvania jurisdiction – has been incorporated by reference in the stevedoring contract it has with QSL; US Steel's "Governing Law" clause reads:

> The purchase order and these terms and conditions shall be governed exclusively by the laws of the Commonwealth of Pennsylvania, excluding Pennsylvania conflict of laws provisions. SELLER IRREVOCABLY AGREES THAT ANY LEGAL ACTION OR PROCEEDING SEEKING THE ENFORCEMENT OR INTERPREATION OF THE PURCHASE ORDER OR THESE TERMS AND CONDITIONS MAY BE BROUGHT IN THE COURTS OF THE COMMONWEALTH OF PENNSYLVANIA IN ALLEGHENY COUNTY, PENNSYLVANIA OR THE FEDERAL DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA IN PITTSBURGH, PENNSYLVANIA. BY ITS ACCEPTANCE OF THE PURCHASE ORDER SELLER HEREBY IRREVOCABLY SUBMITS ITSELF TO THE JURISDICTION OF ANY SUCH COURTS, AND WAIVES ANY OBJECTION IT MAY NOW OR HEREAFTER HAVE TO THE PLACING OF VENUE IN ANY SUCH COURTS AND RIGHT TO REMOVE ANY SUCH ACTION OR PROCEEDING TO ANOTHER COURT.
>
> [Emphasis added.]

[8] In addition, US Steel proceeded to file a complaint against QSL for full compensation in the United States District Court for the Western District of Pennsylvania, sitting in Pittsburgh [U.S. Action]. I should mention that the details of the U.S. Action are not clear, other than reference to those proceedings in the record and during counsel's oral submissions before me. However, the record does indicate that on July 24, 2023, the United States District Court dismissed QSL's motion for a stay of the U.S. Action without reasons, with the matter now proceeding to discoveries.

[9] For its part, and in contrast to the assertions of US Steel, QSL argues that it's Standard Terms and Conditions which contain a governing law and jurisdiction clause has been incorporated in the stevedoring contract. QSL's "Applicable Law and Jurisdiction" clause reads:

> All claims and disputes arising out of or in connection with our Services, whether in contract or in tort, shall be submitted to a court having jurisdiction over the subject matter in Quebec City and in accordance with Canadian maritime law as applied in the Province of Quebec. Notwithstanding the foregoing, claims or disputes that do not exceed CDN$50,000.00, shall be referred to final arbitration in Quebec City, pursuant to the then current small claims procedure of the Rules of the Association of Maritime Arbitrators of Canada.
>
> [Emphasis added.]

[10] Apart from arguing for the application of its own forum selection clause, QSL asserts that the present motion should be dismissed because the applicable forum selection clause binding the parties is in dispute, and that what constitutes the governing contract is a triable issue of mixed fact and law which should be determined by the judge hearing the underlying action on the merits, or possibly, by way of a motion for summary judgment or summary trial after discoveries pursuant to Rules 213 *et seq*.

III. Discussion

[11] I should first mention that US Steel initially framed the present motion as a motion to strike for want of jurisdiction pursuant to Rule 221(1)(a), on a plain and obvious test – similar to the manner in which the application of forum selection clauses is resolved before the Quebec Courts. Although a motion before this Court to strike pleadings pursuant to Rule 221(1)(a) is appropriate where this Court's subject-matter jurisdiction is being challenged (*Black & White Merchandising Co. Ltd. v Deltrans International Shipping Corporation,* 2019 FC 379 at paras 32-33; *Hodgson v Ermineskin Indian Band No 942* (2000), 2000 CanLII 15066 (FC), 180 FTR 285, aff'd [2000], 267 NR 143 (FCA), leave to appeal refused [2001] SCCA No 67 (QL)), here there is no issue – at least none raised by US Steel – that this Court does not enjoy subject-matter jurisdiction given the maritime nature of the underlying claim for damage to marine cargo.

[12] Rather, it is to section 50 of the *Federal Courts Act*, RSC 1985, c F-7 [Act], that reference must be made in the context of the enforcement of forum selection clauses, a provision which empowers this Court to stay proceedings – not dismiss them – for any reason where it is in the interest of justice to do so. Section 50 of the Act provides:

Stay of proceedings authorized	**Suspension d'instance**
50 (1) The Federal Court of Appeal or the Federal Court may, in its discretion, stay proceedings in any cause or matter	50 (1) La Cour d'appel fédérale et la Cour fédérale ont le pouvoir discrétionnaire de suspendre les procédures dans toute affaire :
(a) on the ground that the claim is being proceeded with	a) au motif que la demande est en instance devant un autre tribunal;

in another court or jurisdiction; or	
(b) where for any other reason it is in the interest of justice that the proceedings be stayed.	b) lorsque, pour quelque autre raison, l'intérêt de la justice l'exige.

A. *Stay of the underlying action pursuant to US Steel's forum selection clause*

[13] The discretion not to enforce a forum selection clause comes from the common law, and, to echo the words of Mr. Justice Harrington in *Hitachi Maxco Ltd. v Dolphin Logistics Company Ltd.*, 2010 FC 853 [*Hitachi Maxco*] at paragraph 23: "this Court in its discretion always had jurisdiction to proceed to hear a case on the merits notwithstanding a foreign forum selection clause." (See also *The Eleftheria*, [1969] 1 Lloyd's Rep. 237, [1969] 2 All ER 641 [*The Eleftheria*], at p. 645 (citing to All ER); *Uber Technologies Inc. v Heller*, 2020 SCC 16, [2020] 2 SCR 118 at para 272). That being the case "[h]owever, the jurisprudence, particularly in Canada, had developed such that a Court which otherwise had jurisdiction should in its discretion grant a stay in the light of a foreign forum selection clause." (*Hitachi Maxco* at para 23).

[14] In short, and in the absence of applicable legislation such as section 46 of the *Marine Liability Act*, SC 2001, c 6 [MLA], which finds no application in this case, the exercise of the Court's discretion when a party brings a motion for a stay of proceedings to enforce a forum selection clause – as opposed to an arbitration clause – pursuant to subsection 50(1) of the Act has been governed by the "strong cause" test, with the burden being on the party contesting the enforcement of the clause to satisfy the Court that there exists good reason not to enforce it (*The Eleftheria* at p. 645; *ZI Pompey Industrie v ECU-Line NV*, 2003 SCC 27, [2003] 1 SCR 450 [*The Canmar Fortune*], at paras 19, 20, and 39; *Arc-En-Ciel Produce Inc. v The ship BF Leticia*,

2022 FC 843 at para 142). The principle was recently summarized by Justice Fothergill in *General Entertainment and Music Inc. v Gold Line Telemanagement Inc*., 2022 FC 418 (aff'd on appeal: 2023 FCA 148) [*Gold Line*] at paragraph 3:

> According to that authority, once a court is satisfied that a validly executed forum selection clause binds the parties, it must grant the stay unless the plaintiff can show sufficiently "strong cause" to support the conclusion that it would not be reasonable or just in the circumstances to require the plaintiff to adhere to the terms of the clause.
>
> [Emphasis added.]
>
> (see also *Great White Fleet v Arc-En-Ciel Produce Inc*., 2021 FCA 70 at para 14).

[15] However in the present case, I need not consider the factors which are to be taken into account when considering the "strong cause" test in relation to US Steel's Governing Law clause, nor whether QSL has met its burden of convincing me not to exercise my discretion in favour of staying the present action in accordance with such clause. Quite simply, I have not been satisfied on the record before me, the burden being upon US Steel, that US Steel's Governing Law clause has been duly incorporated in the parties' stevedoring contract and thus binding upon them.

[16] From the evidence, US Steel seems to have had a longstanding business relationship with QSL, having shipped cargoes via QSL's facilities at the Port of Quebec since about 2003. The nature of the contractual dealings between the parties seems not to have significantly change over time; Mr. Geoff Lemont, the now Vice-President of Sales for QSL, gave evidence that towards the latter part of each shipping season, or within the first three months of the following year, he would be contacted by the Manager of Raw Materials of US Steel – who I understood to

be, at least since 2019, Mr. Nathaniel E. Joseph, today the Senior Manager – Raw Materials for US Steel – to discuss projected volumes of iron pellets expected to be shipped to QSL's Beauport terminal during that upcoming shipping season. As commercial people often do, they would primarily focus on stevedoring rates for the upcoming season. I should also mention that the shipping season for the Canadian lakes trade through the St. Lawrence Seaway and the St. Lawrence River generally runs each year from the opening of the Seaway sometime around mid-March until the closure of the Seaway sometime around the end of December.

[17] Once rates were agreed, Mr. Lemont would typically send an email to Mr. Joseph confirming the updated rates for the upcoming shipping season, and also attach QSL's stevedoring contract [QSL's proposed agreement] setting out such terms as the Scope of Work, Term of the Contract, Liability Provisions, Rates, Vessel Nomination, Laytime and Demurrage, and Standard Terms and Conditions, amongst other things. As confirmed by Mr. Lemont in his affidavit and cross-examination, at least as regards more recent years, US Steel was not in the habit of signing QSL's proposed agreement; US Steel takes no issue with this assertion. However, cargos were shipped by US Steel and stevedoring services provided by QSL each year.

[18] Once QSL's proposed agreement was emailed to US Steel, for planning purposes, US Steel's procurement department would then typically send QSL forecasted inbound shipments for the coming months, as well as purchase orders from time to time throughout the year so as to trigger specific shipments. At least according to Mr. Lemont, throughout the parties' business relationship, including for the 2022 shipping season, US Steel conducted itself as if the parties were bound by QSL's proposed agreement as submitted by QSL for that year, and at no time did

US Steel either object to, reject, or otherwise comment on, the terms of QSL's proposed agreement, including the incorporated Standard Terms and Conditions which included QSL's Applicable Law and Jurisdiction clause. In fact, QSL points to the demand letter received from US Steel in late February 2023 which arguably threatens legal action in Canada notwithstanding that the US Steel Governing Law clause only provides for an option to sue within Pennsylvania, as support for the proposition that US Steel knew that it was bound by QSL's Applicable Law and Jurisdiction clause and Canadian jurisdiction.

[19] Specifically as regards the 2022 shipping season, Mr. Joseph reached out to Mr. Lemont in November 2021 requesting rates for the upcoming 2022 shipping season; discussions ensued and, on March 1, 2022, Mr. Lemont sent an email to Mr. Joseph submitting QSL's proposed agreement with updated stevedoring rates. Although Mr. Lemont signed the copy of QSL's proposed agreement sent to Mr. Joseph, as in the past, the agreement was not signed by US Steel notwithstanding the fact that the contract included a signature line seemingly requiring a signature. In addition, the 2022 version of QSL's proposed agreement sent to US Steel included a recently amended clause 2, the Term provision, which read as follows: "If signed prior to March 18, 2022, this agreement will be valid until December 31st, 2022" (more on this issue below). In any event, as was also customary, about a week later, Ms. Carly DeSantis – who, I take it, was with US Steel's procurement department – sent QSL forecasted inbound shipments for March through August 2022; QSL takes the position that this was confirmation that QSL's proposed agreement with the updated rates was accepted by US Steel. Thereafter, and again as was customary and in their normal course of business, around March 20, 2022, QSL was sent a purchase order by US Steel without any further information or explanation; according to

Mr. Lemont, no further explanation was required as purchase orders were meant simply to trigger shipments and were never meant to amend or alter the governing stevedoring contract. A second purchase order was sent by US Steel to QSL in May 2022. US Steel argues that the issuance of its purchase order was not, as contends QSL, acceptance by performance of QSL's proposed agreement, but rather a counteroffer. According to US Steel, QSL's acceptance of its counteroffer was signalled by QSL having eventually provided the stevedoring services.

[20] The evidence seems to confirm that the parties only negotiated and agreed upon commercial terms, and that neither Mr. Lemont nor Mr. Joseph turned their minds to any other aspect of the stevedoring agreement, especially the other party's forum selection clause. US Steel's main focus at the hearing before me and in its written submissions was its argument of "objective rejection" of QSL's proposed agreement, i.e., that US Steel never agreed to the terms and conditions of QSL's proposed agreement for 2022, save as to rates, as confirmed by the objective evidence in the record. US Steel points to a number of purported *indicia* of intent that would inform the issue of whether it agreed to be bound by QSL's proposed agreement and, although accepting that Mr. Lemont and Mr. Joseph "mentally" only negotiated and agreed on commercial terms with their respective boiler plates just being tacked on later, US Steel argues that there is nonetheless *prima facie* evidence of what a reasonable person looking at the sequence of events would conclude was the intention of the parties (see *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v Aga*, 2021 SCC 22 at paras 35-37), and that such *prima facie* evidence would confirm that the parties agreed to be bound by the US Steel Governing Law clause.

[21] As the purchase order is devoid of many of the terms typically found in a stevedoring contract – terms such as Scope of Work, Term of the Contract, Liability Provisions, Vessel Nomination, Laytime and Demurrage – US Steel also argues that should I disagree that the purchase order constituted a wholly separate contract (save as to rates which had been agreed to), the purchase order could still be considered a counteroffer to the terms and conditions specifically addressed therein which, in particular, included US Steel's Governing Law clause with its forum selection component calling for Pennsylvania jurisdiction.

[22] However that is not exactly what Mr. Joseph stated in his affidavit of April 23, 2023; after referring to the March 1, 2022 email from QSL attaching the letter and QSL's proposed agreement for 2022, Mr. Joseph stated at paragraph 9 of his affidavit: "U.S. Steel made a counteroffer to QSL regarding QSL's 2022 stevedoring services." Mr. Joseph then continues by specifying that purchase order 21268567 was provided to QSL, but provides no further explanation or details. Nor does Mr. Joseph state that QSL formally agreed to such "counteroffer" – which QSL denies in any event. US Steel simply points to the deemed acceptance by performance provision in the purchase order itself, and makes the argument before me of its "objective rejection" of QSL's proposed agreement through the issuance of the purchase order.

[23] Under cross-examination, Mr. Joseph admitted having never turned his mind to the terms of the purchase order, which begs the question: how can the purchase order constitute a formal counteroffer to QSL's proposed agreement other than rates when Mr. Joseph was not aware of what he was countering? From what I can tell, the nature and purpose of the purchase order,

fundamental to the issue of its application, is not clear. For example, if the purchase order was truly meant to be a counteroffer to QSL's proposed agreement, why would multiple purchase orders need to be sent to QSL during the course of the same year? At least some of the evidence tends to support Mr. Lemont's testimony that the purchase orders were meant simply as an administrative tool for accounting purposes to confirm an invoice number to QSL against which their invoices for the payment of services provided to US Steel would be issued. In fact, the affidavit of Mr. Lemont of May 31, 2023 confirms that in 2018, QSL had to chase down US Steel for the purchase order, seemingly after the arrival of the vessel and cargo operations were completed, to be able to issue its invoice for stevedoring services. On the other hand, Mr. Lemont also asserts that in 2016 and 2019 no purchase orders were issued by US Steel at all, which begs the question of how QSL was therefore paid for those years. In any event, US Steel confirmed at least one function of the purchase order, the accounting function, conceding before me that in order to get paid, QSL would have had to issue its invoices against a purchase order issued by US Steel.

[24] To prove its point that there is evidence of its "objective rejection" of QSL's proposed agreement, US Steel took me through a somewhat convoluted process of comparing and contrasting the wording of the stevedoring contracts and cover letters sent by QSL to Cliffs with those sent to US Steel; it points to the fact that QSL's proposed agreement contained a signature requirement for acceptance, and argues that without US Steel's signature, it cannot be said that US Steel agreed to its terms and conditions, including QSL's Applicable Law and Jurisdiction clause. In addition, US Steel argues, the fact that Cliffs always signed its contract but US Steel never did is a further objective indication of non-acceptance of QSL's terms and conditions by

US Steel. Finally, US Steels points to the difference in clause 2 of both the Cliffs and the US Steel versions of their respective stevedoring contracts with QSL, underscoring the fact that clause 2 found in the 2022 version of QSL's proposed agreement sent to US Steel, as indicated earlier, includes a Term provision seemingly requiring signature of the contract by US Steel prior to March 18, 2022, so as to render the contract effective – a feature not included in the stevedoring contract with Cliffs. US Steel argues QSL had an expectation that its co-contracting party – US Steel – would sign the contract for it to be bound. On the evidence before me, I would have to say what such an assertion is speculation, and the fact that US Steel, at least in more recent times, was in the habit of not signing the stevedoring contract for the reasons set out in Mr. Lemont's affidavit seems to be overlooked by US Steel.

[25] For its part, QSL points to a November 22, 2021 email from Mr. Lemont to Mr. Joseph where Mr. Lemont sets out the revised rates for the upcoming year, and then ends with "All terms and conditions remains unchanged"; this, argues QSL, is a clear indication that US Steel were perfectly aware that the QSL's proposed agreement applied. QSL also argues that a simple reading of clause 2 of the 2022 version of QSL's proposed agreement confirms that execution by signature was not a requirement so that the contract becomes effective, but only a requirement to lock in the proposed rates offered by QSL for the Term, thus avoiding US Steel facing rate increases for the various shipments throughout the 2022 shipping season. Moreover, during cross-examination, Mr. Joseph confirmed that he assumed the rates for the year were locked in, and this without having signed QSL's proposed agreement; thus QSL argues that from US Steel's perspective, it made no difference if QSL's proposed agreement was signed or not because US Steel nonetheless considered the rates as being fixed for the year, and thus felt bound

by QSL's proposed agreement. QSL also points to the deemed acceptance provision (clause 15) of its proposed agreement pursuant to which, once cargo operations commenced, US Steel was deemed to have accepted the incorporated terms and conditions, both commercial and non-commercial.

[26] Under the circumstances, I must agree with QSL that the determination of what constitutes the terms and conditions of the stevedoring contract between US Steel and QSL, in particular the competing forum selection clauses, is a triable issue of mixed fact and law which will be better determined by the judge hearing the underlying action on the merits, or possibly, by way of a motion for summary judgment or summary trial pursuant to Rules 213 *et seq* following discoveries, when a full record on this issue may be prepared and available to the Court. The historical evidence of the agreements between US Steel and QSL is not fully before the Court, and the record that is before the Court is constrained by the fact that Mr. Joseph has only been in the position he now holds for a few years. During the hearing before me, it quickly became evident that we were left to supposition, speculation, and conjecture as regards any reasonable assessment of the intention of the parties during the history of their relationship as to what truly constituted the terms of their stevedoring agreement, in particular as regards the governing forum selection clause.

[27] For the purposes of the present motion, however, I need not come to a determination as to whether US Steel agreed to and was bound by QSL's Applicable Law and Jurisdiction clause, nor specifically regarding which forum selection clause at all binds the parties; this is neither a motion for summary judgment nor summary trial. Suffice it to say that I have not been

convinced, on the evidence before me, that US Steel's Governing Law clause has been validly incorporated into the stevedoring contract binding the parties. As was clearly set out by Justice Fothergill in *Gold Line*, to undertake a review of the factors purportedly showing a strong cause why I should not exercise my discretion and stay the underlying proceedings in favour of a forum selection clause, I must first be "satisfied that a validly executed forum selection clause binds the parties" (*Gold Line* at para 3). In this case, on the record before me, I am not. It is therefore best that I say nothing further on this issue, as the determination of what constitutes the terms and conditions of the stevedoring contract binding the parties in this case, in particular its governing law and jurisdiction provisions, may well have to be determined at a later stage. That is not to say that I find that QSL's Applicable Law and Jurisdiction binds the parties. Again, on cross-examination, Mr. Lemont also testified that he never turned his mind to that provision of QSL's own Standard Terms and Conditions.

B. *Stay of the action for reasons of* forum non conveniens

[28] In the alternative, US Steel argues that the underlying action should nonetheless be stayed, as the courts of Pennsylvania are a more appropriate forum to hear this matter. However, it seems to me that undertaking a *forum non conveniens* enquiry in this context may be premature. Ordinarily, we would not be undertaking such an enquiry where there exists a valid forum selection clause unless that clause is rendered inoperative by applicable legislation such as section 46 of the MLA. In other words, either there exists a binding forum selection clause and the Court considers the factors relevant to the "strong cause" test, or there is no applicable forum selection clause and a *forum non conveniens* enquiry is undertaken, with its own set of factors to consider. To this I would add that a *forum non conveniens* enquiry may nonetheless still be

required in the event of a successful "strong cause" challenge by a party looking to convince the Court not to exercise its discretion in favour of an otherwise enforceable forum selection clause and where the more appropriate forum is somewhere other than that identified in the forum selection clause.

[29] In this case, the wrinkle is that the applicable forum selection clause is in dispute, an issue which will have to be resolved at some point one way or the other. Once it does, it will render the whole *forum non conveniens* analysis academic. Here, and although section 46 of the MLA is not in play, a *forum non conveniens* enquiry may nonetheless become necessary in the event the Court is eventually convinced that there is a strong cause not to exercise its discretion and stay the action by reason of the forum selection clause, or should the Court decide, based upon the evidence, that the parties never did properly incorporate either of the forum selection clauses into their stevedoring agreement. Therefore, and as the parties have pleaded to the issue of *forum non conveniens*, I will deal with it in the event its determination is eventually required.

[30] The starting point of the analysis is Mr. Justice Harrington's statement in *Hitachi Maxco* at paragraph 43: "[t]he basic rule, which should not be forgotten, is that the choice of forum rests with the plaintiff." I would add that in the determination of whether a matter should be stayed in favour of another jurisdiction, it is not enough for the moving party, in this case US Steel, to show that another jurisdiction is also appropriate or equally appropriate to hear the matter as is this Court; the party seeking a stay on the basis of *forum non conveniens* must establish, to the satisfaction of the Court, that the other forum is "more convenient and appropriate for the pursuit of the action and for securing the ends of justice" (*Antarres Shipping v The Ship Capricorn et al*,

[1977] 2 SCR 422 at p 449). In other words, the existence of a more appropriate forum must be clearly established to displace this Court from hearing the matter (*Mazda Canada Inc. v Mitsui OSK Lines, Ltd* (FC), 2008 FCA 219, [2009] 2 FCR 382 [*The Cougar Ace*] at para 12).

[31] In short, in assessing the factors that are to be considered in determining whether this Court should exercise its discretion to stay an action otherwise properly before it, a tie goes to the party opposing the request for a stay of proceedings. As stated by Justice Sopinka in *Amchem Products Incorporated v British Columbia (Workers' Compensation Board)*, 1993 CanLII 124 (SCC), [1993] 1 SCR 897 at page 921: "[...] I agree with the English authorities that the existence of a more appropriate forum must be clearly established to displace the forum selected by the plaintiff" [emphasis added] (see also *Hitachi Maxco* at paras 24-25; *Alpha Trading Monaco Sam v The ship Sarah Desgagnés*, 2010 FC 695 at para 18).

[32] In *The Cougar Ace*, the Federal Court of Appeal [FCA] at paragraph 11, repeated the non-exhaustive list of ten connecting factors to be weighed by the Court in undertaking a *forum non conveniens* enquiry – the same factors outlined earlier by the Court in *Magic Sportswear Corp. v OT Africa Line Ltd.*, 2006 FCA 284, [2007] 2 FCR 733 [*The Mathilde Maersk*] at paragraph 92, and as established by the Supreme Court in *Spar Aerospace Ltd. v American Mobile Satellite Corp*., 2002 SCC 78, [2002] 4 SCR 205 at paragraph 71:

> (1) the parties' residence, and that of witnesses and experts;
>
> (2) the location of the material evidence;
>
> (3) the place where the contract was negotiated and executed;
>
> (4) the existence of proceedings pending between the parties in another jurisdiction;

> (5) the location of the defendants' assets;
>
> (6) the applicable law;
>
> (7) advantages conferred upon the plaintiff by its choice of forum, if any;
>
> (8) the interests of justice;
>
> (9) the interests of the parties;
>
> (10) the need to have the judgment recognized in another jurisdiction.

[33] In the trial decision of *The Cougar Ace* (2007 FC 916, [2008] 3 FCR 423) at paragraph 33, Justice Harrington added three additional factors to the initial non-exhaustive list set out above which he thought in the context of that particular case should be examined in undertaking a *forum non conveniens* analysis: (1) the public policy of subsection 46(1) of the MLA; (2) although falling within the heading of the location of the defendants' assets, the *in rem* procedure of this Court which Justice Harrington thought deserved special mention; and (3) the forum selection clause in the governing contract of carriage. On appeal, the FCA disagreed with Justice Harrington as to whether subsection 46(1) of the MLA evinced a policy that would favour Canadian plaintiffs in their choice of a forum, and also considered that any possible advantages of this Court's *in rem* procedure is beside the point, as it is only available "if Canada assumes jurisdiction, but not if it does not" (*The Cougar Ace* at para 23). As to any reference to the forum selection clause in the governing contract of carriage, the FCA disagreed only as to the weight given to such a factor in the overall assessment made by the Court (*The Cougar Ace* at paras 22-24). In any event, additional factors 1 and 2 – any public policy consideration in relation to section 46 of the MLA and access to this Court's *in rem* jurisdiction – find no application here.

[34] That said, I am invited by US Steel to consider a further factor in my *forum non conveniens* analysis, and that is the appropriateness of the declaratory relief being sought by QSL in the underlying proceedings. Therefore, in assessing the connecting factors relevant to a *forum non conveniens* enquiry, I find as follows:

(1) The parties' residence, and that of witnesses and experts

[35] Both parties reside in the location of their respective proffered forum selection clauses. There was also consideration given by the parties as to whether US Steel carried on business in Quebec on account of the fact that it has been shipping cargo from the Port of Quebec for some time, however in the end, not much turns on this issue. US Steel argues that this connecting first factor weighs heavily in favour of the Western District of Pennsylvania given that QSL has conceded liability for the loss of cargo, and therefore any witnesses – located in Pittsburgh – would likely be limited to the issue of US Steel's damages. For its part, QSL argues that the primary issue in this case is whether it is entitled to limit its liability, thus impacting significantly the amount of damages recoverable by US Steel, and that the determination of whether limitation of liability is engaged will require not only the testimony from witnesses involved in the circumstances leading to the comingling of the cargoes – who are in Quebec – but may include a site visit to QSL's terminal in Quebec so as to assist the Court in its understanding of the factual issues which may inform such an assessment. As regards the quantum of damages, in the event limitation of liability is not available, QSL argues that the location of experts and other witnesses of the parties may vary.

[36] For my part, I cannot agree with US Steel that the underlying action is primarily about the quantum of its damages and that, therefore, this factor weighs heavily in favour of the courts of Pennsylvania. It may well be that the matter will proceed on an agreed statement of facts; I see witnesses being needed on both sides to set out the factual landscape, including as regards the issue of incorporating the proper choice of law and jurisdiction clause upon which the determination of QSL's ability to limit its liability will be heavily based. I agree with US Steel that there will not be a great number of witnesses, however, there will likely be discoveries and possibly further cross-examinations on affidavits, with witnesses on both sides to be able to get to where an agreed statement of facts can be finalized. In addition, context is important, and I accept that a site visit to QSL's terminal at the Port of Quebec may answer a number of questions that would assist the Court in its assessment of the factors underpinning QSL's claim to limit its liability. Finally, as regards damages, experts may come from anywhere. All in all, I cannot say that this factor favours US Steel in its quest to meet its burden on this motion. At best, it is a neutral factor.

(2) The location of the material evidence

[37] Aside from a possible site visit outlined above, the parties agree that it is expected that all evidence will be documentary; US Steel therefore concedes that this factor does not weigh strongly in the analysis. I agree.

(3) The place where the contract was negotiated and executed

[38] US Steel argues that this factor does not weigh strongly in the analysis as the contract was negotiated by email, QSL's proposal was received by US Steel in Pittsburgh, and that the contract was executed in Quebec. QSL argues that the stevedoring contract was concluded in Quebec when QSL forwarded the agreement to US Steel, which then acknowledged the agreement by sending the forecast of shipments for the coming months. In addition, argues QSL, there is no doubt that the stevedoring contract was executed entirely in Quebec, with the price being stated to be in Canadian dollars and any alleged acts or omissions leading to the damages occurred in Quebec.

[39] First of all, I am not convinced, on the record before me, that the stevedoring contract was concluded in Quebec, as it is not clear whether the agreement sent by QSL to US Steel in early March 2022 was simply a proposal or a confirmed agreement, or whether the forwarding of the shipment forecasts and later the purchase orders constituted "acknowledgement" of the contract, "approval" of the contract, or, in the case of the purchase order, a "counteroffer." Those are the issues that the record before me does not satisfactorily answer; these unanswered issues are why, as stated earlier, I have not been convinced by US Steel that its Governing Law clause has been validly incorporated into the agreement. In any event, US Steel concedes that this factor does not weigh strongly in the analysis, so I say nothing further on this issue.

(4) The existence of proceedings pending between the parties in another jurisdiction

[40] Proceedings have indeed been filed in the Western District of Pennsylvania, thus raising the possibility of conflicting decisions if QSL's claim is allowed to proceed before this Court and the US Action not ultimately dismissed; US Steel argues that this weighs heavily in favour of the Pennsylvania jurisdiction. QSL argues in essence that it is disingenuous for US Steel to take that position because the multiplicity of proceedings only exists because the US Action was commenced after the institution of the present action by QSL before this Court; QSL argues therefore that this factor weighs heavily in its favour.

[41] I should make clear that QSL is not arguing that because it took its action first, that the jurisdiction of the Court must prevail; it is clear that this is not supposed to be a race to the court. Here, both parties took action in accordance with what they perceived, rightly or wrongly, to be the proper jurisdiction under their governing forum selection clause. The *litis pendens* issue will need to be resolved at some point, and I would suspect that as goes the fate of the applicable forum selection clause – which in both cases includes a choice of law clause – so will go the determination of which jurisdiction is to be preferred. Although things may have been different had the US Action preceded the underlying action before this Court, I am not convinced that the factor weighs in favour of the Pennsylvania jurisdiction as argued by US Steel.

(5) The location of the defendants' assets

[42] In the context of these proceedings it is the location of QSL's assets that would be relevant. US Steel argues that QSL is more likely to have assets in both Canada and the United

States, hence this factor does not weigh strongly in the analysis. QSL says that its primary activities are in the Province of Quebec and that in any event, it does not carry on any activity or operations, nor does it have any assets, in the State of Pennsylvania. There is no doubt that QSL's primary assets are in Quebec, however as US Steel has conceded that this factor does not weigh strongly in the assessment that is to be undertaken, I say nothing further on this issue other than I am not convinced it weighs in favour of the courts of Pennsylvania.

(6) The applicable law

[43] US Steel argues that the applicable law is to be found in the Governing Law clause incorporated in its purchase order which it purports is binding on the parties, and therefore this weighs heavily in favour of the Western District of Pennsylvania. QSL says that the applicable law is Canadian Maritime Law in accordance with its Applicable Law and Jurisdiction clause, hence this factor weighs heavily in favour of this Court. What is clear is that there is no agreement on what constitutes the applicable law. However, under this factor, the assumption is that there is no enforceable forum selection clause. If that does end up being the case, I must think that it is likely, although not certain, that the applicable law will be Canadian Maritime law given that QSL resided in Quebec, and most importantly, the events leading to the loss occurred in Quebec. In any event, I cannot say that this factor favours the courts of Pennsylvania.

(7) Advantages conferred upon the plaintiff by its choice of forum, if any

[44] US Steel argues that it would benefit from encouraged alternative dispute resolution in Pennsylvania. US Steel allegedly has no operations in Canada, and would benefit from receiving

counsel from American attorneys; this factor therefore weighs heavily in favour of the courts of Pennsylvania. However, the "plaintiff" in this context is QSL, being the party which instituted the underlying proceedings. In this case, QSL argues that this Court's rules provide for dispute resolution whereby mediation may be ordered at any time, without cost to the parties, and that therefore this factor weighs heavily in favour of this Court's jurisdiction.

[45] I must agree with QSL on this one. This Court, if I may say so myself, is one of the leading courts in the country when it comes to active case management and the availability of alternative dispute resolution solutions. From QSL's perspective, there is equal recourse to alternative dispute resolution options before this Court. Without taking anything away from the United States District Court, I am not convinced that this factor favours US Steel.

[46] As an aside, and although not weighing heavily in my assessment, I found it interesting, as QSL asserted, that United States District Court treats the application of foreign law as a jurisdictional issue, while this Court treats foreign law as an evidentiary issue. In other words, in the event the United States District Court eventually rules in favour of the application of QSL's Applicable Law and Jurisdiction, it would seem as though the court would then dismiss the U.S. Action for lack of jurisdiction. That is different from the approach before this Court where, and putting aside any issue of subject matter jurisdiction which as stated is not an issue here, foreign law may be proven before this Court as a question of fact, and if this Court was to eventually decide that US Steel's Governing Law clause was binding upon the parties but that QSL was successful in establishing that there was a strong cause for this Court not to exercise its discretion and stay the underlying action, it would be open to this Court to nonetheless apply the laws of

the Commonwealth of Pennsylvania, excluding Pennsylvania conflict of laws provisions in accordance with US Steel's Governing Law clause, as such law may be proven by way of expert evidence.

(8) The interests of justice

[47] According to US Steel, there would be an increased likelihood of the dispute going through mediation in Pennsylvania, hence this factor weighs heavily in favour of the Western District of Pennsylvania. QSL takes a broader perspective, and says that it is in the interests of justice that the case against Cliffs and US Steel proceed together as they are interrelated, thus avoiding multiplicity of proceedings and contradictory decisions; in essence, given the commingling of the cargoes aboard the MAGIC THUNDER, Cliffs may have inadvertently sold part of US Steel's cargo, and QSL would be greatly prejudiced if required to litigate in two different jurisdiction. Although Cliffs is based in Ohio, QSL's claim against Cliffs is moving forward before this Court.

[48] From my perspective, and as stated earlier, the prospect of alternative dispute resolution options is as strong in this Court as US Steel argues exists in the United States District Court. More importantly however, the prejudice to QSL if in fact it is forced to fight on two fronts would be significant. Whether US Steel likes it or not, its claim against QSL is tethered to that of Cliffs. The issues regarding both claims are integrally related, and the witnesses necessary to piece together the nature and extent of the damages sustained by one defendant may actually come from the other; I say nothing of any possible third-party claim as between the defendants

being rendered more efficient by the fact that they are both parties to the present action. In any event, the point here is that the interests of justice fall in favour of this Court's jurisdiction.

(9) The interests of the parties

[49] US Steel concedes that as the parties are headquartered in separate countries, their respective interests lie in having the litigation close to home, thus this factor does not weigh strongly in the analysis. QSL repeats that it has a legitimate interest in having these two claims heard together to avoid the necessity of engaging counsel in two different jurisdictions and being required to have witnesses attend discoveries twice and in two different places, thus this factor weighs heavily in favour of this Court. I would have thought that this factor again weighs in favour of QSL; as US Steel concedes that this factor does not weigh strongly in the analysis, I need not say anything further on this issue.

(10) The need to have the judgment recognized in another jurisdiction

[50] US Steel argues that this factor would not weigh strongly in the analysis; receiving a judgment in Pennsylvania would likely not require formal recognition as QSL has significant operations in both the United States and Canada. As the only relief is monetary, any judgment would not have to be recognized in a foreign jurisdiction in either circumstance. QSL argues that any award of damages against QSL by this Court would not require recognition in a foreign jurisdiction, and in addition, as it has no operations, activities or assets in the state of Pennsylvania, any judgment of the United States District Court would need to be recognized either in Canada or in a different U.S. State.

[51] There is nothing in the record as to what measures US Steel would have to take to have a decision of the United States District Court of Western Pennsylvania recognized anywhere else in the United States where QSL may have assets; what is clear is that QSL has no assets in Pennsylvania. It is also clear that no recognition of this Court's possible judgment against QSL would be necessary to attach QSL's assets located in Quebec. From the record, I would think that this factor favours this Court's jurisdiction, however as US Steel has conceded that it should not weigh strongly in the analysis at all, I need not say more.

(11) The nature of the relief being sought by QSL in these proceedings

[52] As stated earlier, US Steel argues that although the manner in which QSL seeks declaratory relief may not necessarily be improper, it is nonetheless inappropriate as QSL was not the "natural plaintiff" in the context of the underlying claim, and that this issue should play into my analysis when it comes time to consider *forum non conveniens*. US Steel argues that this is a matter where this Court should exercise its discretion and determine that declaratory relief is not an appropriate measure in this context. I disagree.

[53] US Steel cites *Ewert v Canada*, 2018 SCC 30 [*Ewert*], for the proposition that declaratory relief is a discretionary remedy which should normally be declined were there exists an adequate alternative statutory mechanism to resolve the dispute or to protect the rights in question (*Ewert* at para 83), and that the possibility for QSL to raise the arguments of choice of law and limitation of liability in defence to the U.S. Action constitutes an alternative statutory mechanism.

[54] I do not see how the Supreme Court decision in *Ewert* assists US Steel in this case. In *Ewert*, the statutory mechanism in question was the grievance procedure created by section 90 of the *Corrections and Conditional Release Act*, SC 1992, c 20 [CCRA], which arguably, in that case, provided an alternative means by which Mr. Ewert could challenge Correctional Service Canada's compliance with its obligation in subsection 24(1) of the CCRA, rather than proceeding to seek a declaratory relief from the Court. The Supreme Court in *Ewert* reconfirmed the principle that the proper remedy for breach of statutory duty by a public authority, traditionally viewed, is judicial review for invalidity. In any event, the Court nonetheless found in that case that declaratory relief was warranted notwithstanding the existence of a possible alternative statutory mechanism. In the present matter, it has not been shown to me that the possibility of QSL pleading its right to limit its liability in defence to the U.S. Action is equivalent to an alternative statutory mechanism to declaratory relief being sought in the underlying action. I agree with the proposition for which *Ewert* stands, but cannot see how it could apply in the circumstances surrounding this case.

[55] In addition, US Steel cites *Amtim Capital Inc. v Appliance Recycling Centers of America*, 2014 ONCA 62 [*Amtim Capital*] and *Vale Canada Limited v Royal & Sun Alliance Insurance Company of Canada*, 2022 ONCA 862 [*Vale Canada*], for the proposition that Canadian courts soundly reject the strategy of a party seeking declaratory relief in an attempt to avoid a direct right of action by the injured party, and that the structure of the present litigation requires that US Steel be the natural plaintiff, and QSL the natural defendant.

[56] In *Amtim Capital*, the Ontario Court of Appeal stated: "Ontario courts have refused to recognize negative declaratory relief where the purpose of the proceeding is to bar the natural plaintiff's claim in the jurisdiction with the closest connection to the litigation" [emphasis added] (*Amtim Capital* at para 19). Putting aside the fact that there existed a valid and uncontested forum selection clause binding the parties in that case to the jurisdiction of Ontario (which is not the case here), the defendant's action in proceeding to the United States to file its claim after the plaintiff had validly filed its claim in Ontario was seen by the Ontario Court of Appeal as a "race to *res judicata*" (*Amtim Capital* at para 19). Be that as it may, the fact remains that the issue of the proper forum selection clause remains hotly contested in this case, and as such, I do not see how *Amtim Capital* assists US Steel's case. In any event, as was made clear by the Ontario Court of Appeal, there must first be a determination of the "jurisdiction with the closest connection to the litigation" for this principle to find any application.

[57] As for the decision in *Vale Canada*, it involved a complex series of litigation between an assured and its multiple insurers over coverage issues, the payment of indemnity for exposure to environmental liabilities, and defence costs incurred by the assured in Ontario. The assured and one of its primary comprehensive general insurers accepted to litigate their dispute in Ontario immediately after another insurer took matters into its own hands and instituted action in the United States in an effort to resolve the same dispute. The motion by the insurers who instituted suit in the United States and who sought to have the Ontario action instituted by the assured against them dismissed for reasons of *forum non conveniens* was itself dismissed. US Steel refers to the comments of the Ontario Court of Appeal at paragraph 10 of the decision:

> Although the scenario presented in these appeals is factually more complex, the insurance issues arise out of an ordinary litigation

> structure in which Vale is the natural plaintiff and its insurers are the natural defendants. This structure cannot be justly or adequately replaced by a suit in which Travelers is the artificial plaintiff and Vale is the artificial defendant in the litigation reconstruction exercise Travelers has undertaken in New York.

US Steel argues that it is the natural plaintiff in the context of the underlying litigation and, as such, allowing QSL to pursue declaratory relief is somehow unnatural.

[58] The rationale of the Ontario Court of Appeal was in fact set out at paragraph 6:

> Our ultimate holding can be stated briefly. A comprehensive general liability insurer, underwriting primary or excess insurance coverage for Ontario risks, connects itself to Ontario for jurisdictional purposes and thus commits itself to defending, in Ontario, claims arising out of those risks. No other outcome is commercially reasonable in the operation of the international insurance market and consistent with the principles of comity. There is no place that enjoys universal jurisdiction.

[59] Clearly, the Court in *Vale Canada* was looking at the complexity of the litigation, and it seems to me that its comments about Vale Canada Inc. being the "natural plaintiff" must be understood in that context. However, as I mentioned earlier, and unlike the situation in *Vale Canada* which prompted the Ontario Court of Appeal to assert the concept of "natural plaintiff," here both parties proceeded in the jurisdiction which they, rightly or wrongly, thought binding upon them by reason of the forum selection clause in the stevedoring contract. There is no policy imperative weighing against, and certainly no legal one preventing, QSL from seeking declaratory relief. As stated in *Manitoba Metis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14, [2013] 1 SCR 623 at paragraph 143: "A declaration is a narrow remedy. It is available without a cause of action, and courts make declarations whether or not any

consequential relief is available." US Steel has failed to convince me that the circumstances of this case do not permit, at least in principle, the nature of the relief sought by QSL.

[60] As stated earlier, during the hearing, US Steel asserted that although the manner in which QSL proceeded (i.e. by seeking declaratory relief) may not necessarily be improper, it was nonetheless inappropriate as it was not the "natural plaintiff," and that how QSL proceeded should play in the analysis when it comes time to consider *forum non conveniens*. I agree that the nature of the proceedings is a consideration in the *forum non conveniens* analysis, but only where the proceedings are improper, which is not the case here. Although an issue more appropriately left for the hearing on the merits, I have not been shown by US Steel that any of the criteria for the issuance of a declaratory order, even on a *prima facie* basis, have not been met by QSL (*SA v Metro Vancouver Housing Corp*., 2019 SCC 4, [2019] 1 SCR 99 at paras 60-61).

[61] From QSL's perspective, its underlying action for declaratory relief is tantamount to a limitation action under sections 32 and 33 of the MLA, and thus, it is QSL, and not US Steel, which would be the "natural plaintiff" given the context of the relief being sought. Although I would not necessarily agree with QSL given that a limitation action is statutorily provided for under the MLA, unlike the relief sought by QSL in the underlying action, I would point out that the FCA in *The Cougar Ace* considered the fact that the carrier had instituted suit in Japan seeking a declaration of non-liability – similar relief to what QSL is seeking in the underlying action – as a significant factor weighing in favour of staying the Canadian action in favour of Japanese jurisdiction, notwithstanding that Canadian action was instituted prior to the Japanese

action for declaratory relief (*The Cougar Ace* at para 16). Under the circumstances, I cannot see how *Vale Canada* is of any assistance to US Steel.

[62] All in all, US Steel has failed to convince me that the United States District Court is a more appropriate forum than this Court to litigate this matter and that I should exercise my discretion and stay the present action for reasons of *forum non conveniens*.

IV. Conclusion

[63] Under the circumstances, I would dismiss the present motion, with costs. If not already clear, my decision is without prejudice to either party proceeding by way of summary motion or to a hearing on the merits in relation to the issue of the governing forum selection clause.

JUDGMENT in T-247-23

THIS COURT'S JUDGMENT is that:

1. The motion to strike is dismissed.

2. United States Steel Corporation shall have 30 days from the date of this Order to file its statement of defence.

3. The whole with costs in favour of QSL Canada Inc.

"Peter G. Pamel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	QSL CANADA INC. v CLIFFS MINING COMPANY
PLACE OF HEARING:	MONTREAL, QUEBEC
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