Federal Court  Cour fédérale

Date: 20220420

Docket: T-122-21

Citation: 2022 FC 571

Toronto, Ontario, April 20, 2022

PRESENT: Case Management Judge Kevin R. Aalto

BETWEEN:

BRINK'S GLOBAL SERVICES KOREA LTD. AND BRINK'S GLOBAL SERVICES INTERNATIONAL, INC.

Plaintiffs

and

BINEX LINE CORP., JOHN DOE BINEX EMPLOYEE, JANE DOE BINEX EMPLOYEE AND OTHER PERSONS UNKNOWN TO THE PLAINTIFFS CURRENTLY OR FORMERLY EMPLOYED BY BINEX, AND WOOWON SEA & AIR CO. LTD.

Defendants

and

A.P. MOLLER-MAERSK A/S AND CANADIAN NATIONAL RAILWAY COMPANY

Third Parties

ORDER AND REASONS

I. Overview

[1] This case has all the elements of an Agatha Christie whodunit. A valuable stolen cargo, a secure location, multiple possible suspects, an unknown perpetrator, and, a trucking company that was given the pickup code with instructions to deliver the cargo to a location unknown to any of the parties. Except for a small portion of the cargo recovered well after the fact, the cargo was never seen again.

[2] The issue in this case is who is liable for the loss of the cargo (the Cargo) of 18,276.02 kg of silver ingots valued at approximately USD $10,262,242.37. The Cargo was in transit from Korea to New York via Montreal. The shipping container disappeared from a Canadian National (CN) railyard in Montreal. Since this action was commenced, the police have recovered a small portion of the Cargo in Canada and the United States.

[3] The Defendant, Woowon Sea & Air Co. Ltd. (Woowon) brings this motion to object to the jurisdiction of this Court to deal with the matter. Woowon seeks to have the matter decided in Korea. Woowon is incorporated under the laws of Korea where it has its principal place of business. Woowon is a carrier and international freight forwarder. It has no physical presence in Canada. Woowon has not attorned to the jurisdiction of this Court.

[4] This motion is opposed by the Plaintiffs, Brink's Global Services Korea Ltd. and its American sister company, Brink's Global Services International Inc. (together, Brink's). Brink's provides logistics and security solutions for the transport of high value cargo.

[5] The motion is also opposed by the Defendant, Binex Line Corp. (Binex). Binex is incorporated under the laws of California and is registered to do business in Ontario, with an office in Mississauga. Binex operates as an international transportation company, offering services including freight forwarding services.

[6] The action has been discontinued against the remaining corporate Defendant, Ex-Logistics Co. Ltd. (Ex-Logistics).

[7] Woowon's motion is supported by two affidavits. The first is an expert affidavit of Haeyeon Song, a lawyer and senior partner of a law firm in Korea who practises in the shipping/maritime field. The affidavit speaks to the applicable law in Korea relating to carriers and cargo loss, as well as the procedure under Korean law relating to actions involving maritime matters. He opines that:

> 43. In my opinion, the Seoul Southern District Court may not stay or dismiss the Seoul Case if the Canadian Court decides not to stay or dismiss the case in Canada considering the above precedents and other precedents from lower courts, in which cases the courts were reluctant to decline jurisdiction when a Korean court has jurisdiction over the case in accordance with jurisdiction provisions of the *Civil Procedure Act of Korea*.

[8] The second affidavit comes from Kim Young Mee, Managing Director of Woowon. Ms. Mee describes the business practices of Woowon in issuing bills of lading and the steps followed regarding shipping of containers.

[9] Brink's relies upon the affidavit of Phil Wright, the Director of Operations and Security at Brink's (Wright Affidavit). His affidavit describes in detail the corporate structures and the overlapping of officers and directors between Woowon and Binex. His affidavit also highlights the chronology of the shipment of the Cargo and identifies the relevant documentation, which are attached as exhibits.

II. Facts

[10] There is little disagreement among the parties as to the relevant facts and chronology.

[11] Sumitomo Corporation ("Sumitomo") owns the Cargo. Sumitomo purchased it from Korea Zinc Company Ltd (Korea Zinc), which is listed as the shipper of the Cargo. Both are non-parties to the present action.

[12] On January 1, 2019, Korea Zinc entered into an International Valuables Transport Contract with Brink's to ship the Cargo from Korea to Sumitomo in New York, via Canada.

[13] Brink's engaged Ex-Logistics to arrange for the shipment of the cargo by rail and sea to Canada. Binex was appointed as the consignee of the cargo.

[14] Ex-Logistics engaged Woowon as the carrier of the Cargo. Woowon issued a multimodal Bill of Lading, no. WSAMTR192351 (Bill of Lading) in Seoul, Korea, on December 25, 2019. The type of move is described as “CY/CY” (container yard to container yard). The port of loading was Busan, Korea. The place of delivery was the CN Railyard in Montreal.

[15] Woowon engaged Maersk Lina A/S (Maersk) to transport the Cargo from Korea to Canada.

[16] Maersk generated and released a pick-up code to the consignee, Binex, without which the CN railyard could not release the Cargo. The sole role of Binex was to receive the pick-up code from Maersk and release it to Brink’s, who would transport the cargo to its final destination in New York.

[17] The Cargo departed from the Busan port on December 26, 2019, transported by Maersk on a vessel to British Columbia.

[18] On January 6, 2020, Maersk e-mailed the pick-up code to Binex. The reception of that email and the subsequent access to it by the thieves are the subject of ongoing investigations.

[19] The vessel arrived in Vancouver on January 7, 2020. On January 10, 2020, the cargo was loaded onto a CN railcar bound for Montreal, where it arrived on January 16, 2020.

[20] On January 20, 2020, a pick-up e-mail was sent to Oriental Cartage, a trucking company in Laval, Quebec, instructing it to pick up the cargo at the CN Railyard. The email contained the correct container number, pick-up code, and weight of the Cargo. The Cargo was transported to a warehouse, as instructed. It was never seen again except for the small portion that has been recovered.

[21] It was later determined that the pick-up email sent to Oriental Cartage was fraudulent.

[22] As a result of the stolen Cargo, Korea Zinc became indebted to Sumitomo for the value of the Cargo. On May 12, 2020, Korea Zinc assigned its rights to Brink's in exchange for payment of the amount owing. It is the amount paid by Brink's, as well as related costs, which Brink's now seeks to recover in this action.

[23] On March 22, 2021, Woowon commenced proceedings in the Seoul Southern District Court in Korea against Brink's, seeking an order on the merits that it is not liable for the stolen Cargo. Brink's was served on June 21, 2021.

[24] Subsequent to the hearing of the motion, Brink's provided a further affidavit of Phil Wright to the Court. This further affidavit advised the Court that a small portion of the Cargo had been recovered in locations in Canada and the U.S. While Woowon objected to this affidavit being filed, the Court is allowing the affidavit into evidence. Nothing of substance turns on this evidence other than confirming that there is an ongoing investigation to discover the culprits and recover the Cargo.

III. Bill of Lading

[25] The Bill of Lading is the key document governing the carriage of the Cargo.

[26] The Bill of Lading lists Korea Zinc as the shipper and Brink's as the consignee. Woowon retained Maersk to physically transport the Cargo to Canada.

[27] At all material times Woowon had an "agent" in Canada. Woowon and Binex entered into an International Forwarding Agency Agreement (the WB Agreement). The WB Agreement names and appoints Binex "as its neutral freight forwarding agent for Korea" and "as its neutral freight forwarding agent for the United States and Canada." Although the Bill of Lading does not refer to Binex as Woowon's agent, the WB Agreement creates an agency relationship between Woowon and Binex relating to this Cargo and stipulates that Binex was the "Party to contact for cargo release."

[28] The parties disagree as to whether a true agency relationship existed between Woowon and Binex as the WB Agreement did not empower Binex to bind Woowon. However, the Wright Affidavit shows that there is a business relationship between Binex and Woowon. The full extent of that business relationship and whether a true agency relationship was created requires a full evidentiary record. Thus, it is not necessary to make any finding of the existence of a true agency relationship. Suffice it to say that Binex acted in a business capacity for Woowon in Canada by virtue of being the recipient of the pick-up code for the Cargo on behalf of Woowon.

[29] The parties to the motion have differing interpretations of certain provisions of the Bill of Lading. In particular, the parties disagree about the application of Articles 2 and 8 which provide for the delivery of the Cargo and the liability of the Carrier:

> 2. MULTIMODAL TRANSPORT BILL OF LADING
>
> The Carrier [Woowon], by the issuance of this Multimodal Transport Bill of Lading, undertakes to perform or in its own name to procure the performance of the entire transport from the place at which the goods are taken in charge [South Korea] to the place designated in this Bill of Lading [Montreal].
>
> Notwithstanding the above, the provisions set out and referred to in this Bill of Lading shall also apply when the transport is performed by one mode of transport.
>
> [. . .]
>
> 8. RECEPTION AND DELIVERY OF GOODS
>
> […] If delivery of the goods or any part thereof is not taken by the Merchant at the time and place when and where the Carrier is entitled to call upon the Merchant to take delivery thereof, the Carrier shall be entitled to store the goods or the part thereof, at the sole risk or [sic] the Merchant whereupon the responsibility of the Carrier in respect of the goods or that part thereof stored as aforesaid (as the case may be) shall wholly cease and the cost and expense of such storage shall forthwith upon demand by the Carrier be paid by the Merchant.

[30] The Bill of Lading also contains a jurisdiction clause upon which Woowon relies. Article 4 provides:

> 4. GOVERNING LAW, JURISDICTION AND LIMITATION STATUTES
>
> The contract evidenced by or contained in this Bill of Lading shall be governed by the laws, statutes and regulations where this Bill of Lading is issued except as may be otherwise provided for herein, and any action against the Carrier thereunder shall be brought before the court where the Carrier has its principle place of business. Nothing in this Bill of Lading shall operate to limit or

> deprive the Carrier of any statutory protection or exemption or limitation of liability authorized by any [applicable] laws, statutes and regulations of any country.

[31] The Bill of Lading defines Carrier as "the company and/or organization mentioned on the face hereof who issues this multimodal transport of Bill of Lading." The face of the Bill of Lading shows the Carrier as Woowon and specifies that Merchant "shall be deemed to include the shipper [Korea Zinc], consignee [Brink's], owner [Sumitomo] and receiver of the goods and holder of this Bill of Lading." Article 7 (1) of the Bill of Lading addresses responsibility for loss or damage to the Cargo. It provides as follows:

> (1) The Carrier's [Woowon] responsibility for loss of or damage to the goods shall commence only when the goods are received by any means whatsoever and **cease absolutely when the goods are delivered to the Merchant"** [emphasis added]

IV. Analysis

[32] The legislative framework of the present dispute is as follows. The Federal Court is granted concurrent jurisdiction over claims arising from maritime shipping by s. 22 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 [*Federal Courts Act*]:

Navigation and shipping **22 (1)** The Federal Court has concurrent original jurisdiction, between subject and subject as well as otherwise, in all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of	**Navigation et marine marchande** **22 (1)** La Cour fédérale a compétence concurrente, en première instance, dans les cas — opposant notamment des administrés — où une demande de réparation ou un recours est présenté en vertu du droit maritime canadien ou d'une loi fédérale concernant la navigation ou la marine marchande, sauf attribution

navigation and shipping, except to the extent that jurisdiction has been otherwise specially assigned.

Maritime jurisdiction

(2) Without limiting the generality of subsection (1), for greater certainty, the Federal Court has jurisdiction with respect to all of the following:

[…]

(f) any claim arising out of an agreement relating to the carriage of goods on a ship under a through bill of lading, or in respect of which a through bill of lading is intended to be issued, for loss or damage to goods occurring at any time or place during transit;

[…]

Jurisdiction applicable

(3) For greater certainty, the jurisdiction conferred on the Federal Court by this section applies

[…]

(c) in relation to all claims, whether arising on the high seas, in Canadian waters or elsewhere and whether those waters are naturally navigable or artificially made so, including, without restricting the generality of the foregoing, in the case of salvage, claims in respect of cargo or wreck found on the shores of those waters;

expresse contraire de cette compétence.

Compétence maritime

(2) Il demeure entendu que, sans préjudice de la portée générale du paragraphe (1), elle a compétence dans les cas suivants :

[…]

f) une demande d'indemnisation, fondée sur une convention relative au transport par navire de marchandises couvertes par un connaissement direct ou devant en faire l'objet, pour la perte ou l'avarie de marchandises en cours de route;

[…]

Étendue de la compétence

(3) Il est entendu que la compétence conférée à la Cour fédérale par le présent article s'étend :

[…]

c) à toutes les demandes, que les faits y donnant lieu se soient produits en haute mer ou dans les eaux canadiennes ou ailleurs et que ces eaux soient naturellement ou artificiellement navigables, et notamment, dans le cas de sauvetage, aux demandes relatives aux cargaisons ou épaves trouvées sur les rives de ces eaux;

[33] Brink's submits that the subject matter jurisdiction granted by s. 22 must be read alongside the personal jurisdiction granted to the Federal Court by subsection 43(1) of the *Federal Courts Act*:

Jurisdiction *in personam*	**Compétence en matière personnelle**
43 (1) Subject to subsection (4), the jurisdiction conferred on the Federal Court by section 22 may in all cases be exercised *in personam*.	**43 (1)** Sous réserve du paragraphe (4), la Cour fédérale peut, aux termes de l'article 22, avoir compétence en matière personnelle dans tous les cas.

[34] However, Woowon argues that the Court should decline its jurisdiction and stay the proceedings in favour of Korea, which is the jurisdiction stipulated in Article 4 of the Bill of Lading.

[35] The Federal Court has discretion to stay proceedings in any matter pursuant subsection 50(1) of the *Federal Courts Act:*

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 **(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.	**50 (1)** La Cour d'appel fédérale et la Cour fédérale ont le pouvoir discrétionnaire de suspendre les procédures dans toute affaire : **a)** au motif que la demande est en instance devant un autre tribunal; **b)** lorsque, pour quelque autre raison, l'intérêt de la justice l'exige.

[36] Brink's and Binex both argue that the Federal Court has jurisdiction despite the forum selection clause by virtue of s. 46 of *Marine Liability Act*, S.C. 2001, c. 6 (*MLA*), because the port of discharge of the Cargo was in Canada:

Institution of Proceedings in Canada **46 (1)** If a contract for the carriage of goods by water to which the *Hamburg Rules* do not apply provides for the adjudication or arbitration of claims arising under the contract in a place other than Canada, **a claimant may institute judicial or arbitral proceedings in a court or arbitral tribunal in Canada that would be competent to determine the claim if the contract had referred the claim to Canada, where** **(a) the actual port of loading or discharge, or the intended port of loading or discharge under the contract, is in Canada;** […] [emphasis added]	**Procédure intentée au Canada** **46 (1)** Lorsqu'un contrat de transport de marchandises par eau, non assujetti aux règles de Hambourg, prévoit le renvoi de toute créance découlant du contrat à une cour de justice ou à l'arbitrage en un lieu situé à l'étranger, **le réclamant peut, à son choix, intenter une procédure judiciaire ou arbitrale au Canada devant un tribunal qui serait compétent dans le cas où le contrat aurait prévu le renvoi de la créance au Canada, si l'une ou l'autre des conditions suivantes existe :** **a) le port de chargement ou de déchargement — prévu au contrat ou effectif — est situé au Canada;** […]

[37] This motion raises the following issues:

A. Does the Federal Court have jurisdiction *simpliciter* over this matter?

B. If not, does s. 46 of the *MLA* apply to establish the Federal Court's jurisdiction?

C. If jurisdiction is within the Federal Court, should it nevertheless exercise its discretion to grant a stay on the basis that Korea is a more appropriate forum under the *forum non conveniens* test?

D. If s. 46 of the *MLA* does not apply, does “strong cause” exist for the Court to decline to stay the action pursuant to s. 50 of the *Federal Courts Act*?

[38] For the reasons that follow, I conclude that this Court has jurisdiction over the claim.

A. *Issue 1: The Federal Court does have jurisdiction* simpliciter *over this matter*

[39] This is a marine cargo theft claim. In order to have jurisdiction *simpliciter*, the Court must have jurisdiction over the subject matter of the claim, the theft of the Cargo, and *in personam* jurisdiction over Woowon.

[40] Jurisdiction of the Federal Court is established when the criteria set out by the Supreme Court in *ITO-Int'l Terminal Operators v. Miida Electronics*, [1986] 1 SCR 752 [*ITO*] at page 766 are met:

1. There must be a statutory grant of jurisdiction by the federal Parliament.

2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.

3. The law on which the case is based must be "a law of Canada" as the phrase is used in s. 101 of the *Constitution Act, 1867*.

[41] The parties to this motion disagree about whether this three-pronged test has been met.

(1) Submissions of the parties

a) Woowon

[42] Woowon submits that the Federal Court has no subject matter jurisdiction in this case because the claim lacks a statutory grant of jurisdiction to satisfy the first prong of the ITO test. Woowon argues that the Bill of Lading was concluded upon delivery of the Cargo to the CN Railyard in Montreal. As the type of move was CY/CY (container yard to container yard) Woowon argues it was no longer involved because the Cargo was, in fact, delivered to the place of delivery. Woowon relies on *Black & White Merchandising Co. Ltd. v Deltrans International Shipping Corporation*, 2019 FC 379, (*Deltrans*) for the proposition that this Court has recognized that its jurisdiction is lost after a Bill of Lading was concluded.

[43] Woowon argues that Articles 2 and 8 of the Bill of Lading support its position that its obligations were exhausted upon delivery of the Cargo to the Montreal railyard. Woowon argues that it fully complied with the terms of the Bill of Lading.

[44] Woowon further submits that the Federal Court lacks personal jurisdiction over Woowon because there is no "presumptive connecting factor" linking the claim to Canada's jurisdiction. This line of argument arises from the real and substantial connection test laid out by the Supreme Court in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 (*Van Breda*). At the hearing, Woowon noted that the Supreme Court did not preclude the application of the *Van Breda* test to establish

the jurisdiction of the Federal Court, so the Court should presume it applies to maritime law cases.

[45] Woowon argues that there is no presumptive connecting factor linking the claim to Canada because: (1) Woowon is not domiciled or resident in Canada; (2) Woowon does not carry on business in Canada with an actual presence in the jurisdiction; (3) there is no evidence of negligence by Woowon in Canada; and (4) no contract connected with the dispute was made in Canada. The sole fact of the theft of the Cargo occurring in Canada does not suffice to establish jurisdiction, as simply sustaining damage in a jurisdiction does not establish this Court's jurisdiction (*Van Breda* at paragraph 89).

b) *Brink's*

[46] Brink's submits that all three requirements of the *ITO* test are satisfied, thereby establishing the Federal Court's jurisdiction over the claim: (1) the statutory grant of jurisdiction is met by subsections 22(2) and paragraph 22(3)(c) of the *Federal Courts Act*; (2) the body of federal admiralty law is essential to the resolution of the claim because it arises from a breach of contract related to the carriage of goods under a through bill of lading even if goods continued by another mode of transportation after the ocean leg (*Elroumi v Shenzen Top China Imp & Exp Co. China*, 2018 FC 633 at para 11(*Elroumi*); and (3) the case is based on a law of Canada by virtue of subsection 91(10) of the *Constitution Act, 1867*.

[47] Brink's argues that the Bill of Lading was not complete because the obligation incumbent upon Woowon was the delivery of the Cargo into the hands of Brink's Canada, as the consignee

listed on the Bill of Lading. This did not happen. Brink's asserts that delivery is not the arrival of the Cargo at the place noted on the Bill of Lading, but the turnover of the Cargo to the consignee.

[48] Brink's challenges Woowon's reliance on *Deltrans,* because in that case the goods were stolen from a warehouse where they were being stored on behalf of the consignee following completion of transport.

[49] Brink's argues that the Federal Court has personal jurisdiction over Woowon by virtue of subsection 43(1) of the *Federal Courts Act,* which grants personal jurisdiction in all cases where jurisdiction is conferred by s. 22. In its view, this is enough to establish the Court's jurisdiction and the application of the *Van Breda* test is therefore misplaced. Brink's notes that the *Van Breda* test has never been applied by the Federal Court to establish admiralty jurisdiction. To the extent that a connection to Canada is required (which Brink's denies), the fact of Woowon having transported goods into Canada and the loss having occurred in Canada establishes a connection.

c) *Binex*

[50] Binex supports the position of Brink's. In its view, jurisdiction is founded on subparagraph 22(2)(i) of the *Federal Courts Act,* which should be a given a broad and purposeful interpretation (*Pantainer Ltd v 996660 Ontario Ltd*., (2000) 183 FTR 211 (FC) at paragraph 100).

[51] Binex further adds that Woowon's reliance on *Deltrans* to deny the existence of a statutory grant of jurisdiction is untenable because in that case the correct entity picked up the cargo from the place of delivery, whereas in this case a fraudulent email to the legitimate trucking company diverted the Cargo to the thieves.

[52] Binex also adopts the position of Brink's with regard to the personal jurisdiction of the Court over Woowon. Binex argues that the Van Breda test is inapplicable in establishing the Federal Court's admiralty jurisdiction. Instead, the Court must look for "some legal nexus" between the claim and the Court's jurisdiction, which in this case is supplied by Woowon's involvement in the cargo mandate (*Oy Nokia AB v. "Martha Russ" (The)* (1973), 37 DLR (3d) 597, 1973 CarswellNat 33 at paragraph 9 (FC), affirmed on appeal (1974), 51 DLR (3d) 632 (CA); *Caterpillar Overseas S.A. v. "Canmar Victory" (The)* (1998), 153 FTR 266, 1988 CarswellNat 1630 (FC)).

(2) Analysis

[53] In my view, jurisdiction *simpliciter* has been established on the facts of this case and on an analysis of the law.

[54] To determine this Court's jurisdiction, the first step is to ascertain the essential nature or character of the claim (*Windsor (City) v Canadian Transit Co.*, 2016 SCC 54 (*Windsor*) at para 25; *Apotex Inc. v Ambrose*, 2017 FC 487 at para 47). As stated by the Supreme Court in *Windsor*:

> [26] The essential nature of the claim must be determined on "a realistic appreciation of the practical result sought by the claimant" (*Domtar Inc. v. Canada (Attorney General)*, 2009 FCA 218, 392 N.R. 200, at para. 28, per Sharlow J.A.). The "statement of claim is not to be blindly read at its face meaning" (*Roitman v. Canada*, 2006 FCA 266, 353 N.R. 75, at para. 16, per Décary J.A.). Rather, the court must "look beyond the words used, the facts alleged and the remedy sought and ensure . . . that the statement of claim is not a disguised attempt to reach before the Federal Court a result otherwise unreachable in that Court" (ibid.; see also Canadian *Pacific Railway v. R.*, 2013 FC 161, [2014] 1 C.T.C. 223, at para. 36; *Verdicchio v. R.*, 2010 FC 117, [2010] 3 C.T.C. 80, at para. 24).
>
> [27] On the other hand, genuine strategic choices should not be maligned as artful pleading. The question is whether the court has jurisdiction over the particular claim the claimant has chosen to bring, not a similar claim the respondent says the claimant really ought, for one reason or another, to have brought.

[55] In this case, the essence of the claim is for loss incurred as a result of the carriage of goods pursuant to a multimodal through bill of lading. This brings the claim within subsection 22(1) of the *Federal Courts Act*. This section grants jurisdiction to the Federal Court "with respect to any claim arising out of an agreement for the carriage of goods on a ship under a through bill of lading . . .for loss or damage to goods at any time or place during transit." *Prima facie*, this claim falls within that section (see, *Elroumi* at para 11). The first part of the ITO test is therefore met.

[56] As each of the parties rely upon the *Deltrans* case, it is necessary to consider carefully what the case decides. It is a factually driven decision and has some similar facts to this case. *Deltrans* concerned the theft of a cargo that was shipped from China to Montreal pursuant to a bill of lading for combined transport shipment. The bill of lading described the type of move as CY/CY, as is the case here.

[57] The party responsible for arranging the logistics for the transportation of the cargo retained Canchi Bon Trading Company Inc. (Canchi) to warehouse the cargo. The cargo was delivered to the container yard as required and then warehoused elsewhere by Canchi. The cargo was stolen from the warehouse where it was being stored.

[58] The Court in *Deltrans* determined that the bill of lading had expired because the cargo was delivered to the place of delivery. Accordingly, any liability under the bill of lading was exhausted. As a result, the Federal Court was without jurisdiction and the action dismissed.

[59] As outlined above, the parties in this case disagree whether delivery was carried out. If delivery was carried out by the delivery of the Cargo to the CN Railyard, as Woowon submits, then the Bill of Lading would have expired. If, on the other hand, delivery was not carried out because the cargo was never delivered into the hands of the consignee, then liability under the Bill of Lading would remain.

[60] In my view, the face of the Bill of Lading stipulates that the Cargo had to be delivered to the consignee at the container yard. It remains an open question whether Woowon's responsibilities under the Bill of Lading were exhausted. It is necessary to determine whether the tendering of the correct code amounted to delivery or whether additional steps were necessary. In my view, this further differentiates the case from *Deltrans*. A full evidentiary record is necessary to establish with finality the question of "delivery" to the consignee.

B. *Issue 2: Section 46 of the MLA establishes the Federal Court's jurisdiction over this matter*

[61] The *MLA* provides for statutory liability issues involving shipping and carriage of goods, including apportionment of liability and limitations on liability. At issue in this case is whether s. 46 applies to the facts of the case. This issue is important because s. 46 can defeat the jurisdiction clause which Woowon relies on to oppose the jurisdiction of this Court.

[62] S. 46 exists to establish Canada's jurisdiction in spite of a jurisdiction clause stipulating a foreign jurisdiction in cases where there is a contract for carriage of goods by water. The parties to this motion take differing views on the applicability of s. 46.

(1) Submissions of the parties

(a) Woowon

[63] Woowon submits that the Cargo in this case was not transported by water after the maritime leg was complete, and therefore s. 46 of the *MLA* cannot apply, as it is found in the section of the *MLA* dealing with "Liability for Carriage of Goods by Water." The Bill of Lading in this case was a multimodal bill of lading. In Woowon's view, a multimodal bill of lading is not carriage of goods by water.

[64] If that argument fails, Woowon submits that the application of s. 46 is limited to those "claims arising under the contract." Woowon argues that the Bill of Lading in this case was complete upon the delivery of the cargo to the CN Railyard and, accordingly, the claim is not a "claim arising under the contract."

[65] Woowon relies on *SDV Logistics (Canada) Inc v SDV International Logistics*, 2006 QCCA 750 at paragraphs 33-36 for the proposition that s. 46 only applies to that portion of maritime transport which corresponds to the definition of "carriage of goods" provided in *The Hague-Visby Rules* [excerpted below].

(b) Brink's

[66] Brink's argues that only one requirement of s. 46 must be met. In this case, it is the fact that the port of discharge was in Canada.

[67] Brink's disagrees that the Bill of Lading in this case is not a contract for "carriage of goods by water", but instead a "multimodal transport bill of lading." While "carriage of goods by water" is not defined in the *MLA*, Brink's notes that the definition is supplied by Article X of *The Hague-Visby Rules*, which applies by virtue of s. 43 of the *MLA*:

Marine Liability Act	***Loi sur la responsabilité en matière maritime***
Hague-Visby Rules	***Règles de La Haye-Visby***
43 (1) The *Hague-Visby Rules* have the force of law in Canada in respect of contracts for the carriage of goods by water between different states as described in Article X of those Rules.	**43 (1)** Les règles de La Haye-Visby ont force de loi au Canada à l'égard des contrats de transport de marchandises par eau conclus entre les différents États selon les règles d'application visées à l'article X de ces règles.
Hague-Visby Rules	***Les règles de La Haye-Visby***
Article X	**Article X**
The provisions of these *Rules* shall apply to every bill of lading relating to the carriage of goods between ports in two different States if **(a)** the bill of lading is issued in a contracting State, or **(b)** the carriage is from a port in a contracting State, or **(c)** the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract; whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.	Les dispositions de la présente convention s'appliqueront à tout connaissement relatif à un transport de marchandises entre ports relevant de deux états différents quand : **(a)** Le connaissement est émis dans un état contractant ; ou **(b)** Le transport a lieu au départ d'un port d'un état contractant ; ou **(c)** Le connaissement prévoit que les dispositions de la présente convention ou de toute autre législation les appliquant ou leur donnant effet régiront le contrat, quelque soit la nationalité du navire, du transporteur, du chargeur, du destinataire ou de toute autre personne intéressé.

[68] Brink's submits that the criteria of Article X are satisfied, so the application of *The Hague-Visby Rules* to "every carriage of goods between ports in two different States…" should be read into the *MLA* to supply a definition for the words "carriage of goods by water."

(2) Analysis

[69] For the reasons that follow, it is my view that s. 46 of the *MLA* applies to the facts of this case and is supported by the jurisprudence.

[70] Paragraph 46 (1) (a) applies because the actual port of discharge on the carriage by water component of the multimodal Bill of Lading was Canada. The carriage of the goods was not limited by the Bill of Lading to only the water carriage component. While the *MLA* speaks only to carriage of goods by water, Woowon's obligations under the Bill of Lading extend to the entire transport of the Cargo.

[71] Thus, *prima facie*, Brink's is able to rely upon s. 46 to pursue this claim in Canada. It also should be noted that s. 46 lists three separate circumstances which give rise to the right to institute judicial proceedings in Canada. The three circumstances are disjunctive as noted by the "or" between paragraphs 46 (1)(b) and (c). Therefore, having met the requirement of paragraphs 46 (1) (a) this action is properly brought in Canada notwithstanding the jurisdiction clause in the Bill of Lading. Arguably, paragraphs 46 (1) (b) is also satisfied as Woowon has an agency presence in Canada through the auspices of Binex which it has appointed its agent for the U.S. and Canada pursuant to the WB Agreement.

[72] Further, the Federal Court of Appeal has opined that this provision allows a party to proceed in Canada for a cargo loss where there is a jurisdiction clause in favour of a place other than Canada. In *Mitsui O.S.K Lines Ltd. v Mazda Canada Inc.*, 2008 FCA 219 (*Mitsui*) a claim was brought in Canada for the loss of a shipment of automobiles. The jurisdiction clause in the bill of lading named Japan as the jurisdiction for determining disputes. The court observed:

> [8] The principles of law governing this matter are relatively well-settled now. It is clear that subsection 46(1) of the Marine Liability Act S.S. 2001, c.6 eclipses the former Canadian law in cases where parties by contract choose the jurisdiction in which the case will be tried. **Such a clause in a contract of carriage is no longer controlling in Canada, but it may be considered as one of the factors to consider in deciding whether an allegation of *forum non conveniens* is made out** (*OT Africa Line Ltd. v. Magic Sportswear Corp.*, 2006 FCA 284). [emphasis added]
>
> [. . .]
>
> [10] This provision in subsection 46(1) merely opens the door for Canadian plaintiffs, allowing an action to be instituted. However, the Court may still decline the jurisdiction on the basis of *forum non conveniens*. (OT Africa, supra). Section 46(1) applies here because the intended port of discharge of the vehicles was New Westminster, B.C. The Plaintiff may therefore institute proceedings here, but *forum non conveniens* arguments remain available to the Defendants.

[73] As far as the issue concerning "carriage of goods by water" is concerned, I am of the view that one can refer to *The Hague-Visby Rules* (*Rules*) to assist in understanding this concept. The parties all agree that there is no definition of "carriage of goods by water" in the *MLA*. S. 43 of the *MLA* imports the *Rules* into the law of Canada. Article X specifies that those *Rules* apply to all contracts for the carriage of goods.

[74] All three of the provisions of Article X are met in this case. First, the Bill of Lading specifies that the Cargo will be carried in an ocean going vessel and therefore the carriage will be by water. Second, the Bill of Lading was issued in Korea, a contracting State. Third, the carriage by water was from one contracting State, Korea, to another, Canada. It is illogical that a Bill of Lading should be parsed into separate pieces and that only one segment of the carriage is captured by s. 46.

[75] Further support for this conclusion can be found in *Z.I. Pompey Industrie v. ECU-Line N.V.*, [2003] 1 SCR 450 (*Pompey*). In that case, a bill of lading provided for the shipment of goods from Antwerp, Belgium to Seattle, Washington. The bill of lading contained a jurisdiction clause in favour of Antwerp. The goods were shipped by water from Antwerp to Montreal and then by train to Seattle. The goods were damaged on the train trip to Seattle after the carriage by water. The issue in the case was whether the jurisdiction clause should be enforced. While the Supreme Court of Canada determined that it should be enforced, it nonetheless considered the applicability of s. 46 of the *MLA*. Because the *MLA* was not in force at the time the damage was incurred, it was found that s. 46 did not apply. However, the Supreme Court explicitly stated that if the *MLA* had been in force then s. 46 would apply. At paragraph 37 of the judgment of Bastarache, J. noted as follows:

> 37 Section 46(1) of the Marine Liability Act, which entered into force on August 8, 2001, has the effect of removing from the Federal Court its discretion under s. 50 of the Federal Court Act to stay proceedings because of a forum selection clause where the requirements of s. 46(1)(a), (b), or (c) are met. This includes where the actual port of loading or discharge is in Canada. **In this case, there would be no question that the Federal Court is an appropriate forum to hear the respondents' claim but for the fact that s. 46 does not apply to judicial proceedings commenced prior to its coming into force**: *Incremona-Salerno Marmi Affini Siciliani (I.S.M.A.S.) s.n.c. v. Ship Castor* (2002), 297 N.R. 151, 2002 FCA 479, at paras. 13-24. Section 46 of the Marine *Liability Act* is therefore irrelevant in this appeal. [emphasis added]

[76] Finally, s. 46 was meant to cure the problem of using boilerplate clauses to insulate carriers from a Canadian court's jurisdiction. In *T. Co. Metals v "Federal EMS"* (The), 2012 FCA 284, the Honourable Justice Johanne Gauthier described the purpose of s. 46 as follows:

> [80] To reiterate, considering the general purpose of part V and the mischief that section 46 was meant to cure (that is, boilerplate jurisdiction and arbitration clauses dictated by carriers to the

> detriment of Canadian importers or exporters who became parties to such contracts), and the different commercial reality that lead to the conclusion of charter-parties, the Judge's conclusion that the voyage charter-party under review is not covered by subsection 46(1) is correct.

[76] Thus, I am satisfied that this claim is properly brought subject to whether Woowon's allegation of *forum non conveniens* is made out on the facts of this case.

C. Issue 3: *If jurisdiction is within the Federal Court, should it nevertheless exercise its* discretion to grant a stay on the basis that Korea is a more appropriate forum under the *forum non conveniens test?*

[77] The jurisprudence teaches that to stay the action in favour of another jurisdiction on the basis of *forum non conveniens* it must be clearly and distinctly a more favourable jurisdiction. The Federal Court of Appeal in noted in *Mitsui*:

> [12] To stay an action because of *forum non conveniens* in Canada, it must be established that another forum is clearly more appropriate. In the case of *Amchem Products Inc. v. British Columbia (Workers Compensation Board)*, [1993] 1 S.C.R. 897, para. 33 (relying on *Spiliada Maritime Corp. v. Cansulex Ltd*., [1987] A.C. 460) Justice Sopinka stated that "the existence of a more appropriate forum must be clearly established to displace the forum selected by the plaintiff." Similarly, Lord Goff in [1987] 1 Lloyd's Rep. 1 explained that the applicant must "establish that there is another available forum which is clearly and distinctly more appropriate." [Emphasis added]

[77] In *Mitsui*, the Federal Court of Appeal set out the non-exhaustive list of factors that apply. At paragraph 11 the Court identified the ten ***non-exhaustive*** factors that a court should weigh in exercising the discretion to determine the issue of *forum non conveniens*:

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.

[78] In my view, an assessment of the *Mitsui* factors supports the proposition that a stay should not be granted. Accordingly, the action should be maintained in Canada.

[79] First, the majority of the parties and witnesses are resident in Canada. All of the key witnesses are located in Canada. Woowon may potentially be calling a fact witness and an expert at trial. The geographical distance between Canada and Korea is of no moment. Discoveries in this technological age now take place over Zoom or other virtual platforms. Similarly, trials in this Court can be entirely conducted over Zoom or in a hybrid model where some witnesses are in person and others over Zoom.

[80] We all now live and work in this new digital age. The law is not static but has always evolved to recognize new social contexts and to respond to new technologies. One need only recall that the fax machine was a new and exciting innovation over 40 years ago which has now, for the most part, been entirely superseded by email and the use of digital communication.

[81] This is a factor that must be considered when weighing the location of witnesses or material evidence. It might very well be that some of the traditional factors of *forum non conveniens* will go the unfortunate way of the dodo bird.

[82] In a nod to this change of approach, the Honourable Justice Morgan of the Ontario Superior Court of Justice in *Kore Metals LLC v Freshii Development LLC*, 2021 ONSC 2896, observed, and I entirely agree, that:

> [1] In the age of Zoom, is any forum more non conveniens than another? Has a venerable doctrine now gone the way of the VCR player or the action in assumpsit?
>
> [. . .]
>
> [28] In response to Plaintiff's counsel, I inquired as to where the AAA is located; the DAA identifies Chicago as Freshii Development's address and the locale for the arbitration, but otherwise states that arbitration is to be submitted to the AAA without identifying a location for that organization. Defendants' counsel indicated that neither counsel was certain as to where the AAA is located, since submissions are made online. I then asked whether the hearing itself would be online, and counsel responded that they presume so since the pandemic has moved most proceedings of this nature to a digital forum.
>
> [29] All of which undermines the majority of *forum non conveniens* factors. If hearings are held by videoconference, documents filed in digital form, and witnesses examined from remote locations, what is left of any challenge based on the unfairness or impracticality of any given forum? To ask the question is to answer it. Freshii Developments may have a miniature post office box or an entire office tower in Chicago, and witnesses or documents may be located in Canada's Northwest Territories or in the deep south of the United States, and no location would be any more or less convenient than another.
>
> [30] The Plaintiff has sued Freshii Inc. apparently on the theory that the parent is the real directing mind of Freshii Development. This may or may not be borne out on the merits, but on this theory Freshii Inc. can likely be made party to the AAA arbitration despite not being a party to the DAA: see *Pan Liberty Navigation*

> *Co. v. World Link (H.K.) Resources Ltd*., [2005] BCJ No 749 (BC CA). Moreover, when it comes to enforcement, Ontario boasts "a strong 'pro-enforcement' legal regime for the recognition and enforcement of international commercial arbitration awards": *Popack v. Lipszyc*, 2018 ONCA 635, at para 35.
>
> [31] It is by now an obvious point, but it bears repeating that a digital-based adjudicative system with a videoconference hearing is as distant and as nearby as the World Wide Web. With this in mind, the considerable legal learning that has gone into contests of competing forums over the years is now all but obsolete. Judges cannot say *forum non conveniens* we hardly knew you, but they can now say farewell to what was until recently a familiar doctrinal presence in the courthouse.
>
> [32] And what is true for *forum non conveniens* is equally true for the access to justice approach to the arbitration question. Chicago and Toronto are all on the same cyber street. They are accessed in the identical way with a voice command or the click of a finger. No one venue is more or less unfair or impractical than another.

[83] The same applies here, the parties are but a click away from accessing the Court.

[84] Woowon argues that the location of its head office, along with its employees and business records, favours Korea. Woowon relies upon *Magic Sportswear Corp. v Mathilde Maersk (The)*, 2006 FCA 284 (*Magic Sportswear*) in support of the proposition that the location of its head office, corporate records, and employees in Korea are factors connecting the claim to Korea. The records related to the formation of the contract and the records related to the sale and transport of cargo are likely to be relevant to the resolution of this case.

[85] There are several reasons this does not tip the scales in favour of a stay. First, the Bill of Lading is not in dispute. Second, for the reasons cited above regarding technology, any Korean witnesses can be accommodated by virtual appearances. Third, the theft occurred in Canada, is

being investigated in Canada and those witnesses who may have knowledge of how the theft was perpetrated are primarily in Canada. Lastly, the *Magic Sportswear* case is distinguishable because the goods, the consignee, the ports of loading or discharge were not located in Canada. By contrast, the port of discharge, the transport from Vancouver to Montreal and the theft all occurred on Canadian soil.

[86] Notwithstanding my view that a more modern approach should be taken to *forum non conveniens*, the review of the remaining factors, on balance, favours a denial of a stay of proceedings.

[87] Turning to the second *Mitsui* factor, the loss occurred in Canada and so the material evidence relating to the loss is primarily in Canada. This weighs in favour of Canada.

[88] The third *Mitsui* factor asks the Court to consider where the contract was negotiated and executed. In my view, this is at best a neutral factor. While entered into in Korea the Bill of Lading is written in English and its terms are not in dispute. This Court is well-equipped to interpret its provisions.

[89] The fourth *Mitsui* factor considers whether there are proceedings pending between the parties in another jurisdiction. Woowon commenced proceedings in Korea against Brink's after the claim in Canada was initiated. The Claim here is wider in scope as the Korean claim only deals with limitations of liability. This another factor weighing against a stay.

[90] Furthermore, there is a potential limitation issue with respect to Korea. While Brink's is a defendant in ongoing Korean proceedings, there may be an issue should Brink's choose to commence this action in the Korean courts. This circumstance favours Canada.

[91] Fifth, all of the defendants, save Woowon, have business locations and/or assets in Canada. This is not a compelling factor for a stay.

[92] Sixth, there is a body of law in Canada that grants jurisdiction to the Federal Court to deal with cargo losses. This may be a neutral factor as Korea, based on the expert affidavit, also has a body of law that deals with cargo losses. However, the loss occurred in Canada and the evidence relating to that loss is likely all in Canada.

[93] Further, while the applicable law is that of Korea, this Court frequently hears expert evidence on the laws of other jurisdictions. While notionally favouring Korea, in my view it is more of a neutral factor, especially considering the ease of hearing foreign witnesses in a virtual or hybrid hearing.

[94] In my view, the remaining factors favour Canada. This Court has specific maritime jurisdiction and a wealth of jurisprudence with such cases. It is in the interests of justice and beneficial to the parties that the matter be heard where the majority of events, key witnesses, evidence and parties reside. The fact that Woowon is deprived of its choice of forum under the Bill of Lading is answered by s. 46 of the *MLA*.

[95] The final factor requiring a consideration of whether there will be a need to have a judgment recognized in a foreign state does not alter the balance in favour of a stay. On the evidence before the Court on this motion, it is clear that all of the parties are sophisticated entities. Binex and Woowon share common directors. It is reasonable to assume that Binex, Woowon and Maersk frequently engage each other's services for international carriage of goods. In my view, it is unlikely that any judgement rendered in Canada would not be recognized and adhered to by the parties.

D. *Issue 4: Is there strong cause not to enforce the jurisdiction clause?*

[96] In maritime matters, when a plaintiff brings an action in a jurisdiction other than the one stated in the bill of lading, the "strong cause test" is applied to determine whether to stay the proceedings and uphold the jurisdiction clause. A plaintiff has the burden to demonstrate to a court that there is good reason not to be bound by a forum selection clause (see *Pompey*). The test was originally developed in *The Eleftheria*, [1969] 1 Lloyd's Rep. 237 (*Eleftheria*) and restated by the Supreme Court in *Pompey* as follows:

> 39 I am of the view that, in the absence of applicable legislation, for instance s. 46(1) of the *Marine Liability Act*, the proper test for a stay of proceedings pursuant to s. 50 of the *Federal Court Act* to enforce a forum selection clause in a bill of lading remains as stated in *The "Eleftheria"*, which I restate in the following way. Once the court is satisfied that a validly concluded bill of lading otherwise binds the parties, the court must grant the stay unless the plaintiff can show sufficiently strong reasons 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. In exercising its discretion, the court should take into account all of the circumstances of the particular case. See *The "Eleftheria"*, at p. 242; *Amchem*, at pp. 915-22; *Holt Cargo*, at para. 91. Disputes arising under or in connection with a contract

> may not be regarded by a court in determining whether "strong cause" has been shown that a stay should not be granted.

[97] The "circumstances" referred to by the Supreme Court from *Eleftheria* are set out as follows:

> (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. [page 242]

[98] All of the parties provided lengthy submissions on this issue. Only a very brief summary is provided. In essence, Woowon, relying on *Pompey*, argues that in the absence of a reason not to, a court should enforce the bargain of the parties.

[99] Brinks argues that if s. 46 of the *MLA* does not apply there is strong cause not to enforce the jurisdiction clause because the facts of the case fall within the circumstances as set out in *Eleftheria*.

[100] Binex supports the position of Brinks and argues that the plaintiffs are relieved from having to show strong cause if s. 46 of the *MLA* applies. It relies upon *Great White Fleet v. Arc-En-Ciel Produce Inc.*, 2021 FCA 70 (*Great White Fleet*) for this proposition wherein the court stated:

> [11] Section 46 determines what test the Court must apply on the stay motion. If applicable, the *forum non conveniens* test applies: *Magic Sportswear Corp. v. Mathilde Maersk (The)*, 2006 FCA 284, [2007] 2 F.C.R. 733 at paras. 33 and 34. If not, the strong cause test applies. As the Supreme Court in *Z.I. Pompey* (at paras. 37-39) noted:
>
> > Section 46 (1) of the *Marine Liability Act*, which entered into force on August 8, 2001, has the effect of removing from the Federal Court its discretion under s. 50 of the *Federal Court Act* to stay proceedings because of a forum selection clause where the requirements of s. 46 (1) (a), (b), or (c) are met. […]
> >
> > […] Section 46 (1) in no way mandates a prothonotary to consider the merits of the case, […]
> >
> > [I]n the absence of applicable legislation, for instance s. 46 (1) of the *Marine Liability Act*, the proper test for a stay of proceedings pursuant to s. 50 of the *Federal Court Act* to enforce a forum selection clause in a bill of lading remains [the "strong cause" test].
>
> [12] **A plaintiff who is entitled to the benefit of section 46 should not have to also meet the burden of establishing strong cause, and it would be an error of law to both decline to determine the application of section 46 and refuse to grant a stay.** For these reasons, questions as to the application of section 46 of the *MLA* should generally be settled prior to trial. Leaving this question to the trial judge defeats one of the purposes of section 46, which is to bring certainty to questions of jurisdiction. Forcing the parties to spend the time and money preparing for a trial which the Federal Court, in the end, may determine it should not hear, does not advance the objective expressed by Rule 3 of the *Federal Courts Rules*, S.O.R./98-106, of ensuring "[the] most expeditious and least expensive determination of every proceeding on its merits." [emphasis added]

(1) Analysis

[101] Since I have found that subsection 46 (1) of the *MLA* applies it is not necessary to dwell at length on the strong cause test. However, in the event that reliance on subsection 46 (1) is misplaced, a brief consideration of the strong test factors demonstrate that strong cause has been made out.

[102] The factors relevant to the strong cause test are set out in *Eleftheria* at p. 242. They include: (a) in what country the evidence is situated or more readily available; (b) the relative convenience and expense as between the two forums; (c) whether the law of a foreign court applies and if it differs from Canadian law in any material way; (d) whether the defendants are seeking a procedural advantage; (e) with what country a party is connected and how closely; and, (f) whether there is prejudice to the plaintiff by having to sue in a foreign court. Prejudice may be inferred from being deprived of security for the claim, an inability to readily enforce any judgment, a limitations period, or for some other reason they would not get a fair trial in the foreign jurisdiction.

[103] The strong cause test and the *forum non conveniens* factors overlap to a large extent and are reviewed above. The conclusions reached are equally applicable to the *Eleftheria* factors.

[104] However, I have taken into account that they are discrete approaches with different burdens. In my view, if I am wrong on the applicability of subsection 46 (1) of the *MLA*, based on my analysis of the *Eleftheria* factors there is strong cause not to stay the action in favour of

Korea. Similarly, as noted, based on my analysis of the forum *non conveniens factors*, those factors do not support exercising the Court's discretion under subsection 50 (1) of the *Federal Courts Act* to grant a stay.

[105] Finally, given the conclusions I have reached, there is no need to consider the *Van Breda* principles.

V. Conclusion

[106] In my view, based on the above, Canada is the appropriate jurisdiction for this claim and the motion is therefore dismissed.

[107] Brink's and Binex are entitled to their costs of the motion. The parties are encouraged to resolve the issue of costs among themselves, failing which they make brief written submissions to the Court within 30 days of the date of this decision.

ORDER ON T-122-21

THIS COURT ORDERS that:

1. The motion is dismissed.

2. Costs are awarded to Brink's and Binex.

3. The parties are encouraged to resolve the issue of costs. In the event, they are unable to do so they make written submissions to the Court limited to three pages and a draft bill of costs within 30 days of this decision.

"Kevin R. Aalto"
Case Management Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-122-21
STYLE OF CAUSE:	BRINK'S GLOBAL SERVICES KOREA LTD. AND, BRINK'S GLOBAL SERVICES INTERNATIONAL, INC. v BINEX LINE CORP, JOHN DOE BINEX EMPLOYEE, JANE DOE BINEX, EMPLOYEE AND OTHER PERSONS UNKNOWN, TO THE PLAINTIFFS CURRENTLY OR FORMERLY, EMPLOYED BY BINEX, AND WOOWON SEA & AIR CO. LTD. AND A.P. MOLLER-MAERSK A/S AND CANADIAN NATIONAL RAILWAY COMPANY
PLACE OF HEARING	HELD VIA VIDEOCONFERENCE
DATE OF HEARING	OCTOBER 7 AND 8, 2021
ORDER AND REASONS:	AALTO CMJ
DATED:	APRIL 20, 2022

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