COURT FILE NO.: 03-CV-261424CM 3
DATE: 20051028

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Chateau Des Charmes Wines Ltd. v. Sabate, USA, Inc. et. al.

BEFORE: MASTER MACLEOD

COUNSEL: John A. Olah for the plaintiff

Kevin A. Johnson for the defendant Sabate, S.A.S.

Diane Stortini for the defendant, Sabate USA Inc.

E N D O R S E M E N T

[1] In this action, the plaintiff, a producer of Ontario wines, seeks damages from the defendants who are engaged in the manufacture and sale of wine bottle closures. The plaintiff alleges that the defendants' Altec[1] closures caused "cork taint" to the plaintiff's wines.[2] As a result more than one million bottles of wine were apparently withdrawn from the market and the plaintiff seeks compensation. The question before me on this motion is whether or not Ontario is the appropriate forum for this action.

The issues

[2] The issues raised by this motion may be summarized as follows:

a) Is there a forum clause forming part of the contract between the parties?

b) Regardless of whether or not I am of the view that there is a forum clause, are the parties bound by a prior determination of this issue in California?

c) Whether or not there is a forum clause, should this court decline jurisdiction?

[3] To put this in context, there is no question of jurisdiction as such. The plaintiff is an Ontario corporation with its head office in Niagara-on-the Lake and it appears the contract in question was made in Ontario. Representations about quality were made in a sales call to the

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[1] Altec®
[2] Cork taint or wine taint results in a musty taste and odour in wines and is generally thought to be caused by TCA, a compound that results when microorganisms present in natural cork react with chlorine. This phenomenon is of major concern to the wine and closure industries.

plaintiff's place of business in this province. The corks were delivered to the plaintiff in Ontario and much of the damage occurred in this jurisdiction. Moreover, pursuant to an undertaking ("stipulation") given by the defendants to the United States District Court for the Northern District of California, the defendants have agreed not to challenge the jurisdiction of the "Court in Canada". As will become apparent, this stipulation has some ongoing significance.

[4] In determining the motion, it has been necessary to review the factual background and the legal proceedings to date in some detail. I have also been required to summarize the present state of the law in Ontario concerning the law of forum and in particular the enforcement of forum selection clauses. This is important not only because of seemingly divergent cases that were cited before me but also because the decision of this court may have to be read by judges in California or France so it would be well to be clear about what principles were applied.

The parties & the cause of action

[5] Chateau Des Charmes is an Ontario corporation with its head office in Niagara-on-the-lake and a winery located in St. David's, Ontario. The title of the proceedings names five defendants but as a result of agreements and discontinuance there are in fact only two – Sabate, S.A.S. and Sabate, USA, Inc. - which I will refer to as "Sabaté France" and "Sabaté USA".[3] The Sabaté companies market a wine closure known as Altec, which is promoted in literature and on the internet as a superior pure cork that "is capable of relieving wine producers from the risk of cork taint, the world over." Cork taint is described as a condition imparting an unpleasant odour and flavour to wine. As mentioned, the action arises because the plaintiff apparently had to withdraw roughly one million bottles of wine from the market due to this condition and it alleges the cause was the Altec closures. The defendants deny this claim but before the merits can be addressed it is necessary to determine in what court the claim should be adjudicated.

[6] Chateau Des Charmes is a family owned company. Sabaté France is a publicly traded corporation but members of the Sabaté family are involved in its senior management. The President of Chateau Des Charmes is Paul M. Bosc and his son Pierre-Jean Bosc is the Director of Operations. Francois Sabaté is president of Sabaté USA. There appears little doubt from the evidence that Francois Sabaté spoke to Paul Bosc in 1998 about the merits of the Altec closures and subsequently sales calls were made to the plaintiff by Eric Mercier, managing director of Sabaté USA and Gail Hildred, a sales representative for "Sabaté".

[7] In February of 2000, Pierre-Jean Bosc contacted Gail Hildred on the toll free number shown on her business card in order to place an order for 500,000 Altec closures. Apparently

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[3] I am advised there were corporate reorganizations in France including an amalgamation between the dates of the sale and the present day. It has been agreed that the proper French defendant is the successor corporation Sabaté S.A.S. Sabaté is spelled with an accent on its letterhead and in the American proceedings but the name is used without an accent in the pleadings in Ontario. Hence there is some inconsistency in usage in these reasons.

Ms. Hilyard was physically located in Vancouver, Canada but that is not apparent from her business card and Mr. Bosc believed he was contacting Sabaté USA.

Formation of the Contract

[8] During the phone call between Mr. Bosc Ms. Hildred, agreement was reached on the quantity, price and delivery dates for the closures and the plaintiff's order was accepted. A schedule of staged delivery dates was established. There was no discussion about a forum clause or any other contractual terms. It does not appear that the plaintiff issued a written purchase order to the defendant nor did the defendant issue a written confirmation. In due course the corks were shipped to the plaintiff's winery as agreed. It is the position of the plaintiff that this was a fully formed oral contract for the supply of the Altec product.

[9] Although Mr. Bosc thought he was speaking with Sabaté USA and in fact it is now apparent that Ms. Hildred faxed an internal purchase order on letterhead to Sabaté France, it does not appear anyone expected Sabaté USA to act as a middleman. The corks were shipped to the winery directly from France. When the plaintiff was invoiced, Sabaté France issued the invoices and payment was remitted directly to France. On the other hand, there is no evidence that the plaintiff would have been surprised if the corks had arrived from California or turned its mind at all to the corporate structure of Sabaté.

[10] The defendant says that Gail Hildred was a sales agent for Sabaté France. Perhaps the role of Sabaté USA was also one of agency but these agency roles do not appear to have been disclosed or clearly articulated. It is notable that Mr. Mercier's business card identifies him as Sales Manager for Sabaté USA and shows a San Francisco address. Ms. Hildred's card shows no address and is simply embossed with her name, the name Sabaté and toll free phone and fax numbers. In July, 2001 when Mr. Mercier was writing to Mr. Bosc in connection with an investigation into the wine taint complaint, he identified Ms. Hildred as "our agent in Canada" and he makes reference to "invoices from our company written in French". Even at that stage it does not appear the roles of the two defendants were differentiated.

The forum selection clause

[11] There was no discussion of forum when the order was placed. Accompanying the shipments of corks was a document entitled "bill of lading". I agree with the plaintiff that this would more accurately be described as a packing slip. This is because no carriage contract was involved[4]. The closures were shipped by the defendant directly to the plaintiff's factory. Whatever its nature, the document stated in English that "Both parties agree to have all disputes heard in the commercial court of Perpignan". Invoices were sent subsequently and they

[4] A bill of lading is generally speaking the written evidence of a contract between a freight carrier and the shipper. A bill of lading in this case would have been evidence of a contract between Sabaté and the carrier. The plaintiff was not a party to the shipping contract.

contained a term in French on the face of the invoice. That read as follows: "*En cas de litige, Seul le Tribunal de Commerce du Perpignan sera compétent.*" There was a more detailed forum clause amongst other terms printed in French on the back of the invoices.

[12] Much was made in argument about the language of the documents but I find that to be of no significance. The owners of Chateau Des Charmes appear to be fluent in French and in any event it would not have been difficult to determine the meaning of the French terms. The same term appears in English on the "bill of lading". The critical question is whether or not the forum clause did form part of the contract or if it was simply an attempt to modify the terms of a contract already formed. It is here that the United Nations Convention on the International Sale of Goods becomes potentially significant.

[13] The Convention is in force in Canada[5] as well as in the United States and in France. The convention provides a framework for the international sale of goods and in particular it sets out certain rules of offer and acceptance. I have reproduced certain sections of the convention at Appendix A to these reasons. The key provisions that might have application to this case are Article 8 (3), Article 9, Article 11, Article 14 (1), Article 18, and Article 19. There is of course no suggestion that the parties turned their minds to the convention but all parties agree it is the law that governs offer and acceptance. To that extent, the law of the contract appears to be the same whether the courts of the United States, Ontario or France are called upon to adjudicate. The convention provides rules for oral formation of contracts and it also provides for amendments to the terms of contracts but has particular rules for substantial amendments.

[14] I agree with the plaintiff that a fully formed contract for the sale of goods was concluded orally once the parties had agreed on the price, quantity and the delivery dates and location. That is not the end of the matter, however, because the convention does allow the parties to amend an agreement and it incorporates for example generally accepted industry practice. The defendant argues that even if the forum clause did not form part of the initial order for 500,000 corks, the plaintiff knew or ought to have known that the forum clause formed part of the terms of sale by virtue of the "bills of lading" and the invoices. When the plaintiff continued to accept delivery and indeed placed further orders (also by telephone to Ms. Hildred[6]) the defendant argues that the forum clause was either accepted as an amendment or it became part of the subsequent orders. On that basis, even if the forum clause did not form part of the contract for the first delivery of corks, it formed part of the contract for subsequent orders.

[15] Of course the plaintiff did not turn its mind to the prospect of litigation when it placed an order for additional corks. It was sometime in 2001 that the plaintiff became aware its wines bottled using the Altec closures were suffering from wine taint. After attempts to resolve the

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[5] It is implemented in Ontario by the *International Sale of Goods Act,* R.S.O. 1990, c. I.10

[6] The first order for Altec closures called for staged delivery of 500,000 corks spread over 180 days commencing in February of 2000. Subsequently there was another order for different corks in August 2000 and a further order for 600,000 Altec corks in October of 2000. It now appears there are Sabaté U.S.A. "purchase orders" for each of these telephone orders but that information is new evidence not before me on the original motion and not originally before the court in California. I will come to this shortly.

problem (including the investigation by Sabaté U.S.A.) were not successful, the plaintiff commenced litigation. That action was not begun in Ontario but rather it was commenced in federal court in California against Sabaté USA and Sabaté France. The plaintiff explains that one reason for choosing California other than the location of Sabaté USA, was the fact that there was already litigation against Sabaté by wineries in California. It was thought advantageous to be in the same forum. The defendants did not agree.

[16] The parties fought a stout battle over forum and jurisdiction in California. That dispute appeared to have culminated when the United States Supreme Court refused certiorari over the decision of the United States Court of Appeals for the 9th Circuit ("the 9th Circuit") concerning jurisdiction and the District Court then dismissed the proceeding on the basis of forum. The American proceedings are highly relevant and it is necessary to describe them briefly.

The American Proceedings

[17] Initially the United States District Court for the Northern District of California declined jurisdiction over the subject matter of the dispute. It did so on the basis that the forum selection clause was binding and that the dispute had nothing to do with California. This finding was appealed to the 9th Circuit, which, apparently of its own volition, applied the Convention and found that the forum clause was not part of the contract between the parties. The 9th Circuit therefore determined that the United States District Court did have jurisdiction and it was this finding that the Supreme Court declined to review.

[18] As a result of the 9th Circuit determination, the matter was remitted back to the District Court. The District Court then decided the matter on the basis of *forum non conveniens*. The District Court dismissed the action as having no real connection with California and held that either Canada or France was a preferable forum. A consideration in that decision was the representation by Sabaté that it would not challenge the jurisdiction of the courts of either Canada or France. In fact the District Court ultimately retained jurisdiction over the California action for the purpose of enforcing this stipulation if necessary.

[19] The defendants confirm that they agreed not to dispute jurisdiction and that both Mr. Mercier and Mr. Sabaté agree to come to Ontario if necessary. They distinguish between jurisdiction and forum as did the court in California. I recognize the distinction of course and it does appear that submissions made in the United States indicated there could still be a forum argument. The stipulation in California, however, should not be disregarded lightly. It appears to be something more than an agreement to attorn to the jurisdiction and to appear if necessary. It is recognition that the courts of Ontario have jurisdiction should they decide to exercise it. In fact there is a written undertaking containing this stipulation as well as agreement by Sabaté France to be responsible for any liability of the predecessor companies originally named as defendants. [7]

[7] This document appears at tab 2a of the motion record of Sabate S.A.S. and was executed by Pierre Fougère, President of the corporation on August 4th, 2004.

[20] This brings us back to the issue of the forum clause because even without the stipulation made before the District Court, Ontario is clearly an appropriate forum and it appears on the face of matters to be the most appropriate forum. As noted earlier, the contract was formed here and was to be performed here. The damages were suffered in Ontario and most of the witnesses for the plaintiff will be in Ontario. Mr. Mercier and Mr. Sabaté will appear in either Ontario or France as required. Ms. Hildred appears to reside in Canada. There is no reason to think that any significant number of factual witnesses will have to come from France. The motion would fail in Ontario on *forum non conveniens.* I will address this distinction in more detail when I analyze the case law but it is obvious that in the absence of the forum clause, there would be no basis to stay the Ontario proceeding. It is on this issue that the appellate findings in the United States are significant.

The 9th Circuit found that applying the Convention, the contract between the parties was a fully formed oral agreement when the order was placed and accepted.[8] The 9th Circuit found that the forum clause did not form part of that agreement and was not binding on the plaintiff. Obviously that decision is not binding on this court but it is entitled to a level of deference. More to the point, I am urged to find that since the issue was litigated in the United States, the defendants are estopped from rearguing the issue. The court is not bound but the parties may be.

The defendants for their part argue that the decision of the 9th Circuit on this point is entitled to no deference at all and that issue estoppel does not apply. This is because I am told, the 9th Circuit raised the issue of the Convention of its own volition and counsel did not have an opportunity to fully argue it. Moreover, it is said, the 9th Circuit was not told or did not understand that there was more than one order for corks.[9] The defendants argue that the forum clause must clearly be part of the contracts encompassing the later orders or alternatively should be construed as a modification to the contract proposed by Sabaté and accepted by the plaintiff through its actions in continuing to accept and order goods.

This motion and subsequent events in California

[21] This motion was discussed in the spring of 2004 and first launched in April by Sabaté U.S.A. At that time Sabaté France had neither been served nor had it instructed counsel to accept service. There ensued considerable delay while the question of the proper parties and acceptance of service of the statement of claim was worked out. Eventually Sabaté France agreed to be served and then brought the same motion. The parties appeared on November 16th, 2004. Argument was not completed and the matter did not resume until February 21st of this year. Subsequently while the decision was under reserve, I was asked to entertain written submissions

[8] But for the Convention, the order would have been a contract that must be in writing under the United States Uniform Commercial Code – see the decision of the 9th Circuit.

[9] The fact that there was a second order is specifically referred to in the reasons of the 9th Circuit. The 9th Circuit may not have been aware there was an intervening order for ordinary corks The 9th Circuit fully appreciated that the delivery of the Altec closures took place in staged shipments and each shipment was separately invoiced.

on a case released by the Ontario Court of Appeal.[10] The submissions I received were far more extensive than simply addressing whether or not the Court of Appeal decision altered the any of the principles already argued. What was submitted was extensive argument about the implications of the law discussed in *Currie* and the evolution of the principles underlying recognition of foreign judgments. Extensive submissions were then submitted in response.

[22] On April 21, 2005 I was advised there had been further proceedings in California and the defendant asked leave to file additional evidence concerning the decision of the other court and its implications for this motion. This was resisted. Given what had transpired, I concluded the only fair way to deal with this was to reopen the matter and allow further time limited oral submissions. The matter was finally argued on September 9th, 2005.

[23] Following the original argument of the motion and while the written submissions on the *Currie* case were in preparation, the plaintiff returned to California and sought to reopen the matter there. The plaintiff sought to sanction the defendant for resisting the jurisdiction of the court in Ontario and thus offending the stipulation. The plaintiff also sought to sanction the defendant for failing to reveal to the California court the existence of the Sabaté USA purchase order since that was evidence potentially demonstrating greater involvement by Sabaté USA (headquartered in California) and might have indicated a more substantial connection between the dispute and California. I am advised the court has rejected either issue as justifying reopening the forum issue but it has reserved on the issue of sanctions for non-disclosure. There is apparently another appeal to the 9th Circuit. The plaintiff's U.S. attorney has sworn an affidavit to the effect that these proceedings are only to keep the plaintiff's rights in California alive in case the courts in Ontario and perhaps France should decline jurisdiction. Be that as it may, there is no doubt the plaintiff's first choice of forum was California and despite this motion being under reserve, the plaintiff has sought to have those courts assume jurisdiction in the interim. The respondent argues that this should give rise to an inference that the plaintiff is simply forum shopping and should weigh in favour of the stay.

[24] I now turn to the principles to be applied to these facts.

Analysis

a) The law of forum in Ontario

[25] I recently reviewed the law on *forum non conveniens* in Ontario. Those reasons are presently unreported but should shortly be available on Quicklaw and other electronic services.[11] I need not repeat that analysis here because despite many of the same cases being argued on this motion, this is not a *forum non conveniens* case. It is however worth reiterating that the current approach to forum in Canada is intertwined with the evolution of the law on enforcing foreign judgments. In the latter situation, the Supreme Court of Canada has embraced the principle of

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[10] *Currie v. Mcdonalds Restaurants of Canada Ltd.* [2005] O.J. No. 506 (C.A.) This is a case about whether or not members of a class in Canada are bound by the determination of a class proceeding in the United States.

[11] *Skyway Canada Limited v. Clara Industrial Services Ltd. et. al.*. Court file no. 05-CV-283515PD 1

"comity" and the "real and substantial connection test." In so doing it has rejected or altered the old common law tests of territoriality, sovereignty, independence and attornment. This approach was articulated in *Morguard* with respect to recognition of judgments by other provinces in Canada and in *Beals v. Saldanha*[12] the court affirmed that the same test should apply to recognition of judgments in the United States and other jurisdictions outside of Canada.

[26] As a result, it will no longer serve a resident of Ontario to ignore a foreign proceeding on the basis there has been no attornment to that jurisdiction. Providing there is a real and substantial connection with the other jurisdiction, the judgment of the foreign court will be recognized on the basis of comity. Conversely an Ontario action will not be stayed simply because there is a foreign proceeding or because the foreign defendant has not attorned to Ontario. The appropriate procedure is therefore to appear in the jurisdiction and to seek a stay on the basis of *forum non conveniens* or if applicable, a forum selection agreement.

[27] I observed above that this is not a *forum non conveniens* case. I say this for several reasons. Firstly, I am not being asked to stay the Ontario action in favour of a parallel proceeding in another jurisdiction. There is a proceeding in California that as matters stand has already been stayed. There is no proceeding in France although the defendant contends that is the only forum in which the plaintiff is entitled to litigate. Secondly, on a simple forum argument, there is no contest. The factors set out in *Eastern Power Limited v. Azienda*[13] either weigh in favour of Ontario, are neutral or do not apply on the facts of this case. Finally, in *Pompey Industrie v. ECU-Line N.V.*[14] the Supreme Court of Canada put to rest the suggestion that a forum clause was simply a factor in a *forum non conveniens* determination. The Court contrasted cases in which a stay is sought based on a forum selection clause and cases based on the *forum non conveniens* doctrine. In the latter, "the burden is normally on the defendant to show why a stay should be granted, but the presence of a forum selection clause … is sufficiently important to warrant a different test, one where the starting point is that the parties should be held to their bargain." In the face of the clause, the party resisting it must show "strong cause" why it should not be bound by the forum selection clause.

[28] This does not mean that such a clause will be determinative. A forum selection clause will not induce a court to take jurisdiction if the action has no real and substantial connection with the jurisdiction.[15] On the other hand, a forum selection clause naming another jurisdiction cannot oust the jurisdiction of the court but it will normally induce the court to stay the action. If there is such a clause it will generally be given full force and effect and the parties will be held to their bargain.[16] In this sense the application of a forum selection clause is not a question of convenient forum but of contractual interpretation and application. Forum selection provisions

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[12] [2003] 3 S.C.R. 416
[13] (1999) 178 D.L.R. (4th) 409 (C.A.), leave to appeal denied, [1999] S.C.C.A. No. 542 and see *Kuhlkamp v. Apera Technologies Inc* .[2004] O.J. No. 3064 (C.A.)
[14] [2003] 1 S.C.R. 450 @ para. 21.
[15] *Shekdar v. K. & M. Engineering and Consulting Corporation* (2004) 71 O.R. (3d) 475 (S.C.J.)
[16] see *Z.I. Pompey, supra, Ash et al v. Corporation of Lloyd's et al* (1992) 9 O.R. (3d) 755 (C.A.) and *Di Paolo Machine Works Ltd. v. Prestige Equipment Corp* (1996) 5 C.P.C. (4th) 175 (Gen. Div.)

are important features of international commercial contracts and should only be overridden if there is extremely good reason to do so.[17] There are then two questions to be asked. Does the contract contain a forum selection clause and if so, is there strong cause to allow the action to proceed notwithstanding the agreement?

[29] I agree with the plaintiff that this is not a "bill of lading" case nor is it a "battle of the forms" case. The contract was not formed by exchange of forms or by delivery pursuant to terms set out in a bill of lading. I also agree with the analysis of the 9th Circuit that there was a fully formed oral contract under the Convention when the order was placed and accepted by telephone. With respect at least to the first order of corks, putting a forum clause into the packing slip or the invoice did not have the effect of modifying the contract. It is unreasonable to suggest that the plaintiff, having ordered the product (and presumably having not ordered whatever closures it would otherwise have used) would have to refuse delivery in order to avoid terms unilaterally inserted into the documents.

[30] I have greater sympathy for the argument that the forum clause formed part of the subsequent contract for the second order of corks. At that time, the plaintiff knew or ought to have been aware of the vendor's terms of sale. It would have been possible to raise the issue when placing the later order and to make it clear that the order was conditional on the forum clause not being enforced. I think it is arguable that the forum clause formed part of the later contract although I recognize the plaintiff's argument that it simply placed a further order for more corks on the same terms as before. In *DiPaolo Machine Works*[18] Hoilett J. held that even if the plaintiff in that case had not read the forum selection clause, it was fixed with knowledge because the clause was not open to serious attack. It was, he said, a clause that was not alien to contracts involving international legal transactions. That of course is a bill of lading case. The plaintiff had arranged with a company in New York to ship goods from Mexico to Texas and then to Ontario. The invoice and its terms were clearly part of the offer and acceptance involved in formation of the contract but the point is that, whether in bills of lading or not, forum clauses are common. Parties involved in international commerce are obliged to read carefully and such clauses are hardly startling. That rationale supports the defendants with respect to the later contracts.

[31] Leaving aside for the moment the question of the decision by the 9th Circuit, I am of the view that the forum clause did not form part of the first contract and if the later orders were separate contracts, the forum clause did form part of those later contracts. If there had been separate actions launched under each contract, I would be inclined to the view that the first contract could be litigated in Ontario and absent strong cause, the second contract should be litigated in France. Life is not so neat and orderly. There is one action and in any event if there were two they quite clearly should be tried together unless the damage can be shown to have originated only from one of the shipments.

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[17] See *Mobile Mini Inc. v. Centreline Equipment Rentals Ltd.* [2004] O.J. No. 3659 (C.A.), *DiPaolo Machine Works Ltd. v. Prestige Equipment Corp.* (1996) 5 C.P.C. (4th) 175 (Gen. Div.), *Holo-Deck Adventures Ltd. v .Orbotron Inc.* [1996] O.J. No. 4417 (Gen.Div.), *Z.I. Pompey Industrie v. ECU-Line N.V.* [2003] 1 S.C.R. 450

[18] supra at note 2

[32] It does not appear possible to differentiate damage caused by the first shipments of corks from damages caused by corks shipped as a result of the later order. The second order may have been placed as the result of what appeared to be satisfactory performance by the corks received in response to the first order. All the corks were ordered in the belief they would not cause cork taint and they were all apparently used to bottle the same vintages of wine. In any event, it would make little sense to split the litigation so that litigation over the first contract could take place in Ontario and litigation concerning the later contract must take place in France. There should only be one proceeding and one trial. The defendants argue that this is a reason the litigation should take place in Perpignan. I do not share the view that is a necessary outcome. In any case in which two actions ought to be tried together, the question of forum would be a consideration. In some instances the goal of efficiency and expediency might outweigh the choice of forum. A forum selection clause dealing only with one component of a proceeding might appropriately be given different weight than one encompassing all of it.

Has the issue been decided in California?

[33] I have reached the conclusion that the forum clause did not form part of the initial contract independently and without considering whether the decision of the 9th Circuit Court creates an estoppel. The estoppel question is whether the finding in California should bind the parties so that even if it is arguable that the forum clause formed part of a second and separate contract, no weight should be given to that argument. On the face of things, the decision in the United States meets the three criteria set out in *Banque Nationale De Paris (Canada) et al v. Canadian Imperial Bank of Commerce.* [19] Those are that the same question has been decided; that the decision said to create the estoppel was final; and the parties before the other court were the same.

[34] The defendant argued that the Court in California should be given no deference because there was a failure of procedural justice. I do not accept that argument. The court may have raised the issue of the convention of its own volition and counsel may not have been properly briefed on the issue but there can hardly be said to have been a failure of natural justice or a lack of procedural remedy. The record in California does not demonstrate lack of opportunity to fully put the issues before the court. The parties have shown themselves quite able to launch appeals and motions for reconsideration in California. In fact they are still doing so on other issues.

[35] The defendant relies on the decision of *Morse Typewriter Co. v. Cairns* [20] as authority that determination of a forum issue by a United States court should not be considered as a final decision concerning factual determinations made in reaching that decision. In *Morse* the District Court in New York had made certain findings about misrepresentations going to the merits of the case itself. The moving party attempted to stay the Ontario action or to narrow the claim on the basis that the plaintiff was estopped from litigating those facts. Macdonald J. held that there was no estoppel.

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[19] (2001) 52 O.R. (3d) 161 (C.A.); leave to appeal to the Supreme Court of Canada refused, S.C.C. Bulletin, 2001, p. 1965

[20] (1992) 7 C.P.C. (3d) 136 (Gen. Div.)

[36] I agree that findings of fact made in a preliminary motion concerning forum may not preclude those facts remaining in issue for the purpose of trial. Arguably factual determinations made by me for forum purposes on the basis of affidavit material do not prevent different facts being pleaded in the action or prevent a trial judge from making different findings at trial after hearing all of the evidence. Hypothetically it may be open to the trial judge to find that (notwithstanding the preliminary determination the clause did not form part of the contract) after a trial the forum clause did apply and the action should have been brought in France. This might then be a consideration in respect of costs or even damages. Obviously this is not the case if I determine the forum clause does apply and should be enforced because in that case there will be no trial in Ontario. That will be a final decision for purposes of this action. As with many kinds of motion, a decision allowing the action to proceed is an interlocutory decision whereas a decision staying or dismissing the action is a final decision.

[37] In *Morse*, the court held that the conclusion about misrepresentation necessary for the forum decision in New York was not binding at trial in Ontario. That is not quite the same as this case. Here what is argued is that findings of fact made for the purpose of a forum determination in California should not be reargued in another forum determination in Ontario. This is a question of "issue estoppel" as opposed to *res judicata* or "cause of action estoppel"[21] I am of the view that issue estoppel could apply to a forum determination in particular circumstances.

[38] In *The Sennar (no. 2)*[22] the House of Lords held that the decision of a Dutch court on forum was binding on the parties in a proceeding in England. In that case a contract for sale of groundnuts was formed by way of bill of lading. The contract contained a clause providing that any actions under the carriage contract could only be brought in Khartoum or Port Sudan and would be governed by Sudanese law. German buyers brought an action in the Dutch courts but the courts in Holland declined jurisdiction on the basis that the forum clause formed part of the contract and was enforceable. The buyers then brought a second action in England for deceit and negligence. The House of Lords was unanimous in holding that the plaintiffs were estopped from suing in England because the decision in Holland was a final determination on the merits for forum purposes. The proper forum for adjudication was the Sudan. *The Sennar (no. 2)* may well be good law in Canada as I see nothing in that decision to contradict *Morse* nor is it contrary to the principles enunciated in Canadian case law.

[39] Although ostensibly similar to the situation before me, closer consideration of *The Sennar (no. 2)* suggests that issue estoppel may not operate symmetrically. In that decision it was the plaintiff that was estopped from bringing the action in England because the plaintiff had been told by the Dutch court that it was obliged to sue in the Sudan. In the case before me, the plaintiff is arguing that the defendant is estopped from arguing that the forum clause applies because the court in California found it did not. There are two major differences from the groundnut litigation before the House of Lords. Firstly, the court in California did not decline jurisdiction because the forum clause applied. It found that the forum clause did not apply and

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[21] see discussion in North, P.M., Fawcett, J.J. *Cheshire and North's Private International Law* (1992) Butterworths, London at pp. 374 - 376

[22] [1985] 1 W.L.R. 490 (H.L.)

despite that the District Court declined jurisdiction on the basis of *forum non conveniens.* Secondly, the California court did not decide that Ontario was the jurisdiction required by the contract, rather it found that either Ontario or France were jurisdictions more connected to the dispute than California. If the court in California had held that the forum clause did apply and France was the required jurisdiction then *The Sennar (no 2)* is authority that the parties – and the plaintiff in particular - would have been estopped from starting this action in Ontario. Had that been the case then it would be the defendant raising the estoppel as a shield to prevent the action from continuing. Those are not the facts.

[40] It seems inherently unfair for a plaintiff to be able to drag a defendant into a forum it successfully resists and then to try to use a finding of fact by an appellate court in that forum to force the defendant to litigate in another forum it resists. With the greatest of deference to the 9th Circuit – the more so since I have independently arrived at a similar conclusion – I do not find that the defendant is bound by the finding of fact that the forum clause did not apply to any of the shipments.

[41] That is not to say the finding in California should be given no weight. The 9th Circuit's interpretation of the Convention is persuasive and I agree that the Convention provides for an international contract for sale of goods to be formed orally. I also agree that the Convention does not permit material amendments to be imposed by silence or by practice. Where I diverge from the 9th Circuit on the evidence before me is whether the forum clause applies to the second order of Altec closures.

Does the forum clause apply to the later orders?

[42] Since I am unable to dodge the issue by concluding it has been decided in California this brings me back to the question of whether the forum clause applies? I have already found that inserting the forum clause in the packing slip or the invoice did not amend the terms of the original oral contract. It appears to me that the plaintiff knew of the forum provision when it placed the second and third telephone orders and those orders formed separate contracts. By that time, it was also obvious that calling Ms. Hilyard was not going to result in a contract with Sabaté U.S.A. but with Sabaté France so any argument of undisclosed agency would no longer apply. There is therefore much merit in the defendant's alternative argument that by placing additional orders the plaintiff bound itself to the forum provision. At the very least this is a triable issue but were it necessary to decide the matter for purposes of this motion, I would conclude that the forum clause did form part of the second order for Altec closures and it was a separate contract.

Should the forum clause be enforced?

[43] The factors I consider make it appropriate to continue with this action in Ontario include the following:

a) The forum clause was not part of the original contract and but for the forum clause, Ontario is the appropriate and natural forum for the dispute;

b) The defendants stipulated to the court in California that they would accept the jurisdiction of the court in Canada or France. While I accept the distinction between jurisdiction and forum, the defendant has agreed to comply with the judgment of this court if the action proceeds.

c) Even if there were separate contracts and the forum clause formed part of the later contracts, it would not be efficient or expeditious to litigate in more than one jurisdiction and as the damages cannot be easily allocated between the contracts, there should only be one trial.

d) The parties argued the question of forum before the United States courts and the 9th Circuit Court of Appeals found that the forum clause did not form part of the contract for the sale of goods under the Convention. While I have not found that finding to raise an estoppel and I concur with it only in part, the time spent on this issue is relevant. The question of forum has now occupied the courts in the United States and now in Ontario for over three years thus stalling the determination of the matter on the merits.

e) This court is the appropriate forum and jurisdiction for the issues raised by the first contract and the initial order of corks. The plaintiff was unaware of any problem with the first order when it placed the second order.

[44] The following factors weigh in favour of staying the action:

a) The plaintiff did not protest the forum clause when it knew or ought to have known it was contained in the shipping documents and invoices.

b) The plaintiff inappropriately – according to the United States court – attempted to bring the action in California before launching the action in Ontario.

c) The plaintiff returned to California and asked the United States court to make a determination that could have impacted on the appropriate forum without disclosing that fact to this court and while a decision on the point was under reserve.

[45] I have concluded however that the forum clause does not apply to the first order of Altec closures and while it may apply to the later order, the factors in favour of allowing the action to continue in Ontario outweigh the other factors applying the strong cause test. I decline to stay the Ontario action.

[46] I have no doubt the issue of costs will require resolution. I invite the parties to do so by agreement of course but the parties may otherwise arrange to obtain direction from me. I may well be prepared to accept submission in writing but none of the parties are to make such submissions unless there is first a direction or an agreement on the timing and length of the

submissions. In the event no arrangement has been made to deal with costs by the end of November, 2005 there shall be no costs of this motion.

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Master Calum U.C. MacLeod

DATE: October 28, 2005

APPENDIX A

UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

CHAPTER II

GENERAL PROVISIONS

Article 7

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Article 8

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

Article 9

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

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PART II

FORMATION OF THE CONTRACT

Article 14

(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

Article 15

(1) An offer becomes effective when it reaches the offeree.

(2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

Article 16

(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

(2) However, an offer cannot be revoked:

(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

(b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

Article 17

An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

Article 18

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

Article 19

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.