SUPREME COURT OF NOVA SCOTIA

Citation: *3289444 Nova Scotia Ltd. v. RW Armstrong & Associates Inc.*, 2016 NSSC 330

Date: 2016 12 08
Docket: Hfx No. 447944
Registry: Halifax

Between:

3289444 Nova Scotia Limited, a body corporate
(a.k.a. High Performance Energy Systems Stakeholders Group)

Plaintiff

v.

RW Armstrong & Associates Inc., a body corporate; and
Masdar Abu Dhabi Future Energy Company, a subsidiary of
Mubadala Development Company, of the Government of Abu
Dhabi of the United Arab Emirates

Defendants

Judge: The Honourable Justice Joshua Arnold

Heard: June 9, 2016, in Halifax, Nova Scotia

Counsel: Jasmine Ghosn, for the Plaintiff
Scott Sterns, for the Defendant RW Armstrong
Jane O'Neill and Ryan Baxter, for the Defendant Masdar

By the Court:

Overview

[1] 3289444 Nova Scotia Limited (the "numbered company") has started an action against RW Armstrong and Associates Inc. ("RWA") and Masdar Abu Dhabi Future Energy Company ("MASDAR") in the Supreme Court of Nova Scotia for breach of contract and an assortment of torts.

[2] RWA and MASDAR say that the numbered company's Notice of Action and Statement of Claim should be struck on the ground that the Supreme Court of Nova Scotia does not have jurisdiction in relation to this matter as the contract provided for disputes to be heard in the United Arab Emerites ("U.A.E."). In the alternative, RWA and MASDAR say that the matter should be stayed as the U.A.E. is the more convenient forum to hear this matter.

Facts

[3] The defendant RWA is a global consulting firm that provides construction management, development and finance, design, planning, and program management services. RWA has offices in the United States and in the Middle East, including Abu Dhabi, U.A.E. RWA has no presence in Nova Scotia.

[4] The defendant MASDAR is a renewable energy company based in Abu Dhabi, U.A.E. It is a subsidiary of Mubadala Development Company, a wholly-owned investment vehicle of the government of Abu Dhabi. MASDAR has no presence in Nova Scotia.

[5] The plaintiff numbered company, 3289444, was incorporated under Nova Scotia law in May 2015. On September 5, 2013, Moir J. granted an order appointing PricewaterhouseCoopers Inc. ("PWC") as receiver for High Performance Energy Systems ("HPES"). By an Assignment Agreement dated May 20, 2015, PWC assigned certain rights to 3289444. On March 13, 2016, RWA and MASDAR were notified that certain claims against them made by HPES had been assigned to the plaintiff.

[6] Having set out the relationships between the parties, it is necessary to review the background of their dealings with one another. In August 2008, MASDAR entered into an agreement for services with RWA (the "Agreement"). RWA

agreed to act as a detail design consultant for the MASDAR Institute of Science and Technology building in Masdar City, U.A.E. (the "MIST Project"). Section 20 of the Agreement contains a choice of law clause, an arbitration clause and a forum selection clause:

> 20. Governing Law and Jurisdiction
>
> 20.1 This Consultancy Agreement and the relationship between the Parties shall be governed by, and construed in accordance with, the laws of the Emirate of Abu Dhabi and the UAE.
>
> 20.2 (a) The Parties shall endeavor to settle by good faith negotiation any dispute, difference, controversy or claim of any kind arising between them out of or in connection with this Consultancy Agreement.
>
> (b) In case of failure to settle the dispute, difference, controversy or claim by such negotiation within thirty (30) days or such-other period as the Parties may agree, the claimant may notify the other Party of its intention to submit the dispute to arbitration. The arbitration shall be heard before three arbitrators. Each of the parties hereto shall appoint one arbitrator with the remaining third arbitrator to be chosen by agreement of the two arbitrators previously chosen if either party fails to appoint its arbitrator or the two arbitrators are not able to agree on the person of the third arbitrator within 30 days from the date the last of the two were appointed, then, either party may approach the Abu Dhabi Chamber of Commerce and Industry (ADCCI) and request that the other party's arbitrator or the third arbitrator as the case may be shall be appointed by the Chairman of the ADCCI. All aspects of such arbitration shall be governed by the regulations of ADCCI in force at such time. All arbitration proceedings are to take place in Abu Dhabi in the English language. The decision of such arbitration shall be final and binding upon the parties hereto without appeal to any court or other party. Pending the decision or award, the parties shall continue to perform their obligations under this Consultancy Agreement. The provisions of the Consultancy Agreement relating to arbitration shall continue in force notwithstanding the termination of this Consultancy Agreement.
>
> (c) Notwithstanding any dispute or arbitration arising hereunder, the Parties shall continue to perform their respective obligations under this Consultancy Agreement unless the Parties otherwise agree.

[7] Section 15.2 of the Agreement states:

> 15.2 To the extent that the Company permits the Consultant to transfer, assign or subcontract the performance of any of the Services to a third party (the Sub-Consultant), the Consultant shall ensure that:

> (a) The Sub-Consultant enters in to an appointment for the performance of the relevant Services in terms approved by the Company and similar in all applicable respects to the terms of this Consultancy Agreement; and
>
> (b) The Sub-Consultant has entered in to a Collateral Warranty (in a form approved by the Company) for the benefit of the Company.

[8] HPES was not a party to the Agreement between MASDAR and RWA.

[9] On December 31, 2008, RWA entered into a Subconsultant Agreement with HPES. Pursuant to the Subconsultant Agreement, HPES was to provide services and deliverables for the MIST Project in Masdar City, U.A.E. The Subconsultant Agreement contains a governing law clause, a dispute resolution clause and a forum selection clause:

> 18. Governing Law and Arbitration
>
> 18.1 This agreement and the relationship between the Parties shall be governed by, and construed in accordance with, the laws of the United Arab Emirates except where it contravenes the laws of United States and Canada.
>
> 18.2 The parties shall endeavor to settle by good faith negotiation any dispute, difference, controversy or claim of any kind arising between them out of or in connection with this Consultancy agreement.
>
> 18.3 R.W. Armstrong and the Company agree that they shall first submit and all unsettled claims, counterclaims, disputes and other matters in question between them arising out of or relating to this Agreement or the breach thereof (Dispute) to mediation by selection and direct private engagement of a neutral mediator without using a dispute resolution organization or administrative service. If no agreement is reached, then (1) the parties may mutually agree to a dispute resolution of their choice, or (2) either party may seek to have the Dispute resolved by a court of competent jurisdiction in the U.A.E.
>
> 18.4 Notwithstanding any dispute or arbitration arising hereunder, the parties shall continue to perform their respective obligations under this consultancy agreement unless the parties otherwise agree.

[10] All invoices relating to the Subconsultant Agreement were to be addressed to RWA in Abu Dhabi. MASDAR was not a party to the Subconsultant Agreement.

[11] On February 22, 2010, RWA terminated the Subconsultant Agreement.

[12] On September 5, 2013, HPES went into receivership. PWC was appointed the Receiver. As noted above, on May 20, 2015, PWC assigned all rights and

claims of HPES under the Subconsultant Agreement to the plaintiff numbered company.

[13] On February 5, 2016, the numbered company filed a Notice of Action and Statement of Claim in the Supreme Court of Nova Scotia naming RWA and MASDAR as defendants. The claim alleges in part:

> 5. On or about May 20, 2015, and pursuant to the terms of an Assignment Agreement between PWC as Receiver of HPES and the Plaintiff, 3289444 Nova Scotia Limited, the HPES Receiver assigned to 3289444 Nova Scotia Limited, certain assets of HPES including all rights and claims of HPES under a Subcontract Agreement dated December 29, 2008, between HPES and RW Armstrong in regards to the MASDAR Institute of Technology Phase 1B (MIST 1b) Project of MASDAR.
>
> 6. The Defendant, RW Armstrong and Associates Inc. ("RWA") was at all material times in the business of providing construction management, finance, design, planning and program design management services. At material times, it had global offices, including its headquarters in Indianapolis, India and Abu Dhabi. In 2014 it was reorganized with its headquarters in Abu Dhabi of the United Arab Emirates.
>
> 7. As of the date of this pleading, RWA's Corporate Headquarters are at the following location:
>
> Capital Tower, 10th Floor
> Capital Centre, Abu Dhabi Exhibitions Center (ADNEC) Complex
> 33rd Street, Abu Dhabi, United Arab Emirates
> +971 (2) 612-777
> +971 (2) 612-7700 Fax
>
> 8. As of the date of this pleading, RWA's North America office is at the following location: RW Armstrong & Associates, 3500 South DuPont Highway, City of Dover, County of Kent, Delaware 19901, USA.
>
> 9. MASDAR Abu Dhabi Future Energy Company ("MASDAR") is a subsidiary owned by Mubadala Development Company and is funded by the Government of Abu Dhabi of the United Arab Emirates.
>
> 10. MASDAR City is a planned city project in Abu Dhabi, in the United Arab Emirates, with the intent of relying on solar and renewable energy sources.
>
> 11. In or about 2008, MASDAR sent one of its representatives, Dr. Afshin Afshari to Halifax, Nova Scotia, to review projects relying on renewable energy sources, undertaken locally by HPES.
>
> 12. At Dr. Afshari's request and/or recommendation, RWA entered into a subcontract agreement with HPES to provide services for MASDAR on the MIST

1b project, for which RWA had a Prime Agreement with MASDAR (the "owner") for the design and construction of the MIST 1b Project in MASDAR.

13. In or about December 2008, RWA subcontracted with HPES to provide services on the MIST 1b Project in MASDAR.

14. Pursuant to the terms of the Subcontract Agreement between RWA and HPES (the "RWA-HPES Subcontract"), HPES provided various services and deliverables including those identified in Schedule 1 of the RWA-HPES Subcontract. The terms of the RWA-HPES Subcontract anticipated additional services as instructed in writing by RWA. Additional services would be calculated based on hourly rates set out in Schedule 1 of the RWA-HPES Subcontract.

15. More particularly, the deliverables under the RWA-HPES Subcontract, were:

(a) Deliverable #1 (Additional Testing for Energy Pile Design) @ $140,000;

(b) Deliverable #2 (Energy Pile Design) @ $75,000;

(c) Deliverable #3 (Tri-Cycle Optimization Design) @ $75,000;

(d) Deliverable #4 (Preparation & Coordination of drawings and specs) @ $50,000;

(e) Deliverable #5 (Design Optimization of Cooling Systems) @ $50,000;

(f) Fees for Provision on Site Supervision for Energy pile Pipe work and Horizontal Piping Network @ $63,000 (Labour), $12,400 (Accomodation) and $10,000 (Travel Expenses);

(g) Reimbursable expense for translation costs for documents or presentations not submitted in English charged at cost; and

(h) Any taxes and charges of any nature raised by authorities in Abu Dhabi and/or the United Arab Emirates.

16. At all materials times, HPES completed work through to Deliverable #5, at the time RWA terminated its Subcontract with HPES, on February 22, 2010.

17. The total fee, as agreed, under the RWA-HPES Subcontract was $475,400 US Dollars, plus fees for additional services as instructed by RWA.

18. HPES received only one payment on this contract, in or about June 2009 for approximately $91,600 US dollars.

19. Pursuant to Section 7.2 of the Subcontract, HPES was entitled to render invoices in accordance with Schedule 1, and such payment would be due upon reasonable time after RWA received payment from its client (MASDAR).

20. Pursuant to Section 7.3 of the Subcontract, in the event of a bona fide dispute, RWA was required to provide HPES with Notice, within 14 days, describing in reasonable detail the reasons for disputing each item.

21. Pursuant to Section 7.4 of the Subcontract, RWA was required to reimburse HPES for all reasonable and additional expenses incurred by HPES, as per Schedule 1.

22. Pursuant to Section 8 of the Subcontract, RWA appointed a Project Director, as specified in Schedule 1. RWA appointed Mohamed Lofty as its Project Director.

23. HPES appointed James Bardsley as its Project Director.

24. Pursuant to Section 9.3 of the Subcontract, RWA was to acquire certain intellectual property rights belonging to HPES, arising from the Project materials; however, when RWA terminated its contract with HPES, RWA terminated any licensing rights it acquired under the Subcontract, yet RWA continues to utilize and benefit from HPES' intellectual property, without appropriate compensation.

25. Section 9.4 of the Subcontract requires RWA to pay in full all fees due under the Subcontract, in order that any intellectual property arising from the Project materials, could vest with RWA.

26. Section 9.15 of the Subcontract states, "This Clause 9 shall remain in full force and effect notwithstanding any termination or expiry of this Agreement".

27. Under clause 14 of the HPES-RWA contract, for HPES to retain additional sub-consultants, this required written approval from RWA. At all material times there were only two RWA approved sub-consultants:

a. PHA (an engineering firm in the United Kingdom); and

b. IF Tech International of the Netherlands, represented by Mr. Aart Snijders.

28. RWA terminated its Subcontract with HPES, by letter dated February 22, 2010.

…

36. Section 11.3 of the RWA-HPES Subcontract states:

> If RW ARMSTRONG terminates this agreement pursuant to Clause 11.1 or if the Company terminates this agreement under Clause 11.2, RW ARMSTRONG shall pay the Company the proportion of the price payable for the Services as relates to the work properly and satisfactorily carried out or where the Services are charged on a time basis, for the time properly and necessarily spent on the Services prior to the effective date of termination.

37. Pursuant to Section 12.3 of the RWA-HPES Subcontract, RWA was permitted to retain one or more third parties to complete the work to perform a portion or all of the Services contemplated under the Subcontract.

[Emphasis in original.]

[14] The substance of the dispute is connected to matters internal to HPES. In particular, the Notice contains allegations against James Bardsley, the HPES Project Manager. The pleadings continue:

> 46. At all material times, RWA and MASDAR representatives knew or ought to have known that HPES' most senior fiduciary, and Project Manager, James Bardsley, was acting in a manner that was oppressive and unfairly prejudicial to HPES, and was breaching his fiduciary obligations to HPES.
>
> 47. At all material times, RWA and MASDAR representatives were warned and informed of Mr. Bardsley's oppressive and unfairly prejudicial conduct. More particularly, RWA knew or ought to have known the terms of the Court Order of the Nova Scotia Supreme Court, issued in March 2009, whereby findings were made against Mr. Bardsley for his oppressive conduct towards HPES.
>
> 48. Nevertheless, RWA and MASDAR representatives conspired with James Bardsley to deprive HPES of the benefits of the RWA-HPES Subcontract, in that:
>
> a. RWA representative Hassan Hashish, colluded with James Bardsley to induce a breach of the RWA-HPES Subcontract;
>
> b. RWA representatives Hassan Hashish and Mohamed Lofty, met in private with James Bardsley to plot a takeover of the RWA-HPES Subcontract;
>
> c. In an email dated February 23, 2009, Hassan Hashish made the following suggestion to Mr. Bardsley:
>
>> "Can you just make them (hpes) send me a letter stating that they will not claim further on, and that they wish to terminate the contract, if that occurs it will help us proceed much faster".
>
> d. As of April 2, 2009, Hassan Hashish advised that RWA was accepting funds from its client (i.e. MASDAR) for the services under the Subcontract Agreement, yet he proposed the following to Mr. Bardsley:
>
>> "you have an option of considering palmers as a sub consultant for HPES and prepare a contract or something between the 2 companies and problem solved. This invoicing has no effect on you or any of the companies, we are at least taking our money from the client to be on the safe side and then we can divide the money between us as per our contract, or wait till the end. It all depends on what you want…"
>
> e. Meanwhile, RWA continued to wrongfully withhold funds due to HPES.
>
> f. Then, on May 1, 2009, Hassan Hashish made the following proposal to James Bardsley:
>
>> "Ok here is another idea! I've seen this happened before and worked, the case now that contractually: palmers client is hpes and their client is rwa how about you send me a official letter stating that you can have done all

> the work and hpes has not payed [sic] you till now, then we can use that to put pressure on them, what do you think?"
>
> g. While James Bardsley and Hassan Hashish were conspiring unbeknownst to other HPES principals, and in or around December 2009, RWA insisted upon a site visit by HPES Engineers who then personally incurred several thousands of dollars in expenses, in order to provide on-site services in Abu Dhabi. The HPES Engineers were never compensated for this work.
>
> h. RWA's only payment to HPES was in June 2009. HPES was regularly providing services from June 2009 through to February 2010, and no payment was made for any services rendered for that 8-month period.
>
> 49. In the circumstances, HPES through its Receiver, and thereby the Plaintiff, is entitled to punitive and exemplary damages, for bad faith dealings.
>
> 50. RWA and MASDAR representatives, made promises to compensate HPES for expenses incurred since June 2009, yet no compensation was provided as promised.
>
> 51. The defendants acted in bad faith, and have been unjustly enriched as a consequence of the collusion as between their agents, representatives, and employees on the one hand, and James Bardsley and Palmer Refrigeration Inc. on the other hand.
>
> 52. Despite repeated demands for payment, payment remains outstanding.
>
> 53. The Plaintiff pleads and relies upon principles of Canadian law, as it applies to a debtor outside Canada, with creditors of an insolvent company inside Canada.
>
> [Emphasis in original.]

[15] The numbered company claims US$171,946 for outstanding fees allegedly due to HPES from RWA pursuant to the terms of the Subconsultant Agreement.

[16] On May 17, 2016, RWA filed a motion for an order dismissing the Notice of Action and Statement of Claim on the following alternative basis: 1) that the Nova Scotia court does not have jurisdiction to hear the matter as the parties are bound by the choice of law and choice of forum clause in the Subconsultant Agreement; 2) that there is no real and substantial connection between this action and the jurisdiction of Nova Scotia; and 3) that Nova Scotia is *forum non conveniens*.

[17] On May 26, 2016, MASDAR also filed a Notice of Motion for an order dismissing the proceeding on essentially the same grounds as RWA, stating that the Supreme Court of Nova Scotia does not have jurisdiction to hear the matter; or that Nova Scotia is *forum non conveniens.*

Issues

1. Who bears the burden of proof?
2. Is the forum selection clause in the Subconsultant Agreement exclusive or non-exclusive?
3. Does the Supreme Court of Nova Scotia have jurisdiction to hear this action (the real and substantial connection test)?
4. Is Nova Scotia a *forum non conveniens*?
5. Is the numbered company bound by the Subconsultant Agreement?
6. Is the numbered company's claim covered by the Subconsultant Agreement?

Relevant Rules and Legislation

[18] Civil Procedure Rule 4.07 governs a motion where jurisdiction is challenged:

> Lack of jurisdiction
>
> 4.07 (1) A defendant who maintains that the court does not have jurisdiction over the subject of an action, or over the defendant, may make a motion to dismiss the action for want of jurisdiction.
>
> (2) A defendant does not submit to the jurisdiction of the court only by moving to dismiss the action for want of jurisdiction.
>
> (3) A judge who dismisses a motion for an order dismissing an action for want of jurisdiction must set a deadline by which the defendant may file a notice of defence, and the court may only grant judgment against the defendant after that time.

[19] Section 41 of the *Judicature Act,* R.S.N.S. 1989, c. 240, allows the court to enter a stay of proceedings, see s. 41 (e).

[20] The *Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003 (2d Sess.), c. 2, ("*CJPTA*") governs issues of territorial competence. It provides, at s. 4:

> 4 A court has territorial competence in a proceeding that is brought against a person only if
>
> (a) that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counter-claim;

> (b) during the course of the proceeding that person submits to the court's jurisdiction;
>
> (c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding;
>
> (d) that person is ordinarily resident in the Province at the time of the commencement of the proceeding; or
>
> (e) there is a real and substantial connection between the Province and the facts on which the proceeding against that person is based.

[21] Neither RWA nor MASDAR are plaintiffs in proceedings against the numbered company. This proceeding does not involve a counter-claim. Neither RWA nor MASDAR are "plaintiff's in another proceeding in the court to which this proceeding is a counter-claim". Neither RWA nor MASDAR have submitted or attorned to this court's jurisdiction merely by the making of this motion. There is no agreement between the numbered company and either RWA or MASDAR to the effect that this court has jurisdiction in the proceeding. Neither RWA nor MASDAR had any presence in Nova Scotia at the time of commencement of the proceeding. Therefore, the only issue remaining under s. 4 of the *CJPTA* is whether there is a real and substantial connection between Nova Scotia and the facts on which the proceeding against RWA and/or MASDAR is based.

[22] The *CJPTA* goes on to set out the real and substantial connection test at s. 11, which provides in part:

> 11 Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between the Province and the facts on which a proceeding is based, a real and substantial connection between the Province and those facts is presumed to exist if the proceeding
>
> (a) is brought to enforce, assert, declare or determine proprietary or possessory rights or a security interest in immovable or movable property in the Province;
>
> …
>
> (e) concerns contractual obligations, and
>
> > (i) the contractual obligations, to a substantial extent, were to be performed in the Province,
> >
> > (ii) by its express terms, the contract is governed by the law of the Province, or
> >
> > (iii) the contract
> >
> > > (A) is for the purchase of property, services or both, for use other than in the course of the purchaser's trade or profession, and

(B) resulted from a solicitation of business in the Province by or on behalf of the seller;

(f) concerns restitutionary obligations that, to a substantial extent, arose in the Province;

(g) concerns a tort committed in the Province;

(h) concerns a business carried on in the Province;

[23] Section 12 of the *CJPTA* addresses the doctrine of *forum non conveniens*:

12 (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.

(2) A court, in deciding the question of whether it or a court outside the Province is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including

(a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;

(b) the law to be applied to issues in the proceeding;

(c) the desirability of avoiding multiplicity of legal proceedings;

(d) the desirability of avoiding conflicting decisions in different courts;

(e) the enforcement of an eventual judgment; and

(f) the fair and efficient working of the Canadian legal system as a whole.

Burden of Proof

[24] Because RWA and MASDAR are the moving parties they would normally carry the burden of proof in relation to their request for the numbered company's claim to be struck or stayed.

[25] The Agreement has a forum selection clause. Of course, there was no contract between MASDAR and HPES. HPES became involved in the MIST Project by way of the Subconsulant Agreement with RWA. The Subconsultant Agreement also has a forum selection clause, although that clause is worded differently than the one in the Agreement.

[26] Generally, the burden falls on a defendant claiming the court lacks jurisdiction. However, if the parties have agreed on an exclusive forum selection clause then the burden lies with the plaintiff to show that the forum as agreed to in the contract should be ignored. In *Z.I. Pompey Industrie v. ECU-Line N.V.* [2003] 1 S.C.R. 450, Bastarache J. stated for the unanimous court:

> 20 Forum selection clauses are common components of international commercial transactions, and are particularly common in bills of lading. They have, in short, "been applied for ages in the industry and by the courts": Décary J.A. in *Jian Sheng, supra*, at para. 7. These clauses are generally to be encouraged by the courts as they create certainty and security in transaction, derivatives of order and fairness, which are critical components of private international law: La Forest J. in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, at pp. 1096-97; *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907, 2001 SCC 90, at paras. 71-72. The "strong cause" test remains relevant and effective and no social, moral or economic changes justify the departure advanced by the Court of Appeal. In the context of international commerce, order and fairness have been achieved at least in part by application of the "strong cause" test. This test rightly imposes the burden on the plaintiff to satisfy the court that there is good reason it should not be bound by the forum selection clause. It is essential that courts give full weight to the desirability of holding contracting parties to their agreements. There is no reason to consider forum selection clauses to be non-responsibility clauses in disguise. In any event, the "strong cause" test provides sufficient leeway for judges to take improper motives into consideration in relevant cases and prevent defendants from relying on forum selection clauses to gain an unfair procedural advantage.
>
> 21 There is a similarity between the factors which are to be taken into account when considering an application for a stay based on a forum selection clause and those factors which are weighed by a court considering whether to stay proceedings in "ordinary" cases applying the *forum non conveniens* doctrine: E. Peel in "Exclusive jurisdiction agreements: purity and pragmatism in the conflict of laws", [1998]*L.M.C.L.Q.* 182, at pp. 189-90. The latter inquiry is well settled in Canada: *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 . In the latter inquiry, the burden is normally on the defendant to show why a stay should be granted, but the presence of a forum selection clause in the former is, in my view, sufficiently important to warrant a different test, one where the starting point is that parties should be held to their bargain, and where the plaintiff has the burden of showing why a stay should not be granted. I am not convinced that a unified approach to *forum non conveniens*, where a choice of jurisdiction clause constitutes but one factor to be considered, is preferable. As Peel, *supra*, notes, at p. 190, I fear that such an approach would not
>
>> ensure that full weight is given to the jurisdiction clause since not only should the clause itself be taken into account, but also the effect which it

> has on the factors which are relevant to the determination of the natural forum. Factors which may otherwise be decisive may be less so if one takes into account that the parties agreed in advance to a hearing in a particular forum and must be deemed to have done so fully aware of the consequences which that might have on, for example, the transportation of witnesses and evidence, or compliance with foreign procedure etc.

In my view, a separate approach to applications for a stay of proceedings involving forum selection clauses in bills of lading ensures that these considerations are properly taken into account and that the parties' agreement is given effect in all but exceptional circumstances. See also M. P. Michell, "Forum Selection Clauses and Fundamental Breach: *Z.I. Pompey Industrie v. ECU-Line N.V., The Canmar Fortune*" (2002), 36 *Can. Bus. L.J.* 453, at pp. 471-72. [Emphasis added}

[27] Two Nova Scotia cases have determined that where the parties have decided on a means of resolving a dispute, and have agreed to apply the law of a particular jurisdiction, the courts should be loath to interfere: *Sensor Technology Limited v. Geospectrum Technologies Inc.*, 2009 NSSC 13, and *Field Turf Inc. v. Recovery Technologies of Pennsylvania Inc.*, 2006 NSSC 197.

[28] The forum selection clauses in both the Agreement and the Subconsultant Agreement detail means for resolving disputes. The characterization of the relevant forum selection clause impacts on the burden of proof. If the forum selection clause is exclusive then the burden is on the plaintiff to show why the parties should not be held to their bargain and the matter should not be stayed. If the forum selection clause is non-exclusive then this factors into the analysis of *forum non conveniens*.

The Agreement

[29] While there is no contract between MASDAR and HPES, considering the allegations made by the numbered company in its Statement of Claim, the Agreement between MASDAR and RWA is peripherally relevant to this case, at a minimum for purposes of comparison. Therefore, the forum selection clause in the Agreement is worthy of analysis. Section 20 of the MASDAR-RWA Agreement is preceded by the heading "Governing Law and Jurisdiction". This is a clear indication that the parties turned their minds to the law and jurisdiction that would be applicable to the contract.

[30] Section 20.1 states that the Agreement "shall be governed by, and construed in accordance with, the laws of the Emirate of Abu Dhabi and the U.A.E." Section

20.2 outlines a procedure for arbitration if a dispute under the Agreement cannot be settled. Three arbitrators must be appointed. The Abu Dhabi Chamber of Commerce and Industry can appoint an arbitrator if the parties cannot agree on one. Section 20.2 goes on to state "All aspects of such arbitration shall be governed by the regulations of ADCCI in force at such time. All arbitration proceedings are to take place in Abu Dhabi in the English language. The decision of such arbitration shall be final and binding upon the parties hereto without appeal to any court or other party."

[31] The Agreement therefore contemplates the possibility of a dispute between MASDAR and RWA. Those parties contracted to resolve any dispute under the contract in the U.A.E. Section 20.2 of the Agreement is an exclusive forum selection clause.

The Subconsultant Agreement

[32] The contract in issue is the Subconsultant Agreement between RWA and HPES. Section 18 of the RWA-HPES Subconsultant Agreement is entitled "Governing Law and Arbitration". This is a clear indication under the terms of the contract that the parties considered and agreed upon a dispute resolution process. (I will discuss the law on exclusive and non-exclusive forum selection clauses below).

[33] Section 18.1 of the Subconsultant Agreement states that the "agreement and the relationship between the Parties shall be governed by, and construed in accordance with, the laws of the United Arab Emirates except where it contravenes the laws of United States and Canada." Therefore, the contracting parties, RWA and HPES, agreed that the laws of the U.A.E. are of primary consideration.

[34] Section 18.2 of the Subconsultant Agreement says in the case of a dispute the parties "shall endeavor to settle by good faith negotiation". This is the first mandatory step in resolving "any dispute, difference, controversy or claim of any kind arising between [the parties] out of or in connection with" the Subconsultant Agreement. There is no evidence that HPES or 3289444 attempted to settle this dispute with RWA by good faith negotiation.

[35] The numbered company argues that its claim is not narrowly framed in contract, and instead points out that their dispute includes allegations of conspiracy, bad faith, "wrongful withholding of funds", "failure to commit to promises made to compensate HPES for expenses", unjust enrichment and

collusion. However, there is no serious dispute that the claim arises out of the Subconsultant Agreement. To be clear, I find that the claims made by 3289444 in the case at bar arise out of the contract between RWA and HPES.

[36] Section 18.3 of the Subconsultant Agreement provides for a three step procedure for resolving disputes if good faith negotiation is unsuccessful: 1) the parties shall first submit any claims "relating to this Agreement or the breach thereof (Dispute) to mediation by selection and direct private engagement of a neutral mediator without using a dispute resolution organization or administrative service."; 2) "If no agreement is reached, then (a) the parties may mutually agree to a dispute resolution of their choice,"; 3) "or (b) either party may seek to have the Dispute resolved by a court of competent jurisdiction in the U.A.E."

[37] As will be discussed, neither HPES nor the numbered company followed the terms of the contract by submitting their dispute to a neutral mediator. The plaintiff completely ignored the first two steps of the Subconsultant Agreement which are geared toward resolving disputes, and were clearly agreed to between the parties.

[38] The numbered company argues that the forum selection clause in the Subconsultant Agreement is non-exclusive and was not binding on HPES and, therefore, is not binding on it. According to Geoff R. Hall's *Canadian Contractual Interpretation Law*, 2d edn, at pp. 237-238, interpretation of a forum clause is normally "a simple matter of application of the normal rules of contractual interpretation." The same general rule applies to the determination of whether a forum clause is considered exclusive or non-exclusive. According to Hall, a non-exclusive forum selection clause can also be referred to as an attornment clause, "providing for attornment to a specific jurisdiction, but not ousting other forums which might otherwise have jurisdiction."

[39] The numbered company argues that the determination of the strength of a forum selection clause is significantly impacted by whether the word "may" or the word "shall" is used. For instance in the Agreement s. 20 uses the words "shall" whereas s. 18 of the Subconsultant Agreement uses both "shall" and "may". I do not agree with 3289444 that the analysis is quite so simple in this case.

[40] Section 18.1 of the Subconsultant Agreement makes the laws of the U.A.E. paramount. Section 18.2 says the parties "shall" attempt to settle any disputes "by good faith negotiation…". However if good faith negotiation is not successful, s. 18.3 provides that the parties "shall" submit disputes to mediation by a neutral

mediator. Those sections make it mandatory that the contracting parties take these steps if there is a dispute under the contract.

[41] If no agreement is reached having followed those two initial mandatory steps, then, according to s. 18.3, the parties "**may** mutually agree to a dispute resolution of their choice or either party **may** seek to have the Dispute resolved by a court of competent jurisdiction in the U.A.E." It is this aspect of s. 18.3 that requires a more detailed analysis.

Forum Selection Clauses

[42] In *Z.I. Pompey Industrie v. ECU-Line N.V.*, the court reviewed the law governing the enforceability of forum selection clauses and affirmed the applicability of the analysis from *The Eleftheria*, [1969] 1 Lloyd's Rep. 237 (Adm Div). Bastarache J., for the court, stated:

> 13 The Court of Appeal concluded that *The "Eleftheria"* did not govern the case, stating, at para. 27:
>
>> The burden of the appellant's submission is that when, as here, a contract contains a jurisdiction clause requiring that all disputes, wherever they arise, are to be dealt with by the Courts of a particular jurisdiction, Anglo-American and Anglo-Canadian jurisprudence both conclude that the dispute must be dealt with by the Courts of the jurisdiction the parties have agreed to. The appellant says that since *The Eleftheria* no case in Anglo-Canadian or Anglo-American jurisprudence has held otherwise. I disagree. *Jian Sheng Co. [v. Great Tempo S.A.,* [1998] 3 F.C. 418 (C.A.)] is a case where this Court held that a prothonotary was right to refuse a stay in circumstances where the appellant had not led sufficient evidence to support the existence of jurisdiction elsewhere than Canada.

[43] As noted earlier, Justice Bastarache affirmed the "strong cause" test and went on to encourage courts to respect forum selection clauses:

> 20 Forum selection clauses are common components of international commercial transactions, and are particularly common in bills of lading. They have, in short, "been applied for ages in the industry and by the courts": Décary J.A. in *Jian Sheng*, supra, at para. 7. These clauses are generally to be encouraged by the courts as they create certainty and security in transaction, derivatives of order and fairness, which are critical components of private international law: La Forest J. in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, at pp. 1096-97; *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907, 2001 SCC 90, at paras. 71-72. The "strong cause" test

> remains relevant and effective and no social, moral or economic changes justify the departure advanced by the Court of Appeal. In the context of international commerce, order and fairness have been achieved at least in part by application of the "strong cause" test. This test rightly imposes the burden on the plaintiff to satisfy the court that there is good reason it should not be bound by the forum selection clause. It is essential that courts give full weight to the desirability of holding contracting parties to their agreements. There is no reason to consider forum selection clauses to be non-responsibility clauses in disguise. In any event, the "strong cause" test provides sufficient leeway for judges to take improper motives into consideration in relevant cases and prevent defendants from relying on forum selection clauses to gain an unfair procedural advantage.

[44] In *Pompey*, at para. 6, the clause in question stated that "any claim or dispute arising hereunder or in connection herewith shall be determined by the courts in Antwerp and no other Courts."

[45] The "strong cause" test was also considered in *Expedition Helicopters Inc. v. Honeywell Inc.,* 2010 ONCA 351, [2010] O.J. No. 1998, leave to appeal refused, [2010] S.C.C.A. No. 258. In that case the defendant sought a stay of an action commenced in Ontario, where the agreement between the parties provided that the courts of Arizona had "exclusive jurisdiction" over all proceedings "arising out of or in connection with this agreement" (para. 5). In both *Pompey* and *Expedition Helicopters* the court was dealing with an exclusive forum selection clause. In applying the strong cause test in *Expedition Helicopters*, Juriansz J.A. stated:

> 23 In this case, there is no reason to depart from the presumption that Expedition should be held to the bargain that it made. A departure is only justified in "exceptional circumstances", as Bastarache J. stressed in *Pompey.* There is nothing exceptional about this case. As discussed above, the analysis of whether there is "strong cause" to decline to enforce a forum selection clause is not an analysis of the *forum conveniens* in the conventional sense. In this case Expedition may have established that it will experience some inconvenience in the conventional sense in having to assert its claim in Arizona. That inconvenience does not justify permitting it to resile from its agreement in this commercial contract to tolerate that inconvenience.
>
> 24 A forum selection clause in a commercial contract should be given effect. The factors that may justify departure from that general principle are few. The few factors that might be considered include the plaintiff was induced to agree to the clause by fraud or improper inducement or the contract is otherwise unenforceable, the court in the selected forum does not accept jurisdiction or otherwise is unable to deal with the claim, the claim or the circumstances that have arisen are outside of what was reasonably contemplated by the parties when they agreed to the clause, the plaintiff can no longer expect a fair trial in the

> selected forum due to subsequent events that could not have been reasonably anticipated, or enforcing the clause in the particular case would frustrate some clear public policy. Apart from circumstances such as these, a forum selection clause in a commercial contract should be enforced.

[46] The numbered company argues that the Subconsultant Agreement contains a non-exclusive, not an exclusive, forum selection clause, and that as a result it is not bound by the clause. In *Loat v. Howarth*, 2011 ONCA 509, [2011] O.J. No. 3166, the Ontario Court of Appeal considered the effect of a non-exclusive clause on the defendant's motion to have Ontario declared *forum non conveniens*. The unanimous court in *Loat* decided:

> 29 While the non-exclusive jurisdiction conferred under the forum selection clause in the Service Agreement did not preclude the plaintiff from commencing an action in England in respect of disputes arising under the Service Agreement, it did not oblige him to do so. The effect of the clause was to foreclose objection by the defendants to an action commenced in Ontario regarding claims contemplated by the Service Agreement: see *Gary Sugar v. Megawheels Technologies Inc.*, 2006 CanLII 37880 (S.C.J.); *Blue Note Mining Inc. v. CanZinco Ltd.* (2008), 297 D.L.R. (4th) 640 (S.C.J.). As a result, on the termination of his employment, the plaintiff was entitled to sue in Ontario for the recovery of any owed and unpaid wages.
>
> 30 The motions judge failed to address the implications of the forum selection clause in the Service Agreement and the resultant contractual attornment to Ontario's non-exclusive jurisdiction over disputes arising from the plaintiff's employment relationship with Storetech Ontario. Indeed, based on his reasons, it appears that the motions judge accorded no weight at all to this clause or to the attornment confirmed under it. Instead, he treated this aspect of the parties' negotiated bargain as completely overridden by the forum selection clause in the Shareholders' Agreement.
>
> 31 The failure to consider the import of the forum selection clause in the Service Agreement was an error. Canadian law favours the enforcement of forum selection clauses negotiated, as here, by sophisticated business people. This court, for example, has affirmed that "[a] forum selection clause in a commercial contract should be given effect" and that the factors "that may justify departure from that general principle are few": *Expedition Helicopters Inc. v. Honeywell Inc.* (2010), 100 O.R. (3d) 241 (C.A.), at para. 24; see also *Momentous.ca Corporation v. Canadian American Association of Professional Baseball Ltd.* (2010), 103 O.R. (3d) 467 (C.A.), at para. 39; *Stubbs v. ATS International BV* (2010), 272 O.A.C. 386 (C.A.), at para. 43.

[47] *Loat* suggested that a non-exclusive forum selection clause forecloses any objection by a defendant to an action commenced in the jurisdiction contemplated

in the agreement. *Loat* also stated that Canadian law favours the enforcement of forum selection clauses negotiated by sophisticated business people.

[48] In *Mackie Research Capital Corp. v. Mackie*, 2012 ONSC 3890, [2012] O.J. No. 3057, Low J. had to consider "whether a contractual provision as to forum has primacy over factors suggesting that a forum other than that stipulated in the contract is the *forum conveniens*" (para. 5). The dispute in *Mackie* came about as a result of a failed corporate merger. The merger agreement provided that "[t]he Parties irrevocably agree and consent to the jurisdiction of the courts of the Province of Ontario to resolve any dispute which may arise among them concerning this agreement and the subject matters hereof." The unanimous shareholders agreement of the new entity provided that "[t]he parties hereto irrevocably attorn to the jurisdiction of the courts of the Province of Ontario to resolve any dispute which may arise among them concerning this Agreement and the subject matters hereof." The plaintiffs alleged, *inter alia*, breach of the merger agreement and commenced proceedings in Ontario. The moving parties claimed that Ontario was *forum non conveniens* and that the forum selection clauses were not determinative.

[49] The issue in *Mackie* was "whether the court should override a forum selection clause where the plaintiff has brought action in compliance with it" (para. 31). This, of course, is the opposite of the present situation whereby 3289444 has brought an action in Nova Scotia not the U.A.E. (the forum referred to in the Subconsultant Agreement). Justice Low considered the distinction between an exclusive and a non-exclusive forum selection clause in *Mackie* and stated:

> 41 I do not accept that for purposes of deciding this motion there is a significant distinction between an exclusive and a non-exclusive forum selection clause. If the forum selection clause were exclusive and it stipulated a forum other than Ontario, the party challenging this forum would have good cause for a stay on the basis that the agreement has been violated. If the forum selection clause is not exclusive, and the plaintiff brings suit in Ontario where the forum selected is another jurisdiction, then the agreement as to forum is a factor among others in determining whether a stay for *forum non conveniens* should be granted.

[50] In another case involving a non-exclusive forum clause, *QBD Cooling Systems Inc. v. Sollatek (UK) Ltd*, 2015 ONSC 947, [2015] O.J. No. 1578, the plaintiff commenced an action in Ontario and the defendant moved to strike the claim on the basis of *forum non conveniens*. The court reviewed the forum clause:

> 21 The contract contains a non-exclusive jurisdiction clause:

> 28. Applicable Law -- The contract shall be construed and have effect in all respects in accordance with the laws of England and the customer hereby submits to the jurisdiction of the English courts.

> 22 The parties agree this means they are not bound to proceed before the English courts but the choice of law may be determined by contract.

[51] The forum selection clause in *Sollatek* detailed that the courts of the designated forum had jurisdiction without including language that specifically removed the possibility of any other forum. This is similar to the language used in *Mackie* in describing an non-exclusive forum selection clause.

[52] In *Sugar v. Megawheels Technologies Inc.*, [2006] O.J. No. 4493 (Sup. Ct. J.), the plaintiff commenced a proceeding in Ontario even though there was a forum selection clause providing that "[t]he Purchaser, in its personal or corporate capacity and, if applicable, on behalf of each beneficial purchaser for whom it is acting, irrevocably attorns to the non-exclusive jurisdiction of the courts of the Province of Alberta." Justice Brown examined the scope of language found in various forum selection clauses:

> 19 Parties to a contract have open to them a spectrum of choices regarding the selection of a forum in which to adjudicate any dispute arising between them. At one end of the spectrum stand contracts that contain no choice of forum clause; the appropriate forum for the adjudication of disputes will be decided in accordance with general principles of jurisdiction. At the other end of the spectrum stand exclusive jurisdiction clauses in which the parties select a particular jurisdiction, and no other, for the adjudication of disputes. The authorities cited to me reveal that choice of forum clauses cover a wide spectrum using language that ranges from the exclusive to the non-exclusive. Examples include the following:
>
> > (i) "any claim or dispute arising hereunder or in connection herewith shall be determined by the courts in Antwerp and no other Courts": *Z.I. Pompey Industrie v. ECU-Line N.V.*, [2003] 1 S.C.R. 450;
> >
> > (ii) "any claims arising under this agreement shall be determined in a court of competent jurisdiction in the State of California": *Mithras Management Ltd. v. New Vision Entertainment Corp.* (1992), 90 D.L.R. (4th) 726 (Ont. Ct.J. (Gen. Div.));
> >
> > (iii) "we ... hereby irrevocably attorn to the jurisdiction of the court of the Province of Saskatchewan with respect to any matters arising out of this agreement": *Kates v. Wyant*, [2002] O.J. No. 503 (Super.Ct.);

> (iv) "... the parties hereby attorn to the non-exclusive jurisdiction of the Courts of the Province of Ontario.": *472900 B.C. Ltd. v. Thrifty Canada, Ltd.*, [1998] B.C.J. No. 2944 (B.C.C.A.).
>
> 20 Exclusive jurisdiction clauses cannot oust the jurisdiction of a domestic court. Courts, however, will give weight in their *forum non conveniens* analysis to the choice of an exclusive jurisdiction. In *Gulf Canada Ltd. v. Turbo Resources* (1980), 18 C.P.C. 146 (Ont. H.C.J.), quoted in *Mithras Management, supra*, Galligan J. stated that a court ought not to interfere with such an agreement "unless it is shown that the matter cannot be properly dealt with in the foreign court." In the case of an international bill of lading using language at the exclusive end of the spectrum, such as that in *ECU-Line N.V., supra*, ("any claim should be determined by the courts in Antwerp and no other Courts"), the Supreme Court of Canada noted that a burden existed on the plaintiff "to satisfy the court that there is a good reason it should not be bound by the forum selection clause" (*ECU-Line N.V., supra*, at para. 20). In staying that proceeding, the Supreme Court of Canada emphasized the need to assure certainty in international commercial transactions.

[53] Justice Brown went on to comment on non-exclusive forum selection clauses:

> 28 Non-exclusive jurisdiction clauses fall between the two endpoints of (i) no forum selection clause and (ii) the use of an exclusive choice of forum clause. By their language, non-exclusive jurisdiction clauses are not the same as exclusive jurisdiction clauses; their operation is more limited in scope. The approach to non-exclusive clauses taken by the English Court of Appeal in the *Ace Insurance* decision makes sense. It gives meaning to the contractual language which is not exclusive in nature: "either party may sue the other wherever it has the right to do so", but when a suit arises in the named jurisdiction, the party must keep its bargain by attorning to that jurisdiction: *Ace Insurance*, paragraphs 59 and 63. If such an interpretation of non-exclusive clauses is not taken, then in my view no practical difference would exist between exclusive and non-exclusive jurisdiction clauses, rendering meaningless the "non-exclusive" language chosen by the parties.
>
> 29 In this case Clause 12 of the Subscription Agreement states: "The Purchaser ... irrevocably attorns to the non-exclusive jurisdiction of the courts of the Province of Alberta." This is not language of exclusive jurisdiction. It leaves the purchaser free to start a suit before another competent court, but requires the purchaser to attorn to a suit brought in Alberta. While the parties turned their minds to the issue of forum selection by agreeing to Clause 12, they did not do so in a way that would give the clause determinative weight in a *forum non conveniens* analysis. Consequently, Clause 12 does not overcome the cumulative effect of the other factors I have examined above; it does not point clearly to Alberta as a more appropriate jurisdiction.

[54] When dealing with an exclusive jurisdiction clause the presumption is that the forum selection as detailed in a contract or agreement will be respected by the court.

[55] When dealing with a non-exclusive jurisdiction clause, many courts have found that a responding party will be obliged to accept jurisdiction where a proceeding is commenced in the designated forum. Additionally, the non-exclusive clause is a factor in any *forum non conveniens* analysis. The specific language used in the non-exclusive clause may have an impact on such an analysis.

[56] As noted in *Megawheels,* depending on the terminology employed in the specific agreement, non-exclusive forum provisions can fall within a broad spectrum "between the two endpoints of (i) no forum selection clause and (ii) the use of an exclusive choice of forum clause" (para. 28). Some clauses are explicitly "non-exclusive."

[57] As noted earlier, I have concluded that the forum selection clause in the Agreement between MASDAR and RWA is an exclusive forum provision. The contracting parties to that contract clearly agreed that all disputes shall be resolved by arbitration in the U.A.E. In comparison, the forum selection clause in the Subconsultant Agreement between RWA and HPES is not as clearly worded as the one in the Agreement.

[58] Sections 18.1, 18.2, 18.3 and 18.4 of the Subconsultant Agreement do not contain open-ended language. In particular, s. 18.2 and 18.3 clearly set out an agreed upon procedure to resolve any dispute between the parties. First, the parties "shall endeavor to settle by good faith negotiation any dispute, difference, controversy or claim of any kind arising between them out of or in connection with this Consultancy agreement." If that is not successful, the parties "shall submit and (sic) and all unsettled claims, counterclaims, disputes and other matters in question between them arising out of or relating to this Agreement or the breach thereof (Dispute) to mediation by selection and direct private engagement of a neutral mediator without using a dispute resolution organization or administrative service." These are mandatory steps in dealing with a dispute between the parties.

[59] There is no evidence of good faith negotiation or mediation between HPES or the numbered company and RWA. During argument, the numbered company conceded that they did not refer the matter to mediation. Therefore, the plaintiff did not follow the first and second stage of the mandated procedure under the contract.

[60] According to the Subconsultant Agreement, if no agreement is reached through good faith negotiation, or subsequently through mediation, s. 18.3 provides that the parties 1) may mutually agree to a dispute resolution of their choice, or 2) either party may seek to have the dispute resolved by a court of competent jurisdiction in the U.A.E.

[61] During submissions on this motion, it became clear that the parties did not "mutually agree to a dispute resolution of their choice" as was their option under s. 18.3(1). No evidence was presented that any such discussions or mediation ever took place. This step was likely never taken because the numbered company ignored the first two stages of the agreed upon dispute resolution process and jumped right to litigation in Nova Scotia.

[62] Contrary to s. 18.3(2), the numbered company did not seek to have the dispute resolved by a court of competent jurisdiction in the U.A.E. Instead, 3289444 started an action in Nova Scotia. This was not one of the three options outlined in the Subconsultant Agreement. The Subconsultant Agreement prescribes the laws of the U.A.E. as paramount and contains a forum selection clause that allows the parties in dispute to litigate in a court of competent jurisdiction in the U.A.E. The word "may" in s. 18.3, as in "either party may seek to have the Dispute resolved by a court of competent jurisdiction in the U.A.E." could be interpreted to mean that parties to the contract do not have to litigate a dispute, but if they do chose to litigate, any dispute should be litigated in the U.A.E. The Subconsultant Agreement does not contain the word "non-exclusive".

[63] However, the Subconsultant Agreement could also be read as allowing disputes to be resolved in the U.A.E. and preferring disputes to be resolved in the U.A.E., but not exclusively limiting dispute resolution to the U.A.E. The Subconsultant Agreement does not specifically contemplate disputes being resolved in any jurisdiction other than the U.A.E., but also does not expressly exclude any jurisdiction other than the U.A.E. If s. 18.3 is a non-exclusive forum selection clause, considering the wording of s. 18 in its entirety, on the spectrum of non-exclusive clauses, s. 18.3 is much closer to the exclusive forum selection end of the scale than to a contract with no forum selection clause.

[64] Since s. 20 of the Agreement between MASDAR and RWA is an exclusive jurisdiction clause, if this was just a dispute involving those parties, not involving HPES, that would end the inquiry regarding the choice of forum. The plaintiff has

not shown a strong cause why any dispute under the Agreement should not be heard in the U.A.E.

[65] However, because it is the Subconsultant Agreement that is relevant, if s. 18.3 is deemed an exclusive forum selection clause then there is no need for an analysis of *forum non conveniens* or a need to consider the *CJPTA,* as the forum selection issue would be determined in favour of RWA (and MASDAR). The numbered company has not shown a strong cause (or much of any cause) why this dispute under the Subconsultant Agreement should not be heard in the U.A.E.

[66] However, due to the ambiguous wording of s. 18.3, I conclude that it is best described as a clear dispute resolution clause containing a non-exclusive forum selection clause that falls towards the exclusive end of the spectrum. Therefore, the choice of forum (U.A.E.) under the Subconsultant Agreement is one of many factors to be considered during the analysis of *forum non conveniens* and the *CJPTA*.

Real and Substantial Connection Test

[67] Due to the non-exclusive nature of the forum selection clause in the Subconsultant Agreement, an analysis relating to whether a real and substantial connection with Nova Scotia exists must be undertaken in accordance with the *CJPTA*.

[68] Section 4 of the *CJPTA* details when a court has territorial competence in a proceeding. Relevant to the case at bar is s. 4(e), which states that "[a] court has territorial competence in a proceeding that is brought against a person only if … there is a real and substantial connection between the Province and the facts on which the proceeding against that person is based."

[69] In *Bouch v. Penny (Litigation Guardian of),* 2009 NSCA 80, [2009] N.S.J. No. 339, leave to appeal refused, [2009] S.C.C.A. No. 379, Saunders J.A. confirmed a two-step approach to determining whether a Nova Scotia court has jurisdiction to try an action:

> 29 In disposing of the application before him, Justice Wright felt compelled to conduct a two-step analysis. He described it this way:
>
>> [20] The Act clearly recognizes and affirms the two step analysis required to be engaged in whenever there is an issue over assumed jurisdiction, which arises where a non-resident defendant is served with an originating

> court process out of the territorial jurisdiction of the court pursuant to its Civil Procedure Rules. That is to say, in order to assume jurisdiction, the court must first determine whether it can assume jurisdiction, given the relationship among the subject matter of the case, the parties and the forum. If that legal test is met, the court must then consider the discretionary doctrine of *forum non conveniens*, which recognizes that there may be more than one forum capable of assuming jurisdiction. The court may then decline to exercise its jurisdiction on the ground that there is another more appropriate forum to entertain the action.
>
> 30 In my view the Chambers judge correctly described the required analytical framework.

[70] Section 11 of the *CJPTA* sets out a non-exhaustive list of twelve factors that should be considered when determining whether there is a real and substantial connection to Nova Scotia. The plaintiff is also entitled to prove other circumstances that might establish a real and substantial connection in addition to the twelve enumerated factors. Of significance to this case, ss. 11(e) and (h) of the *CJPTA* state:

> 11 Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between the Province and the facts on which a proceeding is based, a real and substantial connection between the Province and those facts is presumed to exist if the proceeding
>
> …
>
> (e) concerns contractual obligations, and
>
> (i) the contractual obligations, to a substantial extent, were to be performed in the Province,
>
> (ii) by its express terms, the contract is governed by the law of the Province, or
>
> (iii) the contract
>
> (A) is for the purchase of property, services or both, for use other than in the course of the purchaser's trade or profession, and
>
> (B) resulted from a solicitation of business in the Province by or on behalf of the seller;
>
> …
>
> (h) concerns a business carried on in the Province;

[71] In *Club Resorts v. VanBreda*, 2012 SCC 17, [2012] 1 S.C.R. 572, Lebel J. outlined some considerations when dealing with a conflicts issue in the context of a

torts case (in the instant case it should be kept in mind that the claim is rooted in contract):

> 79 From this perspective, a clear distinction must be maintained between, on the one hand, the factors or factual situations that link the subject matter of the litigation and the defendant to the forum and, on the other hand, the principles and analytical tools, such as the values of fairness and efficiency or the principle of comity. These principles and analytical tools will inform their assessment in order to determine whether the real and substantial connection test is met. However, jurisdiction may also be based on traditional grounds, like the defendant's presence in the jurisdiction or consent to submit to the court's jurisdiction, if they are established. The real and substantial connection test does not oust the traditional private international law bases for court jurisdiction.
>
> 80 Before I go on to consider a list of presumptive connecting factors for tort cases, I must define the legal nature of the list. It will not be exhaustive. Rather, it will, first of all, be illustrative of the factual situations in which it will typically be open to a court to assume jurisdiction over a matter. These factors therefore warrant presumptive effect, as the Court of Appeal held in *Van Breda-Charron* (para. 109). The plaintiff must establish that one or more of the listed factors exists. If the plaintiff succeeds in establishing this, the court might presume, absent indications to the contrary, that the claim is properly before it under the conflicts rules and that it is acting within the limits of its constitutional jurisdiction (J. Walker, "Reforming the Law of Crossborder Litigation: Judicial Jurisdiction", consultation paper for the Law Commission of Ontario (March 2009), at pp. 19-20 (online)). Although the factors set out in the list are considered presumptive, this does not mean that the list of recognized factors is complete, as it may be reviewed over time and updated by adding new presumptive connecting factors.
>
> 81 The presumption with respect to a factor will not be irrebuttable, however. The defendant might argue that a given connection is inappropriate in the circumstances of the case. In such a case, the defendant will bear the burden of negating the presumptive effect of the listed or new factor and convincing the court that the proposed assumption of jurisdiction would be inappropriate. If no presumptive connecting factor, either listed or new, applies in the circumstances of a case or if the presumption of jurisdiction resulting from such a factor is properly rebutted, the court will lack jurisdiction on the basis of the common law real and substantial connection test. I will elaborate on each of these points below.

[72] LeBel J. went on to detail what should be considered when dealing with a tort case (again, in contrast to this case which is rooted in contract):

> 90 To recap, in a case concerning a tort, the following factors are presumptive connecting factors that, *prima facie*, entitle a court to assume jurisdiction over a dispute:
>
> (a) the defendant is domiciled or resident in the province;
>
> (b) the defendant carries on business in the province;
>
> (c) the tort was committed in the province; and
>
> (d) a contract connected with the dispute was made in the province.

[73] If the forum selection clause as detailed in the Subconsultant Agreement is non-exclusive, and the onus falls on RWA (and MASDAR) to rebut a presumption of jurisdiction following a s. 11 *CJPTA* analysis, then *Club Resorts* provides some further guidance:

> 95 The presumption of jurisdiction that arises where a recognized connecting factor - whether listed or new - applies is not irrebuttable. The burden of rebutting the presumption of jurisdiction rests, of course, on the party challenging the assumption of jurisdiction. That party must establish facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them.
>
> …
>
> 100 To recap, to meet the common law real and substantial connection test, the party arguing that the court should assume jurisdiction has the burden of identifying a presumptive connecting factor that links the subject matter of the litigation to the forum. In these reasons, I have listed some presumptive connecting factors for tort claims. This list is not exhaustive, however, and courts may, over time, identify additional presumptive factors. The presumption of jurisdiction that arises where a recognized presumptive connecting factor - whether listed or new - exists is not irrebuttable. The burden of rebutting it rests on the party challenging the assumption of jurisdiction. If the court concludes that it lacks jurisdiction because none of the presumptive connecting factors exist or because the presumption of jurisdiction that flows from one of those factors has been rebutted, it must dismiss or stay the action, subject to the possible application of the forum of necessity doctrine, which I need not address in these reasons. If jurisdiction is established, the claim may proceed, subject to the court's discretion to stay the proceedings on the basis of the doctrine of *forum non conveniens*. ...

[74] The plaintiff argues that ss. 11(e) and (h) of the *CJPTA* are relevant to the real and substantial connection test in this case as they say the contractual obligations were performed, to a substantial extent, in Nova Scotia by a business

registered in Nova Scotia. The plaintiff says RWA should have expected that the work to be done by HPES under the Subconsultant Agreement would be done in Nova Scotia, where HPES had its office. The numbered company submits that this meets the requirements of the *CJPTA* and says this is sufficient to meet the real and substantial connection test. According to the affidavit of David C. Stewart:

> 9. The Design Deliverables are particularized in Schedule 1, page 18. The work as set out there is work that Engineers can do from any location where we have access to our computer and electronic software and databases, since we are required to prepare drawings and reports, modeling, calculations and other technical work. As an HPES Engineer on this Project, I completed the majority of my work on the RWA design deliverables while working from Halifax. I went to the UAE on more than one occasion and in particular in June 2009, I was asked to review calculations and drawings prepared in part by an engineering firm in the UK and once I approved the final drawings, I affixed my Professional Engineering stamp.

[75] RWA argues that the MIST Project was a construction project and the work to be performed under both the Agreement and the Subconsultant Agreement was to be performed in the U.A.E. Despite the claim in David Stewart's affidavit that he did the majority of <u>his</u> work from Halifax, no facts have been presented on this application that clearly explain where HPES did the majority of the work on this project.

[76] According to the affidavit of Felicia Robinson, the Subconsultant Agreement was executed in the U.A.E.:

> 11. During the Masdar MIST Project, RW Armstrong engaged High Performance Energy Systems Inc. ("HPES") to provide services on the Masdar MIST project in the U.A.E. The terms of the agreement between RW Armstrong and HPES were negotiation (sic) by Habib Shehadeh, RW Armstrong's then Regional Director in the U.A.E. The agreement between RW Armstrong and HPES was signed and negotiated in the U.A.E. for work to occur in the U.A.E.

[77] Discussions and meetings pertaining to the Subconsultant Agreement took place in the U.A.E. According to the pleadings filed by 3289444:

> 10. MASDAR City is a planned city project in Abu Dhabi, in the United Arab Emirates, with the intent of relying on solar and renewable energy sources.
>
> …
>
> 13. In or about December 2008, RWA subcontracted with HPES to provide services on the MIST 1b Project in MASDAR.

> 14. Pursuant to the terms of the Subcontract Agreement between RWA and HPES (the "RWA-HPES Subcontract"), HPES provided various services and deliverables including those identified in Schedule 1 of the RWA-HPES Subcontract. The terms of the RWA-HPES Subcontract anticipated additional services as instructed in writing by RWA. Additional services would be calculated based on hourly rates set out in Schedule 1 of the RWA-HPES Subcontract.

[78] All invoices relating to the Subconsultant Agreement were to be addressed to RWA in Abu Dhabi, U.A.E.

[79] The *CJPTA* presumes the existence of a real and substantial connection in certain circumstances. One of these, s. 11(e)(i), includes where the proceeding "concerns contractual obligations, and … the contractual obligations, to a substantial extent, were to be performed in the Province". Jurisdiction in contract is considered in Castel and Walker's *Canadian Conflict of Laws*, at ss. 11.6(b)(i):

> Common law courts in Canada also have jurisdiction over claims arising from breaches of contract in the jurisdiction regardless whether the breach was preceded or accompanied by a breach committed out of the jurisdiction that rendered impossible the performance of the contract that ought to have been performed in the jurisdiction. It will often be the case that a claim for a breach of contract in the jurisdiction will also involve one or more parties based in the jurisdiction. However, even where the parties are not based in the jurisdiction, there may be no other forum with as close a connection to the matter. Where the breach of a contract between a party in the forum and a party outside the forum may be regarded as having occurred outside the forum, there may, nevertheless, be a real and substantial connection between the matter and the forum warranting the granting of leave to serve outside the jurisdiction, such as where failure to deliver goods from outside the forum as promised forces a local retailer to purchase replacements in the forum. This would also be the case where a claim is for unpaid invoices for a contract performed in the jurisdiction, and the relevant evidence is likely to be located predominately in the jurisdiction.

[80] Castel and Walker consider provisions similar to s. 11(e)(i), at ss. 11.6(b)(i):

> … In determining whether a contract is to be performed "to a substantial extent" in the forum, the court considered the entire contract, the obligations arising under it, and the expectations of the parties for performance at the time of contract formation…
>
> The obligation to make payment in the forum does not alone amount to the performance of contractual obligations in the province for this subsection, unless payment is the main substance of the contract and is not merely incidental to the

> provision of goods or services in another jurisdiction… Where a substantial number of the contractual obligations are to be performed in the forum, this subsection does not also require the payment obligation to be one that is to be performed in the forum.
>
> … Moreover, jurisdiction may be established where breaches of contract in a business relationship centred on the cause loss in the forum…

[81] In *Genco Resources Ltd. v. MacInnis*, 2010 BCSC 1342, [2010] B.C.J. No. 1875, the plaintiff company, which operated mines in Mexico, and had its head office in Vancouver, commenced an action in British Columbia for breach of the defendant's employment contract. The defendant was a Canadian citizen resident in Mexico. In considering whether a real and substantial connection was established, the court said:

> 17 There is nothing in the evidence to suggest that the contractual obligations were "to a substantial extent" to be performed in B.C. The defendant's duties were in Mexico. The plaintiff suggested that the defendant could have been required to work elsewhere and that a certain interpretation of the evidence could suggest that the defendant had attended in B.C. No evidence was led to indicate that the plaintiff ever requested or required the defendant to work other than in Mexico. In addition, while paragraph 1 of the Letter Offer indicated that the location of employment was "... whichever other location the Company wishes to assign the Employee" paragraph 2 expressly indicated that the defendant's responsibilities related only to the La Guitarra mine operations. In addition, although the plaintiff's material refers to the fact that the plaintiff owns property in Kamloops and Nevada, it at no time alleges that it had any form of mining operation anywhere except in Mexico.
>
> 18 No evidence was led by the plaintiff to indicate that the defendant had in fact ever attended its offices in B.C. The plaintiff did point to ambiguity within the defendant's evidence on that issue. If the defendant did attend in B.C. at the plaintiff's expense as alleged, I would expect that the plaintiff would have documentary proof of such arrangements and payments or reimbursements. None was presented.
>
> 19 In my view, this contract was to be substantially performed in Mexico.

[82] MASDAR points to the fees provisions of the Subconsultant Agreement between RWA and HPES, which suggest that the "design deliverables" were at least in part anticipated to be performed on-site in the U.A.E. The contract defined "Deliverables" as:

> … such deliverables to be supplied by the Company to R W ARMSTRONG as part of the Services as form part of the final "as built design" of the Project (but

> excluding any designs or other documents or proposals that are either superseded or not used in the project as constructed)…

[83] The "project" was the design and construction of the MIST Project in the U.A.E. The "basic services" that comprised the deliverables are described in detail in Schedule 1 of the contract.

[84] The plaintiff argues that it would have been expected or assumed that the work to be done by HPES would be done in Nova Scotia, since it involved computer modelling and related activities that would presumably be done at HPES's office. Additionally, the numbered company notes that HPES was certified by the relevant Nova Scotia engineering regulator. However, along with the design work, Schedule 1 of the Subconsultant Agreement makes reference to on-site commitments of HPES in the U.A.E. with respect to the deliverables:

> These deliverables are based upon the updated information received on December 23, 2008:
>
> …
>
> (2) Site supervision from January 2009 till the end of March 2009 with HPES personnel first 3 weeks on site and the later 4 weeks during construction with a wrap up of the project by the end of March (2 Weeks) for a total of 9 Weeks.
>
> …
>
> (7) Operation & Maintenance training provided by HPES.
>
> (8) HPES on-site management for later stages of construction.
>
> …

[85] In oral argument, the numbered company submitted, but provided little detail to support their position, that in addition to "substantial performance in the Province" under s. 11(e)(i), the proceeding "concerns a business carried on in the Province", and is therefore presumptively within the court's jurisdiction under s. 11(h) of the *CJPTA*. Justice Moir interpreted this provision in *Armco Capital Inc. v. Armoyan*, 2010 NSSC 102, [2010] N.S.J. No. 128, where the applicant Nova Scotia company claimed the court presumptively had jurisdiction pursuant to s. 11(h). The respondent argued that Florida was *forum conveniens*. The respondent also argued that s. 11(h) "only applies in cases that concern a business carried on in the province by a non-resident defendant or respondent", in view of the residency provisions of s. 8. In rejecting this argument, Moir J. stated:

> 32 Paragraph 11(h) has nothing to do with residency or with service on a corporation. It is about a business, no matter whether it is carried on by a resident or a non-resident, or a corporation or an individual.
>
> 33 The words of a statute are to be read in their entire context according to their grammatical and ordinary meaning. I see no conflict between s. 11(h) and any other part of the *Court Jurisdiction and Proceedings Act*. The words are plain, and we cannot add restrictions.
>
> 34 I find support from my conclusion that s. 11(h) applies to a business carried on in the province by any party in *TimberWest Forest Corp. v. United Steel, Paper and Forestry Union*, [2008] B.C.J. No. 552 (S.C.), to which Mr. Piercey and Mr. Campbell referred.
>
> 35 The cause prosecuted by Armco concerns a business carried on in Nova Scotia. Therefore, this court is presumptively competent.

[86] Justice Moir also took the view the common law "real and substantial connection" analysis led to the same result. He referred to the factors going to jurisdiction enumerated in *Muscutt v. Courcelles* (2002), 213 DLR (4th) 577, [2002] O.J. No. 2128, and *Bouch v. Penny*, and concluded that the Nova Scotia court had territorial competence. Among his findings were that the alleged tort, consisting of the copying by the respondent of a computer containing confidential information, had occurred in Florida, but that the information was "alleged to be owned by a Nova Scotia company, and the loss of alleged confidences would cause harm primarily to business conducted in Nova Scotia and to a Nova Scotia corporation" (para. 38). He concluded, however, that Florida was the *forum conveniens*.

[87] HPES had its head office in Nova Scotia and carried on business in Nova Scotia. This is enough to create the presumption of a real and substantial connection with the province. Jurisdiction has been established. That does not end the inquiry. This presumption is rebuttable based on a global consideration of s. 12 of the *CJPTA,* along with the facts and circumstances of the Subconsultant Agreement.

***Forum Non Conveniens*/Territorial Competence**

[88] If the forum selection clause is non-exclusive, and if 3289444 has established jurisdiction in accordance with s. 11 of the *CJPTA*, then the application of the doctrine of *forum non conveniens* must be considered since this issue has been raised by RWA (and MASDAR). As Lebel J. said in *Club Resorts*:

> 101 As I mentioned above, a clear distinction must be drawn between the existence and the exercise of jurisdiction. This distinction is central both to the resolution of issues related to jurisdiction over the claim and to the proper application of the doctrine of *forum non conveniens*. *Forum non conveniens* comes into play when jurisdiction is established. It has no relevance to the jurisdictional analysis itself.
>
> 102 Once jurisdiction is established, if the defendant does not raise further objections, the litigation proceeds before the court of the forum. The court cannot decline to exercise its jurisdiction unless the defendant invokes *forum non conveniens*. The decision to raise this doctrine rests with the parties, not with the court seized of the claim.
>
> 103 If a defendant raises an issue of *forum non conveniens*, the burden is on him or her to show why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff. The defendant must identify another forum that has an appropriate connection under the conflicts rules and that should be allowed to dispose of the action. The defendant must show, using the same analytical approach the court followed to establish the existence of a real and substantial connection with the local forum, what connections this alternative forum has with the subject matter of the litigation. Finally, the party asking for a stay on the basis of *forum non conveniens* must demonstrate why the proposed alternative forum should be preferred and considered to be more appropriate.

[89] The burden on RWA (and MASDAR) is to show that it would be more fair and efficient to have the matter heard in the U.A.E. As Lebel J. noted in *Club Resorts*:

> 109 The use of the words "clearly" and "exceptionally" should be interpreted as an acknowledgment that the normal state of affairs is that jurisdiction should be exercised once it is properly assumed. The burden is on a party who seeks to depart from this normal state of affairs to show that, in light of the characteristics of the alternative forum, it would be fairer and more efficient to do so and that the plaintiff should be denied the benefits of his or her decision to select a forum that is appropriate under the conflicts rules. The court should not exercise its discretion in favour of a stay solely because it finds, once all relevant concerns and factors are weighed, that comparable forums exist in other provinces or states. It is not a matter of flipping a coin. A court hearing an application for a stay of proceedings must find that a forum exists that is in a better position to dispose fairly and efficiently of the litigation. But the court must be mindful that jurisdiction may sometimes be established on a rather low threshold under the conflicts rules. *Forum non conveniens* may play an important role in identifying a forum that is clearly more appropriate for disposing of the litigation and thus ensuring fairness to the parties and a more efficient process for resolving their dispute.

> 110 As I mentioned above, the factors that a court may consider in deciding whether to apply *forum non conveniens* may vary depending on the context and might include the locations of parties and witnesses, the cost of transferring the case to another jurisdiction or of declining the stay, the impact of a transfer on the conduct of the litigation or on related or parallel proceedings, the possibility of conflicting judgments, problems related to the recognition and enforcement of judgments, and the relative strengths of the connections of the two parties.

[90] Section 12(2) of the *CJPTA* lists the factors that must be considered to determine whether a court outside Nova Scotia is a more appropriate forum to hear a dispute:

> 12 (2) A court, in deciding the question of whether it or a court outside the Province is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including
>
> (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;
>
> (b) the law to be applied to issues in the proceeding;
>
> (c) the desirability of avoiding multiplicity of legal proceedings;
>
> (d) the desirability of avoiding conflicting decisions in different courts;
>
> (e) the enforcement of an eventual judgment; and
>
> (f) the fair and efficient working of the Canadian legal system as a whole.

[91] In the affidavit of Felicia Robinson, filed on behalf of RWA, she states:

> 17. RW Armstrong has never had a relationship, contract, or agreement of any nature or kind with, and has no knowledge of, 3289444 Nova Scotia Limited.
>
> 18. I have been advised by counsel to RW Armstrong, Scott Sterns, and I do verily believe, that 3289444 Nova Scotia Limited was incorporated in Nova Scotia on or about May 19, 2015 and the Director, President and Secretary is counsel for the Plaintiff, Jasmine Ghosn. Attached hereto to my Affidavit as Exhibit 2 is a Nova Scotia Registry of Joint Stock profile dated May 11, 2016 regarding 3289444 Nova Scotia Limited.
>
> 19. The Masdar MIST project was conducted entirely in the U.A.E. All work on the project was done in the U.A.E. The project is physically located in the U.A.E.
>
> 20. If required to defend this matter, RW Armstrong expects it will rely on nine witnesses. None of the witnesses are in Nova Scotia. RW Armstrong is not in Nova Scotia. RW Armstrong has no representatives in Nova Scotia.
>
> 21. Of the nine potential witnesses for RW Armstrong, four are in the U.A.E. and the other five are located internationally, including in the United States.

> 22. All documents related to this matter held by RW Armstrong are held in the U.A.E. or in the United States.
>
> 23. The directing mind on behalf of RW Armstrong is located in the United States. All evidence related to this matter on behalf of RW Armstrong will come from the U.A.E. or the United States.

[92] In the affidavit of Craig Heschuk, filed on behalf of MASDAR, he states:

> 11. The laws of the Emirate of Abu Dhabi and the UAE include the Civil Code of the UAE and Islamic Sharia law.
>
> 12. Masdar does not carry on business in Canada.
>
> 13. Masdar does not have any assets in Canada.
>
> 14. I have reviewed the Statement of Claim and the Answer to the Demand for Particulars filed on behalf of the Plaintiffs. Masdar has never entered into an agreement with High Performance Energy Systems. Attached as Exhibit "B" is a true copy of the Statement of Claim. Attached as Exhibit "C" is a true copy of the Answer to the Demand for Particulars.
>
> 15. The following individuals associated with Masdar are names in the Statement of Claim and the Answer to the Demand for particulars:
>
> Dr. Afshin Afshari, Professor of Practice, Masdar Institute of Science and Technology;
>
> Mr. Sanad Ahmed, Senior Project Manager, Masdar;
>
> Dr. Mohamed Newera, Managing Director, Masdar;
>
> Mohamed Khalil, Procurement Mananger, Masdar;
>
> Moawia Dafaalla, Construction, Masdar.
>
> 16. Each of these individuals resides in the UAE or resided in the UAE at the relevant time of the services performed by RWA.
>
> 17. The following additional witnesses will be required to give evidence on behalf of Masdar: Khaled Ballaith, Yousif Baselaib, Ivan Whare Iraia and Jad al Masri all of whom are located in the UAE and currently employed by Masdar or Mubadala.

[93] In the affidavit of Dr. Allan Abbass, filed on behalf of the plaintiff, he states:

> 27. Witnesses that the Plaintiff Creditor Group may call and/or subpoena, are residing in the Province of Nova Scotia. These include myself and potentially the following:
>
> a. David Stewart, PEng
>
> b. Peter Beani, PEng

c. Bruce Marks, PEng

d. Tim Cranston (former counsel to HPES)

e. Peter Rumscheidt (former counsel to HPES)

f. James Bardsley and/or Carol Harrietha of Palmer Refrigeration Inc (they may be subpoenaed under the Nova Scotia Rules)

g. David Boyd – Receiver of HPES

28. I am personally acquainted with all of the persons listed above, can confirm they are all residents of the Province of Nova Scotia.

Prejudice to HPES Creditors if Required to Pursue Defendants in UAE

29. I have reviewed the Affidavits filed by the Defendants on this motion regarding jurisdiction. They suggest that HPES Creditors should incur expense to travel to the UAE and pay the cost for private arbitration, in addition to the cost of legal fees.

30. With HPES Creditors already having sustained significant financial loss, as described in Mr. Boyd's Affidavit, it would be unfair to the creditors to be forced into further expense to litigate in the UAE.

[94] According to the affidavits, the location of witnesses and the cost of litigation are of paramount significance to all parties in this case. The plaintiff does not acknowledge the existence or significance of the choice of law clause, choice of dispute resolution process clause or choice of forum clause as found in the Subconsultant Agreement.

[95] Paragraphs 12(2) (c), (d) and (f) of the *CJPTA* are not relevant to this matter. However, ss. 12(2)(a) and (b), and to a lesser extent (e) are of significance. Further, the factors listed in s.12(2) are not exhaustive. For example, a choice of law clause, choice of dispute resolution process clause and/or choice of forum clause can also be considered during this analysis. Therefore, the relevant factors in considering *forum non conveniens* in this case include the following:

- The Subconsultant Agreement was executed in the U.A.E.;
- The services and deliverables were to go to the U.A.E.;
- HPES invoices were submitted to RWA in the U.A.E.;
- 3289444 is a Nova Scotia company;
- HPES was a Nova Scotia company;

- Some of the work performed by HPES was done in Nova Scotia (with no evidence as to how much);
- Construction of the MASDAR MIST project was to be done in the U.A.E.;
- Witnesses for 3289444 are located in Nova Scotia;
- RWA has its offices, its employees, and its witnesses in the U.A.E. and the United States and has no presence in Nova Scotia;
- MASDAR has its offices, its employees, and its witnesses in the U.A.E. and has no presence in Nova Scotia;
- Should a judgement be entered, RWA and MASDAR have assets in the U.A.E., but not in Nova Scotia.

[96] It seems logical that the comparative convenience and expense for the parties to the proceeding and for their witnesses would be best served by having the matter heard in the U.A.E. In addition:

- Section 18.1 of the Subconsultant Agreement designates that, "[t]his agreement and the relationship between the Parties shall be governed by, and construed in accordance with, the laws of the United Arab Emirates except where it contravenes the laws of United States and Canada.";
- Any proceeding heard in Nova Scotia would therefore require an expert in U.A.E. law;
- Section 18.3 of the Subconsultant Agreement details that RWA and HPES agreed that if good faith negotiation was unsuccessful, then they could attempt mediation through a private mediator agreed upon by both parties or may have the dispute resolved by a court of competent jurisdiction in the U.A.E.

[97] According to Bastarache J. in *Z.I. Pompey,* a choice of forum provision in a contract carries significant weight when considering the most convenient forum. Therefore, even if dealing with a non-exclusive forum selection clause as in the Subconsultant Agreement, the choice of the U.A.E. is a significant factor when considering *forum non conveniens*. Contracting parties should be held to their bargains. A global consideration of s. 18 of the Subconsultant Agreement between

RWA and HPES clearly steers the parties toward the U.A.E. to resolve any disputes under the contract.

[98] While there was no contract between MASDAR and HPES, it is noteworthy that s. 20 of the Agreement contains an exclusive forum selection clause requiring any disputes to be arbitrated in the U.A.E. U.A.E. law governs any disputes under the Agreement. However, because HPES did not have a contract with MASDAR the exclusive forum selection clause in the Agreement requiring disputes to be resolved by those parties in the U.A.E. is not relevant to my consideration on the issue of *forum non conveniens*.

[99] A review of the s.12(2) *CJPTA* factors, as well as the other relevant factors in this case, leads me to conclude that RWA and MASDAR have more than met the burden of proving that Nova Scotia is *forum non conveniens* and that the U.A.E. is clearly the *forum conveniens*.

Is the plaintiff bound by the Subconsultant Agreement?

[100] The plaintiff numbered company argues that because it is made up of creditors of HPES and was not a signatory to the Subconsultant Agreement, it should not be bound by the terms of the Subconsultant Agreement. In essence, the numbered company says that because it is a creditor of RWA, it has more rights than HPES.

[101] The plaintiff relies on several cases decided under the *Bankruptcy and Insolvency Act,* RSC 1985, c B-3 ("*BIA*"), to support its position. It says that even though PWC was appointed receiver under the Nova Scotia *Companies Act* by Order of Moir J. dated September 5, 2013, and not the *BIA*, it is a creditor nonetheless and, therefore, the bankruptcy cases apply.

[102] RWA (and MASDAR) argue that the numbered company cannot have more rights than the actual signatories to the Subconsultant Agreement. They say that the numbered company merely bought or was assigned the cause of action belonging to HPES. It, therefore, stepped into the shoes of HPES, and cannot claim rights over and above those that would be afforded to HPES.

[103] There is nothing in Moir J.'s decision that would support the numbered company's claim that PWC obtained more rights as a creditor than HPES had when the Subconsultant Agreement was entered into by the parties. The plaintiff does not point to any legislation that supports its claim that PWC, or the numbered

company as creditor, has greater rights than HPES had under the terms of the Subconsultant Agreement.

[104] There is authority for the proposition that a claim advanced by a trustee in bankruptcy appointed under the *BIA* is distinct from a claim advanced by a debtor. In *Indcondo Building Corp. v. Sloan*, 2012 ONCA 502, [2012] O.J. No. 3315, leave to appeal refused, [2012] S.C.C.A. No. 422, the appellant had a proceeding ongoing against the respondent before the respondent declared bankruptcy. The appellant proved its claim in bankruptcy. The claim involved an alleged fraudulent property transfer. The respondent was subsequently discharged in bankruptcy, and obtained an order dismissing the appellant's action pursuant to s. 178(2) of the *BIA*. The appellant then obtained an order under s. 38(1) of the *BIA* authorizing it to bring an action against the respondent. Prior to the respondent's discharge, the trustee had informed the appellant that the estate was impecunious, and that any proceedings against the respondent must be brought under s. 38(1), which states:

> Where a creditor requests the trustee to take any proceeding that in his opinion would be for the benefit of the estate of a bankrupt and the trustee refuses or neglects to take the proceeding, the creditor may obtain from the court an order authorizing him to take the proceeding in his own name and at his own expense and risk, on notice being given the other creditors of the contemplated proceeding, and on such other terms and conditions as the court may direct.

[105] The motions judge in *Indcondo* quashed the s. 38(1) order on the grounds of abuse of process and *res judicata*. However, the Ontario Court of Appeal reversed this decision. Goudge J.A., for the court, held that the motions judge's reasoning rested "on a faulty premise; namely, that in the 2008 action, the appellant is advancing claims identical to those it advanced in the 2002 action. This fails to recognize that, unlike the 2002 action, which the appellant brought on its own behalf, the 2008 action is brought pursuant to s. 38(1) of the *BIA* and the claim is that of the Trustee."

[106] Justice Goudge emphasized that it was the trustee's claim, not the appellant's own previous unsatisfied judgment, that was being advanced:

> 29 … The 2008 action does not constitute a collateral attack on the discharge order. The appellant does not bring this action in its personal capacity. Rather, in bringing this action, the appellant is standing in the shoes of the Trustee. The Trustee is indifferent to the discharge order in that the bankruptcy continues despite that order. Moreover, the discharge order is not a bar to a subsequent s. 38 motion... As I have noted, the appellant does not argue that the Trustee could not

> bring such an action. Hence, by asserting the Trustee's claim, the appellant can bring the action without indirectly attacking the discharge order by which it as creditor would be bound. That action is no more of an indirect attack on the discharge order than it would be if the Trustee brought it.

[107] The numbered company relies on *Indcondo* in arguing that “a claim advanced by a trustee in bankruptcy, as defined under the *BIA*, is a distinct and separate claim from one advanced by the debtor” (By “debtor”, counsel presumably means “creditor.”). The numbered company also argues that “[b]y analogy, the Receiver’s claim as assigned to the Plaintiff creditor group … is distinct from any claim that might have been made directly by HPES.” In *Indcondo*, the appellant’s pre-bankruptcy claim was dismissed as a result of the bankruptcy, and the new post-discharge proceeding was a substantively different claim, by which the appellant was able to “stand in the shoes of the Trustee.” This was the result of the *BIA* statutory mechanism. While there may be some parallel to the present situation, where the numbered company has assumed PWC’s right to advance the claims, it does not follow that the claim must be dealt with in this jurisdiction. *Indcondo* was not concerned with the question of territorial jurisdiction. The claim by the numbered company is the same claim that could have been advanced by HPES. 3289444 has not been granted additional rights or exonerated from respecting the Subconsultant Agreement by virtue of having been assigned the claim by PWC.

[108] The plaintiff additionally relies on general comments from a text by Paul J. Omar, *International Insolvency Law: Themes and Perspectives* (Farnham, UK: Ashgate, 2008). Counsel argues that “[w]hen considering which state has jurisdiction to adjudicate in liquidation or reorganization, states generally defer to the exercise of jurisdiction in the debtor’s domicile, place of incorporation or seat.” According to 3289444, it follows from this general principal that because the receiver has identified creditors of HPES that are resident in Nova Scotia, and because HPES was placed in receivership by the Supreme Court of Nova Scotia under the Nova Scotia *Companies Act*, the litigation must be allowed to proceed in Nova Scotia. The plaintiff cites Omar’s text with respect to “the universal extraterritorial effect of an insolvency adjudication” made in the debtor’s forum state, based on the reasoning that “because title to assets vests in one entity, the law of the state in which the entity is situated should govern everything.” Omar also refers to the notion of “unity of the debtor’s estate”, meaning “the unity of administration, unity of procedure, unity of distribution of the assets and proceeds

and unity of the applicable law, which would principally mean the application of the law of the country where the insolvency proceedings were opened."

[109] Castel and Walker, in *Canadian Conflict of Laws*, state that "[t]he doctrine of unity in bankruptcy has not been adopted in Canada, although, in some circumstances, the courts may be prepared to stay Canadian bankruptcy proceedings or assist a foreign court or a foreign trustee in bankruptcy" (ss. 29.1).

[110] The plaintiff glosses over the fact that this is not an international insolvency matter or a *BIA* proceeding. It also argues that the usual rule of comity, i.e. recognition of foreign judgments, may be displaced where it would work an injustice to citizens of the recognizing state, as noted in *Canadian Imperial Bank of Commerce v. ECE Group Ltd* (2001), 23 C.B.R. (4th) 92, [2001] O.J. No. 535 (Ont. Sup. Ct. J). No evidence was presented to support a claim that the numbered company would suffer an injustice if the matter is heard in the U.A.E. I conclude that the plaintiff would not suffer injustice if there is no finding of jurisdiction, it would merely suffer an inconvenience.

[111] The plaintiff also cites *JP Capital Corp. (Trustee of) v. Perez* (1995), 36 C.B.R. (3d) 57, [1995] O.J. No. 2844 (Ont. Ct. J (Gen. Div.)), where the trustee in bankruptcy in a *BIA* proceeding was seeking a declaration that certain security granted to a Spanish bank by any of the bankrupts or related companies was void as against the trustee in bankruptcy and the creditors. The basis for the claim was an alleged fraudulent preference in the bank's favour. The relevant loan agreements required the parties to submit to the Spanish courts. The bank had filed as a secured creditor in the bankruptcy proceeding. The bank sought a stay of the Ontario proceeding on the basis of *forum non conveniens*. The court distinguished other cases where forum selection clauses had been honoured on the basis that "the main litigant before the court is the trustee in bankruptcy. In the other cases it was a dispute between the parties themselves and they had agreed to the proper forum for resolution of the dispute" (para. 16). After a further review of the facts, the court said:

> 25 The author, Castel, J.G., *Canadian Conflicts of Laws* 3rd ed. 1994 reviews the nature of bankruptcy in relation to conflict of laws. At p. 525 he makes the following comment:
>
> > Canadian law governs the administration and distribution of the estate of a debtor declared bankrupt in Canada. This is an application of the rule that matters of procedure are governed by the *lex fori*. Thus, the appointment of trustees, and their duties and powers, are governed by Canadian

> bankruptcy law. The incapacity of an inspector to acquire any of the property of the estate for which he or she is an inspector extends to property situated outside Canada. Foreign creditors are in the same position as Canadian creditors. "All debts and liabilities, present or future, to which the bankrupt is subject on the date on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt, shall be deemed to be claims provable in proceedings under this Act. However, the proper law, foreign or domestic, will determine whether a debt is valid by that law as well as the question of which property has passed to the trustee, and subject to what charges it has passed to him or her."

[112] The court's comments in *Perez* relate very specifically to the actions of a trustee in bankruptcy operating under the *BIA*. The court in *Perez* went on to say:

> 26 I disagree with the position of counsel for Banco Pastor that the only relevant agreement is the original loan agreement dated March 16th, 1993. In my view the documentation in February 1994 and the subsequent security dated June 1994 are relevant in determining whether Banco Pastor has received a fraudulent preference in contravention of the *Bankruptcy and Insolvency Act*.

[113] The plaintiff relies on the following passages from *Perez*:

> 27 To require the trustee to proceed in three foreign jurisdiction to litigate the validity of the security creates an injustice and places an impossible task and financial burden upon the trustee. Based upon the affidavit evidence before me there will be numerous witnesses in this jurisdiction who will be required to testily relating to the various corporate structures and the transfer of assets. It would be physically impossible to require all of these witnesses to attend in the various foreign jurisdiction to give their evidence.
>
> …
>
> 31 To allow the Banco Pastor application and stay would mean that any bankrupt could transfer or incumber foreign property and take it outside the reach of the trustee and the provisions of the *Bankruptcy and Insolvency Act*.

[114] While the numbered company has assumed the claim from PWC, it has not demonstrated that this now determines the question of territorial jurisdiction. The numbered company has pleaded the agreement between RWA and HPES and has made claims based on specific provisions of that Subconsultant Agreement. It seeks remedies in respect of amounts allegedly due under the Subconsultant Agreement.

[115] There may be a limited analogy with the *BIA* s. 38 procedure as described in the *Indcondo* decision. However, this is not determinative of jurisdiction. In *Crown Resources Corp. S.A. v. National Iranian Oil Co.* (2006), 273 D.L.R. (4th) 65, [2006] O.J. No. 3345 (Ont. C.A.), leave to appeal refused, [2006] S.C.C.A. No. 412, the appellants had moved for, *inter alia*, a stay of the plaintiff's actions under a series of oil-drilling contracts in Iran on the basis of a forum selection clause, lack of a real and substantial connection with Ontario and *forum non conveniens*. The original contracting party, an Ontario corporation called CTI, had become bankrupt. The plaintiffs were assignees of CTI's estate pursuant to s. 38 of the *BIA*. There was a forum selection clause in favour of litigating in Iran. Labrosse JA said, for the court:

> 20 In her analysis on the forum selection clause, the motions judge reviewed, without comment, the position of the plaintiffs who relied on the following factors in arguing that there was strong cause not to enforce the forum selection clause: the lawsuit was started in Ontario, the bankruptcy took place in Ontario and the trustee is in Ontario. In addition she noted that CTI is an Ontario corporation and "both NIOC and NIDC were aware that any dealing with respect to the contracts would be viewed in light of the Ontario laws, given that the damages occurred to the Ontario company."
>
> 21 I cannot accept that those factors assist the plaintiffs in arguing that there is strong cause not to enforce the forum selection clause in the 1990 contract. If the lawsuit had not been started in Ontario there would be no action. The bankruptcy proceeding and the residence of the trustee, who is not a party to these proceedings, have nothing to do with the contract. It would be more logical, in my view, to say that any dealings with respect to the contract should be viewed in light of Iranian laws since both defendants are Iranian companies, the contract specifies the forum, and the alleged breaches and the damages occurred in Iran.
>
> [Emphasis added]

[116] Therefore, according to *Crown Resources,* a forum selection clause could potentially bind the assignees of the original contracting party and the *Companies Act* trustee.

[117] In *Aldo Group Inc. v. Moneris Solutions Corp.*, 2013 ONCA 725, [2013] O.J. No. 5446, leave to appeal refused [2014] S.C.C.A. No. 31, the Ontario Court of Appeal considered the question of whether a forum selection clause was binding on a non-signatory. MasterCard had a license agreement with BMO, who contracted Moneris to process transactions. Those contracts included choice of forum clauses requiring disputes to be resolved in the New York courts. Moneris entered an agreement (also on behalf of BMO) with a retailer, Aldo, which gave

exclusive jurisdiction to the Ontario courts. Tulloch JA, for the court, summarized the contractual relationships:

> 7 The contractual network can be summarized as follows. MasterCard signed Licence Agreements with BMO and Harris, and these incorporated a choice of law and choice of forum clause in favour of New York. BMO and Harris contracted with Moneris; Moneris agreed to comply with MasterCard's standards and expressly agreed to a choice of law and choice of forum clause in favour of New York. Aldo was not a party to the Licence Agreements or Third Party Processing Agreement. Finally, Moneris and BMO contracted with Aldo, and their Merchant Agreement included a choice of law and choice of forum clause in favour of Ontario.

[118] A dispute arose under the Aldo contract with BMO and Moneris, respecting responsibility for deductions made by the defendants on account of alleged fraudulent charges in Aldo stores. Aldo commenced an action against the defendants. MasterCard moved for a stay of the action, alleging, *inter alia*, that Aldo was bound by the New York forum selection clauses. The motions judge dismissed the motion. On appeal, MasterCard argued, first, that the motions judge had erred in characterizing the nature of the claims as not being essentially contractual ones, but rather "direct claims advanced by a stranger to the contracts to which MasterCard is privy" (para. 22). The Court of Appeal rejected this argument, holding that the motions judge had not erred in the application of the analysis from *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929:

> 34 In any event, the motion judge's approach led to an accurate characterization of Aldo's claim. There can be no doubt that the underlying conduct giving rise to Aldo's claim occurred in the context of a contractual relationship between MasterCard, the Acquiring Banks and Moneris. However, MasterCard has not established that this context transforms Aldo's pleading into an "essentially contractual" claim. Plaintiffs have long been entitled to maintain an action in tort even when the underlying facts involve a contract to which the plaintiff is not party... The possibility, in general, of concurrent liability in contract and tort demonstrates that a claim is not necessarily grounded in contract even when it relates to a contractual relationship.
>
> 35 I agree with the motion judge that Aldo pleads direct claims against MasterCard as a stranger to the Licence Agreements and Third Party Processing Agreement. Aldo is not a party to these agreements and does not purport to assert any contractual claim against MasterCard. Whether Aldo's pleaded claim succeeds is a matter for merits adjudication, but its essential character does not require that it be litigated in accordance with the New York forum selection clauses.

> 36 For the same reason, I would reject MasterCard's related argument that Aldo brings its claim as an equitable subrogee...

[119] The Court of Appeal moved on to consider the application of the New York forum selection clauses. The appellant's position was that:

> 38. … the U.S. cases dealing with this issue are persuasive and should have been applied. As the motion judge recognized, the U.S. cases relied on by MasterCard set out a "closely related" test to determine whether a non-signatory to a contract is nevertheless bound by that contract's forum selection clause based on its foreseeable application to the non-signatory. In other words, for a non-party to be bound by a forum selection clause, it must be "closely related" to the dispute such that it becomes foreseeable that it will be bound. MasterCard also shepherds a number of Canadian cases in support of its submission that the New York forum selection clauses apply to Aldo on the facts of this case.

[120] Among the cases MasterCard relied on was *Crown Resources*. Tulloch J.A. distinguished it:

> 41 *Crown Resources Corp. S.A. v. National Iranian Oil Co.* (2006), 273 D.L.R. (4th) 65 (Ont. C.A.), leave to appeal refused, [2006] S.C.C.A. No. 412, involved claims of breach of contract, breach of fiduciary duty and tort against two Iranian state-owned corporations. The relevant agreement contained a forum selection clause in favour of Iran. Although the plaintiffs - creditors and assignees in bankruptcy of one of the parties to the agreements - pleaded claims other than in contract against one of the Iranian corporations, these claims were "so intertwined" with the contract so as to justify them being heard together. This result was in the interests of avoiding a multiplicity of proceedings and inconsistent results. The court did not specifically address the issue of whether the plaintiffs, as creditors and assignees in bankruptcy rather than signatories to the original agreement, should be bound by the forum selection clause. <u>In the present case, Aldo does not plead breach of contract along with its other claims. Moreover, adopting MasterCard's use of Crown Resources would promote, rather than avoid, a multiplicity of proceedings since Aldo is entitled to proceed against Moneris in Ontario</u>. [Emphasis added.]

[121] The Canadian cases relied on in *Aldo* were generally distinguishable on the basis that the forum selection clauses had been agreed to by the plaintiffs. Tulloch J.A. concluded:

> 44 Taken together, the Canadian cases stand for the proposition that, where a plaintiff has accepted a forum selection clause, it will not necessarily escape its bargain by pleading causes of action other than in contract or against multiple parties only some of which are subject to the clause. Courts are properly vigilant

> in ensuring that pleadings do not defeat contractual provisions, exclusions or limitations *to which the plaintiff has agreed*. An important motivating factor in these cases is the convenient administration of justice - if a plaintiff must proceed elsewhere in respect of some of its claims, allowing it to proceed in Ontario in respect of others wastes judicial resources and violates the principle of comity. In my view, these authorities do not compel the conclusion that a plaintiff is bound by a forum selection clause to which it did not agree simply because its claim arises in the context of another party's contractual relationship that includes the clause. [Emphasis in original.]

[122] Tulloch J.A. went on to discuss the "closely related" doctrine, which "operates to bind non-signatories to a forum selection clause where they are so closely related to the dispute that it is foreseeable that they would become bound by the clause. A non-party is "closely related" to a dispute if its interests are completely derivative of and directly related to, if not predicated upon, the signatory party's interests or conduct…" (para. 45). Justice Tulloch noted that "there are good reasons to limit the scope of forum selection clauses to those parties who have bargained for their application. Litigating in a particular forum has real consequences that parties must evaluate…" (para. 46). He continued:

> 47 Sophisticated parties are deemed to have informed themselves about the risks of foreign legal systems and are deemed to have accepted those risks in agreeing to a forum selection clause... It is precisely because signatories to a forum selection clause have weighed and accepted the forum and its risks that these clauses should be enforced. Non-signatories have not necessarily engaged in this weighing exercise.
>
> 48 Of course, the foreseeability component of the "closely related" doctrine attempts to accommodate this concern. The doctrine only operates to bind a non-signatory where it is foreseeable that the non-party would become bound. Arguably, this protects against the binding of those who truly failed to assess the advantages and disadvantages of litigating in the forum. Yet the foreseeability inquiry is uncertain. It injects significant flexibility into the scope of application of forum selection clauses. In so doing, it runs contrary to well-established policy rationales for enforcing forum selection clauses, including certainty and security in commercial transactions…

[123] Justice Tulloch acknowledged that the "closely related" doctrine might operate to bind a non-signatory plaintiff in some circumstances, but held that *Aldo Group* was not one of them:

> 50 … In this case, the application of the "closely related" doctrine would not assist MasterCard. Given the substance of its claim as pleaded, Aldo's interests are not completely derivative and directly related to the interests of any signatory

> to the New York forum selection clauses. Moreover, the motion judge found that MasterCard exercised significant control over the contractual terms governing the issuance and processing of its credit cards. MasterCard surely contemplated that the banks with which it contracted would, in turn, contract with processors and merchants outside of the State of New York. In fact, MasterCard required that certain terms be included in the Acquiring Banks' downstream contracts with processors and merchants. It was open to MasterCard to do the same for forum selection, yet it did not. Moneris was permitted to enter into an agreement with Aldo that contained a broad forum selection clause in favour of the Ontario courts. On this basis, the motion judge found that it was not foreseeable to Aldo that MasterCard's New York forum selection clauses would apply to its claims, and I see no reversible error in this regard. Accordingly, it is unnecessary at this juncture to determine the availability, in general, of the "closely related" doctrine.

[124] Therefore, *Aldo Group* does not dispose of the issue in the 3289444 and RWA (and MASDAR) situation. The "closely related" doctrine would support binding the plaintiff on the basis that the manner in which the action came about made it reasonably foreseeable that the dispute resolution clause detailed in s. 18 of the Subconsultant Agreement (as agreed to between RWA and HPES) would bind the plaintiff, or at least would be asserted against the plaintiff. In this case, the circumstances suggest that 3289444 must have been incorporated with the knowledge of the existence of the terms of the contract between RWA and HPES, including s. 18 of the Subconsultant Agreement. The numbered company was incorporated in May 2015 and its counsel, Jasmine Ghosn, is the director, president and secretary. Ms. Ghosn was also solicitor of record in relation to a series of claims related to HPES, including, but not limited to:

Stewart v. Bardsley, 2012 NSSC 130

Stewart v. Bardsley, 2012 NSSC 191

Stewart v. Bardsley, 2012 NSSC 192

Stewart v. Bardsley, 2013 NSSC 11

Northeast Equipment Ltd. v. High Performance Energy Systems Inc., 2013 NSSC 334

Bardsley v. Stewart, 2014 NSCA 106

Stewart v. Bardsley, 2014 NSSC 342

Bardsley v. Stewart, 2014 NSCA 32

Stewart v. Bardsley, 2015 NSSC 155

[125] In addition to the published decisions, Ms. Ghosn was representing David Stewart, Peter Beaini and HPES when 27 other legal proceedings and execution orders in relation to those parties were stayed by Moir J. in the Order for Receiver dated September 5, 2013.

[126] While there is some ambiguity as to the identity of the numbered company, as counsel for MASDAR argued, it is "a corporation who presumably purchased the action from the *Companies Act* receiver." Counsel for the numbered company characterizes it as a representative of third-party creditors. According to the affidavit of David Boyd, in May 2015, PWC decided to "solicit offers from existing HPES stakeholders who had the potential of maximizing on the realization of the Receiver's interests in causes of action and claims related to contracts that HPES had with various entities", including MASDAR and RWA. The necessity of this course of action was attributable to "limited resources available to the Receiver to pursue claims…" Mr. Boyd advises that PWC accepted the proposal submitted by Ms. Ghosn "on behalf of a group of stakeholders…". The assignment agreement entitles PWC to a share of the proceeds of the litigation. According to the affidavit of Dr. Allan Abbass, he was involved in HPES's earlier dealings with RWA and is also now one of the creditors group involved with the numbered company.

[127] Unlike *Aldo Group,* this is not a situation where the third party claiming not to be bound by the forum selection clause became linked to the relevant contract as an essentially disconnected third party. It is reasonable to consider that the numbered company either had notice or ought to have had notice of the forum selection clauses prior to accepting the assignment. The contract between RWA and HPES, out of which the action arises, predates and is distinct from the HPES receivership situation. By accepting the assignment from PWC, the numbered company essentially stepped into the shoes of HPES. The plaintiff is bound by the dispute resolution clause, including the forum selection clause, as contracted between RWA and HPES.

[128] Additionally, the circumstances in *Crown Resources* are more analogous to those involving the numbered company and RWA than the circumstances in *Aldo Group*. That being said, the court in *Aldo Group* did not dismiss the "closely

related" test for all purposes. Because of the knowledge of Jasmine Ghosn and the involvement of Dr. Abbass, the "closely related" analysis would also result in 3289444 being bound by the forum selection clause in this case.

Is the plaintiff's claim outside the Subconsultant Agreement?

[129] The plaintiff argues that its claim against RWA falls outside of the four corners of the contract and, therefore, the forum selection clause does not apply. It argues that the claim contains allegations beyond simple breach of contract, including allegations of conspiracy, bad faith, "wrongful withholding of funds", "failure to commit to promises made to compensate HPES for expenses", unjust enrichment and collusion, and that the contract is therefore irrelevant.

[130] RWA points out that in the Statement of Claim, 3289444 pleads reliance on the Subconsultant Agreement between RWA and HPES including:

- Various claims of breaches of the Subconsultant Agreement;
- Reliance on the termination provisions of the Subconsultant Agreement; and
- Remedies arising out of the project governed by the Subconsultant Agreement, including amounts allegedly due under the Subconsultant Agreement, orders for disclosure in accordance with the Subconsultant Agreement and an injunction in relation to the Subconsultant Agreement.

[131] In *Kavarit Steel & Crane Ltd. et al. v. Kone Corp.* (1992), 87 D.L.R. (4th) 129, [1992] A.J. No. 40, leave to appeal dismissed, [1992] S.C.C.A. No.117, Kerans J.A. spoke for the unanimous court in discussing the obligations flowing from a commercial contractual relationship and stated:

> 25. The mere fact that a claim sounds in tort does not exclude arbitration. Section 2 of the *International Commercial Arbitration Act* limits its scope to "differences arising out of commercial legal relationships, whether contractual or not." This is permitted by art. 1, s. 3 of the Convention, which leaves to signatory states the decision whether the Convention applies to just those differences, as opposed to all manner of differences.
>
> 26. The Convention and Act thus covers both contractual and non-contractual commercial relationships. They thus extend their scope to liability in tort so long as the relationship that creates liability is one that can fairly be described as

"commercial". In my view, a claim that a corporation conspired with its subsidiaries to cause harm to a person with whom it has a commercial relationship raises a dispute "arising out of a commercial legal relationship, whether contractual or not."

27. One must take care not to render this meaningless by equating "contractual" with "commercial". But I need not hazard an exhaustive definition of the test because, for the purposes of this case, it is enough to say that the relationship between these corporations as alleged in the pleadings was manifestly commercial and nothing but commercial. I reject the argument by Mr. Redmond that the dispute must turn on the terms of the contract and its breach. I therefore conclude that the Act and the Convention contemplate that claims like the claims based upon conspiracy to harm can fall for arbitration.

…

30. In my view, this submission extends beyond rights and duties created by the contract. A dispute meets the test set by the submission if either claimant or defendant relies on the existence of a contractual obligation as a necessary element to create the claim, or to defeat it. Thus, the pleading here that relies upon a claim of a conspiracy by unlawful means to harm the distributor meets the test. This is because a breach of the contract is relied upon as the source of the "unlawfulness". That dispute should be referred to arbitration.

…

36. In the absence of particulars, I can only say that the claim in question must be and is referred to arbitration *if* it relies upon the existence of a contract between the parties. If a claim can be made out free of that reliance, it can go to trial. The risk lies with the plaintiff. In effect, I read down the pleading to add the prefatory words "Apart from any contract or contractual obligations and without reliance upon them,". I should add that I am sceptical that the plea, so adjusted, discloses a cause of action. But that, as I have said, is for another day.

…

38. I cannot say that a dispute arises out of or in connection with a contract unless the existence of the contract is germane either to the claim or the defence. It is not enough to say that the events that give rise to the claim also give rise to a claim for breach of contract. One must be able to say that the other claim relies on the existence of the contractual obligation.

[132] Justice Goodfellow emphasized the importance of holding parties to their contractual obligations in *Canada (Attorney General) v. Marineserve.MG Inc.*, 2002 NSSC 147, [2002] N.S.J. No. 256:

28 Alternatively, applying the purposive rule of interpretation, one must recognize the desirability of (1) holding parties to their contractual obligations;

> and (2) recognizing the dispute resolution mechanism that the parties entered into obviously with the full desire and intent of avoiding lengthy and costly litigation. The alternate dispute resolution mechanism must be invoked in a timely fashion, that is to say the party must select the path it wishes to travel and if that selection is not made until litigation is underway in which it meaningfully participated, then such conduct may well foreclose the alternate path. …
>
> …
>
> 30 I am satisfied the parties should follow the path of their own choosing and proceed to arbitration in accordance with their Agreements.

[133] In *Fieldturf Inc. v. Recovery Technologies of Pennsylvania Inc.,* 2006 NSSC 197, Hall J. dealt with an application similar to that in the case at bar. In *Fieldturf* the contract detailed provisions for dispute resolution, including mandatory negotiation followed by binding arbitration in Toronto, Ontario. The plaintiff started an action in Nova Scotia. In determining the Nova Scotia proceedings should be stayed, Hall J. stated:

> 20 As I see it, the alternative dispute resolution provisions contained in the supply agreement are mandatory pre-requisites that must be complied with before a party to the agreement may commence legal proceedings. In other words, the plaintiff was under a contractual obligation to exhaust the remedies through the alternative dispute resolution process before commencing the action that is now before the court. In these circumstances, since it failed to do so, it would be wrong for this court to exercise any jurisdiction over the matter that it might have.
>
> 21 Accordingly, I conclude on this ground alone that the plaintiff's action ought to be stayed.

[134] In staying the proceedings Hall J. also determined that the plaintiff had not shown a strong case for departing from the choice of forum clause in the contract and also concluded separately that Nova Scotia was a *forum non conveniens*.

[135] The plaintiff’s claim is based in contract, that is, the Subconsultant Agreement between RWA and HPES. There is no contract between HPES and MASDAR. The Subconsultant Agreement contains a valid dispute resolution clause. A valid, non-exclusive forum selection clause is contained within the dispute resolution clause agreed upon between RWA and HPES in the Subconsultant Agreement. The plaintiff has stepped into the shoes of HPES. HPES chose a path to follow if there was a dispute under the Subconsultant Agreement. Parties should be held to their bargains. The numbered company is therefore bound by the entirety of the dispute resolution process as described in s. 18.1, 18.2 and 18.3 found in the Subconsultant Agreement.

Conclusion

[136] The plaintiff admittedly did not follow the steps outlined in s. 18.2 and 18.3, requiring:

> 18.2 The parties shall endeavor to settle by good faith negotiation any dispute, difference, controversy or claim of any kind arising between them out of or in connection with this Consultancy agreement.
>
> 18.3 R.W. Armstrong and the Company agree that they shall first submit and all unsettled claims, counterclaims, disputes and other matters in question between them arising out of or relating to this Agreement or the breach thereof (Dispute) to mediation by selection and direct private engagement of a neutral mediator without using a dispute resolution organization or administrative service. If no agreement is reached, then (1) the parties may mutually agree to a dispute resolution of their choice, or (2) either party may seek to have the Dispute resolved by a court of competent jurisdiction in the U.A.E.

[137] Sections 18.2 and 18.3 of the Subconsultant Agreement require HPES, and now 3289444, to attempt good faith negotiation and then attempt to mediate any disputes with RWA prior to taking the matter to court. The numbered company jumped over this initial requirement and proceeded straight to litigation contrary to the path contracted between RWA and HPES. The proceedings in Nova Scotia could have been stayed on this basis.

[138] Section 18.1 requires the Subconsultant Agreement to be governed by the laws of the U.A.E., except where it contravenes the laws of the United States and Canada. Section 18.3 contains a forum selection clause allowing any litigation to take place before a court of competent jurisdiction in the U.A.E. The Subconsultant Agreement was executed in the U.A.E. MASDAR has no presence in Nova Scotia and is located in the U.A.E. RWA has offices in the U.A.E. and has no presence in Nova Scotia. The MIST project is being built in the U.A.E. Deliverables were for the U.A.E. Invoices were to be submitted to the U.A.E. The law governing any dispute is primarily that of the U.A.E. All aspects of the Subconsultant Agreement point toward having this matter heard in the U.A.E. There is no mention of Nova Scotia in the forum selection clause. The only fleeting connection with Nova Scotia is that HPES was a business located in Nova Scotia and some of the work performed by HPES (with scant evidence as to how much) was done in Nova Scotia.

[139] There is little to connect MASDAR to HPES and even less connecting 3289444's claim against MASDAR to Nova Scotia. However, the claim against

MASDAR is connected to the claim against RWA. The Supreme Court of Nova Scotia does have jurisdiction.

[140] Sections 11(e) and (h) of the *CJPTA* create the presumption of a real and substantial connection with Nova Scotia in relation to the claim by the numbered company.

[141] Nonetheless, when the factors enumerated in s. 12(2) of the *CJPTA* are considered, it is clear that MASDAR and RWA have rebutted this presumption. Nova Scotia is *forum non conveniens* in relation to the Subconsultant Agreement. The overwhelming constellation of facts support the claim by MASDAR and RWA that it would be more fair and efficient to have this matter heard in the U.A.E. and the matter should be dealt with in the U.A.E. In relation to RWA and HPES, these contracting parties selected a path to resolve disputes. 3289444 stepped into the shoes of HPES with full knowledge of the Subconsultant Agreement.

[142] Based on this combination of factors, the proceedings against RWA and MASDAR brought by 3289444 in Nova Scotia should be stayed as Nova Scotia is *forum non conveniens*. The U.A.E. is clearly the most convenient forum.

Prior Rulings

[143] Interestingly, HPES and its principals were embroiled in litigation for years prior to the formation of 3289444. In *Stewart v. Bardsley* , 2012 NSSC 191, Moir J. was dealing with an application by HPES, David Stewart and Peter Beaini, who were directors and shareholders of HPES, for relief under the *Companies Act* against the third director, James Bardsley, as well as Palmer Refrigeration. PWC became involved following this decision. While deciding a morass of issues created by the directors and shareholders of HPES, Moir J. stated:

> 112 *Mr. Bardsley's True Intent for MASDAR*. As I said, the MASDAR contract was signed at the end of 2008. Dr. Abbass swore to the following:
>
> > In January 2009 I traveled with Mr. Bardsley to the UAE to work with him as a consultant to HPES on this project.
> >
> > During our trip or just prior to the trip to UAE in January, 2009, Mr. Bardsley showed me a written proposal that he had brought with him to the UAE. The proposal was to transfer the HPES Contract with RWA over to Palmer Engineering.

> Mr. Bardsley also informed me that in order for the MASDAR contract to be transferred to Palmer, HPES would have to appear to be performing poorly on the project or become bankrupt.
>
> Shortly after Mr. Beaini and Mr. Stewart were fired in February, 2009, Mr. Bardsley immediately made plans to terminate the MASDAR contract and transfer it over to his company Palmer. In that regard, attached hereto as Exhibit "F" is a copy of an email from Mr. Bardsley's partner Carol Harrietha, confirming same.
>
> I was told repeatedly by Mr. Bardsley, viewed many communications to this and verily believe that his intention both before and after the directors' dispute and resulting March 2009 court order, that he intended to take this contract from HPES and into his company Palmer.

The e-mail identified as "F" speaks of Mr. Bardsley's efforts to have the "original contract" terminated. This is a reference to the MASDAR contract, the sub-consultancy contract between RW Armstrong, as consultant to MASDAR, and High Performance, as sub-consultant to RW Armstrong.

113 The first "deliverable" was due at the end of January. E-mails between Mr. Bardsley, Mr. Hassen Hashish who was the main contact at RW Armstrong in Abu Dhabi, and officials of MASDAR itself in February of 2009 show that the work was not ready, the people at RW Armstrong were becoming embarrassed, and the people at MASDAR were becoming impatient.

114 This February, 2009 correspondence contains some references suggesting that Mr. Stewart and Mr. Beaini are no longer to be involved and that the contract is being performed by a Palmer company. Four days before the so-called directors' meeting, Mr. Bardsley was pressing Mr. Hashish to take the sub-consultancy contract away from High Performance and give it to one of the Palmer companies "in order to prevent any long delays".

115 On Saturday, February 28, 2009, Mr. Bardsley wrote to Mr. Hashish. He said, "I will also be in the office all next week initiating the dissolving of the old HPES."

116 Some of the most important technical work for the MASDAR contract was being done by a Swedish technology firm under Mr. Aart Snijders, who Mr. Bardsley hired for High Performance in January of 2009. E-mails and correspondence from Mr. Snijders are attached to several of the Stewart and Beaini affidavits and one of the Bardsley affidavits. No objection was made to the hearsay.

117 The e-mails and correspondence show that, by March of 2009, Mr. Bardsley had "transferred" the Snijders retainer to Palmer Engineering. In June of 2009, Snijders delivered a report to Palmer, and Palmer paid about $50,000 for it.

118 Mr. Snijders, rather than Mr. Bardsley, made Mr. Stewart and Mr. Beaini aware of the "transfer". He did so on March 23, 2009. However, he continued to

correspond with both sides until he got paid by Palmer Engineering in June. That appears to have secured his loyalty.

119 As will be seen, High Performance was unable to perform the MASDAR contract, and the benefits of the contract fell to Palmer Engineering in early 2010, but let us first look at the failure of the other important contracts on The Waterton and Alderney Landing projects.

…

147 In June, High Performance received a large payment in connection with MASDAR. On June 19, Mr. Bardsley topped up the bank balance with $20,000, and cashed the cheque. He did so without speaking to the other directors. I find that he appropriated $105,000 from High Performance to Palmer.

148 Fifty thousand of this money went to Mr. Snijders' firm. The consultant had past due invoices, was refusing to deliver the needed report, and was threatening to go to RW Armstrong.

149 One might think that paying the consultant was in High Performance's best interests. The payment out of Palmer was not innocent. Palmer Engineering got the consultant's report, it withheld the report from High Performance, and it used the report when it got the MASDAR contract away from High Performance.

…

152 *Loss of the MASDAR Contract to Palmer*. In May of 2009 Mr. Stewart and Mr. Beaini sent a document titled "Power of Attorney" to RW Armstrong. It claimed to give "full power of attorney over all business and technical matters" to Mr. Stewart. The two signed as "Managing Director", contrary of the articles of association and the shareholder oppression order. The so-called power of attorney also appointed Mr. Stewart as "the sole Engineering Contact with RWA".

153 This unusual document contradicts Mr. Stewart's and Mr. Beaini's jointly sworn statement that:

> It was not until July 2009 that we insisted upon Mr. Bardsley's replacement with a professional engineer -- Mr. Bruce Marks -- because RWA insisted upon having a professional engineer on the site. Mr. Bardsley -- who is not a professional engineer -- could not fulfill this requirement made by RWA.

154 The so-called power of attorney also shows that, like Mr. Bardsley, Mr. Stewart and Mr. Beaini troubled the customer with information about the internal disputes, what Mr. Hashish referred to as "these silly issues". His correspondence makes it clear that RW Armstrong was losing patience with the three principals. The consultant had good reason for that.

155 High Performance remained in default of the MASDAR contract for months on end. Meanwhile, Mr. Bardsley maneuvered to get the contract away

from High Performance for Palmer Engineering. Mr. Stewart and Mr. Beaini blame the termination on Mr. Bardsley's tactics.

156 In one of their joint affidavits, Mr. Stewart and Mr. Beaini attribute the termination of the High Performance contract for MASDAR to their inability to obtain the Snijders report. There are some difficulties with this assertion.

157 High Performance is to be criticized for not seeking emergency relief in a focussed motion to enforce the shareholder oppression order. I think the court would have quickly required Mr. Bardsley to turn over the Snijders report. Mr. Stewart and Mr. Beaini knew of the attempted "transfer", and the consequential violation of the shareholder oppression order, since March of 2009. They chose to deal with this by excluding Mr. Bardsley, also in violation of the order.

158 Secondly, High Performance attempted to finalize the MASDAR contract without the benefit of the Snijders data or report, although Mr. Stewart and Mr. Beaini now jointly swear that the data was "critical information" and the report was "the vital report".

159 I find the following, which comes jointly from Mr. Stewart and Mr. Beaini, to be misleading:

> In December, 2009 David Stewart travelled to Abu Dhabi, on behalf of HPES, and gave a power point presentation to RWA as part of the final deliverable on the project. However, he did not have access to Mr. Aart Snijders' report for the purpose of the presentation. Mr. Stewart was asked to include the information from Mr. Snijders' report with the final deliverable report due in January, 2010. However, Mr. Snijders refused to give Mr. Stewart the critical information unless HPES gave Palmer another $50,000, as per the email from Mr. Snijders, attached hereto as Exhibit "T" (see page 3 of 4).

This paragraph glosses the events. It does so in sequencing and in content.

160 As regards sequence, the paragraph leads one to think that a power point presentation was made in December, a final report was to be delivered in January, RW Armstrong requested that the Snijders report be included in the January deliveries, but Mr. Bardsley prevented that by demanding $50,000 that High Performance did not have. In fact, the demand for $50,000 was made in October, and Mr. Stewart went to Abu Dhabi knowing he could not provide the Snijders report.

161 As regards content, the truth is that High Performance tried to get by without the Snijders data. RW Armstrong promised MASDAR that after the presentation in Abu Dhabi, which was done on December 9th, High Performance would officially submit the fifth "deliverable". The official energy design plan was to be delivered on December 12th. The record makes it clear that this was to be final. There is no suggestion of supplementing a final design in January with the Snijders report.

162 RW Armstrong submitted the energy design to MASDAR. There is no record of a request for the Snijders report. Instead, MASDAR had High Performance's energy design reviewed by "our in-house experts". They rejected it uncategorically. The record does not suggest that final delivery was to be made in January. It was, in fact, made in December and it caused MASDAR to write to RW Armstrong:

> You are hereby given a final deadline by close of business on 31 December 2009 to respond satisfactorily to the above comments with solid data and calculations. As stated in our last letter to you, if the findings remain unsatisfactory we will thereafter proceed to engage a third party to carry out the works at your cost.

163 The experts at MASDAR found fourteen deficiencies in the design. None appear to be minor.

164 After some exchanges, MASDAR gave RW Armstrong an ultimatum. On February 22, 2010 RW Armstrong terminated its contract with High Performance. Palmer Engineering swooped in.

165 The termination came after months of default, much patience on the part of RW Armstrong and MASDAR, and growing exasperation with High Performance's lack of performance.

166 The tactics of Palmer Engineering must also have been an embarrassment, but I find that RW Armstrong moved the work to Palmer for business reasons.

167 High Performance's failure can be attributed to its having been deprived of the Snijders report, which High Performance had paid for through Mr. Bardsley's wrongful appropriation of funds. He outrageously demanded that High Performance pay over again when his consent was required. I find that he knew High Performance could not pay.

168 I am satisfied that withholding the Snijders report contributed to the failure of the MASDAR contract. I find that the withholding, and Mr. Bardsley's behaviour throughout, was motivated by an intent to deprive High Performance of the benefits of the contract and to redirect them to Mr. Bardsley's company.

169 High Performance's loss on the contract cannot be calculated at this time. RW Armstrong produced a statement on termination that shows that total fees would have been $475,400 and $91,600 was paid for a gross loss of $383,800. However, I have no information on costs. So, I am unable to assess lost profits.

[144] In determining certain of those issues, Moir J. stated:

233 *Damages for "Interference With", or Inducement of Breach of, Contracts*. I refer to the discussion of the Alderney Landing, Waterton, and MASDAR contracts at para. 36 to para. 55 of this decision and to the discussion of the termination of each at para. 120 to para. 137.

> 234 The only legal basis for liability for "interference with" these contracts of which I am aware is breach of fiduciary duty, which I shall discuss separately. No economic tort, other than inducement to breach, is pleaded.
>
> 235 In all these instances, the contracts were terminated because High Performance failed to perform. None of the other contracting parties are, or have ever been, in breach. The facts do not support a finding of liability on the basis of any other economic tort even if another had been pleaded. [emphasis added]

[145] Although Moir J.'s decision has no bearing on my decision in this case, it is interesting to note that he determined in another matter that no parties, including those involved in the MIST Project (consisting, in part, of MASDAR and RWA) are not now, or ever were, in breach of their contracts with HPES.

Arnold, J.