

Ruggeberg v. Bancomer, S.A.

Between

Karin A. Ruggeberg, plaintiff, and

Bancomer, S.A., defendant

[1998] O.J. No. 538

Court File No. 95-CU-94909

Ontario Court of Justice (General Division)

Cullity J.

Heard: December 15, 1997.

Judgment: February 13, 1998.

(37 pp.)

Counsel:

J. Gardner Hodder, for the plaintiff.

John P. Brown, for the defendant.

¶ 1 **CULLITY J.**— The Defendant, Bancomer S.A., has moved under section 106 of the Courts of Justice Act and rule 21.01(3)(c) for an Order staying the action commenced against it by the Plaintiff, Karin A. Ruggeberg, for damages arising out of the termination of her employment in July 1995. In this action, the Defendant was served ex juris.

THE FACTS

¶ 2 On the basis of the affidavits filed in the motion and the submissions of counsel, I understand that the following facts are not in dispute:

- (1) The Plaintiff is 49 years of age and was born and raised in Mexico. She is a Mexican citizen, was educated in Mexico and travels on Mexican passport.
- (2) The Defendant is a bank that was incorporated under the laws of Mexico and has its head office in Mexico City.
- (3) In the fifteen years prior to coming to Canada in 1990, the Plaintiff was employed in Mexico City, first by the Ministry of Tourism and subsequently by financial institutions. In 1984 she was Foreign Trade Account Executive of Banco Nacional de Mexico ("Banamex") in Mexico City. Banamex is the largest bank in Mexico. In 1985 Banamex posted the Plaintiff to Germany as a Deputy Representative. In 1990 she was appointed Banamex's Representative in Toronto.
- (4) In September or October 1993 the Plaintiff commenced discussions with officials of the Defendant with respect to the possibility that she might

become the Defendant's representative in Canada. On at least one occasion before the end of 1993 she travelled to Mexico City to meet with senior officers of the Defendant to discuss this possibility.

- (5) By letter dated December 13, 1993, the Plaintiff received an offer of employment as the Defendant's representative in Toronto. After some discussions she received a revised offer of employment dated January 7, 1994. She signed her acceptance at the bottom of this letter and returned it to Bancoma in Mexico with a covering letter of January 27, 1994.
- (6) The Plaintiff commenced working for the Defendant in Toronto on February 15, 1994. In March of that year she travelled to Mexico and while there she signed an employment agreement (the "March agreement") at the offices of the Defendant in Mexico City. This contract like the letters between the parties of January 7 and January 27, 1994 was in Spanish.
- (7) The Plaintiff was employed as the Defendants's Representative in Toronto until July 20, 1995. From the time that the March agreement was signed, the Plaintiff's wages and other benefit payments were paid to her directly from the Defendant's office in Mexico City. For her first two salary periods prior to the signing of that agreement, she was authorized to withdraw the amount of her salary from one of the Defendant's expense accounts in Toronto.
- (8) The Plaintiff's employment with the Defendant was terminated on July 20, 1995, on the occasion of a visit by two of the Defendant's senior employees. Shortly thereafter, the Defendant ceased to carry on business in Canada, and since October of that year it has had no operations, assets or offices in Canada.
- (9) The Federal Labour Law is a Mexican statute that is intended to govern the rights of employees that arise out of the existence of an employment relationship and its termination.
- (10) The Federal Conciliation and Arbitration Board (the "Federal Board") has jurisdiction to deal with disputes that are governed by the Federal Labour Law.
- (11) The rights of employees under the Federal Labour Law are different from those that the Plaintiff would have under the laws of Ontario.
- (12) In September 1995 the Plaintiff commenced proceedings before the Federal Board in Mexico City in which she sought relief under the Mexican Federal Labour Law. In her application to the Board she acknowledged that she was employed by the Defendant in Mexico City. There is some dispute with respect to the nature and extent of the remedies available to the Plaintiff under the Federal Labour Law but, from the translation of part of the decision delivered by the Federal Board on September 18, 1996, which was exhibited by the Plaintiff, it appears that she sought "constitutional indemnification" for unjust dismissal, payment of wages due to her, payment for overtime, payment of a

seniority bonus, vacation and year-end bonuses, and payment of repatriation expenses. In its decision the Board granted only some of the relief requested by the Plaintiff. The Plaintiff has since appealed from the decision of the Board to a panel of judges with the status of a superior court having either appellate or review jurisdiction over the Board.

¶ 3 As I indicated at the beginning of these reasons, the above matters appear not to be in dispute. There is, however, a conflict of testimony with respect to many details and, in the absence of cross-examination, or further evidence, it is not possible to resolve them on the present state of the record. These disputed matters include the following:

- (1) The Plaintiff takes the position that the letters of January 1994 constituted her employment contract and that she signed the March agreement under duress. The Defendant claims that the letters were proposals only and that it was always mutually understood and intended that a formal agreement would have to be signed in Mexico. The Defendant takes the position that, generally, the letters are complementary to the March agreement.
- (2) The affidavit evidence provided by and on behalf of the Plaintiff alleges the existence of significant discrepancies between the terms of employment and remuneration set out in the letters of January 1994 and the corresponding terms in the March agreement. The Defendant denies the existence of most of the discrepancies but its counsel conceded that there is an issue with respect to the Plaintiff's entitlement to a bonus under the provisions of the letters.
- (3) There are disputes as to the correct translation of the letters of January 1994, certain provisions of the March agreement, and correspondence between the parties with respect to the termination of the Plaintiff's employment.
- (4) As indicated above, there is also disagreement with respect to the nature and extent of the remedies available under the Federal Labour Law. The Plaintiff contends that these remedies provide only a statutory minimum protection which does not exclude the possibility that she might pursue other remedies elsewhere. The Defendant's evidence is that the Federal Labour Law is a code which provides a complete and comprehensive method for obtaining all of the relief to which an employee is entitled with respect to an employment relationship and its termination.

¶ 4 The facts with respect to the termination of the Plaintiff's employment are not addressed in the affidavits filed on behalf of the Defendant and are not dealt with in detail in the evidence adduced by the Plaintiff. The Defendant exhibited the court file in the Mexican proceedings without any translation into English. The Plaintiff provided only a partial translation of the written decision of the Federal Board that suggests that the termination was consequential on the Plaintiff's refusal to accept continued employment on the same terms and conditions. Although the Plaintiff and one of her witnesses were critical of the relevant passages in the decision, this is, fortunately, not an issue that has any material bearing on the disposition of the motion and I make no finding in respect of it.

¶ 5 Some issues of Mexican law do arise and, to some extent, are in dispute. Proof of foreign law in this court is, of course, a question of fact to be determined on the basis of the evidence adduced. For this purpose, the Plaintiff filed an affidavit of Eduardo Ramos-Gomez, an attorney licenced to practice law in Mexico since 1983 and practising as a consultant on questions of Mexican law with a firm in New York City. The Defendant filed an affidavit of one of its employees, David Franco Motylewski, who is licenced to practise law in Mexico and who specializes in labour and employment law. No objection was taken to the qualifications of either witness to testify with respect to questions of Mexican law.

THE LAW

¶ 6 The provisions of the Courts of Justice Act and the Rules of Civil Procedure on which the Defendant relies are as follows:

Courts of Justice Act:

106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

Rules of Civil Procedure

- 21.01(3)(c) The defendant may move before a judge to have an action stayed or dismissed on the ground that ... another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter; ...

¶ 7 The grounds on which the Defendant seeks an order staying the proceedings in Ontario under these provisions are that:

- (a) in the employment contract the parties agreed that the laws of Mexico apply to the employment relationship and that disputes would be submitted to the jurisdiction of the Federal Board; and
- (b) in any event, the common law doctrine of *forum non conveniens* indicates clearly that Mexico, and not Ontario, is the appropriate forum in which the rights and obligations of the parties should be determined.

The Defendant submitted that the burden of proof on each of the above issues was on the Plaintiff.

¶ 8 In response, the Plaintiff contends that the letters of January 1994 constitute the employment contract and that the provisions of the March agreement should be disregarded on the grounds of duress and absence of the additional consideration required to vary the terms of a contract previously concluded. The Plaintiff submits that the proper law of the contract is that of Ontario and, because of the availability of more extensive relief in this jurisdiction, Ontario is the appropriate forum. The Plaintiff argued that the burden of satisfying the court that the proceedings should be stayed is on the Defendant.

1.0 Submission to the Jurisdiction of the Federal Board

¶ 9 It is established that, where the parties to a contract have agreed to submit disputes with respect to its interpretation and enforcement to the exclusive jurisdiction of the courts or tribunals of a particular country, the agreement is not necessarily binding upon this court. It will, however, cast a heavy onus on the party seeking to resort to the courts of another jurisdiction to establish that the latter is a more appropriate forum. This would appear to be an application of the principle of *forum non conveniens* with either a change in the evidential burden or an effectively heavier onus than would otherwise be in place: *Ash et al. v. Corp. of Lloyd's et al.* (1991), 6 O.R. (3d) 235 (Gen. Div.), at pp. 244 - 245, *aff'd* (1992), 9 O.R. (3d) 755 (C.A.); *The Eleftheria*, [1969] 2 All E.R. 641 (P.D.A.).

¶ 10 Where there is a non-exclusive attornment to the courts of a particular jurisdiction, the principles applicable are essentially the same except that it may be easier for a party favouring another jurisdiction to displace the effect of the clause: *Fairfield v. Low et al.* (1990), 71 O.R. (2d) 599 (H.C.); *Pre Print Inc. v. Maritime Telegraph and Telephone Company, Ltd.* (1996), 44 C.P.C. (3d) 40 (N.S.C.A.).

¶ 11 Two translations of the relevant provisions of the March agreement were provided. The Defendant's translation is as follows:

14. For everything not expressly set forth herein, the parties expressly agree to submit to the terms and conditions of the Internal Employment Regulations of the Company and of the Mexican Federal Labour Law.
15. The terms and conditions of the Internal Labour Regulations and of the Mexican Federal Labour Law shall apply to the suspension, rescission or termination of this agreement.
16. Any dispute arising from the interpretation and enforcement of this agreement shall be resolved pursuant to the provisions of the internal Labour Regulations, and the parties agree to submit to the jurisdiction of the Federal Conciliation and Arbitration Board.

¶ 12 The Plaintiff provided the following translation of the same provisions:

- Tenth Fourth.- Both parties agree to be bound by all other items that may not be stipulated in this contract, to the working conditions established by the Company, to the Internal Labour Regulations, and to the Federal Labour Code.
- Tenth Fifth.- The current contract will be suspended, rescinded or will end as per the terms and conditions indicated in the Internal Labour Regulations and the Federal Labour Code.
- Tenth Sixth.- Both parties agree that for the purpose of interpreting and complying with this contract, they will be bound by the effects of the Internal Labour Regulations and by the jurisdiction of the Federal Conciliation and Arbitration Board.

¶ 13 Whether the provisions of clause 16 (Tenth Sixth) should be understood as intended to confer exclusive jurisdiction on the Federal Board is a question of construction that is governed

by the proper law of the contract. In the absence of evidence that there are differences between the laws of Mexico and Ontario with respect to the applicable principles of interpretation, I am entitled, and obliged, to apply the principles recognized by this court as applicable to contracts with no foreign or extra-provincial elements. On that basis, the provisions of clause 16, particularly in the translation provided by the Plaintiff, appear to me to contemplate the exclusive jurisdiction of the Mexican tribunal. If I am wrong on this point -- as far as exclusivity is concerned, the clause appears to fall somewhere in between the clauses in *Fairfield* and *Ash* -- the difference appears to affect no more than the weight of the onus that, as will appear from the discussion below, appears already to be borne by the Plaintiff.

¶ 14 In *Fairfield*, Doherty J. limited his statement of the governing principles to cases where there is no suggestion that "the agreement as it relates to jurisdiction ... was the product of grossly uneven bargaining positions". In this case, the Plaintiff has alleged, in effect, that such inequality existed. She claims that the March agreement was void for economic duress: that, having left her previous employment, she was forced to sign it by a threat to terminate payment of her remuneration. Although, in her affidavit, the Plaintiff did not specifically relate the alleged duress to clause 16 of the March agreement, I understand her position to be that the effect of the alleged duress is that nothing in the agreement that was not contained in the earlier correspondence is binding upon her unless, presumably, she chose to accept it.

¶ 15 In *Fairfield* and *Ash* this court evinced great reluctance to permit the deference to be shown to jurisdiction clauses to be avoided merely because the party wishing to do so had alleged that the contract was invalid on the ground of misrepresentation or fraud. In the former case, Doherty J. stated:

I see several difficulties with the Plaintiff's position. First, it assumes the correctness of the Plaintiff's allegations that he was entitled to terminate or void the contract. Secondly, it renders the jurisdiction clause illusory since most disputes will involve allegations which, if proved, will make the agreement terminable or voidable by the aggrieved party. Thirdly, this approach could lead to a bifurcation of proceedings. The appropriate forum for the determination of the existence of the agreement would be made without reference to the jurisdiction clause in the agreement, but if the agreement was found not to be void or terminated, presumably resort to the jurisdiction clause would be necessary to decide the appropriate forum in which to settle the rights of the parties under the agreement.

Finally, this approach, which would remove many disputes from the reach of even a widely framed jurisdictional clause by the mere allegation of the various types of wrongful conduct, contravenes a cardinal principle of contract interpretation -- plain words should be given their plain meaning: 5 C.E.D. (Ont. 3rd), pp. 385 - 6. Where the parties agree that the courts of British Columbia should have jurisdiction to "entertain any proceeding in respect of this agreement", a proceeding in which one of the parties contend that the other party has conducted itself so as to give the aggrieved party a right to terminate or void the contract, remains, on the plain reading of the term, a "proceeding in respect

of the agreement" even though one or, indeed, both of the parties content that the contract no longer exists or has been voided retrospectively. I do not find the plaintiff's position an appealing one. (at pages 605 - 606)

¶ 16 While apparently accepting that an allegation that a contract was void ab initio, in the sense that it had never been entered into, would neutralize the effect of a jurisdiction clause, the learned judge was not prepared to accept this result when the allegations, if proved, would establish merely that the contract was voidable. In such a case, the jurisdiction clause would prima facie be applicable and, unless the court refused to give effect to it on other grounds, the validity of the contract would fall to be determined in the courts of the chosen jurisdiction. The allegations in Fairfield were held to fall within this category.

¶ 17 In reaching the above conclusions, Doherty J. accepted the reasoning of Lord Denning M.R. and Lord Justice Diplock in *Mackender v. Feldia A.G.*, [1966] 3 All E.R. 847 (C.A.) to essentially the same effect. Neither of these decisions explains why, as seems to have been the case, the courts were prepared to apply their own domestic law to determine whether fraud or misrepresentation makes a contract void or voidable. If, as I should have thought, a contract that is void ab initio has never come into existence, circularity may be difficult to avoid if the question is to be determined by reference to the proper law of the contract.

¶ 18 If the explanation for allowing the laws of Ontario to decide the question of characterization in Fairfield - and, at first instance, in the later decision in Ash - is that there was no evidence, as well as little likelihood, that there was any difference between the laws of the competing jurisdictions on the question of void versus voidable, the decisions on that point should not apply to this case as Mr. Eduardo Ramos-Gomez has testified that, under Mexican law, duress will make an employment contract void.

¶ 19 One might, perhaps, question whether concentration on the validity of the agreement containing an exclusive jurisdiction clause is the most useful approach or the one best grounded in principle. With the spreading influence of the principle of forum non conveniens, the courts appear to have moved away from enforcing jurisdiction clauses qua provisions that are contractually binding. As indicated above, the position seems to be that such clauses either add additional weight to the ultimate onus on a party seeking to show that some other jurisdiction is clearly a more appropriate forum or discharge an evidential burden on a party who would otherwise have to establish that the chosen jurisdiction was the appropriate forum. In consequence, there would appear to be something to be said for asking not whether the contract is valid, void or voidable but, rather, whether, as a question of fact, the parties intended that disputes would be submitted to the courts of a particular jurisdiction. Such an approach would be consistent with that applicable when determining the proper law of a contract. Obviously, in interlocutory motions like this where the evidence is conflicting, almost certainly incomplete and not tested by cross-examination, such an approach may have difficulties in its application. It would, however, avoid problems of circularity and it would be consistent with modern developments with respect to forum non conveniens. The intention of the parties - and not whether an alleged choice of a jurisdiction was contractually enforceable - would be regarded as one of the factors properly to be considered in an inquiry into forum non conveniens. If this approach were open to me, I would conclude that clause 16 (Tenth Sixth) reflected the intentions

of the parties for essentially the same reasons provided below in my discussion of the effect of clauses 14 and 15 on the determination of the proper law of the employment contract.

¶ 20 Be that as it may, I believe that, on the facts of this case, I am compelled by the authority of the Court of Appeal to give great weight to the provisions of clause 16 of the March agreement notwithstanding the allegation that the agreement is void.

¶ 21 In *Ash*, where an application was made pursuant to a predecessor to s. 106 of the Courts of Justice Act, the defendants successfully relied upon an exclusive jurisdiction clause in contracts that were alleged to be void ab initio on the ground of fraud. At first instance, McKeown J., while indicating that there was no allegation that the particular clauses in question had been induced by fraud, followed the reasoning in *Fairfield* and *Mackender* and held that the effect of fraud would be to make the contract voidable. He concluded:

As a result of the foregoing, even if the alleged fraud by Lloyd's were proven at trial, the exclusive jurisdiction clauses contained in the agreements between the plaintiffs and Lloyd's would remain intact and are therefore enforceable. (at page 248)

¶ 22 In delivering the judgment of the Court of Appeal, which dismissed an appeal from this part of the decision at first instance, *Carthy J.A.* appears to have endorsed a broader principle:

The plaintiffs argue that the exclusive jurisdiction clauses should be ignored because if there has been fraud in the circumstances surrounding the procurement of the contracts then the contracts are void ab initio and the clauses relating to forum are of no effect. I agree with McKeown J., and with the authorities he cites, to the effect that an allegation that a contract is void ab initio does not make it so until a final judgment of the court. If the plaintiffs can commence an action with an allegation of fraud which would void the contract and thus vitiate a choice of jurisdiction clause from the outset, then they may succeed on the merits while enjoying their own choice of jurisdiction or fail on the merits while depriving the defendant of the contracted choice. These clauses are too important in international commerce to permit that anomalous result to flow. (at page 758)

¶ 23 While the Court of Appeal expressly approved the entirety of the reasons of McKeown J., the passage quoted does not appear to give any weight to a distinction between void and voidable contracts or to be limited to allegations of invalidity based on fraud. Nor does it suggest that any choice of law issue is raised in such cases. In *Ash*, I understand the Court of Appeal to have held, at least, that a jurisdiction clause in a written agreement executed by the parties will not be vitiated simply because, as here, it is alleged that the contract was void from the outset and not merely voidable.

¶ 24 There may be more to be said on this question - particularly if cases arise where it is alleged that no contract was ever entered into because there was no offer and acceptance or any meeting of the minds - but, on the facts of this case, I feel constrained to apply the reasoning of the Court of Appeal in *Ash* and give great weight to the jurisdictional clause in the March

agreement, notwithstanding the evidence that, under Mexican law, a contract induced by duress is void. However if the above analysis is correct, an inquiry into forum non conveniens is required whether or not deference is to be given to the clause.

2.0 Forum Non Conveniens

¶ 25 Forum non conveniens may be relevant in motions under rule 21.01(3)(c) as well as in those brought pursuant to section 106 of the Courts of Justice Act or under rules 17.03 or 17.06: *Guarantee Company of North America v. Gordon Capital Corporation* (1994), 18 O.R. (3d) 9 (G.D.), at pp. 18 - 19 per Ground J.

¶ 26 I have held that the effect of clause 16 of the March agreement is to place a heavy burden on the Plaintiff to show that Ontario is the appropriate jurisdiction. If clause 16 did not exist or were to be disregarded, the Plaintiff would, in my view, have the same onus, albeit one with rather less weight. As, on this point, I am not accepting the careful submissions of counsel for the Plaintiff, as it is possible that I have interpreted the passage from the judgment of the Court of Appeal in *Ash* too literally and as, in any event, the law on jurisdictional clauses alleged to be void ab initio may require further refinement in the future, I will consider the question of burden of proof independently of the existence of clause 16.

(a) The Burden of Proof

¶ 27 Although there is high authority for the proposition that the burden of proof will rarely be important in cases of forum non conveniens, I have not been able to obtain as much comfort as I would wish from such assurances in these interlocutory proceedings where the affidavits filed contain conflicting statements and there has been no cross-examination. Initially, the submission of counsel for the Plaintiff that the ultimate burden in a motion under section 106 of the Courts of Justice Act, or rule 21.01(3)(c), must be on the moving party -- the Defendant -- is attractive. After all, the Defendant has been properly served, it has not moved to set aside service, or for a stay of the proceedings, under rule 17.06 and, by moving under section 106, or rule 21.01(3)(c), it now asks the court to decline to exercise its jurisdiction. Arguably, it should be for the Defendant to adduce sufficient evidence to satisfy the court that it should exercise its discretion to grant a stay in this case.

¶ 28 In support of his submission that the onus is on the Defendant, counsel cited a passage from the reasons of Borins J. in *Upper Lakes Shipping Ltd. v. Foster Yeoman Ltd.* (1993), 14 O.R. (3d) 548 (G.D.), at p. 570 in which he summarized the effect of the discussion of the forum non conveniens principle by Sopinka J. in *Amchem Products Inc. et al. v. British Columbia (Workers Compensation Board)*, [1993] 1 S.C.R. 897, at pp. 918 - 919 as follows:

On the basis of Sopinka J's reasoning, as I understand it, if such an onus exists in Ontario on a motion under Rule 17.06 it is on the defendant as Rule 17.02 places no onus on a plaintiff to satisfy a judicial officer that its claim falls within Rule 17.02 in order to serve a defendant ex juris. I recognize that a different onus may apply on a Rule 17.06 motion in a case in which a plaintiff has been

required to obtain leave for service ex juris under Rule 17.03. However, I take from the Amchem case that this is the issue to be determined in considering whether Ontario is the forum conveniens: Is there a more appropriate jurisdiction based on the relevant factors in which to litigate the plaintiff's claim? As well, the existence of a more appropriate jurisdiction must be clearly established to replace the forum selected by the plaintiff. (at page 570)

¶ 29 As is apparent, the analysis of Borins J. was provided in the context of a motion under rule 17.06 to set aside service ex juris. It is clear that the learned judge was of the view that, at least where the motion was based on the principle of forum non conveniens under rule 17.06(2)(c), the onus is on the Defendant. Moreover, as the passage from his judgment quoted above indicates, the test for forum non conveniens - Is there another jurisdiction that is clearly more appropriate? - appears to fit more comfortably with an onus on the person who requests the court to give an affirmative answer.

¶ 30 The above approach commended itself to Weiler J.A. in Frymer v. Brettschneider (1994), 19 O.R. (3d) 60 (C.A.) but, for the purposes of a motion under rule 17.06(2)(c), it was not accepted by McKinlay and Arbour JJ.A. In the factum filed on behalf of the Defendant in this motion, the reasoning of the majority of the Court of Appeal was relied upon:

34. As to the burden of proof, the Court in Frymer held that "[i]f the Plaintiff chooses to bring a foreigner into the jurisdiction ... the burden will be on the Plaintiff to establish that Ontario is the appropriate forum if the choice of forum is challenged by the Defendant" emphasis added}. This holding is a refinement of the Amchem test.

35. Therefore, in the present case, the Plaintiff bears the onus of satisfying the court that Ontario is the appropriate forum for this action, i.e. , that there is no other more appropriate forum.

¶ 31 The majority of the Court of Appeal in Frymer were clearly of the opinion that, on a motion to stay proceedings under rule 17.06 on the ground of forum non conveniens, the location of the burden depends upon whether the defendant was served within Ontario or ex juris. The starting point in their analysis was that the introduction of rule 17.02 permitting service ex juris without leave should not be considered to have changed the fundamental principles relating to forum non conveniens. In consequence, as the burden was, and still is, on a plaintiff in applications for leave to serve ex juris, it remains on the plaintiff when the issue of forum non conveniens is raised under rule 17.06 on an application for a stay of proceedings.

¶ 32 It might, perhaps, be argued that a distinction should be drawn between a motion for a stay under rule 17.06 and one, as here, under rule 21.01(3)(c) and section 106 of the Courts of Justice of Act on the ground that, unlike the former, the latter presupposes acceptance of the service. As I have already suggested, it could be said that, if the defendant has not moved under rule 17.06 for a stay or to set aside service ex juris, the onus should be placed on the defendant as if service had been effected within the jurisdiction. Such a distinction would, perhaps, attribute too much significance to counsel's decision to base the motion on one procedural rule rather than the other. More importantly, it does not appear that such a distinction is supportable in view of

the reasoning of the majority in Frymer:

This analysis reveals that the link between service ex juris and forum non conveniens is only superficially addressed by rule 17.06. That rule does not purport to deal with all instances where a motion is made for a stay of Ontario proceedings on the basis that Ontario is not the appropriate forum for the hearing of the proceedings. Such a motion can obviously be brought in a case where service on the defendant was effected in Ontario and the defendant contends that a foreign jurisdiction is the appropriate forum. In such a case, there is no opportunity for the defendant to invoke rule 17.06, which deals only with service ex juris, in order to rely on the doctrine of forum non conveniens; yet that doctrine can be invoked solely on the basis of s. 106 of the Courts of Justice Act, R.S.O. 1990, c. C.43, and the body of law upon which the doctrine of forum non conveniens is based.

In my view, rule 17.06 is only of marginal significance in the appreciation of the scope of forum non conveniens in Ontario and cannot be usefully resorted to as a means of altering the fundamental principles upon which the doctrine in its broader scope should properly rest. The absence of reference to the doctrine of forum non conveniens in the previous rules was held in *Singh*, supra, not to alter its existence and availability in Ontario law. Using the same reasoning, it seems clear to me that the reference to the availability of a motion for a stay of proceedings on the basis of that doctrine in the present rule 17.06 sheds no light on the workings of a doctrine which is essentially based on principles of international comity. Therefore, in my respectful opinion, the Ontario law relating to forum non conveniens is not found in rule 17.06, but in the jurisprudence which has, over the years, elaborated on the rationale for the doctrine and the principles which should govern its application. These principles were thoroughly reviewed by Adams J. in the present case, and were largely confirmed in the subsequent decision of the Supreme Court of Canada in *Amchem*, supra. To the extent that the burden of proof must be resorted to the determination of the appropriate forum, I think that Adams J. correctly stated the law of Ontario as being essentially in line with the approach taken by the Alberta Court of Appeal in *United Oilseed Products Ltd. v. Royal Bank of Canada* (1988), 29 C.P.C. (2d) 28, 60 Alta. L.R. (2d) 73.

Essentially, I would conclude that when the plaintiff chooses a forum in which jurisdiction exists "as of right", in the sense that the defendant is a resident of that jurisdiction, the defendant has the burden of showing that another forum is the convenient one. If the plaintiff chooses to bring a foreigner into the jurisdiction, typically in a case of service ex juris, the burden will be on the plaintiff to establish that Ontario is the appropriate forum if the choice of forum is challenged by the defendant. This, in my view, accords with the principles of comity upon which the doctrine of forum non conveniens rests. (at pages 83 - 85)

¶ 33 This passage appears to me to give rise to a clear inference that, where forum non conveniens is invoked, it will be immaterial whether the motion is brought under rule 17.06(2),

section 106 or rule 21.01(3) as far as the burden of proof is concerned. Such an inference is supported by the majority's endorsement of the approach taken by the Court of Appeal of Alberta in *United Oil Seed Products Ltd. v. Royal Bank* (1988), 29 C.P.C. (2d) 28 which, as far as I am able to ascertain - although it is contrary to a statement in the reasons of the court at first instance in *Frymer* - involved a motion to stay an action where service was effected within the jurisdiction. In delivering the judgment of the court, Stevenson, J.A. summarized the applicable principles as follows:

1. The test to be applied in all cases where there is an issue of determining the appropriate forum, is that of forum conveniens, the forum which is more suitable for ends of justice.
2. Where a forum possesses jurisdiction over a defendant, as of right, the defendant must show that there is another available forum which is clearly or distinctly more suitable.
3. Where the jurisdiction does not exist as of right, the same burden rests on the party seeking to establish jurisdiction (typically service ex juris).
4. While the over all burden is as stated, the party alleging an advantage or disadvantage must establish it. (at page 39)

(b) The Test of Forum Non Conveniens

¶ 34 Although in *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)* (1993), 102 D.L.R. (4th) 96 (S.C.C.), at p. 111, Sopinka J. stated that, despite differences in the language used, the law in common law jurisdictions is remarkably uniform, what may appear to be slight verbal distinctions between statements of the principle are not necessarily without significance:

Sopinka J. described the test as follows:

... the issue remains: is there a more appropriate jurisdiction based on the relevant factors. ... I agree with the English authorities that the existence of a more appropriate forum must be clearly established to displace the forum selected by the plaintiff. (at page 111)

Similarly, in *Frymer*, Arbour J.A. stated:

In all cases, the test is whether there clearly is a more appropriate jurisdiction than the domestic forum chosen by the plaintiff in which the case should be tried. (at page 79)

¶ 35 These statements suggest that, where, as here, the burden is on the Plaintiff, it may be sufficient for her to establish that there is no other jurisdiction clearly more appropriate than Ontario: that Ontario is, in this sense, an appropriate jurisdiction. As the passage quoted from counsel's factum indicates, the Defendant has seized upon the use of the definite article in the last paragraph of the extract quoted above from the reasons of the majority in *Frymer* to justify a submission that the test is more strict: that the Plaintiff must show that Ontario is the more appropriate jurisdiction. This is the approach attributed by Sopinka J. in *Amchem* to the House

of Lords in *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] 1 A.C. 460 in the following words:

In cases in which service is effected *ex juris*, the burden is on the plaintiff throughout and is the obverse of that applicable in cases as of right; that is, the plaintiff must show that England is clearly the appropriate forum. (at page 108)

¶ 36 Later in his reasons, after he had noted the substantial uniformity of the law in different common law jurisdictions, he concluded:

While there are differences in the language used, each jurisdiction applies principles designed to identify the most appropriate or appropriate forum for the litigation based on factors which connect the litigation and the parties to the competing fora. (at pages 111 - 112)

¶ 37 While I have a lingering doubt as to the meaning Sopinka J. intended to convey on this question, I do not believe I would be justified in interpreting the passage from the majority judgment in *Frymer* as if the use of the definite article can be disregarded. Accordingly, I believe that I am constrained by authority to hold that the Plaintiff has the burden of establishing that Ontario is the appropriate forum. This conclusion with respect to the applicable test, as well as my interpretation of the reasons of the majority in *Frymer* on the question of the burden of proof, is consistent with the reasoning of Dambrot J. in *Thermasteel (Canada) Inc. v. Macsteel Commercial Holdings (Pty) Ltd.* [1996] O.J. No. 2979.

¶ 38 In consequence, it appears that, while a defendant will, in other cases, have the ultimate burden of satisfying the court that it should exercise its discretion to stay an action under section 106 and rule 21.01(3), I am obliged to hold that, where a defendant raises the issue of *forum non conveniens* under rule 21.01(3)(c) in a case where service was effected *ex juris*, the ultimate burden, or the risk of non-persuasion, will be on the plaintiff. If a defendant, as in this case, seeks to rely upon an exclusive jurisdiction clause, it will have an evidential burden to prove at least that an agreement containing such a clause was executed by the parties. As I have already indicated, the effect of discharging this evidential burden, in the circumstances of this case, will make the ultimate burden on the Plaintiff more difficult to discharge.

(c) Application of the Principle of *Forum Non Conveniens*

¶ 39 The Plaintiff relies upon the following factors:

- (a) she claims that she would be entitled to seek damages for breach of an implied obligation to give notice of dismissal and punitive damages in the proceedings in Ontario and that these remedies are not available in Mexico;
- (b) she claims that the balance of convenience does not favour the Defendant as many of the witnesses who can attest to the Plaintiff's performance are situated in Toronto and the United States and very few witnesses are situated in Mexico. She points out that the Defendant has been able to secure, in Mexico, the full cooperation of all witnesses whose evidence it

required for this motion;

- (c) all but one of the witnesses who swore affidavits for the Defendant were able to do so in English;
- (d) she questions whether the Defendant is correct in suggesting one of its witnesses, who is no longer an employee, may not be prepared to come to Canada to testify in the proceedings;
- (e) one of the witnesses who are likely to be called by the Defendant resides in New York and travelled to Toronto to dismiss the Plaintiff; and
- (f) difficulties involved in flying witnesses to trial and translating documents into English should not be permitted to outweigh loss of the juridical advantage that is involved in the existence of superior remedies in this jurisdiction. She claims that such a loss would be catastrophic.

¶ 40 On behalf of the Defendant, the court is asked to consider and give weight to the following factors:

- (a) it is said that the Plaintiff was hired in Mexico City and that the employment contract - the March agreement - was signed there;
- (b) the parties have chosen the laws of Mexico to govern the employment contract and, even independently of that choice, the law of Mexico would be applicable;
- (c) it is claimed that the majority of the witnesses reside in Mexico and are Spanish-speaking. Translators will be required;
- (d) the key witnesses are located in Mexico and cannot be compelled to travel to Toronto to testify;
- (e) virtually all of the evidence is in Mexico and all of the documentary evidence requires translation from Spanish to English;
- (f) it is alleged that the Plaintiff was hired in Mexico to work for the Defendant. She was controlled and paid by the Defendant in Mexico; and
- (g) the Plaintiff is a Mexican citizen who spent all of her working life with Mexican employers. The Defendant is a Mexican bank with no assets or employees in Ontario.

¶ 41 In addition to the above factors relied upon by the Defendant, there is the consideration that proceedings were commenced by the Plaintiff in Mexico, that a decision has been received from the Federal Board and that, at the time of the hearing in this court, an appeal by the Plaintiff from the decision of the Federal Board was pending. While no attempt was made in this court to establish that the decision of the Federal Board was a final and conclusive judgment of a foreign tribunal with jurisdiction over the parties, I do not believe that the existence of those proceedings is irrelevant to the question of forum non conveniens. In cases of *lis alibi pendens*, when one party has started actions against the same defendant in more than one jurisdiction in respect of essentially the same facts, it has been customary for the courts to stay one of the actions or put the plaintiff to an election. Although a party - and particularly a party who resides in the province - should not lightly be prevented from resorting to this court, it is I believe a material consideration when addressing forum non conveniens that the Plaintiff has already proceeded - albeit with limited success - before the appropriate tribunal in Mexico. According to the

submission of counsel for the Defendant, the Plaintiff has engaged in a particularly blatant form of forum shopping: she accepted the jurisdiction of the Federal Board and brought proceedings in Mexico; being unsatisfied with the result of those proceedings, she is now determined to re-litigate in Ontario the consequences of the termination of her employment. I believe there is some force in these submissions of the Defendant but that there are other considerations that, by themselves, are sufficient to determine the question of forum non conveniens in this case.

¶ 42 One of the other factors identified by the Defendant that I regard as of considerable importance in the circumstances of this case is the determination of the proper law of the employment relationship and contract. If this is the law of Mexico, it would, in my judgment, be inappropriate to permit proceedings to continue in this court in which Mexican law would have to be applied. In the first place, an appeal is pending in Mexico. Although, as indicated above, no attempt has yet been made to have the Mexican judgment recognized and enforced in Ontario, this may occur in the future. More fundamentally, proof of foreign law must be dealt with as a question of fact in this court and the possibility of appellate proceedings in Ontario is, therefore, strictly limited. Further, quite apart from the problems of language and translation - problems that are very evident even in the material before me - the internal employment law of Mexico is codified and it appears that it is significantly different to the employment laws of this province. It is more appropriate that it be interpreted and applied by the Federal Board rather than by this court. If the proper law is that of Mexico, the evidence is not particularly clear, and may be conflicting, on whether a Mexican court applying that country's rules of the conflict of laws would permit recourse to be had to the laws of Ontario. Even if that would be the case, I have no doubt that the application of Mexican conflicts' rules should far more appropriately be determined by the Federal Board, or by a court in Mexico, rather than dealt with as a question of fact in this court.

¶ 43 There is no doubt that, in some cases, the fact that the proper law of a contract may be foreign will not be a decisive, or even a particularly significant, consideration in applying the principle of forum non conveniens. However, it is also established that, depending upon the circumstances, it can have relevance and weight. In *Spiliada*, a case discussed at some length in *Amchem*, at p. 478, Lord Goff of Chieveley said:

So it is for connecting factors in this sense that the court must first look; and these would include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction ... and the places where the parties respectively reside or carry on business.

¶ 44 On the basis of the evidence before me with respect to the scope and contents of the Federal Labour Law, the policy it seeks to implement, the differences between its provisions and the laws of this province and the significant disagreement in the evidence with respect to the proceedings before the Federal Board and the interpretation of its decision, as well as the other considerations I have mentioned, I have no doubt that, if the laws of Mexico constitute the proper law of the employment relationship, this is a factor to which considerable significance should be attributed for the purposes of this case.

(d) The Proper Law of the Employment Contract

¶ 45 The proper law of the employment contract will be that which the parties intended to govern it, if such an intention can be ascertained. In the absence of an express choice of the governing law, or one that can be inferred from the facts, the proper law is to be determined objectively by identifying the legal system with which the contract has the closest and most real connection: *Imperial Life Assurance Co. of Canada v. Colmenares*, [1967] S.C.R. 443.

¶ 46 A purely objective determination of the proper law in this case presents some difficulty. Facts such as the place of employment, the residence of the Plaintiff, the presence of the Defendant in Ontario throughout the period of the employment and the place where she initially accepted the offer of employment point to the law of Ontario. On the other hand, the head office of her employer was in Mexico, the administrative details connected with her employment were completed there, she was evidently supervised, she took directions and she was paid directly from head office, she was interviewed initially in Mexico and she signed the March agreement there. In my judgment these factors establish an important connection between the employment relationship and Mexico.

¶ 47 In view of the conflicts in the testimony of the witnesses whose affidavits form part of the record - affidavits on which, as I have already indicated, there has been no cross-examination - the determination of the proper law by reference to the intentions of the parties is also a task of some difficulty. Neither party requested a trial of this, or any other, issue.

¶ 48 I have no doubt that it was always the Defendant's intention that the employment relationship and the rights of the Plaintiff on its termination would be governed by Mexican laws. This is explicit in clauses 14 and 15 of the March agreement and, whether or not the agreement was valid, it sufficiently indicates the intention of the Defendant.

¶ 49 One of the witnesses has sworn that, during the discussions in Mexico near the end of 1993, the Plaintiff was told that she would be required to sign a formal employment contract pursuant to Mexican laws. The Plaintiff denies that any such communication took place. There is also a conflict between the testimony of the Plaintiff and that of another employee of the Defendant who was present when the Plaintiff signed the March agreement. The employee has sworn that the relevant meeting lasted between 1-1/2 and 1-3/4 hours, that a number of documents were signed by the Plaintiff after their purpose was explained, that the Plaintiff read the employment contract slowly and carefully, that she initialled every page and used her pocket calculator to check the remuneration figures, and that she wrote in the names of her children. The Plaintiff admits initialling every page and using her calculator but denies that she read the agreement slowly or carefully and claims that she was told that it was "a routine internal document which would not affect the terms and conditions of my employment".

¶ 50 In 1994, before the meeting in March, the Plaintiff had certainly been told that she would be asked to sign an appropriate written contract. Although she states that she understood the January 7, 1994 letter to be the intended contract, she also received a letter of February 22, 1994 - one week after her employment commenced - in which she was told that a written contract would be forwarded to her. As it turned out, she visited Mexico before this was done. As an

experienced executive who had held senior administrative positions in government and with financial institutions in Mexico, this was surely sufficient to put her on notice that the employment contract she was asked to sign at the Defendant's head office in Mexico in March was more than a mere administrative formality.

¶ 51 The Plaintiff has not sworn that she was unaware of the choice of Mexican law in the March agreement or that she read it and objected to it, or found it objectionable but remained silent because of the alleged economic duress to which she claims to have been subjected. Nor has she stated that, at the time she signed the letter of January 27 that she claims, in effect, finalized the terms of her employment contract, she assumed or intended that the laws of Ontario would govern her relationship with the Defendant. In all the circumstances - and making allowances for the conflicts in testimony - I am satisfied that she ought reasonably to have been aware that her employer, a Mexican bank with its head office and administrative offices in Mexico, intended the employment contract to be governed by the laws of that country and I find that it is more probable than not that she was so aware. She did not voice any objection to the express choice of Mexican law at any time before the commencement of these proceedings and I am satisfied that she accepted or, at least, acquiesced in it. Her subsequent attempt to enforce her rights under the Federal Labour Law is, at least, consistent with such acceptance.

¶ 52 The Plaintiff's position on the latter question appears to be that, even though she submits that the proper law is the law of Ontario, she is entitled as well to enforce rights given to the employees of Mexican corporations under the laws of Mexico. The precise basis on which the Federal Board exercises jurisdiction under those laws is not clear to me on the evidence filed but I am far from satisfied that it is not predicated on the existence of facts that, if proven, would point strongly to a conclusion that Mexican law is the proper law.

¶ 53 For the above reasons, I conclude that, whether or not the employment contract was constituted entirely by the exchange of correspondence, entirely by the March agreement or by the letters and the March agreement, the proper law was that of Mexico.

¶ 54 Putting on one side for the moment the juridical advantages that it is claimed the Plaintiff would have in proceedings in this jurisdiction, my conclusions with respect to the proper law and the effect of the express submission to the jurisdiction of the Federal Labour Board, together with the problems of language and translation and the residence of a number of the Defendant's witnesses in Mexico, point strongly, in my judgment, to Mexico, and not Ontario, as the appropriate forum. If clause 16 of the March agreement were to be disregarded, I would reach the same conclusion, although with less conviction, independently of the burden of proof on the Plaintiff.

(e) Juridical Advantages

¶ 55 Since the decision in *Amchem*, it is established that the existence of juridical advantages in one forum is simply one of the factors to be considered in applying the principle of *forum non conveniens*.

¶ 56 Counsel for the Plaintiff has identified two advantages that proceedings in Ontario would provide for the Plaintiff: she may be awarded damages for breach of an implied obligation to give notice of dismissal and punitive damages. It is said that neither remedy would be available to her in Mexico.

¶ 57 The existence of juridical advantages under the laws of Ontario is, of course, of no relevance unless such laws would be applicable if the action is permitted to continue. In consequence, in view of my finding that the law of Mexico is the proper law, counsel's submission has force only if the additional relief the Plaintiff might be awarded in this court includes matters that would be governed by the law of Ontario, as the *lex fori*, and not by the proper law. No authority was cited to me on this question. However, the availability of each of the remedies mentioned appears to me to raise a question that should be characterized as substantive rather than procedural. On that basis, the proper law - the law of Mexico - and not the law of Ontario should be applicable to these questions if a stay of the present proceedings is not granted.

¶ 58 Whether the Plaintiff is entitled to damages for breach of an implied obligation to give notice appears clearly to me to depend upon the nature and extent of her rights under the employment contract. This must surely be regarded as a substantive issue. Similarly, although questions confined to the measure or quantification of damages may be classified as procedural, the right to be awarded punitive damages would appear properly to be characterized as substantive. Punitive damages are not compensatory; they constitute a separate head of damages and the right to them is not, in my view, simply a matter of procedure. Even if that conclusion is wrong, I would not, on the basis of the record, regard the possibility that the Plaintiff might be awarded punitive damages in this court as sufficient to outweigh the factors that point to Mexico as the more appropriate jurisdiction in the circumstances of this case.

¶ 59 For the above reasons, the Defendant's motion for a stay is granted.

¶ 60 Out of an abundance of caution, I should add that neither my decision on this motion nor my reasons set out above should be considered to address the merits of the Plaintiff's claims against the Defendant under either the laws of Ontario, if they were applicable, or the laws of Mexico. On the evidence before me it would be difficult, and unwise, to attempt to decide many of the issues set out in dispute. In particular, I express no opinion on the validity of the March agreement and its effect, if any, on the rights of the Plaintiff other than as set out above. These rights are to be determined in Mexico in accordance with the laws of that jurisdiction including, if applicable, its rules of the conflict of laws. Whether the Federal Labour Board or a Mexican court could, and is inclined to, apply the laws of Ontario to provide additional relief for the Plaintiff, or to require additional consideration before the March agreement would be enforceable, is for it to decide.

¶ 61 If counsel wish to make submissions on costs, they should seek an appointment with me for that purpose before the end of March. Alternatively, if both counsel agree, they may make their submissions in writing within the same period.

CULLITY J.

