

Federal Court



Cour fédérale

Date: 20250813

Docket: T-666-24

Citation: 2025 FC 1373

Ottawa, Ontario, August 13, 2025

PRESENT: The Honourable Madam Justice Saint-Fleur

BETWEEN:

**ATLANTIC MERLIN SHIPPING LIMITED, a
body corporate, and ATLANTIC MERLIN
LIMITED PARTNERSHIP, limited partnership,
and ATLANTIC TOWING LIMITED, a body
corporate**

Plaintiffs

and

**AEGIR-MARINE AMERICAS LLC, a body
corporate, D.F. BARNES SERVICES LTD., a
body corporate**

Defendants

ORDER AND REASONS

I. Overview

[1] By a Notice of Motion filed on June 24, 2024, Aegir-Marine Americas LLC [Defendant], seeks to permanently stay Atlantic Merlin Shipping Limited, Atlantic Merlin Limited Partnership

and Atlantic Towing Limited [Plaintiffs]'s action against it pursuant to the *Federal Courts Rules*, SOR/98-106 [Rules].

[2] The Defendant requests that the Court exercise its discretion to stay the action pursuant to section 50 of the *Federal Courts Act*, RSC, 1985, c. F-7 where the parties have a valid forum selection clause, arguing that the Plaintiffs agreed to and/or the action is subject to an exclusive jurisdiction clause in favour of the courts of the Commonwealth of Virginia, USA.

[3] The motion is also brought to stay the third-party claim for contribution and indemnity brought by D.F. Barnes against Aegir because D.F. Barnes' claim is wholly derivative of the factual and legal circumstances as between Aegir and the Plaintiffs such that the forum selection clause applies also to D.F. Barnes, and because in any event the action is so closely related.

II. Background Facts

[4] The following factual background is taken from the pleadings filed by the parties and the affidavits filed in respect of the motion.

[5] The Plaintiff, Atlantic Merlin Shipping Limited [Atlantic], is the registered owner of the Atlantic Merlin, and the general partner of the co-Plaintiff Atlantic Merlin Limited Partnership. The third Plaintiff is Atlantic Towing Limited, a marine service provider and the vessel manager of the Atlantic Merlin. The Atlantic Merlin's port of registry is St. John's, Newfoundland and Labrador.

[6] The Plaintiffs commenced this action on March 28, 2024, against Aegir-Marine Americas LLC [Aegir], a Delaware company, and D.F. Barnes Services Ltd. [D.F. Barnes], a Newfoundland and Labrador company, alleging that the Defendants work caused the failure of a bow thruster on the vessel Atlantic Merlin. The Plaintiffs sought over \$3.9 million in damages.

[7] In April 2023, during operations in St. John's, the Atlantic Merlin suffered an oil leak from its No. 2 bow thruster. The Plaintiffs engaged Aegir on April 4, 2023, by purchase order, to supply and install new input shaft seals and liners on the Atlantic Merlin's bow thrusters.

[8] The Plaintiffs engaged D.F. Barnes on April 12, 2023, by purchase order, to assist Aegir with the installation work. The work was performed in St. John's.

[9] The Plaintiffs alleges that upon completion of the work, it became apparent that the bow thruster had not been fixed and that the bow thruster had sustained damage, and that the failures were caused by the Defendants' negligence and/or breach(es) of contract.

[10] D.F. Barnes defended the Plaintiffs' claim and brought a third-party claim against Aegir for contribution and indemnity.

[11] Aegir did not file a Statement of Defence and, instead, filed its motion for a stay of proceedings on June 24, 2024. In its motion, Aegir seeks an Order staying the Plaintiffs' action against Aegir and staying D.F. Barnes' third-party claim against it, relying on the forum selection clause in its "On-Site Maintenance & Repair Service Terms" and the Court's discretion

under section 50 of the *Federal Courts Act*. The Plaintiffs submit that they are not bound by these terms. As such, the forum selection clause is not applicable or enforceable, and this stay motion should be dismissed.

III. Issue and Legal Framework

[12] The issue on this motion is whether the Court should exercise its discretion pursuant to section 50 of the *Federal Courts Act* to stay the Plaintiffs' action and D.F. Barnes' third party claim.

Subsection 50(1) of the *Federal Courts Act*, RSC 1985 c F-7 allows the Court to stay the Plaintiffs' action and D.F. Barnes' third party claim against Aegir on the following terms:

50(1) The Federal Court of Appeal or the Federal Court may, in its discretion, stay proceedings in any cause or matter

(a) on the ground that the claim is being proceeded with in another court or jurisdiction; or

(b) where for any other reason it is in the interest of justice that the proceedings be stayed.

[13] In the case at bar, since there is no indication that a claim is being proceeded within another court or jurisdiction as required by section 50(1)(a), Aegir asks the Court to stay these proceedings for any other reason that is in the interest of justice under section 50(1)(b).

[14] The test for the enforcement of a jurisdiction clause pursuant to the exercise of discretion under s. 50(1) is set out by the Supreme Court of Canada in *ZI Pompey Industrie v ECU-Line NV*, 2003 SCC 27, [2003] 1 SCR 450 [*Z.I. Pompey*] at paragraph 39:

39 ... in the absence of applicable legislation, for instance s. 46(1) of the Marine Liability Act, the proper test for a stay of proceedings pursuant to s. 50 of the Federal Court Act to enforce a forum selection clause in a bill of lading remains as stated in *The “Eleftheria”*, which I restate in the following way. Once the court is satisfied that a validly concluded bill of lading otherwise binds the parties, the court must grant the stay unless the plaintiff can show sufficiently strong reasons to support the conclusion that it would not be reasonable or just in the circumstances to require the plaintiff to adhere to the terms of the clause. In exercising its discretion, the court should take into account all of the circumstances of the particular case.

[15] In *Douez v Facebook, Inc*, 2017 SCC 33 [*Douez*] at paragraphs 28-29, the Supreme Court majority confirmed a “two-step approach” to determine whether to enforce a forum selection clause and stay an action brought contrary to it.

[28] At the first step, the party seeking a stay based on the forum selection clause must establish that the clause is “valid, clear and enforceable and that it applies to the cause of action before the court” (*Preymann v. Ayus Technology Corp.*, 2012 BCCA 30, 32 B.C.L.R. (5th) 391, at para. 43; see also *Hudye Farms*, at para. 12, and *Pompey*, at para. 39). At this step of the analysis, the court applies the principles of contract law to determine the validity of the forum selection clause. As with any contract claim, the plaintiff may resist the enforceability of the contract by raising defences such as, for example, unconscionability, undue influence, and fraud.

[29] Once the party seeking the stay establishes the validity of the forum selection clause, the onus shifts to the plaintiff. At this second step of the test, the plaintiff must show strong reasons why the court should not enforce the forum selection clause and stay the action. In *Pompey*, this Court adopted the “strong cause” test from the English court’s decision in *The “Eleftheria”*, [1969] 1 Lloyd’s Rep. 237 (Adm. Div.). [...]

[16] In summary, Aegir must show the jurisdiction clause was part of a validly concluded contract. The first step of the discretionary exercise under section 50 is to establish that the

jurisdiction clause is valid, clear and enforceable, and that it applies to the cause of action before the Court. (*Z.I. Pompey* at para 39; *Douez* at para 28). If so, the Court must grant the stay unless the Plaintiffs’ show sufficiently “strong reasons” to support the conclusion that it would be unreasonable or unjust to require it to adhere to the jurisdiction clause.

IV. Analysis

A. *Parties’ submissions*

[17] Aegir argues the action and third-party claim should be stayed in recognition of the exclusive jurisdiction clause in favour of Virginia because the parties have agreed to an exclusive jurisdiction clause in favour of the courts of the Commonwealth of Virginia, USA as set out in the service contract with Atlantic.

[18] This forum selection clause is found in Aegir-Marine’s “On-Site Maintenance & Repair Service Terms.” According to Aegir, an exchange of emails between Aegir Sales Engineer, Aegir Service Manager sent to Chief Engineer of the M/V Atlantic Merlin were three documents: (1) Aegir-Marine Americas LLC – On-Site Maintenance & Repair Service Terms; (2) Service Rates 2023 – Propulsion Specialist; and (3) Service Estimate [Estimate]. The body of Aegir Service Manager’s email included the following statement: “Conditions: All our offers and orders are subject to the “General Terms and Conditions of AEGIR MARINE AMERICAS terms and conditions of sale” and to the “Aegir-Marine Service Rates 2023”, as attached. The final invoice will be based on the signed time sheets and the actual cost made.”

[19] Aegir submits that the penultimate paragraph of the Aegir-Marine Americas LLC – On-Site Maintenance & Repair Service Terms states: *“End-User expressly agrees that the laws of the Commonwealth of Virginia shall govern the validity, construction, interpretation and effect of these Terms, and of any Maintenance & Repair Services provided under the Terms. The competent courts of, or in the Commonwealth of Virginia shall have exclusive jurisdiction over the Parties in any action of law relating to the subject matter of the interpretation of the Terms.”*

[20] Aegir further indicates that the third bullet point under the heading “Terms and Conditions” on page 2 of the Estimate attached to their Aegir Service Manager email of March 30, 2023, also states: *“Solely applicable are the AEGIR-Marine Americas LLC 'On-Site Maintenance & Repair Service Terms' which is available on: <https://www.aegirmarine.com/en/on-site-maintenance-repair-service-north-america-and-caribbean>.”*

[21] In addition, Aegir points out that the second bullet point under the table on the Order Confirmation attached to their Aegir Service Manager email of April 10, 2023, states: *“Insofar you have been referring in previous documentation or communication to your general terms and conditions, we herewith explicitly reject the applicability thereof”* and that they have received no further terms from the Plaintiffs regarding terms and conditions.

[22] Aegir also submits that On April 10, 2023, they received an email from Mr. Hickey, from Supply Chain, J.D. Irving, Limited, attaching a Purchase Order and the Estimate to which Aegir

replied that same day in an email which included beside the order confirmation Aegir's Maintenance & Repair Service Terms. The body of email also the following conditions:

Conditions:

All our offers and orders are subject to the "General Terms and Conditions of AEGIR MARINE AMERICAS terms and conditions of sale" and to the "Aegir-Marine Service Rates 2023", as attached.

The final invoice will be based on the signed time sheets and the actual cost made.

[23] Aegir also points out that the hyperlink and web address in the Plaintiff's Purchase Order where the Plaintiff's terms and conditions are supposedly to be found does not exist. Clicking on the hyperlink or inputting the web address only redirects the user to J.D. Irving's homepage: <https://www.jdirving.com/>.

[24] Aegir alleges having always made it clear their terms apply to its services. Aegir believes considering the above that they therefore performed the services for the Vessel pursuant to a validly concluded contract governed by their terms and conditions conferring exclusive jurisdiction to the courts of Virginia, USA.

[25] The Plaintiffs submits that in order to work with them and be their service provider, Aegir completed a pre-qualification process in 2018, in which, it agreed to the terms and conditions of J.D. Irving, Limited [JDI]. This division supports procurement for the Plaintiffs. To be pre-qualified, Aegir had to acknowledge and accept that all future purchase orders would be governed by the JDI T&C. Article 17 of the JDI T&C is a governing law and jurisdiction clause:

17. Governing Law. The Contract is to be governed, both with respect to its construction and performance, by the laws of the Province of New Brunswick, Canada and the parties agree to submit to the exclusive jurisdiction of the courts of that Province. The parties expressly exclude the application of the *United Nations Convention on Contracts for the International Sale of Goods* and further exclude the application of the *International Sale of Goods Contracts Convention Act* (Canada) and the *International Sale of Goods Act* (New Brunswick).

[26] According to the Plaintiffs, there was no mutual agreement to adopt different terms or a different jurisdiction clause, nor to allow Aegir to unilaterally insert a jurisdiction clause of its own choosing. According to the Plaintiffs, no one from the Plaintiffs or JDI signed off on Aegir's On-Site Maintenance & Repair Service Terms or otherwise agreed to the Virginia Clause contained therein. Nor did Mr. Hickey, the person with whom Aegir was dealing, have the authority to do so.

[27] D.F. Barnes submits having relatively little to say about the first step of the Section 50 stay of proceedings test, other than that it does not oppose Atlantic's argument that Aegir fails to meet its burden at this first step of the Section 50 stay of proceedings test.

B. *No valid, clear, enforceable and applicable jurisdiction clause in favour of the courts of the Commonwealth of Virginia, USA*

[28] At the first step of the discretionary exercise of this Court, it is Aegir's onus to establish that the clause is valid, clear and enforceable, and that it applies to the cause of action before the Court. I respectfully agree with Atlantic and D.F. Barnes that Aegir fails to meet its burden at this first step of the Section 50 stay of proceedings test and has not proven that the clause conferring to the courts of Virginia is binding.

[29] The evidence demonstrates that Aegir’s terms, on their face, require the End-User, the Plaintiffs, to initial each page, and sign the last page, which was not done in this case. Clearly, the terms and conditions of the Aegir, including the jurisdiction clause conferring jurisdiction to the courts of Virginia, USA have been delivered to the Plaintiffs. However, they have not been signed, acknowledged, or otherwise accepted by them and this clause is not binding to them. (*Tywood Industries Ltd. v St. Anne-Nackawic Pulp & Paper Co.* (1979), 25 OR (2d) 89, 1979 CarswellOnt 792 (H Ct J) at paras 5-7, and 11.)

[30] Furthermore, I respectfully agree with the Plaintiffs that Aegir’s position ignores the fact that it had already agreed to the JDI T&C in February 2018, when it became a pre-qualified service provider. I find that the evidence demonstrates that the pre-qualification process set the general terms for the parties’ future work relations, meaning that there is no battle of the forms in this case. I don’t see that the Plaintiffs have accepted Aegir’s jurisdiction clause when engaged in the specific purchase order at bar in this case. I don’t see that there is a meeting of the minds between the Plaintiffs and Aegir on Virginia being the agreed-upon jurisdiction for resolving disputes between the parties.

V. Conclusion

[31] Considering the above, that Aegir has not proven that the jurisdiction clause favouring the courts in Virginia is binding, it is not necessary for the Court to consider the doctrine of *forum non conveniens* in the alternative and conduct the “strong cause” or “strong reasons” assessment.

VI. Costs

[32] Aegir is seeking the costs of this motion. Atlantic request a dismissal of Aegir's motion with costs.

[33] The Court has full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid, per Rule 400 of the *Rules*. As a general principle, the successful party is entitled to its costs (*Cozak v Canada (Attorney General)*, 2023 FC 1571 at para 30).

[34] Given that Atlantic has succeeded in obtaining the dismissal of Aegir's motion that it sought, the discretionary nature of costs and in considering the factors in Rule 400(3), I award costs in favour of Atlantic, which are fixed in the middle of Column III of Tariff B.

ORDER in T-666-24

THIS COURT'S ORDER is that:

1. Aegir's motion is dismissed.
2. All with costs in favour of Atlantic, which are fixed in the middle of Column III of Tariff B.

"L. Saint-Fleur"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKETS: T-666-24

STYLE OF CAUSE: ATLANTIC MERLIN SHIPPING LIMITED, ET AL. v
AEGIR-MARINE AMERICAS LLC, ET AL.

PLACE OF HEARING: VIDEOCONFERENCE

DATE OF HEARING: APRIL 30, 2025

JUDGMENT AND REASONS: SAINT-FLEUR J.

DATED: AUGUST 13, 2025

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