



Court of Appeal stays Ontario action in favour of the Iranian courts

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This past summer, Ontario's highest court made it clear that contracting parties who choose a particular nation's courts for the litigation of their disputes will almost always be held to their choice – even where that forum may not conform to the traditional Canadian concepts of democracy and fairness.

Writing on behalf of a unanimous appeal panel in *Crown Resources v. National Iranian Oil Co.*¹, Labrosse J.A. overturned the decision of Madam Justice Greer refusing to stay the Ontario action in favour of the courts of Iran; finding that the concerns raised by the plaintiffs regarding Iran and the Iranian courts were not sufficiently strong cause to excuse the parties from their contractual choice of forum.

In making the initial decision not to enforce the choice of forum clauses in favour of Iran², Greer J. cited evidence put forward by the plaintiffs indicating, among other things, that the Iranian Revolutionary Courts lacked the Ontario courts' level of independence, that two key witnesses for the plaintiffs feared for their lives if they returned to Iran, and that the plaintiffs' status as assignees of a trustee in bankruptcy's cause of action under s.38 of the *Bankruptcy Act* would prejudice them before the Iranian courts. This, in her view, constituted strong cause not to enforce the choice of forum clause in favour of the Iranian courts.

Labrosse J.A. disagreed, finding that the numerous factors cited by Greer J. were not sufficient to meet the "strong cause" test for not enforcing the choice of forum clause in the contract. He observed that the bankrupt company in whose interest the plaintiffs were suing under s.38 of the *Bankruptcy*

and Insolvency Act had chosen to do business in Iran and had been represented by experienced Iranian advisors in its dealings with the defendants. As such, it must be taken to have known of the risks of the foreign legal system adopted in the contract and to have accepted those risks when it signed the contract. The fact that it may be difficult or impractical for the plaintiffs to litigate their claim in Iran was not enough to warrant the court ignoring the choice of forum they freely made in their contract.

Interestingly, while the majority of the action was stayed, a portion of the action related to a different contract between the parties that chose Ontario as the forum to litigate any disputes. Consistent with its reasoning regarding the remainder of the action, the Court of Appeal held the parties to *that bargain* as well and allowed that portion of the action to proceed in Ontario.

This case illustrates the importance and significance of taking care when entering into a contract with a foreign party that contains a choice of forum or choice of law clause in favour of a foreign jurisdiction. The bottom line regarding almost all such clauses is the stated principle in this decision that "it is essential that courts give full weight to holding contracting parties to their agreements" and choice of forum clauses will almost always be enforced.

As such, it is important, *before agreeing to such a clause*, that a contracting party obtain sufficient information and advice to fully consider its implications. This includes consideration of whether the foreign jurisdiction's courts, procedures and laws are suitable and impartial and whether the

contracting party has the financial and physical ability to litigate disputes in the chosen foreign jurisdiction. If the foreign jurisdiction is not acceptable, and an alternate forum or dispute resolution mechanism (such as international arbitration) cannot be agreed upon, then a tough question has to be asked: Is the contract sufficiently important to warrant assuming the risk of being subject to the expense and inconvenience of litigating in an unfamiliar legal system before a court that may not have the same procedural and substantive protections afforded by courts in Ontario and elsewhere in Canada? It may be that, in many cases, the risk and cost of having to litigate contractual disputes abroad will outweigh the benefit of the contract itself.



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¹ *Crown Resources Corp. S.A. v. National Iranian Oil Co.*, [2006] O.J. No. 3345 (CA). Link to the decision on the Court of Appeal's website at: <http://www.ontariocourts.on.ca/decisions/2006/august/C44290.htm>

² Link to the original motion decision of Greer J. at: <http://www.canlii.org/on/cas/onsc/2005/2005onsc14586.html>