CITATION: Re: Essar Steel Algoma Inc. Et al, 2016 ONSC 595
COURT FILE NO.: 15-CV-0011169-00CL
DATE: 20160125

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ESSAR STEEL ALGOMA INC., ESSAR TECH ALGOMA INC., ALGOMA HOLDINGS B.V., ESSAR STEEL ALGOMA (ALBERTA) ULC, CANNELTON IRON ORE COMPANY, AND ESSAR STEEL ALGOMA INC. USA

BEFORE: Newbould J.

COUNSEL: *Eliot Kolers, Maria Konyukhova and Yannick Katirai*, for the Applicants

Andrew Kent, Markus Koehnen and Jeffery Levine, for the the Moving Parties The Cleveland-Cliffs Iron Company, Cliffs Mining Company and Northshore Mining Company ("Cliffs")

Derrick Tay, Clifton Prophet and Nicholas Kluge, for the Monitor

L. Joseph Latham and Bradley Whiffen, for the Ad Hoc Committee of Noteholders

Natalie E. Levine, for the Ad Hoc Committee of senior and junior secured Noteholders

Sarah-Anne Van Allen, for Wilmington Trust, National Association,

Evan Cobb, for the directors of the applicants

Andrea Lockhart, for Deutsche Bank

Ronald Carr, for Her Majesty the Queen in right of Ontario

HEARD: January 14, 2016

ENDORSEMENT

[1] The Cleveland-Cliffs Iron Company, Cliffs Mining Company and Northshore Mining Company (collectively "Cliffs") move to object to the jurisdiction of this Court to hear a motion brought by the applicants (together "Essar Algoma") for relief in connection with a supply contract under which Cliffs supplied Essar Algoma for a number of years with all of its iron ore pellets until Cliffs purported to terminate the contract on October 5, 2015, shortly before this CCAA proceeding was commenced. Cliffs submits in the alternative that Ontario is not the convenient forum in which to determine the dispute between Cliffs and Essar Algoma, and in the further alternative a ruling that a summary procedure for the determination of the dispute is inappropriate.

[2] For the reasons that follow, I have concluded that this Court does have jurisdiction over the claim of Essar Algoma against Cliffs and that Cliffs has not established that Ontario is not the convenient forum for the dispute. What the procedure will be to determine the dispute has not yet been settled.

Relevant history

[3] In 2001 Algoma Steel Inc. ("Old Algoma") began proceedings under the CCAA and eventually put forward and had approved a plan of compromise and arrangement. As part of its restructuring, Old Algoma divested itself of certain non-core assets, including its interest in a mine in Michigan (the "Tilden Mine") from which Old Algoma sourced its iron ore pellets. In January 2002 Old Algoma sold its interest in the Tilden Mine to Cliffs in consideration for an assumption by Cliffs of certain Old Algoma liabilities and future obligations in respect of the Tilden Mine and Old Algoma and Cliffs entering into a long-term supply agreement effective

January 31, 2002 (the "Cliffs Contract"). The Cliffs Contract has been amended a number of times. Essar Algoma succeeded to Old Algoma's rights and obligations under the Cliffs Contract in 2007. The Cliffs Contract is governed by Ohio law.

[4] The Cliffs Contract provides that Essar Algoma will source its long-term needs for iron ore pellets exclusively from Cliffs to 2016. As last amended by term sheet in 2013, the Cliffs Contract obliged Essar Algoma to purchase iron ore pellets exclusively from Cliffs until and including 2016. From 2017 to 2024 it obliged Essar Algoma to purchase a portion of its pellets each year from Cliffs. The Cliffs Contract provides that Essar Algoma is obliged in November of each year to provide to Cliffs its good faith estimate of its iron ore requirements (or nomination) for the next year. After Essar Algoma has set its nomination, it has certain rights to modify its nomination to increase or decrease its nomination within a specified range of percentages if it provides written notice to Cliffs by certain deadlines.

[5] The Cliffs Contract specifies: (a) a formula for calculating the price of iron ore pellets for the 2013 calendar year; (b) a price for the purchase and sale of iron ore pellets for the 2014 calendar year; (c) a formula for fixing the price of iron ore pellets in 2015 and 2016; and (d) a separate pricing formula for calendar years 2017 to 2024.

[6] Cliffs mines the iron ore in Michigan at its mines at the Tilden site and then processes and delivers iron ore pellets by rail to a dock in Michigan known as the Marquette dock or a railway yard in Michigan known as the Partridge rail yard, from which points Essar Algoma takes delivery. Essar Algoma then arranges delivery to Sault Ste. Marie by ship or train.

[7] There have been several disputes between Cliffs and Essar Algoma under the Cliffs Contract. The most recent and relevant of such disputes relates to the timing and volume of shipments of iron ore pellets from Cliffs to Essar Algoma beginning in late 2013. At the end of 2013, Essar Algoma advised Cliffs of its nomination for the 2014 calendar year. However, it soon became apparent that the 2013/2014 winter season was one of the coldest and longest in recent history. As a result, the Great Lakes thawed later than usual and the 2014 shipping season

was accordingly shortened and Essar Algoma determined that it would not be able to take and use all of the iron ore pellets that it had nominated for 2014. It met with Cliffs to discuss the situation.

[8] Whether an agreement was reached to reduce the 2014 shipments became contested, Cliffs saying there was no agreement and Essar Algoma saying there was. The number of tons to be taken by Essar Algoma in 2014 remained a question of debate when Essar Algoma nominated in October 2014 what it would take in 2015 and when it reduced its nomination in July 2015. Cliffs took the position that Essar Algoma had to take the entire tonnage that it had nominated in 2014. Essar Algoma took the position that there was an agreement to reduce the tonnage for 2014.

[9] On January 12, 2015, Cliffs filed a complaint in the United States District Court for the Northern District of Ohio (Eastern Division) (the "Ohio Court"). On August 31, 2015, Cliffs amended its complaint. In its Amended Complaint, Cliffs claimed, among other things, damages plus interest and costs for alleged breaches of the Cliffs Contract, including Essar Algoma's alleged failure to take timely delivery of iron ore pellets in the requisite amounts, and a declaratory judgment that Essar Algoma had materially breached the Cliffs Contract by failing to take delivery of or pay for the full amount of ore that it nominated it would require in 2013, 2014 and 2015 by the end of each calendar. Cliffs did not claim any order or direction permitting it to terminate the Cliffs Contract.

[10] In response to the Amended Complaint, Essar Algoma filed an Answer to Plaintiffs' Amended Complaint and Counterclaim on September 14, 2015, wherein it denied Cliffs' allegations and counterclaimed against Cliffs, seeking damages, including a claim for a long-term contract renewal credit payment payable to Essar Algoma pursuant to the Cliffs Contract and a claim for damages for alleged underreporting of moisture levels in pellets delivered by Cliffs.

[11] On July 31, 2015, Cliffs filed a motion for partial summary judgment, seeking judgment on its claim that Essar Algoma breached a contractual duty to take its 2014 nomination and to dismiss Essar Algoma's claim for damages related to Cliffs' underreporting of moisture levels to Algoma since 2010. The Cliffs motion was scheduled to be heard on October 6, 2015.

[12] On October 5, 2015 Cliffs purported to terminate the Cliffs Contract by letter which stated that as a result of multiple and material breaches and repudiation of the Cliffs Contract by Essar Algoma, Cliffs was treating the Cliffs Contract as terminated effective immediately. The termination came with no advance notice and within days of the next adjustment in price and at a time of year that Essar Algoma has historically begun building up inventory before the winter freeze.

[13] On October 7, 2015, Cliffs offered to resume supplying Essar Algoma on a "just in time basis" at a materially higher price than provided for in the Cliffs Contract. The next day Essar Algoma notified Cliffs that the proposed price was commercially unfeasible for it. On October 14, 2015 Cliffs proposed a slightly lower price to Essar Algoma that was still materially higher than the price Essar Algoma had been paying.

[14] The Cliffs summary judgment motion in the Ohio Court was heard on October 6, 2015. On the following day, Judge Nugent released his reasons. He granted Cliffs motion in part and denied it in part. He held that there had been no agreement reached in an exchange of emails in April 2014 regarding Essar Algoma's request to decrease its 2014 nomination and that Essar Algoma had thus failed to meet its annual requirements by a margin of at least 500,000 tons. He held however that there were issues as to whether Essar Algoma had given effective notice to reduce a further amount of tons for 2014, whether a force majeure clause gave Essar Algoma a defence to any liability for damages stemming from its alleged failure to meet its annual requirements nomination amounts for 2014, and whether any outstanding damages remained following any allowable off-sets for alleged over-billing caused by Cliffs' use of the 2014 pricing structure in its 2015 sales. In the result he dismissed Cliffs' motion for summary

judgment for breach of contract relating to Essar Algoma's 2014 nomination. He also granted Cliffs' motion to dismiss the counterclaim of Essar Algoma with respect to moisture content.

[15] On October 6, 2015, one day after Cliffs purported to terminate the Cliffs Contract, Essar Algoma moved in the Ohio Court for a temporary restraining order and a preliminary injunction requiring Cliffs to supply Essar Algoma with iron ore pellets. On October 15, 2015 Essar Algoma filed a notice of withdrawal of its motion. In the notice, Essar Algoma stated that it had obtained supply from another supplier that would provide it with supply for the next several weeks and that this supply removed the need for immediate injunctive relief.

[16] A trial for all of the issues in the Ohio litigation was scheduled for December 7, 2015. On October 30, 2015 Essar Algoma filed a motion to adjourn the trial, essentially on the grounds that too much work, particularly documentary production, the conducting of depositions and the production of expert reports, was required for the parties to be ready to start the trial as scheduled.

[17] This CCAA proceeding commenced on November 9, 2015 when the Initial Order was made. On November 10, 2015, Essar Algoma commenced ancillary insolvency proceedings under chapter 15 of the U.S. Bankruptcy Code in the U.S. Bankruptcy Court for the District of Delaware. On that day the foreign representative of Essar Algoma sought and obtained, among other things, orders recognizing and enforcing in the United States the orders granted in the CCAA proceeding which was recognized as a foreign main proceeding. The foreign representative of Essar Algoma also filed a complaint for a declaratory judgment against Cliffs and a motion for entry of an order compelling Cliffs to resume supplying iron ore pellets under the Cliffs Contract. Judge Shannon who heard the motions in Delaware was advised by counsel for the foreign representative that this motion was filed as a "placeholder" in the event that the Canadian Court declined to assume jurisdiction to hear Essar Algoma's motion for injunctive relief against Cliffs.

[18] On November 11, 2015 Essar Algoma filed with the Ohio Court a notice pursuant to 11 U.S.C. Section 362 that the Ohio action was automatically stayed as to the defendant Essar Algoma. On December 3, 2015 Judge Nugent of the Ohio Court on his own without argument dismissed the case without prejudice. The order stated that upon application, the action may be reinstated, if necessary, when the bankruptcy proceedings have concluded.

[19] On December 4, 2015 Cliffs moved in the Ohio Court for an order vacating the without prejudice dismissal of the action and instead placing the case on the suspense docket until the claim is resolved by the bankruptcy court. No decision on that motion has been rendered by Judge Nugent.

Relevant motions in the CCAA proceeding

[20] In mid-November 2015 Essar Algoma served a motion seeking a critical supplier order against Cliffs under section 11.4 of the CCAA. The motion was adjourned to December 3, 2015 and then ultimately not proceeded with. The explanation given by Essar Algoma is that following the filing of the motion, it was able to find alternative suppliers for the shorter term. It now has supply of pellets to the end of March. What is at issue on its motion is the right of Essar Algoma under Cliffs Contract to the end of 2024.

[21] On December 8, 2015 the applicants served a motion for an order (i) declaring that the CCAA proceedings are the correct forum for the determination of issues relating to the Cliffs Contract; (ii) declaring that the purported termination of the Cliffs Contract was not effective and that it remains in full force and effect and that Cliffs must supply iron ore pellets to Essar Algoma at the price payable under the Cliffs Contract; (iii) directing Cliffs to comply with its obligations under the Cliffs Contract, and (iv) directing Cliffs to pay damages resulting from its purported termination of the Cliffs Contract.

[22] On December 23, 2015 Cliffs delivered a notice of motion for an order (i) dismissing or staying the applicants' motion on the grounds that this Court does not have jurisdiction to grant the relief sought by Essar Algoma; (ii) in the alternative, an order staying the applicants' motion on the grounds that Ontario is not a convenient forum for the hearing of the applicants' motion and (iii) in the further alternative, an order dismissing the applicants' motion without prejudice to the applicants to seek the same relief in the form of an action. It is this motion that was heard on January 14, 2016.

Analysis

[23] Cliffs raises a number of issues, including (i) the lack of power to deal with this matter under the CCAA, (ii) a lack of jurisdiction to deal with the claim against Cliffs in Ontario, (iii) Ontario is *forum non conveniens* and (iv) the relief sought is inappropriate for a summary CCAA proceeding.

Jurisdiction under the CCAA

[24] Cliffs takes the position that there is no jurisdiction in the CCAA to grant the relief sought by Essar Algoma declaring the termination of the Cliffs Contract to be ineffective and requiring Cliffs to deliver iron ore pellets as required by that contract. It says that the Cliffs Contract was terminated before the CCAA proceedings were commenced and thus the powers of the Court given under the CCAA cannot be used in this case. It relies on *Re SNV Group Ltd*., 2001 BCSC 1644 in which Justice Pitfield refused to make an order under the CCAA ordering the repayment of money paid before the CCAA proceeding was brought that was said to have been in breach of an agreement that the debtor had with a third party. In that case, Pitfield J. stated:

> The capacity to stay, whether pursuant to section 11 or by virtue of the Court's inherent jurisdiction, applies to prospective proceedings. By its very nature, a proceeding that has been carried to completion cannot be stayed. An order to repay an amount obtained in contravention of a stay granted by the Court would be appropriate, but it is my opinion that the Court cannot rely on the CCAA or its inherent jurisdiction to compel repayment of an amount alleged to

> have been obtained in reliance upon a contract in a manner that would amount to adjudication of a claim. The CCAA is not intended to give the Court the capacity to undo transactions completed before the effective date of the initial or subsequent orders.

[25] Essar Algoma takes the position that Cliffs has misconstrued what Essar Algoma seeks. Rather, it says that it is requesting the Court to invoke its broad and inherent jurisdiction in exercising its territorial jurisdiction, retaining its territorial jurisdiction under the principles of *forum non conveniens*, and determining the appropriate procedures for the determination of the substantive issues in dispute between the parties. It is the consequent modification of Cliffs' procedural rights that Essar Algoma seeks under the CCAA which it says is routinely granted.

[26] I do not see the *SNV Group* case as being apposite. Essar Algoma is not asking the Court on its motion to declare the Cliffs Contract as operative because of some provision of the CCAA, which is what the situation was in *SNV Group*.

[27] The CCAA is skeletal in nature and does not contain a comprehensive code that lays out all that is permitted or barred. A court under the CCAA has both statutory authority granted under the CCAA and an inherent and equitable jurisdiction when supervising a reorganization. The most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the CCAA text before turning to inherent or equitable jurisdiction to anchor measures taken in a CCAA proceeding. See *Ted Leroy Trucking [Century Services] Ltd., Re*, [2010] 3 S.C.R. 379 at paras. 57, 64 and 65.

[28] The CCAA provides in section 11 that a court has jurisdiction to make any order "that it considers appropriate in the circumstances"[1]. A CCAA court clearly has the power as per

[1] The power in section 11 is "subject to the restrictions set out in this Act." Cliffs argued that an inference should be drawn that because Essar Algoma withdrew its critical supplier motion, an inference should be drawn that it did so because it could not comply with the critical supplier tests in section 11(4). Thus the failure to be able to comply with section 11(4) should be read as a restriction in the Act preventing the use of section 11 by the applicants. I decline to make such an inference and in any event do not think a failure to fall into the language of section 11(4) which provides that a court *may* make an order can be read to be a restriction under section 11. It is commonplace in CCAA proceedings to make orders requiring supply without invoking section 11(4).

Century Services to make the procedural orders of the kind sought by Essar Algoma in this case. See also *Smokey River Coal Ltd., Re,* (1999), 12 C.B.R. (4th) 94 (Alta. C.A.) at paras. 60 and 67 per Hunt J.A. in which he held that a judge has the discretion under the CCAA to permit issues to be decided in another forum (in that case arbitration) but is under no obligation to do so.

[29] The "single control" model also favours a CCAA court to deal with the issues between Essar Algoma and Cliffs. In *Eagle River International Ltd., Re* [2001] 3 S.C.R. 978 ["*Sam Lévy*"] Binnie J. referred to and adopted a "single control" model that favours litigation involving an insolvent company to be dealt with in one jurisdiction. He stated:

> **26** The trustees will often (and perhaps increasingly) have to deal with debtors and creditors residing in different parts of the country. They cannot do that efficiently, to borrow the phrase of Idington J. in *Stewart v. LePage* (1916), 53 S.C.R. 337, at p. 345, "if everyone is to be at liberty to interfere and pursue his own notions of his rights of litigation"...
>
> **27** Stewart was, as stated, a winding-up case, but the legislative policy in favour of "single control" applies as well to bankruptcy. There is the same public interest in the expeditious, efficient and economical clean-up of the aftermath of a financial collapse...

[30] *Sam Lévy* involved a BIA proceeding. In it, Binnie J. referred to *Stewart*, a winding-up application. I see no reason why the principles in *Sam Lévy* should not be applicable in a CCAA proceeding. In *Century Services* it was noted that the harmonization of insolvency law common to the BIA and CCAA is desirable to the extent possible. The central nature of insolvency and the resolution of issues caused by insolvency are common to both BIA and CCAA proceedings and so too should the underlying principles. See my comments in *Nortel Networks Corp., Re*, (2015), 23 C.B.R. (4th) 264 at para. 24.

[31] In this case Cliffs has sued in Ohio for damages claiming material breaches of the Cliffs Contract. It is thus a party that has claimed to be a creditor of Essar Algoma[2]. The single control model requires that its claim against Essar Algoma be dealt with in this CCAA proceeding. Essar Algoma claims in this Court a declaration that the Cliffs Contract has not been legally terminated. Cliffs says that the material breaches by Essar Algoma that it claimed in the Ohio litigation to have occurred permit it to terminate the Cliffs Contract. These issues are completely interwoven and it would make no sense to require Essar Algoma to litigate its claim against Cliffs in the United States[3] when Cliffs' claim against Essar Algoma must be dealt with in this Court in Ontario. The claim of Essar Algoma against Cliffs is an asset of the applicants to be dealt with in this Court.

[32] In *Montréal, Maine & Atlantic Canada Co. Re,* 2013 QCCS 5194, a CCAA proceeding arising out of the Lac-Mégantic rail disaster, it was held that a claim by the debtor against its American insurer under a policy governed by Maine law with a forum selection clause in favour of Maine was an asset of the debtor and should be dealt with in Quebec. Dumas J.C.S. referred to the single control model for insolvencies and stated:

> In the present case, we deal with the contrary. It concerns a bankrupt's claim (via the trustee) against its insurance company. Without a shadow of a doubt, this is an asset of the debtor over which the Bankruptcy Court has jurisdiction.[4]

[33] For the single control model to apply, the third-party, in this case Cliffs, must not be a stranger to the insolvency proceedings. Cliffs has raised significant damage claims against Essar Algoma and seeks to have those claims remain alive and dealt with in Ohio. Its purported

[2] At the request of Cliffs, the claims procedure order signed on January 14, 2016 in this CCAA proceeding by agreement did not cover Cliffs' claims and the procedure to govern those claims is to await the determination of this motion.

[3] It would be up to the Delaware Bankruptcy Court to determine if the claim should proceed in that Court or in the Ohio District Court.

[4] Although Justice Dumas referred to a trustee and the Bankruptcy Court, the case was a CCAA case and the MME was not a bankrupt.

termination of the Cliffs Contract was an important factor that led to Essar Algoma filing for protection under the CCAA. Cliffs is not a stranger to these proceedings.

Jurisdiction *simpliciter*

[34] Jurisdiction must be established primarily on the basis of objective factors that connect the legal situation or the subject matter of the litigation with the forum. See *Van Breda v Village Resorts Ltd.*, 2012 SCC 17 at para. 82 per LeBel J. See also para. 79 in which LeBel J. referred to the link between the subject matter of the litigation and the defendant to the forum.

[35] To establish jurisdiction *simpliciter*, a plaintiff need only establish that there is a good arguable case for assuming jurisdiction. See *Ontario (Attorney General) v. Rothmans Inc.*, 2013 ONCA 353 at para. 54, 110, 118-19. The phrase a "good arguable case" is not a high threshold and means no more than a "serious question to be tried" or a "genuine issue" or that the case has "some chance of success". See *Tucows.com Co. v. Lojas Renner S.A.*, 2011 ONCA 548 at para. 36.

[36] It is for the plaintiff to establish that there is a presumptive connecting factor to the forum. If the plaintiff establishes that, the defendant has the burden of rebuttal and 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. See *Van Breda* at paras. 95 and 100.

[37] Apart from this test of the connection between the subject matter of the litigation and the forum, traditional tests for basing jurisdiction continue to exist. See *Van Breda* at para. 79 in which LeBel J. stated:

> 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.

[38] The subject matter of the dispute is whether the Cliffs Contract has been breached and by whom. Cliffs claims Essar Algoma has materially breached provisions of the contract, which if proven, would be grounds to terminate it under Ohio law. Essar Algoma claims that Cliffs had no basis to terminate the contract. Counsel for Cliffs in argument contended that the subject matter of the dispute is a request for specific performance of the contract in Ohio where the ore is mined and delivered to Essar Algoma. I do not agree with that contention. The subject matter of the dispute is the Cliffs Contract and who breached it. While the relief sought by Essar Algoma includes mandatory injunctive relief, that does not make that prayer for relief the subject matter of the dispute. LeBel J. in *Van Breda* stated that it was the legal situation or the subject matter of the litigation that must be connected to the forum. The legal situation is the contention that the Cliffs Contract has been breached and by whom.

[39] Rule 17.02 provides a guide to what may be a presumptive factor. LeBel J. stated:

> **83** At this stage, I will briefly discuss certain connections that the courts could use as presumptive connecting factors. Like the Court of Appeal, I will begin with a number of factors drawn from rule 17.02 of the Ontario Rules of Civil Procedure. These factors relate to situations in which service *ex juris* is allowed, and they were not adopted as conflicts rules. Nevertheless, they represent an expression of wisdom and experience drawn from the life of the law. Several of them are based on objective facts that may also indicate when courts can properly assume jurisdiction…Thus they offer guidance for the development of this area of private international law.

[40] Rule 17.02 refers to the following in dealing with contract claims:

> **17.02** A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims,
>
> (f) in respect of a contract where,
>
> (i) the contract was made in Ontario,…

[41] Essar Algoma takes the position that the Cliffs Contract was made in Ontario.

[42] The genesis of the Cliffs Contract was the 2001 CCAA proceeding of Old Algoma. As part of that restructuring, Old Algoma sold Cliffs its interest in the Tilden Mine and concurrently entered into the Cliffs Contract. Old Algoma's restructuring, including the Cliffs Contract, required the approval of the CCAA court which was given by order of Chief Justice LeSage of this Court in 2002.

[43] There are traditional rules governing where a contract is made. The general rule of contract law is that a contract is made in the location where the offeror receives notification of the offeree's acceptance. See *Eastern Power Ltd. v. Azienda Communale Energia and Ambiente* (1999), 50 B.L.R. (2d) 33 at para. 22 per MacPherson J.A. When acceptance of a contract is transmitted electronically and instantaneously, the contract is usually considered to be made in the jurisdiction where the acceptance is received. See *Trillium Motor World Ltd. v. General Motors of Canada Ltd*, 2014 ONCA 497 at para. 66 per Lauwers J.A. There is an exception to this rule which is the postal acceptance rule that when contracts are to be concluded by post the place of mailing the acceptance is to be treated as the place where the contract was made. See *Eastern Power* at para. 22.

[44] There is no provision in the Cliffs Contract or any of its amendments that would give rise to the postal acceptance rule. Thus the traditional rule that a contract is made in the location where the offeror receives notification of the offeree's acceptance would apply. The evidence as to how the original Cliffs Contract or its amendments was concluded is somewhat unclear but unlikely to get better. Mr. Mee of Cliffs in his affidavit stated:

> I no longer have a specific recollection of where the Agreement and each of its amendments was negotiated or signed. My general recollection is that Essar would sign amendments first and that Cliffs would sign them in Cleveland, Ohio after they had been signed by Essar. I have looked back in my calendar for face to face meetings with Essar in which I participated since 2002. I found a total of 50 meetings 20 of which were in Canada and 30 of which were in the United States.

[45] Neither the original Cliffs Contract nor the amendments provide that the contract or amendments becomes binding when signed without delivery. The original Cliffs Contract states

in the first recital that "concurrently with the execution and delivery of this Agreement [the parties] are entering into that Purchase and Sale Agreement in which [Cliffs is acquiring the interest of Algoma in the Tilden Mine Company]" (Underlining added). This language would indicate that the parties expected delivery of the contract to the other to be required for it to be binding.

[46] Therefore if the evidence of Mr. Mee of Cliffs is accepted, it would mean that Essar Algoma generally signed the contract and amendments first, then sent them to Cliffs in Cleveland who then signed them and then sent them back to Essar Algoma. That would mean that the contract was formed when Essar Algoma received notice from Cliffs in Ontario of the acceptance of its offer.

[47] There is no date of execution on the original Cliffs Contract effective January 31, 2002 or many of the amendments. There are exceptions. The second amendment was signed and dated by Algoma three days after it was signed by Cliffs. The third amendment was signed and dated by Algoma one day before it was signed by Cliffs. Some were signed the same day. The final amendment that extended the term to 2014 that was produced by Cliffs has an execution date by Essar Algoma of June 7, 2013 and no execution by Cliffs.

[48] Based on the evidence led by Cliffs, I find that based on the traditional rules governing where a contract is made, Essar Algoma has at least an arguable case, and likely a stronger case than that, that the Cliffs Contract and its amendments generally were contracts made in Ontario.

[49] Beyond this, the fact that the original Cliffs Contract became effective only when approved in Ontario by Justice LeSage under the CCAA is a strong indicator that there is a strong and substantial connection of the Cliffs Contract to Ontario. In *Trillium* Lauwers J.A. referred to Professor Waddams and consideration whether the traditional rules in determining the place of contract are appropriate for jurisdictional cases. He stated:

> **70** Should the traditional rules for determining the place of the contract be determinative in applying the fourth PCF [presumptive connecting factor]?

> This is perhaps an issue for another case, but I agree with the observation of Professor Waddams, at paras. 108-109, that the arbitrary common law rules for determining the place of a contract may not always be apposite in jurisdictional cases. The traditional contract placement rules respond to concerns that are different from those engaged by a jurisdictional analysis. A broader, more contextual analysis is required, which would inevitably engage the same considerations as the real and substantial connection test itself.

[50] One may ask why a technical rule as to where an e-mail or fax was sent or received should determine the local of an international piece of litigation. The fact that the Cliffs Contract had its genesis in an Ontario CCAA process and required the approval of the CCAA court in Ontario appears to me to be at least as much a factor in holding that the contract is an Ontario contract as the factor of who sent or received confirmation of the terms of the contract. Often, and in this case, contract terms or amendments are discussed and agreed orally over the phone or in meetings and then papered afterwards.

[51] I conclude and find that Essar Algoma has established a presumptive connecting factor to Ontario for its claim under the Cliffs Contract to Ontario on the basis that the contract was made in Ontario.

[52] Essar Algoma also says that Cliffs has operated its business in Ontario and on that basis Ontario has jurisdiction to hear the Essar Algoma request for relief against Cliffs. As stated in para. 79 of *Van Breda*, a defendant's presence in the jurisdiction is a traditional basis for a court having jurisdiction. LeBel J. also stated that carrying on business in a jurisdiction could be an appropriate connecting factor. He stated:

> **87** Carrying on business in the jurisdiction may also be considered an appropriate connecting factor. But considering it to be one may raise more difficult issues. Resolving those issues may require some caution in order to avoid creating what would amount to forms of universal jurisdiction in respect of tort claims arising out of certain categories of business or commercial activity. Active advertising in the jurisdiction or, for example, the fact that a Web site can be accessed from the jurisdiction would not suffice to establish that the defendant is carrying on business there. The notion of carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there or regularly visiting the

> territory of the particular jurisdiction. But the Court has not been asked in this appeal to decide whether and, if so, when e-trade in the jurisdiction would amount to a presence in the jurisdiction. With these reservations, "carrying on business" within the meaning of rule 17.02(p) may be an appropriate connecting factor. (Underlining added)

[53] Rule 17.02(p) provides:

> 17.02 A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims,
>
> (p) against a person ordinarily resident or carrying on business in Ontario;

[54] The three Cliffs corporations that are a party to the Cliffs Contract are The Cleveland-Cliffs Iron Company, an Ohio corporation with its principal place of business in Cleveland, Cliffs Mining Company, a Delaware corporation with its principal place of business in Cleveland and Northshore Mining Company, a Delaware corporation with its principal palce of business in Silver Bay, Minnesota. They are each wholly-owned subsidiaries of Cliffs Natural Resources Inc. which is an international mining and natural resources company and publicly traded in the United States and until 2014 owned a mining project in the “Ring of Fire” region of Ontario.

[55] Under the Cliffs Contract, Cliffs mined the iron ore in Michigan, refined the ore into iron ore concentrate in Michigan, processed the iron ore concentrate into iron ore pellets in Michigan and delivered the iron ore pellets to Essar in Michigan. Cliffs asserts that it has not carried on any business in Canada and has no presence here. However, the fact that all of the mining and delivery took place in Michigan does not by itself mean that it did not carry on business in Canada.

[56] Essar Algoma relies on the fact that during the course of the Cliffs Contract representatives of Cliffs have continuously dealt with Essar Algoma or its predecessor Old Algoma in Sault Ste. Marie in Ontario. Mr. Mee of Cliffs stated that he himself had visited Canada 20 times in connection with the Cliffs Contract. Essar Algoma and its predecessor Old

Algoma has been a significant customer of Cliffs. Mr. Marwah of Essar Algoma stated in his affidavit that representatives of Cliffs visit Sault Ste. Marie and representatives of Essar Algoma visit Cleveland in alternating years, during which visits they discuss the status of the Cliffs Contract and ongoing issues relating to their business relationship. Representatives of Cliffs review Essar Algoma's operations and stockpiles of iron ore pellets when they visit Sault Ste. Marie. The most recent visit by Cliffs' personnel was on September 18, 2015 shortly before Cliffs purported to terminate the Cliffs Contract. Prior to that, representatives of Cliffs, including sales, operational, safety and quality personnel visited Essar Algoma in Sault Ste. Marie in October 2014 and August 2013. All of these visits fall within LeBel J.'s statement in *Van Breda* that "regularly visiting the jurisdiction" can constitute carrying on business in the jurisdiction.

[57] Cliffs has previously appeared in the Ontario Superior Court of Justice in connection with the Cliffs Contract. In 2010 after Cliffs purported to terminate the Cliffs Contract after a pricing dispute, Essar Algoma applied for and obtained interim injunctive relief. Cliffs appeared on the application and did not oppose the jurisdiction of the Court to hear the relief. Rather it opposed the injunction on the merits. Cliffs complied with the terms of the injunction.

[58] I conclude and find that Essar Algoma has established a presumptive connecting factor to Ontario for its claim under the Cliffs Contract to Ontario on the basis that Cliffs has carried on business in Ontario.

[59] Cliffs has the burden of rebuttal and must establish facts which demonstrate that the presumptive connecting factors in this case do 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. I do not think Cliffs has met that burden. The relationship between the Cliffs Contract and Ontario is not weak and the visits and meetings by Cliffs personnel in Sault Ste. Marie were not for trivial purposes. They were regular visits to meet with an important customer.

[60] Accordingly I find that this Court has jurisdiction over the claim of Essar Algoma against Cliffs.

Forum non conveniens

[61] The party raising *forum non conveniens* has the burden of showing that the alternative forum is clearly more appropriate. The use of the word "clearly" 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. See *Van Breda* at paras. 108 and 109.

[62] The factors to be considered are numerous and variable. See *Breeden v. Black*, [2012] 1 S.C.R. 666 at para. 23. In *Van Breda*, at para. 5 LeBel J. provided a non-exhaustive list of factors that could play a role. Cliffs relies on a number of these factors as supporting Ohio as the more convenient forum.

[63] Before going through these factors, there is an issue as to whether Ohio is the alternative jurisdiction. Essar Algoma says the alternative jurisdiction is Delaware in which the chapter 15 proceedings are taking place. I hesitate to get into that issue and will assume that the alternative forum is the Ohio District Court. That is certainly the view of the expert witness Allan L. Gropper relied on by Cliffs.

(i) The cost of transferring the case or of declining the stay

[64] Cliffs says it will result in substantial additional cost and delay to litigate the issues in Ontario. It says that both parties have teams of lawyers in Ohio who are intimately familiar with the case, the relevant documents, witnesses and issues. Cliffs had spent approximately U.S. $1 million on the Ohio litigation before it was dismissed. Essar Algoma has stated that it has a team of 12 attorneys who have spent more than 5,000 hours reviewing documents in the Ohio

litigation and that its attorneys have reviewed more than 43,000 documents that Cliffs has produced.

[65] Cliffs is concerned that if the matter is litigated in Ontario, both sides will have to educate Ontario lawyers about all of this. At one time, that would have been a major concern. However it is now possible and becoming commonplace in cross-border litigation for American lawyers to appear in an Ontario court, and *vice versa*. The recent Nortel trial was a perfect example of that in which on many days there were 10 to 20 U.S. lawyers in Toronto attending the trial.

[66] Cliffs also says that as the Cliffs Contract is governed by Ohio law, there would be the added expense of proving Ohio law. That appears to me to be a minor expense. Essar Algoma has already provided an affidavit of an expert on Ohio law, which Cliffs accepted at least on one point during argument. An affidavit on Ohio contract law could not be relatively expensive in comparison to what has already been expended. Cliffs has also provided a copy of Ohio jury instructions for a civil breach of contract case. The concepts seem virtually identical to Ontario concepts.

[67] This factor is essentially a neutral one.

(ii) The impact of a transfer on the conduct of the litigation or on related parallel proceedings

[68] Cliffs says having an Ontario court hear the dispute would deprive it of an Ohio judge who is familiar with the issues. Judge Nugent is certainly far more familiar with the issues than an Ontario judge would be. However an Ontario judge, like any other judge hearing a trial or proceeding, is used to coming in cold and picking it up quickly.

[69] Judge Nugent has not ruled on whether the Cliffs Contract can be terminated or on whether there were breaches of the contract by Essar Algoma that could be considered material breaches. He merely found on the summary judgment motion, that he dismissed, that there was no legally enforceable agreement between the parties to reduce the 2014 annual nomination to

3.3 million tons and that Essar Algoma therefore failed to meet its annual requirements by a margin of at least 500,000 tons. He did not deal with other defences that Essar Algoma was asserting and stated that he could not conclude that there was a breach entitling Cliffs to damages. Cliffs did not claim any declaration that it had a right to terminate the Cliffs Contract. Cliffs says that if it can prove that there were material breaches, it would have the right to terminate the Cliffs Contract. These are issues yet to be dealt with.

[70] So far as the timing of any trial or other proceeding is concerned, there is no evidence that the Ohio District Court would be in a better position to hear the case sooner than in this Court. Cliffs says it is ready to proceed to trial. Essar Algoma has said it needs more discovery. Both Cliffs and Essar Algoma say they want the matter determined as quickly as possible.

[71] Whatever the situation, this Court can accommodate the parties quickly. The situation for Essar Algoma is critical, and the Monitor has stated in its sixth report that in developing and carrying out the SISP, which has tight timelines, Algoma needs certainty concerning the status of the Cliffs Contract and an expedited determination of the rights of the parties is linked to the development of the SISP. Whether those rights can be determined that quickly may be a question mark, but this Court is in at least as good a position as the Ohio court to deal with the issues quickly.

[72] I see this factor as neutral or at best perhaps slightly favouring Cliffs.

(iii) The possibility of conflicting judgments

[73] I do not see this as an issue. In argument, Essar Algoma acknowledged that it is bound by the finding made by Judge Nugent, to which I have already referred. It could hardly say otherwise, given the principle of *res judicata*. All other issues remain open.

(iv) Location of evidence

[74] Cliffs says it will have to call evidence of witnesses in the U.S. regarding its advance planning and why Essar Algoma's actions were a problem to Cliffs. These witnesses would come from Cleveland.

[75] However, Essar Algoma's witnesses are from Sault Ste. Marie. There is no evidence how many from each side will need to be called. It is a shorter trip from Cleveland to Toronto than from Sault Ste. Marie to Toronto, whether by air or car. In this day of international contracts, particularly between parties near the Canadian border, I do not see this factor as compelling. It is a neutral factor.

(v) Applicable law

[76] Ohio law governs the Cliffs Contract. Cliffs says there is a risk an Ontario court will apply Ohio law incorrectly. I suppose it can be said that an Ohio judge would also apply it incorrectly. This might be a material factor if the law in question was markedly different from Ontario law with concepts unknown to Ontario law. It is clear from the record however that this is not the case. It was acknowledged in argument that Ohio law is not substantially different from Ontario law regarding material breach.

[77] Cliffs cites the standard jury instructions in Ohio which defines material breach as follows:

> "Material breach" by plaintiff means a breach that violates a term essential to the purpose of the contract. Mere nominal, trifling, slight or technical departures from the contract terms are not material breaches so long as they occur in good faith.

[78] The jury instructions go on to say that some Ohio courts have utilized the following five factors listed in the Restatement of the Law, (2d) Contracts (1981) in deciding whether a breach is material:

> (i) The extent to which the injured party will be deprived of the benefit which he reasonably expected;
>
> (ii) The extent to which the injured party can be adequately compensated for the part of the benefit of which he will be deprived;
>
> (iii) The extent to which the party failing to perform or to offer to perform will suffer forfeiture;
>
> (iv) The likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
>
> (v) The extent to which the behaviour of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.
>
> (vi) The extent to which the behaviour of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

[79] Cliffs argues that the determination of whether a party failed to comport with standards of good faith and fair dealing is an inherently local reflection of local commercial mores and that the nature of an Ontario court's determination of standards of good faith and fair dealing would inevitably reflect Ontario values and standards rather than Ohio values and standards. I find this argument a stretch. There is no suggestion in the evidence that the values in Cleveland on such an issue would be different from the values in Sault Ste. Marie. In any event, there is nothing in the Ohio law that says that in a case involving parties undertaking a contract in Cleveland and Sault Ste. Marie, it is the Cleveland values rather than the Sault Ste. Marie values that are to be considered.

[80] Ontario courts can and do often apply foreign law. In this case I do not consider the fact that the law to be applied is Ohio law much of a factor, if any.

(vi) Recognition and enforcement of an Ontario judgment

[81] Cliffs takes the position that there is no jurisdiction in this Court to deal with the Essar Algoma claim against Cliffs because an injunction should not be ordered against a U.S. resident such as Cliffs that could not be enforced.

[82] This argument assumes that Cliffs would ignore a decision of an Ontario court. Whether that is so is a question. Cliffs complied with an injunction ordered in Ontario in 2010 after it purported to terminate the Cliffs Contract. Cliffs has requested alternative relief if this Court assumes jurisdiction requiring a statement of claim to be delivered by Essar Algoma, which is some indication that it intends to appear and deal with the issue if it is to be dealt with in Ontario. If it does there could be no issue of Ontario having jurisdiction that would not be recognized by a U.S. Court as Cliffs would have attorned to the jurisdiction.

[83] Cliffs relies on a passage from Sharpe, *Injunctions and Specific Performance*, (loose-leaf ed. November 2015 Toronto: Canada Law Book), ¶1.1220 that refers to a reluctance of courts to make an order that cannot be enforced, as follows:

> Claims for injunctions against foreign parties present jurisdictional constraints which are not encountered in the case of claims for money judgments. In the case of a money claim, the courts need not limit assumed jurisdiction to cases where enforceability is ensured. Equity, however, acts *in personam* and the effectiveness of an equitable decree depends upon the control which may be exercised over the person of the defendant. If the defendant is physically present, it will be possible to require him or her to do, or permit, acts outside the jurisdiction. The courts have, however, conscientiously avoided making orders which cannot be enforced. The result is that the courts are reluctant to grant injunctions against parties not within the jurisdiction and the practical import of rules permitting service *ex juris* in respect of injunction claims is necessarily limited. Rules of court are typically limited to cases where it is sought to restrain the defendant from doing anything within the jurisdiction. As a practical matter the defendant "who is doing anything within the jurisdiction" will usually be physically present within the jurisdiction to allow ordinary service.

[84] I have not been provided with any case however involving cross-border insolvencies in which orders in proceedings under the CCAA cannot be enforced in the United States in chapter 15 proceedings under the U.S. Bankruptcy Code or that deal with evidence as in this case regarding the enforceability of a non-monetary judgment in the United States.

[85] Cliffs relies on an opinion of Allan L. Gropper, a highly regarded federal bankruptcy judge for the Southern District of New York from 2000 to 2015. In that opinion, Mr. Gropper

stated that United States courts have the greatest respect for the orders and judgments of courts of other nations, particularly those of Canada and judgments for money are ordinarily enforced. He stated that while non-monetary judgments are less regularly enforced, in appropriate circumstances they may be enforced under the common law principle of comity. However, in order for a foreign order or judgment to be enforced, the foreign court must have personal jurisdiction over the defendant.[5]

[86] I could hardly quarrel with an opinion on these matters by someone as eminent as Mr. Gropper. However, Mr. Gropper was instructed to assume that Cliffs does not carry on business in Canada, and that assumption is critical to his analysis. That assumption cannot stand in light of the findings that I have made regarding Cliffs carrying on business in Ontario. While Mr. Gropper opines that a U.S. court must scrutinize the basis on which a foreign court asserts jurisdiction over a defendant, and in light of international concepts of jurisdiction to adjudicate, there is no discussion of this issue if the foreign court such as this Court has found that the defendant has carried on business in Ontario under a contract made in Ontario.

[87] Essar Algoma relies on an opinion of Ronald A. Brand, a professor of law at the University of Pittsburgh and highly qualified in the area of the recognition of foreign judgments. Professor Brand's opinion is that the fact that a Canadian judgment provides relief in the form of (a) a declaratory order concerning the rights and obligations of parties under and the status of a contract, and/or (b) specific performance of contractual obligations, would not prevent the recognition and enforcement of that judgment in a court in the United States. Recognition is based on the principle of comity and derives from a U.S. case of *Hilton v. Guyot*, 159 U.S. 113

[5] Mr. Gropper went on in his opinion to give his view ("it is submitted…") that a U.S. Court would not find that Cliffs has submitted to the jurisdiction of the Canadian courts. I have serious doubts as to whether an expert in foreign law should go beyond stating what the foreign law is and give an opinion on what the foreign court would do in a particular case. See my comments in *Nortel Networks Corp. (Re)* (2014), 20 C.B.R. (6th) 171 at paras. 103-104. In any event, his opinion was based on the assumption that Cliffs did not carry on business in Canada.

(1895). Professor Brand says that the principles of comity discussed in that case have made the U.S. one of the most liberal countries in the world in recognizing foreign judgments.

[88] Cliffs relies on an opinion of Richard B. McQuade Jr., as U.S. District Court judge from 1986 to 1989 and before that an Ohio Common Pleas Court judge from 1978. Since 1998 he has served as a judge by assignment in both federal and Ohio states courts. His opinion is that an Ohio, Minnesota or Michigan court would not enforce an order of an Ontario court in the nature of specific performance. I must say that I prefer the opinion of Professor Brand for the reasons given by Professor Brand and his impressive credentials on the subject, credentials that I believe to be superior to those of Mr. McQuade.

[89] Mr. McQuade states in his opinion that recognition of foreign judgments is based upon general principles of comity. He then goes on to state that the Uniform Foreign-Money Judgments Recognition Act that has been adopted in many states, including Ohio, Michigan and Minnesota, restricts the enforcement of foreign judgments to the recovery of money only. This, however, is not the whole picture. As Professor Brand points out, those state statutes are limited in scope to the recognition of foreign money judgments, but they all include a "savings clause" which specifically acknowledges that judgments other than money judgments may be recognized by applying traditional concepts of comity.

[90] Mr. McQuade in his opinion stated that courts that adopted the Uniform Act have consistently denied enforcement to non-monetary judgments, and he cited one case *Sea Search Armada v. Republic of Columbia*, 821 F. Supp. 2d 268 as authority for that proposition. However, as explained by Professor Brand, that decision dealt with a version of the Uniform Foreign Money-Judgments Recognition Act that was in effect in Washington D.C. in 2011 that did not contain the savings clause that other states including Ohio, Michigan and Minnesota had adopted. A Washington D.C. statute was later passed in 2011 after the decision to expressly preserve the D.C. courts' discretion to recognize foreign non-money judgments under principles of comity or otherwise. Curiously, Mr. McQuade in a footnote to his opinion stated that a U.S. court may provide injunctive relief to enforce a foreign judgment it has recognized and that a

U.S. court in doing so may take into account a number of factors typically taken into account in ordering injunctive relief. That footnote was contrary to his opinion stated in the body of his affidavit.[6]

[91] There is also the issue as to what a U.S. court would consider in recognizing an injunctive order from this Court. In a recent article in 2014 by Judge Martin Glenn of the United States Bankruptcy Court for the Southern District of New York, Judge Glenn commented on the practice of comity between the U.S. and Canada. He stated:

> In *Hilton v. Guyot*, the Supreme Court held that if the foreign forum provides "a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it is sitting," the judgment should be enforced and not "tried afresh." *Hilton*, 159 U.S. at 202–03. "[W]hen the foreign proceeding is in a sister common law jurisdiction with procedures akin to our own, comity should be extended with less hesitation, there being fewer concerns over the procedural safeguards employed in those foreign proceedings." *In re Bd. of Dirs. of Hopewell Int'l. Ins. Ltd., Inc.,* 238 B.R. 25, 66 (Bankr. S.D.N.Y. 1999), *aff'd,* 238 B.R. 699 (S.D.N.Y. 2002) (internal quotation marks and citations omitted). For example, the U.S. and Canada share the same common law traditions and fundamental principles of law. Canadian courts afford creditors a full and fair opportunity to be heard in a manner consistent with standards of U.S. due process. U.S. federal courts have repeatedly granted comity to Canadian proceedings.

[92] Judge Glenn also referred to a reluctance to second guess a decision of a foreign court in taking jurisdiction if the defendant appeared in the foreign court to challenge its jurisdiction and failed to prevail. He stated:

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[6] Mr. Gropper also referred, in a footnote to his statement that in appropriate circumstances a non-monetary may be enforced under the common law principle of comity, to the *Sea Search* case as authority that where the Uniform Act has been adopted, courts have consistently denied enforcement to non-monetary judgments. However Professor Brand's analysis is a complete answer to that case. I would note that while Mr. Gropper has extremely impressive credentials as a bankruptcy expert, his *curriculum vitae* does not list experience in dealing with state courts or the enforcement of foreign judgments under state legislation.

> In deciding whether to enforce a foreign judgment, a court in the United States may scrutinize the basis for the assertion of jurisdiction by the foreign court. *See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW* § 482 cmt. c. ("*Lack of jurisdiction over defendant*. The most common ground for refusal to recognize or enforce a foreign judgment is lack of jurisdiction to adjudicate in respect of the judgment debtor. If the rendering court did not have jurisdiction over the defendant under the laws of its own state, the judgment is void and will not be recognized or enforced in any other state. Even if the rendering court had jurisdiction under the laws of its own state, a court in the United States asked to recognize a foreign judgment should scrutinize the basis for asserting jurisdiction in the light of international concepts of jurisdiction to adjudicate."). Whether jurisdiction was challenged in the foreign court is relevant but not necessarily decisive in deciding whether to enforce a foreign judgment, although a renewed challenge to jurisdiction is generally precluded. *Id.* ("If the defendant appeared in the foreign court to challenge the jurisdiction of the court and failed to prevail, it is not clear whether such determination will be considered *res judicata* by a court in the United States asked to recognize the resulting judgment."); *Id.* at § 482 rn.3 ("[i]f the defendant challenged the jurisdiction of the rendering court in the first action and the challenge was unsuccessful or was not carried to conclusion . . . a renewed challenge to jurisdiction of the rendering court is generally precluded").

[93] I recognize the reluctance expressed by Justice Sharpe in his text that our courts avoid making orders that cannot be enforced. However on the basis of the evidence before me, Cliffs has not established that an order made in this Court requiring Cliffs to perform the Cliffs Contract would not be enforced in those states where Cliffs has assets. I accept that there may be some risk as opinions are only opinions, but the risk on the basis of the evidence before me does not rise to the level that would render Ontario a *forum non conveniens* in this case.

(vii) Conclusion on forum non conveniens

[94] Cliffs has not met its burden of showing that the alternative forum, in this case Ohio, is clearly more appropriate.

Is the relief inappropriate for a summary proceeding?

[95] Cliffs takes the position that the relief Essar Algoma seeks is inappropriate for a summary proceeding and that there is no basis for Essar Algoma claiming urgency. This is not

raised as a *forum non conveniens* point. It requests an order that Essar Algoma must deliver a statement of claim.

[96] So far as the urgency is concerned, the Monitor has made clear that the issue needs to be quickly decided. I cannot find that Essar Algoma has purposely delayed the issue. In any event, Cliffs in argument took the position that it wanted the issue decided quickly.

[97] Regarding the kind of hearing required to deal with the dispute, there is nothing in the record before me to say that Essar Algoma is demanding some summary procedure that would impair Cliffs' procedural rights in any material way. In argument, counsel for Essar Algoma said that what procedure will be adopted is for this Court on another day and that the parties will have to work together to come up with an appropriate procedure. It could be a full trial or less.

[98] I would not at this stage order that Essar Algoma deliver a statement of claim. What the form of the process will take is yet to be decided. I agree with Cliffs that the procedural rights of the parties should be protected as much as possible as the circumstances will permit. Those circumstances, of course, include the fact that Essar Algoma filed under the CCAA shortly after Cliffs purported to terminate the Cliffs Contract and that the issue needs to be dealt with quickly for the sake of both parties. As well, the principles laid out in *Hryniak v. Mauldin*, 2014 SCC 7 and the need to be mindful of the most proportionate procedure for a case will need to be considered.

Conclusion

[99] The motion of Cliffs is dismissed.

Newbould J.

Date: January 25, 2016