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Mr. Heintzman practised with McCarthy Tétrault LLP for over 40 years with an emphasis in commercial disputes relating to securities law and shareholders' rights, government contracts, broadcasting and telecommunications, construction and environmental law.

Thomas Heintzman is the author of *Heintzman & Goldsmith on Canadian Building Contracts,* 4th Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada.

Heintzman & Goldsmith on Canadian Building Contracts has been cited in over 183 judicial decisions including the two leading Supreme Court of Canada decisions on the law of tendering.

Supreme Court of Canada Holds: Court May Dismiss Action Based On An International Commercial Agreement Even After The Defendant Files A Defence

A very recent decision of the Supreme Court of Canada has held that a court may properly dismiss an action arising from an international commercial agreement, even after the defendant has filed a Statement of Defence: ***Momentous.ca Corp. v. Canadian American Association of Professional Baseball Ltd***. This decision is important since the contracts in issue contained both a forum selection clause and an arbitration clause, and the consequence of the filing of the Statement of Defence is not the same for each of those clauses.

In holding that the action could be dismissed after the filing of a Statement of Defence, the Supreme Court effectively applied the law applicable to forum selection clauses, not the law applicable to international commercial arbitrations.

Background Facts

The decision of the Supreme Court is very short and does not refer to the background facts. The decisions of the Ontario Court of Appeal and Ontario Superior Court of Justice set forth the facts, as do the factums in the Supreme Court.

The plaintiffs/appellants were all Ontario companies. Except for the City of Ottawa and one other respondent, the respondents were all non-Ontario parties and resided or carried on business in the United States.

In 2008, the appellants entered into a letter agreement with the respondent Wolff whereby the appellant Rapidz Sports acquired an interest in a company controlled by Wolff which had leased the rights to membership in the Can-Am League, a baseball league operating in the USA and Canada. Under this letter agreement, the appellant Rapidz Sport agreed to manage and operate a professional baseball team in Ottawa.

The appellants signed two agreements governing Rapidz Baseball's entry into the Can-Am League: a lease agreement and a League affiliation agreement. These agreements required that disputes be arbitrated and enforced in the courts of North Carolina. The plaintiffs also agreed to abide by the League's by-laws. Those bylaws contained an internal dispute resolution process requiring that any dispute between a member and the League be heard by the League's board of directors, provided for appeal rights and stated that the dispute and appeal process "shall be the exclusive and sole remedy of all the parties thereto."

In the 2008 season, Rapidz Baseball lost money and by September, it had ceased operations. It asked to withdraw from the League voluntarily because of financial hardship.

The Prior and Present Proceedings

In late September 2008, the Board of the League dismissed Rapidz Baseball's application for voluntary withdrawal. After a hearing, the Board terminated the team's membership. Rapidz Baseball's appeal from the Board's decision was dismissed for failure to file the appeal bond required by the by-laws. The League then called on Rapidz Baseball's $200,000 letter of credit.

The League then brought a motion in the North Carolina General Court of Justice to confirm the Board's "arbitration award". Rapidz Baseball brought a motion to dismiss the League's motion. The League's motion was granted, Rapidz's motion was dismissed, and these decisions were upheld by the North Carolina Court of Appeals.

In November 2008, Wolff made a demand on two of the appellants, Momentous and Zip respectively, for the former's guarantee of his shareholder's loan to one of the companies and for the latter's indemnification for the stadium rent for 2008. When payment was not forthcoming,

Wolff sued Momentous and Zip in the North Carolina courts. Momentous and Zip brought motions to dismiss Wolff's actions on the basis of lack of personal jurisdiction in North Carolina. Their motions were granted.

In August 2009, Wolff sued in Ontario for the same relief that he had sought in North Carolina. That action was stayed pending the completion of the motion to dismiss the appellants' action.

In January 2009, the appellants commenced the present action in Ontario alleging breach of contract and various economic torts. The Can-Am defendants and Wolff delivered Statements of Defence, defending the action on the merits and also relying on the arbitration and choice of forum provisions in the lease agreement, League affiliation agreement and League by-laws. The City of Ottawa delivered a notice of intent to defend.

The Can-Am League and its principals then brought a motion to dismiss the appellants' action under Rule 21.01(3) (a) of the Rules of Civil Procedure. They submitted that the Ontario court had no jurisdiction over the subject matter of the action. They said that the choice of forum and arbitration clauses in the League's by-laws and in the agreements signed by the plaintiffs required that all disputes with the League be resolved in the state of North Carolina and were subject to arbitration. The motion judge agreed and granted the motion and dismissed the plaintiffs' whole action. That decision was upheld by the Ontario Court of Appeal and the Supreme Court of Canada.

Decisions of the Courts based upon the Forum Selection Clause

Each level of court held that the issue should be determined by the law applicable to forum selection clauses. The law in Canada entitles a defendant to move to dismiss an action if the action is brought contrary to a clause in a contract which requires the action to be brought in another forum. The case law in Canada allows that motion to dismiss to be brought even after a Statement of Defence is filed. Accordingly, each level of court held that the defendants were entitled to bring their motion to dismiss even after they had filed a Statement of Defence. None of the three levels of courts expressly considered whether the action could be dismissed after the Statement of Defence was delivered based solely on the arbitration clause.

Logically, if the court could dismiss the action based on either the forum selection or the arbitration clause, then the one clause which permitted such dismissal seems sufficient. The case is important for that point alone, even though none of the courts expressly stated it. The necessary result appears to be that a defendant is entitled to a dismissal of an action based upon a forum selection clause even in the presence of an arbitration which, by itself, might not lead to the same result.

Interestingly, however, each level of court referred to the arbitration clause as being a "forum selection" clause. Thus, the motion judge referred to "the forum selection clause, including the arbitration clause…." The Supreme Court of Canada said that it agreed with the Court of Appeal's decision dismissing the action "because the parties had agreed to arbitrate and litigate disputes in another forum."

Potential Application of the Act, the Model Law and Article 8(1)

None of the three levels of court considered the motion to dismiss based on the arbitration clause itself. It is interesting to consider the motion from that standpoint since the result may have been entirely different, due to the application of the **Ontario *International Commercial Arbitration Act*** (the Act) and the Model Law adopted by the Act.

Was the Arbitration "International"?

Section 1 of the Model Law states that an agreement is "international" if it meets one of the listed criteria:

- The parties have their places of business in different States at the time they enter into the agreement, or
- The place of the arbitration is outside of the State where the parties have their place of business, or
- The place of performance or the place where the subject matter of the dispute is connected is outside of the State in which the parties have their places of business.

Many of the facts referred to above appear to bring the arbitration clause at issue in the *Momentous* action within the Act.

Did Article 8(1) of the Model Law apply?

Article 8(1) of the Model Law states as follows:

> "A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."

This article, accordingly, draws a clear time line for objecting to an action being brought in contravention of an arbitration agreement. If the objection is made by the defendant before its first statement on the substance of the dispute, the action must be stayed and the parties must be referred to arbitration. But the article does not expressly state what is to be done if the objection is brought later, and whether the delivery of a defence amounts to a waiver of the arbitration agreement.

This article is in contrast to section 7 of the domestic arbitration statute in Ontario, the ***Arbitration Act, 1991***. That section states that while generally speaking a motion to stay or dismiss an action on the basis of an arbitration agreement shall be granted, the court may refuse to stay the action if the motion is brought with "undue delay." No distinction is made between a motion to stay or dismiss the action brought before of after the delivery of the Statement of Defence. This subsection has been interpreted to mean that pleading does not amount to a waiver of the arbitration agreement.

Section 7(2).4 of the present Ontario domestic may in turn be contrasted with the old law in the prior Ontario Arbitrations Act, which had stood for decades. That Act stated that, if the defendant brought a motion to stay the action based upon an arbitration agreement, and did so "before delivering any pleading or taking any other step in the proceeding", then the court had the discretionary power to stay the action. The Act did not expressly state that the failure to bring the motion before pleading or taking a step in the action amounted to waiver of the submission to arbitration, but the Act was so interpreted. Indeed, asking for particulars was held to amount to such a waiver.

Accordingly, it would seem that it is arguable that the filing a Statement of Defence does amount to a waiver of the arbitration agreement under article 8(1) of the Model Law. That argument would be supported by the contrast to the present domestic Act, and by reference to the prior domestic Act under which, in the presence of arguably similar wording, such a pleading was held to be a waiver.

That argument might also be supported by reference to section 9(3) of the **UK *Arbitration Act, 1996***. That Act incorporates the Model Law, but not exactly because it applies to both domestic and international arbitrations. Section 9(3) states that an application to stay an action based upon an arbitration agreement may not be made by a defendant "after he has taken any steps in those proceedings to answer the substantive claim." This sub-section apparently reflects the English understanding that the Model Law requires the stay motion to be made before a defence is delivered. If there is some advantage to consistent applications or interpretations by Canadian, English and other courts of the regime relating to stay motions based upon arbitration agreements, then a consideration by a Canadian court of section 9(3) of the UK Act might be helpful.

If the Canadian courts should hold that the filing of a Statement of Defence is not itself a waiver of the arbitration agreement under article 8(1) of the Model Law, and that the courts have a remaining power to stay the action, then several interesting issues might arise. First, is the power mandatory (as it is if the stay motion is made before pleading): must the stay be granted? Or is it discretionary? And if it is discretionary, then how is the discretion to be exercised?

If the power is discretionary, the plaintiffs/appellants in the *Momentous* case had a very unsympathetic case. They had agreed to contractual provisions requiring arbitration of any disputes, and requiring court proceedings to occur, in North Carolina. They had appeared in the arbitration proceedings in North Carolina. They had participated in the review of the arbitration decision by two levels of court in North Carolina. After all that, it would seem only fair that they not be permitted to raise in Ontario the very issues that had been determined in the arbitration and by the courts in North Carolina.

In these circumstances, the respondents had a strong basis to argue that the discretion ought to be exercised in their favour. In addition, they had a strong factual record to argue that article 8(1) of the Model Law should be interpreted so as to leave discretion with the courts to stay an action after a Statement of Defence is filed. They could well argue that such an

interpretation is the correct one because even after a Statement of Defense is filed, the court should have a remaining discretion to stay the action and not allow the plaintiffs to escape the consequences of their agreements and procedural steps as arguably had occurred in this case.

The courts in the *Momentous* case based their decisions entirely on the forum selection issue. As a result, they did not determine whether the arbitration clause in issue was an "international" arbitration under Article 1. Nor did they determine the effect of Article 8(1), of the Model Law. We will have to await another international commercial arbitration case to see which way the debate on those Articles will go.

Arbitration – International Commercial Arbitration – Stay Motion – Alleged Waiver of Arbitration Agreement

***Momentous.ca Corp. v. Canadian American Association of Professional Baseball Ltd.*, 2012 SCC 9**

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