Cassels

Federal Court Confirms There's No Easy Escape From an Arbitration Clause

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Highlighting the importance of arbitration clauses in commercial agreements and the courts' systematic referral of disputes to arbitration, Justice Fothergill recently stayed a copyright and trademark infringement action in favour of arbitration in Bermuda. In *General Entertainment and Music Inc. v. Gold Line Telemanagement Inc*., 2022 FC 418, the Court found that parties face a high bar to escape an arbitration clause.

The defendants (collectively, Gold Line) had a Content Acquisition and Licensing Agreement with "General Entertainment Media" that included an arbitration clause. General Entertainment and Music Inc. (GEM Inc.), based in Canada, broadcasts Farsi-language television programming. Gold Line, based in Bermuda, provides IPTV streaming services.

In 2021, GEM Inc. sued Gold Line, arguing that Gold line had infringed its copyright and trademarks, as well as its rights under the *Radiocommunication Act*, by allegedly pirating GEM Inc.'s satellite television signals and by reproducing and retransmitting TV programs. Several months later, Gold Line started arbitration proceedings in Bermuda. The Case Management Judge dismissed Gold Line's motion to stay the Canadian proceedings in favour of arbitration. Gold Line appealed. The Court overturned the Case Management Judge and granted Gold Line's request to stay the proceedings.

Stay of Court Proceedings in Favour of Arbitration

Parties to a valid arbitration are required to abide by their agreement.

Courts will almost always stay court proceedings where there is, or even appears to be, an arbitration clause between the parties. Essentially, the principle is that arbitrators have jurisdiction to rule on their own jurisdiction—the so-called competence-competence principle. Thus, where the parties have an agreement with an arbitration clause, any challenge to the jurisdiction of the arbitrator must first be referred to the arbitrator, unless the arbitrator's jurisdiction is challenged on the basis of a question of law alone. In other words, even where the issue involves the jurisdiction of an arbitrator to hear a dispute, and determining jurisdiction requires consideration of factual proof or questions of mixed law and fact, Courts will normally refer the matter to the arbitrator.

GEM Inc. argued that the 2013 agreement had been terminated in 2015 and so the arbitration clause did not apply to the dispute. GEM Inc. also challenged the applicability of the agreement, arguing that it is a distinct entity from “General Entertainment Media.” The Court was not convinced.

In this case, the question of the arbitrator’s jurisdiction required consideration of disputed facts, including whether GEM Inc. and “General Entertainment Media” were distinct entities, whether GEM Inc.’s claims arose from the agreement, and whether a business relationship between the parties continued after the agreement was terminated. In other words, the determination involved complex questions of fact and law, which must first be determined by the arbitrator.

The Court also noted that Gold Line’s actions in response to GEM Inc.’s statement of claim did not detract from its obligations to systematically refer disputes to arbitration and the principles of commercial certainly, commenting that: “Attornment cannot be an escape hatch to avoid arbitration.”

Survival of Arbitration Clauses

Arbitration clauses are considered to be autonomous and independent from the main contract. Therefore, GEM Inc. could not rely on evidence of the agreement’s termination to avoid arbitration, and even if the agreement were validly terminated, courts still have a duty to refer the parties to arbitration. Indeed, as long as a dispute *potentially* falls within an arbitration clause, it must be referred to arbitration.

This means that there is a high burden on a party seeking to escape an arbitration. An arbitration clause is only null and void, inoperative or incapable of being performed where it is manifestly tainted – it must be “incontestable” based on only a superficial review of the record, such that no serious debate can arise about the validity.

Arbitration Clause Distinct from Choice of Law and Forum Selection Clauses

The Court commented that “choice of law clause,” “forum selection clause,” and “arbitration clause” are not interchangeable. A choice of law clause specifies the law of the contract, a forum selection clause ousts the jurisdiction of otherwise competent local courts in favour of a foreign jurisdiction, and an arbitration clause binds the parties to an agreed-upon dispute resolution mechanism.

Here, the clause at issue was an arbitration clause, but the parties had wrongly directed the Case Management Judge to jurisprudence relating to forum selection clauses, and so the Case Management Judge had applied the wrong legal test in refusing the stay.

Filling in the Gap in Canada's Federal Arbitration Statute

This case also helps to fill in a gap in Canada's federal arbitration statute. While every Canadian province has adopted legislation requiring courts to stay actions in favour of arbitration where there is an arbitration clause, except in very limited circumstances, the scope of the federal *Commercial Arbitration Act* is not co-extensive with the jurisdiction of the Federal Court. It only applies to actions involving the federal Crown, and maritime and admiralty law matters. It does not apply to other claims that can be brought in the Federal Court, such as claims under intellectual property statutes and the *Competition Act*. As a result, these other claims are not subject to the mandatory stay provided for in the *Commercial Arbitration Act*. Instead, parties to arbitration agreements not covered by the *Commercial Arbitration Act* must apply for a stay under subsection 50(1) of the *Federal Courts Act*, which grants the court discretion to order a stay where the claim is being proceeded with before another court or jurisdiction, or in the interests of justice.

While Justice Fothergill did not address this gap in the *Commercial Arbitration Act* (in fact, he did not even mention the Act), he effectively filled it by adopting the Supreme Court's strong endorsement of the principle that arbitration clauses should be enforced (as set out in *Dell Computer Corp v Union des consommateurs*). He thus effectively imported the concept of the mandatory stay into the Federal Court, even where the *Commercial Arbitration Act* does not apply, holding that "So long as the dispute potentially falls within the arbitration clause, it must be referred to arbitration."

This is not the first time that the Federal Court has enforced an arbitration clause that was outside the scope of the *Commercial Arbitration Act*. In 2011, it stayed a proposed class action asserting a claim under the *Competition Act* on behalf of Amway distributors because of an arbitration clause (*Murphy v. Compagnie Amway Canada*). The court also seems to have accepted that the Ontario A*rbitration Act, 1991* could apply because the parties had incorporated it into their contract. The Federal Court of Appeal upheld the decision to stay the action, but noted that parties could not oust its jurisdiction by adopting the Ontario *Arbitration Act, 1991*, as this statute has no force of law in the federal courts.

The Takeaways

This case highlights that the courts will not lightly depart from the terms of commercial agreements and take the principles of commercial certainty underlying such contracts seriously. Absent a manifestly tainted arbitration clause or a pure question of law as to jurisdiction, as long as a dispute might fall within an arbitration clause parties will be held to their agreed-upon dispute resolution mechanism—even in the absence of a statutory mandatory stay.
