Cassels

Federal Court of Appeal Confirms Arbitration Clauses Should be Honoured in All But the Clearest Cases

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Last year, we discussed a Federal Court decision that highlighted the importance of arbitration clauses in commercial agreements and the courts' systematic referral of disputes to arbitration (the original article is available here). In that decision, the Federal Court stayed the action in favour of arbitration in Bermuda. The Federal Court of Appeal recently upheld that decision in *General Entertainment and Music Inc. v. Gold Line Telemanagement Inc.*, 2023 FCA 148.

In dismissing the plaintiffs' appeal, Justice Webb considered whether it is appropriate for the judge deciding the request for a stay to make findings of fact, or mixed fact and law, related to the jurisdiction of the arbitrator. He also considered the test for granting a stay and whether the fact that the party opposing the stay has taken steps in the court proceeding disentitles it to the stay. The Federal Court of Appeal's answer on both issues was 'no.'

The background to the dispute is set out in our previous article. In short, the plaintiff (GEM Inc.) sued the defendants (collectively, Gold Line) for copyright and trademark infringement, as well as infringement of its rights under the *Radiocommunication Act*. Gold Line started arbitration proceedings in Bermuda and sought a stay of the Federal Court proceedings, both after filing its defence. The Case Management Judge dismissed Gold Line's stay motion, but the Federal Court overturned that decision and granted the stay. GEM Inc. appealed the Federal Court's decision.

Questions of Fact or Mixed Fact and Law Related to the Jurisdiction of the Arbitrator Must First be Decided by the Arbitrator

Where there is an arbitration clause in an agreement, the Supreme Court has stated that any challenges to the jurisdiction of the arbitrator must first be referred to the arbitrator. Questions of fact or mixed fact and law related to the jurisdiction of the arbitrator to decide the relevant issues must first be referred to the arbitrator. The only exception to this rule is where the challenge to the arbitrator's jurisdiction concerns a question of law alone.

Importantly for this case, where the issue of an arbitrator's jurisdiction that is before a court requires anything more than a superficial examination of the evidence in the record, courts will normally refer the

question to the arbitrator. In other words, if the question of jurisdiction requires the admission and examination of factual proof, it will be a question for the arbitrator, not the court.

Here, the main issue was whether GEM Inc. was bound by the Content Acquisition and Licensing Agreement that contained the arbitration clause—a matter of mixed fact and law. The complexity of the arrangements between the various entities involved in the agreement and the dispute, and even their names, meant that the issue could not be resolved by a superficial examination of the documentary proof. Therefore, Justice Webb held that it was not appropriate for the Court to make a determination on the issue of the arbitrator's jurisdiction and dismissed this ground of appeal.

Absent Legislation to the Contrary, the Party Seeking the Stay Does not Need to do so Before Taking Steps in the Court Proceeding

Gold Line filed its defence and counterclaim to GEM Inc.'s Federal Court claim about two weeks before it commenced arbitration proceedings in Bermuda and brought a motion seeking the stay. As a result of these steps taken in the court proceeding, GEM Inc. argued that Gold Line was not entitled to the stay. The Court of Appeal held, however, that as there was no applicable statutory provision that required Gold Line to apply for a stay before filing a defence or a counterclaim and so dismissed this ground of appeal as well.

The analysis for mandatory stays in favour of arbitration has two general but distinct components, though the considerations may differ depending on the jurisdiction and the nature of the arbitration: (i) technical requirements, and (ii) statutory exceptions.

Under the first element, the party seeking the stay must prove only that it has an "arguable case" that the technical prerequisites are met, namely: (i) there is an arbitration agreement, (ii) court proceedings have been started by a "party" to the agreement, (iii) the court proceedings relate to a matter the parties agreed to submit to arbitration, and (iv) the party seeking the stay has not taken any "steps" in the court proceeding. If the technical requirements are met, the burden shifts to the party opposing the stay to show on a balance of probabilities—a higher standard—that one or more statutory exceptions apply (*Peace River Hydro Partners v. Petrowest Corp*., 2022 SCC 41).

Here, only the technical requirements were at issue, specifically whether the steps taken in the court proceeding by Gold Line meant the fourth prerequisite was not met. The Court held that the requirement that the party seeking the stay not have taken any steps in the court proceeding only applies where the parties identify an applicable statute that includes such a provision, as many provincial arbitration statutes do. However, the parties in this case identified no applicable statute and the Court found no such requirement in the *Federal Courts Act* (or in the *United Nations Foreign Arbitral Awards Convention Act*, which has been declared to have the force of law in Canada). As a result, the filing of a defence and

counterclaim by Gold Line did not disentitle it to a stay of the court proceedings.

The Court also found that Gold Line had not waived its right to arbitration and, indeed, had specifically pled that the Federal Court was not the proper forum and had sent a request to GEM Inc. for arbitration prior to filing its defence and counterclaim.

The Takeaways

This appeal decision reinforces that courts are generally unwilling to depart from the terms of commercial agreements and will favour arbitration where parties have agreed to arbitrate their disputes. Except for clear cases where the question of an arbitrator's jurisdiction is a pure question of law that requires nothing more than a superficial examination of the evidence in the record, a court will refer the matter to arbitration. This is borne out by the low burden of proof on a party seeking a stay in favour of arbitration to show only an arguable case that the technical requirements have been met.

It is also notable that the party seeking the stay is not prevented from doing so simply because they took steps, such as pleading over, in the court proceeding, unless there is a specific statutory requirement otherwise. So, parties seeking or opposing a stay on the basis of an arbitration clause should carefully consider what legislation might apply before taking any steps in the court proceeding.
