Proctor v. Schellenberg, 2002mbca170
Docket(s): AI02-30-05317
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IN THE COURT OF APPEAL OF MANITOBA
Coram: Scott C.J.M., Monnin and Hamilton JJ.A.
B E T W E E N:

SHELDON PROCTOR) G. G. Zazelenchuk
) for the Appellant
(Applicant)
Respondent)
) R. A. McFadyen
) for the Respondent
- and -)
) Appeal heard:
) October 15, 2002
LEON SCHELLENBERG)

) Judgment delivered:
(Respondent)
Appellant) December 11, 2002

HAMILTON J.A.

1 This appeal concerns the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention), which applies in Manitoba, pursuant to The International Commercial Arbitration Act, S.M. 1986-87, c. 32, Cap. C151 (the Act). The non-resident applicant (the respondent in this appeal) obtained an arbitral award, in his favour, against the respondent (the appellant in this appeal) in the State of Illinois and was successful in his application to the Court of Queen's Bench to have the award recognized and enforced in Manitoba. The respondent appeals this judgment on the basis that the motions judge erred in holding that the applicant supplied to the court the documentation required by the Convention to obtain recognition and enforcement of the award.

The Act and the Convention

2 The Convention was adopted by the United Nations Conference on International Commercial Arbitration in New York on June 10, 1958 (s. 1(1) of the Act). The Convention applies in Manitoba to arbitral awards and arbitration agreements in respect of "differences arising out of commercial legal relationships, whether contractual or not" (s. 2(2) of the Act). The Convention is Schedule A to the Act. Although not directly applicable here, I note that the Act also provides that International Law applies in Manitoba to international commercial arbitration agreements and awards (s. 4(2) of the Act). International Law is the Model Law On International Commercial Arbitration (the Model Law), adopted by the United Nations Commission on International Trade Law on June 21, 1985. The

Model Law is set out in Schedule B to the Act.

3 The Province of Manitoba is a "Contracting State" under the Convention and, as such, has agreed to recognize and enforce arbitral awards in accordance with the Convention. Article II and Article IV of the Convention are particularly pertinent to the issues on this appeal and, specifically, paras. 1 and 2 of Article II, and para. 1 of Article IV. These paragraphs read as follows:

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

4 It is s. 3 of the Act that provides that recognition of an arbitral award, pursuant to the Convention, is obtained on application to the Court of Queen's Bench. As noted above, para. 1 of Article IV of the Convention requires certain documents to be supplied to the court when making such an application.

5 Article V of the Convention gives the court the discretion to refuse the recognition and enforcement of an arbitral award in certain circumstances if the party, against whom the award is invoked, furnishes sufficient proof of these circumstances. Paragraph 2 of Article V provides further discretion where the subject matter of the arbitration is not capable of settlement by arbitration under the law of the country, where enforcement is sought, or recognition and enforcement is contrary to public policy.

6 The respondent does not rely on Article V. Rather, the respondent argues that the applicant did not satisfy the requirement of para. 1 of Article IV to supply to the court the "agreement in writing" referred to in Article II.

Background Facts

7 The applicant is a broker in Chicago, Illinois, engaged in the buying and selling of commodities (future contracts and future options) on behalf of customers. The respondent is a chartered accountant, who resides in Winnipeg, and has been involved in the trading of commodities. In July 1997, the respondent opened an account with LIT Division of First Options of Chicago, Inc. (First Options), the brokerage house through which the applicant purchased and sold commodities. To open this account, the respondent signed a number of forms sent to him and delivered them back to First Options. These documents included a one-page document entitled "Arbitration Agreement" (the Arbitration Document). At the top of the Arbitration Document was a reference to First Options, and it was signed by the respondent and dated July 24, 1997.

8 In July 1998, the respondent's trading account was transferred to E. D. & F. Man International, Inc. (Man International), when Man International purchased the retail commodity portion of First Options' business. The applicant remained the respondent's broker. The respondent continued to trade on his trading account with Man International for a period of time before his account was closed in October 1998, as a result of differences between the respondent and the applicant and Man International. The trading account was in a deficit position when it was closed. The applicant, through his counsel in Illinois (Illinois counsel), made demands upon the respondent to pay the deficit balance. In response to these demands, the respondent had a conversation with Illinois counsel and then faxed a copy of the Arbitration Document to Illinois counsel advising that it was signed when he opened his account with First Options. In his detailed reasons, the motions judge found on the evidence that in the conversation that preceded this fax, the respondent advised Illinois counsel that he had signed an arbitration agreement when he opened his trading account, and that any dispute regarding the account must proceed to arbitration. It was open to the motions judge to make this finding, and I take no issue with it. I say this because, in his reasons, the motions judge painstakingly reviewed the affidavit and cross-examination evidence before him. This included, in his own words, at para. 15, "a good hard look at what can be best described as partial or incomplete denials by the respondent in his affidavit as to the existence of an arbitration agreement."

9 The cover page of the facsimile sent by the respondent had the following handwritten notations from the respondent: See Attached Arbitration Agreement dated July 24, 1997. Not sure whether if it was faxed separately or not. I remember Mr. Proctor faxed the A/C Agreement documents & I faxed him back only the pages that required signatures. Is this legal???

10 The respondent's trading account was subsequently assigned by Man International to the applicant, and arbitration proceedings were commenced against the respondent by the applicant. The respondent received notice of the arbitration proceeding, and it was adjourned to provide the parties the opportunity to address certain issues, including the assignment of the arbitration portion of the respondent's trading account agreement evidenced by the Arbitration Document. The respondent chose not to respond to the arbitration proceedings or to participate in any manner.

11 On September 13, 2000, the arbitrator granted an award in favour of the applicant and against the respondent for payment of the sum of $35,353.72 (U.S.). This is the award that the motions judge ordered be registered and enforced in Manitoba under the Act and the Convention. In the award, the arbitrator specifically noted the assignments of the Arbitration Document from First Options to Man International, and then from Man International to the applicant.

Issues/Arguments

12 The applicant supplied the court with a certified copy of the Arbitration Document. The respondent argues that this does not satisfy the requirement of para. 1(b) of Article IV for two reasons:

1. The Arbitration Document was not signed by the respondent.
2. There was no written assignment from First Options to Man International provided to the court.

13 The respondent argues that the motions judge was in

error when he ruled:

1. that the applicant had satisfied the onus upon him to supply the arbitration agreement to the court and thereby bring himself within the requirements of the Act;
2. that there was sufficient evidence of an assignment of the arbitration agreement from First Options to Man International, and it was not necessary to provide the actual assignment document to the court and, in any event, the court must defer to the arbitrator's findings with respect to the assignments; and
3. that there was an onus on the respondent to review the assignment documentation contained within voluminous transaction documents involving First Options and Man International, pursuant to the offer made by the applicant's counsel to the respondent's counsel that he would make the transaction documentation available.

A brief comment is warranted to explain the third ground of appeal. The respondent argues that the motions judge effectively placed an onus on the respondent when he wrote in his reasons, at para. 15, "I can only assume that Mr. Zazelenchuk either satisfied himself of the existence and contents of these documents or, alternatively, elected not to bother." The motions judge did note that it would have been preferable for the contract documents to have been tendered to the court for review, but went on to explain why this was not fatal to the application.

14 The respondent points to the definition of "agreement in writing" found in para. 2 of Article II of the Convention and, specifically, the words "signed by the parties" for much of his argument. The full definition bears repeating here: "The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." The respondent maintains that this definition must be strictly construed and, in accordance with that principle, the agreement to be supplied to the court to satisfy para. 1(b) of Article IV of the Convention must be signed by both parties. The respondent says that the Arbitration Document, with only the signature of the respondent, does not satisfy this requirement.

15 The respondent relies on Kaverit Steel and Crane Ltd. et al. v. Kone Corp. et al. (1992), 120 A.R. 346 (C.A.), for the principle that the Act and the Convention are to be strictly construed. The Kaverit Steel case dealt with whether there should be a stay of a lawsuit brought in Alberta, when there was an arbitration clause in a written agreement between only some of the parties to the lawsuit. In holding that only the parties who were signatories to the agreement (and not the wholly owned and wholly controlled subsidiaries, as would be the case in the United Kingdom) could be required to be bound by arbitration, Kerans J.A. commented (at paras. 17 and 19):

Alberta, like the United Kingdom, could have sent to arbitration claims by or against those who claim through or under an agreement containing a submission. It has not, and perhaps this is to be regretted.

... I accept that forcing the subsidiaries to partake in the arbitration may well be sensible and practical. I insist only that it is for the parties or the Legislature, not me, to decide what procedure is right for these cases.

16 The applicant answers by referring to the words "shall include" in the definition of "agreement in writing." He argues that these words make it clear that the definition is not exhaustive and that it

should be read disjunctively. He points to two reasons why the applicant has complied with para. 1(b) of Article IV of the Convention. He says that by supplying the Arbitration Document, he provided the arbitral clause of the trading agreement to the court and that is all that is required. He also points out that the "agreement in writing" arose from the sequence of events whereby the respondent returned the Arbitration Document to First Options after communicating with the applicant by fax to sign up the trading account documentation. In other words, the agreement was contained in an exchange of letters or telegrams.

17 I will only briefly comment on the respondent's argument related to the assignment issue. The essence of the respondent's argument is that the assignment is an integral part of what constitutes the "agreement in writing" and no documentation of the assignment from First Options to Man International was produced to the court. As one might expect, the applicant disagrees. He argues that if evidence of this assignment is even necessary, there was ample evidence before the motions judge of the assignment. As well, the applicant relies on the rulings of the arbitrator with respect to the assignments of the arbitration agreement and argues such rulings are to be deferred to by the court. In this regard, the applicant cites Corporacion Transnacional de Inversiones, S.A. de C.V. v. STET International, S.p.A. (1999), 45 O.R. (3d) 183 (S.C.J.); appeal dismissed at (2000), 49 O.R. (3d) 414 (C.A.), [2000] O.J. No. 3408 (Q.L.); application for leave to appeal to the Supreme Court of Canada dismissed at [2000] S.C.C.A. No. 581 (Q.L.). As one can see, these arguments raise a number of issues. However, in light of my decision that follows, it is unnecessary for me to address them.

Decision

18 The requirements of para. 1 of Article IV of the Convention are mandatory requirements that an applicant must satisfy on an application under the Act. The issue here is whether an agreement was supplied to the court by the applicant, as required by para. 1(b) of Article IV of the Convention. To answer this, one must first determine what "agreement in writing" means. In doing so, one must give meaning to the words "shall include." These words make it clear that the definition is not exhaustive. It is also clear that written documentation is required. My reading of the definition is that written documentation can take various forms, including an arbitral clause within a contract signed by both parties; an arbitration agreement signed by both parties; an arbitral clause within a contract contained in a series of letters or telegrams; or an arbitration agreement contained in a series of letters or telegrams. Because the definition is inclusive rather than exhaustive, the Legislature did not limit the definition to these articulated methods of documentation. What is important is that there be a record to evidence the agreement of the parties to resolve the dispute by an arbitral process. This flexibility is important in this day and age of changing methods of communication. In my view, communication by facsimile falls within the definition. This is in keeping with a functional and pragmatic interpretation of the definition to serve the Legislature's intent to give effect to arbitral awards granted in other jurisdictions in this era of interjurisdictional and global business.

19 I have concluded that the answer to the question before us lies in the communication between the respondent and Illinois counsel, after demand was made on the respondent, by Illinois counsel, to pay the deficit position of his trading account. The respondent himself

sent by facsimile the Arbitration Document to Illinois counsel. As counsel for the applicant, Illinois counsel was in a position to bind the applicant. By his communication with Illinois counsel, the respondent made it clear that the dispute should proceed to arbitration and the applicant, through Illinois counsel, agreed by the subsequent correspondence. There is the agreement in writing through this exchange of facsimiles and letters. Simply then, the respondent on his own initiative, acknowledged and endorsed the Arbitration Document as the method to resolve the dispute. The applicant agreed through his counsel and the matter proceeded to arbitration.

20 In coming to this conclusion, I am mindful that neither counsel focused their arguments on this exchange of facsimiles and letters. However, at the appeal hearing, the court did question counsel as to the effect of this exchange on the appeal issues. In response, counsel for the respondent simply noted that the applicant, in argument, had not relied on this exchange of documentation. In light of the opportunity given to counsel to respond, there is no need to require further argument from counsel.

21 The motions judge gave thoughtful consideration to many more issues in his reasons than are addressed here and, as noted above, he carefully reviewed all of the evidence. Although my reasons are different from the motions judge, I agree with his conclusion. The respondent's appeal is dismissed with costs.

_____ J.A.

I agree:

_____ C.J.M.

I agree:

_____ J.A.