Food Services Of America, Inc. v. Pan Pacific Specialties Ltd., 1997 CanLII 3604 (BC SC)

Date:	1997-03-24
Docket:	A970243
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Decisions cited

- Quintette Coal Ltd. v. Nippon Steel Corporation, 1991 CanLII 5708 (BC CA) — [1991] 1 WWR 219 • 50 BCLR (2d) 207
- Schreter v. Gasmac Inc., reflex — 7 OR (3d) 608 • 89 DLR (4th) 365 • 6 BLR (2d) 71 • 41 CPR (3d) 494

Date: 19970324
Docket: A970243
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

(IN CHAMBERS)

BETWEEN:

FOOD SERVICES OF AMERICA, INC.,
carrying on business as Amerifresh

PETITIONER

AND:

PAN PACIFIC SPECIALTIES LTD.

RESPONDENT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE DROSSOS

Counsel for the Plaintiff: G.J. Tucker

Counsel for the Defendant: J.G. Mendes

Place and Date of Hearing: Vancouver, B.C.
February 19, 1997

Facts:

[1] The petitioner ("Amerifresh") seeks and order pursuant to the *International Commercial Arbitration Act*, S.B.C. 1986, c.14, s.35 and the *Foreign Arbitral Awards Act*, S.B.C. 1985, c.74, s.4 to enforce the Arbitration Award ("the Award") of Melvin Greeley, John P. Bauer and F.S. Cluthe (the tribunal) on December 6, 1996 in Case #76-T153-0086-96 of the American Arbitration Association. The Award required the respondent, ("Pan Pacific"), to pay to the petitioner the sum of U.S. $126,438.75 plus interest at the rate of 9% per annum from August 20, 1992 until paid

[2] The petitioner is a Delaware corporation with offices in Seattle, Washington. The respondent has its registered office in Vancouver, B.C.

[3] The arbitration was the result of an Agreement to Arbitrate signed March 12, 1996 by the parties. The agreement stated, in part, as follows:

1. Agreement to Arbitrate. The parties agree that all controversies and claims ... shall be determined by arbitration in accordance with the International Arbitration Rules of the American Arbitration Association and judgment on the award rendered by the Arbitrators may be entered in any Court having jurisdiction thereof.

Issues:

1.Is the petitioner prohibited from bringing these proceedings by s.337 of the *Company Act*, R.S.B.C. 1979, c.59?
2.Did the respondent waive its right to oppose enforcement of the award?
3.If the respondent did not waive its right to oppose enforcement, should enforcement be denied?

Analysis:

1.Is the petitioner prohibited from bringing these proceedings by s.337 of the *Company Act*?

[4] In the Agreement to Arbitrate, the parties agreed to have a judgment "entered, recognized, registered or enforced on the arbitration award by any court of competent jurisdiction, whether in the United States of Canada." This court is a court of competent jurisdiction per s.35 of the *International Commercial Arbitration Act*.
The respondent argues that the petitioner is prohibited by s.337 of the *Company Act* from maintaining a proceeding in this province and, therefore, cannot properly bring there proceedings.

[5] Section 337 reads as follows:

337. (1) An extraprovincial company that is not registered as required by this Act is not capable of

(a)maintaining an action, suit or other proceeding in any court in the Province in respect of any contract made in whole or in part in the Province in the course of or in connection with its business;

[6] The petitioner is not registered under the *Company Act*.

[7] Section 337 applies only to a foreign company which carries on business in British Columbia. The petitioner asserts that it does not carry on business in B.C. The respondent alleges that the petitioner does carry on business in B.C. There is insufficient evidence before the court to determine whether the petitioner does in fact do business in B.C. However, it is not necessary to make a finding on that question.

[8] The application of s.337 is clear from the wording of the section. It applies to any proceedings brought on the basis of a contract. That is not the situation before the court. The court is not being asked to assess any issues based on any contract between the parties. These proceedings are to enforce an international commercial arbitration award and, therefore, the petitioner cannot be prohibited from bringing the action by s.337.

2.Did the respondent waive its right to oppose enforcement of the award?

[9] Under s.36 of the *International Commercial Arbitration Act*, a number of grounds are set out upon which a party may rely to oppose enforcement of an award.

[10] In the Agreement to Arbitrate, the parties waived the benefit of s.36 in the following words:

> 11. Waiver of Section 36 of the International Commercial Arbitration Act of British Columbia. The parties intend that any award entered by the arbitrators in this case be final and binding, subject to enforcement either in Canada and/or the United States. In this regard, both parties hereby expressly waive any entitlement they have or may have to rely upon the provisions of Section 36 of the International Commercial Arbitration Act of British Columbia (SBC 1986 c.14) and any similar provision in any comparable legislation in any other jurisdiction, to seek to avoid recognition or enforcement of an arbitration award made pursuant to this Agreement.

[11] On the basis of this waiver, the petitioner argues that the respondent waived its right to oppose enforcement under s.36.

[12] The respondent argues the waiver only applies to an arbitration award made "pursuant to this agreement" and that the award in question was not made pursuant to the agreement. The respondent argues the agreement incorporated the International Arbitration Rules and those Rules make a number of requirements that were not met in this case. Those are: that the arbitrators provide written reasons; that the arbitrators apply the applicable law to the dispute; and that the protocol for challenging arbitrators be followed during the arbitration.

[13] Essentially, the respondent submits the waiver only applies where the arbitration was conducted in strict accord with the Rules. If that were the case, there would be no need to make use of s.36 and the waiver would be meaningless.

Section 36 allows for opposition to enforcement where there has been some jurisdictional or procedural breach by the arbitrators. If a waiver of s.36 only applied where there were no jurisdictional or procedural breaches, it would be meaningless. That could not have been the intention of the parties or the meaning of the waiver under their agreement.

[14] The Court of Appeal of British Columbia set out the standard with respect to the degree of deference to be accorded the decision of international arbitrators in *Quintette Coal Ltd. v. Nippon Steel Corp.*, 1991 CanLII 5708 (BC CA), [1991] 1 W.W.R. 219 (B.C.C.A.) at
229:

It is meet therefore, as a matter of policy, to adopt a standard which seeks to

> preserve the autonomy of the forum selected by the parties and to minimize judicial intervention when reviewing international commercial

arbitral awards in British Columbia. That is the standard to be followed in this case.

[15] This narrow scope of court intervention with respect to international arbitral awards can equally be applied to an agreement between the parties with respect to such an arbitration. It would not be appropriate for a court to go beyond the clear meaning of the words in an arbitration agreement and interpret them in such a way as to render the clause meaningless.

[16] Accordingly, the only possible conclusion is that the parties waived their right to oppose enforcement of the award under s.36 and the respondent's grounds for opposing enforcement cannot be supported as they clearly fall under that waiver.

[17] In any event, I will go on to address those further arguments of the respondent.

3.If the respondent did not waive its right to oppose enforcement, should enforcement be denied?

[18] The respondent argues that the arbitrators made 3 separate errors with respect to the arbitration and that on the basis of those errors the enforcement should be denied as they render the arbitral procedure "not in accordance with the agreement of the parties" (s.36(1)(a)(v) of the *International Commercial Arbitration Act*). The agreement of the parties incorporated the International Arbitration Rules and the respondent submits these errors violate those Rules and, therefore, the agreement of the parties.

[19] The errors in question are:
a)the arbitrators failed to deliver reasons for their award;
b)the arbitrators failed to decide the dispute in accordance with the law;

c)the arbitrators failed to follow the correct procedure following a challenge to their impartiality.

[20] I will address each alleged error in turn.

a) the arbitrators failed to deliver reasons for their award [21] Article 28(2) of the International Arbitration Rules requires the arbitrators to state the reasons upon which the award is based. In this matter, written reasons were not issued. The respondent alleges this to be an error which renders the arbitral procedure not in accordance with the agreement of the parties and, therefor, a reason to refuse enforcement of the award under s.36.

[22] The award was made on December 6, 1996, and was to be paid no later than December 31, 1996. This petition was filed on January 27, 1997, and the respondent filed an appearance the following day. The respondent wrote to request reasons for the arbitral award on February 12, 1997.

[23] The petitioner submits that the respondent should have requested reasons within 30 days under Article 31 and by not doing so, waived its right to object to the failure to give reasons. Alternatively, the petitioner argues that the failure to give reasons is an irregularity only and does not render the award defective such as to preclude enforcement.

[24] Article 31 states that:

"1. Within 30 days after receipt of an award, any party, with notice to the other parties, may request the tribunal to interpret the award..."

[25] The petitioner submits that since the respondent, Pan Pacific, failed to request, within 30 days, written reasons under this Article as an interpretation of the award, the respondent cannot now raise the lack of written reasons as an

issue. Whether this Article would apply to such a request is for the tribunal or the administrator of the American Arbitration Association to determine under the provisions of
Article 37 which read:

"The tribunal shall interpret and apply these rules insofar as they relate to its powers and duties. All other rules shall be interpreted and applied by the administrator."

[26] Although it may have been open to the respondent to so request under Article 31, it is not clear that a failure to make such a request bars the respondent from objecting after the 30 day period.

[27] The issue then is whether the failure to give reasons is sufficiently serious to render the arbitral procedure to have not been in accordance with the agreement of the parties such as to warrant denying enforcement of the award.

[28] In *Schreter v. Gasmac Inc.* reflex, (1992), 7 O.R. (3d) 608 (Gen.Div.), the court held that the failure of international

arbitrators to give reasons did not amount to a ground upon which the court should exercise its discretion to refuse enforcement of the award and the respondent did not satisfy the onus to rely on s.36. In coming to this conclusion, the court assessed the issues before the arbitrators and the extent to which the basis of the award could be unclear in the absence of reasons. It was found that only a small portion of the award was based on an issue upon which, in the absence of reasons, it was unclear whether the arbitrators took jurisdiction over that issue.

[29] In Casey's *International and Domestic Commercial Arbitration*, it is stated that the failure to give reasons is not a reason in and of itself to refuse enforcement of an award and that the burden is on the respondent to show that it fits within one of the subsections of s.36. (at 10-5)

[30] The respondent asserts the failure to give reasons falls under s.36(1)(a)(v) as the "arbitral procedure was not in accordance with the agreement of the parties" as that agreement stipulated that the claims were to be "determined by arbitration in accordance with the International Arbitration Rules".

[31] A large degree of deference is required by this court in exercising its discretion to refuse enforcement of an award:

Quintette Coal. On that basis, a strict interpretation should be taken of s.36.

[32] The respondent relies on the agreement of the parties to have their claims determined by an arbitration which is in accordance with the Rules. The plain meaning of this is that the arbitration itself, that is the hearing and the process of deciding the matter, be in accord with the Rules. The issuing of reasons after the fact is not part of the arbitration itself. Further, s.36(1)(a)(v) provides a basis for opposition to enforcement when the arbitral procedure did not accord with the parties' agreement. In this case, the procedure of the arbitration is not in question, it was in accord with the parties' agreement. Even if the failure to give reasons were considered part of the arbitral procedure, the failure does not bring into question the fairness of the hearing or of the decision making process and is, therefore, not sufficiently serious to violate the parties' agreement to have an arbitration in accord with the Rules. The respondent has failed to bring itself under s.36 to warrant the court exercising its discretion to refuse enforcement on this basis.

b)the arbitrators failed to decide the dispute in accordance with the law

[33] The agreement of the parties required the arbitrators to apply the applicable law to the dispute. The respondent submits the arbitrators failed to do this and, rather, decided the dispute in accordance with "equity and good conscience".

[34] The respondent submits that in the absence of reasons from the arbitrators, there is no evidence before the court to indicate that their decision was based on law. The respondent wishes the court to draw the inference that the arbitrators' failure to provide reasons indicates they simply decided the dispute according to their conscience.

[35] Following the Court of Appeal in *Quintette Coal*, this court should defer to the award of international arbitrators unless there is a clear reason their award should not be enforced.

[36] The respondent wishes the court to draw an inference that the arbitrators decided this matter on the basis of their conscience rather than based on the applicable law. To do that, the arbitrators would have been in direct contravention of their instructions. The respondent has offered no evidence to support this serious allegation.

[37] In the absence of any evidence, it is not open to this court to suggest that the arbitrators decided the matter in an improper manner. This alleged error does not exist on the evidence and could not stand in the way of enforcement of the arbitral award.

c)the arbitrators failed to follow the correct procedure following a challenge to their impartiality

[38] During the arbitration hearing, the petitioner put on record that it was giving notice of its intention to challenge the impartiality of the arbitrators under Article 8. Article 8 of the International Arbitration Rules requires a written challenge to be submitted within 15 days of the circumstances giving rise to the challenge. After discussion, the arbitration proceeded on the basis that the petitioner had preserved its right to challenge the arbitrators.

[39] The respondent argues this was an error by the arbitrators in allowing the arbitration to proceed under the threat of a challenge to their impartiality.

[40] The petitioner never did comply with Article 8 as there was never any written complaint filed. A concern was raised, discussed and the petitioner apparently chose not to pursue it. In the absence of a formal written complaint, there was no obligation on the arbitrators to withdraw or take any other action. While it could be said that they continued to act under the threat of a challenge, this is no different from the situation as it would have been absent the oral notice by the petitioner. Arbitrators can be challenged under Article 8 within 15 days of the circumstances which give rise to that challenge. For that reason, an arbitrator is always acting under the threat of a challenge and could be making special

efforts to be impartial as the respondent alleges in this situation.

[41] As no formal complaint was ever made, there was no onus on the arbitrators to act in any different manner. On that basis, this alleged error does not exist and cannot bar enforcement of the award.

[42] It is also significant that the respondent did not take issue with this alleged error during the arbitration. Article
26 of the Rules provides as follows:

> A party who knows that any provision of the rules or requirement under the rules has not been complied with, but proceeds with the arbitration without promptly stating an objection in writing thereto, shall be deemed to have waived the right to object.

[43] On the basis of Article 26, even if the arbitrators had committed an error in the handling of this issue, the respondent's failure to object at the time means that they are deemed to have waived the right to object and cannot properly bring an objection at this time.

Conclusion

[44] The petitioner has met the requirements for enforcement of the arbitral award under s.35. This petition was properly brought and was not barred by s.337 of the *Company Act.* Further, the respondent had waived its right to oppose this enforcement under s.36 and, in any event, the errors it alleges are not sufficient to bring it under s.36 to warrant the court exercising its discretion to refuse enforcement.

[45] The same arguments as those discussed above were also made under the *Foreign Arbitral Awards Act*. It is not necessary to address those as the same reasoning will apply and the enforcement can be ordered under the *International Commercial Arbitration Act* in any event.

[46] Enforcement of the award is so ordered.

"N.A. Drossos, J."

N.A. DROSSOS, J.