Javor v. Francoeur, 2003 BCSC 350 (CanLII)

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Legislation cited (available on CanLII)

- Commercial Arbitration Act, R.S.B.C., 1996, c. 55 — 22

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Javor v. Francoeur,*** 2003 BCSC 350

Date: 20030306

Docket: L022829

Registry: Vancouver

IN THE MATTER OF THE FOREIGN ARBITRAL AWARDS ACT

R.S.B.C. 1996, CHAPTER 154

AND THE INTERNATIONAL COMMERCIAL ARBITRATION ACT

R.S.B.C. 1996, CHAPTER 233

AND THE MATTER OF AN AWARD AND SUPPLEMENTAL AWARD OF AN ARBITRATOR OF THE AMTERICAN ARBITRATION ASSOCIATION

DATED MAY 9, 2002 AND JULY 8, 2002 RESPECTIVELY, AND OBTAINED BY THE CLAIMANTS IN THE FOLLOWING MATTER, NAMELY:

Between:

Eddie Javor, an individual, and Fusion-Crete, Inc., a California Corporation

Petitioners

And

Luke Francoeur, an individual, and Fusion-Crete Products, Inc., a Canadian Corporation

Respondents

Before: The Honourable Mr. Justice R.R. Holmes

Reasons for Judgment

Counsel for the Petitioners: David L. Varty

Counsel for the Respondent Francoeur: Patrick F. Lewis

Date and Place of Hearing: December 20, 2002

Supplemental Written Argument Filed by the Petitioners: December 31, 2002

Reply Filed by the Respondents: January 6, 2003

Vancouver, B.C.

[1] This application follows upon the judgment of Groberman J. on October 21, 2002 granting the respondent Francoeur an adjournment for filing materials and preparation of argument limited to the issue of whether the arbitrator had jurisdiction over Francoeur personally and whether this court could enforce the monetary award against him. In all other respects the petition was dealt with by Groberman J.

FACTS

[2] An arbitration was carried out under the Rules of the American Arbitration Association pursuant to an arbitration agreement entered into between the claimants Eddie Javor and Fusion-Crete, Inc. and the respondent Fusion-Crete Products Inc., dated March 25, 1995. In the course of the arbitration, the arbitrator made a finding that in April 19, 2000 there was no separation between the corporate respondent and the individual respondent Francoeur. On February 12, 2001, the arbitrator revisited the matter and held that the respondent Francoeur could not re-argue the issue of his having been found the alter ego of the company as his counsel had voluntarily argued the merits earlier. An order adding the respondent Francoeur as a party to the arbitration proceeding was made.

[3] The arbitrator published his award May 9, 2002 at Los Angeles, California in favour of the petitioners. A supplemental award dealing with attorney fees was issued July 8, 2002. The award and supplemental award in favour of the petitioners totalled $94,828.26 U.S., equivalent to $147,269.22 Canadian funds, the judgment sought here.

[4] The petitioners moved for judgment to enforce the award against both the corporate respondent, which Groberman J. ordered, and the individual respondent Francoeur which was adjourned and is the subject of this application, pursuant to section 4 and Articles III and IV(I) of the *Foreign Arbitral Awards Act*, R.S.B.C. 1996, Chapter 154 (the "*FAAA*") and section 35 of the *International Commercial Arbitration Act*, R.S.B.C. 1996, Chapter 233 (the "*ICAA*").

DEFENCES RAISED BY RESPONDENT FRANCOUER

[5] The respondent Francoeur raises four objections to this application:

1. The *FAAA* and *ICAA* do not apply to “non-parties” to arbitration agreements.

2. The arbitral procedure followed in California was not in accordance with the agreement of the parties. Francoeur was a party to the arbitration proceeding but was never a party to the arbitration agreement.

3. The subject matter of the difference between these parties is not capable of settlement by arbitration under the laws of British Columbia. In British Columbia the personal liability of a company representative for a

corporate obligation on the alter ego theory must be decided by a court of law. [*FAAA* Article V(2)(a); *ICAA* s. 36(1)(b)(i)].

4. Recognition of the award is contrary to the public policy of B.C. [*FAAA* Article V(2)(B); *ICAA* s.36(1)(b)(ii).

[6] The first objection is comprehensive in scope. The remaining objections are set forth as alternatives based upon specific available discretionary statutory exclusions from enforcement.

1. IS FRANCOEUR PARTY TO THE AGREEMENT OF MARCH 25, 1995?

[7] The agreement is clear on its face that Francoeur is not a party nor did the arbitrator suggest Francoeur had been a party to the arbitration agreement. He found Francoeur "…should be held personally liable for any debts of the corporation that might ultimately be imposed in these proceedings…"; that Francoeur was a proper party to the arbitration proceeding; and that Francoeur was liable jointly with the corporation to pay costs in the arbitration proceedings.

[8] The arbitrator's finding was not that Francoeur was a party to the arbitration agreement, and therefore the liability imposed upon Francoeur by the arbitrator was not for breach of the arbitration agreement.

[9] The petitioner seeks an enforcement order against Francoeur under the provision of either the *FAAA* or the *ICAA*. It must bring the arbitration award it seeks to enforce clearly within its provisions.

[10] Counsel for Francoeur identified the following portions of the two statutes with the relevant portions italicized:

Foreign Arbitral Awards Act

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.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, *under the conditions laid down in the following articles*. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

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.*

2 If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1 Recognition and enforcement of the award may be refused, *at the request of the party against whom it is invoked*, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) *The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity*, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) *The party against whom the award is invoked* was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure *was not in accordance with the agreement of the parties*, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) *The award has not yet become binding on the parties*, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2 Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

International Commercial Arbitration Act

2(1) For the purposes of this Act:

. . .

"party" means a party to an arbitration agreement and includes a person claiming through or under a party;

. . .

7(1) In this Act, *"arbitration agreement"*
means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) *An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.*

(3) *An arbitration agreement must be in writing*.

(4) *An arbitration agreement is in writing if it is contained in*

(a) *a document signed by the parties,*

(b) *an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or*

(c) *an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other*.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

. . .

35(1) Subject to this section and section 36, an arbitral award, irrespective of the state in which it was made, must be recognized as binding and, on application to the Supreme Court, must be enforced.

(2) Unless the court orders otherwise, *the party relying on an arbitral award or applying for its enforcement must supply*

(a) the duly authenticated original arbitral award or a duly certified copy of it, and

(b) *the original arbitration agreement or a duly certified copy of it*.

(3) If the arbitral award or arbitration agreement is not made in an official language of Canada, the party must supply a duly certified translation of it into an official language.

36(1) Recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only

(a) *at the request of the party against whom it is invoked, if that party furnishes* to the competent court where recognition or enforcement is sought proof that

(i) *a party to the arbitration agreement was under some incapacity*,

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the state where the arbitral award was made,

(iii) *the party against whom the arbitral award is invoked* was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present the party's case,

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the arbitral award which contains decisions on matters submitted to arbitration may be recognized and enforced,

(v) the composition of the arbitral tribunal or the arbitral procedure *was not in accordance with the agreement of the parties* or, failing any agreement, was not in accordance with the law of the state where the arbitration took place, or

(vi) *the arbitral award has not yet become binding on the parties* or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made, or

(b) if the court finds that

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of British Columbia, or

(ii) the recognition or enforcement of the arbitral award would be contrary to the public policy in British Columbia.

[11] On review I note the overall similarity and several instances of identical wording of the two Acts.

[12] An arbitration agreement is the common foundation upon which each of the two statutes rest. The obvious goal of each is to allow enforcement of an award against a party signatory to

the agreement. The parties voluntarily contract to accept enforcement by the court in their home jurisdiction should they be found in breach of contract in an arbitration award held in another jurisdiction.

[13] In the circumstances here the issue is whether a person who was not party to an arbitration agreement but was found by an arbitrator to be a proper party to the arbitration proceeding can have an award for costs against him enforced under the *FAAA* or the *ICAA*.

[14] I am advised by counsel there is no authority on this issue.

[15] I am of the view that it is the intention of both the *FAAA* and the *ICAA* to limit enforcement of arbitration awards to the parties to the arbitration agreement.

[16] The *ICAA* addresses the issue squarely: "'party' means party to an arbitration agreement…" and that the arbitration agreement "…must be in writing…" and is deemed in writing "…if it is contained in a document signed by the parties…". As is the case here "…an arbitration agreement may be in the form of an arbitration clause in a contract…".

[17] Francoeur is not a named party to the arbitration agreement. He is not a signatory to the agreement in his individual capacity.

[18] Counsel for the Petitioner argues that unlike the *ICAA*, the *FAAA* contains no definition of "party" and it must therefore be given a broad interpretation. The words "…the party against whom it is invoked…" in Article V(l) may therefore refer either to a party to an arbitration agreement or to a person who has become a party to the arbitration proceeding.

[19] Counsel further argues that the meaning of "agreement in writing" in Article II(2) is inclusive rather than restrictive and is broad enough to encompass the written documents considered by the arbitrator during the arbitration. I consider that a strained interpretation.

[20] I do not accept that the meaning of "party" as used in the *FAAA* differs materially from its meaning in the *ICAA*.

[21] The *FAAA* is based upon "…an agreement in writing under which the parties undertake to submit to arbitration…". It is a contractual obligation and the parties are those to the "agreement in writing", not persons procedurally added involuntarily as parties during arbitration.

[22] The concept that the parties are signatories is made in Article II(2).

[23] In keeping with enforcement being limited to parties to the arbitration agreement, I note that both under the *FAAA* [Article IV(1)(b)] and the *ICAA* [section 35(2)(b)] an original or certified copy of the arbitration agreement must accompany the enforcement application. That appears directed to the ability of the court to verify the signatory parties and existence of an arbitral clause within the agreement.

2. ARBITRATION PROCEDURE NOT IN ACCORDANCE WITH THE AGREEMENT OF THE PARTIES

[24] Article V(1)(d) of the *FAAA* and section 36(1)(a)(v) of the *ICAA* contain parallel provisions permitting enforcement to be refused where "…arbitration procedure was not in accordance with

the agreement of the parties…". It would appear the arbitrator had procedural authority under California law to proceed against Francoeur as he did. That however does not permit enforcement of an order against Francoeur if it is not in accordance with the agreement of the parties.

[25] The agreement of the parties in issue did not provide for the involvement of Francoeur as a party and there exists an inconsistency between the arbitration agreement and the arbitral procedure employed by the arbitrator in finding his award.

[26] I am of the view that neither the *FAAA* or *ICAA* provide for issue of enforcement orders of arbitration awards against a person not party to the arbitration agreement.

[27] I agree with the expressed view of counsel for Francoeur "…that each of these statutes was clearly intended to set up an independent and complete code for enforcing foreign arbitral awards; it is apparent they parallel each other, and it would seem unreasonable (and arguably absurd) to consider that one was intended to govern parties to arbitration agreements but the other parties to the arbitration proceedings".

[28] The award against Francoeur for costs is not enforceable under the *FCAA* or the *ICAA* as it involves a person never party to the arbitration agreement.

3. THE ISSUE OF FRANCOEUR'S PERSONAL LIABILITY COULD NOT HAVE BEEN SETTLED BY ARBITRATION UNDER BRITISH COLUMBIA LAW

[29] Article V(2)(a) of the *FAAA* and Section 36(1)(b)(i) of the *ICAA* provide parallel grounds permitting the court to refuse enforcement of the award where the "…subject matter of the dispute [difference] is not capable of settlement by arbitration under the law of that country".

[30] The issue here is whether Francoeur should bear personal liability in this matter. In British Columbia, the jurisdiction of arbitrators derives from statute and is confined to a jurisdiction over parties to arbitration agreements. [*Commercial Arbitration Act*, R.S.B.C. 1996, c. 55, s. 22; Domestic Commercial Arbitration Rules of Procedure ss. 2 and 20].

[31] The claim against Francoeur for personal liability could not properly have been the subject of arbitration under the agreement here as he was not a party. It would be a matter for judicial determination.

[32] I accept therefore that it is a proper reason to exercise a discretion against the enforcement application.

4. ENFORCING THE AWARD AGAINST FRANCOEUR WOULD BE CONTRARY TO PUBLIC POLICY

[33] Article V(2)(b) of the *FAAA* and section 36(1)(b)(ii) of the *ICAA* provides parallel grounds that would permit the Court to refuse enforcement of the arbitration award where it "…would be against the public policy of B.C.".

[34] Assuming the arbitrator had the authority to add Francoeur as a party to the arbitration proceeding and inquire into his relationship with the corporate respondent, I do not feel I have

sufficient ability to gauge the strength of the evidence that lead to the finding that Francoeur was the alter ego of the corporate respondent. I make no finding on this objection.

RESULT

[35]   In the result the petitioner has failed to prove entitlement to the enforcement order sought against Francoeur.

[36]   The application in that regard is dismissed and Francoeur is entitled to costs on scale 3.

"R.R. Holmes, J."

The Honourable Mr. Justice R.R. Holmes

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