Court of Queen's Bench of Alberta

Citation: Bad Ass Coffee Company of Hawaii Inc. v Bad Ass Enterprises Inc., 2007 ABQB 581

Date: 20070926
Docket: 0501 12165
Registry: Calgary

Between:

Bad Ass Coffee Company of Hawaii Inc.

Plaintiff

- and -

Bad Ass Enterprises Inc., Attitude Coffee Corporation and Ron Plucer also known as Ronald Plucer

Defendants

Reasons for Judgment
of
J.B. Hanebury, Q.C., Master in Chambers

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[1] This application raises the question of whether the court should refuse to register a foreign judgment obtained by a United States franchisor against an Alberta franchisee if the franchise agreement does not comply with the Alberta *Franchises Act*.

[2] Bad Ass Coffee Company of Hawaii Inc. (BAH), a Utah-incorporated company, entered into a series of franchise agreements with Bad Ass Enterprises Inc. (Enterprises) and Attitude Coffee Corporation (Attitude). Ron Plucer guaranteed the payments to be made under some of those agreements. The relations between the companies deteriorated and BAH obtained a judgment in Utah against Enterprises, Attitude and Ron Plucer. BAH has sued on its judgment in Alberta and now seeks summary judgment under rule 159 of the *Alberta Rules of Court*.

Facts

[3] BAH is a franchisor for the distribution and sale in retail stores of Bad Ass coffee products. It allows the stores to utilize the Bad Ass coffee name, logo and method of operation, as set out in a series of franchise documents. The principals of Enterprises and Attitude expressed an interest to BAH in becoming a master franchisee, or similar developer of franchise operations and a distributor of Bad Ass brand products in stores to be developed primarily in Alberta. A number of contracts were entered into between these companies and BAH relating to their franchise arrangements.

[4] On February 16, 2000, the parties entered into the first "franchise agreement" and Enterprise agreed to the jurisdiction of, and the litigation in, the courts of Utah and Alberta, and the use of Utah law. There was a fall-back clause if Utah law was inapplicable. Arbitration was to be before the American Arbitration Association using Utah law. Mr. Plucer signed this agreement on behalf of Attitude and also signed an attached "Personal Guaranty" guaranteeing performance under the agreement.

[5] On December 29, 2000, a second franchise agreement was signed by the parties for another store. It contained similar wording and a similar guarantee executed by Mr. Plucer.

[6] On December 16, 2002, BAH and Enterprises entered a "Multi-Unit Development Agreement" (MUDA). In this agreement the choice of jurisdiction and law was Utah for both litigation and arbitration. This agreement was also signed by Ron Plucer on behalf of Enterprises and its performance was personally guaranteed by him.

[7] Various other agreements were entered into by the parties but need not be referred to as they were not the subject of the arbitral award and subsequent judgment obtained in Utah.

[8] The franchise relationship between the parties soured, and BAH filed a demand for arbitration with the American Arbitration Association. It alleged that the defendants failed to honour their obligations under the agreements by failing to pay royalties, failing to provide income and distribution fee reports and ignoring the requirements for the opening of a new store. When the defendants resisted arbitration of the disputes, BAH petitioned in the Utah court for an order directing that the dispute between the parties proceed to arbitration.

[9] On September 14, 2004, Alberta counsel for the defendants, Enterprises, Attitude and Plucer, sent a letter to the International Center for Dispute Resolution and counsel for BAH setting out the position of his clients. He said that the agreements alleged to be subject to the arbitration were franchise agreements subject to the provisions of the *Franchises Act*, RSA 2000 ch. F – 23. He said: "I may indicate that it will be the intention of my clients... to claim all the defences available under the *Franchises Act* and to counter claim for damages suffered but all of this will be done in the Court of Queen's Bench of Alberta." He said that these determinations could not be made by the Board of Arbitration in Utah and advised that his clients will oppose

the application brought in the District Court in Utah to compel the arbitration and will commence its own action in Alberta for appropriate remedies. He contested the liability of Mr. Plucer on his guarantees as they did not comply with the requirements of Alberta law. He said liability must be determined by the courts of Alberta. He closed by stating:

> Nothing in the foregoing is to be constituted as my clients or any of them acceding to the jurisdiction of the International Center for Dispute Resolution for any matters at issue including the matter of determination of whether or not it has jurisdiction to hear the arbitration sought by Bad Ass Utah or the applicability of the laws of any jurisdiction to such purported arbitration.
>
> Accordingly, my clients (who have never executed a Consent to arbitration) will not participate further in any procedures related to this purported arbitration unless ordered to do so by a Court of competent jurisdiction.

[10] At that time Enterprises, Attitude and Plucer were also represented by counsel in Utah, and a week later he provided a Response to Petition to Compel Arbitration that raised a number of defences to the Petition to Compel Arbitration. It argued that the petition failed to state a claim upon which relief could be granted, and it failed to attach copies of the written agreements. The response denied that Mr. Plucer provided any enforceable guarantees and alleged that the petitioner materially breached one or more of the agreements which existed between the parties. It said that there was no default under the agreements and that the MUDA was never enforceable, nor were there any enforceable arbitration agreements between the parties. It stated that the petition and the claims were barred as the dispute was governed by the laws of Alberta and Canada, the court therefore lacked jurisdiction over the dispute, and the venue was improper. The Response raised a number of other defences including a lack of consideration, a failure of consideration and/or a failure of a condition precedent necessary for BAH to rely on the agreements.

[11] A Memo in Opposition to the Petition to Compel Arbitration was filed by the defendants' Utah counsel three weeks later. In that memo the defendants stated that aside from the fact that the court lacked "subject matter jurisdiction" the petition should be denied for other reasons, including an assertion that some of the agreements did not become binding contracts, one agreement did not contain an arbitration clause, certain conditions precedent were not met, portions of the arbitration clauses which purported to require the application of Utah law in Utah were void under Canadian law, and the amounts in controversy were less than $75,000, the minimum threshold necessary for federal jurisdiction.

[12] A court hearing was held on October 6, 2004, and the Utah counsel for the defendants appeared. At its conclusion the court requested that the parties submit supplemental briefs on various substantive issues. A detailed affidavit of Ronald Plucer was filed October 12, 2004, in opposition to the motion to compel arbitration.

[13] On October 25, 2004, the defendants filed an application in the Alberta courts against BAH and the International Center for Dispute Resolution (a division of the American Arbitration Association) seeking an injunction to prohibit the arbitration from proceeding in Utah. That application did not proceed and is now moot.

[14] On November 29, 2004, the defendants filed an affidavit of David Steed, a Calgary lawyer, in opposition to the motion to compel arbitration. Mr. Plucer filed a declaration in opposition to the motion on November 29, 2004 and the supplemental memorandum requested by the court was filed on November 29, 2004. This document, 32 pages in length, argued the points raised by the court on the merits and pursuant to the law of Utah.

[15] The defendants continued to participate in the proceedings, including an appearance at the motion to compel arbitration on December 6, 2004.

[16] On Dec. 6, 2004, the Utah court considered the terms of the agreements in relation to arbitration and the use of the law of Utah and ordered the arbitration proceed in relation to the first three agreements: the first and second franchise agreements and the MUDA, and granted a motion for a preliminary injunction. The court found that an evidentiary hearing was necessary to determine whether the other agreements came into existence. The court retained jurisdiction to confirm any arbitration award rendered pursuant to the arbitration. In the course of his judgment, Judge Jenkins said, at paragraph 2, that the agreements "were the product of arm's length negotiations between sophisticated business parties assisted by competent counsel". The defendants "had the opportunity to negotiate the terms of these three agreements and availed themselves of this opportunity".

[17] On January 10, 2005, the defendants submitted their witness list to the arbitrator identifying three witnesses they expected to call in their case in chief at the arbitration. The witness list noted that "[t]he provision of this respondent's witness list does not constitute an admission on the part of any of the respondents that they attorn to the jurisdiction of the ICD or in any of the matters related to the arbitration request of the claimant against the present respondents". On January 13, 2005, the defendants submitted their exhibits numbered 1 to 26 to the arbitrator. Then, by letter of January 19, 2005, they informed the arbitrator that they did not intend to participate in the hearing as they contended that the International Center for Dispute Resolution had no authority to proceed with the arbitration. The arbitrators warned the defendants that if they failed to appear the tribunal could proceed with the arbitration.

[18] The arbitration hearing was held on January 25, 2005. The defendants did not appear and a determination was made in their absence. The arbitrator concluded that the award against the corporate defendants would be the same under either Alberta or Utah law and that Plucer's written guarantee was enforceable under Utah law. In relation to the enforcability of the guarantee pursuant to Utah law the court relied on ***Bank of Montréal v. Snoxell*** cited as [ACQB 1982] and ***Associates Capital Services Corp. v. Multi Geophysical Services Inc.*** cited as [ACQB 1987].

[19] On February 7th, 2005, Utah counsel appeared on the defendants' behalf at a court application for an order to show cause, due to the defendants' alleged continued use of BAH's logo. The defendants' Utah counsel applied to withdraw from the record. On February 7, 2005, the court granted the motion.

[20] BAH then moved to perfect the arbitrator's decision in the Utah District Court and on April 15th, 2005, the arbitrator's award was confirmed by the court. Two days prior to that confirmation, the defendants provided notice that they would not file a memorandum in opposition to the application for confirmation. Their notification said that it was "filed under special appearance and shall not be construed to constitute an admission that this court has jurisdiction over this matter." Judgment was then entered against the defendants and it is this judgment that BAH has sued upon in Alberta.

Overview of the Arguments of the Parties

[21] BAH argues that this judgment should be entered and enforced in Alberta. It says that the test for when a Canadian court will enforce a United States judgment is found in ***Beals v. Saldanha*** [2003] S.C.J. No. 77, where the majority held that if the U.S. court has what the Canadian court recognizes as a "real and substantial connection" with either the subject matter of the action or the defendant, the Canadian court should recognize, respect and enforce the judgment, subject to the defences of fraud, natural justice and public policy.

[22] BAH argues that the case holds that a real and substantial connection to the foreign jurisdiction is established when a significant connection exists between the cause of action and the foreign court or when the defendant has participated in something of significance in or was actively involved in the foreign jurisdiction. BAH also relies on ***Morguard Investments Ltd. v. De Savoye*** 1990 CarswellBC 283 (SCC), particularly paragraph 43 of that decision, where the court held that finding that a foreign court has properly exercised its jurisdiction is easy when the defendant submitted to its jurisdiction, whether by agreement or by attornment. The court has jurisdiction by agreement or because of attornment and no injustice results.

[23] BAH says that the facts support a real and substantial connection between it, the defendants and the Utah court. It points to a number of factors, including BAH's incorporation in Utah; Utah as the home of its business operations; the executed agreements establishing the applicability of Utah law and the jurisdiction of the Utah courts and arbitrators; and the participation of the defendants in the proceedings. BAH says that the overall effect of the agreements entered into by the parties was to permit the development of franchises in the four provinces and two territories of Western Canada and the use and licensing in Canada of BAH's intellectual property and processes.

[24] BAH also notes that when deciding whether a foreign court properly exercised its jurisdiction, it is appropriate for the Canadian court to consider the standards under which that foreign court operates on jurisdictional questions: ***Muscutt v. Courcelles*** 2002 CarswellOnt 1756 at para. 102, 109 (C.A.) The affidavit evidence of Mr. Marsden, a Utah attorney, states that under

Utah law, the Utah court was entitled to exercise its jurisdiction over both the parties and the dispute.

[25] Finally, BAH argues that none of the recognized defences to the recognition of a foreign judgment, fraud, breach of natural justice, or public policy, are applicable in this situation. It argues that the absence in Utah of the protections that are found in the relevant Alberta legislation, the *Franchises Act* and the *Guarantees Acknowledgment Act*, is not sufficient to meet the threshold requirements of the public policy defence; it is not an affront to fundamental morality.

[26] The defendants have raised a number of defences to this application for summary judgment. First, they argue that they have never submitted to the jurisdiction of the Utah courts. Second, they argue that there is no substantial connection between them and the State of Utah. Finally, they argue that the agreements provide that the law of Utah is applicable and this contravenes the Alberta *Franchises Act* and is against public policy with the result that there is no right to register the Utah judgment in this jurisdiction. In relation to the guarantee, Ron Plucer says that the guarantee does not conform with the Alberta *Guarantees Acknowledgment Act* and therefore is unenforceable.

Analysis

[27] I have considered the case law cited by the parties. I have also considered ***British American Oil Co. Ltd. v. Born Engineering Co.*** [1964] 44 D.L.R. 569; ***Anraj Fish Products Industries Ltd. v. Hyundai Merchant Marine Co.*** [2000] F.C.J. No. 944 (FCA), leave to appeal dismissed [2000] S.C.C.A; ***Morrison v. Society of Lloyd's*** [2000] N.B.J. No. 41 (N.B.C.A.), leave to appeal dismissed, [2000] S.C.C.A. No. 132; ***Z.I. Pompey Industrie v. ECU-Line N.V.*** 2003 SCC 27; ***Can-Am Produce & Trading Ltd. v. Ship Senator et al.*** (1996), 112 F.T.R. 255 (Fed. T.D.); ***Naccarato v. Brio Beverages Inc.*** 91998) 57 Alta. L.R. (3d) 206; ***City Schooner Inc. v. Bridal Fair Inc.*** 2005 ABQB 155; ***Boardwalk Regency Corp. v. Maalouf*** [1992] O.J. No. 26 (Ont. C.A.); ***MGM Grand Hotel Inc. (c.o.b. MGM Grand Hotel/Casino) v. Kiani*** [1997] A.J. No. 1084 ; and ***Society of Lloyd's v. Saunders*** [2001] O.J. No. 3403 (C.A.).

[28] The plaintiff's application is for summary judgment under rule 159 of the *Alberta Rules of Court*. The test to be met on such an application was set out by the Alberta Court of Appeal in ***Tottrup v. Clearwater (Municipal District No. 99)*** 2006 ABCA 380 at paragraph 11:

> ... the ultimate outcome of the case may depend on the interpretation of some statute or document, or on some other issue of law that arises from undisputed facts. In such cases the test for summary judgment is not whether the issue of law is "beyond doubt", but whether the issue of law can fairly be decided on the record before the court. If the legal issue is unsettled or complex or intertwined with the facts, it is sometimes necessary to have a full

> trial to provide a proper foundation for the decision. In other cases it is possible to decide the question of law summarily...

[29] The facts and law relevant to the issues raised by the parties must be considered in light of this test. The following issues were raised by the parties: did the defendants submit to the jurisdiction of the Utah courts and the Utah arbitrator; is there a substantial connection between Utah and the matters in issue; should the defence of public policy be applied; and are the guarantees of Ron Plucer enforceable?

Did the defendants submit to the jurisdiction of the Utah courts and the Utah arbitrator?

[30] BAH relies on the authors of several texts to argue that a defendant submits to the jurisdiction of the court when he defends on the merits: See *Canadian Conflict of Laws*, 4th ed., J.-G Castel, Butterworths: (undated) p. 203 para.125; *Canadian Encyclopedic Digest*, 3rd ed., Western Vol. 30, p.76 para. 20 to 25; and *Civil Procedure Encyclopedia,* Stevenson and Cote, Juriliber (undated) p. 2-6 - 2-8.

[31] The Alberta Court of Appeal has followed this approach. In ***British American Oil Co. Ltd. v. Born Engineering Co.*** [1964] 44 D.L.R. 569, the court found that the defendant attorned to the jurisdiction of the foreign court when it entered a conditional appearance and put on the record allegations of fact, which, if true, would have met the plaintiff's claim on the merits. The court, relying on earlier authorities, agreed that "where a question of jurisdiction arises a man cannot both have his cake and eat it". He cannot fight on the merits and preserve the right to say, if he loses on the merits, that the court has no jurisdiction to decide against him. Therefore, he cannot take any step "unequivocally referable to the issue on the merits". Once he does so, he has lost the right to raise the issue of the court's jurisdiction.

[32] The defendants rely on the decision of ***Dovenmuehle v. Rocca Group Ltd.*** [1980] 34 N.B.R.(2d) 444 (leave to appeal to the S.C.C. refused: 1982 no citation provided) which considered a provision of the *Foreign Judgments Act,* R.S.N.B. 1973, c. F-19. That section provided that a foreign court had jurisdiction when a defendant appeared in the action without protest. While this case is distinguishable, as it deals with legislation not found in Alberta, it does not contradict the approach of the texts cited and the Alberta Court of Appeal decision in ***British American Oil***. At paragraph 14 of ***Dovenmuehle,*** the court found that it is "well settled in English jurisprudence that if a litigant voluntarily submits his case to a foreign tribunal for determination, that tribunal has jurisdiction to decide the case...[and] the same would appear to be true where a defendant, as well as pleading to the merits of the case, contests the jurisdiction of the foreign court..."

[33] The law appears settled that if the defendants addressed the merits of their case before the Utah courts, they attorned to the jurisdiction of that court. The responses of the defendants to the application to compel arbitration contained numerous submissions on the merits. The defendants clearly submitted to the jurisdiction of the Utah courts. The September, 2004, letter of their Alberta counsel alleged that they would not accept the jurisdiction of the International Center for

Dispute Resolution unless ordered to do so by a court of competent jurisdiction. By attorning to the jurisdiction of the Utah court, the Utah court became a court of competent jurisdiction that could order the parties to arbitration. It did so, and the defendants were then subject to the jurisdiction of the arbitrators. Furthermore, by filing their witness list and exhibit list in the arbitration, the defendants acknowledged the arbitrator's jurisdiction over them.

Is there is a substantial connection between Utah and the matters in issue?

[34] Subject to certain defences, a Canadian court will enforce a foreign judgment when there is a "real and substantial connection" to the dispute: see ***Beals***, paragraph 19. In deciding if the foreign jurisdiction had a "real and substantial connection", the court must find that a significant connection exists between the cause of action and the foreign court. BAH argues that there is a real and substantial connection between the parties and the state of Utah as BAH is a Utah company, the agreements provide for the jurisdiction of the Utah courts and the Utah arbitrator, and the defendants have attorned to their jurisdiction.

[35] With a finding of an attornment by the defendants to the Utah courts, a consideration of the parties' arguments on the real and substantial connection test appears unnecessary. The court in ***Beals*** noted at paragraph 37, that while "such a [real and substantial] connection is an important factor, parties to an action continue to be free to select or accept the jurisdiction in which their dispute is to be resolved by attorning or agreeing to the jurisdiction of a foreign court".

[36] In this case the defendants have done both. They executed agreements that provided for the jurisdiction of the Utah courts and the American Arbitration Association and they attorned to the jurisdiction of the Utah courts and the Utah arbitrator.

[37] Where the parties have made an agreement as to the jurisdiction to govern their disputes, the courts will not lightly set it aside. In ***Anraj Fish Products Industries Ltd. v. Hyundai Merchant Marine Co.*** [2000] F.C.J. No. 944 (FCA), leave to appeal dismissed [2000] S.C.C.A. No. 441, the court agreed that strong reasons are needed to depart from the prima facie rule that contractual undertakings must be honoured. In ***Morrison v. Society of Lloyd's*** [2000] N.B.J. No. 41 (N.B.C.A.), leave to appeal dismissed, [2000] S.C.C.A. No. 132, the court pointed out that the onus is on the party seeking to override the jurisdiction clause and, since the clause represents the reasonable expectations of the parties, it is a heavy burden. This approach was adopted by the Supreme Court of Canada in ***Z.I. Pompey Industrie v. ECU-Line N.V.*** 2003 SCC 27, when it described the "strong cause" test that must be met to override the agreement of the parties as to the jurisdiction that will govern their disputes. This test, it said, "reflects the desirability that parties honour their contractual commitments and is consistent with the principles of order and fairness at the heart of private international law, as well as those of certainty and security of transaction at the heart of international commercial transactions": see paragraph 27.

[38] The initial requirements for the enforcement of the foreign judgement have been met. The parties agreed to the jurisdiction of the Utah courts and arbitrators and submitted to their

jurisdiction. There is no strong cause to set it aside. However, this does not end the matter. ***Beals*** makes it clear that a foreign judgment will not be enforced if one of three defences is successfully raised. The third defence, public policy, is the one relied upon by the defendants.

Should the defence of public policy be applied?

[39] The defendants argue that the public policy of concern in this case is the violation of the provisions of the *Franchises Act,* and in particular sections 7, 16 and 17. They say that it would be against public policy to permit the registration and enforcement of a foreign judgment determined under Utah law rather than pursuant to these provisions of the Alberta *Franchises Act.* Before considering the public policy argument, the initial question to address is whether there has been a violation of these provisions of the *Franchises Act.*

[40] For the purpose of argument, BAH accepts, without admitting, that the agreements that were subject to arbitration are franchise agreements as that term is defined in the *Act*. The three sections of the *Act* that the defendants say have been violated are:

> Fair Dealing
>
> 7. Every franchise agreement imposes on each party a duty of fair dealing in its performance and enforcement.
>
> Alberta Law
>
> 16. The law of Alberta applies to franchise agreements.
>
> Limit on Jurisdictional Choice
>
> 17. Any provision in a franchise agreement restricting the application of the law of Alberta or restricting jurisdiction or venue to any forum outside Alberta is void with respect to a claim otherwise enforceable under this Act in Alberta.

[41] In relation to s. 7 of the *Act*, the fair dealing provision, the defendants argue that it was breached because they did not receive "disclosure documents" on a timely basis as required by s. 4 of the *Act.* When the disclosure documents were eventually produced they allegedly indicated that BAH was, and had been, involved in litigation regarding its ownership of certain intellectual property relating to the "Bad Ass Coffee" name, system of franchising and marketing operations.

[42] The defendants rely on ***Emerald Developments Ltd. v. 768158 Alberta Ltd.*** (2001) 287 A.R. 151 (Q.B.) which discusses the purpose of the disclosure requirements. That case notes that the disclosure requirements are meant to protect <u>both</u> the franchisee and the franchisor. The franchisor is protected as the *Act* provides that the franchisee must seek rescission of the franchise

agreement within a certain time period after receiving the disclosure documents. The defendants admit that they did not comply with the time lines for rescission. As the defendants chose not to rely on the protections given them by the *Act* for a breach of s. 4, I see little merit in their argument that non-compliance by the franchisor with the requirements of s. 4 is a violation of s. 7 that should result in a refusal to enforce the Utah arbitral award. The defendants did not lose the protections of the *Act*; they chose not to use them. Furthermore, the defendants have now sued BAH in Alberta on the basis of non-disclosure and misrepresentation.

[43] The defendants' argument in relation to sections 16 and 17 is tied to the choice of law and choice of jurisdiction clauses in the agreements that underpin the arbitral award. To consider the defendants' argument the terms of the three agreements that underpin the arbitral award must be examined.

[44] On February 16, 2000, the parties entered into the first franchise agreement, which included the guarantee of Mr. Plucer. Section 8.03 sets out the franchisor's remedies in case of default and includes "seeking any other remedy available to Franchisor at law or in equity under the laws of the State of Utah". In section 14.01 it is provided that a dispute shall, on the request of either party, be submitted for arbitration in Salt Lake City, Utah, heard in Utah or Alberta and governed substantively by the laws of Utah.

[45] In section 19.02 the defendants "consent to the exercise of general personal jurisdiction of the courts of record of the State of Utah and Alberta, Canada over Franchisee" and the parties agree that "all causes of action and claims arising out of this Agreement shall be litigated in the courts of record in the state of Utah or Alberta, Canada, even though it may be otherwise possible to obtain jurisdiction over the Franchisor elsewhere".

[46] Clause 19.01 provides that the agreement "shall be governed, construed and interpreted in accordance with the laws of the State of Utah." It says:

> [h]owever, if a court of competent jurisdiction determines that this agreement must be governed by the laws of another state or province, then the laws of that state will govern this agreement. If the laws of the state whose laws govern this agreement, including Utah, require terms other than or in addition to those in this agreement, then such terms shall be deemed incorporated herein, but only to the extent necessary to prevent the invalidity of this agreement or any of the provisions hereto or the imposition of civil or criminal penalties or liability. To the extent permitted by the laws of the state whose laws govern this agreement, franchisee hereby waives any provisions of law or regulations which render any portion of this agreement altered invalid or unenforceable in any respect. If any provisions of this agreement are, or shall come in conflict with any applicable laws, then the applicable law shall govern and such provisions shall be automatically deleted and shall not be effective to the extent they are not in accordance with applicable law and the remaining terms and conditions of this agreement shall remain in full force and effect.

[47] On December 29, 2000, the second franchise agreement, containing similar wording, was signed by the parties and guaranteed by Mr. Plucer.

[48] On December 16, 2002, BAH and Enterprises signed the MUDA. This agreement refers to the franchise agreements and provides that any party can demand arbitration which "shall be held in Salt Lake City, Utah." Clause 15.03 provides that the rights of the parties and the provisions of the MUDA "shall be interpreted and governed in accordance with the laws of the State of Utah". The defendants consent to the jurisdiction of the Utah courts over them and agree that disputes shall be litigated in Utah, even though it may be possible to obtain jurisdiction elsewhere.

[49] The relevant clauses in the franchise agreement and the MUDA appear to lead to contradictory results. The franchise agreements provide for the jurisdiction of the Alberta and the Utah courts for litigation and for the hearing of an arbitration before the American Association of Arbitrators in either Utah or Alberta. They provide for the application of Utah law to the litigation and the arbitration, with a provision that could, in certain circumstances, lead to the applicability of the law of Alberta.

[50] The MUDA provides that litigation and arbitration "shall" occur in Utah. Similarly, the law to be applied is the law of Utah.

[51] The defendants argue that these clauses offer or require the state of Utah to be the choice of jurisdiction and choice of law for disputes under the agreement and therefore are in violation of sections 16 and 17 of the *Act*, the sections that provide that the law of Alberta is to apply to franchise agreements and that clauses restricting the application of Alberta law or restricting jurisdiction to a venue outside Alberta are void.

[52] In response, BAH argues that a franchise agreement which provides for the law or venue of a jurisdiction other than Alberta does not offend sections 16 and 17 unless it purports to exclude the application of Alberta law or to exclude an Alberta venue as a "back stop". It says that the provisions in the agreements at issue relating to choice of jurisdiction and choice of law do not run afoul of s. 17 of the *Act* and should be most reasonably read as providing for the law and venue of Utah without expressly excluding the law and venue of Alberta.

[53] In support of this argument BAH relies on ***1279022 Ontario Ltd. v. Posen*** 2003 CarswellMan 207 (Master), 2003 CarswellMan 465 (Q.B.), 2004 CarswellMan 254 (C.A.)**.** In that case, over 30 plaintiff franchisees from different provinces sued the defendant franchisor in Manitoba. The franchisor sought to compel the Alberta plaintiffs to take their suit to Alberta based on s. 17 of the Alberta *Franchises Act* and the provisions of the franchise agreements.

[54] The clause in the franchise agreements provided that the parties "shall attorn" to the jurisdiction of Alberta. The Master held that this clause did not exclude the jurisdiction of the courts of Manitoba; it provided a "back stop" in the event that there was no clear choice of *forum conveniens*. He found that the agreements were in compliance with s. 17 of the *Act;* they did not attempt to restrict Alberta's territorial jurisdiction or venue. At the same time, he said, s. 17 of the

Act could not be interpreted to mean than an Alberta franchisee can never take its particular dispute for hearing in another province.

[55] This part of the Master's decision was upheld without comment on appeal and then found unnecessary for consideration to determine the subsequent appeal to the Court of Appeal.

[56] I do not see ***Posen*** as determinative of the issues in this case. The agreements in ***Posen*** provided that Alberta had jurisdiction and they complied with Alberta law as they did not restrict the applicability of Alberta law or venue. The question was whether other jurisdictions could also hear the actions. In this case the facts are different. The agreements allow another jurisdiction, relying on its own laws, to determine disputes between the parties. If these clauses allow for a choice of jurisdiction, ***Posen*** indicates that they are in compliance with the *Act*. However, if they allow for exclusive Utah jurisdiction and reliance on Utah law, they may be in violation of the *Act.*

[57] While the two franchise agreements may allow for Alberta law and jurisdiction, the MUDA arguably provides for the exclusive use of Utah law and the Utah courts. A review of the case law suggests that the courts have recently adopted a more flexible approach when interpreting a choice of jurisdiction clause and no longer require express language of exclusivity. In ***Can-Am Produce & Trading Ltd. v. Ship Senator et al.*** (1996), 112 F.T.R. 255 (Fed. T.D.), the court held that it was not necessary to use the word "exclusive" to find that a jurisdiction clause granted exclusive jurisdiction to the foreign court. Mandatory language such as "and no other courts" or "shall be..." were sufficient to create exclusive jurisdiction. The reasoning in ***Can-Am*** was applied in ***Naccarato v. Brio Beverages Inc.*** 91998) 57 Alta. L.R. (3d) 206 where the choice of jurisdiction clause provided that the agreement would be construed in "accordance with the laws prevailing in British Columbia and any proceeding ... will be commenced and maintained in the Court of appropriate jurisdiction in the County of Vancouver, British Columbia". This clause was found to confer exclusive jurisdiction. A similar approach was taken in ***City Schooner Inc. v. Bridal Fair Inc.*** 2005 ABQB 155. There is no clause in the MUDA that detracts from this apparent granting of exclusive jurisdiction to Utah.

[58] On the information and argument provided, I am not satisfied, to the extent necessary on a summary judgment application, that all of these clauses provide for the applicability of Alberta law. Therefore, I must assume that the agreements are not in compliance with s.16 of the Alberta *Franchises Act* requiring that the law of Alberta apply to franchise agreements.

[59] A breach of s. 16 of the *Act* does not mean that there is automatically a breach of s. 17 of the *Act*. That section provides that provisions restricting the application of the law of Alberta or restricting jurisdiction or venue to a forum outside Alberta are void "with respect to a claim otherwise enforceable under this Act in Alberta". The *Act* provides for certain specific types of claims but s. 15 makes it clear that the parties may still make all claims that they may have in law.

[60] BAH argues that to trigger s. 17, a claim must be made under the *Act* and that its claim is outside the *Act*. An examination of the claim that was arbitrated in Utah indicates that it was not a

claim under the *Act*; it was a claim for damages for breach of contract. The filings in Utah by the parties do not indicate otherwise. While the Response to Petition to Compel Arbitration and the Memorandum Opposing Petition to Compel Arbitration filed by the defendants refer to the provisions of s. 17 of the *Franchises Act*, neither filing addresses the question of whether the claim is one that would "otherwise be enforceable"under the *Act.*

[61] From a review of the *Act* and the documents filed in the Utah proceedings, and as there is no evidence that the claim of BAH is one that is enforceable under the *Act*, I am satisfied that the arbitral award and subsequent judgment do not result from a claim to which s. 17 is applicable. This analysis leads to the conclusion that s. 17 of the *Act* has not been triggered and therefore, it has not been violated by the decision of the Utah arbitrator. As a result, s. 16 is the only section of the *Act* that may have been violated by the claim and resultant arbitral award and judgment in Utah. Is this sufficient for the court to refuse to enforce the judgment on the basis of public policy?

[62] BAH relies on the decision in ***Beals*** to argue it is not. ***Beals*** explains that a foreign judgment will not be enforced when the foreign law is contrary to our view of basic morality. In paragraph 72, the court said that a judgment would not be enforced if it is "founded on a law contrary to the fundamental morality of the Canadian legal system" or "rendered by a foreign court proven to be corrupt or biassed". At paragraph 75, the court warned that refusing to enforce a foreign judgment "is not a remedy to be used lightly" and "[t]he expansion of this defence to include perceived injustices that do not offend our sense of morality is unwarranted". It is a defence that "should continue to have a narrow application".

[63] The defendants argue that ***Beals*** is distinguishable on two grounds. First, the *International Commercial Arbitration Act* R.S.A 2000 C. I-5 applies to the registration of the Utah judgment and the definition of public policy under that legislation should be different than that discussed in ***Beals***. Second, the court in ***Beals*** considered the situation where the amount of the award and the external law, ie. the foreign law, were argued to be contrary to fundamental public policy. The defendants say the situation here is quite different as there has been a violation of internal law, in this case the statute law of Alberta.

Does the common law definition of public policy apply to the International Commercial Arbitration Act?

[64] The *International Commercial Arbitration Act* applies to the enforcement of an arbitral award in Alberta, a fact the defendants say is admitted by all of the parties. That *Act* refers to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* adopted by the United Nations Conference on International Commercial Arbitration on June 10, 1958. Section 2 of Article V of that *Convention* is reproduced in a Schedule to the *Act* and it states that the recognition and enforcement of an arbitral award may be refused, if the competent authority in the country where recognition and enforcement is sought, finds that to do so would be "contrary to the public policy of that country".

[65] No definition of "public policy" is found in the *International Commercial Arbitration Act.* No case law was cited that distinguishes between the use of the "public policy" defence in the *Act* and its use in the common law.

[66] A commentary on the meaning of "public policy" as found in the Model law, (Schedule 2 to the *Act*) is found in the Report of the United Nations Commission on International Trade Law, June 3-21, 1985[1]:

> It was understood that the term "public policy", which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside. It was noted, in that connection, that the wording "the award is in conflict with the public policy of this State" was not to be interpreted as excluding instances or events relating to the manner in which an award was arrived at.

[67] This commentary does not indicate a definition of public policy that is in conflict with the common law in relation to the enforcement of foreign judgments. In fact, the intent of the legislation appears to be to extend to foreign arbitral awards the common law recognition and enforcement rights already extended to foreign judgments. See: ***Grow Biz International Inc. v. D.L.T. Holdings Inc.*** 2001 PEISCTD 27 and the cases cited therein; and ***Karaha Bodas Co. L..L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara et al*** [2004] 364 A.R. 272 (Master). As a result, I see no reason why the guidance given by the Supreme Court of Canada on the definition and use of the public policy defence found in ***Beals*** cannot be turned to when deciding whether to enforce an arbitral award.

*Can the definition of public policy in **Beals** be applied where there is a violation of internal law?*

[68] The defendants also seek to distinguish ***Beals*** on the basis that it considered the fundamental morality of the application of foreign law, rather than the fundamental morality of the violation of internal law. This is correct. However, other case law that pre-dates ***Beals*** has considered the public policy defence in relation to internal law and applied similar principles.

[69] In ***Boardwalk Regency Corp. v. Maalouf*** [1992] O.J. No. 26 (Ont. C.A.), the defendant borrowed money and built up a gambling debt at the plaintiff's casino in Atlantic City, New Jersey. The plaintiff obtained a judgment in New Jersey and brought an action on that judgment in Ontario. The defendant argued that the provisions of the Ontario *Gaming Act* R.S.O. 1980 ch.-183, should be applied. It provided that "[e]very contract or agreement by way of gaming or

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[1] Published in the Canada Gazette, Part I, Vol.120, No. 40, October 4, 1986, Supplement at p. 3 and referred to in ***Society of Lloyd's v. Saunders*** [2001] O.J. No. 3403 (C.A.) paragraph 17.

wagering is void, and no suit shall be ...maintained for recovering any sum of money...on which a wager has been made..."

[70] The court found that "[t]he legal issue to be addressed is whether the language of the Gaming Act...is to be taken as an expression by the legislature which bears the mantle of public policy to the point of making it offensive to participate in enforcement of the foreign judgment".

[71] Finding that the public policy defence did not operate to stop the enforcement of the New Jersey judgment, the court said at paragraphs 9 and 10:

> The common ground of all expressed reasons for imposing the doctrine of public policy is essential morality. If must be more than the morality of some persons and run through the fabric of society to the extent that it is not consonant with our system of justice and general moral outlook to countenance the conduct, no matter how legal it may have been where it occurred. If that be so, the Gaming Act must be viewed in the context of the community's sense of morality. An important element of that sense of morality is what the community has consensually determined is not to be tolerated, as found in the Criminal Code...the Gaming Act may reflect that general morality or may, upon analysis, appear to have a very narrow focus related to the recovery of debts with no present relevance as a moral statement.
>
> If this case concerned enforcement of a judgment based upon a contract relating to the corruption of children, our instinctive moral repugnance would find confirmation in... the Criminal Code, declaring such corruption a criminal offence.

[72] The court found support for its view of the issue in a judgment of the New York Court of Appeals, ***Intercontinental Hotel Corp (Puerto Rico) v. Golden***, 203 N.E.2d 210, at pp. 212 and 213:

> Public policy is not determinable by mere reference to the laws of the forum alone. Strong public policy is found in prevailing social and moral attitudes of the community...

[73] The decision in ***Boardwalk*** was relied upon by Master Quinn of this court in ***MGM Grand Hotel Inc. (c.o.b. MGM Grand Hotel/Casino) v. Kiani*** [1997] A.J. No. 1084, when he granted a summary judgment application of MGM Grand Hotel to register a Nevada judgment for a gambling debt.

[74] In ***Society of Lloyd's v. Saunders*** [2001] O.J. No. 3403 (C.A.), one of the test cases to decide the liability of parties who had contracted as "names" with Lloyd's, the court considered whether it should enforce judgments of the English courts when the party seeking enforcement acknowledged, for the purposes of the court's decision, that it had breached the Ontario *Securities*

Act prospectus requirements. At issue was whether the breach had the "necessary moral opprobrium traditionally required for the application of the public policy exemption".

[75] The court pointed out that in many of the cases before the courts where enforcement was being sought, including ***Boardwalk Regency***, the obligation underpinning the judgment arose outside of the enforcing court's jurisdiction. Those cases held that if every provincial statutory enactment were treated as an expression of Canadian public policy for the purpose of defeating foreign judgments, little would be left of the principle of judicial comity. In ***Saunders***, the basis for the judgment was an obligation within the jurisdiction of the enforcing court, an illegal trade in securities that occurred in Ontario. The court emphasized that it had also been admitted by the parties that if the action had been brought in Ontario, it would have been unsuccessful due to the failure to meet the disclosure obligations under the *Securities Act.*

[76] The court looked at the legislative objectives of the Ontario *Securities Act* as described in the case law: the regulation of the operation of capital markets in Ontario for the protection of all who use them. It noted the fundamental importance of a prospectus for the "orderly, fair and reliable operation" of financial markets and the protection of the investing public. That protection, the court said, was basic to the well-being of society and the economy. At paragraph 65, the court said:

> However, to view the disclosure obligation provisions of the Securities Act, such as the prospectus requirement, as akin to a moral imperative may be to stretch the concepts unnecessarily. Public policy has been universally described as "fundamental values" and "essential principles of justice." In my view, it is appropriate at this stage in the development of our society, to characterize the protection of our capital markets and of the public who invest in and depend on the confident and consistent operation of those markets as such a fundamental value.

[77] However, despite finding that it offended a fundamental moral value to enforce a judgment that would not be granted in Ontario, due to a breach of the *Securities Act*, the court found that the public policy defence did not apply for two reasons.

[78] First, it found that the argument of public policy had been foreclosed by the court when the court initially referred the case to the British courts for a determination. At that time the court was aware of the breach of the *Act* and, regardless, permitted the action to be heard in England.

[79] Second, the court found that the principles of international comity required the judgment be enforced. The court referred to the decision of La Forest J. in ***Hunt v. T& N plc,*** [1993] 4 S.C.R. 289 where he said at p. 321:

> A central idea in that judgment [Morguard Investments Ltd. v. De Savoye] was comity. But as I stated, at p. 1098, "I do not think it much matters whether one calls these rules of comity or simply relies directly on the reasons of justice,

> necessity and convenience" that underlie them. In my view, the old common law rules relating to recognition and enforcement were rooted in an outmoded conception of the world that emphasized sovereignty and independence, often at the cost of unfairness. Greater comity is required in our modern era when international transactions involve a constant flow of products, wealth and people across the globe.

[80] The court in ***Saunders***, pointed out that the United States' courts and other Canadian courts have faced the same public policy argument in similar Lloyd's actions and have almost uniformly rejected it on the basis of principles of international comity. The court in ***Lipcom v. Lloyd's*** [1998] CA11-QL 402 (11th Cir.) upheld the British decisions despite their violation of American securities legislation and was quoted at para.84:

> ...we believe that to invalidate the choice [of law] provisions for that reason in effect would be to conclude that "the reach of the United States securities laws [is] unbounded"... and to ignore the Supreme Court's caveat that "[w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts..."

[81] The court also noted the comments of the United States' courts about the significant financial effects if Lloyd's was required to comply with American securities legislation.

[82] The court concluded that while the breach of the *Securities Act* provisions went against fundamental and essential values, the earlier recognition by the Ontario court of the authority of the English courts to hear and decide the Lloyd's litigation and the important principles of international comity were important considerations. The court held the judgments could be enforced in Ontario.

[83] While this case preceded ***Beals***, it is not at odds with that decision. The definition of public policy in ***Beals*** can be applied when there is a violation of internal law. Both cases rely on the same earlier decision of the Supreme Court in ***Morguard Investments.*** The court in ***Saunders*** recognized that a consideration of the public policy defence involves a resolution of the tension between the upholding of internal laws, important to the moral fabric of society, and the attraction, acceptance and encouragement of international commerce. The question is when the importance of the former should act as a barrier to the latter. The court in ***Saunders*** balanced these competing concerns by way of a two-step analysis. The court in ***Beals*** made it a single step test when it held that the ambit of the public policy defence should be narrowly construed: to succeed, the registration of the foreign judgment must be "contrary to the fundamental morality of the Canadian legal system".

[84] Making the determination when to enforce a foreign judgment can involve a difficult decision on where the line should be drawn, as can be seen by the divided courts found in ***Beals*** and ***Boardwalk Regency***, and the two-step analysis undertaken in ***Saunders***. However, I see no

reason why this determination cannot be made in this case on a summary basis. The facts are not in dispute.

Is the breach of s. 16 of the Franchises Act sufficient to defeat the registration of the Utah judgment on the basis of public policy?

[85] Until 1995, franchises were regulated by the Alberta Securities Commission. The *Franchises Act* replaced the legislative franchise regime that had been in place since 1972. This change represented a significant shift toward self regulation by the industry. The purposes and philosophy of the *Act* are set out in section 2:

> (a) to assist prospective franchisee in making informed investment decisions by requiring the timely disclosure of necessary information,
>
> (b) to provide civil remedies to deal with breaches of this act, and
>
> (c) to provide a means by which franchise stores and franchisees will be able to govern themselves and promote fair dealing among themselves.

[86] The purpose of the *Act* was explained to the legislature as "to provide a new framework to assist prospective franchisees in making informed investment decisions by requiring timely disclosure of necessary information and to provide a means by which franchisors and franchisees will be able to govern themselves and promote fair dealing among themselves." (*Hansard,* May 2, 1995). Disclosure requirements, not securities commission oversight, were the primary source of protection for prospective franchisees. Section 16 and 17 of the new *Act* had no equivalent in the former regime, as the Alberta Securities Commission had jurisdiction over all complaints.

[87] Section 16 of the Alberta *Franchises Act* provides that the law of Alberta applies to franchise agreements. It would appear this section was inserted to ensure that the provisions in the new regime applied to Alberta franchisees. Section 17 builds on s. 16 and is the sanction provision that applies to claims made pursuant to the specific remedies and provisions of the *Act.* The Utah judgment is based on a contractual breach by the franchisee of three franchise agreements, at least one of which appears to provide that only Utah law applies. The claim does not come within the remedies described in the *Act*. The arbitrator who made the decision upon which the foreign judgment is based, acknowledged that he applied Utah law and noted that the same determination would have been made under Alberta law.

[88] Unlike ***Saunders***, there is no admission, or even argument, that the claim could not have been pursued in Alberta due to a violation of Alberta law. The violation of s. 16 of the *Franchises Act* does not have criminal or quasi-criminal implications or overtones. I cannot find that permitting the enforcement of the Utah judgment in Alberta would be offensive to fundamental morality as that term has been described in the case law. The application of Utah law rather than Alberta law by the Utah court is not sufficient to meet the test described in ***Beals***. In balancing the tension between the principles underlying the internal legislation, the *Franchises Act*, and the

principles of international comity, I agree with the approach of the American court quoted in ***Saunders.*** If a society expects to attract international commerce, of which franchising is one aspect, principles of international comity must be respected. The defence of public policy must be narrowly defined to allow the increasingly global marketplace to operate.

[89] The application for summary judgment is granted against Enterprises and Attitude.

Are the guarantees of Ron Plucer enforceable?

[90] The final question is whether the judgment based on the guarantees of Ron Plucer should be enforceable in Alberta despite their noncompliance with the *Guarantees Acknowledgment Act* R.S.A. 2000 c. G-11. BAH relies on ***Emerald Investments*** for the proposition that "mere technical noncompliance does not void the guarantee in the absence of evidence by the guarantor that he did not understand the guarantee". Plucer argues that the cases cited in support of that proposition all involved substantial compliance with the *Act*. He says that, in his case, there was no attempt to comply with the legislation.

[91] BAH, in the course of arbitration proceeding in Utah, relied on two Alberta cases to argue that Alberta courts would apply Utah law relating to the guarantee: ***Bank of Montréal v. Snoxell*** [1982] A.J. No. 1018 (Q.B.) and ***Associate Capital Services Corp. v. Multi Geophysical Services Inc.*** [1987] A.J. No. 643 (Q.B.). Plucer argues that the ***Bank of Montréal*** case can be distinguished because the plaintiff and the defendant both carried on business in British Columbia and the guarantee, while executed in Alberta, provided that the contract would be governed by British Columbia law. Judgment was obtained in British Columbia and an application brought to enter it in Alberta. The court held that entering a judgment in Alberta in that situation would not be void on grounds of public policy.

[92] In ***Associate Capital***, a case more on point, the Alberta Court of Queen's Bench found that the guarantee was valid despite noncompliance with Alberta legislation, because it was governed by California law. Plucer argues that this case can be distinguished on the basis that section 16 of the *Franchises Act* is applicable and the law of Alberta would apply to the franchise agreements guaranteed by Plucer. This attempt to distinguish ***Associate Capital*** misses a vital point. Ronald Plucer chose to have the law of Utah apply to proceedings taken to enforce his guarantee. He was free to do this regardless of whether the law of Utah or the law of Alberta applied to the franchise agreements. The choice of law in those arguments is not relevant.

[93] The court in ***Snoxell*** makes it clear that the choice of the law to govern the guarantee will be upheld by the Alberta courts unless it is void on public policy grounds. The case of ***Associate Capital*** demonstrates that the Alberta courts have allowed guarantees to be governed by American law where it has been by agreement.

[94] The three guarantees in issue are in relation to the two franchise agreements and the MUDA. The guarantees signed in relation to franchise agreements are short and incorporate the arbitration provisions which set Utah as the jurisdiction for, and the law governing, the arbitration.

A notary public acknowledges the signature of Ron Plucer. The guarantee signed in relation to the MUDA is more lengthy and provides that the law of Utah shall apply. In the cross-examination on affidavit of Mr. Plucer he confirmed that he executed the guarantees in Alberta before an Alberta lawyer. He also confirmed that he knew that he was executing personal guarantees and that they were a requirement of BAH entering into their business arrangements. There is no public policy reason not to enforce these guarantees. On the basis of the above case law, BAH is entitled to judgment against Ron Plucer.

Conclusion

[95] There is no dispute in relation to the relevant material facts and a decision may be made summarily in this instance. The application for summary judgment is granted. BAH is entitled to its costs of the application and of the action.

Heard on the 21st day of June, 2007.
Dated at Calgary, Alberta this 26th day of September, 2007.

J. B. Hanebury, Q.C.
M.C.Q.B.A.

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