COUR SUPÉRIEURE

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

NO : 500-17-026371-057

DATE : 27 juillet 2005

DATE D'AUDITION : 15 juillet 2005

EN PRÉSENCE DE :
JEAN-FRANÇOIS BUFFONI, J.C.S.

Sonox Sia
Plaintiff
v.
Albury Grain Sales Inc., Ari Ben-Menashe and Alexander Legault
Defendants

COUR SUPÉRIEURE DU QUÉBEC

FILE NO.: C.S. Qué. Montréal 500-17-026371-057

DATE: 27 july 200527 july 200529 july 2005

HEARING DATE: 15 july 2005 - 27 july 2005

PRESENT: Buffoni J.C.S.

Sia v. Albury Grain Sales Inc.
Jean-François Buffoni, J.S.C.:–

1 Should the declinatory exception *ratione materiae* raised here be denied because the action is based on fraudulent representations voiding the contract *ab initio*?

Backdrop

2 By contract dated April 11, 2005, Sonox Sia (Sonox), a Latvian company, bought grain from Albury Grain Sales Inc. (Albury), a Canadian company, for a price of over 4 million dollars.

3 As provided by the contract, Sonox gave Albury a deposit of $ 413,000.

4 Alleging a default on the part of Sonox, Albury refused to ship the grain and to return the deposit.

5 In the present action against Albury and two individuals said to control Albury, Sonox alleges that the defendants are involved in various schemes in different countries to defraud co-contractors for millions of dollars by obtaining deposits on contracts of sale and by never delivering the goods, that Sonox was the victim of false representations and that the contract is void for want of consent.

6 The action demands that the contract be declared void *ab initio*, that a seizure before judgment practised at the outset be upheld and that damages of over 800 000 $ be awarded to Sonox.

7 Albury and defendant Ari Ben-Menashe have appeared. Lavigne has not.[1]

8 By way of a motion under article 164 CCP in declinatory exception based on an arbitration clause,[2] Albury asks for the dismissal of the action or, alternatively, an order sending the file and the parties to arbitration, and suspending the present action until the arbitration sentence is rendered.

9 Sonox claims that the arbitration clause does not apply to the present matter.

The Arbitration Clause

10 The arbitration clause in issue reads:

ARTICLE 11 : BINDING ARBITRATION

11.1 THE BUYER AND SELLER AGREE TO ATTEMPT TO RESOLVE ALL DISPUTES IN CONNECTION WITH THIS CONTRACT OR THE FULFILLMENT *[SIC]* OF THIS CONTRACT THROUGH FRIENDLY DISCUSSION. IF THE DISPUTE CANNOT BE RESOLVED THROUGH FRIENDLY DISCUSSION, THE DISPUTE SHALL BE ARBITRATED IN LONDON, UNITED KINGDOM BY THE ICC WITH THE PREVAILING LAW TO BE THE "UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1980)" AND THE LAWS OF CANADA.

11 It is not seriously contested that this clause fulfills all the requirements of a conclusive undertaking to arbitrate *(clause compromissoire parfaite).*

12 The real issue has to do with its scope.

13 Sonox claims that the arbitration clause does not apply to the present case for reasons which can be summarized as follows:

While arbitrators generally have jurisdiction to decide issues relating to the interpretation and application of a contract, they totally lack jurisdiction to annul a contract *ab initio;*

Furthermore, Sonox being the victim of false representations, it cannot have validly consented to submit to arbitration.

A. Are Arbitrators Empowered to Annul a Contract Ab Initio?

14 Sonox submits that actions to annul a contract *ab initio* and based on extra-contractual acts – such as false representations – are not covered by arbitration clauses because the rights invoked do not arise from the contract.

15 The problem with that argument is that it relies on judgments, many of which rendered prior to the 1994 reform of the Civil Code, that concerned clauses which specifically limited the scope of arbitration.

16 For example, a 2003 judgment of the Superior Court submitted by Sonox in support of its argument (the *Boudreault* judgment) dealt with the following arbitration clause:

17. ARBITRAGE

S'il survient un différend entre les parties sur l'application ou l'interprétation d'une clause de cette convention ou à l'égard des droits ou obligations en découlant, ce différend sera soumis à un comité d'arbitrage composé de trois (3) membres choisis de la façon suivante: *[The underlining appears in the judgment.]* 3

17 The underlined limitation was one of the reasons the Court held that the arbitrators did not have jurisdiction to declare the contract null *ab initio*.

18 A different clause was considered by the Court of Appeal in the 1999 *Kingsway* judgment:

10.01 In the event there is **any dispute arising out of or related to this Agreement** (including, without limitation, any dispute as to the exact amount owed or owing in respect of the Purchase Price or any individual payment due in respect thereof but specifically excluding the obligation to indemnify pursuant to Article 8), its interpretation or any breach hereof, then the following procedure shall apply. *[Emphasis added.]* 4

19 Writing for the Court, Madam Justice Rousseau-Houle remarked:

À certaines occasions, notre Cour a jugé que les parties ne pouvaient emprunter la procédure d'arbitrage pour le motif que le litige les opposant n'était pas visé par la clause compromissoire.

Dans l'arrêt *C.C.I.C. Consultech International c. Howard R. Silverman, [1990] R.D.J. 500 (C.A.),* il s'agissait d'une réclamation en dommages-intérêts pour atteinte à la réputation. De l'avis de la Cour, ce recours était parfaitement étranger aux litiges relatifs à la vente d'actions visés par la clause d'arbitrage.

Également, dans *Le Club de Hockey Les Nordiques (1979) Inc. c. Vincent Luckac [1987] R.D.J. 360 (C.A.),* la Cour a jugé que l'arbitre n'était pas habile pour décider si oui ou non le contrat était nul *ab initio* car il ne s'agissait pas là d'un litige qui était né du contrat lui-même.

En l'espèce, le fondement du recours de l'appelante est le dol de la partie venderesse et de son président David. Ceux-ci auraient **faussement représenté certains faits,** et ce, contrairement aux affirmations contenues aux articles 3.01 et s. du contrat. **Bien que le dol puisse constituer une faute extracontractuelle née avant la formation du contrat, l'action de l'appelante contre la partie venderesse et son président est, selon moi, intimement reliée au contrat entre les parties.** Si ce n'était de la réserve *[the exclusion clause]* qu'elle contient, la clause 10.01 *[the arbitration clause]* **trouverait clairement application.** *[Emphasis added.]* 5

20 As a result, the Court of Appeal upheld the portion of the Superior Court judgment maintaining the declinatory exception and dismissed the action.

21 The opposite results reached respectively in the *Kingsway* and *Boudreault* judgments show once again that generalizations are dangerous and that the wording of each particular clause must be examined with care.

22 They also highlight the fact that actions alleging false representations and asking the annulment of a contract *ab initio* are not by nature

excluded from the application of an arbitration clause.[6]

23 The clause in the present case applies to *«all disputes in connection with this contract or the fulfillment* [sic] *of this contract».* This broad wording is comparable to that of clause 10.01 cited in the *Kingsway* judgment. Following the reasoning of *Kingsway,* this wording applies to the subject matter of this action.

24 The argument that the clause in issue would not empower the arbitration tribunal to annul the contract *ab initio* is therefore rejected.

B. The Absence of Consent to Submit to Arbitration

25 Bearing in mind that the arbitration clause is a contract distinct from the main agreement (article 2642 CCQ), Sonox then claims that it did not validly agree to be bound by that distinct contract because the false representations vitiated its consent.

26 Insofar as this argument differs from the previous one, it cannot stand. If, as determined above, allegations of false representations leading to demands that the main contract be declared null *ab initio* do not in themselves prevent the application of an arbitration clause, it does not matter whether this clause is considered alone or as part of the whole contract.

27 Another reason to dismiss this argument lies in the principle that arbitrators must rule on their own jurisdiction first. As our former colleague Madam Justice Rayle wrote, *«the courts should refrain from intervening prematurely: the intent of the Legislator is that the arbitrators decide issues of competence in the first place.»* [7]

C. Conclusion on the Arbitration Clause

28 The arguments by Sonox being rejected, clause 11.1 is found to apply to the subject matter of this action.

Other Considerations

29 Should the action be sent to arbitration, stayed or dismissed?

30 According to article 163 CCP, it may be asked that the suit be referred to the competent court within the legislative jurisdiction of Québec, or that the suit be dismissed if there is no such court.

31 In our case, the elected arbitration tribunal is designated as *«the ICC»,* an acronym for the International Chamber of Commerce. This obviously refers to the ICC International Court of Arbitration. Since this body is not a court within the legislative jurisdiction of Québec, Albury asked the Court during argument to disregard its original alternate conclusion which requested that the present file and the parties be sent before the ICC. The Court agrees.

32 As between staying and dismissing the action, the caselaw holds that once the Court comes to the decision that the matter should be referred to arbitration, it no longer has jurisdiction to stay the action and that it should be dismissed.[8]

33 This teaching should be tempered in the present case in view of the following particularities which need a tailor-made solution.

1. The Fact that not all Defendants are Parties to the Arbitration Clause

34 Of the three defendants, only Albury is a party to the contract and the arbitration clause. As for the two individual defendants, on whom this Court has personal jurisdiction, they are third parties to the arbitration clause.[9]

35 Therefore the jurisdiction of this Court on the subject matter *(ratione materiae)* remains intact as regards these two individuals.

36 In such a case, it might be open to these gentlemen to ask the Court to decline jurisdiction on the basis of article 3135 CCQ (the *Forum Non Conveniens* exception*)*:

3135. Even though a Québec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide.

37 As can be seen from the text, this is an exceptional occurrence and is dependent upon a party making an application. No such application was ever made here.

38 In the circumstances, the Court shall dismiss the action only as regards Albury and it shall declare that it retains jurisdiction over the two individual defendants.

2. The Seizure before Judgment

39 The plaintiff has practised a seizure before judgment with an authorization of a judge of this Court under article 733 CCP. A motion to quash that seizure is presently pending. The attorneys have informed the Court that they had agreed to stay the motion to quash until a judgment is rendered on the present motion.

40 This raises the issue of the Court's jurisdiction on provisional and conservatory measures.

41 Article 3138 CCQ, states:

A Québec authority may order provisional or conservatory measures even if it has no jurisdiction over the merits of the dispute.

42 This principle is complemented by article 940.4 CCP:

A judge or the court may grant provisional measures before or during arbitration proceedings on the motion of one of the parties.

43 Although it is not disputed that the Court should retain jurisdiction over the pending seizure before judgment, can it remain in place for ever? This question was answered in the negative by the Court of Appeal in the *D.D.H. Aviation* case[10] and given a practical solution:

However, the provisional or conservatory measure cannot remain in place indefinitely without the initiation of the main proceedings of which it is an accessory. Accordingly, in each instance where a provisional or conservatory measure is authorized by a Court in Quebec, prior to the filing of the principal action outside of Quebec, it should fix a time within which the party seeking the said measure must file the main action outside of Quebec, failing which the provisional or conservatory measure would lapse.[11]

44 In *D.D.H. Aviation*, the Court fixed the time period at 30 days. The attorneys in the present case have acknowledged that this would constitute a reasonable period of time, should the motion be otherwise maintained. The Court agrees and judgment shall be rendered accordingly.

3. The Right of the Parties to the Arbitration Clause not to Enforce it

45 It is open to the parties to an arbitration clause to agree not to enforce it, a possibility that Sonox and Albury may want to consider, now that the action is split between this Court and the ICC in London.

46 For that reason, and following the example set by the *Bridgepoint* case, the action shall be dismissed with recourse *(sauf recours)*.

Costs

47 The caselaw gives examples of judgments that maintain declinatory motions and dismiss actions *"with costs on an action dismissed before plea, excluding any additional fee."* [12]However, in view of the parties' divided success on the motion, no costs shall be awarded here.

47 *FOR THESE REASONS, THE COURT*:

48 *MAINTAINS* the Motion in Declinatory Exception *Ratione Materiae* in part*;*

49 *DECLARES* that the plaintiff Sonox Sia and the defendant Albury Grain Sales Inc. are subject to the arbitration process as provided for in article 11.1 titled Binding Arbitration of their Contract dated April 11th, 2005;

50 *DISMISSES,* as regards the defendant Albury Grain Sales Inc. only, the Introductory Motion and the Amended Introductory Motion dated July 14th, 2005, with recourse;

51 *DECLARES* that this Court retains its full jurisdiction over the subject matter of this action as regards the defendants Ben-Menashe and Lavigne;

52 *DECLARES* that the seizure before judgment practised under the authorization granted on June 28th, 2005 in the present case shall be quashed and become null, effective 30 days from the date of this judgment, unless a true copy of arbitration proceedings taken before the *ICC* in London, United Kingdom, is filed in the office of the Superior Court, District of Montreal within the said 30 days, subject to and under reserve of any future judgment, including any judgment on the motion to quash the

seizure presently pending before this Court;

53 *WITHOUT COSTS.*

JEAN-FRANÇOIS BUFFONI, J.S.C.

Me André Rivest, for Plaintiff
Me Sharon Kennedy, Me John B. MacDougall, for Albury Grain Sales Inc. and Ari Ben-Menashe

1. At the hearing, Albury raised doubts as to whether Lavigne had yet been served with the proceedings.

2. Declinatory exception *ratione materiae* raising lack of jurisdiction over the subject matter.

3. *Gestion J & N Boudreault Inc. v. Domaine de la Sorbière (1991) Inc.* , [2003] AZ-50197618 (C.S.), at par. 31.

4. *Kingsway Financial Services Inc. v. 118997 Canada Inc.* , [1999] AZ-50068857 (C.A.), at par. 27. Incidentally, the contract also contained, at its article 8.01, an exclusion clause limiting the scope of the arbitration which is of no consequence here, see par. 28.

5. At paragraphs 33 to 36.

6. For other examples of judgments explicitly or implicitly supporting this view, see *Ouellette v. Société de récupération d'exploitation et de développement forestiers du Québec (Rexfor),* [1997] AZ-97011706 (C.A.); W *orld L.L.C. v. Parenteau & Parenteau Int'l Inc.,* [1998] AZ-98021411 (C.S.); *Automobiles Duclos Inc. v. Ford du Canada Ltée,* [2000] AZ-01021062 (C.S.).

7. *Bridgepoint International (Canada) Inc. v. Ericsson Canada Inc.,* [2001] AZ-01021616 (C.S.), at par. 24.

8. See endnote 7 of the *Bridgepoint* judgment.

9. The contract provides that the signatories “may bind their corporations and themselves individually”. This has to do with the signatories’ capacity. It does not mean that Ben-Menashe, who signed in his capacity as director for Albury, has himself become a party to the contract or the arbitration clause.

10. *D.D.H. Aviation Inc. v. Fox,* [2002] AZ-50137191 (C.A.).

11. At par. 48.

12. The *Bridgepoint* case is one such example.