SUPERIOR COURT

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

N°: 500-17-045357-087

DATE : March 5, 2009

PRESIDING: THE HONORABLE BRIAN RIORDAN, J.S.C.

EGO-BELTEX UNDERWEAR, LLC
RESPONDENT - Plaintiff

-and-

ROBINSON SHEPPARD SHAPIRO, LLP.
MIS-EN-CAUSE - Defendant

v.

AGI LOGISTICE USA, LLC
PETITIONER – Mise-en-cause

JUDGEMENT ON RE-AMENDED MOTION TO SUSPEND THE FILE

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[1] Petitioner ("**AGI**") asks the Court to suspend the present file the time necessary for a New York arbitrator, duly appointed under the Rules of the American Arbitration Association (the "**Arbitrator**"), to render his decision in an arbitration file instituted by AGI in July 2008. The jurisdiction of the Arbitrator is not contested before us.

[2] Basing itself on Article 3137 C.C.Q.[1], AGI argues that this Court has the discretion to "stay its ruling" on the action instituted in the present file because the case before the Arbitrator, a "foreign authority", is "between the same parties, based on the same facts and (has) the same object".

[3] Respondent ("**Beltex**") opposes the suspension and wishes to proceed to the trial on the merits in the present file (the "**Action**") already set for April 10th of this year and based on an oral defence. This demonstrates a remarkable display of judicial efficiency by the Superior Court, since the action was brought only in September of last year. To date, three days of hearing have taken place before the Arbitrator and the final two days are scheduled for April 23 and 24, 2009, after which he has thirty days under the American Arbitration Association Rules to render his decision.

[4] Beltex bases its opposition on both procedural and substantive grounds, arguing that:

a. AGI does not have the standing to take the present motion, since it is not a "party" in this Action;

b. Article 3137 C.C.Q. does not apply to arbitration decisions, since an arbitrator is not a "foreign authority" for those purposes;

c. Article 3137 C.C.Q. does not apply since there is not identity of parties, facts and object between the arbitration and the Action;

d. In any event, the present motion should be dismissed because it was not taken within a reasonable delay.

[5] The facts are contested in general, but those relevant to the present decision are clear in the Court's view. The argument relates to an amount of $94,000 (U.S.) (the "**Escrowed Funds**") held in trust by the firm of Robinson, Sheppard, Shapiro (the "**Law Firm**") relating to a sale by AGI to Beltex of goods located in Haifa, Israel (the "**Haifa Goods**"). AGI opted for arbitration in July to determine if the sale of the Haifa Goods, among others, should go forward. Two months later, Beltex sued the Law Firm to order it to restore the Escrowed Funds to it.

[6] Concerning AGI's standing to take this motion, it was named in the Action as Mise-en-Cause by Beltex and served with the proceedings. It is true that it plans to present a Motion in Forced Intervention in five days, but that does not change its status at this

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[1] **3137.** On the application of a party, a Québec authority may stay its ruling on an action brought before it if another action, between the same parties, based on the same facts and having the same object is pending before a foreign authority, provided that the latter action can result in a decision which may be recognized in Québec, or if such a decision has already been rendered by a foreign authority.

juncture. The case law and doctrine indicate that a Mise en Cause has all the rights of a defendant with respect to the contestation of the action[2]. The taking of a motion similar to the present one seems to fall squarely within those rights.

[7] Moreover, AGI's presence in the file is clearly necessary to permit a complete solution of the question involved in the action, since it makes a claim to the Escrowed Funds before the Arbitrator and its rights could be affected by the judgment in the Action[3]. Beltex admitted this indirectly by naming it as Mise-en-Cause.

[8] The Court rejects this ground of contestation.

[9] Concerning the application of Article 3137 C.C.Q. to an arbitration decision and the status of the Arbitrator as a foreign authority for the purposes of that provision, nothing there would act to exclude foreign arbitration proceedings under that article[4]. In general, Quebec Courts respect arbitration clauses and readily homologate foreign arbitration decisions, as seen by reference to Article 949 C.C.P.

[10] There, the legislator orders that "an arbitration award shall be recognized and executed if the matter in dispute is one that may be settled by arbitration in Québec and if its recognition and execution are not contrary to public order". This appears to us to be confirmation that the Arbitrator's decision would be a "decision which may be recognized in Quebec" under Article 3137. Moreover, we note the use of the word "decision" there, which is broader than the word "judgment" and is often used to refer to arbitration awards.

[11] Finally on this point, it is relevant to underline the fact that, given the possibility of homologation of the Arbitrator's decision by our Court, it becomes clear that there is a risk of contradictory judgments in Quebec. Avoiding such a situation is one of the *raisons d'être* of the principle of litispendence

[12] The Court rejects this ground of contestation.

[13] Concerning the issue of identity of the parties, facts and object of the two instances, the distinctions that Beltex points to are that the issues before the Arbitrator are broader than those in the Action, the Law Firm is not a party to the arbitration and it does not admit that the Escrowed Funds are one of the objects of the arbitration.

[14] The fact that all the issues are not present before both adjudicators is not an obstacle to a finding of litispendence with respect to those that are. The same reasoning

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2 Denis FERLAND and Benoît EMERY, *Précis de procédure civile*, 4th edition, vol. 1, Cowansville (Qc), Yvon Blais, 2003, at pages 363-364.

3 *Les estimations du Québec inc. c. Caumartin*, AZ-85011298 (C.A.Q. - 23 octobre 1985) See opinion of Tyndale, J.C.A.

4 In general on this point, see: *Lac d'amiante du Québec ltée c. 2858-0702 Québec inc.*, AZ-97021460 (Q.S.C. - April 30, 1997), at page 10.

applies with respect to the identity of the parties. As for the argument concerning the object, the Court finds the facts to point so clearly to the contrary position that it is surprised that it is even raised.

[15] The Court rejects this ground of contestation.

[16] Finally, on the grounds that the present motion is beyond the delays that should apply, we first note that no such delays are stipulated in the Code of Procedure. Secondly, AGI's explanation that it thought that the Arbitrator would render his decision well before the trial date in the Action is supported by the proof. Finally, it is over a month before the trial is scheduled and, although pushing the limit a bit, this does not seem unreasonable, particularly in light of the fact that the file is less than six months old.

[17] The Court rejects this ground of contestation also.

[18] This appears to be a matter where the Court should exercise its discretion to ensure a logical, efficient and proportional management of the resources of both the Court and the parties. It makes absolutely no sense to hold a trial here when the Arbitrator is on the verge of rendering a decision that will likely resolve the issue. The Court will grant AGI's Motion to Suspend the File according to its conclusions.

[19] **FOR THESE REASONS, THE COURT:**

[20] **GRANTS** Petitioner's Motion to Suspend the File;

[21] **ORDERS** the suspension of proceedings in the present file until the arbitrator seized of the arbitration file between the Plaintiff and the Mise en Cause renders his award;

[22] **THE WHOLE** with costs.

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BRIAN RIORDAN, J.S.C.

Mtre. Liviu Kaufman
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Hearing Date: March 5, 2009