

Kluwer Arbitration Blog

Canadian Supreme Court Sends Dispute to Arbitration Despite the Filing of a Defence in Court Litigation

Barry Leon (Perley-Robertson, Hill & McDougall LLP) · Friday, March 23rd, 2012

Canada's highest court, the Supreme Court of Canada, recently considered whether a party had waived its right to rely on arbitration and forum selection clauses by submitting a statement of defence on the merits in an Ontario court litigation in which it also pleaded the clauses. The Court ruled that there had been no waiver.

In *Momentous.ca Corp. v. Canadian American Association of Professional Baseball Ltd.*, 2012 SCC 9, the Supreme Court unanimously upheld the decision of the Ontario Court of Appeal and dismissed the appeal in a short decision.

The Supreme Court said that “when another forum – an arbitration panel, a tribunal or another court – has the exclusive jurisdiction to deal with the claim, [an Ontario court] will not take jurisdiction, based upon agreement or statute.” Relying on its previous decision in *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, the Supreme Court held that “unless there is a ‘strong cause’ as to why a domestic court should exercise jurisdiction, order and fairness are better achieved when parties are held to their bargains.”

The dispute arose following the unsuccessful brief tenure of the Ottawa Rapidz, a professional baseball team of the Can-Am League that played its home games in a stadium owned by the City of Ottawa.

Due to financial losses it sustained during the 2008 season, the baseball team, which was ultimately owned by Momentous.ca, notified the League that it would not be able to continue to operate and applied under the League's by-laws to withdraw voluntarily. The League's Board of Directors rejected the application, terminated its membership and drew down a letter of credit the team had been required to post.

The team and its related companies sued the League, its principals, and the City of Ottawa before the Ontario Superior Court of Justice claiming that the League illegally terminated its membership and had no right to draw down the letter of credit.

Only after filing a statement of defence contesting the merits of the claim did the League and its principals ask the Superior Court of Justice to rule that it did not have jurisdiction over the dispute based on the choice of forum and arbitration clauses in the League's by-laws and agreements signed by team. According to the by-laws and agreements, all disputes with the League were to be

resolved in the State of North Carolina by means of arbitration.

In bringing its motion, the respondents relied upon Rule 21.01(3)(a) of the *Ontario Rules of Civil Procedure* in which a defendant may apply to have an action stayed or dismissed on the ground that the Ontario court does not have jurisdiction over the subject matter of the dispute. Noticeably absent from the rule is a timeframe in which a defendant must bring the motion.

The Ontario Superior Court of Justice and the Ontario Court of Appeal held that the team and its related parties failed to show “strong cause” why the parties should not be bound the forum selection and arbitration clauses in their agreements.

The Supreme Court ruled that that a motion to stay or dismiss an action on the ground that the court does not have jurisdiction over the subject matter of the dispute must be brought promptly. However, it went on to rule that nothing requires the motion to be brought before delivery of a statement of defence and a statement of defence that specifically pleads a forum selection clause does not amount to consent to the court assuming jurisdiction.

Given that the appellants did not argue that there was any reason, apart from the delivery of a statement of defence, to displace the forum that the parties had chosen to resolve their disputes, the Supreme Court held that the action was properly dismissed.

This is yet another decision in a series of decisions by the Supreme Court of Canada further supporting Canada as an arbitration-friendly jurisdiction and one that readily enforces arbitration and other dispute resolution agreements.

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