Focus ALTERNATIVE DISPUTE RESOLUTION

Court got it wrong in Novatrax

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The Ontario Court of Appeal decision in *Novatrax International Inc. v. Hägele Landtechnik GmbH* 2016 ONCA 771 has raised eyebrows among arbitration practitioners across Canada. Possibly based on the way in which the case was argued before it, the court simply applied the wrong principles of law to an appeal from an order staying an action in the Ontario Superior Court of Justice.

A dissent by Justice Kathryn Feldman goes a long way to placing the issues on the appeal within the correct legal framework but, unfortunately, fails to correct some fundamental misconceptions that underlie the majority decision.

In the *Novatrax* case, an Ontario company entered into an exclusive sales agreement (ESA) with a German company. The German company terminated the agreement after allegedly requiring the Ontario company to hire certain individuals who, after termination, commenced a competing business in Ontario. The Ontario company sued the German company in the Ontario Superior Court of Justice for wrongful termination and for tortious misconduct. The action included claims against the individuals who started the competing business.

The ESA contained the following clause:

"The contractual parties agree that German law is binding and to settle any disputes by a binding arbitration through the 'Industrie und Handelskammer' (Chamber of commerce) in Frankfurt."

Beyond question, this is an arbitration clause and, since the parties are from different countries, it is an *international* arbitration clause to which the Ontario *International Commercial Arbitration Act* (ICAA) applies exclusively. The ICAA adopts the UNCITRAL Model Law on Arbitration which in turn is in fulfilment of the *New York Convention on Arbitration Agreements and Awards* to which Canada is a signatory.

The question of a stay of proceedings before the Ontario courts in respect of a matter which is the subject of an international arbitration agreement is governed by Article 8 (1) of the Model Law which mandatorily requires the referral to arbitration of disputes which are the subject of the agreement, with limited exceptions. There is extensive and consistent jurisprudence across Canada that addresses how to apply this Article of the Model Law to applications to stay court proceedings (see *Dancap Productions Inc. v. Key Brand Entertainment, Inc.* 2009 ONCA 135; *Kaverit Steel and Crane Ltd. v. Kone Corp.* [1992] A.J. No. 40; *Babey v. Greer* 2016 SKCA 45; and *Gulf Canada Resources Ltd. v. Arochem International Ltd.* [1992] B.C.J. No. 500).

None of this is mentioned in the majority decision of the Court of Appeal in *Novatrax*. Rather the majority proceeds on the basis that it is dealing with a forum selection clause. (Apparently the parties had framed the issue that way.)

Except in a broad colloquial sense, an arbitration clause is not a forum selection clause. It is vital to distinguish between the two for purposes of legal analysis because the law with respect to the enforcement of arbitration clauses (especially international arbitration clauses) is highly prescriptive whereas the law with respect to the enforcement of forum selection clauses is highly discretionary and involves the application of completely different principles.

A forum selection clause involves the choice of the *courts* of a particular jurisdiction as the forum in which disputes will be adjudicated. Such clauses may be exclusive or non-exclusive. They may or may not be combined with an arbitration clause where the arbitration clause may not cover all possible disputes that may arise (see for example *Momentous.ca Corp. v. Canadian American Association of Professional Baseball Ltd.* 2012 SCC 9). But the distinction is always clear and has become even clearer as a result of the *Hague Choice of Court Convention,* which is expected to be ratified by the Ontario Legislature in the current session.

A provision for the choice of law, such as that contained in the ESA, does not amount to a forum selection clause: *Canadian Encyclopedic Digest Conflict of Laws volume 2.*

Despite its fundamentally flawed analysis, the decision of the majority in *Novatrax*, to stay the action as against the other party to the arbitration agreement is almost certainly the same as the decision that would have been reached, on the stated facts, applying Article 8 of the Model Law. However, the failure to identify the correct category of legal analysis arguably led it into error when considering the issue of staying the action against non-parties to the arbitration agreement. On that issue, the dissenting reasons of Justice Feldman turn the analysis back to the more pertinent and satisfying line of reasoning now laid out in numerous decisions of the Alberta Court of Appeal beginning with *Kaverit Steel* (*supra*).

Justice Feldman's essential conclusion is that while arbitration clauses should be enforced between the parties to that agreement, they should not be used to deprive a party to the clause of the right to pursue claims against non-parties which can be framed as independent claims to which the other party to the arbitration agreement is not a necessary party. Nor should such clauses be used, subtly or unsubtly, to pressure parties to submit claims to arbitration which they had not agreed to do.

With the increased use of arbitration, both international and non-international, for the settlement of business disputes and the growing competition among jurisdictions to attract arbitration related activity, it is extremely important that both the bar and the bench are thoroughly familiar with the applicable legal framework. *Novatrax* is an unfortunate, but timely, illustration of that point.

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