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M.J.B. Enterprises Ltd. v. Defence Construction (1951), [1999] 1 S.C.R. 619 and
Double N Earthmovers Ltd. v. Edmonton (City), [2007] 1 S.C.R. 116

When Is An Arbitration An International Commercial Arbitration?

Is an arbitration between two domestic companies arising from a contract for a shipment between two foreign countries an "international commercial arbitration" for the purposes of the UNCITRAL Model Rules, particularly if the arbitral agreement requires arbitration in a foreign location? And if it is, does the domestic court have any residual discretion to stay the arbitration and allow the court action to proceed?

Those are the important issues which the Superior court of Ontario faced in *Star Tropical Import &Export Limited v. International Management Consortium Ltd.*

The facts in this case raised a conflict between the court's sense of fairness, and the rigidity and almost total absence of discretion in the Model Rules. How should a court resolve this conflict?

The two agreements in question were made in Canada between two companies carrying on business in Ontario. The agreements provided for the receipt of sugar in Brazil and the delivery of the sugar in Ghana. The first contract dated November 2006 required all disputes to be settled in Paris or Zurich by arbitration under ICC Rules. The second agreement dated April 2007 stated that it replaced the first agreement and provided for arbitration under the "Refined Sugar Association" rules. Those rules stated that disputes were to be resolved by arbitration to be held in London, U.K.

Problems with the performance of these contracts ensued. In October 2007, Star Tropical commenced an action in Ontario against International Project and one of its officers. In November 2007, International Project wrote to Star Tropical stating its position that the dispute must be resolved by arbitration. But International Project took no steps to commence arbitration, and delivered no Statement of Defence in the Ontario action. It consented to several orders reviving the Ontario action when it was struck out for the failure of the parties to advance it.

In November 2010, three years after the action was commenced with no Statement of Defence having been delivered, International Project brought a motion to stay the Ontario action on the basis that the dispute was required to be resolved by arbitration. In its motion, International Project relied upon the stay provisions of Ontario's domestic *Arbitration Act, 1991*. It did not rely on the Ontario *International Commercial Arbitrations Act* (ICAA) which incorporates the UNCITRAL Model Rules.

Article 1(3) of the UNCITRAL Model Law states that an arbitration is "international" if:

(a) at the time of the conclusion of the agreement, the parties had their places of business in different states: or

(b)(i) the place of arbitration determined in or pursuant to the agreement is outside the state in which the parties have their places of business; or

(b)(ii) the place where a substantial part of the commercial relationship is to be performed, or in which the subject matter of the dispute is most closely connected, is a place outside the state in which the parties have their places of business; or

(c) the parties have agreed that the subject matter of the agreement relates to more than one country.

The Master of the Ontario Superior Court noted that section 2(3) of ICAA states that, despite Article 1(3) (c) of the Model Code, an arbitration conducted in Ontario between parties having

their place of business in Ontario is not international only because the parties have expressly agreed that the subject matter of the agreement relates to more than one country. While the Master said that section 2(3) helped to answer the question before the court, he did not say how that subsection could apply to the provisions of Article 1(3) other than clause (c).

The court concluded that the agreements did not give rise to "international commercial arbitrations" to which the ICAA and the Model Law applied. The reasons for so concluding are not entirely clear. The court appears to have decided that Article 1(3) (a) did not apply since the parties were Ontario corporations. The Ontario court was clearly concerned about sending two parties off to arbitrate in Europe when they were both located right in Ontario. However, Article 1(3) (b) (i) apparently applied to the facts because the state where the arbitration was to be held (France or Switzerland, or the U.K. if the second agreement applied) was not the state where the parties carried on business (Ontario or Canada).

This result could be avoided if the court were to hold that, by repeatedly using the plural word "places" in the expression "places of business" in Article 1(3), the Model Rules only intended an arbitration to be "international" if the parties are located in different states. This conclusion does not seem appropriate since Article 1)3)(a) deals specifically with that situation and therefore the disjunctive provisions of Article 1(3)(b) and (c) are logically not restricted to that situation.

The court did not expressly address Article 1(3(b)(ii) which also apparently applied. The receipt (in Brazil) or delivery (in Ghana) of the sugar seems to have been substantial parts of the commercial relationship between the parties. The states where those activities were to occur were not states in which the parties carried on their business (Ontario, Canada). Perhaps the court considered that, since there were two places of performance, neither place predominated. However, Article 1(3) (b) (ii) says "a substantial part of the obligation" not "the substantial part". Thus, an agreement may be substantially performed in several places, only one of which need be different than the parties' place of business.

The court may also have applied a principle analogous to the *forum non conveniens* rule that the plaintiff's choice of forum should prevail unless there is some other clearly preferable forum. But Article 1(3) does not contain that principle.

The court dismissed the application to stay. In doing so, the court applied the Ontario *Arbitration Act, 1991*, not the ICAA. Section 7(2) of the Ontario domestic arbitration statute gives the court a much broader discretion to dismiss the stay motion than does the ICAA, most particularly if the motion is brought with undue delay. That particular ground is not found in the ICAA.

The motion to stay was dismissed for three reasons:

First, the motion to stay was only brought under the domestic Act, not the ICAA. While the Master himself raised the issue of the ICAA, he appears to have been satisfied, either that the ICAA did not apply due to the factors referred to above, or that since the motion was not

brought under the ICAA then he was not obliged to apply that statute. If so, then his decision will not be applicable in the next case if the stay motion is brought under the ICAA.

Second, the delay of International Project to proceed with the arbitration disentitled it to rely upon the refined sugar association rules and to a stay under section 7(2) of the Ontario *Arbitration Act, 1991*. A real question is whether this issue of delay should have been dealt with by the arbitral tribunal or the court.

Third, Star Tropical's claim against the officer of Project International could not be arbitrated.

The Master held that the claim against International Project and the claim against its officer should be heard together by the same tribunal. Under section 7(5) of the Ontario Act, the court had discretion to allow the two claims to be heard together by dismissing the stay motion.

This third reason is problematic for a number of reasons. It seems to provide an open invitation to a party to an arbitration agreement to include an officer of the other party as a defendant in an action, in order to avoid arbitration. The ICAA does not provide an exception to its rules of mandatory arbitration in relation to this circumstance.

This decision represents a classic conflict between the court's perception of fairness and the strict provisions of the Model Rules. The Model Rules were expressly drafted to stipulate the specific rules under which an international commercial arbitration is to proceed. If a motion to stay the action is brought before or at the time of the delivery of the Statement of Defence in the action, then Article 8 of the Model Rules requires the Court to stay the action unless the arbitral agreement is null and void, inoperative or incapable of being performed. As long as the stay motion is brought no later than the deliver of the Statement of Defence, then delay and even egregious delay in advancing the arbitration or bringing the stay motion is not mentioned in the Model Rules as a ground upon which the court can decline to stay the action and force the parties to proceed by way of arbitration. Nor is the expense and delay of two domestic corporations being forced to arbitrate their dispute in a distant country. These omissions may seem illogical and unfair, but they appear to follow from the Model Rules and, now in Ontario, from the ICAA.

In these circumstances, it is difficult to see how the court can avoid the Model Rules by adopting a discretionary approach to the stay motion. If the delay in seeking arbitration is to be a factor, that factor is one to be applied by the arbitral tribunal. The arbitral tribunal can consider the delay and either accept jurisdiction if it decides that it should do so, or dismiss or stay the arbitration and send the dispute back to the court system. Pursuant to Article 8(2) of the Model Rules, the court can allow this process to unfold by staying the stay motion pending a hearing before the arbitral tribunal. The primary role of the arbitral tribunal in this situation is consistent with the *competence-competence* principle now applied by Canadian courts.

In the alternative, the court might apply its own procedural law to the stay motion, found in Ontario in the *Courts of Justice Act* and the *Rules of Civil Procedure*. Both that Act and those Rules contain specific prohibitions against undue delay and in favour of expedition. If the court

were to apply those rules on a motion to stay, then the issue would be: which should prevail, the ICAA and the Model Rules, or the *Courts of Justice Act* and the *Rules of Civil Procedure*? That is an issue which was not addressed in this case.

Arbitration - International Commercial Arbitration – Stay – Competence-Competence

Star Tropical Import & Export Limited v. International Management Consortium Ltd., 2011 ONSC 4005 (CanLII)

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