

News

Ruling shines light on forum selection clauses

Court OKs Ontario jurisdiction for breach of contract lawsuit

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A unanimous Court of Appeal for Ontario decision outlines the need for clarity in forum selection clauses. In *2249659 Ontario Ltd. v. Siegen* [2013] O.J. No. 2496, the court allowed Ontario manufacturer Rohwedder Canada Inc.'s appeal of a dismissal of its claims of negligent misrepresentation and breach of contract against German bank Sparkasse Siegen and German manufacturer Thomas Magnete GmbH (TMG). The court ruled that the Superior Court of Justice has jurisdiction to entertain the claims.

Referring to previous decisions *Z.I. Pompey Industrie v. ECU-Line N.V.* [2003] S.C.J. No. 23, and *Expedition Helicopters Inc. v. Honeywell Inc.* [2010] O.J. No. 1998, Justice David Doherty wrote on behalf of the court, "Forum selection clauses in an agreement between parties, particularly sophisticated commercial parties, will normally be enforced by Ontario courts. A plaintiff who seeks to litigate in Ontario, having agreed that the dispute would be litigated in another forum, carries a heavy burden and must show a 'strong cause' for departing from the terms of the agreement."

"Although there is some language to this effect in the *Pompey* decision, this is the first explicit discussion of the need for clarity in forum selection clauses, said Jonathan Lisus of Lax O'Sullivan Scott Lisus in Toronto, who acted on behalf of

the appellants with James Renihan. He said it's clear that the court will carefully review the scope of such clauses and, "if there are multiple aspects to a commercial relationship/transaction reflected in multiple agreements, then counsel trying to give their client the benefit of a forum selection clause should be careful to try and ensure that the clause they prepare has universal application to the relationship beyond the four corners of the agreement it appears in."

TMG was first approached in 2006 by Chrysler supplier GETRAG to manufacture solenoids in Ontario. TMG entered into a confidentiality agreement with Rohwedder Canada Inc. (RCI) in 2007. The choice of forum clause listed Germany as the sole place of jurisdiction for future disputes. TMG and RCI subsequently entered into an agreement in the form of a purchase order to purchase and install assembly lines in the Ontario plant.

In 2007, TMG incorporated Thomas Magnete Canada Inc. (TMC) in Ontario, a wholly controlled subsidiary, which sought financing from Sparkasse for the purchase of the assembly lines from RCI. Sparkasse advised that TMC would have to be the legal owner of the assembly lines so they could be included in the bank's security for the loan. TMG agreed to guarantee the loan, then asked RCI to substitute TMC for TMG as the purchaser, explaining that the change would assist TMG



Lisus

in tax planning. RCI delivered the assembly lines to the Ontario plant in 2008 but GETRAG subsequently went bankrupt and TMC acknowledged that RCI was owed close to \$1.5 million. TMG wound up TMC in 2009 and both RCI and Sparkasse claimed entitlement to the proceeds of the assembly line sale. RCI was successful in the Ontario litigation.

RCI's lawsuit was brought in September 2010. Instead of relying on the purchase orders' terms of agreement, RCI relied on an agreement it alleges the respondents made in 2007. The agreement promised to guarantee payment to RCI of amounts not paid by TMC regarding the assembly lines' manufacture and installation.

In holding that Ontario has jurisdiction *simpliciter*, Justice Doherty wrote: "An applicable forum selection clause designating a forum other than Ontario places a heavy onus on the plaintiff to justify

Ontario as *forum conveniens*."

Concluding that the motion judge made errors in concluding that Ontario did not have jurisdiction *simpliciter*, Justice Doherty turned to *Club Resorts Ltd. v. Van Breda* [2012] S.C.J. No. 17, in which the appellants relied on three presumptive connecting factors: "The respondents were carrying on business in Ontario; the tort of negligent misrepresentation was committed in Ontario; and the contracts relied on in the statement of claim were made and breached in Ontario."

Even assuming that there was a forum selection clause that favoured Germany in the purchase orders, "the respondents must still demonstrate that the claims advanced against them fall within the ambit of the language in the forum selection clause," wrote Justice Doherty. The respondents "had the onus of showing that a German court was in a better position to fairly and efficiently dispose of this claim than was an Ontario court. I think the respondents demonstrated that Germany was a *forum conveniens*, but I do not think the respondents demonstrated that Germany was 'clearly more appropriate for disposing of the litigation' than was Ontario: see *Van Breda*, para. 109."

Lisus said the court considered "the scope of carrying on business's presumptive connecting factor for jurisdiction *simpliciter*. The SCC left this undecided in *Van Breda* other than to say adver-

tising on a website isn't enough... [t]hey also avoided making a finding but did observe that a parent carrying on business through a controlled subsidiary was a 'formidable argument' that the presumptive connecting factor of carrying on business was met."

The decision makes it clear that a forum selection clause in one of the agreements between the parties is not enough. "Such a clause has to be connected to the claim as pleaded," said Lisus. "The court clarified the weight to be given to deficiencies in the pleading on such a motion, saying that unless they are so deficient as to preclude a proper evaluation of a claim they aren't to be used as a basis for denying jurisdiction or forum."

As for how immediately connected to the forum selection clause the litigation has to be in order to attract its application, he said, "in this case it was clear that the dispute and the claim as pleaded had no application at all to the only clearly drafted clause in the group of agreements that applied to the parties' commercial dealings. I think that if the court is not satisfied that the clause is clear and that the dispute clearly falls within it, then the 'strong cause' requirement will not be engaged."

Evan L. Tingley of Baldwin Sennecke Halman in Toronto, who acted for Sparkasse Siegen, and P.A. Neena Gupta of Gowlings in Waterloo, Ont., who represented Thomas Magnete GmbH, could not be reached for comment.

Some hi-tech tips for the smaller firms



Luigi Benetton
Hi-Tech

You might think small law firms have small budgets, but they don't all act like it. Thank technology, which is getting better and cheaper all the time, for letting savvy lawyers build big-firm presence using small-firm resources.

In this column, we'll look at innovations in client relations and efficient ways to handle social media.

Collaborate with clients

Dominic Jaar simplifies docu-

ment and project management by creating a Microsoft SharePoint-based extranet for each engagement, giving clients user names and passwords and turning them loose.

"Whenever people create a new document or update an existing document, all parties receive an e-mail containing a hyperlink to the document so that they can see what happened," says KPMG's national leader, information management and e-discovery.

He especially wants to avoid ending up with 25 versions of the same document. "With SharePoint, we always look at the same document at the same time," he says. "Clients don't have to manage documents, they always know where their documents are, and they can access them any time."

Train clients

Jaar eases clients into technologies he knows they'll find useful. "When I set up SharePoint sites for clients, the only things clients see are a folder structure with documents inside, he says."

He teaches clients how to share documents and explains e-mail alerts sent when documents are added or changed.

"When people feel comfortable in a simplified environment, you can add features," he says, noting that shared online calendars prove useful.

"Most clients see this as added value. Clients don't get this from most of their providers. They enjoy this."

Client data storage costs

Jaar figures client data storage

costs increasingly eat into law firm margins. So he got clients to perform their own data retention.

During his three years as head of a small consultancy (since acquired by KPMG), Jaar did not charge for faxing, printing, scanning or similar tasks. Instead, "I charged clients a hosting fee for the data they had in the SharePoint environment, as well as user licences," he says. Clients did not object to monthly hosting bills during engagements.

When bills arrived after engagements ended, he reminded clients "that I was hosting their documents," Jaar continues. "I didn't have to make the uncomfortable call to the client asking to cut access and to return data to the client. Instead, clients called saying a file had been closed, noted that they were still receiving a bill for

access and asked what to do next."

Stay in touch

Some of solo practitioner Monica Goyal's clients regularly ping her on Skype. "People want that instant feedback — not everybody, but a certain group of people do want it," she says.

Mark Hayes returns client calls the same day. "If you can't offer that, your clients will go somewhere else," says the managing director for Heydary Hayes PC.

Before the mobile phone era, Hayes worried during vacations about issues he couldn't deal with away from the office. Now he takes vacations with more peace of mind. "I know that if something comes up, I can take care of it wherever I am. For me, that decreases pressure."

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Onus: Lawyer sees big role for arbitrators looming

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Justice Abella, writing for Justices LeBel, Fish, Cromwell, Karakatsanis and Wagner, declined—noting that to accept the interveners' invitation would fly in the face of the "arbitral consensus" in Canada.

"A unilaterally imposed policy of mandatory, random and unannounced testing for all employees in a dangerous workplace has been overwhelmingly rejected by arbitrators as an unjustified affront to the dignity and privacy of employees unless there is reasonable cause, such as a general problem of substance abuse in the workplace," Justice Abella wrote. "Where, as here, the employer proceeds unilaterally without negotiating with the union, it must comply with the time-honoured requirement of showing reasonable cause before subjecting employees to potential disciplinary consequences."

She added, "Given the arbitral consensus, an employer would be justifiably pessimistic that a policy unilaterally imposing random alcohol testing in the absence of reasonable cause would survive arbitral scrutiny."

The union's counsel, Dan Leger of Fredericton's Pink Larkin, said the decision confirms that employers do not have a universal right to introduce safety policies, including random alcohol or drug testing, even in the most highly sensitive working environments.

"What the court has said concretely is that the Canadian model—which has been in existence in arbitration law for the past 25 years—is that there needs to be some demonstrated problem to introduce a random testing regime," said Leger, whose co-

counsel were David Mombourquette and Joel Michaud.

Leger added that the ruling underscores that in unionized workplaces, safety is a joint employer-union responsibility which should be addressed via collective bargaining. Moreover, "an employee maintains their *Charter* rights at the workplace, the same as they do in private life and in order to breach those privacy rights there needs to be some demonstrable cause."

Peter Gall of Vancouver's Heenan Blaikie, who represented the intervenor Canadian Mining Association and five provincial mining associations, predicted litigation in the wake of *Irving*, including over the extent of evidence necessary to justify random testing.

"There has to be some evidence of a problem—how much evidence is going to be up to particular arbitrators to determine," Gall said. "And even in future cases in particular workplaces, because of the high degree of safety required, there may not have to be evidence of any problem. So I think all of that is still up for determination in individual cases by arbitrators. In essence the Supreme Court of Canada said it's not our job to rule on this, it's [the] arbitrators' jobs."

Gall said more employers in safety-sensitive workplaces are engaging in random testing, "so we are going to see a lot more litigation before this issue is clarified."

Gall also pointed out that in many parts of the world, random testing is accepted as necessary to promote and protect safety in safety-sensitive workplaces. "I don't think you can say that Canada's approach, or the arbitral approach, to random testing is somehow frozen as a



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result of this decision."

Justice Abella restored as "reasonable" a 2009 majority arbitration board decision which applied the governing "arbitral consensus" to conclude that Irving acted unjustifiably, and went beyond its management rights, by imposing random alcohol testing on all mill employees in safety-sensitive posts, even though there was not "a demonstrated workplace problem" of alcohol abuse.

The policy was grieved by a long-time teetotaler. (Refusing to blow into the breathalyzer was grounds for immediate dismissal under the Irving policy. Testing of the employee revealed he had zero

blood alcohol). Evidence accepted by the arbitration board indicated that during the 22 months the policy was in place before the arbitration hearing, not a single employee tested positive, either on a random test or when Irving tested particular employees based on reasonable cause. Nor were there any accidents, injuries or near-misses connected to alcohol use, in what was accepted to be a dangerous workplace, in the 15 years prior to Irving's implementation of mandatory random alcohol and drug testing. In those 15 years, eight employees were found at work to have consumed alcohol. The board concluded there was not a significant problem with alcohol use and that there was a very low incremental risk of safety concerns or alcohol-related job performance impairment.

"In the end, the expected safety gains to the employer in this case were found by the board to range 'from uncertain...to minimal at best,' while the impact on employee privacy was found to be much more severe," Justice Abella said.

The governing arbitral jurisprudence (*KVP* test) stipulates that any rule or policy unilaterally imposed by an employer that is not later agreed to by the union must be consistent with the collective agreement and be reasonable.

Justice Abella said the arbitral jurisprudence around the unilateral exercise of management rights in the safety context has produced "a carefully calibrated 'balancing of interests' proportionality approach. Under it, and built around the hallmark collective bargaining tenet that an employee can only be disciplined for reasonable cause, an employer can impose a rule with

disciplinary consequences only if the need for the rule outweighs the harmful impact on employees' privacy rights.

In their dissent backed by Chief Justice Beverley McLachlin, Justices Marshall Rothstein and Michael Moldaver concluded that the arbitration board departed from the arbitral consensus to produce an unreasonable decision.

They identified the key issue in the case as "the threshold of evidence that the employer was required to introduce in order to meet its burden to demonstrate *KVP* reasonableness."

"What emerges is an arbitral consensus that an employer must demonstrate evidence of an alcohol problem in the workplace," the dissenters said. Here Irving had only to lead "some evidence of an alcohol problem at the mill in order to establish the reasonableness of its policy"—i.e., "evidence of a problem."

Yet the arbitration board applied a higher standard in holding that there was no evidence of a "significant problem" with alcohol-related impaired job performance at the mill, and that the evidence was not tied or causally linked to the actual experience of accidents, injury and near-misses at the plant.

The arbitral consensus does not require employers to establish cause and effect between alcohol use and workplace accident, Justices Rothstein and Moldaver said. "The arbitral cases recognize that evidence of alcohol use at an inherently dangerous facility such as the Irving mill—where the impact of a catastrophic failure could extend well beyond the safety of workers—is 'a problem' enough."

Static: Nobody stays on sites littered with digital tumbleweeds

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Faxes and voice mail

Several fax and voice mail services deliver incoming messages of both types attached to e-mail, so lawyers need only check their inboxes for digital messages of all kinds.

Internet access

To ensure connections, cellular service providers offer modems on USB sticks. Certain phones can tether computers to the Internet. Jaar thinks these might be good investments. "As people use hosted environments more, they need to be able to connect at any time, since they have less and less information on their hard drives," he says.

Manage client relationships

David Feld takes notice of companies that strive to earn client loyalty. "I look at BMW," says the real estate lawyer. "When I take my car in, I get an e-mail a few hours later saying, 'I hope you enjoyed our service. Would you take this survey?'" They say, 'Happy Birthday.' They remind me when my car needs service. If I book an appointment, I get an e-mail containing a calendar invitation. It's just beautiful. I look at them and think, 'I have to do that too.'"

In his view, this involves timely communication with clients and offering them some autonomy. "Wouldn't it be nice if you could simply check the status of your file right now? You could see where we are, what we need from you right

now, what we're still waiting on."

Using social media

When appearing at conferences, Omar Ha-Redeye and his associates usually tweet proceedings. They also preserve content, parts of which they offer online.

Social media activity like this enables "individual lawyers or legal teams to highlight their expertise," says Connie Crosby, principal of Crosby Group Consulting. "It also allows for direct communication with the general public or specific industries, raising one's profile while putting a human face on a legal practice."

Blogs and newsletters

Jaar blogged nearly every day to

his WordPress-based site. To offer a monthly newsletter, he used a WordPress plug-in called Easy Automatic Newsletter that automatically generated a newsletter containing blog posts from the preceding month.

Publishing to social media

Simply creating accounts on LinkedIn, Facebook, Twitter et al. isn't enough. Those profiles need to show activity, since few people stay on profiles where they see "digital tumbleweeds."

Social media "dashboards" like HootSuite.com enable people to both post and schedule messages on multiple social media accounts at the same time. This means the account holder posts only from one web page, not one for each

account. Dashboards also offer a quick view of streams from each account and the ability to participate in conversations.

Podcasting

Today's clients might find lawyers by using referrals or business listings, but "many people now jump directly to YouTube to look for information or answers, and having a presence there can raise a firm's profile," says Crosby.

Concerned about the time needed to learn how to podcast? Crosby suggests engaging a professional production company, at least at the start.

We want to hear from you!

Send us your verdict:

comments@lawyersweekly.ca