Federal Court  Cour fédérale

Date: 20220328

Docket: T-410-21

Citation: 2022 FC 418

Ottawa, Ontario, March 28, 2022

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

GENERAL ENTERTAINMENT AND MUSIC INC.

Plaintiff
(Responding Party)

and

GOLD LINE TELEMANAGEMENT INC., GLWIZ INC., AVA TELECOM LIMITED, ATA MOEINI, SHAWN REYHANI, ARASH BAFEKR

Defendants
(Moving Parties)

and

VIDA SHARIFIPOUR D.B.A. GLOBAL FILM AND MEDIA

Defendant

JUDGMENT AND REASONS

I. Overview

[1] The Defendants Gold Line Telemanagement Inc, GLWiZ Inc, and Ava Telecom Limited [collectively, Gold Line] appeal an Order of Prothonotary Martha Milczynski, issued in her capacity as case management judge [CMJ], dismissing a motion to stay these proceedings in favour of arbitration in Bermuda.

[2] The CMJ found that the agreement containing the arbitration clause had been validly terminated; the Plaintiff General Entertainment and Music Inc [GEM Inc] was not a party to the agreement; and Gold Line had taken certain steps to further the litigation that precluded it from contesting the Court's jurisdiction.

[3] When they presented their arguments before the CMJ, all parties agreed that the exercise of the Court's discretion was governed by the Supreme Court of Canada's decision in *Z.I. Pompey Industrie v ECU-Line N.V.*, 2003 SCC 27 [*Pompey*]. According to that authority, once a court is satisfied that a validly executed forum selection clause binds the parties, it must grant the stay unless the plaintiff can show sufficiently "strong cause" to support the conclusion that it would not be reasonable or just in the circumstances to require the plaintiff to adhere to the terms of the clause.

[4] On appeal, Gold Line takes a different approach. It now argues that the exercise of the Court's discretion is to be determined in accordance with *Campney & Murphy v Bernard & Partners*, 2002 FCT 1136 [*Campney*], where Prothonotary John Hargrave held that the Court

"… need only decide if it is arguable that the dispute falls within the arbitration provision" (at para 18).

[5] For the reasons that follow, the Court's discretion to stay a proceeding in favour of arbitration should be exercised in accordance with the doctrine established by the Supreme Court of Canada in *Dell Computer Corp v Union des consommateurs,* 2007 SCC 34 [*Dell*]. Pursuant to this doctrine, arbitrators have jurisdiction to rule on their own jurisdiction (the "competence-competence principle"). When an arbitration clause exists, any challenges to the jurisdiction of the arbitrator must first be referred to the arbitrator. Courts should derogate from this general rule and decide the question first only where the challenge to the arbitrator's jurisdiction concerns a question of law alone.

[6] Where a question concerning the jurisdiction of an arbitrator requires the admission and examination of factual proof, courts must normally refer such questions to arbitration. For questions of mixed law and fact, courts must also favour referral to arbitration. The only exception occurs where answering questions of fact entails a superficial examination of the documentary proof in the record, and where the court is convinced that the challenge is not a delaying tactic or will not prejudice the recourse to arbitration.

[7] The CMJ's refusal to stay these proceedings was premised on an incorrect principle of law. The appeal is allowed, and the proceedings in this Court are stayed in favour of arbitration in Bermuda.

II. Background

A. *Parties*

[8] GEM Inc was incorporated in Canada in 2015. Its purposes include owning intellectual property rights in Canada. GEM Inc broadcasts 28 television channels in the Farsi language to customers through subscription satellite services.

[9] Programming on the channels offered by GEM Inc consists of television series, movies and other cinematographic works produced or acquired from other producers. GEM Inc asserts that it owns the copyright in these works, and also registration of the "GEM" family of trademarks in Canada.

[10] Until 2017, the GEM group of companies was based in Istanbul, Turkey and Dubai, United Arab Emirates, and operated primarily through an entity called General Entertainment and Media Advertising Agency LLC [GEMCO]. In its Statement of Claim, GEM Inc pleads that GEMCO is the predecessor-in-title to certain assets now owned by GEM Inc. GEM Inc nevertheless maintains that it is not the corporate successor of GEMCO, and that it has not assumed GEMCO's contractual obligations.

[11] Ava Telecom Limited [Ava] is a Bermuda-based company that sources content for its parent company, Gold Line Telemanagement Inc. Ava is the contracting entity. Gold Line Telemanagement Inc provides technology products. GLWiZ Inc is a subsidiary of Gold Line

Telemanagement Inc that owns, runs, and updates software for a global IP platform called GLWiZ.

[12] Collectively, Gold Line provides over the top [OTT] media services, including streaming of multicultural internet protocol television programming, including live television channels and video on demand, under the name GLWiZ. The GLWiZ services are offered through smart TV apps, mobile device apps, websites and set top boxes.

B. *Content Acquisition and Licensing Agreement*

[13] In late 2013, Ava executed a Content Acquisition and Licensing Agreement [Agreement] with an entity named "General Entertainment Media". The Agreement describes "General Entertainment Media" as the Licensor, but does not specify whether this is GEMCO, the GEM group of companies generally, or another entity.

[14] Pursuant to the Agreement, Ava acquired the right to offer content from General Entertainment Media. This included television programs that were either produced or licensed by General Entertainment Media, as well as other audio and video content.

[15] Gold Line says that it assisted GEMCO with other corporate endeavours, such as developing a tourism website, distributing set-top boxes and corresponding subscriptions, and providing GEMCO's Toronto office with telephone services. Gold Line alleges that some of

these services were provided before the Agreement was signed, and resulted in General Entertainment Media owing Gold Line $89,933.38 USD.

[16] Gold Line says that the Agreement was executed, in part, to compensate it for services previously rendered to GEMCO. Following execution of the Agreement, Gold Line alleges that GEMCO owed it $266,457.02 USD. As of December 31, 2020, Gold Line claims that GEMCO's indebtedness had been reduced in accordance with the Agreement by $197,361.39 USD.

C. *Relevant Clauses of the Agreement*

[17] The Agreement contains an arbitration clause, reproduced below:

> J. 8. *Governing Law*. This Agreement shall be shall be [*sic*] governed by and interpreted in accordance with the laws of Bermuda, without giving effect to any conflict of laws provisions. Any disputes under this Agreement shall be settled by Arbitration in Bermuda, and each of the parties hereby irrevocably submits to the exclusive jurisdiction of Bermuda.

[18] The Agreement also contains a termination clause. The relevant portion is reproduced below:

> I. 3. In addition to the foregoing, either party may terminate this Agreement without cause, at any time, with six (6) months' notice.

[19] In April 2014, Ava and General Entertainment Media executed "Addendum No. 1" [Addendum] to the Agreement. The Addendum stipulated that Ava could offset any payments it

was owed against any amounts payable by Gold Line. The Addendum was executed by Ava on April 16, 2014, and on behalf of "GEM TV" on April 22, 2014.

D. *Disputed Termination of the Agreement*

[20] On October 17, 2015, Mahan Karimian, in his capacity as General Manager of "Gem Group TV", sent Ava an e-mail message purporting to terminate the Agreement with immediate effect, and demanded that all broadcasting of GEM content be suspended. On October 22, 2015, Ava's Vice President, Operations rejected the notice of termination on the ground that six months' notice was required. He also noted there were still amounts owing, and stated that Ava would continue to broadcast content until all outstanding invoices were paid. Gold Line continued to act in accordance with the Agreement until March 2019.

III. Procedural History

[21] This action was commenced by Statement of Claim filed on March 5, 2021. GEM Inc alleges that Gold Line has infringed its rights under the *Copyright Act*, RSC 1985, c C-42, the *Trademarks Act*, RSC 1985, c T-13, and the *Radiocommunication Act*, RSC 1985, c R-2. The Statement of Claim alleges widespread pirating of GEM Inc's satellite television signals, as well as the unauthorized reproduction and retransmission of television programs and films over which GEM Inc asserts copyright.

[22] The Statement of Claim alleges in paragraph 64 that GEMCO is the predecessor-in-title to GEM Inc. According to paragraph 69 of the Statement of Claim:

> Over time, the corporate Defendants and GEMCO (and/or its corporate affiliates or successors-in-title) entered into further agreements pursuant to which the Defendants were provided with access to additional GEM programming (such as VOD content including certain of the GEM Works) in addition to access to the GEM Channels, to in turn to [*sic*] be offered to the Defendants' subscribers through the GLWiZ platforms (including in Canada), including a Content Acquisition and Licensing Agreement executed in or around October 2013 […]

[23] Gold Line responded to the Statement of Claim with a series of requests for particulars and documents. GEM Inc provided responses to those requests on April 15, 2021.

[24] On April 23, 2021, Gold Line sent a request to GEM Inc for its consent to stay the proceedings in this Court in favour of arbitration in Bermuda, as contemplated by the Agreement. GEM Inc refused to consent to a stay on May 6, 2021.

[25] Gold Line delivered its Statement of Defence and Counterclaim on June 9, 2021. The counterclaims are for violations of the *Trademarks Act* and the *Competition Act*, RSC 1985, c C-34.

[26] The Statement of Defence pleads that this Court is not the proper forum for resolving the parties' disputes, and the arbitration clause contained in the Agreement applies. The Statement of Defence declares Gold Line's intention to "reserve all rights with respect to jurisdiction and the

forum of this action and dispute", and to "reserve all rights to have this matter stayed, dismissed, discontinued, or take any other steps […]".

[27] Gold Line commenced arbitration in Bermuda by way of notice dated June 25, 2021.

[28] Following a case management conference on July 2, 2021, Gold Line agreed to bring a motion for a stay of proceedings pursuant to s 50(1) of the *Federal Courts Act*, RSC 1985, c F-7. The motion was filed on July 5, 2021.

[29] The parties presented their arguments on September 23, 2021, and the CMJ dismissed the motion for a stay of proceedings on December 8, 2021.

IV. Issue

[30] The sole issue raised by this appeal is whether the proceedings in this Court should have been stayed in favour of arbitration in Bermuda.

V. Analysis

[31] Pursuant to s 50(1) of the *Federal Courts Act*, the Court may stay proceedings: (a) on the ground that the claim is being proceeded with in another court or jurisdiction; or (b) where for any other reason it is in the interest of justice that the proceedings be stayed.

[32] Factual conclusions reached by the CMJ are subject to review on appeal against the standard of palpable and overriding error. With respect to questions of law and questions of mixed fact and law, where there is an extricable legal principle at issue, the applicable standard is correctness (*Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at paras 65-66).

[33] Here, the CMJ was invited by the parties to apply the wrong legal test for determining whether the proceedings in this Court should be stayed in favour of arbitration in Bermuda. This caused the CMJ to render a decision that was incorrect in law.

[34] The parties have tended to use the terms “choice of law clause”, “forum selection clause” and “arbitration clause” indiscriminately, resulting in much confusion. A choice of law clause specifies the law of the contract; a forum selection clause ousts the jurisdiction of otherwise competent local courts in favour of a foreign jurisdiction; and an arbitration clause binds the parties to a dispute resolution mechanism crafted through consensual agreement (*Douez v Facebook, Inc*, 2017 SCC 33 at para 1; *TELUS Communications Inc v Wellman,* 2019 SCC 19 at paras 52-55).

[35] The considerations that inform the application of each type of clause are not the same, and they are not interchangeable. Forum selection clauses do not determine the mechanism of dispute resolution, but only the forum. With respect to arbitration clauses, the Supreme Court of Canada has repeatedly affirmed that parties to a valid arbitration agreement must abide by their agreement.

[36] The *United Nations Foreign Arbitral Awards Convention Act*, RSC 1985, c 16 incorporates into Canadian law the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Can TS 1986 No 43, adopted by the United Nations Conference on International Commercial Arbitration in New York on June 10, 1958 [*NY Convention*]. Article II.3 of the *NY Convention* provides as follows:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

[37] Where a party seeks to avoid an arbitration clause by challenging the validity of the agreement and/or the jurisdiction of the arbitrator, the Court should generally permit the matter to first be determined by an arbitrator (*Dell* at para 84). In *Uber Technologies Inc v Heller*, 2020 SCC 16 [*Uber*], the Supreme Court of Canada summarized the doctrine established in *Dell* as follows:

> The doctrine established in *Dell* is neatly summarized in its companion case, *Rogers Wireless Inc. v. Muroff*, [2007] 2 S.C.R. 921, at para. 11: The majority of the Court held that, when an arbitration clause exists, any challenges to the jurisdiction of the arbitrator must first be referred to the arbitrator. Courts should derogate from this general rule and decide the question first only where the challenge to the arbitrator's jurisdiction concerns a question of law alone. Where a question concerning jurisdiction of an arbitrator requires the admission and examination of factual proof, normally courts must refer such questions to arbitration. For questions of mixed law and fact, courts must also favour referral to arbitration, and the only exception occurs where answering questions of fact entails a superficial examination of the documentary proof in the record and where the court is convinced that the challenge is not a delaying tactic or will not prejudice the recourse to arbitration.

[38] With respect to what constitutes superficial review, the essential question is whether the necessary legal conclusions can be drawn from facts that are either evident on the face of the record or undisputed by the parties (*Uber* at para 36).

[39] Here, the relevant facts are neither evident on the face of the record nor undisputed by the parties. GEM Inc challenges both the application and the validity of the Agreement. Whether GEMCO and GEM Inc are distinct entities, whether GEM Inc's claims arise from the Agreement, and whether the business relationship continued after the notice of termination was issued are all questions that require a more thorough review of the evidentiary record than is permitted on a motion to stay. These are complex issues of mixed fact and law that must first be considered by an arbitrator.

[40] The Supreme Court of Canada has recognized the importance of the "competence-competence" principle, *i.e.*, arbitrators are competent to determine their own jurisdiction. This internationally-recognized principle encompasses determinations of whether an arbitration agreement is enforceable, whether a dispute is arbitrable, and whether an arbitrator has jurisdiction to provide the remedies sought (*Dell* at para 11; *Seidel v TELUS Communications Inc*, 2011 SCC 15 [*Seidel*] at para 29; *Uber* at paras 31-33).

[41] A party cannot escape arbitration by alleging termination of the contract containing the arbitration clause. The doctrine of separability considers an arbitration clause to be "autonomous and juridically independent from the main contract in which it is contained". The separability doctrine is a logical extension of the rule that a challenge to an arbitral tribunal's jurisdiction

should be considered first by the tribunal itself. There is near uniform recognition of the separability doctrine by courts around the world, even where no legislation provides for it (*Uber* at paras 221-223).

[42] It follows that GEM Inc cannot rely on evidence of the Agreement's termination as a reason to avoid arbitration. Even if the Agreement were validly terminated, this would not detract from the Court's duty to "systematically" refer the parties to arbitration. There is no question that the scope, validity and duration of the Agreement are at the heart of the dispute between the parties.

[43] The burden on a plaintiff seeking to escape an arbitration clause is high. It is not enough for the plaintiff to show that the arbitration clause may not apply, or even that it likely does not apply. So long as the dispute potentially falls within the arbitration clause, it must be referred to arbitration (*Campney* at para 10, citing *Sarabia v Oceanic Mindoro (The)*, 1996 CanLII 1537 at para 28 (BCCA).

[44] An arbitration clause is null and void, inoperative or incapable of being performed only where it is manifestly tainted. In order to be manifestly tainted, the alleged invalidity of an arbitration agreement must be "incontestable", such that no serious debate can arise about the validity (*Uber* at para 33). An "incontestable" invalidity must not require anything more than a superficial review of the record. That is not the case here.

[45] The parties' reliance on *Pompey* before the CMJ was misplaced. That case concerned a bill of lading which selected the courts of Antwerp, Belgium as the forum in which to resolve disputes. There was no arbitration clause between the parties. *Pompey* provides guidance on the application of a forum selection clause, not on the enforcement of an arbitration clause.

[46] The CMJ did not make a specific finding that Gold Line had "attorned" to the jurisdiction of this Court. Instead, the CMJ noted that the actions and steps taken by Gold Line upon being served with the Statement of Claim were relevant to her exercise of discretion respecting whether a stay should be granted.

[47] Attornment cannot be an escape hatch to avoid arbitration. This would be contrary to the principles underlying commercial certainty and the courts' systematic referral to arbitration. Not surprisingly, questions of attornment do not figure in *Uber*, *Dell*, *Seidel*, or *Desputeaux v Éditions Chouette (1987) inc*, 2003 SCC 17 [*Desputeaux*].

[48] GEM Inc argues that the proceedings in this Court should not be stayed because the remedies it seeks are statutory. However, in *Desputeaux*, the Supreme Court of Canada noted that the purpose of enacting a provision such as s 41.25 (then s 37) of the *Copyright Act* is to define the jurisdiction *ratione materiae* of the courts over a matter. It is not intended to exclude arbitration. It merely identifies the court which, within the judicial system, will have jurisdiction to hear cases involving a particular subject matter. It cannot be assumed to exclude arbitral jurisdiction unless it expressly so states (*Desputeaux* at para 42).

[49] If Parliament had intended to exclude arbitration in copyright matters, it would have done so clearly (*Desputeaux* at para 46). Neither the *Trademarks Act* nor the *Radiocommunication Act* contains explicit language excluding arbitration.

VI. Conclusion

[50] The appeal is allowed, and the proceedings in this Court are stayed in favour of arbitration in Bermuda.

[51] If the parties are unable to agree upon costs, Gold Line may make written submissions, not exceeding three (3) pages, within fourteen (14) days of the date of these Reasons for Judgment. GEM Inc may make written submissions in reply, not exceeding three (3) pages, within fourteen (14) days thereafter.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The appeal is allowed, and the proceedings in this Court are stayed in favour of arbitration in Bermuda.

2. If the parties are unable to agree upon costs, Gold Line may make written submissions, not exceeding three (3) pages, within fourteen (14) days of the date of this Judgment. Gem Inc may make written submissions in reply, not exceeding three (3) pages, within fourteen (14) days thereafter.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-410-21
STYLE OF CAUSE:	GENERAL ENTERTAINMENT AND MUSIC INC. v GOLD LINE TELEMANAGEMENT INC., GLWIZ INC., AVA TELECOM LIMITED, ATA MOEINI, SHAWN REYHANI AND ARASH BAFEKR v VIDA SHARIFIPOUR D.B.A. GLOBAL FILM AND MEDIA
PLACE OF HEARING:	BY VIDEOCONFERENCE BETWEEN TORONTO AND OTTAWA, ONTARIO
DATE OF HEARING:	MARCH 1, 2022
JUDGMENT AND REASONS:	FOTHERGILL J.
DATED:	MARCH 28, 2022

APPEARANCES:

James Green Laurent Massam	FOR THE PLAINTIFF/ RESPONDING PARTY
Neil Paris Adam Stikuts Michael Adams	FOR THE DEFENDANTS/ MOVING PARTIES

SOLICITORS OF RECORD:

Gowling WLG (Canada) LLP Barristers and Solicitors Toronto, Ontario	FOR THE PLAINTIFF/ RESPONDING PARTY
Paris & Company Barristers and Solicitors Toronto, Ontario	FOR THE DEFENDANTS/ MOVING PARTIES
Riches McKenzie Herbert Barristers and Solicitors Toronto, Ontario	