In the Court of Appeal of Alberta

Citation: Resin Systems Inc. v. Industrial Service & Machine Inc., 2008 ABCA 104

Date: 20080313
Docket: 0701-0343-AC
Registry: Calgary

2008 ABCA 104 (CanLII)

Between:

Resin Systems Inc. operating as RS Technologies a Division of Resin Systems Inc.

Respondent

- and -

Industrial Service & Machine Inc. operating as McClean Anderson a Division of Industrial Service & Machine Inc.

Appellant

The Court:

The Honourable Mr. Justice Keith Ritter
The Honourable Mr. Justice Clifton O'Brien
The Honourable Madam Justice Patricia Rowbotham

Memorandum of Judgment
Delivered from the Bench

Appeal from the whole of the Order by
The Honourable Mr. Justice D. I. MacLeod
Dated the 30th day of November, 2007
Filed on the 30th day of November, 2007
(Docket: 0701-06249)

Memorandum of Judgment
Delivered from the Bench

2008 ABCA 104 (CanLII)

The Court:

Introduction

[1] The respondent, Resin Systems Inc., operating as RS Technologies a division of Resin Systems Inc. (Resin), has commenced an action in Alberta against the appellant, Industrial Service & Machine Inc., operating as McClean Anderson a division of Industrial Service & Machine Inc. (ISM). ISM appeals an order of a chambers judge dismissing its application to refer the parties to an arbitration earlier commenced by Resin, and to stay the action.

[2] The chambers judge dismissed the application on the ground that the arbitration agreement between the parties was *inoperative* within the meaning of the Schedules to the *International Commercial Arbitration Act*, R.S.A. 2000, c. I-5 (the *Act*).

Facts

[3] ISM and Resin are parties to two Purchase Agreements, which contain a common arbitration provision, stating in part:

> Except as modified by this Agreement, any claim or controversy arising out of or relating to this Agreement, shall be determined by binding arbitration in accordance with the Court of Arbitration of the International Chamber of Commerce and its rules.

[4] Resin initiated an arbitration of issues arising from the Purchase Agreements by submitting a Request for Arbitration, dated October 20, 2006, to the International Chamber of Commerce (ICC).

[5] ISM submitted its defences in the arbitration proceedings and, by January 24, 2007, a sole arbitrator had been appointed, with the hearing scheduled to be held in Denver, Colorado in December 2007.

[6] In February 2007, the ICC requested payment from each party of $87,500, being an advance on costs, calculated upon Resin's claim in the arbitration exceeding $27 million.

[7] ISM continued to take steps in the arbitration in defence of the claim against it, but refused to make payment of the advance costs required by the ICC and, in fact, has not submitted payment in any amount. It refused to pay, on the basis that Resin has caused the costs to be grossly inflated because its claim far exceeds the contractual limits on liabilities and damages set out in the Purchase Agreements. These agreements generally provide that ISM's maximum liability shall not exceed the original sale price, and that it will not be liable for consequential damages. ISM submits that the contractual limit of any claim is in the amount of $2,852,000.

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[8] The ICC granted ISM two extensions of time, through May 23, 2007, to make payment of its share of advance costs. ISM advised that it did not intend to make payment. Resin took the position that the arbitration process was frustrated and, on June 15, 2007, commenced its action in Alberta, advancing essentially the same claim as had been made in the arbitration proceedings.

[9] The ICC subsequently advised that the time for ISM to pay its share of advanced costs had expired, and invited Resin to substitute in paying ISM's share. Resin has not paid ISM's share, but rather has elected to proceed with its action in Alberta.

Governing legislation and arbitration rules

[10] Schedule 1 of the *Act* is entitled Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Article II, section 3, states:

> 3. The court of 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.
>
> [emphasis added]

[11] Schedule 2 of the Act is entitled UNCITRAL Model Law on International Commercial Arbitration. Article 8, section (1), states:

> (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of dispute, refer the parties to arbitration unless it finds that the agreement is null and void, *inoperative* or incapable of being performed.
>
> [emphasis added]

[12] Article 30 of the Rules of Arbitration of the ICC governs costs and provides, in part:

> 2
> As soon as practicable, the Court shall fix the advance on costs in an amount likely to cover the fees and expenses of the arbitrators and the ICC administrative costs for the claims and counterclaims which have been referred to it by the parties. This amount may be subject to readjustment at any time during the arbitration. Where, apart from the claims, counterclaims are submitted, the Court may fix separate advances on costs for the claims and the counterclaims.
>
> 3
> The advance on costs fixed by the Court shall be payable in equal shares by the Claimant and the Respondent. Any provisional advance paid on the basis of Article

> 30(1) will be considered as a partial payment thereof. However, any party shall be free to pay the whole of the advance on costs in respect of the principal claim or the counterclaim should the other party fail to pay its share. When the Court has set separate advances on costs in accordance with Article 30(2), each of the parties shall pay the advance on costs corresponding to its claim.
>
> 4
> When a request for an advance on costs has not been complied with, and after consultation with the Arbitral Tribunal, the Secretary General may direct the Arbitral Tribunal to suspend its work and set a time limit, which must be not less than 15 days, on the expiry of which the relevant claims, or counterclaims, shall be considered as withdrawn. Should the party in question wich to object to this measure, it must make a request within the aforementioned period for the matter to be decided by the Court. Such party shall not be prevented, on the ground of such withdrawal, from reintroducing the same claims or counterclaims at a later date in another proceeding.

Analysis

[13] ISM argues that the arbitration is not inoperative because Resin can elect to pay the whole of the advance costs and cause the arbitration to proceed.

[14] However, ISM is not entitled to rely upon its own breach of the Arbitration Rules which provide that the advance costs *shall* be payable in equal shares by each of the parties. Resin is not obliged to pay the costs of ISM and is entitled, under the Rules, to allow the claims made in the arbitration to be deemed withdrawn.

[15] ISM's contention that it is absolved from making payment of its share of advanced costs, because Resin's claim exceeds the contractual limits, is without merit. If the arbitration had continued, it would have been an issue therein as to whether the contractual limits on liability and damages are binding. Whether Resin will succeed is open to question; however, there is nothing that precludes it asserting a claim exceeding the contractual limits.

[16] The relevant Articles within the Schedules to the *Act* contemplate the reference to arbitration at the request of one of the parties. In our view, it is implicit that the party making the request is prepared to proceed with the arbitration in accordance with the arbitration rules to which that party has agreed. We question whether the request can be regarded as bona fide if the party making it is insistent on flaunting a mandatory rule requiring payment of its share of the advance costs. In any event, the refusal to pay the costs makes the arbitration unworkable, and thereby inoperative, as there is no obligation on the other party to fund the defaulting party's share. Non payment in these circumstances results in the claims in the arbitration as being considered to be withdrawn.

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[17] In *Paczy v. Haendler*, [1981], Lloyd's L.R. 302 (C.A.), the claimant argued the reverse situation, namely that the respondent should post all costs because the claimant could not pay its share, and that if the respondent did not do so the claimant could proceed in court. Brightman L.J. described the claimant's argument as a "fantastic assertion" (at 309). In this case, we characterize ISM's request that Resin be denied access to the courts because it does not chose to pay ISM's share of arbitration costs, which ISM refuses to pay in breach of the arbitration rules, as audacious.

Conclusion

[18] The chambers judge, in the circumstances of this case, was entitled to find that the arbitration agreement was inoperative. The appeal is dismissed.

Appeal heard on March 10, 2008

Memorandum filed at Calgary, Alberta
this 13th day of March, 2008

O'Brien, J.A.

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Appearances:

E. J. Lee
for the Appellant

B. Kapusianyk, Q.C. G.D. Holub
for the Respondent

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