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Docket: CI 01-01-23778
Indexed as: Proctor v. Schellenberg
Cited as: 2002 MBQB 135
(Winnipeg Centre)

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COURT OF QUEEN'S BENCH OF MANITOBA

IN THE MATTER OF: An application under s. 3 of ***The International Commercial Arbitration Act***, S.M. 1986-87, c. 32, Cap. C151

B E T W E E N:

SHELDON PROCTOR,	)	ROSS A. MCFADYEN
	)	for the applicant
applicant,	)	
	)	
- and -	)	
	)	GENE ZAZELENCHUK
LEON SCHELLENBERG,	)	for the respondent
	)	
respondent.	)	
	)	JUDGMENT DELIVERED:
	)	APRIL 22, 2002

CLEARWATER J.

THE PARTIES AND THE PROCEEDING

[1] The applicant is a broker who was, at all material times, either employed by or represented brokerage firms in Chicago, Illinois who were engaged in the buying and selling of commodities (future contracts and future options) on the Chicago Mercantile Exchange and on other commodity exchanges. The respondent, a chartered accountant who resides in Winnipeg, has been involved in the buying and selling of future contracts and future options on the Chicago

Mercantile Exchange for approximately one year prior to starting to trade with or through the applicant. In July 1997, the respondent entered into an agreement and opened an account with LIT Division of First Options of Chicago, Inc. ("First Options"). The applicant was employed by Price Futures Group Inc. ("Price"), who is described in the materials as an "introducing broker". As is the case here, introducing brokers buy and sell commodities for their customers (clients) through a brokerage house that has a seat on the exchange (in this case First Options had the seat on the exchange) (as opposed to brokers who actually have a seat on the exchange and are thereby able to buy and sell commodities for the customer directly).

[2] The respondent started doing business with the applicant and First Options. Pursuant to certain written documents executed by him on or about July 24, 1997, he opened an account with First Options and over the next year or so he conducted business on various commodity exchanges by giving instructions to the applicant. He received monthly statements evidencing the status of his account directly from First Options. From time to time the respondent's account was significant; for example, on August 31, 1998, when his account was transferred (according to him without any prior knowledge of the transfer) to a different brokerage house, E D & F Man International, Inc. ("Man International"), $294,045.80 (U.S. cash) was transferred to Man International. As it turns out, Man International had purchased the retail commodity portion of First Options' business at that time. Although his account was now with Man International

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rather than First Options, the respondent continued, for a relatively short period of time (4-8 weeks), to trade in his Man International account through or with the services of the applicant. Differences arose between them in October 1998. At that time, the respondent's account was closed (negligently or inappropriately as he now alleges), resulting in losses to the respondent (and apparently to the applicant as evidenced by the arbitration award in issue in this proceeding).

[3] On September 13, 2000, following a hearing that took place in Chicago (initially on July 18, 2000 and adjourned to August 18, 2000 to permit certain issues to be addressed), the arbitrator made an award in favour of the applicant and against the respondent for payment of the sum of $35,353.72 U.S.

[4] Pursuant to s. 3 of ***The International Commercial Arbitration Act***, S.M. 1986-87, c. 32, Cap. C151 ("the ***Act***") and Manitoba Queen's Bench Rule 14.05(2)(b), the applicant now seeks recognition of this arbitration award; in effect, to have same declared to be, and recognized as, a judgment of this court. The respondent did not appear at the arbitration hearing in Chicago on July 18, 2000. He did not avail himself of the opportunity to address the issues made by the arbitrator when the matter was adjourned to August 18, 2000. The basis for the respondent's opposition to this relief may be summarized as follows:

(a) the applicant has not met the onus on him of establishing that the respondent entered into an agreement to arbitrate which corresponds with the definition of the term "agreement in writing" in the ***Act***. The respondent "does not admit" to entering into such

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an agreement in his affidavit evidence and he submits that the applicant's evidence does not satisfy the technical requirements of the statute as follows:

(i) there is not (and presumably never was) any "agreement in writing" signed by the parties or contained in an exchange of letters or telegrams (as the ***Act*** requires); and

(ii) the applicant has not supplied either the original of any such "agreement in writing" or "agreement to arbitrate" or any duly certified copy thereof and, accordingly, is not entitled to recognition;

(b) if any arbitration agreement, *supra*, exists, it was entered into between the respondent and First Options only. No notice of any assignment of any such agreement by First Options to Man International and subsequently by Man International to the applicant was ever provided to the respondent in a timely manner. For example, the purported assignment of the "agreement" from Man International to the applicant did not take place until after the parties (or either of them) elected "to utilize the arbitration agreement if such an agreement exists";

(c) if an agreement to arbitrate exists, it is simply part of a contract between a customer and his broker; this is a personal service

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contract or personal covenant and is not, in law, capable of being assigned;

(d) if any arbitration agreement (agreement in writing) exists, it was voluntary on the respondent's part and, at best, would only be enforceable in law with respect to a dispute directly between First Options and him.

The applicant also seeks a declaration converting the U.S. award to Canadian funds using the appropriate exchange rate, together with a declaration that he is entitled to interest on the amount of the judgment at the "pre-judgment rate" specified in ***The Court of Queen's Bench Act***, S.M. 1988-89, c. 4 – Cap. C280 [ss. 80(1) to 82] and (or) pursuant to the ***Illinois Code of Civil Procedure***.

[5] Although the ***Act*** and Queen's Bench Rule 14.05(2)(b) clearly contemplates proceedings such as this by way of application on affidavit evidence, in light of what appears (at least on first reading of the affidavits which contain contradictory depositions on the existence of any agreement to arbitrate), I gave serious consideration to directing the trial of an issue or issues, either on an expedited basis or otherwise. After due consideration and analysis of the contents of the affidavits, the documentary exhibits, and the transcript of Mr. McKinnon's cross-examination, I am satisfied that this court can (and should), after taking the same "good hard look" at this evidence as one would take on a motion for summary judgment, dispose of this particular application on the materials as they stand.

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THE EVIDENCE

[6] In addition to the comprehensive briefs and oral submissions of both counsel, my decision in this matter depends on an analysis of the following evidence:

(a) the affidavit of Mr. McKinnon sworn July 10, 2001, which exhibits a certified copy of the award of the American arbitrator dated September 13, 2000, a copy of what is described as an "Arbitration Agreement" signed by the respondent and "certified" by Man International's general counsel, together with an uncertified facsimile copy of the same arbitration agreement which had been sent to Mr. McKinnon on May 31, 2001 (Mr. McKinnon being Manitoba counsel for the applicant);

(b) the affidavit of Nancy Blair sworn July 20, 2001 evidencing the exchange rate for U.S. dollars in Canadian funds as of July 20, 2001 to be $1 U.S. equals $1.5418 Canadian;

(c) the respondent's first affidavit sworn August 1, 2001, combined with his "supplementary affidavit" sworn November 12, 2001. This supplementary affidavit simply exhibits two documents which were inadvertently not attached to his first affidavit;

(d) Mr. McKinnon's second affidavit sworn August 28, 2001 and exhibits to this affidavit; in particular, the respondent's facsimile

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dated November 5, 1999 and a copy of the arbitration agreement which was faxed at that time by the respondent to the applicant's U.S. counsel, plus a further (or perhaps better) "duly certified copy of the arbitration agreement dated July 24, 1997" between First Options and the respondent;

(e) the transcript of the cross-examination of Mr. McKinnon conducted by counsel for the applicant on October 11, 2001.

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THE LAW

A. The Statutes

[7] The following provisions of the ***Act*** (which I have summarized for purposes of this decision) are relevant to the issues before me:

(a) the term "Convention" is defined in s. 1(1) as being the Convention on the Recognition and Enforcement for an arbitral award, adopted by the United Nations Conference on International Commercial Arbitration in 1958. It is set out fully in "Schedule A" to the ***Act***;

(b) the "Convention" applies in Manitoba (subject to the provisions of the ***Act***) and it applies to arbitral awards and arbitration agreements "only" in respect to differences arising out of commercial legal relationships, whether contractual or not. Any party seeking recognition of a foreign arbitral award pursuant to the Convention must apply to this court [ss. 2(1), 2(2) and 3];

(c) the following provisions ("Articles") of the Convention are relevant to the issues before me:

(i) Manitoba, being a contracting state, shall recognize an agreement in writing under which the parties undertake to submit their differences, whether arising from a contract or not, to arbitration; (Article I, para. 1);

(ii) Article II, para. 2 - "The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams" [underlining supplied];

(iii) Article IV reads as follows:

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof;

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said

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agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

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[8] The applicant also refers to and relies on the following statutes and (or) court rules:

(a) s. 1 of ***The Manitoba Evidence Act***, R.S.M. 1987 c. E150, which defines "action" to include "any civil proceeding, inquiry, arbitration, ..." [underlining supplied];

(b) s. 30(1) of ***The Manitoba Evidence Act*** reads:

> 30(1) Every court shall take judicial notice of the laws of any part of the Commonwealth, or of the United States, or any state, territory, possession, or protectorate thereof, but foreign law shall nevertheless be pleaded where any rule or law so requires.

(c) the provisions of ***The Court of Queen's Bench Act***, *supra*, relating to "pre-judgment" interest (ss. 79-81). I pause to note that s. 82(b) and (c) of ***The Court of Queen's Bench Act*** make the provisions of ss. 79-81 inapplicable; there is an agreement between these parties respecting pre-judgment interest or compensation in the place of interest and payment of pre-judgment interest or compensation in the place of interest is otherwise provided for by law [***The Illinois Code of Civil Procedure*** (Illinois Rev. Statute, 1991, Chap. 110)];

(d) para. 5/2-1303 of the ***Illinois Code of Civil Procedure***, which provides that, in Illinois, judgments recovered in court (whether entered upon any award, report or verdict) will bear interest at 9%

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per annum from the date of the judgment until date of payment (or at a lower rate if the judgment debtor is a unit of local government, a school district, community college, district or some other governmental entity);

(e) s. 12 of the ***Currency Act***, R.S.C. 1985, Chap. C-52, which requires any reference to money or monetary value in any legal proceeding to be stated in Canadian currency. I pause to note that this has been interpreted (in a decision of Carruthers J. of the Ontario High Court of Justice in ***Batavia Times Publishing Co. v. Davis*** (1978), 88 D.L.R. (3rd) 144) to provide that in an action to enforce a foreign judgment, the appropriate rate of exchange to be applied is that prevailing at the date of the "domestic judgment"; the date of my decision in this instance.

B. <u>The Authorities</u>

[9] Although Morse J. was considering an application (under the ***Act***) for an order that a particular dispute be referred to arbitration pursuant to "an agreement in writing" to arbitrate in ***Cangene Corp. v. Octapharma AG***, [2000] M.J. No. 362, his analysis of the objects and purposes of the ***Act*** and the authorities are, in my view, generally applicable to the issues before me. Morse J. was dealing with the interpretation and applicability of Schedule "B" to the ***Act*** (the international law sometimes referred to as the "Model Law"), whereas the

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issues before me must be determined with reference to Schedule "A" to the ***Act*** ("the Convention"). At para. 13, he stated:

> Generally speaking, Canadian courts, as well as the courts of other countries bound by the Convention and the Model Law, have upheld arbitration clauses such as the arbitral clause in this case, holding that the clauses requiring a referral to arbitration are mandatory in the absence of a finding that the agreement is null and void, inoperative, or incapable of being performed. ...

[10] In this proceeding, the respondent adopts a twofold approach:

(a) firstly, the applicant has not placed before the court an "agreement in writing" signed by both parties as required by the ***Act***; and even if the written arbitration agreement signed by the respondent is in substantial compliance with the ***Act***, it has never been properly assigned to the applicant and is inoperative or unenforceable;

(b) secondly, even if the document in question constitutes an "agreement in writing" to arbitrate, the court should exercise the discretion it has pursuant to Articles V and VI of the Convention, *supra*, and refuse recognition and enforcement because:

(i) the subject matter of the differences between the parties (in effect, issues surrounding allegations as to the quality or lack thereof of personal services provided by a broker to his customer) is not capable of settlement by arbitration under the laws of Canada [Article V, s. 2(a)] and (or) recognition of the award would be contrary to public policy; that is, contracts of the nature and type that existed between the

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respondent and First Options are not, in law, capable of assignment as they are essentially contracts of personal service.

[11] The following is a brief summary of some of the principles expressed by Morse J. in ***Cangene***, *supra*, and other cases where the ***Act*** has been considered:

(a) where there are issues as to whether or not a particular dispute falls within the terms of an arbitration agreement or even where it is arguable that a party to legal proceedings is a party to the arbitration agreement, those issues should be left to be determined by the arbitral tribunal [see ***Gulf Canada Resources Ltd. v. Arochem International Ltd.***, [1992] B.C.J. No. 500 (B.C.C.A.)];

(b) in recent years, international commercial arbitration has been recognized as an important and growing area of the law. Courts in Canada and the United States have, on the basis of freedom of contract, generally accepted and approved of the arbitration contemplated in the ***Act*** and there is little room for judicial intervention in the process [***BWV Investments Ltd. v. Saskferco Products Inc.***, [1994] S.J. No. 629 (Sask. C.A.)];

(c) the ***Act*** (and other legislation dealing with arbitration) reflects a growing recognition of the "importance, desirability, and acceptance of alternative dispute resolution approaches".

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> Therefore, older court decisions dealing with arbitration (and prohibiting arbitration) must be read and applied very carefully [***NetSys Technology Group AB v. Open Text Corp.***, [1999] O.J. No. 3134 (Ont. Superior Court of Justice), para. 31].

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ANALYSIS AND DECISION

[12] The first issue which I must determine is whether this applicant has complied with the mandatory requirement in Article IV of the ***Act***, which requires it to place before the court either the original or a duly certified copy of the agreement in writing under which the parties undertook to arbitrate. Although it would have been preferable for the applicant to have filed all of the documents (or certified copies) that evidence the account agreement between First Options and the respondent in July 1997 (instead of only the "arbitration agreement" dated July 24, 1997), when I look at the totality of the evidence (which includes the somewhat ambiguous statements of the respondent in his affidavit, which I will refer to later) I am convinced that the applicant has, at least substantially, complied with this requirement. The respondent's submission to the effect that because the document (the arbitration agreement dated July 24, 1997) is signed by only one of the parties (and not by First Options, for some reason not explained in the evidence or in submissions) is technical (at best) and not consistent with the application of the foregoing legal principles to this situation, the wording of the ***Act*** and the Convention, and these documents. I have no doubt there was a binding arbitration agreement, in writing, which formed part

of the overall account agreement (customer/client relationship) between First Options and the respondent. The respondent initially deposes in his August 1, 2001 affidavit that he (in effect) would never agree to commercial arbitration because it was not his practice to "sign things that I do not have to" and "I am not a proponent of commercial arbitration in any event". Whether or not the respondent is a proponent of commercial arbitration, he was not correct in suggesting that he never signed an agreement to arbitrate. The suggestion in para. 9 of his affidavit ("I did not sign the arbitration clause") is either deliberately incorrect ***or***, when he swore this affidavit on August 1, 2001, he forgot about the telephone conversation(s) that he had with Ms Steffe after receiving Ex. "B", her letter of October 26, 1999, and immediately before faxing her his memo of November 5, 1999 and a copy of the arbitration agreement (Ex. "A" to Mr. McKinnon's affidavit of August 28, 2001). Moreover, after receiving Mr. McKinnon's affidavit and cross-examining him on both of his affidavits, the respondent filed a supplementary affidavit on November 12, 2001. He did not avail himself of the opportunity to deny or otherwise put in issue the evidence of Ms Steffe as presented through Mr. McKinnon to the following effect:

(i) by letter dated October 26, 1999 (Ex. "B" to the respondent's August 1, 2001 affidavit), Ms. Steffe notified the respondent, in writing, of the claim which forms the basis for the arbitration award. I pause to note that I can give little weight to the respondent's allegation in para. 13 of his August 1, 2001 affidavit

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> when he deposes "that I received no indication that E. D. & F. Man. International, Inc. had assumed any contract which I had with LIT Division of First Options of Chicago Inc." He is technically correct in the balance of that paragraph when he says he has never been provided with any assignment of his contract from First Options to Man International; I say "technically" because he was, at all material times after August 31, 1998 (when his entire account was transferred from First Options to Man International), aware that his account had been transferred, aware that his only agreement with First Options was his trading account agreement (which included the arbitration agreement), and he continued to do business with Man International and the applicant after August 31, 1998 (whether or not the fees were different or the margins were different). He did not decide to close the account until mid to late October 1998 (para. 20 of his August 1, 2001 affidavit).

[13] The respondent's evidence in para. 13 of his affidavit and in that portion of para. 24 of that affidavit where he speaks of some "particular significance" of Ms Steffe identifying herself in the October 26, 1999 letter as counsel for the applicant, has to be weighed in the context of the wording of the October 26, 1999 letter, the actual knowledge that the respondent had from and after August 1998 as to the transfer of his account, and the business that he conducted after

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August 1998 with Man International and the applicant. A reading of that entire letter establishes that Ms Steffe made demands, both on behalf of the applicant and Man International [see the third paragraph on p. 2 where she expressly says this and encloses a "draft Complaint" (which the respondent fails to exhibit to his affidavit)]. These demands and complaints are continued in the last paragraph on p. 2 of her letter and over onto p. 3. Whether or not she expressly says so, it is clear from the entire contents of this letter that she is making demand for the applicant and Man International (not just for the applicant).

[14] I accept from the respondent's supplementary affidavit of November 12, 2001 that it was inadvertence on the part of himself and his counsel that Exs. "E" and "F" to his August 1, 2001 affidavit were inadvertently not attached; I cannot, however, accept that it was inadvertence on the part of the respondent to fail to disclose the following to the court in his August 1, 2001 affidavit:

(i) the fact that he had a telephone conversation with Ms Steffe after receiving her October 26, 1999 letter and prior to faxing his copy of the arbitration agreement to Ms Steffe on November 5, 1999 (Ex. "A" to Mr. McKinnon's August 28, 2001 affidavit);

(ii) the fact that with full particulars of the claims being advanced by the applicant and Man International, the respondent (not the applicant or Man International) told Ms Steffe that he had signed an arbitration agreement and that the matter must proceed to

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arbitration. He followed up this election by sending Ms Steffe a copy of the agreement which she did not have at that time.

[15] As I noted earlier (para. 3, p. 5), when I take a good hard look at what can be best described as partial or incomplete denials by the respondent in his affidavit as to the existence of an arbitration agreement, I have no hesitation in concluding that a trial of this particular issue (the existence of an agreement which was ultimately assigned to the applicant as disclosed by the documentation and by the finding of the arbitrator) is not required. If I am wrong in this conclusion, I would not, in these circumstances, have dismissed the application as urged by the respondent; rather, if I were satisfied that the affidavit materials raised issues that could only be determined on a trial, I would stay the application and direct counsel to move to have these issues defined and determined by a trial. I am mindful that the applicant has not filed with the court the entire written account agreement entered into between the respondent and First Options in July 1997 and (or) the written assignment of these account agreements which are, according to the transcript of Mr. McKinnon's cross-examination, included in the agreement(s) whereby First Options sold its retail commodity business to Man International. However, Mr. McKinnon made this document available to Mr. Zazelenchuk during the course of his cross-examination (pp. 4 and 5 of the transcript) and I can only assume that Mr. Zazelenchuk either satisfied himself of the existence and contents of these documents or, alternatively, elected not to bother. It would have been

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preferable for these contract documents to have been tendered to the court for review. I have concluded that the failure to do so is not, and should not, be fatal to the application because:

(a) the respondent was aware of them and had every opportunity to inspect them prior to the hearing;

(b) by August 1998 the respondent was in fact fully aware that his account had been transferred from First Options to Man International and he continued to do business (trade) with Man International and the applicant thereafter. He cannot now be taken to deny the existence of (or knowledge of) the transfer or assignment of his account(s);

(c) when I consider the authorities, *supra* (as listed on Schedule "A" to these reasons), in interpreting the ***Act***, issues such as this [the validity and enforceability of an assignment and (or) an arbitration agreement] were intended by the parties and by the ***Act*** to be left to the arbitrator. The reading of the arbitrator's award makes it clear that he was fully cognizant of these issues. He even adjourned the hearing and gave both parties an opportunity to make further submissions and (or) file further material as to the issues arising from the assignment or transfer of the account from First Options.

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[16] The second (and important) issue which must be determined is whether, as the respondent submits, the arbitral award should not be recognized or enforced in this country by virtue of the common law, and Article V 2 of the Convention (*supra*) grants the court a discretion ("may") to refuse recognition and enforcement if:

(a) the subject matter of the difference between the parties is such that it cannot, by Canadian law, be settled by arbitration; or

(b) recognition or enforcement of the award would be contrary to the public policy of Canada. In essence, the issue is whether the original agreement (which includes the agreement to arbitration) between the respondent and First Options is a personal service contract (a personal covenant) and, therefore, is not, in law, capable of being assigned. I am mindful of the submissions of respondent's counsel and the authorities referred to by him to the effect that any agreement or contract for personal services, which would usually include an agreement between a customer and his broker which contains an element of trust (a fiduciary duty), is one of those contracts that cannot, in law, be assigned [***Century 21 Market Realty Ltd. et al v. Deuville et al*** (1992) 116 N.S.R. (2d) 312 (N.S. County Court, District No. 4)]. However, it is significant, in my view, that the ***Act*** (the Convention) uses discretionary rather than mandatory language ("may" instead of

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> "shall") in providing guidance to the courts on this issue. In applying the provisions of the ***Act*** and the common law to this fact situation, the court should, wherever possible, be guided by the overall intention of the Legislature as discussed in ***Cangene***, *supra*, and those other authorities referred to by Morse J.

[17] In discussing the issue of arbitration agreements (and their assignment), the following statement from ***Chitty on Contracts (General Principles)*** (27th ed., Vol. 1, 1994) – para. 15.014 (p. 725-6), is instructive:

> An assignee of a contract is bound by and may take the benefit of an arbitration clause contained therein, but he cannot continue an arbitration already commenced by the assignor unless and until he gives notice of the assignment to the other party to the dispute and effectively submits to the jurisdiction of the arbitrator.

Accepting that the authorities relied on by the respondent for the general proposition that contracts of personal service are not capable of assignment in Canadian law are correct, that law should not apply to the particular facts of this case. This is a situation where one party to a contract which included, at his option, the right to have disputes arbitrated elected to have the dispute arbitrated with knowledge that his contract has been transferred or assigned (albeit, perhaps without knowledge of the specific wording of the transfer or assignment). To the extent that First Options and Man International were performing what might be considered to be personal services in each instance, both before and after each assignment, the applicant (personally) continued to perform the services under the assigned contract. This is not a situation (as in

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the case of ***Century 21 Market Realty***, *supra*) where the assignee of the personal service contract is, in effect, a different individual who might be relied on to perform personal services; rather, this is more in the nature of an assignment of a monetary liability or potential monetary liability and not an attempt to assign personal service obligations to someone else. At para. 19-029, p. 975, ***Chitty on Contracts***, *supra*, the author refers to a line of authorities [including the case of ***Cottage Club Estates Ltd. v. Woodside Estate Co. Ltd.***, [1928] 2 K.B. 463, referred to by the respondent] and concludes:

> ... The mere presence of an arbitration clause in a contract does not as a general rule render the contract incapable of assignment.

In my view, the benefits and obligations of an arbitration clause, at least in commercial circumstances such as this can, and should be capable of assignment. The older law as to the general non-assignability of a personal service contract must be considered in light of the development of alternate dispute resolution systems and the intention of the Legislature as expressed in the ***Act*** and considered by the courts in ***Cangene***, *supra*.

[18] In conclusion, I am satisfied that the arbitrator's award should be recognized (and thereby enforced) as a judgment of this court, and it is so ordered.

[19] With respect to the issue of interest on the award, I am satisfied that the applicant is entitled to interest on the award in accordance with the agreement (the contract) made between the respondent and First Options in the first

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instance. I do not have the precise rate of interest but it can be determined with reference to para. 4 of the arbitrator's award; interest under the contract (and pursuant to the applicable law which is Illinois law) on the deficit balance of $17,434.96 from November 16, 1998 to the date of the award (September 13, 2000) amounted to $1,525.55 U.S. If counsel cannot calculate the rate for the purposes of my order, they may attend on me to have same determined. I would not, and do not, allow any interest on that portion of the arbitrator's award for attorney's fees and expenses (or on that portion of the award or administrative fees and expenses of the American Arbitration Association and the compensation and expenses of the arbitrator).

[20] I am satisfied, as submitted by the applicant, that the ***Currency Act***, *supra*, applies to this situation and should be interpreted such that the effective date for the conversion will be the date of my decision and the exchange rate to be used will be the effective rate on this date. The applicant will have its costs of this application on a party-and-party basis, to be spoken to if they cannot be agreed.

_____J.

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SCHEDULE "A"

STATUTES, TEXTS, AND AUTHORITIES CONSIDERED

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Statutes

- ***The International Commercial Arbitration Act***, S.M. 1986-87, c. 32, Cap. C151
- ***The Court of Queen's Bench Act***, S.M. 1988-89, c. 4 – Cap. C280
- ***The Manitoba Evidence Act***, R.S.M. 1987, c. E150 [ss. 1 and 30(1)]
- ***The Interpretation Act***, R.S.M. 1987, c. I80 (ss. 1, 2, 6, and 27)
- Manitoba Court of Queen's Bench Rules [14.05(2)(b)]
- ***Currency Act***, R.S.C. 1985, Chap. C-52
- ***The Illinois Code of Civil Procedure*** (Illinois Rev. Statute 1991, Chap. 110, para. 5/2-1303)

Texts

- ***Chitty on Contracts (General Principles)*** (27th ed., Vol. 1, 1994) (chap. 15 – "Arbitration Clauses" and chap. 19 – "Assignment")
- ***Canadian Encyclopedic Digest (Western)*** (3rd ed., Vol. 31, Title 132, Part VII) ("Relationship Between Broker and Client")
- J.-G. Castel, ***Canadian Conflict of Laws*** (4th ed., 1997) (para. 515)

Authorities

- ***Cottage Club Estates Ltd. v. Woodside Estate Co. Ltd.***, [1928] 2 K.B. 463

- ***Royal Financial Insurance Limited v. National Biscuit and Confection Company Limited***, [1933] 1 W.W.R. 43 (B.C.S.C.)

- ***Sullivan v. Gray***, [1942] 3 D.L.R. 269 (Ont. High Court)

- ***Warner Bros. Records Inc. v. Rollgreen Ltd. et al***, [1975] 2 All ER 105 (Eng. C.A., Civil Division)

- ***Batavia Times Publishing Co. v. Davis*** (1978), 88 D.L.R. (3d) 144 (Ont. High Court of Justice)

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