COURT OF APPEAL FOR ONTARIO

CITATION: Husky Food Importers & Distributors Ltd. v. JH Whittaker & Sons Limited, 2023 ONCA 260
DATE: 20230417
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Fairburn A.C.J.O., Brown and Sossin JJ.A.

BETWEEN

Husky Food Importers & Distributors Ltd.

Plaintiff (Appellant)

and

JH Whittaker & Sons Limited and Star Marketing Ltd.

Defendants (Respondent)

L. Leslie Dizgun and Allyson Fischer, for the appellant

Lauren Tomasich and Andrea Korajlija, for the respondent

Heard: March 14, 2023

On appeal from the order of Justice Barbara A. Conway of the Superior Court of Justice, dated March 29, 2022, with reasons reported at 2022 ONSC 1679.

BROWN J.A.:

I. OVERVIEW

[1] This appeal concerns the law of international commercial arbitration. The narrow legal issue can be framed as follows: Where a party seeks to stay an Ontario court proceeding under s. 9 of the *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sch. 5, ("*ICAA*") on the basis that the matter in dispute

is the subject of an arbitration agreement but the responding party contends no such agreement exists, what standard of proof must the moving party meet to establish that a stay should be granted and the dispute referred to arbitration?

[2] The appellant, Husky Food Importers & Distributors Ltd., commenced an action in Ontario for breach of a commercial distribution agreement against the respondent, JH Whittaker & Sons Limited, a New Zealand company that manufactures chocolates.[1] JH Whittaker moved for an order staying the action pursuant to s. 9 of the *ICAA*. The motion judge granted the order and stayed the action (the "Order"). Husky Food appeals.

II. BACKGROUND FACTS

[3] In late 2014, Husky Food and JH Whittaker entered into an initial distribution arrangement under which Husky Food would import, distribute, and market JH Whittaker products in Canada. The terms of the arrangement were part oral and part written.

[4] Between 2016 and 2020, Husky Food and JH Whittaker sought to negotiate a formal, long-term, exclusive distribution agreement. Toward the end of the negotiations in early 2020, the parties exchanged revised drafts of a distribution agreement.

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[1] Husky Foods also named Star Marketing Ltd. as a defendant, claiming damages for inducing JH Whittaker to breach its distribution agreement with Husky Foods.

[5] Prior to April 2020, drafts of the proposed new distribution agreement had included a Schedule G, titled the "Standard Form Order Agreement for Purchases." The drafts left the schedule blank.

[6] An April 19, 2020 draft JH Whittaker sent to Husky Food added text to Schedule G, specifically a set of "Whittaker's Standard Terms of Sale." JH Whittaker red-lined the added terms, one of which – section 19 – is an arbitration clause. Headed "Overseas Disputes", s. 19 to Schedule G states:

> **19 OVERSEAS DISPUTES**
>
> 19.1 Where the Customer is located outside of New Zealand, any dispute, controversy or claim arising out of or in connection with these Terms, or any question regarding its existence, breach, termination or invalidity, will be referred to the New Zealand International Arbitration Centre for arbitration in accordance with the New Zealand Arbitration Act 1996. Such arbitration shall also be as follows:
>
> (a) the number of arbitrators will be: one;
>
> (b) the place of arbitration will be: Wellington, New Zealand; and
>
> (c) the language of the arbitration will be: English.

[7] Husky Food sent a May 15, 2020 email to JH Whittaker that stated, in part: "Attached please find a 'slightly' revised version of the last contract you sent over. This has been signed off by JH." In her affidavit on the motion on behalf of Husky Food, Ms. Nicola Mattiace described the May 15, 2020 email as one "in

which the changes made by [JH Whittaker] in the April 19, 2020 Draft were accepted."

[8] Husky Food made a few changes to the April 19 draft in the version it emailed to JH Whittaker on May 15, 2020 including: removing the red-lining under the terms added to Schedule G; slightly amending one of them – s. 3.1(b); and inserting the following language to s. 8.4 in the main body of the draft distribution agreement:

> If there is any inconsistency between any provision or term in the main body of this Distribution Agreement and in any schedule annexed hereto, the terms in the main body of this Distribution Agreement shall have paramountcy to the extent of such inconsistency only.

[9] In both the April 19 and May 15 drafts, the main body of the draft distribution agreement contained a s. 8.7, which provides:

> This Distribution Agreement and the individual delivery contracts between the parties shall be governed by the laws of New Zealand. The parties submit to the non-exclusive jurisdiction of the courts of Wellington, New Zealand to hear and determine all disputes arising from or related to this Distribution Agreement or transactions contemplated herein.

[10] Following Husky Food's May 15, 2020 email, the parties attempted to set up a conference call to discuss the agreement. In the result, the parties did not sign a new long-term distribution agreement.

[11] That summer a dispute arose between the parties about the re-routing of two shipments of products ordered by Husky Food from JH Whittaker. Husky Food alleged that JH Whittaker wrongly diverted the shipments to the co-defendant, Star Marketing.

[12] Husky Food commenced its Ontario action on June 3, 2021. In its statement of claim, Husky Food pleads that "[a]fter a lengthy negotiation process, Husky and JHW reached agreement on all the material terms as of May 15, 2020." Husky Food alleges JH Whittaker breached that agreement.

[13] JH Whittaker moved to stay Husky Food's action pursuant to s. 9 of the *ICAA*, which states:

> Where, pursuant to article II(3) of the [New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards] or article 8 of the [UNCITRAL Model Law on International Commercial Arbitration], a court refers the parties to arbitration, the proceedings of the court are stayed with respect to the matters to which the arbitration relates.

[14] In opposing JH Whittaker's stay motion, Husky Food took the position that it never agreed to arbitrate disputes that might arise under the distribution agreement with JH Whittaker.

III. THE COURT'S JURISDICTION TO HEAR THE APPEAL

[15] As a preliminary issue, JH Whittaker submits the Order is interlocutory in nature and, therefore, an appeal does not lie to this court. I am not persuaded by its submission.

[16] This court has held that an order denying a motion for a stay under s. 7 of the *Arbitration Act, 1991*, S.O. 1991, c. 17, is final in nature for the purposes of determining the route of appeal as it finally determines the forum in which the dispute between the parties is to be resolved: *Smith Estate v. National Money Mart Company*, 2008 ONCA 746, 303 D.L.R. (4th) 175, at para. 30; *Griffin v. Dell Canada*, 2010 ONCA 29, 315 D.L.R. (4th) 723, at para. 26. This is also the case for orders granting a stay: see the cases cited in *Huras v. Primerica Financial Services Ltd.* (2000), 137 O.A.C. 79 (C.A.), at para. 13.

[17] An order granting a stay of an action under s. 9 of the *ICAA* has the same legal nature. A stay order effectively ends the action before the court. The decisions in *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, and *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35, [2007] 2 S.C.R. 921, re-affirmed the general principle that normally challenges to the jurisdiction of an arbitrator must first be referred to the arbitrator (unless they involve pure questions of law or questions of mixed fact and law that can be determined by a superficial review of the evidence in the record). Underlying that

general principle is the working assumption that if the court grants a stay and does not decide an issue in the action, then the arbitrator will proceed to decide it: *Uber Technologies Inc. v. Heller*, 2020 SCC 16, [2020] 2 S.C.R. 118, at para. 38. This practical assumption that a stay will end an action for all intents and purposes supports characterizing an order granting a stay under s. 9 of the *ICAA* as final in nature for the purpose of determining the route of appeal.

IV. HUSKY FOOD'S GROUNDS OF APPEAL

[18] Husky Food advances two related grounds of appeal:

(i) The motion judge erred in holding that a court should grant a stay under art. 8 of the Model Law where it is "arguable" that an arbitration agreement exists. Husky Food contends that the party moving for a stay first must prove the existence of an arbitration agreement on a balance of probabilities before a court may proceed to consider the other factors in the stay analysis; and

(ii) The motion judge made a palpable and overriding error in holding that arguably there was an agreement to arbitrate between Husky Food and JH Whittaker. Husky Food contends the record clearly shows that it explicitly rejected the inclusion of an arbitration agreement in the distribution agreement.

V. FIRST ISSUE: WHAT STANDARD APPLIES TO THE QUESTION OF WHETHER AN ARBITRATION AGREEMENT EXISTS?

[19] As re-affirmed by the Supreme Court of Canada most recently in *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41, it is well established in Canadian law that, absent legislated exceptions, a court normally should refer challenges to an arbitrator's jurisdiction to the arbitrator: at para. 41; *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, at para. 29. This follows from the adoption and application of the competence-competence principle that gives precedence to the arbitration process: *Peace River*, para. 39. The competence-competence principle, however, is not absolute: a court may resolve a challenge to an arbitrator's jurisdiction if the challenge involves pure questions of law or questions of mixed fact and law that require only superficial consideration[2] of the evidentiary record: *Peace River*, at para. 42; *Uber*, at paras. 31-36; *Seidel*, at para. 29; *Rogers*, at para. 11; *Dell*, at paras. 84-85. Where questions of fact alone are in dispute, a court should normally refer the case to arbitration: *Uber*, at para. 32.

[20] Ontario legislation gives arbitrators broad scope to determine issues of their jurisdiction. Both art. 16(1) of the Model Law and s. 17(1) of the *Arbitration Act,*

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[2] A superficial review is one where 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.

1991 provide that an arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the "existence or validity" of the arbitration agreement.

[21] Section 9 of the *ICAA* and art. 8 of the Model Law provide the mechanism by which a party can seek to stay a court proceeding in favour of referring the dispute to arbitration. Section 9 of the *ICAA* states:

> Where, pursuant to article II (3) of the Convention or article 8 of the Model Law, a court refers the parties to arbitration, the proceedings of the court are stayed with respect to the matters to which the arbitration relates.

Art. 8(1) of the Model Law provides:

> 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 the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

[22] Husky Food submits that when considering a request to stay an action under either s. 7 of the *Arbitration Act, 1991* or s. 9 of the *ICAA*, a motion judge must apply the analytical framework set out by this court in *Haas v. Gunasekaram*, 2016 ONCA 744 and ask the following questions: (1) Is there an arbitration agreement? (2) What is the subject matter of the dispute? (3) What is the scope of the arbitration agreement? (4) Does the dispute arguably fall within the scope of the arbitration agreement? (5) Are there grounds on which the court should refuse to stay the action?

[23] The 2016 *Haas* framework has been superseded by the framework adopted by the Supreme Court in 2022 in *Peace River*, a decision on which neither party made submissions to us. In that case,[3] the Supreme Court identified two general components common to stay provisions in provincial arbitration legislation: (i) the technical prerequisites for a mandatory stay of court proceedings; and (ii) the statutory exceptions to a mandatory stay of court proceedings. The applicant for a stay must establish the technical prerequisites "on the applicable standard of proof"; if the applicant does so, the party seeking to avoid arbitration then must show that one of the statutory exceptions applies, such that a stay should be refused: at paras. 76-79.

[24] The technical prerequisites concern whether the stay applicant has established the arbitration agreement engages the mandatory stay provisions. As the Supreme Court observed in *Peace River*, at para. 83, provincial arbitration legislation typically contains four relevant technical prerequisites:

> (a) an arbitration agreement exists;
>
> (b) court proceedings have been commenced by a "party" to the arbitration agreement;
>
> (c) the court proceedings are in respect of a matter that the parties agreed to submit to arbitration; and

[3] The majority reasons authored by Côté J. set out the analytical framework. The concurring reasons authored by Jamal J. followed that framework but found a different basis on which to find the arbitration agreement "inoperative".

> (d) the party applying for a stay in favour of arbitration does so before taking any "step" in the court proceedings.

[25] If all the technical prerequisites are met, the mandatory stay provision is engaged. The court should then move on to the second component of the analysis, which concerns the statutory exceptions to granting a stay, such as whether an arbitration agreement is "void, inoperative or incapable of being performed": see *Peace River*, at paras. 88-89 and 172. Issues under the second component do not arise in the present case.

[26] While the *Peace River* framework was crafted in the context of domestic arbitration legislation, in my view it applies equally to stays sought under s. 9 of the *ICAA* in respect of international commercial arbitration agreements.

[27] Common to both the old *Haas* framework and the governing *Peace River* framework is the prerequisite that an arbitration agreement exists. Husky Food contends a party moving for a stay must demonstrate, on a balance of probabilities, that an arbitration agreement exists. As a result, the motion judge erred by applying a lower standard of whether it was "arguable" that an arbitration agreement exists.

[28] Husky Food's submission ignores how the Supreme Court in *Peace River* decided the issue of the standard of proof applicable to establishing the technical prerequisites to a mandatory stay. *Peace River* states, at para. 84:

> It is important to note that the standard of proof applicable at the first stage is lower than the usual civil standard. To

> satisfy the first component, the applicant must only establish an "arguable case" that the technical prerequisites are met (McEwan and Herbst, at § 3:47; *Sum Trade Corp. v. Agricom International Inc.*, 2018 BCCA 379, 18 B.C.L.R. (6th) 322, at paras. 26 and 32, citing *Gulf Canada Resources Ltd. v. Arochem International Ltd.* (1992), 66 B.C.L.R. (2d) 113 (C.A.), at paras. 39-40).[4] [Emphasis added.]

[29] The Supreme Court adopted a different standard of proof for the second component of the analysis. At that stage, the party seeking to avoid arbitration must show, on a balance of probabilities, that a statutory exception applies: *Peace River*, at para. 88.

[30] In *Peace River*, the Supreme Court approved the "arguable case" standard to establish the technical prerequisites for a mandatory stay previously articulated by the British Columbia Court of Appeal in *Sum Trade*.[5] In the present case, the motion judge adopted and applied *Sum Trade's* arguable case standard. In so doing, she obviously applied the correct legal principle as the Supreme Court subsequently approved *Sum Trade's* arguable case standard in *Peace River*.

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[4] See also *Peace River*, at para. 159.

[5] Applying the "arguable case" standard to the technical prerequisite of whether an arbitration agreement exists tracks this court's case law. See, for example, *Trade Finance Solutions Inc. v. Equinox Global Limited,* 2018 ONCA 12, at para. 23. See also the line of cases that state a court should grant a stay under art. 8 of the Model Law where it is arguable that either the dispute falls within the terms of an arbitration agreement or the relevant party is party to an arbitration agreement: *Dancap Productions Inc., v. Key Brand Entertainment, Inc.*, 2009 ONCA 135, 246 O.A.C. 226, at paras. 32-33; *Dalimpex Ltd. v. Janicki* (2003), 64 O.R. (3d) 737 (C.A.), at paras. 18-22. As noted by the BCCA at para. 29 of *Sum Trade*:

> [A] distinction in principle cannot be drawn between a case where a litigant says it is not a party to an arbitration agreement and a case where a litigant says the contract to which it is a party does not incorporate an arbitration agreement. Neither dispute involves the scope of the arbitration agreement. Rather, each raises the fundamental question of applicability: whether the agreement is effective to bind the party at all.

[31] Accordingly, the motion judge did not apply the wrong legal test when considering whether to grant a stay under s. 9 of the *ICAA*.

VI. SECOND ISSUE: WHETHER THE EXISTENCE OF AN ARBITRATION AGREEMENT WAS ARGUABLE ON THE RECORD

[32] As its second ground of appeal, Husky Food contends the motion judge made a palpable and overriding error in holding that it was arguable on the record that an agreement to arbitrate existed between Husky Food and JH Whittaker. It submits the motion judge "expressly ignored certain material facts which clearly demonstrate that Husky did not agree to submit disputes to arbitration." The material evidence Husky Food points to includes: (i) its removal of an arbitration clause from pre-2020 drafts of the distribution agreement; (ii) the 2019 insertion by JH Whittaker of a template purchase order form at Schedule "G" of the then version of the draft agreement; and (iii) Husky Food's insertion in the May 15, 2020 draft of language that resolved any inconsistency between a term in a schedule and a term in the main body of the agreement in favour of the latter.

[33] I see no such error by the motion judge. Her reasons disclose she was alive to Husky Food's submissions which relied on that evidence. However, the record before the motion judge contained evidence that pointed in the other direction. For example, the record shows that:

- Husky Food predicated its Ontario action on the existence of a May 2020 distribution agreement between the parties. Specifically, in para. 4 of its Statement of Claim Husky pleads that "[a]fter a lengthy negotiation process, Husky and JHW reached agreement on all the material terms as of May 15, 2020";
- Schedule G to both the April 19 and May 15, 2020 drafts of the distribution agreement contained terms of trade that included, in s. 19, an arbitration agreement. Both of Husky's affiants deposed that the "changes made by Whittaker in the April 19/20 Draft were accepted" by Husky in the May 15, 2020 draft (emphasis added); and
- As well, the evidence fully supported the motion judge's findings, at para. 20, that:

> [T]here is evidence here that the Terms did come to Husky's attention. Whittaker's sent the Terms containing the Arbitration Clause to Husky. As noted, Husky then engaged with the Terms by selecting the days for payment and removing the track changes in the Terms. It left the Arbitration Clause in place.

[34] Husky Food contends this is a case where the evidence "clearly" demonstrates that it did not agree to submit disputes to arbitration. I disagree. The evidentiary record supports the motion judge's conclusion that "it is arguable that there is an arbitration agreement." She did not make a palpable and overriding error in so finding.

[35] A review of the record also discloses this is not a case where the parties' intention regarding the existence of an arbitration agreement can be determined from a superficial review of the record. Instead, this is a case where determining the issue of the existence of the arbitration agreement will require a thorough review of the parties' competing evidence. Consequently, I see no reversible error in the motion judge granting a stay of Husky's Ontario action.

VII. DISPOSITION

[36] I would dismiss the appeal.

[37] In accordance with the submissions of the parties, I would award JH Whittaker its costs of the appeal fixed in the amount of $30,000, inclusive of disbursements and applicable taxes.

Released: April 17, 2023 "JMF"

"David Brown J.A."
"I agree. Fairburn A.C.J.O."
"I agree. Sossin J.A."