
Arbitration and Fraudulent Misrepresentation: Another Canadian court overlooks the CISG

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In *Sonox Sia c. Albury Grain Sales Inc.* [2005] Q.J. No. 9998 (Court File No.: 500-17-026371-057) (Que.S.C.), [“*Sonox*”] the Quebec Superior Court considered the validity of an arbitration clause specifying that all contractual disputes be arbitrated by the ICC¹ in London, UK, with the CISG² stipulated as the governing law.

In *Sonox*, the plaintiff, Sonox Sia, a Latvian company, [“*Sonox*”] bought grain from a Canadian company, Albury Grain Sales Inc. [“*Albury*”] for a price of approximately \$4 Million (CAN). Sonox delivered a deposit of \$413,000 as stipulated in the contract. Alleging a default by Sonox, Albury refused to deliver the grain shipment or return the deposit. Sonox then commenced an action in the Quebec Superior Court against Albury and two of its principals, alleging fraudulent misrepresentation, claiming that Albury was involved in an international fraud scheme in collecting deposits from purchasers without any intention to deliver up under the contracts of sale, thereby rendering the contracts void *ab initio* (based upon a lack of consent). Sonox sought declaratory relief, an order upholding the pre-judgment seizure and damages in the amount of \$800,000.00.

The defendant, Albury brought a motion under article 164 of the Code of Civil Procedure, raising lack of jurisdiction in the subject matter from the declinatory exception based on the arbitration clause. Albury sought dismissal of the action or, alternatively, an order staying the action and remitting the parties to arbitration. The Arbitration Clause read as follows:

ARTICLE 11: BINDING ARBITRATION

11.1 THE BUYER AND SELLER AGREE TO ATTEMPT TO RESOLVE ALL DISPUTES IN CONNECTION WITH THIS CONTRACT OR THE FULFILLMENT [SIC] OF THIS CONTRACT THROUGH FRIENDLY DISCUSSION. IF THE DISPUTE CANNOT BE RESOLVED THROUGH FRIENDLY DISCUSSION, THE DISPUTE SHALL BE ARBITRATED IN LONDON, UNITED KINGDOM BY THE ICC **WITH THE PREVAILING LAW TO BE THE “UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF**

GOODS (1980)” AND THE LAWS OF CANADA.
[emphasis added]

Sonox argued that while arbitrators generally have jurisdiction to interpret and apply contracts, they totally lacked jurisdiction to declare contracts void *ab initio*. Alternatively, Sonox argued that due to the alleged fraudulent misrepresentations made by Albury, they lacked the necessary consent to voluntarily submit to arbitration.

Buffoni, J.S.C. considered the validity or enforceability of the parties’ choice of forum and choice of law contained in the contractual arbitration clause. Relying on Quebec case law,³ the motions judge held that actions alleging false representations and asking the annulment of a contract *ab initio* are not by nature excluded from the application of an arbitration clause. Justice Buffoni also rejected Sonox’s lack of consent argument, relying on Article 2642 Civil Code of Quebec, which states that an arbitration clause is a contract distinct from the main agreement. Thus, the arbitration clause was “severable” from the contract which is consistent with Article 81(1) of the CISG respecting avoidance of contracts generally.⁴

Having determined that the matter should be referred to arbitration, the court held that it no longer had jurisdiction and dismissed the action against Arbury. However, since the two individual defendants were not parties to the arbitration clause, the court held that “the jurisdiction of this Court on the subject matter (*ratione materiae*) remains intact as regards these two individuals.”⁵ The court suggested, however, that these remaining personal defendants could still move to dismiss the action against them on the basis of *forum non conveniens*.⁶

Analysis

As is so often the case in Canadian jurisprudence,⁷ the court failed to refer to any CISG caselaw or scholarly commentary. Specifically, the court failed to refer to the impact of the allegation of fraud vis-à-vis the validity exclusion under Article 4(a) of the CISG. Relying on the strict wording of the arbitration clause is less than satisfactory when fraud “rears its ugly head”, particularly since fraudulent misrepresentations are rarely within the reasonable expectation of the parties when entering into a contract. Whether or not the fraud vitiates the contract was an issue deferred to the arbitrator.

Nor did the court consider the contract formation rules under the CISG. In particular, the court failed to consider the timing of the plaintiff's objection to the arbitration clause based upon the alleged fraudulent misrepresentations. If Sonox had argued that the fraud was the "*sine qua non*" in Sonox entering into the contract, (i.e. but for the fraudulent misrepresentation, Sonox would not have agreed to purchase the grain) then the court may have been in a position to consider whether the arbitration clause was an "additional or different term" which materially altered the terms of the offer. Article 19(3) of the CISG reads:

Art. 19 (3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the *settlement of disputes* are considered to alter the terms of the offer materially. [emphasis added]

The Court also may have considered lifting the corporate veil against the two principals based upon Article 317 of the Civil Code of Quebec which provides as follows: "In no case may a legal person set up juridical personality against a person in good faith if it is set up to dissemble fraud, abuse of right or contravention of a rule of public order". Thus, the Quebec court failed to critically analyze whether the substance (not the characterization) of the fraud allegations constituted sufficient grounds to invalidate the arbitration clause, and, by logical reference, the parties' choice of forum. In any event, the validity exclusion under Article 4(a) would not restrict the plaintiff's claim to damages under Article 74.⁸

Nevertheless, the *Sonox* decision is noteworthy on the scope and applicability of arbitration clauses for international sale of goods contracts where the CISG is designated as the choice of law by the contracting parties.

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¹ At ¶ 31, the court clarified that the reference to the "ICC" was actually to the ICC- International Court of Arbitration in London, the United Kingdom.

² The reference to the "Laws of Canada" appears redundant, insofar as the CISG forms part of the laws of Canada both federally and within each of the constituent provinces, including the Province of Quebec, since its accession on May 1, 1992. See *International Sale of Goods Contracts Convention Act*, S.C. 1991, c. 13 and *An Act Respecting the United Nations Convention on Contracts for the International Sale of Goods*, R.S.Q., c. C-67.01. See generally the CISG Canada website

maintained by Peter J. Mazzacano, LLM candidate at Osgoode Hall Law School, Toronto, Ontario, Canada: <http://www.yorku.ca/osgoode/cisg/index.html>

³ At ¶s 16-24 per Buffoni, J.S.C., citing : *Gestion J & N Boudreault Inc. v. Domaine de la Sorbière (1991) Inc.*, [2003] AZ-50197618 (C.S.), at par. 31; *Kingsway Financial Services Inc. v. 118997 Canada Inc.*, [1999] AZ-50068857 (C.A.), at par. 27; *Ouellette v. Société de récupération d'exploitation et de développement forestiers du Québec (Rexfor)*, [1997] AZ-97011706 (C.A.); *World L.L.C. v. Parenteau & Parenteau Int'l Inc.*, [1998] AZ-98021411 (C.S.); *Automobiles Duclos Inc. v. Ford du Canada Ltée*, [2000] AZ-01021062 (C.S.).

⁴ See Prof. Albert Kritzer, Editorial Remarks, *Filanto, S.p.A. v. Chilewich International Corp.* U.S. District Court (SDNY) 14 April 1992 available at: <http://cisgw3.law.pace.edu/cisg/wais/db/editorial/920414u1editorial.html>

⁵ At ¶ 35.

⁶ At ¶36, citing Article 3135 CCQ (the Forum Non Conveniens exception):

3135. Even though a Québec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide.

⁷ See Peter J. Mazzacano, *Brown & Root Services v. Aerotech Herman Nelson: The Continuing Plight of the U.N. Sales Convention in Canada*, *Pace Rev. of the CISG (2004-2005)*. (Munich: Sellier European Law Publishers, 2006) (forthcoming) available at: <http://cisgw3.law.pace.edu/cisg/biblio/mazzacano.html> and Peter J. Mazzacano, *Canadian Jurisprudence and the Uniform Application of the UN Convention on Contracts for the International Sale of Goods*, 17 *Pace International Law Review*, Issue No. 2 (Spring 2006).

⁸ See GER OLG Köln 22U4/96, 21 May 1996, cited by John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 3rd ed. (1999), pages 63-70 (§ 65 (a) Remedies for Fraud) available at: <http://cisgw3.law.pace.edu/cisg/biblio/ho4.html>

⁹ For an analysis of forum selection clauses from a Canadian perspective, see Antonin I. Pribetic, "Strangers in a Strange Land": Transnational Litigation, Foreign Judgment Recognition, and Enforcement in Ontario, 13 *J. Transnat'l L. & Pol'y* (Spring 2004) 347-391, available at: <http://cisgw3.law.pace.edu/cisg/biblio/pribetic.html>. For a discussion of gaps and exclusions under Articles 4 and 5 of the CISG, see Antonin I. Pribetic, "Bringing Locus into Focus": A Choice-of-Law Methodology for CISG-based Concurrent Contract and Product Liability Claims, *Pace Rev. of the CISG (2004-2005)* (Munich: Sellier European Law Publishers, 2006) (forthcoming).