Société du port ferroviaire de Baie-Comeau-Hauterive c. *Jean Fournier inc.*, [2010] QCCA 2161, EYB 2010-182681

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This case illustrates the pitfall of structuring a construction project so as to allow interlinked disputes to be resolved by different procedures and in different forums by the various participants involved in the construction project.

The facts are relatively simple. A rail terminal operator, *Société du port ferroviaire de Baie-Comeau-Hauterive*, awarded a contract at a fixed cost of $10,709,000 to a contractor, Jean Fournier inc., for the construction of a rail link between its terminal and an industrial park and for the development of a transhipment centre. The general conditions of the prime contract contained an arbitration clause whereby the parties agreed that "Any dispute between the parties with regard to the contract, its plans and specifications or any other matter related thereto, will be resolved by arbitration pursuant to the provisions of the *Code of Civil Procedure of Quebec*" (writer's translation).

In turn, the contractor awarded a subcontract for a part of the construction to PNR Coyle Inc. The subcontract did not contain an arbitration clause similar to that found in the prime contract.

The contractor was late in delivering the project to the terminal operator. As a result, the terminal operator invoked a penalty clause for late delivery that was set out in the prime contract and deducted $188,911 on that account from the contract balance it owed to the contractor.

In the meanwhile, the subcontractor, not having been paid, brought an action against the contractor claiming $303,754 for work it had performed. The contractor reacted by counter-claiming $377,927 from the subcontractor, incidentally holding the subcontractor accountable for the late delivery of the project and therefore responsible for the penalty imposed by the terminal operator on the contractor.

The contractor faced the dilemma of having its dispute with the subcontractor stuck in civil court while having agreed that a dispute with the terminal operator would be resolved by arbitration to the exclusion of the civil courts. To circumvent the arbitration clause and manoeuvre all parties into the same court at the same time, the contractor tried an end-around play. It applied to the court (i) to force the terminal operator to intervene into the

pending litigation between the contractor and subcontractor, (ii) to have the penalty clause in the prime contract declared to be null and void on the grounds that it represented an abusive clause in the prime contract which the contractor qualified as being a contract of adhesion (that is, a contract which the contractor was unable to freely negotiate); or (iii) in default of the court declaring the penal clause to be null, to reduce the amount of the penalty clause and to determine its amount; and (iv) to have the court consequently declare that the penalty represents a liquid and exigible debt which the contractor is entitled to claim from the subcontractor.

Needless to say, the terminal operator asked the court to quash the contractor's application to force the terminal operator to join the pending civil action between the contractor and subcontractor and to refer its dispute with the contractor to arbitration as provided in the prime contract. The trial judge rejected the terminal operator's application on the grounds that the Superior Court is a court of original general jurisdiction (Article 31 of the *Code of Civil Procedure*) and, where circumstances warrant, the Superior Court may implead a third party (i.e., the terminal operator) whose presence is necessary to permit a complete solution of the question involved in the action (i.e., between the contractor and subcontractor) or against whom a party claims to exercise a recourse in warranty (Article 216 of the *Code of Civil Procedure*).

The terminal operator appealed. The Court of Appeal of Quebec unanimously reversed the trial judge. The Court of Appeal held that the trial judge failed to take into account a clear instruction in the *Code of Civil Procedure* to the effect that:

> 940.1 Where an action is brought regarding a dispute in a matter on which the parties have an arbitration agreement, the court shall refer them to arbitration on the application of either of them unless the case has been inscribed on the roll or it finds the agreement null.

In this regard, a court has no discretion when a party invokes a valid arbitration agreement. In support, the Court of Appeal cited the Hon. Marie Deschamps of the Supreme Court of Canada in *Dell Computer Corp*. v. *Union des consommateurs*, [2007] 2 S.C.R. 801, 2007 SCC 34, to the following effect:

> 149. On the primary question of whether the lower courts erred in refusing to refer the parties to arbitration, it is not contested by the respondents that, if the arbitration agreement is valid and applicable to the dispute, the courts have no discretion and must not refuse to refer the parties to arbitration. On that point, art. 940.1 C.C.P. seems clear: if the parties have an agreement to arbitrate on the matter of the dispute, on the application of either of the parties, the court *shall* refer the parties to arbitration, unless the case has been inscribed on the roll or the court finds the agreement to be null. It is well established that, by using the term "shall", the legislator has indicated that the court has no discretion to refuse, on the application of either of the parties, to refer the case to arbitration when the appropriate conditions are met (see *GreCon Dimter*, at para. 44; *La Sarre (Ville de) v. Gabriel Aubé inc.*, [1992] R.D.J. 273 (C.A.), at p. 277). On a plain reading of art. 940.1 C.C.P., these conditions appear to be threefold: (i) the parties must have an arbitration agreement on the matter of the dispute; (ii) the case must not have been inscribed on the roll; and (iii) the court must not find the agreement to be null. Regarding the latter condition, it appears obvious to us that the reference to the nullity of the agreement is also meant to cover the situation where the

> arbitration agreement cannot, without being null, be set up against the applicant.

The Court of Appeal wrestled with two competing principles. How does one reconcile the clear instruction in the *Code of Civil Procedure* that a court must refer a matter to arbitration when so requested by a party to a valid arbitration agreement vs. the right of a party to forcibly implead a third party into legal proceedings where the presence of that third party is necessary to permit a complete solution of the question involved in the action or in order to exercise a recourse in warranty?

The Court of Appeal indicated that the answer to this dilemma would depend upon the particular circumstances of each case. It cited Rothman J. in a previous ruling of the Court of Appeal of Quebec in *Guns N'Roses Missouri Storm inc.* c. *Productions musicales Donald K. Donald inc. et autres* , [1994] R.J.Q. 1183, who said:

> (24) I do not believe that the presence of a third party in the dispute, or even the fact that a third party has initiated proceedings, should, in itself, render the arbitration clause inapplicable and deprive the parties of a forum for the settlement of their disputes which they have chosen in their contract. It is not difficult to imagine any number of commercial disputes where it would be entirely appropriate to proceed to arbitration under the arbitration clause agreed upon between two parties notwithstanding a claim against one of the parties by a third party. [...]
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> (38) I do not wish to suggest that the mere initiation of a suit by a third party will permit a party to an arbitration clause to defeat the purpose and intention of the clause by exercising warranty proceedings. There will doubtless be cases where the parties should be referred to arbitration, notwithstanding the existence of a suit by a third party. Much will depend on the nature of the claims and the circumstances of each case.

The Court of Appeal concluded that a superior court, even if it is a court of original general jurisdiction, does not have precedence on that account alone over an arbitral tribunal. It held that disputes regarding the validity and extent of a penalty clause properly fell within the exclusive competency of an arbitral tribunal pursuant to the valid arbitration agreement contained in the prime contract.[1] It further held that the forced joinder of the terminal operator was not necessary in order to resolve the pending civil proceedings between the subcontractor and contractor. 'Clearly', the Court of Appeal volunteered as an administrative direction to all concerned parties and tribunals, 'a decision in the arbitration should be rendered first, before deciding the merits of the civil suit between the contractor and subcontractor'.

Accordingly, the Court of Appeal referred the dispute between the terminal operator and the contractor to arbitration and refused the request of the contractor to forcibly implead the terminal operator into the pending civil proceedings between the contractor and its subcontractor.

Comment: this case reinforces the advisability, to the extent possible, that all construction project participants - inclusive of the owner, design professionals, contractors and subcontractors - be subject to the same general arrangements for the resolution of disputes, so that disputes involving multiple parties may be consolidated and heard in a common forum.

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[1] In its judgement the Court of Appeal acknowledged the exclusive jurisdiction of the arbitral tribunal. The Court of Appeal likely was aware of, but did not cite, the ensuing paragraph of Madam Justice Deschamps of the Supreme Court of Canada in the previously mentioned *Dell Computer* case that the Court of Appeal followed and which is instructive in understanding the privative effect of a valid arbitration agreement under Quebec civil law (and probably under the common law of the other provinces):

> 150. It is also well established that the effect of a valid undertaking to arbitrate is to remove the dispute from the jurisdiction of the ordinary courts of law (per *Zodiak International Productions*, art. 940.1 C.C.P. and art. 3148, para. 2 C.C.Q.). It is also accepted that jurisdiction over the individual actions that form the basis of a class action is a prerequisite to the exercise of jurisdiction over the proceedings (*Bisaillon* v. *Concordia University*, 2006 SCC 19 (CanLII), [2006] 1 S.C.R. 666, 2006 SCC 19). There is consequently no question that, if the arbitration agreement is valid and relates to the dispute, the Superior Court has no jurisdiction to hear the case and must refer the parties to arbitration.

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