THE COMPETENCE-COMPETENCE PRINCIPLE AND STAY OF PROCEEDINGS

By Patrick Williams December 29, 2017

A recent Supreme Court of British Columbia decision has addressed section 8 of the *International Commercial Arbitration* of British Columbia (the "ICAA"). Section 8 states that if a party to an arbitration agreement commences legal proceedings, a party may apply to the court for a stay of proceedings.

In *Sum Trade Corp. v. Agricom International Inc.*, 2017 BCSC 2213, Sum trade Corp. ("STC") sued in BCSC for damages for breach of contract. Agricom International Inc. ("Agricom") sought a stay of proceedings per s. 8 of the ICAA. The contracts in question were merely 2 pages long and entitled "Sales Contracts". At the bottom of the first page, below the list of essential items, were the following annotations:

> Trade Rule Info:
> GAFTA 88, Incoterms 2010

GAFTA 88 is a standard form of template contract for the "Grain and Feed Trade Association". Section 26 of the template incorporates an arbitration clause. The court found that if section 26 applied, then the parties must arbitrate and the stay would be justified. It is not a matter of whether it was in fact successfully incorporated into the contract because that would be a question for the arbitrator. All that was necessary was for the court to find it was arguable that it was.

The court cited a number of cases and referred to the definition of an arbitration agreement under s. 7 of the ICAA. Section 7 states:

> ***Definition of arbitration agreement***
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> ***7*** *(1) In this Act,* ***"arbitration agreement"*** *means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.*
>
> *(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.*
>
> *(3) An arbitration agreement must be in writing.*
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> *(4) An arbitration agreement is in writing if it is contained in*
>
> > *(a) a document signed by the parties,*
> >
> > *(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or*
> >
> > *(c) an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.*
>
> *(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.*

STC argued that the only provision that could possible apply was s. 7(5). It argued that the annotation did not make s. 26 of the GAFTA 88 form of contract part of the Contracts between the parties – hence that was fatal to the stay application.

The court held that whether s. 26 formed part of the contract was a decision for the arbitrator to make, per the competence-competence principle. In other words the arbitrator was competent to determine whether the arbitrator was competent to arbitrate the dispute. The question was one primarily of fact, or perhaps mixed fact and law. The resolution would require more than just superficial consideration of the documentary evidence.

The court held that the standard with respect to a stay was whether there was an arguable case. The court was satisfied that an arguable case could be put forward by both parties. The court ordered a stay of proceedings pursuant to s. 8 of the ICAA.

What can we learn from this decision? The BCSC continues to make orders that are consistent with disputes being arbitrated, as long as there is a sniff that the parties intended to refer disputes to an arbitrator. Unless it is a matter of law, the courts will defer to the arbitrator to decide whether an arbitrator has jurisdiction. On the face of it, there was precious little to suggest that arbitration of disputes was part of the agreement of the parties. Nevertheless, the court left it to the arbitrator to make that determination.