CITATION: Kore Meals LLC v. Freshii Development LLC, 2021 ONSC 2896
COURT FILE NO.: CV-20-00629856
DATE: 20210419

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Kore Meals, LLC, Plaintiff

– and –

Freshii Development, LLC and Freshii Inc., Defendants

BEFORE: E.M. Morgan, J.

COUNSEL: *George Pakozdi*, for the Plaintiff

Michael O'Brien and Judith Manger, for the Defendants

HEARD: April 16, 2021

STAY OF PROCEEDINGS

[1] In the age of Zoom, is any forum more *non conveniens* than another? Has a venerable doctrine now gone the way of the VCR player or the action in assumpsit?

I. Arbitration vs litigation

[2] On October 31, 2009, the Defendant, Freshii Development LLC ("Freshii Development"), a Chicago, Illinois-based company, entered into a Development Agent Agreement (the "DAA") with the Plaintiff, a Houston, Texas-based company, to develop Freshii franchises in Texas. The Plaintiff claims breach of the DAA and unjust enrichment.

[3] Article 22A of the DAA is an arbitration clause that requires disputes between the parties to be submitted for arbitration by the American Arbitration Association in the city where Freshii Development has its business address, which is identified as Chicago. In a move which the Plaintiff's counsel say justifies litigation in Toronto, the Plaintiff has included Freshii Development's parent company, the Defendant, Freshii Inc., an Ontario corporation, in the lawsuit. Freshii Inc. is not a party to the DAA.

[4] The Defendants move for a stay of proceedings. They state that art. 22A of the DAA requires that this matter be arbitrated in the United States and not litigated in Canada, and that any claim against Freshii Inc. is so intimately intertwined with the claim under the DAA against Freshii

Development that they must be arbitrated together. Alternatively, they state that even if this matter were to be litigated, or if there were some remedy sought by the Plaintiff such as injunctive relief that is beyond the authority of an arbitrator, art. 22B of the DAA, a forum selection clause, requires that it be litigated in the courts of the state or federal courts in Chicago, Illinois, and not in the province of Ontario.

[5] For their part, Plaintiff's counsel submit that arbitration in Chicago would be an artificial and inconvenient exercise. They have evidence from an investigator that Freshii Development does not actually carry on business there or have any presence there at all other than a postal box inside a UPS store.

[6] The Plaintiff further contends that since the Defendants will not disclose where Freshii Development's real office is, the arbitration clause which calls for arbitration in the city where Freshii Development is located is void for vagueness. In the Plaintiff's view, taking into account the addition of Freshii Inc., a Toronto-based company, as a Defendant, the fairest and most logical jurisdiction for the action is Ontario.

[7] It is the Defendants' position that the DAA is valid and enforceable on its own terms, but that in any case if there is a dispute over the arbitrator's jurisdiction over Freshii Inc. and the subject matter of the claim, the arbitrator has the authority to determine its own jurisdiction in the first instance. They submit that the competence-competence principle applies, and that it is essential to the arbitral process that an arbitration panel be competent to decide on their own competence.

[8] The Plaintiffs retort that the ambiguity over the arbitration clause applies equally to the question of whether the arbitrator can determine the preliminary question of arbitration vs litigation. They contend that just as it is unclear where the arbitration is to take place, it is unclear where the preliminary motion would take place; that is, if the DAA does not properly determine the place of arbitration, then it also does not properly determine the place of the motion.

II. Application of the *International Commercial Arbitration Act*

[9] Section 5(3) of the *International Commercial Arbitration Act, 2017*, S.O. 2017, c.2, Sched. 5 ("ICAA"), provides that the ICAA applies to international agreements dealing with "matters arising from all relationships of a commercial nature" which call for arbitration. The DAA is a commercial franchise development contract for a restaurant chain, and calls for arbitration of disputes under the auspices of the American Arbitration Association ("AAA"). Further, and as counsel for the Defendants points out, the allegations in the Statement of Claim relating to Freshii Inc. – which the Statement of Claim alleges is one and the same entity as Freshii Development – are pleaded in such a manner that *prima facie* relate to both the Freshii Development and Freshii Inc.

[10] The Supreme Court of Canada stated in *Dell*, *supra*, at para 84, that, "in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the

arbitrator." This approach reflects the so-called competence-competence principle, in accordance with which the arbitral tribunal is held to have the competence to determine its own competence for the arbitration: *Uber Technologies Inc. v. Heller*, 2020 SCC 16, at para. 35.

[11] Moreover, section 9 of the ICCA provides that, "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: *UNCITRAL Model Law on International Commercial Arbitration* (UN doc. A/40/17, annex I and A/61/17, annex I, adopted by the UN Comm'n on Int'l Trade Law on June 21, 1985, as amended by the UN Comm'n on Int'l Trade Law on July 7, 2006) ("Model Law").

[12] For this purpose, article 7 of the Model Law defines and arbitration agreement as "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." The obligation to arbitrate is subject only to limited exceptions. Thus, article 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."

[13] In *Uber*, at para 34, the Supreme Court of Canada affirmed this approach:

> … when an arbitration clause exists, any challenges to the jurisdiction of the arbitrator must first be referred to the arbitrator. Courts should derogate from this general rule and decide the question first only where the challenge to the arbitrator's jurisdiction concerns a question of law alone. Where a question concerning jurisdiction of an arbitrator requires the admission and examination of factual proof, normally courts must refer such questions to arbitration. For questions of mixed law and fact, courts must also favour referral to arbitration, and the only exception occurs where answering questions of fact entails a superficial examination of the documentary proof in the record and where the court is convinced that the challenge is not a delaying tactic or will not prejudice the recourse to arbitration.

[14] Questions of mixed fact and law are to be referred to the arbitrator: *Ibid*. Likewise, art. 22A of the DAA itself provides that issues going to the scope of the agreement to arbitrate are "to be determined by an arbitrator, not a court." This is in keeping with the inherent authority of an arbitrator as set out in art. 16 of the Model Law:

> The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

[15] The test for a stay of proceedings in the face of an arbitration clause is a relatively low one. In *Ontario Medical Association v. Willis Canada Inc*., 2013 ONCA 745, the Court of Appeal explained that the governing principle is deference to the method contracted for by the parties:

> It is now well-established in Ontario that the court should grant a stay under art. 8(1) of the Model Law where it is 'arguable' that the dispute falls within the terms of an arbitration agreement. In *Dalimpex Ltd. v. Janicki* (2003), 2003 CanLII 34234 (ON CA), 64 O.R. (3d) 737 (C.A.), at para. 21, Charron J.A. adopted the following passage by Hinkson J.A. in *Gulf Canada Resources Ltd. v. Arochem International Ltd.* (1992), 1992 CanLII 4033 (BC CA), 66 B.C.L.R. (2d) 113 (B.C.C.A.), at paras. 39-40, as 'the proper approach' to art. 8(1):
>
> > it is not for the court on an application for a stay of proceedings to reach any final determination as to the scope of the arbitration agreement or whether a particular party to the legal proceedings is a party to the arbitration agreement because those are matters within the jurisdiction of the arbitral tribunal. Only where it is clear that the dispute is outside the terms of the arbitration agreement or that a party is not a party to the arbitration agreement or that the application is out of time should the court reach any final determination in respect of such matters on an application for a stay of proceedings.
> >
> > Where it is arguable that the dispute falls within the terms of the arbitration agreement or where it is arguable that a party to the legal proceedings is a party to the arbitration agreement then, in my view, the stay should be granted and those matters left to be determined by the arbitral tribunal.
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> As Charron J.A. explained in *Dalimpex*, at para. 22, 'a deferential approach' allowing the arbitrator to decide whether the dispute is arbitrable, absent a clear case to the contrary, 'is consistent both with the wording of the legislation and the intention of the parties to review their disputes to arbitration.'

[16] The Court of Appeal most recently confirmed this deferential test in *Trade Finance Solutions v. Equinox Global Limited*, 2018 ONCA 12, which entailed interpretation of an arbitration clause included in an insurance agreement. Justice LaForme held, at para 26, that the granting of a stay of the court proceedings depends on "whether there was an operative arbitration agreement in the contract." The DAA is an operative arbitration agreement, and unless it is unenforceable or some policy ground exists for refusing to enforce it, a stay is to be granted.

[17] The test under the ICAA is, in effect, the same as the prevailing test under the *Arbitration Act*, S.O. 1991, c. 17. That test has been set out most clearly by the Court of Appeal in *Haas v. Gunasekaram*, 2016 ONCA 744, at para. 17, as a five-step inquiry:

(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?

[18] As with the ICAA, unless the fifth question is answered in the affirmative – i.e. unless there is some cogent reason for ignoring the express terms of the arbitration clause in the DAA – a stay of proceedings is called for.

III. The convenient forum and access to justice

[19] As indicated, the Plaintiff's record contains evidence casting doubt on whether the Defendants carry on any business at all in Chicago. In bringing their challenge to an arbitration proceeding in Chicago, Plaintiff's counsel rely on the Federal Court of Appeal's judgment in *Jian Sheng Co. v. Great Tempo S.A.*, 1998 CanLII 9059, which held that a company's "real business is carried on where the central management and control actually abides." They submit that real management and control of Freshii Development cannot possibly reside where the company has nothing but a post office box.

[20] The Defendants say that does not matter, as the DAA identifies the place of arbitration as the city in which Freshii Development has a business address, and not where it carries on business. And while there is evidence suggesting that no one from the company actually works in Chicago, there is no evidence to suggest that it does not collect its mail at an address in the city. Moreover, they point out that nothing about Chicago as a venue for arbitration takes the Plaintiff by surprise, since the DAA identifies the Chicago street address (now revealed to be that of the UPS store) as the Freshii Development business address. The Plaintiff knew when it entered the DAA that arbitration would be the means of any dispute resolution and that Chicago would be the venue for those proceedings, and that Freshii Development's management and control has nothing to do with it.

[21] Plaintiff's counsel submit that the question of whether and where to submit to arbitration cannot ignore the convenience factor, as the choice of venue is directly related to access to justice. They point out that the Court of Appeal has for some time been of the view that arbitral proceedings ought not be held "where it would be either unfair or impractical to refer the matter to arbitration": *MDG Kingston Inc v. MDG Computers*, 2008 ONCA 656, at para 36. In making this point, they rely on the statement of principle by the Supreme Court of Canada in *Uber Technologies Inc. v.*

Heller, 2020 SCC 16, at para. 119, observing that, "…a measure intended to enhance access to justice is now to be used as a tool for cutting off access to justice. That cannot be right."

[22] Counsel for the Plaintiff take these statements to import into the arbitrability analysis a *forum non conveniens* analysis – i.e. a tallying up of connective factors, or lack thereof, which makes the chosen forum otherwise appropriate or inappropriate for a hearing. They indicate that none of the potential witnesses or relevant documents are located there, and that from the point of view of both sides a hearing in Chicago represents a burdensome and costly way to proceed. They therefore submit in their factum that, "This court cannot countenance an approach that would defeat the very purpose of arbitration clauses, i.e., ensuring efficiency and predictability for the parties in resolving disputes – the same goals that Freshii Inc. refers to in support of its forum selection by-law in favour of Ontario.

[23] In posing these competing arguments, both sides are in a sense right. Plaintiffs cannot deny that they entered the DAA with eyes wide open, and that Chicago is the stated business address for Freshii Development and thus the presumed location of arbitral proceedings arising from their business relationship. Defendants, in turn, cannot deny that the choice of Chicago is based on a technicality rather than on any meaningful connection to that city, and that there is no substantive reason that would justify a proceeding taking place there.

[24] In view of all of this, the Plaintiff accuses the Defendants of being "strategic" in their insistence on Chicago as the venue, as if adhering to the contractually identified location is an attempt to impose an unnecessary burden on the Plaintiff that is otherwise irrelevant to the dispute between them. For their part, the Defendants accuse the Plaintiff of being strategic in including Freshii Inc. as a Defendant, as if making the parent company's head office location the venue for the proceedings is an attempt to impose a burden on Freshii Development that is otherwise irrelevant to the dispute under the DAA.

IV. Is there an "unfair or impractical" forum?

[25] In *TELUS Communications Inc. v. Wellman*, [2019] 2 SCR 144, at para 65, the Supreme Court of Canada confirmed that the factors to be considered in granting or refusing a stay of arbitral proceedings include the *forum non conveniens*-type analysis of whether the forum/venue identified in the arbitral agreement is unfair or impractical for one or another of the parties. Traditionally, the circumstances to be considered "include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction": *Amchem Products Incorporated v. British Columbia (Workers' Compensation Board)*, [1993] 1 SCR 897, quoting *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] AC 460, 478 (HL). As the Supreme Court has put it elsewhere, everything from "the domicile of the parties, the locations of witnesses and of pieces of evidence, parallel proceedings, juridical advantage, the interests of both parties and the interests of justice" can be taken into account: *Club Resorts Ltd. v. Van Breda*, [2012] 1 SCR 572, at para 107.

[26] At the hearing before me, I indicated that I was inclined to agree with the Defendants that, whether or not arbitration in Chicago is appropriate under the circumstances, it is the arbitrator who first and foremost has authority to make that decision. In fact, the Supreme Court of Canada itself has stated that, "arbitrators should be allowed to exercise their power to rule first on their own jurisdiction": *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 SCR 801, at para. 70.

[27] Plaintiff's counsel was of the view that this would only re-state the initial problem. They argue that the arbitrator would have to sit somewhere in holding that preliminary inquiry and the DAA identifies Chicago as the forum – the very location being challenged as artificial and therefore unfair and impractical.

[28] In response to Plaintiff's counsel, I inquired as to where the AAA is located; the DAA identifies Chicago as Freshii Development's address and the locale for the arbitration, but otherwise states that arbitration is to be submitted to the AAA without identifying a location for that organization. Defendants' counsel indicated that neither counsel was certain as to where the AAA is located, since submissions are made online. I then asked whether the hearing itself would be online, and counsel responded that they presume so since the pandemic has moved most proceedings of this nature to a digital forum.

[29] All of which undermines the majority of *forum non conveniens* factors. If hearings are held by videoconference, documents filed in digital form, and witnesses examined from remote locations, what is left of any challenge based on the unfairness or impracticality of any given forum? To ask the question is to answer it. Freshii Developments may have a miniature post office box or an entire office tower in Chicago, and witnesses or documents may be located in Canada's Northwest Territories or in the deep south of the United States, and no location would be any more or less convenient than another.

[30] The Plaintiff has sued Freshii Inc. apparently on the theory that the parent is the real directing mind of Freshii Development. This may or may not be borne out on the merits, but on this theory Freshii Inc. can likely be made party to the AAA arbitration despite not being a party to the DAA: see *Pan Liberty Navigation Co. v. World Link (H.K.) Resources Ltd*., [2005] BCJ No 749 (BC CA). Moreover, when it comes to enforcement, Ontario boasts "a strong 'pro-enforcement' legal regime for the recognition and enforcement of international commercial arbitration awards": *Popack v. Lipszyc*, 2018 ONCA 635, at para 35.

[31] It is by now an obvious point, but it bears repeating that a digital-based adjudicative system with a videoconference hearing is as distant and as nearby as the World Wide Web. With this in mind, the considerable legal learning that has gone into contests of competing forums over the years is now all but obsolete. Judges cannot say *forum non conveniens* we hardly knew you, but they can now say farewell to what was until recently a familiar doctrinal presence in the courthouse.

[32] And what is true for *forum non conveniens* is equally true for the access to justice approach to the arbitration question. Chicago and Toronto are all on the same cyber street. They are accessed in the identical way with a voice command or the click of a finger. No one venue is more or less unfair or impractical than another.

V. Disposition

[33] The arbitration provision in the DAA is valid and enforceable. The Defendants' motion for a stay of proceedings is granted.

[34] The parties may make written submissions as to costs. I would ask that counsel for the Defendants provide me with submissions of no more than 2 pages (plus a costs outline or bill of costs) within two weeks of today, and that counsel for the Plaintiff provide me with submissions of no more than 2 pages (plus a costs outline or bill of costs) within two weeks thereafter.

[35] The cost submissions may be sent to my assistant by email. There is no need to provide me with copies of authorities cited therein, provided that all authorities are accessible online and the submissions contain proper citations or links to those authorities.

Morgan J.

Date: April 19, 2021