

In the Court of Appeal of the Northwest Territories

Citation: *Miller Sales et al v Metso Minerals et al*, 2017 NWTCA 3

Date: 2017 05 12

Docket: A-1-AP-2016-000 008

Registry: Yellowknife

Between:

**Miller Sales & Engineering Inc. dba Miller Engineering
assignee of Diavik Diamond Mines (2012) Inc.**

Appellant
(Plaintiff)

- and -

**Metso Minerals Industries Inc. and Metso Minerals
dba Svedala Industries Inc.**

Respondents
(Defendants)

The Court:

**The Honourable Madam Justice Patricia Rowbotham
The Honourable Mr. Justice Brian O’Ferrall
The Honourable Madam Justice Shannon Smallwood**

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Mr. Justice A.M. Mahar
Dated the 19th day of February, 2016
Filed the 5th day of April, 2016
(2016 NWTSC 23; Docket: #S1-CV20110000110)

Memorandum of Judgment

The Court:

I. Introduction

[1] At issue in this appeal is whether the parties were bound to arbitrate by virtue of a clause in their distribution agreement. The chambers judge found that they were and stayed the action. We conclude that the chambers judge's decision was reasonable. The appeal is dismissed.

II. Background

[2] Miller Sales and Engineering Inc dba Miller Engineering ("Miller") designs industrial pumping systems for dewatering mines. Metso Minerals Industries Inc and Metso Minerals dba Svedala Industries Inc ("Metso") manufactures pumps. In 2003 Miller (through its division ANM Equipment) and Metso (through its Pump and Process division), entered into a distributor agreement ("Distributor Agreement") under which Metso agreed to supply various products for distribution by Miller.

[3] In 2006 Miller entered into an agreement with Diavik Diamond Mines Incorporated ("Diavik") under which Miller was to design and supply a dewatering system to be used in a mining operation. In accordance with the Distributor Agreement, Miller purchased from Metso a specially designed series of 12 pumps.

[4] In December 2009 Diavik raised concerns regarding the dewatering system. It alleged deficiencies and failures with respect to the system design and performance of the pumps. There were discussions among Diavik, Miller and Metso. In August 2011 Diavik sued Miller alleging negligence and breach of contract ("Claim"). Diavik did not sue Metso. Miller defended and in March 2012 third-partied Metso. Miller's third party notice alleged that any damages suffered by Diavik were attributable to Metso, and sought contribution and indemnity to the extent that Miller was found liable to Diavik ("Third Party Notice").

[5] On October 10, 2014 Diavik amended the Claim to change the plaintiff's name to a successor company, Diavik Diamond Mines (2012) Inc. ("Diavik 2012"). On October 24, 2014 Diavik 2012 and Miller entered into a settlement agreement ("Settlement Agreement and Assignment"). Diavik 2012 assigned to Miller "any and all right, title and interest to any cause of action, suit, proceeding, or any other claim or claims, at law or in equity" that Diavik 2012 has or might have against Metso.

[6] On March 6, 2015 Diavik 2012 applied and was granted an order substituting Metso as defendant in the Claim. On that same date Miller applied and was granted an order amending the Claim such that the plaintiff is now styled as Miller as "assignee of Diavik Diamond Mines (2012)

Inc.” Accordingly, the Claim in its present form is between Miller as assignee of Diavik (2012) and Metso.

[7] Metso applied pursuant to the *International Commercial Arbitration Act*, RSNWT 1988, c. I-6 to stay or dismiss the Claim on the basis that the Distributor Agreement contained an arbitration clause that governed any and all disputes between Miller and Metso. The Distributor Agreement included the following clause (“Arbitration Clause”):

16.0 Arbitration

16.1 Any and all disputes of whatever nature arising between the parties of this Agreement or the underlying business relationship, including termination thereof, and which are not resolved between the parties themselves, shall be submitted for final settlement by arbitration conducted in accordance with the then current JAMS/Endispute Comprehensive Arbitration Rules and Procedures, except as listed within this section, by a sole and independent arbitrator who shall base his or her decision solely on presentations by the parties and not by independent review, in Milwaukee, WI or at such other location as may be mutually acceptable. Any and all disputes shall be submitted to arbitration hereunder within one year from the date they first arose or shall be forever barred. Arbitration hereunder shall be in lieu of all other remedies and procedures available to the parties, provided that either party hereto may seek preliminary injunctive or other interlocutory relief prior to the commencement or during such proceedings. The arbitrator shall be selected by agreement of the parties; provided that if the parties fail to agree upon an arbitrator within thirty (30) days, any party may petition JAMS for appointment of the arbitrator, which appointment shall be made within ten (10) days of the petition therefor. The arbitration procedure and enforcement of the arbitration award shall be governed by the United States Arbitration Act, 9 U.S.C. §§ 1 et seq., regardless of any other choice of law provision in this agreement and judgment upon the award by the arbitrator may be, but is not required to be, entered by any court of competent jurisdiction. Any award of punitive damages shall be limited to twice the amount of compensatory damages.

[8] Miller argued that the Claim was not between it and Metso but rather an assigned claim between Diavik 2012 and Metso and therefore the Arbitration Clause did not apply. It contended that as Diavik 2012 was not a party to the Distribution Agreement, it was not bound by it. It followed that Miller in its capacity as Diavik 2012’s assignee was also not bound by the Arbitration Clause.

[9] After reviewing the timing of various steps in the litigation and the wording of the Settlement Agreement and Assignment, the chambers judge concluded that the Claim was “Diavik (2012)’s claim in name only” and, was “an attempt by Miller to escape the bonds of an agreement it voluntarily entered into with Metso.” The chambers judge found that:

This litigation flows directly from a dispute between Miller and Metso. The machinations discussed above fall under the rubric of “other remedies and procedures”

in the distributor agreement arbitration clause and the parties are therefore referred to arbitration.

[10] The chambers judge declined to make a finding on whether the one-year limitation period in the Arbitration Clause had lapsed. He stayed the assignee Miller's action against Metso but noted that this "should not be seen as extinguishing the rights of Diavik (2012) as against Metso".

III. Grounds of Appeal and Standard of Review

[11] Miller's main ground of appeal is that the chambers judge erred in failing to give legal effect to the Settlement Agreement and Assignment. This led him to err in concluding that the current litigation flowed directly from a dispute between Miller and Metso, and that the steps taken by Miller and Diavik 2012 fell under the rubric of "other remedies and procedures" in the Arbitration Clause.

[12] Miller submits that the standard of review is correctness because the alleged errors are errors of law. In particular, it contends that the chambers judge erred in assessing the legal effect of the assignment which was to have Miller conduct the litigation but only as assignee of Diavik 2012.

[13] We frame the issue somewhat differently. The issue is the proper characterization of the Settlement Agreement and Assignment. Although resolving that issue involves the interpretation of a contract, the interpretation is inextricably linked to the background of the litigation. The court must look at the Settlement Agreement and Assignment within a particular factual matrix. Accordingly, we conclude that the chambers judge's decision is reviewable on the palpable and overriding error standard: *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at paras 50, 54-55, [2014] 2 SCR 633.

IV. Analysis

[14] It is important to place this appeal in its proper context. The *International Commercial Arbitration Act* adopts as law, the UNCITRAL Model Law on International Commercial Arbitration (Schedule B to the *Act*.)

[15] The leading case interpreting the Model Law is *Gulf Canada Resources Limited v Arochem International Ltd* (1992), 11 BCAC 145, 66 BCLR (2d) 113 at para 43:

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 ... 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.

[16] “The law favours giving effect to arbitration agreements. This is evident in both legislation and in jurisprudence”: *Haas v Gunasekaram*, 2016 ONCA 744 at para 10. As *Gulf Canada* makes plain, if it is less than “clear”, that is, if it is arguable that the dispute and the parties to it are within the terms of an arbitration agreement, the final determination of those matters should be left to an arbitrator.

[17] The broad language of the Arbitration Clause reinforces this principle: “Any and all disputes of whatever nature arising between the parties of this agreement or the underlying business relationship ... which are not resolved between the parties themselves, shall be submitted for final settlement by arbitration ...” (emphasis added). So as a starting principle, even the issue of whether the Claim comes within the terms of the Arbitration Clause ought to be submitted to an arbitrator.

[18] The appellant’s argument is straightforward. It says that as a result of the Settlement Agreement and Assignment, Miller’s capacity in the Claim is *qua* assignee of Diavik 2012’s claim. As assignee, Miller stands in the shoes of Diavik 2012 and all Diavik 2012’s rights are now those of Miller *qua* assignee. Miller submits that this is more than form over substance; legal rights have been assigned for valuable consideration and the chambers judge overlooked or misunderstood this.

[19] The appellant also submits that the pith and substance of the Claim is a dispute between Diavik 2012 and Metso, not between Miller and Metso. The allegations which flowed from the relationship between Metso and Miller, and Miller’s claims for contribution and indemnity are no longer part of the Claim, having been overtaken by the Settlement Agreement and Assignment and the amendments which followed.

[20] In our view this argument ignores the broader context in which the Settlement Agreement and Assignment are placed. That context includes the steps taken in the litigation and their timing, the wording of the pleadings, and the wording of the Settlement Agreement and Assignment.

[21] When Diavik originally raised the problems with the dewatering system, there were discussions that included both Miller and Metso. Yet, when Diavik issued its Claim in August 2011, it did not name Metso as a defendant. It was only as a result of Miller’s Third Party Notice that Metso became a named party in the lawsuit, and the claim was one for contribution and indemnity. There was still no direct claim by Diavik against Metso. Even on October 10, 2014 when Diavik applied to amend the Claim to substitute Diavik 2012 as plaintiff, it did not make a claim against Metso. Nor did it do so at any time prior to the Settlement Agreement and Assignment. It was only after the Settlement Agreement and Assignment, that Diavik 2012 applied to substitute Metso as a defendant in the place of Miller and to remove Miller as a party. This was followed immediately by an application by Miller for an order substituting Miller as assignee of Diavik 2012 in place of Diavik 2012 as plaintiff. Prior to the Settlement Agreement and Assignment there was no claim by Diavik against Metso.

[22] The wording of the pleadings also provide context. The Third Party Notice makes a claim for contribution and indemnity based upon breach of contract and negligence. It sets out fifteen particulars of breach of contract and negligence. Miller acknowledges that the Third Party Notice was a dispute which was subject to the Arbitration Clause. The Claim in its present form is framed solely

in tort. It alleges a duty owed by Metso to Diavik 2012 and pleads that Metso breached its duty of care and is liable in negligence. The fifteen particulars of negligence in the Claim's present form are identical to the particulars in the Third Party Notice.

[23] The most telling evidence is the wording of the Settlement Agreement and Assignment. It includes two recitals: "Miller has not resolved its dispute with, or its claims against, Metso and, in fact, wants to continue to pursue Metso" and "[i]t is the intention of Miller to bring finality to the involvement of DDMI [Diavik 2012], except to the extent that Miller wants to continue to pursue Metso for contribution towards the amount paid by Miller to DDMI" (emphasis added).

[24] Moreover, Miller and Diavik 2012 contemplated that their assignment might not be effective to continue the lawsuit:

23. If either of the Amended Statement of Claim or the Assignment is struck out or disallowed by the Court (including the Court of Appeal) for any reason, the parties hereby agree that the Action shall be discontinued by consent, on a without-cost basis, without prejudice to DDMI's receipt of, and entitlement to, the Settlement Funds.

[25] Viewed in this context, the Claim is in pith and substance a claim by Miller against Metso. It continues to be a "dispute of whatever nature arising between" Miller and Metso, and as the chambers judge found, the Claim falls under the rubric of "other remedies and procedures" in the Arbitration Clause.

V. Conclusion

[26] There was ample support on this record for the chambers judge to conclude that the parties were bound by the Arbitration Clause. His decision to stay the Claim is reasonable and entitled to appellate deference.

[27] The appeal is dismissed.

Appeal heard on April 19, 2017

Memorandum filed at Yellowknife, N.W.T.
this day of May, 2017

Rowbotham J.A.

O'Ferrall J.A.

Smallwood J.A.

Appearances:

S. Weber
for the Appellant

C. Hanert
for the Respondents

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FOR THE NORTHWEST TERRITORIES

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