

Miller Sales & Engineering Inc. et al. v. Metso Minerals
Industries Inc. et al., 2016 NWTSC 23

S-1-CV20110000110

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

B E T W E E N:

MILLER SALES & ENGINEERING INC. dba MILLER
ENGINEERING assignee of DIAVIK DIAMOND MINES (2012) INC.

Plaintiff

- and -

METSO MINERALS INDUSTRIES INC. and METSO MINERALS
dba SVEDALA INDUSTRIES INC.

Defendants

Transcript of the Decision by The Honourable Justice
A. M. Mahar, at Yellowknife in the Northwest Territories,
on February 19th, A.D., 2016.

APPEARANCES:

Ms. S. Webber:
(by Teleconference)

Counsel for the Plaintiff

Ms. C. Hanert:
(by Teleconference)

Counsel for the Defendants

1 THE CLERK: Ms. Hanert, you are on the
2 line?
3 MS. HANERT: Hello.
4 THE CLERK: So I have both Ms. Hanert
5 and Ms. Webber on the phone.
6 MS. WEBBER: I am here, it is Sandra
7 Webber, yes.
8 THE CLERK: Court is in session, the
9 Honourable Mr. Justice Mahar presiding.
10 -----
11 Teleconference connected
12 -----
13 THE COURT: Good morning, Ms. Hanert,
14 Ms. Webber.
15 MS. WEBBER: Good morning.
16 MS. HANERT: Good morning.
17 THE COURT: This is the case of Miller
18 Sales and Engineering Incorporated, Miller
19 Engineering assignee of Diavik Diamond Mines
20 (2012) Incorporated as plaintiff; Metso
21 Minerals Industries Incorporated, Metso
22 Minerals, Svedala Industries Incorporated,
23 defendants. This is an application by the
24 defendant.
25 Application and position of the parties:
26 This is an application by the defendants
27 Metso Minerals Industries Incorporated and

1 Metso Minerals Svedala Industries Incorporated
2 seeking to have the action brought by Miller
3 Sales and Engineering Incorporated, Miller
4 Engineering, assignee of Diavik Mines (2012)
5 Incorporated referred to arbitration and
6 either stayed or dismissed.

7 The claim is that Miller and Metso are
8 bound by the terms of a distributor agreement
9 which contained an arbitration clause. Miller
10 takes the position that what is at issue here
11 is not a claim between Miller and Metso, but
12 an assigned claim between Diavik (2012) and
13 Metso. Since Diavik (2012) was not a party to
14 any agreement with an arbitration clause, then
15 they are not bound by any such agreement and
16 neither is their assignee in good faith.

17 Background:

18 On April 12, 2002, Miller and Metso
19 entered into a distributor agreement under
20 which Metso agreed to supply various products
21 which Miller would then distribute. These
22 products included the pumps which form the
23 basis of this action. They agreed, in article
24 16.1 of this agreement, that any disputes
25 arising between them would be settled through
26 recourse to arbitration. This clause bears
27 repeating in full, as it is notably broad and

1 all-encompassing:

2 16.1 Any and all disputes of
3 whatever nature arising between
4 the parties to this agreement or
5 the underlying business
6 relationship, including
7 termination thereof, and which are
8 not resolved between the parties
9 themselves, shall be submitted for
10 final settlement by arbitration
11 conducted in accordance with the
12 then current JAMS/Endispute
13 Comprehensive Arbitration Rules
14 and Procedures, except as listed
15 within this section, by a sole and
16 independent arbitrator who shall
17 base his or her decision solely on
18 presentations by the parties and
19 not by independent review, in
20 Milwaukee, Wisconsin or at such
21 other location as may be mutually
22 acceptable. Any and all disputes
23 shall be submitted to arbitration
24 hereunder within one year from the
25 date they first arose or shall be
26 forever barred. Arbitration
27 hereunder shall be in lieu of all
other remedies and procedures
available to the parties.

17 The distributor agreement remained in
18 force until March 25th, 2012.

19 In the fall of 2006, Metso agreed to
20 provide Miller with 12 pumps which Miller had
21 agreed to provide to Diavik Diamond Mines
22 Limited for the purpose of dewatering their
23 mine property. The pumps were provided and
24 installed in 2007.

25 In January of 2009, Diavik expressed
26 concerns to Miller about the pumping system
27 Miller had provided and Metso had

1 manufactured. During the course of 2010,
2 Diavik and Miller corresponded about the
3 alleged deficiencies and Miller also
4 corresponded with Metso.

5 On November 12, 2010, Metso notified
6 Miller that it would not acknowledge full
7 liability for the alleged deficiencies.

8 On December 17, 2010, Miller responded and
9 claimed that any deficiencies resulted from
10 defective manufacture and advised Metso that
11 Miller would seek indemnification for any
12 ensuing loss suffered by Miller as the result
13 of payments to Diavik.

14 On August 5, 2011, Diavik issued a
15 Statement of Claim against Miller for damages
16 resulting from negligence and breach of
17 contract in the evaluation, engineering and
18 design of the pumps. Metso was not named as a
19 defendant.

20 On September 28, 2011, Miller filed a
21 Statement of Defence.

22 On March 23, 2012, two days before the
23 agreed upon termination of the mutual
24 obligations contained in the distributor
25 agreement, Miller issued a third party claim
26 against Metso, alleging that any damages
27 suffered by Diavik were the result of breach

1 of contract and negligence by Metso and
2 seeking indemnification should Miller be found
3 liable to Diavik.

4 On October 10, 2012, Diavik Diamond Mines
5 (2012) Inc. was substituted as plaintiff in
6 lieu of the earlier incarnation of Diavik and
7 the Statement of Claim was amended
8 accordingly. Metso was not named at this
9 point or at any point previous as a defendant
10 by Diavik or Diavik (2012).

11 Two weeks later, on October 24, 2012,
12 pursuant to a settlement and assignment
13 agreement with Miller, Diavik assigned the
14 rights to carry on this litigation to Miller.
15 Two specific portions of this settlement
16 agreement were brought to my attention by the
17 applicant and warrant repeating for the
18 record. The settlement agreement states, in
19 part, that "Miller has not resolved its
20 dispute with, or its claims against Metso and,
21 in fact, wants to continue to pursue Metso"
22 and "it is the intention of Miller to bring
23 finality to the involvement of (Diavik) except
24 to the extent that Miller wants to continue to
25 pursue Metso for contribution towards the
26 amount paid by Miller by (Diavik)".

27 On March 6, 2015, Metso was substituted in

1 place of Miller as defendant, and Miller was
2 substituted in place of Diavik (2012) as
3 plaintiff. On April 28, 2015 a further
4 Amended Statement of Claim was filed
5 reflecting these changes.

6 At no point in any of these proceedings,
7 with the exception of this application, did
8 Metso take any position. It never attended to
9 these proceedings.

10 Analysis:

11 The question of whether or not this
12 dispute is captured by the International
13 Commercial Arbitration Act RSNWT 1988, c. I-6,
14 depends on the answer to a more fundamental
15 question - is this a dispute between Miller
16 and Metso, or, as the respondent claims, a
17 dispute between Diavik (2012) and Metso to
18 which Miller is simply an assignee?

19 Section 7(1) of the Act provides that
20 "Subject to this Act, the International
21 Arbitration Law applies in the Territories";
22 and in subsection (2), "the International
23 Arbitration law applies to international
24 commercial arbitration agreements and awards,
25 whether made before, on, or after August 10,
26 1986."

27 There is no question that Diavik (2012),

1 in its own right, is not limited in any way
2 from pursuing a claim in damages against
3 Metso.

4 It also appears clear to the Court that
5 Miller, under the terms of the distributor
6 agreement between Miller and Metso, would be
7 precluded from making any sort of claim
8 against Metso directly by virtue of the
9 unequivocal arbitration clause contained in
10 that agreement.

11 The third party claim filed by Miller
12 against Metso, two days before the expiry of
13 the binding terms of the distributor
14 agreement, is interesting in this context.
15 The respondent has taken the position that
16 Miller was never required to refer this
17 dispute to arbitration because there was no
18 actual dispute unless and until damages had
19 been ascertained. It makes limited sense that
20 Miller can claim that it was in a position to
21 file a third party action against Metso and at
22 the same time claim that there was no dispute
23 such that arbitration could have been
24 commenced.

25 At any of many points in time over the
26 long history of this litigation, Miller could
27 have asked that this dispute go to

1 arbitration. None of the parties to this
2 proceedings are unsophisticated, nor do they
3 lack the advice of obviously highly capable
4 counsel. Clearly, a decision was made early
5 on to avoid the arbitration process in the
6 hope that another avenue to compensation could
7 be found.

8 Miller and Metso entered into an agreement
9 which was intended to limit the risk of both
10 parties in the event of a dispute. Miller,
11 for whatever reason, chose not to enter into a
12 similar agreement with Diavik. The
13 arbitration clause states, in no uncertain
14 terms, that "any and all disputes shall be
15 submitted for arbitration" and that
16 "arbitration...shall be in lieu of all other
17 remedies and procedures available to the
18 parties".

19 The convoluted and imaginative
20 restructuring of this litigation certainly
21 gave me pause, as did the able and compelling
22 presentation by counsel for the respondent,
23 but underneath it all this is simply an
24 attempt by Miller to escape the bonds of an
25 agreement it voluntarily entered into with
26 Metso. This is Diavik (2012)'s claim in name
27 only. As was stated by counsel for the

1 applicant during this hearing, the question is
2 whether the Court looks to the form or the
3 substance of things. This Court takes the
4 view that where there is a choice to be made
5 between the two, substance should always
6 triumph over form.

7 This litigation flows directly from a
8 dispute between Miller and Metso. The
9 machinations discussed above fall under the
10 rubric of "other remedies and procedures" in
11 the distributor agreement arbitration clause
12 and the parties are therefore referred to
13 arbitration.

14 It is not necessary for me to rule on
15 whether or not the one year limitation period
16 in the arbitration clause has passed. It is
17 difficult to conceive of an interpretation of
18 events in such a way in which the one year
19 limitation period has not been exceeded,
20 however I make no such finding.

21 Pursuant to section 11 of the
22 International Commercial Arbitration Act, the
23 parties, having been referred to arbitration,
24 this action is stayed insofar as the assignee
25 litigant Miller's action against Metso is
26 concerned. This should not be seen as
27 extinguishing the rights of Diavik (2012) as

1 against Metso.

2 Costs to go to the applicant on a
3 party-party basis.

4 I want to thank you both again for your
5 very thorough and fulsome presentation. Close
6 court.

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Certified correct to the
best of my skill and
ability,

Lois Hewitt,
Court Reporter