THE LAWYER'S DAILY

The Lawyer's Daily | 111 Gordon Baker Road, Suite 900 | Toronto, ON M2H 3R1 | www.thelawyersdaily.ca
Phone: (800) 668-6481 | Fax: (905) 479-3758 | John.Carson@lexisnexis.ca

Civil Litigation

Choice of law, choice of court clauses

By **Majid Pourostad**

Majid Pourostad

(May 13, 2020, 11:16 AM EDT) -- Does a choice-of-law, choice-of-court clause include or exclude the Convention on Contracts for the International Sale of Goods (CISG)?

In *Best Theratronics Ltd. v. ICICI Bank of Canada* 2020 ONSC 2246, Best Theratronics Ltd (Best), an Ontario supplier of medical devices, entered into a contract with the Republic of Korea (Korea) through its Public Procurement Services (PPS). Best sought an injunction preventing ICICI Bank in Ontario from disbursing $1,335,000 as well as brought a breach of contract action against Korea and PPS. Korea and PPS request an order setting aside the injunction and dismissing the main action. Ultimately, the court held that Best's action was stayed, and the injunction was continued.

1. Does the Choice-of-Law Clause Include or Exclude CISG?

Article 34(2) of the contract under the title "Governing Laws" provides: "the formation, validity, construction, and the performance of the contract shall be governed by the laws of the Republic of Korea." Best's position is that since the contract's choice of law clause has not explicitly excluded the CISG, the applicable law would be the same and it makes no difference whether the matter was heard in Ontario or in the Republic of Korea.

While quoting from Franco Ferrari and Marco Torsello's *International Sales Law in a Nutshell* (2014), " … the CSIG does not constitute a comprehensive code", PPS submitted that "… the court may be required to have recourse to the laws of South Korea for any matters that are outside of the CISG." Therefore, PPS implicitly admits that the choice of the laws of Korea as a contracting state to CISG does not exclude its applicability and has the effect of designating the law applicable to questions outside the scope of the CISG. It also appears this quotation was so conspicuous that the Ontario Superior Court cited it and based its premise on that statement.

Nevertheless, the reason why the CISG is not a comprehensive code lies with the two of its salient features: it applies only to international sales contracts not domestic situations, and as well the parties may exclude CISG or derogate from most of its provisions.

Despite the above points, whether CSIG constitutes a comprehensive code is not the pivotal point but the question is if it should be governed over the contract. It is well-established that once a country has become a contracting state, the CISG becomes part of the domestic law of that country unless parties explicitly exclude its application to their contract. It could also be implicitly excluded through providing for a choice of law clause in the agreement. However, that is not the case where the parties choose the law of a country that is a party to the CISG and *a fortiori* where the both parties are also themselves signatories to the convention.

Both Canada (Ontario) and South Korea are signatories to the CISG forming an inherent part of both Ontario and Korea's domestic laws. The contract selecting "the laws of the Republic of Korea" will still be governed by the CISG even without making any mention of it. Because the contract is an international sales agreement, according to s. 6 of the CISG the parties have not excluded it from their contract.

In conclusion, the choice-of-law clause contained in the parties' international sales contract selecting "the laws of the Republic of Korea" should have been construed to select the CISG as the governing law even though it has not expressly been mentioned by them. Therefore, not only "the formation, validity, construction, and the performance of the contract" but also other articles such as remedies, passing of risk etc. are indirectly subject to CISG no matter how consciously they have chosen it.

2. Is choice-of-court clause valid, clear and enforceable?

The court stayed the Ontario-based company's litigation in favour of "… the court chosen by PPS among the competent courts by the law and one of the following courts: 1. Seoul Central District Court; 2. The Competent Court where the head office of PPS belongs." Since the clause specifies that the dispute may be settled by arbitration "only if an agreement is made between the parties to the dispute," there has been no binding arbitration clause yet and this article is not addressing it.

Best argues that the choice-of-court clause is operationally defective because the selection process of, and its right to resort to a competent jurisdiction, is subject to approval by PPS while PPS can freely choose its desired jurisdiction. Therefore, it can proceed with litigation against Korea in Ontario. The Superior Court rejected this argument stating that Best does not need PPS's permission to sue PPS and the forum selection clause does not impose a limitation that Best must first obtain PPS's decision. The court holds that the forum selection clause is inelegant but not unintelligible and ultimately it is "valid, clear and enforceable" based on the test adopted by *Douez v. Facebook, Inc.*, 2017 SCC 33 and *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27.

The choice-of-court clause is neither clear nor enforceable and consequently it is not valid.

First, the court has disregarded this phrase "among the competent courts by the law" contained in the clause and has put its focus only on "the court chosen by PPS among … and one of the following courts. …" It appears that "among the competent courts by the law" are not limited to the Republic of Korea's courts but it could be any competent jurisdiction including Canada (Ontario), establishing some close and strong connection to the contract.

The wording of the clause raises the possibility that the drafter of the clause intended to give PPS a greater latitude in selecting a competent jurisdiction in Ontario for a rainy day, in particular to bring any legal action arising or relating to the guarantees or performance bonds. Article 31 does not explicitly indicate that the Korean court's jurisdiction is exclusive. Therefore, while the Ontario Superior Court sees this clause as an exclusive one and finds Best in the breach of this exclusive choice-of-court clause, what exactly the clause means by this phrase is open to interpretation. More interestingly, in the U.S. and Australia, a jurisdiction clause is presumed non-exclusive unless the parties' agreement expressly and clearly indicates that it is exclusive.

Second, if one accepts the Ontario Superior Court's interpretation that the clause is exclusive then it allows PPS to make a three-tiered limitation: 1. The courts of Korea are competent jurisdiction; 2. Either of two-named courts must be chosen as a litigation venue; and 3. The chosen court must be approved by PPS. Best might face the risk of denial of justice and would be locked into this inelegant clause. This so-called intelligible clause puts the knife in PPS's hand to halve an apple without giving Best a choice to choose either half.

Majid Pourostad is an internationally trained lawyer (ITL). He has extensive practical experience in drafting international business contracts as well as dispute resolution clauses. He also just obtained the degree of professional LLM in international business law from Osgoode Hall Law School *and currently is an NCA candidate to be eligible to apply to the bar admission program in Ontario.*

Photo credit / 3D_generator ISTOCKPHOTO.COM

Interested in writing for us? To learn more about how you can add your voice to The Lawyer's Daily, *contact Analysis Editor Richard Skinulis at* Richard.Skinulis@lexisnexis.ca *or call 437-828-6772.*

© 2020, The Lawyer's Daily. All rights reserved.