> would compete with the haulage and storage process employed by ROHES and Graillen.

As ROHES and Graillen failed to persuade the court that they would have been successful bidders if Entac's bid had been disqualified, the judge did not grant them the damages related to the lost profits.

With respect to the second cause, *i.e.*, the unreasonable exercise of the termination clause by the Town, the judge looked at the commercial purpose of the contract. As contracts are not made in a vacuum, importance should be given to the surrounding circumstances such as the background, the context and the market in which the parties of the contract are operating. In that context, it was worth noting that both parties were commercially sophisticated, represented by counsel and had equal bargaining power.

ROHES and Graillen alleged that the Town did not exercise its discretion to terminate in a reasonable fashion and in good faith. However, after reviewing the evidence, the judge concluded that there was nothing improper and unreasonable about the way the Town used its right of termination. As the Town decided to go with the bid with the dewatering process, which brought significant cost savings, the offsite biosolid storage became unnecessary. Therefore, terminating the purchase and sale agreement was a prudent business decision left for the Town to make.

The judge found the wording of the termination clause quite broad, discretionary and not limited to the cited examples. In principle, the termination clause reserved the Town's right to cancel the transactions within the permitted timeframe, if it thought it was advisable to do so. From the foregoing cost evaluation, it was clear that dewatering was the way to go and the Town was justified in terminating the agreement without being in breach of contract. The judge, therefore, dismissed ROHES and Graillen's claim for the breach of contract and granted the Town's counterclaim for refund of its deposit.

Ontario Superior Court of Justice

Graillen Holdings Inc. v. Orangeville (Town)
Stinson J.
June 3, 2016

CASE SUMMARY

Michael Valo
Glaholt LLP, Toronto

COURT OF APPEAL DECISION ON ARBITRABILITY CONSISTENT WITH NATIONAL STANDARDS

Haas v. Gunasekaram

The recent Ontario Court of Appeal decision in *Haas v. Gunasekaram* clarified the analysis of whether any given issue or dispute is arbitrable, and elaborated on the distinction between subjective arbitrability, which concerns whether someone has the capacity to be a party to an arbitration, and objective arbitrability, which concerns the subject matter that may be arbitrated, *i.e.*, the scope of the arbitrator's jurisdiction.

The trial judge had found that tort claims fell outside the scope of the arbitration agreement, and moreover, that the Haas' fraud claim had vitiated the arbitration agreement in any event. In so doing, the trial judge would have permitted Mr. Haas to avoid arbitrating the matters in dispute despite an arbitration agreement in the parties' contract. In setting aside that decision, the Court of Appeal once again stressed the principle that the law favours the enforcement of arbitration agreements.

While the appeal decision ostensibly deals with the proper interpretation and application of s. 7 of the *Arbitration Act*, more fundamentally, the

Court of Appeal addresses the critical question of arbitrability.

The Ontario Court of Appeal's decision reinforces the long-established legal principle that favours giving effect to arbitration agreements. As the Court of Appeal noted, "the court should not lightly depart from the strong policy support for enforcing arbitration agreements". In reviewing the proper approach to arbitration agreements, the Court of Appeal found that the mandatory, unequivocal language of s. 7 of the *Arbitration Act* signals the legislature's clear intent to give wide effect to arbitration agreements. Section 7 of the Act provides as follows:

> If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, **the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding**.
> (emphasis added)

The Court of Appeal re-affirmed that questions of arbitrability, or an argument as to whether a dispute falls within the terms of an arbitration agreement, must be determined by the arbitrator or arbitral tribunal, and not the courts. A motion to stay litigation under s. 7 of the *Arbitration Act* in favour of arbitration may not be used by parties as a "backdoor" to have courts decide issues of arbitrability. These determinations properly fall within the jurisdiction of the arbitrator. As Justice Deschamps noted in *Union des consommateurs v. Dell Computer Corp*., in "any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator".

Having established that matters of arbitrability must be determined by the arbitrator, the Court of Appeal provided the following framework for considering an application to stay under s. 7 of the *Arbitration Act*:

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?

While the above framework is intended to guide a s. 7 analysis to stay litigation, it is essentially an analysis to determine arbitrability.

In this case, the arbitration agreement was contained in a shareholder agreement between the parties and was drafted in typical, broad terms, referring to "any dispute, difference or question … or any failure to agree … respecting this agreement or anything herein contained then every such dispute, difference or question or failure to agree shall be referred to a single arbitrator". Haas had amended his statement of claim to eliminate all of his claims but for claims in tort and fraud, and then argued that the dispute was properly litigated in court as the arbitration agreement only captured contract claims.

The Court of Appeal rejected Haas' argument, citing with approval the principle set out in *Dancap Productions Inc. v. Key Brand Entertainment Inc.*, that contractual language calling for the arbitration of disputes "relating to" an agreement have been generously interpreted to enjoy a "wide compass," and interpretation consistent with the legislative policy, which favours arbitration over litigation.

The message sent by the Court of Appeal in this case is clear that any constraints on the scope of an arbitration agreement must be express. For example, the Court of Appeal found it significant that the arbitration agreement did not specifically exclude tort, misrepresentation, or fraud claims. In the Court of Appeal's view, there is no justification for limiting the scope of an arbitration agreement to contract claims only.

The Court of Appeal also rejected the trial judge's finding that a fraud claim vitiates an arbitration agreement, in part on the basis of a strong public policy argument that the integrity of international commerce was too important to permit such an outcome. As the Court of Appeal noted, "the court should lean against a result that undermines arbitration agreements". The Court of Appeal re-emphasized this public policy principle throughout its decision. In the court's view, while fraud could in some circumstances vitiate the arbitration agreement, this would be a highly fact-dependent outcome, and would be the exception, not the norm.

The decision of the Court of Appeal on the issue of arbitrability is consistent with the approach across Canada, which was recently surveyed by the International Bar Association in its "IBA subcommittee on the recognition and enforcement of awards: arbitrability in Canada". The subcommittee report, submitted by Craig Chiasson and Ramsey Glass, found that across Canada courts have been consistent in adopting a broad approach to the analysis of whether any given issue or dispute is arbitrable, *i.e*., within the scope of the relevant arbitration agreement.

The IBA's subcommittee report distinguished between subjective arbitrability, which concerns whether someone has the capacity to be a party to an arbitration, and objective arbitrability, which concerns the subject-matter that may be arbitrated, *i.e.*, the scope of the arbitrator's jurisdiction. While the analysis of objective arbitrability is broad in scope, as we have seen, subjective arbitrability is much more narrowly construed, with arbitrators and courts displaying a reluctance to subject non-parties to an arbitration agreement to arbitration. In other words, while the subject-matter within an arbitrator's purview might be wide, the individuals bound by the arbitrator's decision must be construed narrowly.

The lower court decision in *Haas* was therefore diametrically opposed to the prevailing trend in Canadian arbitration jurisprudence, and the Ontario Court of Appeal's reversal of that decision provides welcome clarity.

Ontario Court of Appeal

Haas v. Gunasekaram
J.C. MacPherson J.A., Janet Simmons J.A., and P. Lauwers J.A.
October 13, 2016

GUEST ARTICLE

John V. O'Dea, Q.C.
McInnes Cooper, St. John's

I CAN'T GET NO RECTIFICATION: THE NEWFOUNDLAND & LABRADOR SUPREME COURT DENIES RECTIFICATION OF LUMP SUM SUBCONTRACT

It's tough to persuade a court to rectify the terms of a written contract with those of an oral agreement, as illustrated by the recent Newfoundland and Labrador Supreme Court (General Division) decision in *Newfoundland Rubber Coating Corp. v. Newfoundland and Labrador (Transportation and Works)*, denying a subcontractor's claim to rectify a lump sum contract based on two alleged oral agreements. And it's not going to get easier. The Newfoundland court relied on the legal test for rectification that the Supreme Court of Canada set out in 2002 in *Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd*. Within a month of the Newfoundland decision, the Supreme Court of Canada issued two decisions on rectification, *Canada (Attorney General) v. Fairmont Hotels Inc.* and *Jean Coutu Group (PJC) Inc. v. Canada (Attorney General)*, both of which af-