

Indexed as:
International Time Recorder Co. v. Lavie Computers Ltd.

Between
International Time Reorder Company Limited, plaintiff, and
Lavie Computers Ltd., defendant

[2000] O.J. No. 917
Court File No. 99-CV-174769

Ontario Superior Court of Justice
Spence J.

Heard: March 1, 2000.
Judgment: March 20, 2000.
(37 paras.)

Conflict of laws — Jurisdiction — Submission to jurisdiction — What constitutes — Effect of — Jurisdiction excluded by contract — Stay of proceedings, when available.

Motion by the defendant, Lavie Computers, for stay of the action by International Time Recorder based on forum non conveniens. The plaintiff brought an action in Toronto claiming damages for the breach of a software licence agreement. The plaintiff was a Toronto corporation. The defendant was an Israeli corporation. The software licence agreement contained a clause granting jurisdiction with respect to the agreement to the Courts of Israel.

HELD: Motion allowed, and action stayed. Although the clause in the agreement did not provide that Israel had exclusive jurisdiction, it was the only grant of jurisdiction made by the parties. There was no ambiguity that would warrant reading the clause as giving mutual consent to the selection of another jurisdiction. Furthermore, there was no suggestion that the agreement offended public policy.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, s. 106.

Counsel:

G.E. Wood, for the plaintiff.
K.M. Landy, for the defendant.

SPENCE J.:—

Overview

- ¶ 1 This is a motion for the stay of an action based on forum non conveniens.
- ¶ 2 The plaintiff has brought an action in Toronto, claiming inter alia, damages for the breach of a

software licence agreement. The plaintiff, International Time Recorder Company Limited ("ITR") is a Toronto corporation. The defendant, Lavie Computers Ltd. ("Lavie") is an Israeli corporation. The software licence agreement contains a clause granting jurisdiction with respect to agreement to the Courts of Tel Aviv, Israel.

¶ 3 The defendant brings this motion challenging the plaintiff's choice of the Ontario Superior Court for the trial of this action, and seeks to have this action stayed or dismissed.

The Facts

¶ 4 In 1996 ITR and Lavie entered into a Software Distribution Licence Agreement ("the Licence Agreement"). Although the Agreement was dated January 1, 1996, Lavie signed the Agreement in Ramat-Gan, Israel in June 1996.

¶ 5 Paragraph 17.5 of the Licence Agreement provides:

17.5 This Agreement shall be governed by and construed in accordance with the laws of the State of Israel. Jurisdiction shall be vested in the competent courts of the City of Tel Aviv.

¶ 6 The Licence Agreement was a continuation of longstanding business arrangements between Lavie and ITR, and the continuation of a series of written agreements between Lavie and ITR. The first written Agreement between Lavie and ITR was in June 1989.

¶ 7 Lavie and ITR, as two corporations carrying on business internationally at arms length, entered into negotiations, and eventually agreed to the terms of the Licence Agreement. Gil Yuval ("Yuval"), a principal of Lavie, signed the Licence Agreement for Lavie, and Tracy Parzych ("Parzych") signed for ITR. For Lavie, according to Yuval, paragraph 17.5 of the Licence Agreement was a very important contractual term which Lavie relied upon in agreeing to enter into the Licence Agreement. Without the jurisdiction clause of paragraph 17.5, Yuval said Lavie would not have agreed to become a party to the Licence Agreement.

The Windows Supply Agreement

¶ 8 The parties entered into the Windows Supply Agreement in December of 1996. The Agreement relates to the original Licence Agreement. Paragraph 1 of the Windows Supply Agreement begins with the phrase "in compliance with Section 5 (Minimum Annual Purchase Quantities) of the Software Distribution Licence Agreement". The Windows Supply Agreement has no provision concerning choice of law or jurisdiction. It appears the matter was not raised.

The Debugging Agreement

¶ 9 At a meeting in Toronto in December 1997, ITR and Lavie entered into a further agreement ("the Debugging Agreement"), by the terms of which Lavie agreed to rectify deficiencies in its software. Lavie further agreed that failing rectification of such deficiencies, it would refund the purchase price of any software purchased and installed by ITR, where the customer was refusing to pay the purchase price of the ITR system because of software deficiencies. The agreement further provided that ITR would purchase and pay for Lavie software in the sum of \$140,000 by March 31, 1998, provided that the remaining deficiencies in Lavie software, as of that date, did not exceed four in number.

¶ 10 ITR claims that Lavie defaulted in its obligations under the Debugging Agreement, in that there were significantly in excess of four deficiencies in Lavie software as of March 31, 1998.

The Provisions of the Rules and the Courts of Justice Act

¶ 11 Section 106 of the Courts of Justice Act, R.S.O. 1990, c. C.43 provides:

A Court, on its own initiative or on a motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

¶ 12 Rule 21.03(a) and (c) provides:

A defendant may move before a judge to have an action stayed or dismissed on the grounds that,

- (a) the court has no jurisdiction over the subject matter of the action; ...
- (b) another proceeding is pending in ... another jurisdiction between the same parties in respect of the same subject matter.

¶ 13 Rule 17.06(1) and (2) provides:

(1) A party who has been served with an originating process outside Ontario may move, before delivering a defence, notice of intent to defend or notice of appearance,

- (a) for an order setting aside the service and any order that authorized the service; or
- (b) for an order staying the proceeding.

(2) The court may make an order under subrule (1) or such other order as is just where it is satisfied that,

- (a) service outside Ontario is not authorized by these rules;
- (b) an order granting leave to serve outside Ontario should be set aside; or
- (c) Ontario is not a convenient forum for the hearing of the proceeding.

¶ 14 In a motion where forum non conveniens is invoked, it is immaterial whether the motion is brought under Rule 17.06(2), s. 106 or Rule 21.03, as far as the burden of proof is concerned.

Ruggeberg v. Bancomer, S.A. [1998] O.J. No. 538, Quicklaw, page 7, para. 33 (Cullity J.)

Whether the Jurisdiction Clause Grants Exclusive Jurisdiction

¶ 15 A question was raised as to how far the jurisdiction clause goes in according jurisdiction to Israel. It was pointed out that the clause does not state that Israel has exclusive jurisdiction. On this basis it was argued that there is an ambiguity that should be interpreted against Lavie, the originator of the agreement, on the basis of the contra proferentem rule.

¶ 16 Against this position, it was noted that the clause uses the mandatory word "shall" in the phrase

"jurisdiction shall be vested ...".

¶ 17 It is also important that the clause uses the word "vested".

¶ 18 Black's Law Dictionary gives the following definition for the word "vested":

"fixed; accrued; settled; absolute; complete. Having the character of absolute ownership, not contingent, not subject to be defeated, by a condition precedent ..."

¶ 19 Taking the specific wording of the clause into account, the reasonable interpretation is that, although the parties have not expressly denied that any other court could have jurisdiction, they have agreed between themselves to jurisdiction being given to the courts of Tel Aviv and they have not agreed to jurisdiction being given to any other courts. Although this agreement may not amount to a grant of exclusive jurisdiction to the courts of Tel Aviv, it is the only grant of jurisdiction made by the parties. There is no ambiguity here that would warrant reading the clause as somehow giving mutual consent to the selection of another jurisdiction.

The Significance of the Subsequent Agreements

¶ 20 The two agreements other than the Licence Agreement which are part of the subject matter of the action are the Windows Supply Agreement and the Debugging Agreement. According to the plaintiff's statement of claim, Lavie agreed at the time the Distribution Agreement was entered into, that Lavie would furnish upgrades from DOS to Windows programs and accordingly, to obtain Windows version of specified ITR software, ITR entered the Windows Supply Agreement with Lavie. The statement of claim also alleges that by December 1997, in order to obtain Lavie's technical support to rectify numerous deficiencies that were occurring in the Lavie's software in the ITR systems, ITR entered into the Debugging Agreement with Lavie.

¶ 21 It was said for the plaintiff that, in considering the significance to be attributed to the jurisdiction clause in the Licence Agreement, it should be recognized that there are also the two other agreements which are part of the claim and those two agreements have no jurisdiction clauses. However, it is clear that the plaintiff itself in its statement of claim effectively characterizes these two other agreements as agreements which deal with arrangements entered into between the parties to the Licence Agreement in order to deal with problems that arose under it. They are therefore clearly supplemental to the License Agreement. The fact that they have no jurisdiction clauses does not alter anything. It would be reasonable to expect that jurisdiction in respect of them would follow jurisdiction in respect of the Licence Agreement.

The Effect of the Jurisdiction Clause

¶ 22 Where the parties have agreed upon the jurisdiction in a contract which is the subject matter of the dispute, and where there is no suggestion that the agreement as it relates to jurisdiction offends public policy or was the product of grossly uneven bargaining positions, the court should give effect to the term of the agreement unless the party seeking to have the case heard in another jurisdiction can establish that the interests of the parties and the interests of justice, favour trial in that other jurisdiction.

Fairfield v. Low (1990) 71 O.R. (2d) 599 at 603

¶ 23 Exclusive jurisdiction clauses in contracts are too important to international commerce to be ignored. Even allegations of fraud and claims that a contract are void ab initio, will not allow courts to

ignore the jurisdiction clause.

Ash et al v. Corporation of Lloyd's et al, (1992) 9 O.R. (3d) 755 at 758

¶ 24 Jurisdiction clauses are to be given great deference.

Ruggeberg, supra, paragraph 15

¶ 25 The evidence shows that the terms of the Licence Agreement was freely negotiated and the jurisdiction clause ought to be given great deference.

The Plaintiff's Onus

¶ 26 A jurisdiction clause casts a heavy onus on the party seeking to resort to a court of another jurisdiction to establish that the latter is a more appropriate forum.

Ruggeberg, supra, paragraph 9.

Relevant Factors in Determining Appropriate Forum

¶ 27 In determining the appropriate forum, the primary considerations are the interests of the parties and the interests of justice. In this regard, the relevant factors in determining the appropriate forum are:

- (a) the location where the contract in dispute was signed;
- (b) the applicable law of the contract;
- (c) the location in which the majority of witnesses reside;
- (d) the location of key witnesses;
- (e) the location where the bulk of the evidence will come from;
- (f) the jurisdiction in which the factual matters arose;
- (g) the residence or place of business of the parties;
- (h) the loss of judicial advantage to the plaintiff if the action proceeds to trial outside of Ontario.

Eastern Power Ltd. V. Azienda Comunale Energia and Ambiente [1999] O.J. No. 3275, Q.L. (Ont. C.A.)

¶ 28 Each of the three agreements was signed by Lavie in Israel and by ITR in Canada.

¶ 29 The applicable law of the Licence Agreement is stated to be Israeli law. There is no choice of law clause in the other two agreements.

¶ 30 The persons who will be the plaintiff's key witnesses are primarily in Ontario. They are present or former employees of the plaintiff or employees of customers of the plaintiff. The defendant's witnesses will be persons who are in Israel. They are employees of the defendant. The plaintiff submits that some of the persons it would consider to be crucial witnesses could not be summoned to testify in Israel and thus the plaintiff's claim would be effectively extinguished. The defendant says that if those of its employees who have to give evidence were required to attend at the hearing in Ontario, this would have a deleterious effect on the business of the defendant because it would leave it without an operating senior management in Israel.

¶ 31 As set forth in the statement of claim, the central issue and factual dispute will concern the alleged technical defects in the defendant's software. Lavie's evidence will come from Israel. ITR's evidence will come from Ontario.

¶ 32 The factual matters in dispute, in terms of the nature and extent of the deficiencies in the Lavie software installed in ITR systems, arose in Ontario and in other provinces where ITR conducts business.

¶ 33 The plaintiff carries on business in Toronto and the defendant in Israel. The plaintiff also has a business presence in Ontario and Quebec.

¶ 34 There is no evidence of a loss of judicial advantage if the matter proceeds in Israel. Regardless of where the action is tried, Israeli law will apply to the action. The defendant provided evidence that Israel can and will take jurisdiction of all aspects of the dispute between the plaintiff and the defendant.

Analysis and Conclusion

¶ 35 Leaving the jurisdiction clause to one side, it appears that the factors are fairly evenly balanced. With respect to the interests of the parties, each will suffer cost and inconvenience if the action must be tried in the other's jurisdiction. The plaintiff alleges that its claim will be effectively extinguished if it must litigate in Israel but there is nothing before the court to show that it would be impossible as a practical matter to put before the court in Israel the evidence that would most readily come from the Ontario persons who are not in the employ of the defendant. It is not possible to conclude from the material before the court that the consequences of giving effect to the jurisdiction clause would be such that, in the interest of the parties or the interests of justice, that clause should be overridden and the action instead submitted to the jurisdiction of the courts of Ontario.

¶ 36 Accordingly, the plaintiff's action in Ontario should be stayed.

¶ 37 The parties may consult me about costs, if necessary.

SPENCE J.

QL Update: 20000413
cp/d/qlfwb/qlalm