Court of King's Bench of Alberta

Citation: Orica Canada Inc v ARVOS GmbH, 2024 ABKB 97

Date: 20240220
Docket: 1701 03144
Registry: Calgary

Between:

ORICA CANADA INC and ORICA INTERNATIONAL PTE LTD

Plaintiffs

- and -

ARVOS GMBH

Defendant

- and -

ARSOPI, INDUSTRIAS METALURGICAS ARLINDO S. PINHO, S.A. and ARSOPI-INDUSTRIAS METALURGICAS ARLINDO S. PINHO, LDA

Third Party Defendants

Reasons for Decision
of the
Honourable Mr. Justice Darren J. Reed

Introduction

[1] In this application, the Third Party Defendants, Arsopi, Industries Metalurgicas arlindo S. Pinho, S.A. and Arsopi-Industrial Metalurgicas Arlindo S. Pinho, LDS (collectively, "**Arsopi**") apply, pursuant to the provisions of the *International Commercial Arbitration Act*, RSA 2000, c. I-5 ("***ICAA***") to have this court stay, in whole or in part, the Third Party Claim issued against them by the Defendant, ARVOS GMBH ("**ARVOS**"). ARVOS was formerly "Alstom Power Energy Recovery GmbH ("**Alstom**"). I note in passing that the evidence from Arsopi is that Arsopi

changed its corporate name in 2019, and the named Arsopi parties are now one and the same corporation.

[2] There is no dispute between the parties that ARVOS is a company doing business primarily in Germany, that Arsopi is a company primarily doing business in Portugal, and that the contract in issue was made outside of Canada and is subject to German law. As a result, while the application filed by Arsopi was styled to have been brought under Alberta's domestic *Arbitration Act*, RSA 2000 c. A-43 ("***Arbitration Act***"), by agreement of the parties at the outset of the hearing it was argued as though it was made under the *ICAA*, and I thus amend the application to have plead the *ICAA*, not the *Arbitration Act*.

[3] The main argument advanced by Arsopi in support of this application is that the claims made in the Third Party Claim in this action by ARVOS ("**TPC**") are claims that are subject to an arbitration clause in a contract made between the parties, and as such the *ICAA* requires the Court to refer the parties to arbitration and stay the Third Party Claim.

[4] While not plead in its application, Arsopi, in its written brief and in the hearing, urged the Court to strike the Third Party Claim in whole or in part, rather than stay it. ARVOS responds, saying this issue was not raised by Arsopi in its application, and further it is not relief the Court should grant in any event. I will address this later in these reasons.

Evidence before the Court

[5] Arsopi tendered evidence via affidavit through a fact witness, Jorge Leite Pinho ("**Pinho**") a director and administrator of Arsopi. It also provided expert evidence on German law and the interpretation of the arbitration clause in issue through an affidavit from Anke Meier, a lawyer in Germany ("**Meier**" and "**Meier Report**").

[6] ARVOS tendered no fact evidence, but provided its own expert evidence from Dr. Martin Alexander, a lawyer in Germany ("**Alexander**" and "**Alexander Report**"), who opined on German limitations law and the impact thereof, were ARVOS to commence any proceedings in Germany (which I understand it has not done).

[7] Neither party cross examined on the evidence, nor did they object to the qualification of the expert of the other or otherwise object to the admissibility of the opinion evidence. As a result, I accepted, and am prepared to declare Meier and Alexander experts in German law in the areas covered in their affidavit and reporting for the purposes of this application, and to consider their opinions to assist the court.

[8] While in reaching the decisions I have on this application I have read and considered all evidence filed by the parties, I nonetheless will canvass certain points in the evidence as they relate to the issues to be determined.

The Pleadings

[9] ARVOS alleges in its third party claim that it engaged Arsopi to fabricate and assemble a superheater and waste heat boiler ("**Equipment**") pursuant to a purchase order, and that it provided, pursuant to a contract between ARVOS and Orica Australia Pty Ltd. ("**Orica Australia**"), the equipment to that entity, which then found its way to Orica Canada Inc. and was installed in an Ammonium Nitrate Plant in Carseland, Alberta.

[10] Orica Canada Inc. and Orica International Pte Ltd. (collectively, "**Orica**") sued ARVOS in relation to the Equipment. The wrinkle in the matter is that neither plaintiff had a direct contract with ARVOS. As noted above, ARVOS had contracted with another entity, Orica Australia, who took delivery of the Equipment and then sold it on to Orica.

[11] The Third Party Claim in issue in this application makes pleas of:

(a) Breaches of fitness for purpose;

(b) Knowledge that Orica would be the end users of the Equipment, and a duty of care between Arsopi and Orica between those parties as a result "to perform its services in a good and workmanlike manner and in accordance with the standards expected of an industrial fabricator";

(c) A duty of care between Arsopi and Orica, and Arsopi and ARVOS "to fabricate and assemble the Equipment in accordance with the relevant design intentions, specifications and drawings, free of defect or debris to be fit for service and of a quality that would permit to successfully operate the Plant";

(d) That in tendering the Equipment to Orica Australia, Arsopi represented that "it had fabricated and assembled the Equipment in accordance with design intentions, specifications and drawings, that the Equipment was free of defect or debris, and was otherwise fit for service..." which representation Arsopi knew that Orica and ARVOS would rely upon, and did rely upon, to their detriment;

(e) That if the Plaintiffs (Orica) have suffered loss and damage, such losses and damages were caused or contributed to by the negligence, negligent misrepresentations, and breach of contract of Arsopi, with express reliance upon the *Tort-Feasors Act*, RSA 2000, c. T-5 ["***Tort-Feasors Act***"] and the *Contributory Negligence Act*, RSA 2000, c. C-27 ["***Contributory Negligence Act***"], and a claim for contribution of indemnity.

[12] While Arsopi argued an "all for one" approach to the pleading, I disagree. The Third Party Claim does make certain separate and distinct claims against Oria and Arsopi. I agree with ARVOS that the claims made in the Third Party Claim can be separated into:

(a) A *Tort-Feasors Act* indemnity claim as between Orica and Arsopi due to a duty of care that Arsopi allegedly owed Orica and was breached (Third Party Claim, paras. 10,11,13-15, 22 and 23) (the "**OA TFA Claim**");

(b) A tort claim between ARVOS and Arsopi (Third Party Claim, paras. 10, 11, and 15) (the "**AA Tort Claim**"); and

(c) A breach of contract claim between ARVOS and Arsopi (the "**AA Contract Claim**").

[13] These distinctions become salient when addressing the substantive issues in this application.

[14] The Orica Statement of Claim alleges, among other things, that ARVOS:

(d) Negligently designed or manufactured the Equipment;

(e) Negligently misrepresented its capabilities and experience to Orica and Orica Australia;

(f) Which Orica alleges caused loss and damage as set out in the Statement of Claim.

Timing of Commencement of the Third Party Claim

[15] On March 6, 2017, the Statement of Claim was filed.

[16] On July 11, 2017, ARVOS wrote to Arsopi advising that ARVOS "would likely file a third party claim against it", asking Arsopi to preserve records and advise its insurers.

[17] ARVOS filed its Statement of Defence on July 13, 2018.

[18] On March 24, 2020 the Third Party Claim was filed. It was provided to Arsopi on or about April 6, 2020 "as a courtesy notice"; no Order for service *ex-juris* had been obtained at that point.

[19] An Order for service *ex-juris* was obtained and received by Alberta counsel for Arsopi on June 2, 2020, service was accepted on August 4, 2020.

[20] On September 1, 2020, Arsopi's counsel wrote ARVOS' counsel and put them on notice of intent to bring the within application.

Contractual Background Between ARVOS and Arsopi

[21] On May 12, 2012 Arsopi entered into Minutes of Negotiation with Alstom, ARVOS' corporate predecessor ("**Minutes**"). The Minutes indicate that if an order is placed, the Minutes and Alstom's purchasing conditions would be the contractual basis for such order.

[22] Alstom issued a purchase order to Arsopi for the Equipment, pursuant to the Minutes. This purchase order, along with its change orders, resulted in the final Purchase Order (Number 273-4505074576) which had Alstom's General Terms and Conditions for the Purchase of Products attached ("**Purchase Order**" and "**Purchasing Conditions**").

[23] The parties appear to agree that the Purchasing Conditions are the operative conditions governing the Purchase Order. Both parties sought to rely upon provisions in the Purchasing Conditions in argument.

[24] The Equipment was manufactured and was delivered by Arsopi to Orica Australia in Portugal. Through other transactions Arsopi was not involved in, it came to be installed in Alberta in Orica's facilities.

[25] Invoicing exchanged between Arsopi and Alstom indicates that the "Final Destination" of the Equipment was "Orica Carseland Works, Miles West of Highway, 24 Carseland Alberta – T0J 0M0 Canada".

[26] The main clauses in the Purchasing Conditions raised by both parties are as follows:

> **22. GOVERNING LAW AND CONTRACT LANGUAGE**
>
> 22.1 The Contract and any dispute in relation thereto shall be governed
>
> by and construed in accordance with the laws of Germany with the
>
> exception of its conflict of law provisions. **...**

> **23. DISPUTE RESOLUTION**
>
> All disputes arising out of or in connection with the Contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with the said Rules of Arbitration. The place of arbitration shall be in Frankfurt am Main, Germany. The language shall be English, provided that documentary evidence submitted to the arbitral tribunal in German shall not need to be translated into English. The arbitration shall be confidential.

Issues to be Determined

[27] The questions before the court on this application are:

(a) Is this an appropriate case to give credence to the competence-competence principle, and direct ARVOS to commence arbitral proceedings in Germany, seeking to have an arbitrator rule on her or his jurisdiction over the matters in the TPC;

(b) If not, should the Third Party Claim be stayed or struck in whole or in part pursuant to the provisions of the *ICAA*, which includes:

(i) What is the proper law for the interpretation of the Dispute Resolution Clause, and what is the result of the application of that law;

(ii) What is the impact of German limitations laws in issue on the analysis (if any); and

(iii) If all or some of the matters in the Third Party Claim are arbitrable, is the appropriate remedy to stay or strike?

Analysis of the Issues

The Competence-Competence Principle

[28] The competence-competence principle was raised by Arsopi's counsel in oral argument for the first time. ARVOS responded substantively. In essence, Arsopi argues that this principle must apply in the present case, and that proper application requires the court to stay the ARVOS Third Party Claim and refer all matters in issue in this application as to the scope of the Dispute Resolution Clause to an arbitration tribunal. Arsopi argues this is contemplated by Schedule 2, Article 16 of the *ICAA* which indicates that the "arbitral tribunal may rule on its own jurisdiction".

[29] ARVOS' position is that the determinations that Arsopi is asking this Court to make can be made at law as an exception to the competence-competence principle. It further argues that it is untenable in the circumstances, where, as I will discuss below, it appears more likely than not that any chance of arbitration in Germany could well be barred by operation of German limitations law, and as a practical consequence, giving credence to the competence-competence principle in

this case will have the practical effect of the matters in issue before the court not being determined at all as ARVOS is not likely to commence arbitration in such circumstances.

[30] In support of its argument on this point, Arsopi relied upon the decision of the Supreme Court of Canada in ***Peace River Hydro Partners v Petrowest Corp.***, 2022 SCC 41 ["***Peace River***"]. ARVOS in turn relied upon that case as well, saying that the exceptions laid out by the Court apply.

[31] In *Peace River*, the Supreme Court indicated that competence-competence is a principle that gives precedence to the arbitration process. It holds that as a general proposition "arbitrators should be allowed to exercise their power to rule first on their own jurisdiction" (at para. 39), and further stated that it is well established in Canada that a challenge to an arbitrator's jurisdiction should generally be decided at first instance by the arbitrator, which reflects the presumption that arbitrators have fact-finding expertise comparable to that of courts, and that the parties intended an arbitrator to determine the validity and scope of their agreement.

[32] There are, however, limits on, and exceptions to, this principle. The Supreme Court of Canada went on at para. 42 in *Peace River* to say that:

> The competence-competence principle is not absolute, however. A court may resolve a challenge to an arbitrator's jurisdiction if the challenge involves pure questions of law, or questions of mixed fact and law requiring only superficial consideration of the evidentiary record. This exception is justified by the particular expertise that courts have in deciding such questions. Further, it allows a legal argument relating to the arbitrator's jurisdiction "to be resolved once and for all, and also allows the parties to avoid duplication of a strictly legal debate". [Citations omitted]

[33] The Supreme Court of Canada, in ***Uber Technologies Inc. v Heller***, 2020 SCC 16 ["***Uber***"] stated, in relation to what is meant by a "superficial consideration" that "[t]he essential question, in our view, is whether the necessary legal conclusions can be drawn from the facts that are either evidence on the face of the record or undisputed by the parties" (at para. 36).

[34] *Uber* provides guidance in cases, such as this one, where the reality is that to give credence to competence-competence means the issues of jurisdiction may never be decided. The underlying assumption made is that if the court does not decide an issue, then the arbitrator will. If the matter would never be resolved if a stay were granted, this raises practical problems regarding access to justice: *Uber*, at para. 38.

[35] The test laid out by the Supreme Court is two fold: first, the court must determine whether, assuming the facts pleaded to be true, there is a genuine challenge to arbitral jurisdiction, and second, review the supporting evidence to determine whether there is a real prospect that, if the stay is granted, the challenge may never be resolved by the arbitrator: *Uber*, at para. 44. With respect to the second question, some limited assessment of evidence is required, which must not devolve into a mini-trial. The only question at this stage is whether there is a real prospect, in the circumstances, that the arbitrator may never decide the merits of the jurisdictional challenge.

[36] The Supreme Court went on to state that: "As a result, therefore, a court should not refer a bona fide challenge to an arbitrator's jurisdiction to the arbitrator if there is a real prospect that doing so would result in the challenge never being resolved. In these circumstances, a court may resolve whether the arbitrator has jurisdiction over the dispute and, in so doing, may thoroughly analyze the issues and record.": *Uber*, at para. 46.

[37] Applying this law to the case before me, I find that this is a case where the competence-competence principle ought not be exercised, and where I must determine the issues before me on the merits, rather than refer these issues to an arbitral tribunal.

[38] Primarily, this is a case where the challenge involves pure questions of law, or questions of mixed fact and law requiring only superficial consideration of the evidentiary record: *Peace River* and *Uber*. While I do have to find German law as a fact, as I discuss below, there has been no challenge or conflict on that evidence. Determining this preliminary issue raised by Arsopi will avoid duplication.

[39] I would also decline on the basis of the reasoning in *Uber*. First, it is clear (and as my reasons below show) that there is a genuine challenge to arbitral jurisdiction in this matter. There are arguments put forward by Arsopi that the entirety of the Third Party Claim falls within the scope of the Dispute Resolution Clause. ARVOS counters saying that none, or in the alternative, only some of the claims made in the Third Party Claim are caught.

[40] In relation to the second question outlined in *Uber*, upon review of the evidence before me, there is a real prospect that if a stay is granted, the challenge brought and issues before me may never be resolved by an arbitrator. As noted, the evidence of Alexander, and the Alexander Report before me were not cross examined on. Both parties relied upon his evidence in relation to the passage of limitations periods in Germany in relation to commencement of an arbitration in that jurisdiction. His evidence is clear that no matter what the factual pattern may be, the time to commence arbitration in Germany by Avros has most likely passed. Of course, it does remain open to ARVOS to commence arbitration and have that issue raised by Arsopi and determined by an arbitrator in Germany, but I understand from ARVOS in argument that there are practical reasons it may never do so absent a ruling on jurisdiction by this court.

[41] As a result, I dismiss Arsopi's competence-competence argument and decline to stay the Third Party Claim on that basis on the facts of this case.

[42] While my decision does not turn on this point, I also note that this is Arsopi's application. Arsopi chose to bring this application before the Court (rather than engage the Dispute Resolution Clause and have an arbitrator in Germany rule on his or her jurisdiction, then come to this Court to seek a stay). It filed evidence and let ARVOS file evidence in response, the matter was fully briefed. It seems quite prejudicial to ARVOS for Arsopi, the applicant, to argue for the first time at the hearing, that the matters it has raised must not be decided but must be sent to an arbitrator for decision. Arsopi chose the venue and jurisdiction for its application.

The *ICAA*

[43] As mentioned above, while the application was initially framed and argued as an application under the *Arbitration Act*, Arsopi's counsel properly realized prior to the hearing that it needed to proceed under the *ICAA* as the applicable statute, given that the parties are international companies and the agreement between them was reached outside of Canada.

[44] The relevant provisions of the *ICAA* are sections 2, 10 and Schedule 2, Article 8:

> **Application of Convention**
>
> 2(1) Subject to this Act, the Convention applies in the Province.

(2) The Convention applies to arbitral awards and arbitration agreements, whether made before or after the coming into force of this Part, but applies only in respect of differences arising out of commercial legal relationships, whether contractual or not.

Stay of proceedings

10 Where, pursuant to article II(3) of the Convention or article 8 of the International Law, a court refers the parties to arbitration, the proceedings of the court are stayed with respect to the matters to which the arbitration relates.

...

Article 8. Arbitration agreement and substantive claim before court

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

[45] The parties are agreed that these are the operative sections. The threshold question is whether or not the Third Party Claim, in whole or in part, is "an action brought in a matter which is the subject of an arbitration agreement" such that I must refer the parties to arbitration and stay the proceedings, in whole or in part.

Proper Law for Interpretation of the Dispute Resolution Clause

[46] Arsopi argues that the proper law to interpret the Dispute Resolution Clause are the laws of Germany, as stated in the Governing Law Clause, and that based upon the Meier Report, all causes of action pleaded in the Third Party Claim fall within the Dispute Resolution Clause. This being the case, Arsopi argues that the court must stay or strike the Third Party Claim.

[47] ARVOS argued that if that is the case, there seems to be room in the Meier evidence and Meier Report for some of the matters pleaded in the Third Party Claim to fall outside of the scope of the Dispute Resolution Clause. I will address that issue below.

[48] In addition, while ARVOS raised, and Arsopi responded to arguments seeking to interpret what is arbitrable under the Dispute Resolution Clause using Albertan/Canadian law, that law simply does not apply. The Dispute Resolution Clause is clear on its face, and neither party raised any jurisdictional objection nor alternate interpretation as to the clear intent of that clause and the Governing Law and Contract Language.

[49] Foreign law is a fact which must be pleaded and proved, on a balance of probabilities, by producing clear and cogent evidence: Castel, J.-G., *Introduction to Conflict of Laws* (Toronto: Butterworths, 1986) at 44; see also, ***Canada (Minister of Employment and Immigration) v Taggar***, 1989 CanLII 5278 (FCA), [1989] 3 FC 576; ***Canada (Minister of Citizenship and Immigration) v Saini***, 2001 FCA 311 (FCA); ***Yordanes v. Bank of Nova Scotia***, 2006 CanLII 1777 Ont. S.C. (Ont. S.C.).

[50] Alberta Courts have framed the applicable principles as follows: (1) foreign law is a question of fact and must be proved as a fact; (2) foreign law must be specifically plead by the party who wants to rely upon it; (3) the onus of proving foreign law is on the party wishing to rely on the foreign law; and (4) if foreign law is not plead or proven, a court will apply the law of the forum: ***Phillips v. Avena***, 2006 ABCA 19 (Alta. C.A.) at para. 72, citing ***Royal Trust Corp. of Canada v. A.S.(W.)S***., 2004 ABQB 284 (Alta. Q.B.), starting at para. 24.; ***CNH Capital Canada Ltd. v Highway Equipment Sales Ltd.***, 2014 ABQB 6 (Alta. Master) at para. 5.

[51] In this case there is no doubt that the laws of Germany apply to the Dispute Resolution Clause. The Purchasing Conditions are clear and unequivocal in this regard. As the party who has plead and is seeking to rely upon German law, Arsopi bears the burden of proof. I must consider the evidence of Meier, including the Meier Report, and assess whether it permits me to find, on a balance of probabilities, German law as a fact for the purposes of such interpretation, failing which I must apply the law of the forum in interpreting this clause.

Findings of Fact on German Law regarding the Dispute Resolution Clause

[52] After a thorough review of the Meier Report, and consideration of the arguments of the parties, I find on a balance of probabilities that, under German law:

(a) The Dispute Resolution Clause is valid, clear and enforceable under German law;

(b) German courts construe arbitration agreements broadly, provided that there is a clear intent to refer a dispute to arbitration in the stead of the court system;

(c) The Dispute Resolution Clause would be interpreted as being all encompassing as between claims that exist at law in Germany between Arsopi and ARVOS, which extends to product liability and damage claims, irrespective of whether they are based in tort or contract law (while I find this a fact, I note at this stage that I disagree with Meier's premise that "I understand that factual foundation of the claim is the contractual relationship between Arsopi and ARVOS" since there are clearly claims pleaded in the Third Party Claim as between Arsopi and Orica, which exist by operation of Canadian law, and thus are not included, as I discuss below);

(d) The Dispute Resolution Clause does not only exclude regular litigation proceedings in Germany but also proceedings in Germany under their third party process, "as long as the alleged claims against Arsopi are related to their contractual relationship with ARVOS";

(e) An arbitral tribunal in Germany would proceed with any arbitration commenced despite existence of the litigation in Canada.

[53] With respect to the Meier Report's Opinion on German Third Party Notices, I find as a fact on a balance of probabilities that German law in this regard is that:

(a) There is a procedure in German law for Third Party Notices (*Streitverkundung)* that permits a defendant to serve a Third Party Notice upon third parties if the defendant believes it has a claim for redress against the third party in the event the defendant loses the case brought against it (emphasis mine);

(b) If valid, the Third Party Notice has the effect of rendering the findings of the court in the proceeding between the plaintiff and the defendant binding for subsequent decisions that are rendered between the defendant and the third party;

(c) If ARVOS issued a Third Party Notice under German law against Arsopi, it would not result in a final decision on potential redress claims between them, but would preserve the findings of the court for a second lawsuit. The effect is that in a second lawsuit, the decision of the first lawsuit has to be taken into account.

(d) If ARVOS in fact filed a second lawsuit, Arsopi could raise the Dispute Resolution Clause and have the matter referred to arbitration; it could not be used to circumvent the requirement to arbitrate.

[54] That is as far as I am prepared to go on the Meier Report on this particular issue. While the Meier Report does go on to hypothesize that a third party notice could be launched even if the claim for redress against the third party is covered by an arbitration agreement, and that at best this would require an arbitration after the claim between Orica and ARVOS were completed, this presupposes a claim has been brought in Germany by Orica against ARVOS. That has not happened. There is no claim in Germany that has been commenced that Avros could issue a *Streitverkundung* against.

[55] In addition, on this point, the Meier Report further acknowledges that "I have not located legal precedent on this specific issue", and while it goes on to say that such a position is supported "according to the majority of scholarly opinion" it only cites one secondary source for that proposition. Further, the conclusions as to how such a notice would play out in the arbitral context rely upon reasoning by analogy from a recent decision in the German Federal Court (*Bundesgerichtshof*) related to counterclaims in Germany. In the result, I am unable to find, on a balance of probabilities, that it is the law in Germany that ARVOS could issue a third party notice in Germany related to issues covered by the Dispute Resolution Clause, even if Orica and ARVOS were litigating in the German Courts.

[56] The entire sub-issue of the process related to German Third Party Notices is a red herring given Meier's conclusion, which I have accepted, that the Dispute Resolution Clause would exclude third party proceedings in Germany.

[57] Further, this portion of the Meier Report was set up to be a pre-emptive response to an argument anticipated by ARVOS which never came. However, in argument, ARVOS tried to argue that this portion of the Meier Report somehow should be applied in the instant case to permit the AA Contract and AA Tort Claims to survive here, so that damages could be assessed in the future in Germany some day, in arbitration or otherwise, similar to the operation of third party process discussed by Meier.

[58] Those arguments fall flat for all the reasons discussed, and I dismiss them. They do not focus on the real issue to be determined, since the potential availability of third party process in non-existent German litigation is not of assistance in determining whether the contents of the Third Party Claim fall within the Dispute Resolution Clause.

Application to the Dispute Resolution Clause and Third Party Claim

[59] Overall, the German law which I have found as a fact coincides, and is captured by, the scope of s.2 of the *ICAA*, since the claims made in the Third Party Claim are "differences arising out of commercial legal relationships, whether contractual or not".

[60] Arsopi argued that the Meier Report was all encompassing, and that this somehow included the OA TFA Claim. I disagree. Orica are not parties to the Dispute Resolution clause, and are strangers to the contracting documents between ARVOS and Arsopi. The tort claim against Arsopi advanced by ARVOS arises due to the operation of law under the *Tort-Feasors Act*, and the common law (see ***Moran v Pyle National (Canada) Ltd.***, [1975] 1 SCR 393, 1973 CarswellSask 132 at para. 28 (S.C.C.); ***Viridian v Dresser Canada Inc.***, 2002 ABCA 173 at para. 31 (Alta. C.A.). I find the OA TFA Claim is not something that the Meier Report covers and is not within the Dispute Resolution Clause. It is not expressly mentioned, and I find that the generalized references to the Third Party Claim in the Meier Report cannot encompass this particular claim due to nuances which Meier has not appreciated nor addressed. This is a claim whose genesis is in Canadian law.

[61] With respect to the AA Tort Claim and the AA Contract Claim, in its written materials, ARVOS candidly admitted that "Arsopi's stay application is stronger with respect to the ARVOS v Arsopi Contract and Tort Claims". Nonetheless, ARVOS tried to rely upon a clause in the Purchase Conditions to argue Arsopi's attornment to jurisdiction of this court on these claims. Clause 15 is entitled "Third Party Claims" and states:

> The Seller shall indemnify, hold harmless and defend the Buyer, its agents, employees, officers and directors, from and against any and all claims, liabilities and expenses (including legal fees) arising out of or in relation to the performance or non-performance of the Contract and resulting in bodily injury or death or damage to or destruction of third-party property, except in the event that the bodily injury or death or damage to third party property is not due to Seller or Seller's representatives.

[62] ARVOS argues that by agreeing to indemnify ARVOS for claims, of which ARVOS says the Orica claim is one, Arsopi waived the arbitration clause and attorned to the jurisdiction of this court for the purposes of the claims contained in the Third Party Claim "in order to defend ARVOS against claims arising out of the performance of" the agreement between the parties. In support it relied upon the case of ***Clayton Systems 2001 Ltd. v Quizno's Canada Corp.,*** 2003 BCSC 1573 (B.C.S.C.) at para. 28.

[63] That case is not helpful to the Court. It involved an application for leave in British Columbia to file an out of time third party claim to seek enforcement of an indemnity clause contained in a purchase agreement notwithstanding that the agreement contained a choice of venue and a choice of law clause. The case was in essence one of jurisdiction and application of the legal test related to enforcement of forum clauses. No such arguments on the enforceability of the forum clause in this case were advanced.

[64] Counsel for ARVOS indicated in the hearing they were not aware of the indemnity in Clause 15 having been engaged at all between ARVOS and Arsopi. I find this argument to be a red herring. The presence of this clause in the Purchase Conditions does not create any attornment by Arsopi in the absence of evidence that the indemnity was in fact sought by ARVOS, and agreed to or otherwise engaged by Arsopi.

[65] ARVOS also argued that Arsopi has attorned to the jurisdiction of this honourable court by arguing that the Third Party Claim should be struck on the basis of a limitations defence under German law, arguing that this "invites the court to make findings on the merits of the claim, findings which Arsopi will no doubt accept as binding if the motion is decided in its favour". In

support of this argument, ARVOS cites ***Cincurak v. Lamoureux***, 2002 ABQB 777 (Alta. Q.B.) at paras. 22, 28 and 29. Again, this case does not support ARVOS.

[66] In *Cinurak*, the party seeking to stay the action had filed a defence that did not challenge forum and had in fact applied for summary judgment before the Alberta Court. The court found express attornment. Here, it is ARVOS itself that led evidence on German limitations law, and Arsopi simply seeks to argue, pursuant to a line of Alberta authority, that where there are matters subject to an arbitration clause, and the time to commence arbitration has expired under Alberta's limitations law, the proper remedy is not to stay the claim in question but to strike it: ***HOOPP Realty Inc. v Emery Jamieson LLP,*** 2014 ABCA 20 (Alta. C.A.) at para. 7; application for leave to appeal ref'd, 2014 S.C.C. No. 35757) ("*HOOPP*"). I will have more to say on Arsopi's *HOOPP* argument below.

[67] In the result, I find that the AA Tort Claim, and the AA Contract Claim are subject to the Dispute Resolution Clause and subject to arbitration. It is clear that these claims fall within the arbitration clause and are governed by German law.

[68] The OA TFA Claim, however, does not. That claim is premised on a cause of action at law between Orica and Arsopi, and fall outside the scope of the Dispute Resolution Clause. It is governed by Canadian law.

Impact of German Limitations Law, if Any

[69] ARVOS argues that due to the evidence of Alexander, if the Third Party Claim were to be commenced as an arbitration in Germany, it would be very likely barred by the limitation periods under German law. Arsopi agrees with ARVOS.

[70] Alexander's report goes through a number of potential permutations and concludes that the claims in the Third Party Claim, assuming they "arise out of" the Minutes (which includes the Purchasing Conditions) would "most certainly" be barred by the operation of German limitations law.

[71] After a thorough review of the Alexander Report, and consideration of the arguments of the parties, I find on a balance of probabilities that, under German law:

(a) The statute of limitations in sales law for "a building" and items with the purpose to be used for a building (like bricks) is five years from the date of delivery. The statute of limitation for other items which are not intended for buildings is two years from the date of delivery;

(b) The contracting parties may agree on a different limitation period;

(c) The Minutes contain a different limitation period, being "The liability period shall be 36 months from delivery or 24 months commencing with the final acceptance, whichever ceases first. The defects liability period will be extended for 12 months from the date of repair for that part of equipment subject to repair, however in any case not longer than for a period of 12 months after the end of the normal liability period";

(d) Because the parties agreed to another limitation period in the Minutes, which is valid, there is no need to discuss the question whether the items listed in the "Scope of supply" are parts for a building pursuant to the limitation period stipulated in the German Civil Code;

(e) As the Minutes stipulate its own priority over the Purchase Conditions, and therefore overrules the regulation regarding limitation in Clause 11.2 of the Purchase Conditions, the limitation period stated in the Purchase Conditions does not apply (which sets out a limitation period of 2 years after a Notice of Defect was issued by ARVOS);

(f) Therefore, the limitation period is 36 months from delivery or 24 months from the date of the final acceptance, whichever period expires first;

(g) Section 203 of the German Civil Code stipulates that if the parties negotiate on the claim or the circumstances of the claim, the limitation period is suspended until one or the other party refuses to continue the negotiations. The requirements for such negotiations are rather low. Any exchange of views leads to a negotiation within the meaning of Section 203 of the German Civil Code and is capable of suspend the limitation. However, unilateral declarations are not sufficient because an "exchange" of opinions is required;

(h) The requirements to end the suspension of limitation due to negotiations are rather high. The party who would like to end the negotiations needs to refuse not only the demand for claim / payment but also needs to state that no further discussions will take place (a so-called "double no" — no claim and no further negotiations);

(i) If the statement of the party who would like to end the suspension does not meet the requirements stated above, the suspension can still end when the parties discontinue the negotiations. The negotiations end in the point in time at which an answer by the respective other side could have been expected at the latest;

(j) How much time may pass until the other party can expect a response is determined by the court for each and every contact between the parties. In most cases, the suspension ends one month after the last contact, but can also be shorter;

(k) This period must be determined for each correspondence and depends on the reasonable expectation of the party who is waiting for the response. Since ongoing negotiations can consist of a lot of correspondence and not every time the other party replies within the expected time, the whole limitation period can become suspended and continue several times.

[72] Dr. Alexander then assumes that:

(a) The day of delivery of the Equipment was on or about May 12, 2013;

(b) While the final acceptance date is not known, since operations commenced October 2013, he assumes that final acceptance should not have taken place after that date;

(c) A notice of defence was issued November 20, 2014;

(d) The parties appear to have negotiated from December 5, 2014 to June 8, 2016; and

(e) The Third Party Claim was filed March 24, 2020.

[73] Dr. Alexander finds that it is not possible on the facts before him to calculate the *exact* suspension period under German law in this case. However, he goes on to analyse all permutations, including:

(a) Application of the limitation period in the Minutes;

(b) Impact of any suspension periods;

(c) Application of Clause 11.4 of the Purchase Conditions (2 years from delivery of Notice of Defect); and

(d) Impact of any suspension periods.

[74] All potential permutations and dates are analyzed, and Dr. Alexander concludes that "Even in the most liberal calculation in favor of ARVOS there is no scenario in which the claim is not time-barred.... We consider it highly unlikely that Arsopi would fail to invoke the limitation argument."

[75] He further states: "Based on the assumptions in this report we are certain that the claim of Arcos has already become time-barred, Arsopi would rise the argument of limitation and that an Arbitration tribunal court would dismiss a claim in a very early stage because of this issue."

[76] Dr. Alexander's conclusions are reasonable, borne out through his analysis and were not challenged by any party. I also note that there is no date which Dr. Alexander canvasses that shows that the Third Party Claim was filed, in Alberta, within any limitation period that might apply in Germany.

[77] ARVOS argues that the OA TFA Claim is governed by Albertan limitations law, since its genesis is from the *Tort-Feasors Act* and not a part of the Dispute Resolution Clause. I agree, though given that I have found that this claim is outside the scope of the Dispute Resolution Clause, I do not think it matters for the purpose of my analysis, and I make no finding on the impact, if any, of the *Limitations Act* to the OA TFA Claim. ARVOS also argues that the AA Contract claim is "likely" governed by German law, with the AA Tort Claim subject to future interpretation.

[78] ARVOS does agree that whether or not the German limitations laws are considered substantive or procedural, the Third Party Claim's chances of survival if brought in Germany would be poor. ARVOS seems to have raised the issue of limitations in Germany to argue that striking the Third Party Claim would be a "death sentence" for ARVOS, and that Arsopi's explicit objective is to gain a procedural advantage over ARVOS. While they try to rely upon *Uber* as authority for the proposition that such advantages ought not be granted, where a reference to arbitration will mean the substantive causes of action between them may never be determined.

[79] With respect this argument takes *Uber* beyond its scope. I have addressed *Uber* fully above. The reality is that ARVOS, knowing of the Dispute Resolution Clause, has chosen not to arbitrate. Despite writing Arsopi in 2017, it waited several years before filing the Third Party Claim. Arsopi's application was filed in 2021, and still ARVOS did not hedge its bets by commencing arbitration. In doing so, ARVOS assumed the risk it might be foreclosed from proceeding with some or all of the matters raised in its Third Party Claim against Arsopi should it be directed to arbitration. It is ARVOS who seems to by trying to gain the procedural advantage by raising this argument. I dismiss it.

The *ICAA* - Should Portions of the Third Party Claim be Struck or Stayed?

[80] Whet then, is the overall result? With the OA TFA Claim outside of the Dispute Resolution Clause, that claim must remain unaffected by, and is not subject to, the *ICAA*. It will not be stayed or struck. It will be heard and determined in Alberta.

[81] The AA Contract and Tort Claims are within the scope of the Dispute Resolution Clause. This engages the provisions of the *ICAA* earlier quoted.

[82] The power of the Court to grant or withhold a reference under the *ICAA* is very limited. If the claims in question are arbitrable, the *ICAA* mandates a stay: ***Kaverit Steel & Crane Ltd. v Kone Corp.***, 1992 ABCA 7 at para. 47; leave to appeal dismissed, [1992] S.C.C.A. No 117 ["***Kaverit***"].: *Kaverit* at paras 47-50. ***Autoweld Systems Limited v. CRC - Evans Pipeline International, Inc.***, 2009 ABCA 154 at para. 7.

[83] The only exception to this is if I somehow find the Dispute Resolution Clause "is null and void, inoperative or incapable of being performed": *ICAA*, Schedule 2, Article 8(1). *Kaverit* provides guidance on what those words mean. The Court stated at para. 52:

> In my view, the proviso about "null and void, inoperative, and incapable of being enforced" simply preserves the rule in *Heyman v. Darwins Limited* cited earlier. The arbitrator cannot decide whether the submission is valid. Its validity and enforceability must be pronounced upon before the referring Court can enforce it by a reference and stay. It is not valid if it, or the contract in which it is found, is, by operation of domestic law in the referring tribunal, either void or unenforceable. The proviso is an echo of the law about void contracts ("null and void"), unenforceable contracts ("inoperative"), and frustrated contracts ("incapable of being enforced"). See *Paczy v. Haendler & Naterman* [1981] 1 Lloyd's Law Reports 302 at 307-8.

[84] Neither party argued the Dispute Resolution Clause was null and void, inoperative or incapable of being performed, and I do not find that it is. The mere fact that the substantive claims that could be arbitrated may ultimately be determined by an arbitrator to be statute barred does not make the agreement inoperative or incapable of being performed in any way.

[85] As a result, I must refer the parties to arbitration and stay the AA Tort Claim and the AA Contract Claim: Schedule 2, Article 8 and s.10 of the *ICAA*.

[86] The default position in the *ICAA* is a stay of the matters that are subject to arbitration. That is the relief Arsopi sought in its filed application. However, Arsopi now wants the Court to strike, not stay. Arsopi primarily relies upon *HOOPP* for the proposition that where parties agree they must arbitrate a dispute, but one party has issued a claim and has not commenced arbitration within the limitation period for arbitration, the court must strike out the claim: *HOOPP*, para. 7; see also, ***Agrium Inc v Babcock***, 2005 ABCA 82 (Alta. C.A.) ["***Babcock***"].

[87] Arsopi argued that under either German or Alberta limitations law, the claims in the Third Party Notice are out of time. In reference to the 2-year limitation period in the *Limitations Act*, RSA 2000, c. L-12 ("*Limitations Act*"), Arsopi argues that ARVOS stated to Arsopi in writing on June 11, 2017 they may have to bring a third party claim in this Action against Arsopi, and did not do so for more than two years after that.

[88] At this stage, I note three things:

(a) Arsopi's application did not seek this relief, nor did it plead Rule 3.68 of the *Rules of Court*, in fact its application is titled "APPLICATION TO STAY THIRD PARTY CLAIM";

(b) Arsopi's application did not plead limitations law (whether German or otherwise), or the *Limitations Act*;

(c) Arsopi argued this issue in the context of the provisions of the *Arbitration Act*, and case law under that Act, which does not directly apply to this application.

[89] In *HOOPP* and *Babcock*, there was a properly constituted application to strike under Rule 3.68 before the Court, and the law was argued in that regard in relation to the terms of the *Arbitration Act*. That is not what has happened here. There is no properly constituted application to strike that ARVOS had adequate notice of. In addition, the *Limitations Act* does not apply to the arbitrable claims, nor does the *Arbitration Act.*

[90] A party ought not lie in the weeds and spring a substantive application to strike on another party in their brief. While the application included the boilerplate "such further and other relief as counsel may request and this Honourable Court deems just" and "such further and other rules as counsel may advise" as well as "such further and other Acts and Regulations as counsel may advise" that is simply not enough in this case.

[91] I refuse to exercise my discretion to permit ARVOS to seek such relief on this application.

[92] Arsopi needed to put ARVOS on adequate notice that German and Alberta limitations periods would be argued to have lapsed, and that R. 3.68 would be relied upon to seek to have all or portions of the Third Party Claim struck. It did not.

[93] In addition to this, the law is clear that a defence under the *Limitations Act* is only available to a party if they "expressly plead" the LA as a defence. Section 3(1) of the LA states:

> 3(1) Subject to subsections (1.1) and (1.2) and sections 3.1, 3.2 and 11, if a claimant does not seek a remedial order within
>
> (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
>
> (i) that the injury for which the claimant seeks a remedial order had occurred,
>
> (ii) that the injury was attributable to conduct of the defendant, and
>
> (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,
>
> or
>
> (b) 10 years after the claim arose,
>
> whichever period expires first, **the defendant, on pleading this Act as a defence**, is entitled to immunity from liability in respect of the claim. [Emphasis added]

[94] This requirement has been affirmed in ***Makowichuk v. Makowichuk***, 2013 ABCA 439 (Alta. C.A.), followed in ***Cummings v Steinke & Company Realty Ltd.***, 2015 ABCA 55 at para. 23 (Alta. C.A.).

[95] Further, the *Rules of Court require* that a party relying upon a limitations defence specifically plead such a defence: *Rules of Court*, Rule 13.6(3)(q) and (r). The reason for this is stated in the rule: it is one of those pleas that make take a party by surprise: ***Manji v Prasad***, 2016 ABQB 273 at paras. 36-37 (Alta. Q.B.).

[96] Of course, an application is not a "pleading": *Rule of Court*, "Definitions" "pleading'. However, in a case such as the present, where Arsopi has refused to file a response pleading (Statement of Defence to Third Party Claim) pending this application, I find that in order to properly seek the remedy of striking, it should have expressly pleaded such relief, and cited Rule 3.68 as well as the *Limitations Act* to properly put ARVOS on notice.

[97] As a result, the AA Tort Claim and AA Contract Claim are stayed pursuant to the provisions of the *ICAA*.

Overall Conclusion

[98] The OA TFA Claim does not fall within the Dispute Resolution Clause and that claim remains in the Third Party Claim for determination in this Action.

[99] The AA Tort Claim and AA Contract Claim fall within the Dispute Resolution Clause. Pursuant to the *ICAA*, those claims must be referred to arbitration, and as a result and those claims in the Third Party Claim are stayed.

[100] If the Parties are unable to agree on costs, they have leave to file three page costs submissions (plus authorities) and I will deliver a costs decision without further oral argument.

[101] I thank all counsel for their written and oral submissions.

Heard on the 26th day of January, 2024.
Dated at the City of Calgary, Alberta this 20th day of February, 2024.

The Honourable Darren J. Reed
J.C.K.B.A.

Appearances:

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