COURT OF APPEAL FOR ONTARIO

CITATION: RH20 North America Inc. v. Bergmann, 2024 ONCA 445
DATE: 20240605
DOCKET: COA-23-CV-0550

Gillese, Brown and Paciocco JJ.A.

BETWEEN

RH20 North America Inc. and Unit Precast (Breslau) Ltd.*

Plaintiffs (Appellant*/
Respondent by way of cross-appeal*)

and

Martin Friedrich Bergmann, Martin Friedrich Bergmann carrying on business as Martin Bergmann Umwelttechnik, Bergmann Umwelttechnik GmbH, Bergmann Beton + Abwassertechnik GmbH, Bergmann GmbH, Bergmann AG, Bergmann North America Inc.*, Click+Clean GmbH**, Lars Bergmann*, Michael John MacCormack*, LeRoy Harvey Robinson*, Carlos Felipe Araque Parra*

Defendants (Respondents*/
Appellant by way of cross-appeal**)

Anne Tardif and James Plotkin, for the appellant/respondent by way of cross-appeal

Adam J. Stephens and Jessica Pei, for the respondents/appellant by way of cross-appeal

Heard: April 15, 2024

On appeal from the order of Justice Michael J. Valente of the Superior Court of Justice, dated April 19, 2023, with reasons reported at 2023 ONSC 2378.

Brown J.A.:

OVERVIEW

[1] In the proceedings leading to this appeal, the motion judge was faced with one motion that sought two types of relief. First, the Moving Defendants, who consisted of two groups of the defendants, namely (a) Bergmann North America Inc., Click+Clean GmbH ("Click"), and Lars Bergmann (collectively the "Bergmann Defendants", who were part of the larger Bergmann Group of companies) and (b) Michael John MacCormack, LeRoy Harvey Robinson, and Carlos Felipe Araque Parra (collectively the "Departing Employees"), sought to strike out several of the claims made by the plaintiffs., RH20 North America Inc. ("RH20") and Unit Precast (Breslau) Ltd. ("Unit Precast"). Second, in the same notice of motion, Click sought an order staying the action against it by the plaintiff, RH20, on the basis that the dispute should be referred to arbitration in London, England, pursuant to an arbitration agreement between it and RH20.

[2] In the result, the motion judge:

1. struck out all claims of the plaintiff, Unit Precast, against all the Moving Defendants, including Click, without leave to amend;
2. struck out RH20's claim of conspiracy against all defendants, including Click, with leave to amend;
3. struck out RH20's claims against Lars Bergmann, with leave to amend;

4. ordered that the amended statement of claim of RH20 be delivered within 45 days of the release of the decision or such later date as agreed by the parties; and
5. dismissed Click's stay motion.

[3] Unit Precast appeals the dismissal of its claims. On appeal, it seeks an order dismissing the respondents' motion to strike its claims (i) for conspiracy and intentional interference with contractual or economic relations and (ii) those asserted personally against Lars Bergmann, the CEO of Bergmann North America.

[4] On its part, Click advances a cross-appeal from the dismissal of its stay motion and seeks an order staying the action against it and referring the matter to arbitration.

[5] For the reasons set out below, I would dismiss the appeal and cross-appeal.

APPEAL BY UNIT PRECAST

The Statement of Claim

[6] For many years, RH20 licensed WSB-branded wastewater treatment models from the Bergmann Group companies in Germany for distribution in Canada. RH20 licensed control panels for WSB systems from Click, a Bergmann Group company.

[7] RH20 was party to a WSB licence agreement with Martin Bergmann UMWELTTECHNIK or Bergmann Umwelttechnik GmbH as the licensor (the "WSB

Licence Agreement"). Both Martin Bergmann UMWELTTECHNIK and Bergmann Umwelttechnik GmbH are part of the larger Bergmann Group of companies. Neither responded to the claim; both were noted in default.

[8] The most recent package of licence agreements for the Click control panels was entered into between RH20 and Click (the "Click Licence Agreements").

[9] According to the statement of claim, RH20 manufactured and distributed licensed WSB-branded wastewater systems, which were assembled and sold in Ontario by Unit Precast, a company established by the founder of RH20. RH20 also subcontracted WSB system maintenance and services to Unit Precast. As well, RH20 sold Click control panels to Unit Precast in Ontario.

[10] RH20 alleges that, in 2018, the Bergmann Group wrongfully terminated the WSB and Click Licence Agreements and then set up a North American company, Bergmann North America Inc. ("Bergmann NA"), which took over RH20's business. RH20 also alleges that the individual defendant Departing Employees resigned from RH20, joined Bergmann NA, and misused confidential RH20 information for the benefit of Bergmann NA. RH20 alleges a conspiracy amongst the Bergmann Group and Departing Employees to usurp its business opportunities.

[11] Accordingly, the pleaded factual backdrop against which the motion judge was required to assess the motion to strike Unit Precast's claims featured three key elements:

1. the licensing agreement for the WSB system was with RH20, not Unit Precast;
2. the licensing agreement for the Click control panel was with RH20, not Unit Precast; and
3. the Departing Employees had been employees of RH20, not Unit Precast.

Analysis

[12] The motion judge struck out all of the claims asserted by Unit Precast, without leave to amend. Unit Precast only appeals the striking out of three of its claims: (i) its conspiracy claim, in combination with RH20, against the defendants; (ii) its claims against Lars Bergmann; and (iii) its claim for intentional interference with contractual relations.

[13] The motion judge correctly identified the principles to apply when considering whether Unit Precast's pleading failed to disclose a reasonable cause of action, as well as the constituent elements of the causes of action asserted by Unit Precast against the respondents. The motion judge performed a detailed analysis of the statement of claim. While Unit Precast contends the motion judge read the statement of claim in an unduly restrictive manner, in my view his reasons reflect a fair, generous, and accurate reading of that pleading.

[14] As I understand Unit Precast's submissions, it advances five main grounds of appeal.

[15] First, in its factum, Unit Precast repeatedly asserts that “RH20’s business includes Unit Precast”. Based on that assertion, Unit Precast advances an overarching ground of appeal that the “Motion Judge erred in failing to recognize that RH20’s business includes Unit Precast ... As a result, [the defendants'] intent to appropriate RH20's business necessarily implies an intent to appropriate Unit Precast’s business.”

[16] I see no such error for the simple reason that Unit Precast is attempting to recast on appeal the claim that it pleaded in its the statement of claim, which is what the motion judge considered. In my view, the motion judge correctly described the pleaded relationship between RH20 and Unit Precast when he wrote, at para. 19:

> As a preliminary matter, I find that the statement of claim establishes a relationship between RH20 and Unit Precast to the extent that RH20 sub-contracts work to Unit Precast respecting the WSB brand of wastewater systems and it sells the Click + Clean control panels to Unit Precast. I also find, however, on the basis of RH20’s plead letter of April 10, 2018 to defendant, Bergmann Umwelttechnick GmbH, that Unit Precast was not at all material times an “affiliate” of RH20. [Emphasis added.]

[17] As well, the clear thrust of the statement of claim, as drafted, is that the defendants wrongfully terminated the various licensing agreements with RH20 and took steps to wrongfully compete against and take over the business RH20 had developed.

[18] Unit Precast's submissions essentially ask this court to read any reference to RH20 and its business in the pleading as a reference to "RH20 and Unit Precast". Such a reading is not tenable even on the most generous reading of the pleading, a pleading that was drafted by counsel, not by a self-represented party.

[19] Second, Unit Precast contends that the motion judge erred in striking its claims against Lars Bergmann in his personal capacity. I see no such error. I agree with the motion judge's conclusion, at para. 57, that "unlike RH2O, Unit Precast has not advanced the slightest claim against Lars in his personal capacity even with the benefit of the most generous reading of the pleading." As I understand Unit Precast's factum, it contends that the claims it asserted against the defendants as a group for conspiracy and unlawful interference with contractual relations are based, in part, on the conduct of Lars Bergmann. That was not pleaded expressly or as a basis for a claim against Lars Bergmann personally.

[20] Third, para. 162 of the statement of claim contains a pleading by the "plaintiffs" of a claim based on the intentional interference with their contractual relations. The motion judge struck that claim explaining, at para. 38:

> Given that I have found that the plaintiffs have not plead the existence of any contract between Unit Precast and a third party, there cannot be any knowledge by the defendants of Unit Precast's contracts or actual wrongful interference by one or more of the defendants. These elements are essential to the tort. [Citations omitted.]

[21] I see no error in the motion judge's reading of the claim or his conclusion. Unit Precast submits the trial judge erred because pleading the existence of a contract with a third party is not a constituent element of that cause of action. Unit Precast points to the decision of the Supreme Court of Canada in *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177, as support for its position. That case dealt with the tort of "unlawful interference with economic relations" or "causing loss by unlawful means". In the present case, the motion judge dealt with the claim framed by the plaintiffs in para. 162 of their statement of claim: namely, that the defendants had intentionally interfered with "the plaintiffs' contractual relations." Given that the motion judge dealt with the claim as specifically pleaded by the plaintiffs, I see no error on his part.

[22] Fourth, the plaintiffs' conspiracy claim is contained in one paragraph of their statement of claim. Paragraph 161 pleads, in its entirety, the following:

> 161. The Plaintiffs state that the Defendants have conspired together with a view to having Bergmann NA usurp RH20's position in the Canadian market place and with its customers and partners using wrongful and unlawful means, the particulars of which include the following:
>
> (a) The Defendants manufactured allegations of default of the Bergmann Licensing Agreement and the Click Licensing Contract so as to create the pretext to cancel them prematurely;
>
> (b) The Defendants knew or ought to have known that the bad faith termination of the Bergmann Licensing

> Agreement and the Click Licensing Contract as well as the bad faith termination of access to the Webviewer would interfere with RH20's ability to service its customers and partners thereby creating the opportunity for Bergmann NA to present itself to these same customers and partners as RH20's replacement in the marketplace;
>
> (c) The Defendants engaged in a scheme to solicit key employees away from RH20;
>
> (d) The Defendants misappropriated RH20's confidential information for Bergmann NA's use;
>
> (e) The Defendants induced Click to ignore its obligations to RH20 not to use its confidential customer information contained in the Webviewer. Instead Click utilized this confidential information to contact RH2O customers and partners and present themselves as the replacement for RH2O; and
>
> (f) The Defendants induced RH20 customers and partners already contracted with RH2O on projects to replace RH2O with Bergmann NA. [Emphasis added.]

[23] Apart from the reference to the "plaintiffs" in the opening words of the paragraph, the pleading contains no reference to Unit Precast, nor does the appellant's name appear in any of the pleaded particulars of the conspiracy. Given the absence of any such reference, it is not surprising that the motion judge struck out Unit Precast's conspiracy claim. As he stated at para. 53 of his reasons:

> To my mind, by failing to particularize any material facts to support an agreement between two or more of the defendants to injure Unit Precast as well as the acts done by each of the conspirators to achieve that end, the plaintiffs have failed to plead the essential elements of

> the tort of conspiracy on behalf of Unit Precast. Bald assertations that the defendants conspired with one another to do certain things intended to injure this plaintiff do not meet the required standard for a plea of conspiracy on behalf of Unit Precast.

[24] Unit Precast's attack on the motions judge's conclusion rests on its untenable assertion that the pleaded claim must be read as meaning RH20's business included that of Unit Precast. As stated earlier in these reasons, I see no merit in that position. Just like the other pleaded claims, the pleading of conspiracy identifies RH20 as the target of the defendants' allegedly unlawful activities and as the entity that suffered economic injuries as a result of those injuries. The appellant's submissions that (a) "there is no basis for distinguishing between the two plaintiffs" and (b) para. 161 should be read as identifying Unit Precast as one of the entities towards which the defendants directed their conduct, simply are not tenable on the pleading as drafted. In other words, the motion judge correctly concluded that the pleaded conspiracy claim against Unit Precast left the defendants "in the dark as to the case to be met": *PMC York Properties Inc. v. Siudak*, 2022 ONCA 635, 473 D.L.R. (4th) 136, at para. 40, leave to appeal refused, [2022] S.C.C.A. No. 407.

[25] Finally, Unit Precast contends the motion judge erred by declining to grant it leave to amend the struck claims. While leave to amend usually is denied only in clear cases, the motion judge explained, in some detail, why he would not grant Unit Precast leave to amend: at paras. 46-47 and 54. I see no error in the motion

judge's exercise of his discretion that would justify interfering with his decision: *RWDI Air Inc. v. N-SCI Technologies Inc.*, 2015 ONCA 817, at para. 14. The statement of claim was lengthy (52 pages and 175 paragraphs), prepared by counsel at a major law firm, and recounted a detailed claim by RH20 for wrongs done to it. The absence of similar detail for the claims asserted by Unit Precast strongly supports the motion judge's conclusion, at para. 46, that he had "no confidence that Unit Precast could improve its position by alleging further material facts to support its alleged causes of action."

[26] For these reasons, I would dismiss the appeal by Unit Precast.

CROSS-APPEAL BY CLICK OF THE DISMISSAL OF ITS STAY MOTION

The issue on the cross-appeal

[27] As mentioned, on the motion below Click sought two orders: (i) an order staying the action against it and referring the dispute to arbitration pursuant to s. 9 of the *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sch. 5 (the "*ICAA*") and art. 8 of the *Model Law on International Commercial Arbitration* (the "Model Law");[1] and (ii) together with the other Moving Defendants, an order seeking to strike out parts of the statement of claim. The motion judge dismissed Click's request for a stay of the court proceeding against it. Click appeals that

[1] United Nations. Commission on International Trade Law. *UNCITRAL Model Law on International Commercial Arbitration*, U.N. Doc. A/40/17 (1985), Ann. I, arts. 8, 16, being Schedule 2 to the *ICAA*.

dismissal, contending that the motion judge erred in failing to give effect to the arbitration agreement between it and RH20.

The facts and the motion judge's decision

[28] In November 2012, Click and RH20 entered into two agreements for the control panels used for the WSB wastewater systems: a Licence Contract and a General Agreement for Web Portal and GPRS Use (the "Web Portal Agreement").

[29] Section 21 of the Licence Contract contains an arbitration agreement that provides:

> All disputes arising in connection with this contract … shall be finally decided in accordance with the rules of the London Court of International Arbitration (LCIA Arbitration Rules) by exclusion of taking recourse to the courts of law. The place of the arbitration proceedings is London, U.K. The number of arbitrators is one … This contract is subject to the law of the Federal Republic of Germany.

[30] The final clause of the Web Portal Agreement states:

> The exclusive place of jurisdiction for any disputes about the accrual and termination of this Contract and all rights and obligations under this Contract shall be Kuhlenfeld [Germany].

[31] In his reasons, the motion judge made several findings about the arbitration agreement contained in the Licence Contract:

- The arbitration referenced in the Licence Contract is an international arbitration governed by the *ICAA* and the Model Law;

- The parties agreed that art. 8(1) of the Model Law applied to Click's request for a stay. Art. 8(1) of the Model Law states:

> 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]

- The provisions of the arbitration agreement applied to all disputes between RH20 and Click, including all the tenable causes of action pled against Click in the statement of claim.[3]

[32] While the motion judge commented that "the nature of the claims favours arbitration", he dismissed Click's motion for a stay for three main reasons:

1. He held that the arbitration agreement in the Licence Contract conflicted with the choice of forum clause in the Web Portal Agreement, with the result that the arbitration agreement was "incapable of being performed" within the meaning of Art. 8(1) of the Model Law.

[2] Section 9 of the *ICAA* states: "Where, pursuant to art. II (3) of the Convention or article 8 of the Model 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."

[3] It was unnecessary for the motion judge to make such a definitive finding. It went beyond the proper bounds of the application of the competence-competence principle since, under Canadian jurisprudence, a party requesting a stay of court proceedings in favour of arbitration need only establish an "arguable case" that the court proceedings are in respect of a matter that the parties agreed to submit to arbitration: *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41, 475 D.L.R. (4th) 1, at para. 84.

Consequently, the court was not required to refer the parties to arbitration: at para. 70;

2. "Strong cause" existed to reject the forum selection clause in the Web Portal Agreement since the multiple agreements between the parties contained conflicting clauses designating different jurisdictions for dispute resolution: at paras. 72-74; and

3. By joining the other Moving Defendants in seeking an order to strike out certain of the plaintiffs' claims, Click took a step to invoke the jurisdiction of the court. Participating in such a motion was equivalent to waiving the agreement to arbitrate. As a result, the arbitration agreement was "inoperative" within the meaning of art. 8(1) of the Model Law. By bringing a motion to strike out pleadings along with its request for a stay, Click gave the court consent-based jurisdiction. Consequently, the court was not required to stay the court proceeding: at paras. 75 and 81.

[33] Click argues that each finding is tainted by reversible error.

[34] In my view, the motion judge did not err in refusing to grant Click's stay request. I see no need to examine whether the motion judge erred in his first and second reasons for refusing a stay since I agree with the core conclusion in his third reason: namely, that Click's participation in the motion to strike out certain claims was equivalent to waiving the agreement to arbitrate, thereby rendering the

arbitration agreement “inoperative” within the meaning of art. 8(1) of the Model Law. That was a sufficient basis upon which to refuse Click’s stay request.

[35] My explanation of that conclusion contains four parts:

- First, in *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41, 475 D.L.R. (4th) 1, the Supreme Court of Canada described the fourth “technical requirement” for a stay of a court proceeding in favour of arbitration as requesting a stay before taking any “step” in court proceedings. I will explain why I regard that requirement as reflecting a common conceptual element shared by most Canadian domestic and international commercial arbitration regimes: namely, that parties to an arbitration agreement must abide by a negative obligation not to seek the resolution of disputes subject to an arbitration agreement in domestic courts;
- Second, art. 8(1) of the Model Law gives effect to that negative obligation of the parties;
- Third, the motion judge correctly treated Click’s motion to strike certain of the plaintiffs’ claims as breaching its negative obligation under the arbitration agreement in the Licence Contract. That breach amounted to a waiver of its right to arbitrate; and
- Fourth, Click’s waiver of its right to arbitrate rendered the arbitration agreement “inoperative”, within the meaning of art. 8(1) of the Model Law, in regard to the dispute between the parties.

The *Peace River* decision

[36] By the time the motion judge heard the motion for a stay, the Supreme Court of Canada had released its decision in *Peace River*. In that case, the Supreme Court described two general components to the stay provisions in provincial arbitration legislation, which this court summarized in *Husky Food Importers & Distributors Ltd. v. JH Whittaker & Sons Limited*, 2023 ONCA 260, at paras. 23-25:

> [In *Peace River*] the Supreme Court identified two general components common to stay provisions in provincial arbitration legislation: (i) the technical prerequisites for a mandatory stay of court proceedings; and (ii) the statutory exceptions to a mandatory stay of court proceedings. The applicant for a stay must establish the technical prerequisites "on the applicable standard of proof"; if the applicant does so, the party seeking to avoid arbitration then must show that one of the statutory exceptions applies, such that a stay should be refused: at paras. 76-79.
>
> The technical prerequisites concern whether the stay applicant has established the arbitration agreement engages the mandatory stay provisions. As the Supreme Court observed in *Peace River*, at para. 83, provincial arbitration legislation typically contains four relevant technical prerequisites:
>
> > (a) an arbitration agreement exists;
> >
> > (b) court proceedings have been commenced by a "party" to the arbitration agreement;
> >
> > (c) the court proceedings are in respect of a matter that the parties agreed to submit to arbitration; and

> (d) the party applying for a stay in favour of arbitration does so before taking any "step" in the court proceedings.
>
> If all the technical prerequisites are met, the mandatory stay provision is engaged. The court should then move on to the second component of the analysis, which concerns the statutory exceptions to granting a stay, such as whether an arbitration agreement is "void, inoperative or incapable of being performed".

[37] As the Supreme Court noted in *Peace River*, at para. 77, the two general components are "interrelated" but ought to remain analytically distinct.

[38] The appeal in the *Peace River* case considered the application of provincial domestic arbitration legislation, specifically the pre-2020 version of the British Columbia arbitration legislation, the *Arbitration Act*, R.S.B.C. 1996, c. 55.[4] That legislation contained a stay provision containing language similar to that found in art. 8(1) of the Model Law but that also expressly referred to the effect of a party to an arbitration agreement taking a "step" in a court proceeding. Sections 15(1) and (2) of the old British Columbia act stated:

> 15(1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may apply, before filing a response to civil claim or a response to family claim or taking any other step in the proceedings, to that court to stay the legal proceedings.

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[4] That act was replaced by S.B.C. 2020, c. 2.

> (2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed. [Emphasis added].

[39] By the time the Supreme Court heard submissions in the *Peace River* case, new provincial arbitration legislation had been enacted in British Columbia: the *Arbitration Act*, S.B.C. 2020, c. 2. The stay provision in the new legislation tracked much of the language found in the former statute but dropped the express reference to a "step" in the court proceeding. Sections 7(1) and (2) of the new Act provide:

> 7(1) If a party commences legal proceedings in a court in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may, before submitting the party's first response on the substance of the dispute, apply to that court to stay the legal proceedings.
>
> (2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.

[40] At the time of the hearing of the *Peace River* case, Ontario's domestic arbitration legislation also did not contain any language about the effect on the availability of a stay by a party to an arbitration agreement taking a further "step"

in the court proceeding.[5] Nor did Alberta's domestic arbitration act, the language of which is very similar to that of the Ontario act.[6]

[41] I refer to this legislative history of the British Columbia *Arbitration Act* and the content of stay provisions in other major provincial domestic arbitration legislation to make a simple point. Although the appeal in *Peace River* involved arbitration legislation whose stay provision included the language of "taking any other step in the proceedings", the Supreme Court's identification of a two-part framework for stays of court proceedings in favour of arbitration did not turn on such statutory "step" language. As I read *Peace River*, the court's general description of "the technical prerequisites for a mandatory stay of court proceedings" in "stay provisions in provincial arbitration legislation across the country" reflected conceptual elements common to most Canadian arbitration

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[5] Section 7 of the *Arbitration Act, 1991*, S.O. 1991, c. 17, provides, in part, as follows:

> 7 (1) 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.
>
> (2) However, the court may refuse to stay the proceeding in any of the following cases:
> 1. A party entered into the arbitration agreement while under a legal incapacity.
> 2. The arbitration agreement is invalid.
> 3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.
> 4. The motion was brought with undue delay.
> 5. The matter is a proper one for default or summary judgment.

[6] *Arbitration Act*, R.S.A. 2000, c. A-43, s. 7.

legislation. As I shall explain shortly, those conceptual elements include the negative obligation of parties to an arbitration agreement not to seek the resolution of disputes subject to an arbitration agreement in domestic courts.

[42] That negative obligation is also a common conceptual element shared by most provincial domestic arbitration legislation and provincial legislation that has adopted the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Can. T.S. 1986 No. 43, (the "New York Convention")[7] and Model Law for international commercial arbitration agreement disputes. That conceptual commonality underpinned this court's decision in *Husky Foods* to apply the *Peace River* framework to stays sought under s. 9 of the *ICAA* and art. 8(1) of the Model Law in respect of international commercial arbitration agreements.

[43] The appeal in *Husky Foods* did not raise the issue that is central to this appeal: whether the party requesting a stay had waived its right to arbitration by taking a step in the court proceeding other than challenging the court's jurisdiction to hear the dispute. Instead, *Husky Foods* involved the issue of whether an arbitration agreement existed and, more specifically, the standard of proof applicable to establishing the technical prerequisites for a mandatory stay: at paras. 28-35. Accordingly, the present case requires a further consideration of how to apply *Peace River*'s two-step framework to international arbitration agreements

[7] Schedule 1 to the *ICAA*.

under the *ICAA* in circumstances where it is argued that a stay should be denied because the requesting party took a "step" in the court proceeding.

Art. 8 of the Model Law and the negative obligation of a party to an international arbitration agreement

[44] In this case, the availability of a stay of court proceedings in favour of arbitration is controlled by art. II(3) of the New York Convention, art. 8(1) of the Model Law, and s. 9 of the *ICAA*:

- Art. II(3) of the New York Convention reads:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

- Art. 8(1) of the Model Law was set out in para. 33 above of these reasons; and

- Section 9 of the *ICAA* states:

> Where, pursuant to article II (3) of the Convention or article 8 of the Model 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.

[45] Arbitration agreements have both positive and negative effects on parties. The positive effects include the obligation to participate and cooperate in good faith in the arbitration of disputes pursuant to the parties' arbitration agreement; the

negative effects include the obligation not to seek the resolution of such disputes in national courts: Gary B. Born, *International Commercial Arbitration*, 3rd ed., at p. 1349.[8] The negative obligations imposed by an agreement to arbitrate have their source in the parties' agreement. As Born explains in his treatise, at p. 1368: "The scope of this aspect of the negative obligation not to litigate arbitrable disputes is generally the mirror image of the scope of the positive obligation to arbitration: put simply, disputes which must be arbitrated, may not be litigated."

[46] One consequence of a party to an arbitration agreement breaching its negative obligation was described by Smutny, McDougall and Daly in *A Practical Guide to International Arbitration*:

> Most people think of the negative obligations first. In particular, parties to a valid arbitration agreement are *prohibited* from trying to resolve any disputes falling under the agreement in court or by any means other than arbitration. One of the cornerstones of international arbitration is exclusivity. A valid arbitration agreement designates the arbitral tribunal as the one and only forum to resolve any disputes arising out of that agreement. This means that parties bound to arbitrate also thereby agree to waive their rights to litigate disputes in a national court.
>
> …
>
> A party can waive the right to compel arbitration. This usually happens when that party fails to invoke its rights under the arbitration agreement or acquiesces to

[8] Gary B. Born, *International Commercial Arbitration*, vol. I, 3rd ed. (Alphen aan den Rijn: Kluwer Law International, 2021).

> litigation concerning matters subject to arbitration — for example, by participating in the litigation beyond raising threshold jurisdictional objections."[9] [Emphasis in original].

[47] Where parties have agreed to submit disputes to arbitration, provisions in the New York Convention and the Model Law recognize and enforce the negative effects of an agreement by requiring either the stay of national court litigation of arbitrable disputes or the dismissal of such litigation. Art. 8(1) of the Model Law reflects such a policy. To repeat, that article states:

> 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.

[48] As Born writes, at p. 1369:

> Article 8(1) of the UNCITRAL Model Law is representative of national arbitration legislation's treatment of the negative effects of an arbitration agreement ... Article 8(1) imposes an obligation identical to that in Article II of the New York Convention, requiring that courts "refer the parties to arbitration." <u>This provision impliedly precludes a national court from entertaining a dispute on the merits, if the parties have agreed to arbitrate it</u>, and instead requires that the parties be referred to arbitration. [Emphasis added.]

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[9] Abby Cohen Smutny, Andrew de Lotbinière McDougall and Michael P. Daly, *A Practical Guide to International Arbitration* (U.S.A.: JurisNet, 2020), at pp. 75 and 86.

[49] At p. 1371, Born explains the basis underlying the policy given effect by art. 8(1) of the Model Law:

> [T]he predicate of this approach is that parties to arbitration agreements are themselves mandatorily prohibited from litigating arbitrable disputes. Efforts to do so, by pursuing litigation of arbitrable disputes, are *per se* violations of a party's negative obligation not to litigate disputes that are subject to arbitration. Just as the obligations of national courts, under the Convention and Model Law are mandatory, so the obligations of parties under their agreements to arbitrate are mandatory. [Emphasis added].[10]

[50] A court considering a party's request for a stay under art. 8 of the Model Law therefore must assess two timing-related matters: (i) whether the party has requested a court to refer the parties to arbitration "not later than when submitting his first statement on the substance of the dispute"; and (ii) whether, before making that request, the party had sought assistance from the court on the substantive claims asserted against it.

[51] As to the timing of the request for a stay, in his commentary on art. 8(1) of the Model Law, Professor Gilles Cuniberti writes that "[b]eyond this time, a request for reference to arbitration would be inadmissible and the court may continue its

[10] Born continues, at p. 1372, by stating: "Although arbitration clauses typically do not provide expressly that 'all disputes shall be resolved by arbitration, *to the exclusion of national courts*,' this negative obligation is the undisputed meaning of virtually all international arbitration agreements." [Emphasis in original.]

proceedings." [11] A late request would be inadmissible as its timing would signal that the requesting party had not adhered to its fundamental negative obligation not to litigate disputes that are subject to litigation.

[52] In the present case, Click satisfied that aspect of the timing requirement of art. 8(1) of the Model Law as it made its request for a stay before it had filed a statement or pleading in response to the statement of claim.[12]

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[11] Gilles Cuniberti, *The UNCITRAL Model Law on International Commercial Arbitration: A Commentary* (Cheltenham, UK: Edward Elgar, 2022), at §8.08.

The commentary on art. 8 of the Model Law in the Analytical Commentary contained in the report of the Secretary General to the 18th Session of the United Nations Commission on International Trade Law picks up on this point. Sections 3 and 4 of that commentary were reproduced in the Divisional Court's decision in *ABN Amro Bank Canada v. Krupp Mak Maschinenbau GmbH* (1996), 135 D.L.R. (4th) 130, at para. 13:

With respect to art. 8, the commentary reads:

> 3. As under the 1958 New York Convention, the court would refer the parties to arbitration, i.e. decline (the exercise of its) jurisdiction, only upon request by a party and, thus, not on its own motion. A time element has been added that the request be made at the latest with or in the first statement on the substance of the dispute. It is submitted that this point of time should be taken literally and applied uniformly in all legal systems, including those which normally regard such a request as a procedural plea to be raised at an earlier stage than any pleadings on substance.
>
> 4. As regards the effect of a party's failure to invoke the arbitration agreement by way of such timely request, it seems clear that article 8(1) prevents that party from invoking the agreement during the subsequent phases of the court proceedings. It may be noted that the Working Group, despite the wide support for the view that the failure of the party should preclude reliance on the agreement also in other proceedings or contexts, decided not to incorporate a provision of such general effect because it would be impossible to devise a simple rule which would satisfactorily deal with all the aspects of this complex issue. [Emphasis added].

[12] In the arbitration context, a "statement" takes the form of some record that identifies the matters in issue between the parties and the relief sought: J. Brian Casey, *Arbitration Law of Canada: Practice and Procedure,* Fourth Edition (Huntington, New York: Juris Publishing, 2022), at p. 240. In *ABN Ambro*, at para. 14, the Divisional Court treated a party's statement of defence and counterclaim as a "statement on the substance of the dispute" for the purposes of art. 8 of the Model Law.

[53] However, a court assessing a request for a stay under art. 8(1) of the Model Law must also consider whether the requesting party had sought the court's assistance on the substantive claim before requesting a stay in favour of arbitration, thereby ignoring its fundamental obligation not to pursue in court the resolution of disputes that are subject to arbitration. As put by David St. John Sutton, Judith Gill & Matthew Gearing in *Russell on Arbitration*, 24th ed. (London: Thomson Reuters, 2015), at §7-028, if the requesting party accepts "the court's jurisdiction to hear the substantive case he is treated as electing to have the matter dealt with by the court rather than insisting on his contractual right to arbitrate."

[54] Alexander M. Gay, Associate Justice Alexandre Kaufman & James Plotkin, in their *Arbitration Legislation of Ontario: A Commentary*, 4th ed., (Toronto: Thomson Reuters, 2023) at pp. 974-75, identify some the principles that have emerged from the jurisprudence on this aspect of art. 8(1) of the Model Law:

> Failure to comply with the requirement of art. 8(1) may result in a loss of a party's right to invoke the arbitration agreement … The request for arbitration may be made in pleadings provided these pleadings are the first statement on the substance of the dispute … In determining whether a defendant has lost its right to have the dispute arbitrated, a court may consider whether a defendant has served pleadings which are incompatible with reliance on the arbitration process. <u>The filing of a statement of defence and seeking the court's intervention to dismiss a plaintiff's claim will result in a defendant losing his right to have the dispute arbitrated</u>. [Emphasis added].

The characterization of Click's motion to strike out claims

[55] In the present case, Click did not bring a stand-alone motion to stay the court proceeding against it. Instead, Click joined the other Moving Defendants in bringing one motion that included a request by all Moving Defendants, including Click, to strike out certain of the plaintiffs' claims against them.

[56] The motion judge concluded that, by joining the request to strike out parts of the statement of claim, Click did "far more than [seek] a procedural foundation for the jurisdictional challenge". Instead, by joining the motion to strike, Click sought "substantive relief" and "should not be entitled to the benefit of the litigation process while also preserving its ability to reject that same process in favour of arbitration".

[57] I agree with that characterization by the motion judge. In my view, the motion to strike that Click joined cannot be characterized as a procedural step taken within the confines of the "jurisdictional" motion to stay the court proceeding in favour of arbitration: *Fraser v. 4358376 Canada Inc.*, 2014 ONCA 553, 376 D.L.R. (4th) 295, at para. 9. Instead, Click, together with other Moving Defendants, sought to reduce their exposure to liability by asking the court to dismiss part of the plaintiffs' substantive claims as disclosing, at law, no reasonable cause of action; or, in the words of the Supreme Court in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42,

[2011] 3 S.C.R. 45, at para. 19, to weed out the plaintiffs' "hopeless claims."[13] That was a request for the Ontario court to render a final determination on the merits of part of the proceeding in their favour.

[58] The motion judge properly treated Click's request that the court dismiss some of the plaintiffs' substantive claims as disclosing no reasonable cause of action as, in its effect, an election by Click to have some of the substantive claims against it dealt with by the court. By making such a request for substantive judicial relief, Click breached its negative obligation under the arbitration agreement not to litigate arbitrable disputes in the courts. Click thereby waived its right to arbitrate.

[59] I would observe that it was not necessary for Click to ask for the assistance of an Ontario court to reduce the extent of the claims against it in order to seek a reference to arbitration under the Model Law. The *London Court of International Arbitration Rules*[14] that govern the arbitration under the Licence Contract would have provided Click with an opportunity to argue that some claims were "manifestly

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[13] I am not persuaded by the characterization made by the motion judge in *Conconi Developments Ltd. v. DR4 Developments Ltd.*, 2014 BCSC 1101, at para. 8, that an application to strike is merely a "step taken to negate or curtail litigation rather than one taken to affirm the litigation process for resolving the dispute." Nor am I persuaded by the comments of the motion judge in *Fathers of Confederation Buildings Trust et al. v. Pigott Construction Co. Ltd.* (1974), 44 D.L.R. (3d) 265 (P.E. S.C.), at p. 273, that an application to strike out a statement of claim merely constitutes an attempt by a defendant to "smother the action". A request to strike out a pleading under r. 21.01.(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, on the ground that it discloses no reasonable cause of action is a request by a party for the court to make a legal determination that will end some or all of the proceeding against the party.

[14] London Court of International Arbitration, "LCIA Arbitration Rules" (1 October 2020), art. 22.1(viii), online (pdf): <https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx>.

outside the jurisdiction of the Arbitral Tribunal" or "inadmissible or manifestly without merit".[15]

Technical prerequisite or statutory exception?

[60] How should one categorize a finding that a party to an international arbitration agreement breached its negative obligation not to seek the resolution of disputes arising under an arbitration agreement in national courts thereby waiving its right to arbitration? Does it amount to a breach of what the *Peace River* decision described as the fourth "technical prerequisite" that a party applying for a stay in favour of arbitration not take any "step" in the court proceeding before requesting a stay? Or, does it fall within the statutory exceptions to a mandatory stay of courts proceedings under art. 8(1) of the Model Law because the arbitration agreement "is null and void, inoperative or incapable of being performed"?

[61] Applying the *Peace River* framework to international commercial arbitration agreements requires adhering to the requirements of the *ICAA*, New York

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[15] Art. 22.1 (viii) of the *London Court of International Arbitration Rules 2020* provides:

> 22.1 The Arbitral Tribunal shall have the power, upon the application of any party or (save for sub-paragraph (x) below) upon its own initiative, but in either case only after giving the parties a reasonable opportunity to state their views and upon such terms (as to costs and otherwise) as the Arbitral Tribunal may decide:
> …
> (viii) to determine that any claim, defence, counterclaim, cross-claim, defence to counterclaim or defence to cross-claim is manifestly outside the jurisdiction of the Arbitral Tribunal, or is inadmissible or manifestly without merit; and where appropriate to issue an order or award to that effect (an "Early Determination").

Convention, and Model Law. Born's commentary on art. 8(1) of the Model Law suggests that Click's participation in the motion to strike amounted to a breach of the negative obligation not to litigate arbitrable disputes. Born writes that the "obligation not to litigate disputes that are subject to arbitration is expansive and applies to all form of litigation of the merits of the parties' dispute."[16] In his view, "an arbitration agreement would be 'inoperative' where the parties actively pursued litigation, rather than arbitration, resulting in a waiver or abandonment of the right to arbitrate under applicable law."[17] He argues that "Article 8(1) is directed towards the waiver of the right to arbitrate a particular dispute (and not the termination or invalidity of the underlying arbitration agreement)".[18]

[62] I am persuaded by such reasoning. By seeking the judicial determination of a substantive, non-jurisdictional aspect of its dispute with RH20, Click waived its right to arbitrate the dispute thereby rendering the arbitration agreement in the Licence Contract "inoperative" within the meaning of art. 8(1) of the Model Law.[19]

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[16] Born, at p. 1373.
[17] Born, at p. 903.
[18] Born, at p. 1013. Born places two qualifiers on his view. At p. 1011 he writes: "As discussed above, waiver is also arguably encompassed within the Convention's reference to arbitration agreements that are 'inoperative'". Later, at p. 1015, Born states: "[D]espite the aspirations of the Model Law, the application of Article 8(1) 'may vary from one jurisdiction to another.'"

As well, in *Peace River* the Supreme Court observed, at paras. 138-39, that the term "inoperative" had no universal common law definition. However, in arbitration law "the term has been used to describe arbitration agreements which, although not void *ab initio*, 'have ceased for some reason to have future effect' or 'have become inapplicable to the parties and their dispute' …Possible reasons for finding an arbitration agreement inoperative include frustration, discharge by breach, waiver, or a subsequent agreement between the parties." [Emphasis added].

[19] Several international decisions treat a party's waiver of its right to arbitrate as rendering an arbitration agreement "inoperative" under art. 8(1) of the Model Law. See the cases discussed in *CSI Toronto Car Systems Installation Ltd. v. Pittasoft Co., Ltd.*, 2021 ONSC 5117, at paras. 26-31.

Accordingly, the motion judge did not err in refusing to grant Click a stay of the court proceeding under *ICAA* s. 9 and art. 8(1) of the Model Law.

[63] Given that conclusion, there is no need to address the additional issue raised by RH20 that the motion judge erred in concluding its claims fell within the arbitration agreement.

[64] For these reasons, I would dismiss Click's cross-appeal.

DISPOSITION

[65] For the reasons set out above, I would dismiss the appeal by Unit Precast, as well as Click's cross-appeal.

[66] Since I would dismiss both the appeal and cross-appeal, I would not order any costs of the appeal and cross-appeal.

Released: June 5, 2024 "E.E.G."

"David Brown J.A."
"I agree. E.E. Gillese J.A."
"I agree. David M. Paciocco J.A."