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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

DALBIR BAINS and 10031670 MANITOBA LTD.,	)	Peter Halamandaris
	)	Lauren Gergely
	)	for the Plaintiffs
Plaintiffs,	)	
	)	
- and -	)	
	)	
JAMES TWOREK, CANDELLA CAPITAL INC., JOSH SCHUMANN, JOSH SCHUMANN FAMILY CORPORATION, INC., AARON SHAPIRO, THE SHAPIRO LAW FIRM, LLC, RORY LOADER, and SORTEPAX HOLDINGS LIMITED,	)	Jonathan M. Woolley
	)	Jarrod Sundmark
	)	for the Defendants
	)	Rory Loader
	)	Sortepax Holdings Limited
	)	
	)	
Defendants.	)	
	)	JUDGMENT DELIVERED:
	)	July 18, 2024

McKELVEY J.

I. INTRODUCTION

[1] This matter deals with two related actions, CI 20-01-28774 (the "First Action") and CI 21-01-31173 (the "Second Action"). The First Action was commenced by the plaintiffs on October 20, 2020, against the named defendants who include Rory Loader ("Loader") and Sortepax Holdings Limited ("Sortepax") (collectively, "Loader defendants"). The plaintiffs, Dalbir Bains ("Bains") and

10031670 Manitoba Ltd. ("1003") have brought the First Action against the defendants based on allegations of conspiracy, fraud, deceit, fraudulent misrepresentations and other torts related to failed financial transactions. The torts, which are alleged to have been orchestrated by all the defendants, are contended to have induced the plaintiffs' participation in financial dealings that did not come to fruition (approximately $1,000,000 Canadian).

[2] The Second Action was brought against Bains and his wife as a consequence of a failed home purchase when funds were not forthcoming as promised by the defendants under the First Action. The Second Action is based on a breach of contract for failure to pay the entire sale proceeds on the home purchase. On July 16, 2021, Bains and his wife caused a third party claim to be filed against the same defendants as exist in the First Action and others seeking contribution and indemnity.

[3] The Loader defendants have brought motions seeking an order to stay the proceedings against them on the grounds of a lack of jurisdiction, or, in the alternative, based on the doctrine of *forum non conveniens* in both the Actions based upon virtually identical material filed in support.

[4] Counsel, in their submissions, focused on the motion to stay the First Action on the express understanding that the issues and decisions of this court will apply equally to the motion to stay the Second Action. Accordingly, the use of the term 'plaintiffs' throughout this decision relates only to Bains and 1003.

[5] The matter is before the Court of King's Bench at the direction of the Manitoba Court of Appeal (2023 MBCA 102 and 2024 MBCA 12):

> [20] As the motion judge failed to make the required findings of fact, to discuss or review the principles related to the tests that he was bound to apply, or to weigh the factors relevant to the issue of jurisdiction *simpliciter* in this case, this Court is not able to carry out its role of considering the issues on appeal through the deferential lens of reviewing the exercise of discretion by the motion judge. For these reasons, the appeals were granted and the motions are to be returned to the trial court for a new hearing before a different judge. (2023 MBCA 102)

The Court of Appeal also directed that the "… new hearing will include the issues of jurisdiction *simpliciter*, the doctrine of *forum non conveniens* and the effect of the arbitration clause…" (2024 MBCA 12, para. 9). Consequently, it is those three issues that will be addressed, accompanied by a review of the facts which have brought these issues before the court.

[6] This court has a broad power to stay proceedings pursuant to ***The Court of King's Bench Act***, C.C.S.M., c. C 280, s. 38, "on such terms as are considered just". Further, Court of King's Bench Rules 17.06 and 21.01(3) and (4) also deal with the power to stay a proceeding.

II. BACKGROUND

[7] The Loader defendants have brought the stay motions on the basis that:

(a) this court lacks jurisdiction over the subject matter of the actions;

(b) the parties agreed to resolve all claims or controversies through arbitration; or

(c) Manitoba is not the proper forum for the hearing of this matter and the doctrine of *forum non conveniens* is applicable.

[8] This litigation involves complex financial dealings and transactions that includes numerous parties located around the world. The Loader defendants, along with the plaintiffs in the First Action, are the only signatories to the two relevant Agreements in question. The plaintiffs allege they have suffered losses and damages based upon the torts of fraudulent misrepresentation, conspiracy, breach of fiduciary duty, and/or knowing assistance, unjust enrichment, and deceit. These allegations relate to the plaintiffs' participation in syndicated financial transactions at the behest of all the defendants. The nature of the transactions in question can be briefly summarized along with the more pertinent facts (detailed accounts of the transactions are well outlined in the parties' filed briefs, but it is unnecessary to fully recount those details for the purposes of this decision):

- in December 2018, Bains began discussions with James Tworek ("Tworek"), an investment consultant, advisor and broker residing in Alberta. The purpose of this consultation was to facilitate Bains raising capital to develop an investment fund for private healthcare projects with which he was involved;
- the other defendants occupied various roles and capacities with respect to this investment fund, which ultimately resulted in contact amongst Bains, Josh Schumann ("Schumann"), and Loader in January 2019. Schumann resides in New York, USA, and is a financial investment broker. Bains met Schumann through Tworek.

Schumann contacted Loader for the purpose of discussing alternative financing solutions ("AFS") on behalf of Bains. These transactions were described as the monetization of standby letters of credit ("SBLC"). There were discussions between the parties as to the appropriateness, likely success, validity, and legality of an AFS;

- an SBLC allows parties to participate in the hypothecation of financial instruments issued between large financial institutions. In this case, Sortepax was said to have the ability to arrange syndicates to participate in such transactions. These transactions usually take place in Europe and/or Asia;
- Tworek advised Bains to incorporate 1003 as the vehicle to receive the monetization proceeds of the investment transactions;
- Bains was told to fund the monetization of a loan by way of a deposit, after which the amount of the deposit would ultimately be received back along with a significant percentage of the monetized proceeds. This would result in 1003 being in receipt of millions of dollars;
- the plaintiffs were at all times resident and situated in the Province of Manitoba, while Tworek resided in Calgary, Alberta; Schumann resided in New York City; Loader resided in South Africa; and,

Sortepax, located in the Republic of Seychelles, was incorporated by Loader, who acted as its CEO;

- Schumann and Bains entered into a SBLC "Leasing Agreement" on February 5, 2019. This preceded Bains's deposit of funds with Schumann who was to facilitate a SBLC through Loader/Sortepax. There were additional elements and others involved in these transactions;
- two separate loan agreements were then entered into by Bains/1003 with Loader/Sortepax to monetize the SBLC. These Agreements were signed by Loader on behalf of Sortepax in South Africa and Bains on behalf of 1003 in Manitoba. The first Agreement entitled "Private Non-Recourse Loan Deed of Agreement on Monetization of Standby Letter of Credit Swift MT760" was executed on March 14, 2019. The provider was 1003, represented by Bains with the receiver/monetizer being Sortepax Capital. The provider and the receiver/monetizer were identical for the second "Private Non-Recourse Loan Deed of Agreement on Monetization of Standby Letter of Credit Swift MT760" dated April 2, 2019. These agreements each contained two arbitration clauses;
- Loader prepared and executed the Agreements on behalf of Sortepax in South Africa and then sent them to Schumann in New York who forwarded them to Bains in Winnipeg. Bains signed the

documents in this city. The Agreements were subsequently returned electronically to Sortepax by Schumann;

- the registered corporate address for 1003 was in the City of Winnipeg, while the company address for Sortepax was in the Seychelles;
- the issuing banks for the first Agreement were located in Hong Kong and Guangxi, China. The issuing banks for the second Agreement was the Barclays Bank in the United Kingdom, as well as the Hong Kong and Shanghai Banking Corporation;
- Bains forwarded all necessary funds from Manitoba, as directed, through his Winnipeg based legal counsel, and signed all relevant documents in this province;
- the Loader defendants have never resided or carried on business in Manitoba. All agreements, on behalf of Sortepax, were executed by Loader in South Africa and forwarded to Schumann, in New York, who sent them to Bains for execution;
- the monies to be provided to Bains and 1003, in accordance with the SBLC Agreements, was never received by them.

There are many additional details as regards the transactions and dealings between all the parties, but the more salient points have been outlined.

III. **JURISDICTION *SIMPLICITER***

[9] The Manitoba Court of Appeal in ***Bains et al v. Loader et al,*** 2023 MBCA 102, held:

> [13] Determining jurisdiction *simpliciter* is a two-step process. First, the court must determine whether the existence of a recognized presumptive connecting factor has been established. If so, the court must consider whether the party challenging the assumption of jurisdiction (here, the Loader defendants) have successfully rebutted the presumption by establishing that there is no real and substantial connection between the chosen forum and the subject matter of the litigation. (See *Haaretz* at para 34).
>
> [14] *Presumptive Connecting Factors*: Of the four presumptive connecting factors set out in *Haaretz* (see para 36), the Bains plaintiffs are relying on the presumptive factor that a court has jurisdiction where the alleged torts were committed in Manitoba. Determining whether this presumptive factor has been established involves questions of fact and mixed fact and law.
>
> [15] *Rebutting the Presumption*: If a court finds that one or more presumptive connecting factors have been established, it has to determine whether that presumption has been rebutted. As explained in *Haaretz*, "presumptive connecting factors must not give rise to an irrebuttable presumption of jurisdiction" and a "defendant may argue that a given connection is inappropriate in the circumstances of a particular case" (at para 42). This was explained by LeBel J, for the Supreme Court, in *Club Resorts Ltd v Van Breda*, 2012 SCC 17 (at para 95):
>
> > . . . [The defendant] must establish facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them.
>
> See also para 81.
>
> [16] Finally, *Haaretz* also states (at para 44):
>
> > . . . While it is not appropriate to propose an exhaustive list of factors that can rebut the presumption of jurisdiction in these types of cases, it is not difficult to imagine circumstances in which it would not be reasonable to expect that the defendant would be called to answer a legal proceeding in a chosen forum. . . .

> [17] The factual and discretionary nature of the test is confirmed in Abrams (at sections 9.85-9.86):
>
> > The exact limits of what constitutes a reasonable assumption of jurisdiction cannot be defined. The principles followed in earlier cases should not be rigidly applied, since no court can anticipate all of the unique features that may be associated with all future cases. The real and substantial connection test is not meant to be a rigid test. . . . The assumption of, and the discretion not to exercise, jurisdiction must ultimately be guided by the requirements of order and fairness, as opposed to a mechanical counting of contacts or connections. . . .
> >
> > . . . The real and substantial connection test involves a fact-specific inquiry, which rests upon legal principles of general application. . . .
>
> [footnotes omitted in original]

[10] In the event the plaintiffs are able to establish that a tort or torts were committed in Manitoba, jurisdiction would appropriately rest in this province. As was said in ***Martens et al v. Barnhardt et al***, 2021 MBQB 92:

> [33] The decision in ***Meeking*** continues to review the ***Van Breda*** principles:
>
> > [74] Where an action falls within one of the existing presumptive connecting factors or a new one recognized by the court, "the court might presume, absent indications to the contrary, that the claim is properly before it under the conflicts rules and that it is acting within the limits of its constitutional jurisdiction" (at para. 80). And further, where "a recognized presumptive connecting factor does apply, the court should assume that it is properly seized of the subject matter of the litigation" (at para. 94). These factors being only presumptive, of course, it is always open to the party challenging the jurisdiction of the court to establish that the presumptive connecting factor does not point to any real relationship between the subject matter and the litigation (see paras. 95-100).

It is unnecessary to decide at this time whether the alleged facts in support of the plaintiffs' tort allegations can be proven on a balance of probabilities at trial.

[11] The initial Court of Appeal decision as regards this matter (2023 MBCA 102) held:

> [4] In Linda S Abrams & Kevin P McGuinness, *Canadian Civil Procedure Law*, 2nd ed (Markham: LexisNexis, 2010), jurisdiction is explained as follows (at sections 2.13-2.14):
>
> > In the context of the law of civil procedure, jurisdiction is the power or authority of a court to take cognizance of a matter put before it, to decide that matter and to enforce its decision. The jurisdiction that a court possesses is a matter of law. . . .
>
> A court may not act where it lacks jurisdiction, and any decision, order or judgment given by a court that lacks jurisdiction may be declared a nullity, and may be restrained by judicial review in the case of an inferior court. . . .
>
> [5] When jurisdiction is challenged, that issue must be determined before the court has any authority to take any further steps in the matter. (See CED 4th, *Conflict of Laws*, "Jurisdiction of the Courts" at §§4-6 (September 2023).)

Jurisdiction is determined through the statute by which the court is constituted.

[12] The relevant jurisdictional test, as set out in ***Club Resorts Ltd. v. Van Breda,*** 2012 SCC 17 ("***Van Breda***") is:

1. Does the court have presumptive jurisdiction?

2. Can the court's presumptive jurisdiction be rebutted?

[13] With respect to presumptive connecting factors that *prima facie* entitles a court to assume jurisdiction over a dispute, the court in ***Van Breda*** stated:

> [90] To recap, in a case concerning a tort, the following factors are presumptive connecting factors that, *prima facie*, entitle a court to assume jurisdiction over a dispute:
>
> (a) the defendant is domiciled or resident in the province;
> (b) the defendant carries on business in the province;
> (c) the tort was committed in the province; and
> (d) a contract connected with the dispute was made in the province.

There are further presumptive connecting factors which entitle a court to assume jurisdiction:

> [92] … All presumptive connecting factors generally point to a relationship between the subject matter of the litigation and the forum such that it would be reasonable to expect that the defendant would be called to answer legal proceedings in that forum…

[14] The onus is on the plaintiffs to firstly show that a presumptive connecting factor exists with Manitoba. If established, the Loader defendants have the opportunity to rebut the presumptive jurisdiction.

IV. POSITION OF THE LOADER DEFENDANTS

[15] The Loader defendants challenge the assertion that this court has jurisdiction based on the non-existence of a real and substantial connection between the subject matter of the litigation and Manitoba.

[16] They maintain that the plaintiffs cannot satisfy the ***Van Breda*** test, as presumptive connecting factors to Manitoba do not exist. This is in part because the Statement of Claim lacks particularity with respect to jurisdiction: ***Schreiber v. Mulroney***, [2007] 288 DLR (4^{th}) 661 at paras. 26 and 27. It is argued that a jurisdictional connection is not shown within the pleading, nor is there an evidentiary basis, including a consideration of the Bains affidavit, for suggesting that the torts occurred in Manitoba or have any connection with this province.

[17] I am satisfied that the Statement of Claim demonstrates sufficient particularity as regards jurisdiction after a considered review of the pleading. In the event the pleading was thought to be insufficient, a motion to strike could have

been entertained. The Statement of Claim recites specific particulars and facts of the alleged tortious conduct and where it transpired.

[18] The Loader defendants further assert that all parties, including all aspects of the transactional relationship with the Asian funders, with the exception of Bains and 1003, were located outside of Manitoba. They argue that the only possible jurisdictional connecting factor is that the plaintiffs reside in Manitoba. That said, the Agreements were not formed in Manitoba but, instead, were undertaken in the location where the Loader defendants received notice of acceptance from the plaintiffs after the Agreements were executed by Bains and returned to Loader in South Africa. At all material times, Sortepax was located in the Republic of the Seychelles with Loader residing in the Republic of South Africa: ***Eastern Power Limited. v. Azienda Comunale Energia Ambiente***, 1999 CanLII 3785 (ON CA) at para. 22. Further, the Loader defendants never carried on business or had a physical presence in Manitoba.

[19] The Loader defendants claim that no direct contact occurred between them and Bains/1003 until well after the signing of the Agreements. Any contact occurred in May 2019 and not before. That contact related to Bains's inquiries of Loader as to the status of the transactions, as delays in payments were transpiring. The Loader defendants denied involvement in any inducements to enter into a contractual relationship. This was stipulated in Loader's affidavit, affirmed January 27, 2022:

> 5. Prior to and at the time the Agreements were entered into, neither Sortepax nor I had any direct contact with either of the plaintiffs, and were

> not involved in any discussions with, or the making of any representations to the plaintiffs. The Agreements were electronically transmitted to Sortepax by Josh Schuman Family Corporation Inc. ("JSFC"), who had requested that Sortepax facilitate the sourcing, securing and monetisation of the financial instruments referenced in the Agreements. At all material times, I understood that JSFC operated out of New York City in the United States, Sortepax was located in the Seychelles, and I was located in South Africa.

In any event, they argue that none of the acts or omissions alleged in the Statement of Claim occurred in the Province of Manitoba. Accordingly, jurisdiction cannot be founded in this province. Further, the decision in ***Yip v. HSBC Holdings plc,*** 2018 ONCA 626 at paras. 27-30, warned against judicial overreach by virtue of an assumption of jurisdiction by a court.

[20] The Loader defendants acknowledge that if the first stage of the ***Van Breda*** test has been met, the onus shifts to them to rebut the jurisdictional presumption. The presumption is contended to be rebutted based upon the non-existence of a real and substantial connection between the subject matter of the litigation and the jurisdiction of Manitoba. At best, only a minor relationship could be said to exist. These torts, if committed by the defendants, are multi-jurisdictional in nature with only a minor relationship or connection to the Province of Manitoba. The Loader defendants rely on the ***Van Breda*** decision which held that, "… the presence of the plaintiff in the jurisdiction is not, on its own, a sufficient connecting factor…" (para. 86). Further, "[t]he use of damage sustained as a connecting factor may raise difficult issues" (para. 89). A mandatory stay of proceedings is sought by the Loader defendants.

V. POSITION OF THE PLAINTIFFS

[21] The plaintiffs maintain that the torts were committed in the Province of Manitoba - misrepresentations were received and acted upon in the province, contracts connected with the dispute were formed and signed in this province, and damages were suffered in this province. The plaintiffs rely on the decision in ***Blonde Ambition Investments Inc. v. Rjm Ventures LLC***, 2019 SKQB 275 ("***Blonde***"):

> [46] A court must undertake a balancing exercise to determine whether in the circumstances of the case another forum is more appropriate. That being said, the existence of an appropriate forum must be "clearly" established to displace the forum selected by the plaintiff and the doctrine of *forum non conveniens* is to be "applied exceptionally"...

[22] The plaintiffs submit that the torts are founded in the jurisdiction where the Loader defendants' and other defendants' representations were relied and acted upon; where the representations were received and where the harm was suffered – all in Manitoba. Manitoba is where Bains received the fraudulent misrepresentations and acted upon them by authorizing the funding of the deposits through his Manitoba-based financial institutions; this is where he received and signed the SBLC Loan Agreements before returning them to the others involved; and this is where the plaintiffs suffered harm, being the loss of the deposited funds and having a summary judgment noted against him and his wife in the Second Action related to the failed house purchase caused by reliance on receipt of expected funds through the SBLC Agreements.

VI. ANALYSIS

[23] It is necessary to determine firstly whether the plaintiffs have established a recognized presumptive connecting factor to this jurisdiction. Primary reliance is placed on the fact that Manitoba is argued to be where the alleged torts were committed and harm suffered.

[24] The real and substantial connection test is not one to be rigidly applied, but must be guided by what is reasonable and fair in the circumstances. As was held in ***Van Breda***, "[t]he *situs* of the tort is clearly an appropriate connecting factor…" (para. 88). It is also noteworthy that decisions such as ***Van Breda, Uber Technologies Inc. v. Heller***, 2020 SCC 16***,*** and ***Peace River Hydro Partners v. Petrowest Corp.***, 2022 SCC 41, do not deal with similar fact situations that involve allegations related to torts such as fraud. This, arguably, creates a varied factual *situs* situation than the scenario purported by the Loader defendants.

[25] There must be a relationship between the subject matter of the litigation and the forum to establish a presumptive connecting factor in order to resolve jurisdictional disputes. This must be established objectively in the circumstances. The decision in ***Martens et al*** (at paras. 51-55) articulates that a real and substantive connecting factor is where representations were made and received. There is no necessity at this juncture for an assessment as to whether the alleged facts and torts can be proven on a balance of probabilities at trial. In circumstances of negligent misrepresentation, jurisdiction is founded where the

consequences or impact of the torts are felt and where negligent misrepresentations are received and acted upon.

[26] With respect to the tort of conspiracy, the decision in ***Right Business Limited v. Affluent Public Limited,*** 2011 BCSC 783 found:

> [63] In terms of conspiracy, the courts have held that the tort occurs where the harm has occurred, regardless of where the wrongful act took place… Furthermore, once jurisdiction over any wrong, including conspiracy, is established, all defendants potentially liable to the plaintiff are properly joined in the action. This includes *ex juris* defendants who are alleged to be parties to a conspiracy.

A similar conclusion was reached in ***Ewert v. Höegh Autoliners AS***, 2020 BCCA 181, where the British Columbia Court of Appeal held that it is well established that, "… a conspiracy occurs in the jurisdiction where the harm is suffered regardless of where the wrongful conduct occurred" (para. 67).

[27] In this case, the plaintiffs have provided evidence in support of the allegations that misrepresentations were received by the plaintiffs from the Loader defendants in advance of the Agreements being entered into:

- Bains's affidavit, May 25, 2022:

  > 4. … BainsCorp and I had direct contact with Loader and LoaderCorp, they were involved in discussions with me and BainsCorp, and they made representations to me and to BainsCorp. As the facts are, I and BainsCorp had multiple telephone calls with Loader, LoaderCorp, and the other Fraud Conspirators regarding the SBLC Venture. For example, see the WhatsApp correspondence previously attached as Exhibit "C" regarding scheduling a conference call with Loader (personally and on behalf of LoaderCorp) and other Fraud Conspirators.

- in these circumstances, particularly given the amount of money involved, it would seem appropriate for Bains to have engaged in

some type of contact with the Loader defendants before entering into the substantive Agreements;

- the Agreements with Loader and Sortepax were signed by Bains in Winnipeg;
- Bains prepared a Q+A before entering into the transactions with answers provided by Schumann. Certain of the responses to Bains were admittedly provided by Loader through Schumann and Tworek (Loader's July 13, 2022 examination for discovery):

p. 133, Q. 123

> A. In March I may well have had conversations or communications with Dalbir through Schumann and Tworek. I was certainly aware of him from January, but when he started communicating properly during about, in or during May, where Dalbir and I started talking, by that stage he was texting me feedback on the transactions.

p. 58, Q. 175

> Q. Okay. So my question for you is, isn't it true that you provided the answers to the Q&A?
>
> A. It's quite possible, looking at them, yes, but not directly to Mr. Bains.

p. 58, Q. 176

> Q. No. No, you –
>
> A. So, yes, it's quite possible. These are the kind of questions that would get asked typically by the client and the precursor leading up to these, and these would be answers that I would give.

The decision in ***WS Leasing Ltd. v. Platinum Equipment Ltd.***, 2012 BCSC 558 stipulates that, "[a] defendant can be held liable for false statements to a third

party when the defendant is aware that the plaintiff will rely on them…" (para. 35).

[28] Bains and his wife purchased an expensive Winnipeg home based on reliance that substantial monies would be received through 1003 as a consequence of the SBLC Agreements. The funds were never received and, accordingly, damages were suffered in this jurisdiction, being a summary judgment against them. (The Second Action)

[29] It is unnecessary in the context of this decision to make determinations as to whether torts were committed and can be proven on a balance of probabilities. That said, I am satisfied that there are recognized presumptive connecting factors that apply, being the alleged commission of torts in the Province of Manitoba and that the Agreements connected with the dispute were signed by Bains on behalf of the plaintiffs in Manitoba after Loader had signed them on behalf of Sortepax in South Africa. The fact that the signing of the contract by Bains in this province constituted a connecting factor as regards "acceptance" is arguable (see ***Eastern Power***, para. 29). That said, Bains contends that he was in receipt of fraudulent misrepresentations in Manitoba and acted upon those misrepresentations in this province to his detriment. Further, to the plaintiffs' detriment, harm and damages were suffered in Manitoba.

[30] It is noteworthy that the courts in the cases of ***Martens et al***, ***Agrawest***, ***AWI v. BMA*** 2005 PESCTD 36 (CanLII), ***Sakab Saudi Holding Company v. Al Jabri***, 2021 ONSC 4443, and ***Blonde*** have all embraced findings of jurisdiction

over actions commenced by residents of their respective jurisdictions who were the alleged victims of fraudulent financial schemes perpetrated by defendants in other jurisdictions. I am satisfied that this dispute has a real and substantial connection to the Province of Manitoba, as being the *situs* of the torts and where harm was allegedly experienced.

[31] The tort of misrepresentation occurs where the misrepresentation is received and/or acted upon. If the plaintiffs' allegations are accepted, Manitoba is the presumptive forum. The tort of conspiracy is similarly positioned.

[32] The issue remains whether the Loader defendants can rebut the presumption of jurisdiction. They submit that the transactions went through parties in Alberta, U.S.A., South Africa, and the Seychelles, with the involvement of Asian and UK banking institutions. Accordingly, jurisdiction must be founded elsewhere, or through the jurisdictions named in the arbitration clauses. I am not satisfied that any of those jurisdictions constitute a more appropriate forum for the hearing of this litigation over the Manitoba courts. No other forum has stronger connecting factors.

[33] The plaintiffs have submitted an evidentiary basis to argue that Loader's representations were acted upon in Manitoba and harm suffered as a consequence. At all times, Loader was aware of the plaintiff's location, where the funds were coming from, where the Agreements were signed, and was in both direct and indirect communications with Bains through other named defendants. Whether that evidence can withstand the rigors of a court proceeding and

assessment on a balance of probabilities is a matter for another day. I am satisfied that proposed jurisdictions by the Loader defendants have a weak connection and, in all fairness, no other jurisdiction has stronger connecting factors. It is fair and reasonable to conclude that jurisdiction *simpliciter* rests in Manitoba and that the Loader defendants be required to answer these legal proceedings in this forum. I acknowledge that the Loader defendants are not domiciled or resident in the province, nor do they carry on business here. However, I have concluded that the Loader defendants have failed to counter the presumptive connecting factors of the torts commission occurring in Manitoba or the possibility that the contracts were made in Manitoba. Again, I make no conclusions as to whether the alleged torts can be proven at trial. Manitoba is the appropriate jurisdiction based on the foundation that the consequences and impacts of the allegations were suffered in this province. The plaintiffs received and acted upon the alleged misrepresentations in Manitoba with harm and damage being occasioned. Accordingly, presumptive connecting factors have been established. Additionally, a proper law clause was not utilized in these Agreements, which would have served to establish jurisdiction with certainty and clarity.

VII. ARBITRATION CLAUSES

[34] The Loader defendants contend a mandatory stay of proceedings is appropriate on the basis that the parties, in the two executed SBLC Agreements, determined that all claims or controversies would be resolved through an arbitration process.

[35] There are identical arbitration clauses contained in the two Agreements:

Arbitration Clause One:

> Any disputes arising from and related to this agreement shall be settled by the parties through friendly negotiations. If a dispute cannot be resolved through friendly negotiations within sixty (60) calendar days from the date the dispute arose, the relevant party may submit such dispute for arbitration in accordance with the arbitration rules of the International Chamber of Commerce E in Paris. The arbitration award shall be final and binding on the respective parties.

Arbitration Clause Two:

> Any controversy or claim arising out of or relating to this contract, which is not settled by the parties, shall be subject to binding arbitration. The verdict rendered by the panel of arbitrators shall be final and binding and may be enforced in any court of competent jurisdiction. The following procedures shall apply:
>
> (a) A written notice shall be sent (by registered mail at the postal address or through e-mail with return receipt requested) by the aggrieved party to the party in default, which shall include an explicit and detailed statement of the dispute. The party being served the notice shall have 15 (fifteen) business days to respond in writing and/or to cure the default. If the parties fail to resolve the dispute within the fifteen-business day period, the matter will be submitted to arbitration as follows.
>
> (b) The parties agree that any controversy or claim arising out of or relating to this by arbitration in accordance with the rules of conciliation and arbitration of the International Chamber of Commerce, Philadelphia, Pennsylvania per ICC document Y432-A and other applicable ICC documents. Arbitration proceedings shall be directed by three arbitrators, one appointed by each party and the third subsequently appointed by the first two arbitrators. The arbitrators for any arbitration proceeding referred to herein shall be chosen as follows:
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> 1. One shall be chosen by the party seeking arbitration;
> 2. One shall be chosen by the other party hereto; and
> 3. One shall be chosen by the two arbitrators selected hereunder.
>
> (c) The arbitrators to be chosen by the parties shall be chosen within 30 (thirty) days of the service of a demand for arbitration on any of the parties. If the two arbitrators appointed above shall not agree to the appointment of the third arbitrator to be appointed as provided herein, such third arbitrator shall be appointed jointly by the other two appointed arbitrators, subject to challenge by any party only by

reason of a conflict of interest. The parties agree to have the dispute arbitrated in accordance with said rules of arbitration. The arbitration proceedings shall be held in Hong Kong, Singapore, England or other location mutually agreed in writing by the parties. Failure to appear without a showing of good cause, shall entitle the other party to an award.

(d) The decision and award made by the arbitrators shall include the award of all costs and expenses including the attorney's fees and expenses, incurred by the aggrieved party as a result of the dispute. Any such award shall be paid to the prevailing party by the unsuccessful party within thirty (30) days after the award. In the event of circumvention, either directly or indirectly, or any other dispute arising out of, or relating to this contract, the aggrieved party shall be entitled to monetary compensation equal to the maximum fee, commission, remuneration, consideration, or benefit it would have received.

From such transaction, and such other damages and relief as may be deemed appropriate, the sum allowed, and relief granted shall [b]e paid and become due and payable within the thirty (30) day period required for the payment of fees and expenses, unless otherwise specified in the arbitration decision. Settlement upon an award shall be final, and may be entered in any court of competent jurisdiction.

All matters concerning arbitration and litigation of this agreement shall be conducted in English; and in all matters of interpretation and comprehension of this agreement and any documentation howsoever pertaining to it, the English language shall take precedence over all 0others.

In the unlikely event that the parties refuse the decision of the arbitration process a further procedure will be invoked in the London courts under the jurisdiction of the laws of England and Wales.

VIII. POSITION OF THE LOADER DEFENDANTS

[36] The Loader defendants submit that, as a consequence of the arbitration clauses in the Agreements, a mandatory stay of proceedings is required pursuant to s. 10 of ***The International Commercial Arbitration Act***, C.C.S.M. c. C151 ("***ICAA***"). The Model Law on International Commercial Arbitration is also referenced in Schedule B, Article 8, of the ***ICAA***: ***Cangene Corp. v. Octapharma AG,*** 2000 MBQB 111 (see also ***Automatic Systems Inc. v.***

Bracknell Corp, 27 C.P.C. (3d) 56 (Ont. C.A.). In the ***Cangene Corp.*** decision, which deals with the application of s. 10 of the ***ICAA*** and Article 8, a stay of proceedings was entered because of the existence of what was referred to as an imperative arbitration clause. In ***Gulf Canada Resources Ltd. v. Arochem International Ltd.***, [1992] 66 B.C.L.R. (2d) 113; [1992] B.C.J. No. 500 (QL), the court held:

> 34 Where it is arguable that the dispute falls within the terms of the arbitration agreement or where it is arguable that a party to the legal proceedings is a party to the arbitration agreement then, in my view, the stay should be granted and those matters left to be determined by the arbitral tribunal.

[37] The Loader defendants contend that by virtue of entering into the Agreements that they, along with the plaintiffs, are bound by the arbitration clauses and the stipulated arbitration processes. The tort allegations arise out of the Agreements and, accordingly, form part of a controversy or claim arising out of or related to those contracts. It is submitted that the terms of the arbitration clauses are sufficiently broad so as to be applicable to both tort and contractual claims which emerge out of the parties' relationship. Further, the clauses do not exclude the applicability of the arbitration process for tort claims, fraud, or other misrepresentations: ***Novatrax International Inc. v. Hägele Landtechnik GmbH et al,*** 2016 ONCA 771, at para. 15. Additionally, the proceedings ought to be stayed and submitted to arbitration based on the "competence-competence" principle which holds that arbitrators can and should rule on issues relating to their own jurisdiction: see ***Uber Technologies Inc.*** at para. 34. The defendants also

rely on the Ontario Court of Appeal decision in ***Haas v. Gunasekaram***, 2016 ONCA 744, where Justice Lauwers, speaking for the court, held:

> [39] Put simply, in cases involving arbitration agreements, fraud does not necessarily vitiate everything. It is a matter of interpretation. The arbitration agreement in this case contains broad language, referring to "any dispute, difference or question … or any failure to agree … respecting this Agreement or anything herein contained then every such dispute, difference or question or failure to agree shall be referred to a single arbitrator" (emphasis added). There is no exclusion for tort claims, misrepresentation or fraud.
>
> [emphasis in original]

[38] The Loader defendants submit that an "arguable" case has been made out in these circumstances and that the four technical prerequisites set out in the ***Peace River*** decision have been satisfied so as to render the arbitration provisions applicable. However, as was stated in ***Peace River***, court proceedings are not automatically stayed in favour of arbitration where the technical prerequisites are met. The court must then evaluate the second component of the test and assess whether any statutory exceptions apply. The onus is then on the party seeking to avoid arbitration to show on a balance of probabilities that one or more of the statutory exceptions apply. If not, the court must grant a stay. The Loader defendants submit that "[t]he mandatory nature of stay provisions across jurisdictions in Canada reflects the presumptive validity of arbitration clauses and the principle of party autonomy" (***Peace River,*** para. 88). The court, in ***Peace River***, went on to say:

> [89] It follows that a court should dismiss a stay application on the basis of a statutory exception only in a "clear" case... A clear case is, for example, one in which the party seeking to avoid arbitration has established on a balance of probabilities that the arbitration agreement is void, inoperative, or incapable of being performed. Where the invalidity or unenforceability of

> the arbitration agreement is not clear (but merely arguable), the matter should be resolved by the arbitrator. Such an approach accords due respect to arbitral jurisdiction, in light of the competence-competence principle, as well as to the parties' intention to refer their disputes to arbitration...

[39] The Loader defendants rely on ***Peace River*** and maintain that the evidence presented by the plaintiffs falls well short of proof that the Agreements are void, inoperative or incapable of being performed based on the torts of fraudulent misrepresentation, conspiracy, and other allegations. The express intent of the parties was clear in the Agreements that any and all disputes were to be submitted to arbitration. This position was argued to be supported by the Ontario Court of Appeal determination in ***Haas*** where the strategy of alleging fraud and similar allegations to suggest that a contract is void *ab initio* were found to be insufficient to bar the validity of the arbitration clause until a final decision by the court (para. 36). Further, in ***James v. Thow et al***, 2005 BCSC 809, allegations of fraudulent misrepresentation, breach of trust, breach of fiduciary duty and fraud were held not to vitiate the applicability of the arbitration clause. It was found that an arbitration clause should be broadly interpreted and respected as it reflects the intention of the parties.

IX. POSITION OF THE PLAINTIFFS

[40] The plaintiffs submit that this claim was not brought against the Loader defendants on the basis of breach of contract but, instead, is founded on the torts of fraudulent misrepresentation, deceit, conspiracy, breach of fiduciary duty, and unjust enrichment. Consequently, these torts do not arise from matters which the parties agreed to submit to arbitration, nor do they arise from "any controversy or

claim arising out of or relating to the SBLC Agreements" (document no. 44, p. 15, para. 57). It is contended that the Agreements were simply part of a fraudulent scheme perpetrated by these defendants against the plaintiffs, which serves to render the contracts to be unenforceable, void, and inoperative. The fraud/scam alleged was present before the Agreements were ever entered into.

[41] Additionally, the plaintiffs contend that when this Claim was commenced, the Agreements containing the arbitration clauses had expired and/or had been cancelled. This is based on the premise that Loader had indicated that the SBLC Agreements were cancelled in and around the end of 2019, being a time prior to when the First Action was initiated. Further, the Agreements expired in early 2020. Accordingly, no arbitration clauses were in existence or survived the Agreements cancellations when the First Action was initiated.

[42] As indicated, the plaintiffs argue that the fraud, misrepresentations, conspiracy and other torts occurred before the contractual Agreements were entered into, and, accordingly, the entire transaction was a "scam". Consequently, the Agreements themselves were fraudulent, voided, and inoperative. The plaintiffs rely upon the decision in ***Agrawest*** where the court held that, "[c]laims of fraud and certain other illegal acts cannot be the subject of an agreement to arbitrate pursuant to the *Act*…" (para. 44). Additionally, ***Red River Division Assn. No. 17 v. Red River School Division No. 17***, [1972] M.J. No. 74, held:

> 19 I may clear the ground by disposing of one or two simple cases. If it appears that the dispute is as to whether there has ever been a binding contract between the parties such a dispute cannot be covered by an arbitration clause in the challenged contract. If there has never been a contract at all there has never been as part of it an agreement to arbitrate.

The plaintiffs also rely upon ***Graves v. Correactology Health Care Group Inc.***, 2018 ONSC 4263 and ***ODC Exhibit Systems Ltd. v. Lee***, 1988 CarswellBC 507. These decisions consider situations where defendants have engaged in a fraudulent scheme to deceive, which is acted upon by a victim prior to entering into a formal agreement. In those circumstances where a contract is induced by conspiracy, deceit and fraud, it cannot reasonably be expected that the matter will be settled through arbitration.

X. ANALYSIS

[43] The Supreme Court of Canada, in ***Peace River***, has set out a two-part framework to be met for a stay of proceedings in favour of arbitration:

> [76] There are two general components to the stay provisions in provincial arbitration legislation across the country. As the framework is similar across jurisdictions, it will be useful to provide a general overview before turning to the interpretation of s. 15 of the *Arbitration Act* itself. The two components are as follows:
>
> (a) the technical prerequisites for a mandatory stay of court proceedings; and
>
> (b) the statutory exceptions to a mandatory stay of court proceedings.
>
> [77] Though interrelated, these two components ought to remain analytically distinct. This distinction is necessary because the burden of proof shifts between the first component and the second.
>
> [78] Under the first component, the applicant for a stay in favour of arbitration must establish the technical prerequisites on the applicable standard of proof (McEwan and Herbst, at § 3:43; *Hosting Metro Inc. v. Poornam Info Vision Pvt, Ltd.*, 2016 BCSC 2371, at paras. 29- 30 (CanLII)).
>
> [79] If the applicant discharges this burden, then under the second component, the party seeking to avoid arbitration must show that one of the statutory exceptions applies, such that a stay should be refused (McEwan

and Herbst, at § 3:43; Casey, at ch. 3.4). Otherwise, the court must grant a stay and cede jurisdiction to the arbitral tribunal.

[80] I will briefly elaborate on each component and its respective standard of proof.

(1) Technical Prerequisites

[81] The first component is concerned with whether the applicant for a stay has established that the arbitration agreement at issue engages the mandatory stay provision in the applicable provincial arbitration statute.

[82] Considerations at this stage may differ depending on the jurisdiction and the nature of the arbitration (i.e., whether it relates to domestic or international arbitration). Broadly speaking, however, this threshold inquiry requires the court to determine whether the party seeking to rely on the arbitration agreement has established the technical prerequisites for a stay in favour of arbitration.

[83] There are typically four technical prerequisites relevant at this stage:

(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 and the court should move on to the second component of the analysis.

[84] It is important to note that the standard of proof applicable at the first stage is lower than the usual civil standard. To satisfy the first component, the applicant must only establish an "arguable case" that the technical prerequisites are met (McEwan and Herbst, at § 3:47; *Sum Trade Corp. v. Agricom International Inc.*, 2018 BCCA 379, 18 B.C.L.R. (6th) 322, at paras. 26 and 32, citing *Gulf Canada Resources Ltd. v. Arochem International Ltd.* (1992), 66 B.C.L.R. (2d) 113 (C.A.), at paras. 39-40).

[85] I acknowledge that, in *Dell*, this Court characterized the applicable standard of proof as that of proof on a "*prima facie*" basis (para. 82). However, as the Court of Appeal for British Columbia has noted, there is no substantive difference between the arguable case test in *Gulf Canada Resources* and the *prima facie* test in *Dell*:

> The significance of both standards is that there is room for a judge to dismiss a stay application when there is no nexus between the claims and the matters reserved for arbitration, while referring to the arbitrator any legitimate question of the scope of the arbitration jurisdiction. This avoids duplication and respects the competence-competence principle.
>
> (*Clayworth v. Octaform Systems Inc.*, 2020 BCCA 117, 446 D.L.R. (4th) 626, at para. 30)

[86] Notwithstanding this less onerous standard of proof, court proceedings are not automatically stayed in favour of arbitration where the technical prerequisites are met. Rather, the court must move on to the second component and assess whether any of the statutory exceptions apply (*Dell*, at para. 87; *Clayworth*, at paras. 31-32).

(2) Statutory Exceptions

[87] Certain exceptions, such as whether the arbitration clause is "void, inoperative or incapable of being performed", arise from the Model Law and the New York Convention and appear in several provincial arbitration statutes, including the *Arbitration Act*. I will discuss these particular exceptions in the context of this appeal in further detail below. Other statutory exceptions may also be relevant, depending on the jurisdiction (see, e.g., *Arbitration Act, 1991*, S.O. 1991, c. 17, s. 7(2)).

[88] At this second stage, the key question is whether, even though the technical requirements for a stay are met, the party seeking to avoid arbitration has shown on a balance of probabilities that one or more of the statutory exceptions apply. If not, the court *must* grant a stay. The mandatory nature of stay provisions across jurisdictions in Canada reflects the presumptive validity of arbitration clauses and the principle of party autonomy.

[89] It follows that a court should dismiss a stay application on the basis of a statutory exception only in a "clear" case (McEwan and Herbst, at § 3:55; A. J. van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1981), at p. 155). A clear case is, for example, one in which the party seeking to avoid arbitration has established on a balance of probabilities that the arbitration agreement is void, inoperative, or incapable of being performed. Where the invalidity or unenforceability of the arbitration agreement is not clear (but merely arguable), the matter should be resolved by the arbitrator. Such an approach accords due respect to arbitral jurisdiction, in light of the competence-competence principle, as well as to the parties' intention to refer their disputes to arbitration (McEwan and Herbst, at § 3:55; *Dalimpex Ltd. v. Janicki* (2000), 137 O.A.C. 390 (S.C.J.), at paras. 3-5, aff'd (2003), 228 D.L.R. (4th) 179 (C.A.)).

The Manitoba Court of Appeal decision in ***Pokornik v. SkipTheDishes Restaurant Services, Inc.***, 2024 MBCA 3, similarly dealt with this issue (paras. 25-27).

[44] The party seeking the stay carries the onus under s. 7(1) of ***The Arbitration Act***, C.C.S.M. c. A120. The standard of proof is the establishment of an "arguable" case. The International Chamber of Commerce (the "ICC"), Article 8 of its Arbitration Rules and Mediation Rules dispute resolution procedures, "mirrors" the stay sections of ***The Arbitration Act***.

[45] As ***Peace River*** stipulates, there are typically four relevant technical prerequisites (para. 83):

> (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.

In those circumstances where the technical prerequisites are met, a mandatory stay is possibly engaged. The court is then required to move on to the second component of the analysis and assess whether any of the statutory exceptions against granting a stay apply. With respect to the second part of the test, the court should dismiss the stay application only in the "clearest of cases". A clear case is one where the arbitration clause is "void, inoperative, or incapable of being performed" (***Peace River***, paras. 87 and 89). In this case, the onus on the second

part of the test rests with the plaintiffs to establish, on a balance of probabilities, that the arbitration agreement is void, inoperative, or incapable of being performed.

[46] This is not an easy determination based on the material provided for the purposes of this motion as to whether granting a stay to facilitate arbitration is an appropriate course of action. Without question, further evidence is required and determinations made as to credibility, fact finding, and other areas during the course of a trial. There are also conflicting statements of law with respect to this matter, along with the fact that fraud, misrepresentations, conspiracy, and deceit are all alleged to have transpired before the Agreements were executed and entered into. Were the plaintiffs induced by the defendants' misrepresentations to enter into the Agreements? If that is proven, without question, the arbitration clauses would be of no force or effect. All said, it appears that the plaintiffs relied on representations made by Tworek and Loader, through Schumann and, perhaps, others, as to what was to transpire with respect to the nature of the transactions themselves and the profits to be realized. Those profits and the return of deposits did not occur. The tort allegations before the court may or may not be proven. That said, I am not satisfied that this matter can be resolved through the stipulated arbitration process.

[47] A number of the decisions relied upon by the plaintiffs are persuasive as regards this matter. The first is the ***Agrawest*** decision where it was held that an

alleged agreement predicated on conspiracy, fraud and other illegal acts cannot be the subject of an agreement to arbitrate. The court held:

> [47] I have determined that it will not be necessary to determine these issues because the alleged illegal fraudulent agreement cannot be subject to arbitration no matter what. To hold otherwise would amount to saying that BMA and the Agrawest directors could enter into an agreement which defrauded Agrawest and others, and further agreed upon an arbitration clause which would force Agrawest to arbitrate the fraud, and gave the arbitration board power to uphold or overturn the fraud, a power binding on Agrawest, one of the victims of the fraud. That would be illogical and unfair.
>
> [48] This is not even a case where two parties conspire for the benefit of both to harm a third and agree to arbitrate differences between conspirators. This is a case where two parties conspired together and now one asserts they agreed to arbitrate differences between one of them and the victim.

[48] Justice Wilson, in ***Red River Division Assn. No. 17***, quoted the decision in ***Heyman v. Darwins Ltd.*** [1942] A.C. 356, at p. 345, as follows:

> 'I may clear the ground by disposing of one or two simple cases. If it appears that the dispute is as to whether there has ever been a binding contract between the parties such a dispute cannot be covered by an arbitration clause in the challenged contract. If there has never been a contract at all there has never been as part of it an agreement to arbitrate.'

[49] The Ontario Superior Court of Justice decision in ***Graves*** held:

> [61] If, as the Plaintiffs allege, the Defendants are engaged in a fraudulent scheme to deceive unsuspecting students who believe they are obtaining credentials to provide a health care-related service, this would go beyond the scope of the relevant arbitration clauses. In the event that the Defendants' business is not a sham, the nature of both the Program and the services for which students are trained and licensed raise questions as to whether they are operating outside of the relevant regulatory schemes. Either way, the matters in dispute raise significant concerns about the legality of the Defendants' business. The invalidity of the arbitration clauses is not a mere allegation, but a serious issue, since the entire arrangement may be illegal or invalid.
>
> [62] Even if there were some basis on which to find that the dispute is subject to arbitration, s. 7(5) of the *Arbitration Act* anticipates that when an action contains claims that are subject to an arbitration claim and claims that are not, the court may grant a partial stay, but only where it is reasonable to

> separate the matters dealt with in the agreement from other matters. When a partial stay is not reasonable, the proceedings will not be bifurcated: *Wellman v. Telus Communications Co.*, 2017 ONCA 433, 138 O.R. (3d) 109. In this case, the fraudulent scheme alleged by the Plaintiffs is so intertwined with the other issues that it would not be reasonable to separate the matters dealt with in the agreement from the other matters.
>
> [63] Moreover, the alleged scheme involves the Association and the individual defendants, who are not parties to the arbitration agreements. Where one of the parties to an action is not subject to an arbitration clause, and the claim involving the non-party to the arbitration clause and the claim sought to be submitted to arbitration both contain closely related facts and issues in dispute, a partial stay may not be reasonable, and the court should instead exercise its discretion to allow the entire matter to proceed in the one forum of the court: *Shaw Satellite*, at para. 44.
>
> [64] As a result, if the dispute falls under the relevant arbitration clauses, I would exercise my discretion to refuse to stay the proceedings due to the invalidity of the arbitration clauses or, alternatively, on the basis that it is not reasonable to separate the matters dealt with in the agreement from the other matters in dispute.

[50] The ***ODC Exhibit Systems Ltd.*** decision similarly held:

> [34] The action here does not arise out of "this agreement". It arises out of something allegedly done by the defendants Expand International, Spennare and Lee before the conciliation agreement came into being. The plaintiff alleges that it was induced by their conspiracy, deceit and fraud to execute the conciliation agreement. It cannot be reasonably said that these allegations which induced the plaintiff to enter into the conciliation agreement, were matters which the parties had agreed (or had even contemplated) as being among those to be settled by arbitration pursuant to clause 8: *Petersen,* at p. 343.
>
> [35] Section 8(1) of the Act applies only to proceedings in a Court "in respect of a matter agreed to be submitted to arbitration". It is therefore a condition precedent for the bringing of an application for a stay of proceedings under s. 8(1), that the Court action must be one in respect of a matter agreed to be arbitrated. Since, as above noted, this action is not in respect of such a matter, the condition precedent has not been met and, therefore, the defendant cannot invoke s. 8 for a stay of proceedings.

[51] In these circumstances, I am not satisfied that the arbitration clauses are applicable, nor does what is alleged to have transpired relate to any controversy or claim arising out of or relating to the Agreements. These allegations related to

misrepresentation, fraud, deceit and conspiracy are well outside of the Agreements' content and allegedly existed before the Agreements were entered. These areas are not appropriately arbitrated in the circumstances based upon an evaluation of the clauses and what may have occurred in this case. This is particularly so as between these parties, as to do so, arguably, would amount to the defendants entering into a fraudulent agreement with the plaintiffs and then require that the plaintiffs arbitrate the alleged torts before an arbitration board having the ultimate power to uphold or overturn the tort allegations. That decision would then be binding on the potential victim of the fraud. As was said in ***Agrawest***, such a result would be unfair and illogical. The determinations in this matter substantially relate to pre-Agreement issues and, perhaps, inducements. Accordingly, I am not satisfied that a consensus to arbitrate as contained in the Agreements exists, or, in the event it does, the torts alleged are not matters that the parties agreed to submit to arbitration. All the technical prerequisites as set out in ***Peace River*** have not been met.

[52] A second issue is that there are two arbitration clauses in each of the Agreements – an unusual occurrence. Those clauses in each Agreement are, arguably, different and contradictory in content. The first arbitration clause would result in binding the parties to the arbitration rules of the ICC in Paris and being bound by the decision. The second arbitration clause stipulates that the applicable rules of conciliation and arbitration are those of the ICC, Philadelphia, Pennsylvania with the result binding on the parties. It was said to be agreed that the arbitration

proceedings could be held in Hong Kong, Singapore, England, or other mutually agreeable location. Further, in the event a party refused to accept the "binding" decision of the arbitration process, a further procedure could then be invoked in the London courts under the jurisdiction of the laws of England and Wales. In many respects, these dueling arbitration clauses are non-sensical in nature, content, and are contradictory. In fact, the second arbitration clause relies on the rules of conciliation and arbitration of the ICC, Philadelphia, Pennsylvania, per ICC document Y432-A. That document does not exist (affidavit of Bains, affirmed May 5, 2022, tab X). The dueling arbitration clauses make it unclear as to how and where arbitration is to take place and as to whether it is truly binding on the parties.

[53] A further complication is that the second arbitration clause purports to outline how arbitrators are to be chosen. One is to be chosen by the party seeking arbitration, the second arbitrator is to be chosen by the other party, while the third is to be chosen by the two selected arbitrators. The clause then states, "If the two arbitrators appointed above shall not agree to the appointment of the third arbitrator to be appointed as provided herein, such third arbitrator shall be appointed jointly by the other two appointed arbitrators…". That clause, again, makes no sense whatsoever. There is no certainty or clarity in the terms utilized in these clauses. Effectively, these arbitration clauses are contradictory and, in essence, inoperable. This, along with the allegations relied on by the plaintiffs as regards illegality, misrepresentations, conspiracy, and possible fraud that are all

said to have transpired before the Agreements were entered into negates reliance on the arbitration provisions or their applicability.

[54] I am not satisfied that the four technical prerequisites for a mandatory stay have been satisfied. This is based on the fact that the arbitration clauses may not have come into existence for the reasons outlined as regards the validity of the Agreements. Further, the tort allegations do not constitute matters that the parties agreed to arbitrate. The arbitration clauses are also internally contradictory and unclear in nature.

[55] I have concluded that:

(i) the causes of action in this matter, being the torts of fraudulent misrepresentation, deceit, conspiracy, breach of fiduciary duty and unjust enrichment do not arise from matters which the parties agreed to submit to arbitration within the Agreements. The tort allegations do not arise from "any controversy or claim arising out of or relating to the SBLC Agreements" as those Agreements are simply one aspect of the transactional relationships that occurred between the parties. It does not embrace pre-Agreements conduct. Accordingly, it is arguable that the Agreements themselves are void, unenforceable, and inoperative;

(ii) the plaintiffs did not receive any monies as a consequence of the Agreements and representations made. Accordingly, there was, arguably, no consideration for the Agreements;

(iii) the Agreements were contended to be void *ab initio* and, consequently, the arbitration clauses are inapplicable;

(iv) the term of the Agreements had either expired or had been cancelled by Loader prior to the plaintiffs' initiating the First Action;

(v) the other six defendants named in the actions are not signatories to the Agreements containing the arbitration clauses. However, those parties have attorned to the court's jurisdiction in Manitoba or had been noted in default. The issues involving all defendants are inextricably intertwined, and to separate them would not serve the interests of justice or fairness;

(vi) the Loader defendants have not satisfied the burden of an "arguable case" that the arbitration clauses are operative;

(vii) as previously indicated, if I am wrong and the Loader defendants have established that the arbitration clauses are in effect on a *prima facie* basis, then the plaintiffs, on a balance of probabilities, fall within certain of the exceptions such as:

- the Agreements containing the arbitration clauses were allegedly procured by fraud, misrepresentations, and other torts;
- the allegations of the plaintiffs as to the existence of fraudulent misrepresentations were made prior to the execution of the SBLC Agreements;

- the arbitration clauses are ambiguous, confusing, and contradictory;
- the arbitration clauses are void, inoperative and incapable of being performed.

XI. ***FORUM NON CONVENIENS***

[56] In those situations where jurisdiction *simpliciter* has been found, the court may still exercise discretion pursuant to King's Bench Rule 17.06 to order that Manitoba is not the convenient forum for the hearing of the proceeding, given the existence of another clearly more appropriate forum: ***Van Breda***, paras. 103 and 108. Further, ***The Court of King's Bench Act***, s. 38, permits the court to grant a stay of proceedings on such terms as are considered just. A stay granted pursuant to *forum non conveniens* is discretionary in nature. The onus is on the Loader defendants to demonstrate why Manitoba is not an appropriate forum in these circumstances and identify a better positioned and connected forum.

[57] The factors to be considered as to whether to apply *forum non conveniens* may include the locations of parties and witnesses, the cost of transferring the case to another jurisdiction or of declining the stay, the impact of a transfer on the conduct of the litigation, the possibility of conflicting judgments, problems related to the recognition and enforcement of judgments, and the relative strengths of connections of the parties: ***Van Breda***, para. 110.

XII. POSITION OF THE LOADER DEFENDANTS

[58] The Loader defendants point to what they regard as more appropriate forums, being the locations where the arbitration clauses stipulate that any disputes are to be arbitrated. They submit that these transactions were multi-jurisdictional with parties and witnesses located in various countries throughout the world. It is for this reason that an international arbitration process or forum should be regarded as more appropriate for the resolution of the disputes between these parties, as only the plaintiffs reside in Manitoba.

XIII. POSITION OF THE PLAINTIFFS

[59] The plaintiffs maintain that the Loader defendants have not identified another forum with a more appropriate connection. The jurisdictions set out in the various arbitration clauses have no real or substantial connection to the subject matter of the litigation and, in any event, those clauses are invalid and inoperative.

XIV. ANALYSIS

[60] I am satisfied that Manitoba is the most convenient forum for the hearing of these proceedings. No other forum presented in this multi-jurisdictional dispute represents as a clearer and/or more satisfactory location to settle the disagreements between these parties. Certainly, the *situs* as stipulated in the arbitration clauses has no relationship with these parties or establishes a proper forum. The plaintiffs' residence in Manitoba, along with the allegations as to what transpired in this province results in an entitlement to litigate this matter here as opposed to any other forum. As was held in the ***Blonde*** decision, "the party

asking for a stay on the basis of *forum non conveniens* must show that the alternative forum is 'clearly more appropriate' (*Van Breda* at para 108)" (para. 31).

[61] The existence of a more appropriate forum has not been established in this case. Further, the interests of reasonableness and fairness dictates that Manitoba is the most suitable jurisdiction. The plaintiffs are entitled to have this dispute settled in Manitoba as opposed to any other location.

XV. CONCLUSION

[62] The motions brought on behalf of the Loader defendants are dismissed.

i. Jurisdiction *simpliciter* is founded in Manitoba.

ii. The arbitration clauses are of no effect.

iii. The doctrine of *forum non conveniens* is not applicable.

[63] Costs of this motion will be in the cause.

_____ J.