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Krutov v. Vancouver Hockey Club Ltd.

Between  
Vladimir Krutov, Plaintiff, and  
Vancouver Hockey Club Ltd., Defendant

Vancouver Registry No. C916447

[1991] B.C.J. No. 3464

British Columbia Supreme Court  
Vancouver, British Columbia  
(In Chambers)

Harvey J.

Heard: November 18, 1991

Judgment: November 22, 1991

Counsel for the Plaintiff: R.D. Wittchen & H. Hunter.  
Counsel for the Defendant: R.H. Hamilton & M.G. Demers.

HARVEY J.:-- The defendant applies for a stay of proceedings of the action herein pursuant to s. 8 of International Commercial Arbitration Act 1986 S.B.C. c. 14 as amended (the "Act") and Rules 44, 52 and 57 of this court.

In the action, commenced on September 23, 1991, the plaintiff Vladimir Krutov, a professional ice hockey player, a resident of Moscow, U.S.S.R., sues the defendant, a British Columbia corporation with a registered office in Vancouver, for breach of the provisions of a contract, a National Hockey League Standard Players' Contract (the "agreement"), entered into by the parties on September 6, 1989. The agreement relates to three seasons and remuneration in relation thereto.

It is common ground the agreement is one for services and the plaintiff provided services and has been paid the agreed upon amount for such services for the first season stated therein. The plaintiff claims judgment in the amount of \$750,000 (Canadian) representing the agreed upon amount for his services for the next two seasons, the last season being for 1991/1992.

Clause 19 of the agreement, in part, reads as follows:

The Club and the Player severally and mutually promise and agree to be legally bound by the Constitution and By-Laws of the League and by any Collective Bargaining Agreement that has been or may be entered into between the member clubs of the League and the NHLPA, and by all of the terms and provisions thereof, copies of which shall be open and available for inspection by Club, its directors and officers, and the Player,

at the main office of the League, the main office of the Club and the main office of the NHLPA.

The Club and the Player further agree that in case of dispute between them, except as to the compensation to be paid to the Player on a new contract, the dispute shall be referred within one year from the date it arose to the President of the League, as an arbitrator and his decision shall be accepted as final by both parties, unless, and to extent that, other arbitration procedures are provided in any Collective Bargaining Agreement between the member clubs of the League and the NHLPA to cover such dispute.

The defendant, for reasons I do not need to consider on this motion, refused to pay the plaintiff for the 1990/91 and 1991/92 seasons. The plaintiff did not provide his services to the defendant during those seasons. The defendant on August 8, 1991 sent the dispute between it and the plaintiff to Mr. John Ziegler, president of the National Hockey League for arbitration pursuant to paragraph 19 of the agreement.

There is common ground to the extent that the arbitration agreement contained in clause 19 of the agreement is international and commercial and that the Act applies to it. I refer particularly to s. 8(1) and (2) which provides:

(1) Where 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, before or after entering an appearance and before delivery of any pleadings or taking any other step in the proceedings, apply to that court to stay the proceedings.

(2) In an application under subsection (1), the court shall make an order staying the legal proceedings unless it determines that the arbitration agreement is null and void, inoperative or incapable of being performed.

Counsel for the defendant submits, inter alia, that as there is a dispute between the defendant and the plaintiff the dispute is subject to the arbitration agreement contained in clause 19 of the agreement and comes within the mandatory provision of s. 8 of the Act. Furthermore, he submits that a party to an arbitration agreement has the right to an automatic stay of proceedings, the wording of s. 8 of the Act taking away the discretion of a court to deflect an arbitration to which the parties have agreed.

Counsel for the plaintiff opposes the motion on a twofold basis:

(a) The arbitration agreement is null and void - there is no arbitration agreement existing upon which the defendant can rely.

(b) Procedural irregularities exist which make it impossible to refer the differences between the parties to arbitration.

Counsel for the plaintiff also suggests that the correspondence passing between the parties by way of their respective representatives indicates the potential of bias but I find there is no merit to this submission.

With regard to (a), it is submitted that the parties do not have an agreement to submit to arbitration because of the language contained in a certain letter dated November 6, 1990 from the defendant to the solicitor then representing the plaintiff, the relevant paragraph of which reads as follows:

Attached please find Page Two of my letter to you of October 10th, 1990. I have underlined the first two sentences in the third full paragraph on that page. As I pointed out at that time, the hockey club could not, and still cannot, suspend Mr. Krutov on the basis of conditioning. This is due to the fact that we do not have a valid contract with Mr. Krutov, at least in the eyes of the National Hockey League. If and when Mr. Krutov signs an agreement which meets National Hockey League requirements, we will deal the conditioning issue.

The words "at least in the eyes of the National Hockey League" relate to registration of the agreement which the National Hockey League was not prepared to register because it contained in an addendum a restriction related to the plaintiff not being required to play for any "farm team" or team not in the calibre equal to that of the National Hockey League.

With regard to (b), it is submitted the defendant failed to meet procedural requirements in the agreement itself and, more importantly, as set out in the terms of a certain collective bargaining agreement stated to expire on September 15, 1991 subject to conditions as to termination stated therein.

The procedural requirements relied upon relate to time periods within which disputes shall be referred, described as limitation periods during argument, notice to the plaintiff of the intention of the defendant to refer the dispute to arbitration and other notice provisions.

In keeping with the conclusion I have reached in the matter, no useful purpose is served by reviewing the submissions further.

I do not agree that the language of the letter of the defendant dated November 6, 1990, referred to above, and the fact that the agreement is not registered with the National Hockey League renders "the arbitration agreement null and void".

I accept the submission of counsel for the defendant that an arbitration agreement will survive even if the underlying contract within which it is contained comes to an end whether by frustration or by repudiation by one party and acceptance of that repudiation by the other party. The right to have disputes settled by the method chosen by the parties at the time the contract was entered into remains. (See *Haymen & Another v. Darwins*)

Ltd., [1942] 1 All E.R. 337 (H.L.) at pp. 343, 347 & 350; and Roy v. Boyce, (1991) 57 B.C.L.R. (2d) 187).

I was led to understand that the "transfer payments aspect" of the agreement, requiring certain payments to be made by the defendant to the Soviet Hockey Federation, has already been submitted to arbitration in Sweden.

In my view, whether there are procedural irregularities with regard to the implementation of the arbitration process, including time or notice periods, under either the agreement itself or the collective bargaining agreement, does not serve to prevent the dispute between the parties from proceeding to arbitration. (See *Coopers & Lybrand Limited v. Canpotex Shipping Services Ltd.*, unreported, November 2, 1987, T-1875-87, Denault J. (F.C.T.D.)).

These are matters, as are other matters, for determination in the first instance by the arbitrator. I refer in passing to s. 36(1)(a) and (b) of the Act which describes circumstances, including notice, any of which, if proved, would constitute grounds for refusing recognition or enforcement of an arbitral award.

Having found the arbitration agreement is not null and void, inoperative, or incapable of being performed, and that the procedural irregularities alleged are questions for determination by the arbitrator, I order that the plaintiff's action against the defendant be stayed.

The defendant is entitled to recover its costs of this application.

HARVEY J.