Citation: Bains v Loader, 2026 MBCA 66
Date: 20260723

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Madam Justice Janice L. leMaistre
Mr. Justice David J. Kroft

Docket: AI24-30-10113
B E T W E E N:

VICKY JORDAN and KEITH JORDAN

(Plaintiffs)

- and -

DALBIR BAINS and NAVNEET KAUR-BAINS

(Defendants) Respondents

- and -

RORY LOADER and SORTEPAX HOLDINGS LIMITED

(Third Parties) Appellants

- and -

AMIT BINDRA, RE/MAX EXECUTIVES REALTY, JAMES TWOREK, CANDELA CAPITAL INC., JOSH SCHUMANN, JOSH SCHUMANN FAMILY CORPORATION INC., AARON SHAPIRO and THE SHAPIRO LAW FIRM, LLC

(Third Parties)

- and -

J. M. Woolley *and*
J. R. Sundmark
for the Appellants

P. Halamandaris *and*
L. L. Gergely
for the Respondents

Appeals heard:
January 14, 2026

Judgment delivered:
July 23, 2026

Docket: AI24-30-10114
B E T W E E N:

DALBIR BAINS and 10031670 MANITOBA LTD.

(Plaintiffs) Respondents

- and -

RORY LOADER and SORTEPAX HOLDINGS LIMITED

(Defendants) Appellants

- and -

JAMES TWOREK, CANDELA CAPITAL INC., JOSH SCHUMANN, JOSH SCHUMANN FAMILY CORPORATION INC., AARON SHAPIRO and THE SHAPIRO LAW FIRM, LLC

(Defendants)

On appeal from *Bains and 10031670 Manitoba Ltd v Tworek et al*, 2024 MBKB 111 [*reasons*]

KROFT JA

Introduction

[1] The appellants, Rory Loader (Loader) and Sortepax Holdings Limited (Sortepax) (together, the appellants), appeal the dismissal of their motions to stay the claims against them (the stay motion) brought in two related actions (the actions). The first action is the claim filed by Dalbir Bains (Bains) and 10031670 Manitoba Ltd. (1003). The second is a related action

in which Bains and Navneet Kaur-Bains (Bains' wife) brought a third-party claim against the appellants.

[2] Bains, 1003 and Bains' wife are collectively the respondents. The remaining parties to the action are not respondents on the appeal. The respondents' allegations relate to an international commercial financing transaction and sound in fraudulent misrepresentation, conspiracy, breach of fiduciary duty, knowing assistance in respect of the breach of fiduciary duty, deceit and unjust enrichment. The fate of the stay motion in one action mirrors the other.

[3] The appellants argue the Manitoba courts lack jurisdiction over the respondents' claims against them or, alternatively, the Manitoba courts should decline jurisdiction because Manitoba is not the convenient forum. The appellants also argue that arbitration agreements in the relevant documents (the arbitration agreements) require the respondents' claims to be decided by an arbitrator, and that the jurisdiction question must be determined by an arbitral tribunal, not the court.

[4] This case affords an opportunity to set out the legal principles applicable to these distinct, but sometimes related jurisdictional issues.

[5] Despite certain concerns expressed in the course of these reasons, at the end of the day, the judge did not err in dismissing the stay motion on the basis that the Manitoba courts have jurisdiction *simpliciter* and are the most convenient forum in which to hear the actions. She also did not err in finding the arbitration agreements were incapable of being performed.

[6] For the reasons that follow, I would dismiss the appeals.

Background

Source of Facts

[7] The factual foundation for the stay motion is the respondents' statement of claim, the statement of defence and crossclaim of James Tworek (Tworek) and Candela Capital Inc., the affidavits of Loader and Bains, and the transcripts of the cross-examinations thereon.

[8] Consistent with their position that the Manitoba courts have no jurisdiction to deal with the claims against them, the appellants did not file pleadings prior to filing the stay motion.

Factual Context

[9] The facts underpinning the stay motion were summarized neatly by the judge (see *reasons* at para 8). The respondents and the appellants had a commercial financing arrangement involving the monetization of standby letters of credit (LOCs), whereby the respondents were to gain access to millions of dollars to invest in private health care projects (the proceeds of monetization).

[10] Tworek was Bains' investment broker. Tworek introduced the respondents to the appellants and to Josh Schumann (Schumann), the principal of the Josh Schumann Family Corporation Inc. based in New York, USA, also investment brokers. The financing transaction was international in nature: the respondents resided in Manitoba, Tworek in Alberta, Schumann in New York, Loader in South Africa, and Sortepax (controlled by Loader) in the Seychelles

(East coast of Africa). The LOCs to be monetized were to issue from financial institutions based in Asia and Europe.

[11] The appellants were parties experienced in, and responsible for, effecting the monetization of the LOCs. The agreements setting out the rights and obligations of the appellants and the respondents, and upon which they rely, are entitled "Private Non-Recourse Loan Deed of Agreement on Monetization of Standby Letter of Credit Swift MT760" (the finance agreements).

[12] The finance agreements drafted by the appellants were entered into on March 14 and April 2, 2019, respectively. The finance agreements were signed by 1003 (controlled by Bains) and Sortepax. Loader signed the finance agreements in South Africa on behalf of Sortepax and transmitted them to 1003 and Bains through Schumann. Bains then executed the finance agreements on behalf of 1003 and returned them to Sortepax, also through Schumann. The finance agreements contained identical arbitration agreements, which will be discussed in detail later in these reasons.

[13] As a condition of the financing arrangement, the respondents were required to pay two deposits totalling USD one million. The deposits were to be repaid as part of the financing or within ten days if the LOC did not issue or the proceeds of monetization were otherwise not received.

[14] The parties agree that the respondents never received the proceeds of monetization or the return of the deposits. The litigation ensued.

[15] At all material times, the respondents were situated in Manitoba. The same cannot be said for any of the appellants.

[16] As previously noted, the appellants filed the stay motion pursuant to section 38 of *The Court of King's Bench Act*, CCSM c C280 and rules 17.06(1)-17.06(2), 21.01(3)(a) of the MB, *King's Bench Rules*, Man Reg 553/88, for an order staying the proceedings against them for lack of jurisdiction or, in the alternative, based on the doctrine of *forum non conveniens*. The judge dismissed the stay motion. Based on the documentary record before her, she concluded there was a real and substantial connection between Manitoba and the subject matter of the litigation such that the Manitoba courts have jurisdiction over the actions (jurisdiction *simpliciter*) and that a more convenient forum had not been established (*forum non conveniens*). The judge also found that the arbitration agreements did not apply to the alleged facts, were void because of the fraud allegations, or alternatively, were incapable of being performed such that the court, as opposed to an arbitrator, could determine the jurisdiction question.

<u>The Grounds of Appeal</u>

[17] The grounds of appeal can be summarized as follows:

1) The judge erred in law in her application of the principles governing jurisdiction *simpliciter*.

2) The judge erred in law by conflating the principles applicable to jurisdiction *simpliciter* with the principles applicable to *forum non conveniens*.

3) The judge erred in law by failing to apply, or by incorrectly applying, the principles applicable to staying proceedings where there is an arbitration agreement.

Analysis

Ground One: The Judge Erred in Law in Her Application of the Principles Governing Jurisdiction Simpliciter

Ground Two: The Judge Erred in Law by Conflating the Principles Applicable to Jurisdiction Simpliciter with the Principles Applicable to Forum Non Conveniens

Standard of Review

[18] The first two grounds predominantly involve questions of law attracting a correctness standard of review. That said, at times the respondents' argument spilled into matters of mixed fact and law, which attract a palpable and overriding error standard of review (see *Sinclair v Venezia Turismo*, 2025 SCC 27 at para 42 [*Sinclair*]; *Housen v Nikolaisen*, 2002 SCC 33 at paras 8, 10, 26-37).

Applicable Legal Principles

[19] Before examining the first two grounds of appeal, I will briefly summarize the legal principles applicable to jurisdiction *simpliciter* and *forum non conveniens*:

i) Court decisions dealing with the assumption and exercise of jurisdiction typically are interlocutory, made early in the litigation process based on pleadings, affidavits and documents in the court record. Questions of fact relevant to jurisdiction are determined in that context (see *Club Resorts Ltd v Van Breda*, 2012 SCC 17 at paras 71-72 [*Van Breda*]).

ii) In tort cases, the following factors are presumptive connecting factors that prima facie establish a real and substantial connection between the chosen forum and the subject matter of the litigation, entitling 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.

See *Sinclair* at para 47; *Bains et al v Loader et al*, 2023 MBCA 102 at paras 13-14 [*Bains 2023*]; *Ewert v Höegh Autoliners AS*, 2020 BCCA 181 at paras 16-17 [*Ewert*]; *Haaretz.com v Goldhar*, 2018 SCC 28 at paras 27, 36 [*Haaretz*]; *Van Breda* at paras 78, 90.

It is sufficient to identify just one presumptive connecting factor (see *NHK Spring Co Ltd v Cheung*, 2024 BCCA 236 at para 38, leave to appeal to SCC granted, 41451 (13 November 2025); *Ewert* at para 16; *Meeking v Cash Store Inc et al*, 2013 MBCA 81 at para 73, quoting *Van Breda* at paras 91-92). The list of connecting factors is not exhaustive and may expand in the future (see *Van Breda* at paras 80, 91, 100; *Haaretz* at paras

36-37; *Sinclair* at para 48).[1] A commonality among the factors is that they generally point to a relationship between the subject matter of the litigation and the forum such that it is reasonable to expect that a defendant would be called to answer legal proceedings in that forum (see *Van Breda* at para 92).

iii) The party asserting a court should assume jurisdiction has the burden of establishing the relevant presumptive connecting factor or factors. The evidentiary burden is a low one (see *Ewert* at para 16; *Van Breda* at para 100).

iv) Where at least one presumptive connecting factor is established, the real and substantial connection and jurisdiction are presumed. However, the presumption can be rebutted. The burden of rebutting the presumption rests with the party challenging the assumption of jurisdiction, who must show that, notwithstanding the presumption of jurisdiction, a real and substantial connection does not exist (see *Sinclair* at para 49; *Bains 2023* at para 15; *Ewert* at para 17; *Van Breda* at para 100).

v) Where at least one connecting factor exists and has not been rebutted, jurisdiction exists and the court should not decline to exercise that jurisdiction unless the defendant successfully establishes from the record *forum non conveniens* applies (i.e., that an alternative forum is <u>clearly more appropriate,</u>

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[1] The list does not purport to be an inventory of connecting factors covering the conditions for assuming jurisdiction over all claims known at law (see *Van Breda* at para 85).

taking into account considerations of fairness and efficiency). The factors a court might consider may vary with context. It is not enough for a defendant to establish merely that a comparable forum exists in another state or province (see *Haaretz* at paras 30-32, 46-47; *Van Breda* at paras 94, 100-103, 105, 108-9).

vi) *Forum non conveniens* is distinct from jurisdiction *simpliciter* and comes into play only after jurisdiction *simpliciter* is established. It recognizes a court's residual discretionary power at common law to decline to exercise its jurisdiction where the record establishes another forum is clearly more appropriate (see *Sinclair* at para 77; *Haaretz* at paras 27-28; *Van Breda* at paras 101, 104).[2]

Applying the Principles

[20] I will now apply the legal principles to the first two grounds of appeal. As I will explain, in my view, the judge made no error warranting appellate intervention. When read as a whole and in context, the judge's reasons on jurisdiction *simpliciter* and *forum non conveniens* demonstrate she correctly identified and applied the legal principles, and committed no palpable and overriding errors in her fact finding or in applying the law to those facts.

[21] As a starting point, the judge cited the two-part test articulated in *Van Breda* (also referenced in paragraphs 20(ii)-20(iv) herein). After

[2] That is, in limited circumstances (see *Van Breda* at para 104).

considering the principles for determining the location (or *situs*) where the torts of fraudulent (or negligent) misrepresentation and conspiracy occurred, and applying those principles to the facts before her, she concluded that, for the purposes of the stay motion, those torts were committed in Manitoba. As such, presumptive connecting factors were established.

[22] In respect of the respondents' misrepresentation allegations, the judge held the tort of misrepresentation occurs where the misrepresentation is received and/or acted upon. In doing so, she relied upon *Right Business Limited v Affluent Public Limited*, 2011 BCSC 783 at paras 63, 68 [*Right Business*] and *Martens et al v Barnhardt et al; Star v Barnhardt et al*, 2021 MBQB 92 at para 55, citing *Central Sun Mining Inc v Vector Engineering Inc*, 2013 ONCA 601 at paras 30-35. The appellants have presented no authorities establishing the judge erred in that regard.

[23] Evidence in the documentary record relied upon by the judge to find the misrepresentation occurred in Manitoba included: Bains' testimony that, while in Manitoba and prior to signing the finance agreements, he had direct telephone conversations with Loader; a WhatsApp messenger record of Bains scheduling a telephone conversation with Loader; the fact that Bains signed the finance agreements in Manitoba; Loader's written responses to questions prepared and sent by Bains from Manitoba prior to signing; and the fact that Bains received neither the proceeds of monetization nor the return of his deposit which, among other consequences, prevented him from completing a house purchase.

[24] This evidence was accepted by the judge over evidence from Loader taking issue with Bains' version of the timing and nature of the representations

articulated. It was within the judge's purview to consider and weigh all the evidence that was before her at the time of the stay motion and to make such findings as, in her discretion, she deemed appropriate. The findings she made were reasonably available to her based on the record.

[25] As for the conspiracy allegations, the judge cited with approval cases holding that the tort of conspiracy will be regarded as having taken place where the economic damage is suffered (see *Ewert* at para 70; *Right Business* at para 63). The appellants have presented no authorities establishing she erred in doing so.

[26] In respect of damages suffered by the respondents in Manitoba, the judge accepted, for the purpose of the stay motion, that at no time were the proceeds of monetization advanced or deposits returned and that Bains and Bains' wife purchased an expensive Winnipeg home, relying on the promise that 1003 would be receiving substantial funds through the monetization of the LOCs. These conclusions were reasonably available based on the documentary record.

[27] Still in the context of presumptive connecting factors, this Court heard submissions about whether, at law, it could be said that the finance agreements arose at the time Bains affixed his signatures in Manitoba or when Loader received the signed finance agreements in South Africa on behalf of Sortepax.

[28] In contract law, the general rule is that a contract is made in the location where the offeror (Sortepax) receives notice of the offeree's (1003) acceptance. An exception to that rule is where a contract is to be concluded by mail. In that circumstance, the place of mailing the acceptance will be

treated as the place where the contract came to be (the postal rule). The rationale for the postal rule was to avoid commercial delay inherent in mailing documents (see *Eastern Power Limited v Azienda Communale Energia and Ambiente*, 1999 CanLII 3785 at paras 22-23 (ONCA)).

[29] In support of establishing another presumptive connecting factor, the respondents submit that because the finance agreements were sent electronically through Schumann (i.e., not instantaneously), the postal rule should apply such that the finance agreements can be said to have been made in Manitoba. The appellants disagree.

[30] Given my opinion that the judge correctly found the torts of fraudulent misrepresentation and conspiracy were committed in Manitoba, thereby establishing presumptive connections to the province, I see no practical utility in ruling on whether the postal rule applies to the facts of this case and whether there is yet another connecting factor. I refrain from doing so.[3]

[31] Having concluded presumptive connecting factors existed, the judge proceeded to the second part of the jurisdiction *simpliciter* test: Has the presumption of jurisdiction been rebutted? The appellants say the judge erred in the manner in which she addressed the rebuttal question.

[32] Perhaps most significantly, the appellants assert the judge conflated the rebuttal portion of the jurisdiction *simpliciter* test with the doctrine of *forum non conveniens*. In support of their conflation argument, the appellants

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[3] I also make no comment on the potential applicability of section 21(3) of *The Electronic Commerce and Information Act*, CCSM c E55.

rely on select portions of the following two paragraphs in the *reasons* (at paras 32-33):

> *The issue remains whether the [appellants] 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.*
>
> The [respondents] 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 [Bains'] location, where the funds were coming from, where the [finance] 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 [appellants] 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 [appellants] be required to answer these legal proceedings in this forum. I acknowledge that the [appellants] are not domiciled or resident in the province, nor do they carry on business here. However, I have concluded that the [appellants] 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 [respondents] 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 [finance] Agreements, which would have served to establish jurisdiction with certainty and clarity.
>
> [emphasis added]

[33] The appellants submit that in assessing whether the presumption of jurisdiction has been rebutted, it was inappropriate for the judge to consider the degree of connection between the dispute and the foreign jurisdiction. In their view, the analysis should have been confined to the jurisdiction where the actions were commenced, and any comparative assessment of connections to foreign jurisdictions ought to have been reserved for, and was only relevant to, the *forum non conveniens* analysis.

[34] In my opinion, the appellants' submission is too technical and restricted. It should be rejected. When the *reasons* are read as a whole, rather than piecemeal, I am satisfied the judge did not err.

[35] The task of the appellants was to marshal facts from the documentary record to show that the presumptive connecting factors do not point to any real relationship between the dispute and Manitoba. That evidence is summarized in the *reasons* at para 32 (quoted above). Generally speaking, that evidence focused on the international aspects of the financing arrangement at issue. Against that evidence, the judge focused on facts connecting the dispute to Manitoba (see *ibid* at para 33). The nature of the facts and matters weighed by the judge was consistent with the inquiry properly undertaken at the rebuttal stage of the jurisdiction *simpliciter* analysis. She did not specifically discuss the economy, efficiency, practicality

or impact of the litigation, which she addressed later in her *forum non conveniens* analysis.

[36] The judge did not conflate jurisdiction *simpliciter* with *forum non conveniens*.

[37] Underlying the appellants' jurisdiction *simpliciter* argument is the broader suggestion the judge erred by failing to give sufficient weight to the evidence they say supports a jurisdiction other than Manitoba. To succeed on that front, the appellants must establish the judge made a palpable and overriding error in her fact finding.

[38] Once again, I am satisfied her findings of fact respecting the rebuttal are reasonably supported by the documentary record before her at the stay motion. Moreover, in *Van Breda*, the Supreme Court of Canada recognized that some presumptive connecting factors may be harder to overcome than others. Such is the case where, as in the present circumstances, the connecting factor is a tort committed in the jurisdiction (*ibid* at para 96):

> On the other hand, where the presumptive connecting factor is the commission of a tort in the province, rebutting the presumption of jurisdiction would appear to be difficult, although it may be possible to do so in a case involving a multi-jurisdictional tort where only a relatively minor element of the tort has occurred in the province.

[39] The *reasons* clearly reflect the judge's view that more than relatively minor aspects of the torts occurred in Manitoba.

[40] The appellants appropriately cautioned this Court about the risk of jurisdictional overreach. This risk was a central consideration in the

development of the two-part real and substantial connection test in *Van Breda* (see *Sinclair* at para 44; *Yip v HSBC Holdings plc*, 2018 ONCA 626 at paras 29-30). Given my conclusion that the judge did not err in her application of the test and that the Manitoba courts have jurisdiction *simpliciter*, it follows I am satisfied there has been no jurisdictional overreach in the present case.

[41] The appellants' first two grounds of appeal cannot succeed. I will now address the last ground.

Ground Three: The Judge Erred in Law by Failing to Apply, or by Incorrectly Applying, the Principles Applicable to Staying Proceedings Where There Is an Arbitration Agreement

Standard of Review

[42] As with the first two grounds, the third ground involves a question of law, attracting a correctness standard of review. Once again, the appellants' arguments at times transition to matters of fact or mixed fact and law, thereby attracting a palpable and overriding error standard of review.

[43] As I did previously, I begin with a summary of the legal principles.

The Law: Arbitration Agreement

[44] The starting point in this case is *The International Commercial Arbitration Act*, CCSM c C151 [the *ICAA*]. The *ICAA* adopts in Manitoba both the Convention on the Recognition and Enforcement of Foreign Arbitral

Awards (the Convention)[4] and the UNCITRAL Model Law on International Commercial Arbitration (the Model Law).[5] The Convention and the Model Law form Schedules A and B of the *ICAA*, respectively. Most relevant to these appeals are Article II of Schedule A and Articles 8 and 16 of Schedule B:

SCHEDULE A	**ANNEXE A**
Article II	Article II
1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, *whether contractual or not*, concerning a subject matter capable of settlement by arbitration.	**1.** Chacun des États contractants reconnaît la convention écrite par laquelle les parties s'obligent à soumettre à un arbitrage tous les différends ou certains des différends qui se sont élevés ou pourraient s'élever entre elles au sujet d'un rapport de droit déterminé, *contractuel ou non contractuel*, portant sur une question susceptible d'être réglée par voie d'arbitrage.
2. The term **"agreement in writing"** shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.	**2.** On entend par « **convention écrite** » une clause compromissoire insérée dans un contrat, ou un compromis, signés par les parties ou contenus dans un échange de lettres ou de télégrammes.
3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an	**3.** Le tribunal d'un État contractant, saisi d'un litige sur une question au sujet de laquelle les parties ont conclu

[4] Adopted by the United Nations Conference on International Commercial Arbitration in New York, USA on June 10, 1958.
[5] Adopted by the United Nations Commission on International Trade Law on June 21, 1985.

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*.

une convention au sens du présent article, *renverra* les parties à l'arbitrage, à la demande de l'une d'elles, *à moins qu'il ne constate que ladite convention est caduque, inopérante ou non susceptible d'être appliquée*.

SCHEDULE B

Article 8

Arbitration Agreement and Substantive Claim Before Court

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

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

ANNEXE B

Article 8.

Convention d'arbitrage et actions intentées quant au fond devant un tribunal

1. Le tribunal saisi d'un différend sur une question faisant l'objet d'une convention d'arbitrage *renverra* les parties à l'arbitrage si l'une d'entre elles le demande au plus tard lorsqu'elle soumet ses premières conclusions quant au fond du différend, *à moins qu'il ne constate que ladite convention est caduque, inopérante ou non susceptible d'être exécutée*.

2. Lorsque le tribunal est saisi d'une action visée au paragraphe 1 du présent article, la procédure arbitrale peut néanmoins être engagée ou poursuivie et une sentence peut être rendue en attendant que le tribunal ait statué.

Article 16

Competence of Arbitral Tribunal to Rule on its Jurisdiction

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect of the existence of validity of the arbitration agreement. For that purpose, *an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.*

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

Article 16.

Compétence du tribunal arbitral pour statuer sur sa propre compétence

1. Le tribunal arbitral peut statuer sur sa propre compétence, y compris sur toute exception relative à l'existence ou à la validité de la convention d'arbitrage. À cette fin, *une clause compromissoire faisant partie d'un contrat est considérée comme une convention distincte des autres clauses du contrat. La constatation de nullité du contrat par le tribunal arbitral n'entraîne pas de plein droit la nullité de la clause compromissoire.*

2. L'exception d'incompétence du tribunal arbitral peut être soulevée au plus tard lors du dépôt des conclusions en défense. Le fait pour une partie d'avoir désigné un arbitre ou d'avoir participé à sa désignation ne la prive pas du droit de soulever cette exception. L'exception prise de ce que la question litigieuse excéderait les pouvoirs du tribunal arbitral est soulevée dès que la question alléguée comme excédant ses pouvoirs est soulevée pendant la procédure arbitrale. Le tribunal arbitral peut, dans l'un ou l'autre cas, admettre une exception soulevée après le délai prévu, s'il estime que le retard est dû à une cause valable.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

3. Le tribunal arbitral peut statuer sur l'exception visée au paragraphe 2 du présent article soit en la traitant comme une question préalable, soit dans sa sentence sur le fond. Si le tribunal arbitral détermine, à titre de question préalable, qu'il est compétent, l'une ou l'autre partie peut, dans un délai de trente jours après avoir été avisée de cette décision, demander au tribunal visé à l'article 6 de rendre une décision sur ce point, laquelle ne sera pas susceptible de recours; en attendant qu'il soit statué sur cette demande, le tribunal arbitral est libre de poursuivre la procédure arbitrale et de rendre une sentence.

[italics added, underlining in original]

[45] These sections in the *ICAA*, and functionally similar provisions governing international and domestic arbitrations in other Canadian provinces, in conjunction with modern jurisprudence considering those provisions, reflect a number of important principles, including:

i) As a general rule, an arbitral tribunal, not a court, should decide jurisdictional questions at first instance (see *Spark Event Rentals Ltd v Google LLC*, 2024 BCCA 148 at paras 8, 13 [*Spark*]; *Peace River Hydro Partners v Petrowest Corp*, 2022

SCC 41 at paras 39, 41 [*Peace River*]; *ICAA*, Sched B, art 16). The incorporation of this principle, known as competence-competence, was a policy choice not to be lightly displaced. Modern arbitration statutes endorse the freedom of parties to determine how their disputes should be adjudicated and the practical benefits of arbitration as a means to access justice.

ii) The competence-competence principle should be displaced only in clear cases. The descriptors abnormal and unusual have been used in the case law (see *Spark* at para 13; *Peace River* at paras 39-41; see also *Kaverit Steel and Crane Ltd v Kone Corporation*, 1992 ABCA 7).

iii) Under the *ICAA*, the exception to the rule that an arbitrator decides their own jurisdiction at first instance arises where an arbitration agreement is null and void, inoperative, or incapable of being performed.[6] The jurisdictional question must go to an arbitrator where the exception is not clear or where it is merely arguable.

iv) Moreover, a court should determine the jurisdictional issue only where it involves a question of law or, if the issue is one of mixed fact and law, where the necessary facts are apparent from the documentary record or agreed to by the parties. The level of scrutiny for this factual review is described as "superficial". A stay motion is not a mini trial. The court is to proceed as if the allegations in the statement of claim are true

[6] Additional limited domestic exceptions appear in arbitration legislation enacted across Canada.

> or at least capable of being proven (see *Uber Technologies Inc v Heller*, 2020 SCC 16 at para 34 [*Uber*], quoting *Rogers Wireless Inc v Muroff*, 2007 SCC 35 at para 11; *Pokornik v SkipTheDishes Restaurant Services Inc*, 2024 MBCA 3 at para 75 [*Pokornik*]; *Peace River* at paras 42-43; *Spark* at paras 15-18).

[46] These principles inform what the Supreme Court has described as two general components when applying the stay provisions in the *ICAA* and other arbitration legislation across Canada (see *Davidson v Lyra Growth Partners Inc*, 2024 BCCA 133 at paras 30-33 [*Davidson*]; *Peace River* at paras 76-79). The first component (*Peace River* Component 1) involves establishing the following technical prerequisites (*Peace River* at 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.

Also see *Davidson* at paras 30-33.

[47] The standard of proof applicable at this stage is lower than the usual civil standard. The party seeking a stay need only establish an *arguable* case that the prerequisites are met (see *Peace River* at paras 83-84; *Pokornik* at paras 24-26; see also *Spark* at paras 16-17).

[48] Assuming the technical prerequisites are met, the second component involves determining whether exceptional circumstances exist to justify the court, rather than the arbitral tribunal, determining the jurisdiction question (*Peace River* Component 2). As previously noted, in the context of the *ICAA* (as in the present case), the only statutory exception is where an arbitration agreement is null and void, inoperative or incapable of being performed. In contrast to the technical requirements under *Peace River* Component 1, an exception under *Peace River* Component 2 must be established on a higher, civil balance of probabilities standard (see *Peace River* at paras 88-89).

[49] Applying a higher standard under *Peace River* Component 2 recognizes the presumptive validity of arbitration agreements and the principle of party autonomy (see *ibid* at paras 87-88). A court should dismiss a stay application on the basis of a statutory exception only in the clearest of cases.[7] Where the exception is not clear (i.e., merely arguable), a court must defer the jurisdictional question to an arbitrator in accordance with the competence-competence principle (see *ibid* at para 89; *Lin v Uber Canada Inc*, 2025 FCA 183 at paras 10, 17-18; *Clayworth v Octaform Systems Inc*, 2020 BCCA 117 at para 23).

[50] Where a commercial agreement is breached and becomes unenforceable or invalid, that does not, in itself, rescind the agreement to arbitrate (see *Ismail v First York Holdings Inc*, 2023 ONCA 332 at para 45). Allegations of fraud must clearly impugn the arbitration agreement as distinct from the contract as a whole (see *James v Thow et al*, 2005 BCSC 809 at paras 96-99).

[7] As noted in *Peace River* at para 139, the exception for an operative arbitration agreement is to be narrowly interpreted.

[51] Pursuant to Article 16 of Schedule B to the *ICAA* (i.e., the Model Law), an arbitration agreement shall be treated as an agreement independent from the other terms of the contract. A decision by an arbitral tribunal that a contract is null and void will not, by that fact alone, invalidate an arbitration agreement (see *Haas v Gunasekaram*, 2016 ONCA 744 at paras 12-13 [*Haas*]). The presence of tort claims, even fraud, will not necessarily vitiate an arbitration agreement (see *ibid* at paras 35-36; *Graves v Correactology Health Care Group Inc*, 2018 ONSC 4263 at para 52).

[52] Before concluding this summary of the applicable legal principles, note that in *Uber*, the Supreme Court recognized there will be situations where impediments exist that functionally prevent a party from bringing a matter to arbitration, thereby insulating the issue of validity of an arbitration agreement from determination by an arbitral tribunal (see *ibid* at paras 45-46; see also *Spark* at paras 22-23; *Lochan v Binance Holdings Limited*, 2024 ONCA 784 at para 17). In *Spark* at para 19, the British Columbia Court of Appeal colloquially referred to this situation as the "brick wall" scenario. This scenario creates an alternate justification for a court, as opposed to an arbitral tribunal, to determine a jurisdictional challenge.

[53] Examples of insurmountable impediments include situations where the cost of participating in an arbitration is prohibitive relative to the amount in dispute or the means of a claimant, or where a claimant is physically unable to attend the place of arbitration (see *ibid* at paras 19-20; *Uber* at paras 9-10, 47). Each case will turn on its own facts. To remain true to the competence-competence principle, the determination of whether functional impediments preventing a matter from ever getting before the arbitrator exist is to be made on a limited assessment of the evidence, not a deep dive. However, where an

insurmountable impediment is made out, a court may then conduct a more robust analysis of the evidence to decide the issue of jurisdiction on its merits, as if it were the arbitrator (see *Spark* at para 24).

Applying the Principles

[54] I will now apply the legal principles to the third ground. As I will explain, in my opinion, the judge erred in law in her application of *Peace River* Component 1, resulting in her conclusion that there was no *arguable case* that an arbitration agreement existed and that the court proceedings are not in respect of a matter the parties agreed to submit to arbitration (these are two of four technical prerequisites enumerated in *Peace River*). That said, it also is my opinion that the judge correctly applied *Peace River* Component 2 and found the arbitration agreements were incapable of being performed, such that the jurisdiction question was properly before the Court of King's Bench.

[55] I begin my analysis by turning to the arbitration agreements in the finance agreements, which are identical. The relevant portions provide:

> Limit of Liability
> …
> 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 . . . the relevant party *may* submit such dispute for arbitration in accordance with arbitration rules of the *International Chamber of Commerce E in Paris*. The arbitration award shall be *final and binding* on the respective parties.
>
> Arbitration
>
> 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* . . .. In the event of a dispute, the following procedures shall apply:
>
> (a) A written notice shall be sent . . . by the aggrieved party to the party in default . . .. The party being served the notice shall have 15 fifteen business days to respond . . .. 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 . . . appointed by the first two arbitrators.*
>
> . . .
>
> (c) The arbitrators . . . shall be chosen within 30 (thirty) days of the service of a demand for arbitration . . .. *If the two arbitrators appointed above shall not agree to the appointment of the third arbitrator . . ., 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 arbitration proceedings shall be held in Hong Kong, Singapore, England or other location mutually agreed* . . . by the parties[.] Failure to appear without a showing of good cause, shall entitle the other party to an award[.]
>
> . . .
>
> *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*.
>
> [emphasis added, all caps omitted]

[56] In the *reasons*, the judge quoted at length the two components articulated in *Peace River* (summarized at paragraphs 47-49 herein) and correctly concluded the components applied to this case. In respect of *Peace River* Component 1, the technical prerequisites relevant to the present case (to

be established on an *arguable case* standard) are (a) the existence of an arbitration agreement, and (b) the proceedings are in respect of a matter the parties agreed to submit to arbitration. In respect of *Peace River* Component 2, the relevant exception in this case, to be established on a balance of probabilities, is whether the arbitration agreement is null and void, inoperable or incapable of being performed.

Peace River Component 1

[57] Dealing first with the technical prerequisites, the judge ultimately concluded they were not met. Specifically, she found she was "not satisfied that the arbitration [agreements] are applicable, nor does what is alleged to have transpired relate to any controversy or claim arising out of or relating to the [finance agreements]" (*reasons* at para 51).

[58] I agree with the appellants that the judge erred by failing to apply, or properly apply, the applicable legal principles such that deference is not owed to that finding. I say this for four reasons:

1) The judge recognized her task at this preliminary stage was "not an easy determination based on the material provided for the purposes of [the stay] motion" and that "[w]ithout question, further evidence is required and determinations made as to credibility, fact finding, and other areas during the course of a trial" (*ibid* at para 46).

2) The clear message from modern jurisprudence is that when establishing the technical prerequisites for *Peace River* Component 1, the party seeking a stay need only raise an

arguable case. The judge's own comments suggest there is an arguable case surrounding the tortious allegations, including fraud.

3) The arguable case standard (and the *Peace River* framework more generally) exists in the broader context of well-accepted principles including: an arbitral tribunal, not a court, should decide jurisdictional questions at first instance (the competence-competence principle), a departure from this practice is justified only in clear cases, arbitration agreements are to be treated independently of the other terms of an agreement, and the presence of tort claims, including fraud, does not automatically vitiate an arbitration agreement in the same agreement.

4) It is not apparent from the *reasons* how the judge reconciled the competing facts before her with the modern legal principles governing arbitration agreements.

[59] I agree with the judge's observation that she had limited and incomplete evidence, and that the issues cannot be fully or definitively decided until trial. When the record in this case is scrutinized at the level required (superficial), there clearly are competing narratives such that it cannot be said the facts pertaining to the respondents' tort allegations (even assuming the allegations in the statement of claim are true or capable of being proven) are agreed to or readily apparent from the documentary record. There is at least an arguable case that the broadly-worded arbitration agreements not only survive but cover the tort allegations, including fraud. As the Ontario

Court of Appeal explained in *Haas*, a fraud claim does not necessarily vitiate an arbitration agreement (see paras 31, 35, 39).

[60] Furthermore, as stated in *Novatrax International Inc v Hägele Landtechnik GmbH*, 2016 ONCA 771: "It is well-established that a broad forum selection clause covering 'any disputes' applies not only to contract claims, but also tort claims" (at para 15; see also *Davidson* at para 109). As noted in Geoff R Hall, *Canadian Contractual Interpretation Law*, 4th ed, (Toronto: LexisNexis, 2020), "[p]hrases such as 'arising out of' and 'arising in connection with' in an arbitration clause have been held to have a very broad meaning which is indicative of a universal arbitration clause" (at s 9.2.3).

[61] In my opinion, when the relevant legal principles are applied to the facts of this case, the technical prerequisites identified in *Peace River* Component 1 have been met. Without more, the jurisdictional question should properly be determined by an arbitral tribunal, always mindful that an arbitrator could nonetheless determine a court is the proper tribunal to adjudicate the dispute.

Peace River Component 2

[62] I will now address *Peace River* Component 2. Have the respondents established, on a balance of probabilities, an exception to the competence-competence principle?

[63] In the *reasons*, the judge identified a number of inconsistencies, contradictions and flaws within the arbitration agreements reproduced in

paragraph 56 above. She described them collectively as “non-sensical” (*ibid* at para 52), noting, among other things (see *ibid* at paras 52-53):

- inconsistencies about which rules of arbitration govern—Paris or Philadelphia;
- contradiction between the declared binding nature of the arbitration agreements and the provisions prescribing procedures in London in the event a party refuses to accept the binding decision;
- a reference to, and reliance on, International Chamber of Commerce Document Y432-A, which she found did not exist.
- a process to appoint three arbitrators, which provides that when the arbitrator appointed by each party cannot agree on the third arbitrator, those same two arbitrators will nonetheless jointly appoint a third arbitrator.

[64] While not specifically mentioned by the judge, I observe that, in one provision in the finance agreements, the words “may submit” are used in reference to arbitration; whereas a subsequent provision uses the phrase “shall be subject to” arbitration. This inconsistency introduces further contradiction.

[65] The judge ultimately concluded the documentary record established, on a balance of probabilities, what she described as exceptional circumstances justifying a court, as opposed to an arbitral tribunal, determining the jurisdiction question. The circumstances identified by the judge are as follows (see *ibid* at para 55(vii)):

- the finance agreements were allegedly procured by fraud, misrepresentations and other torts;

- the allegations of the respondents as to the existence of fraudulent misrepresentations were made prior to the execution of the finance agreements;

- the arbitration agreements are ambiguous, confusing and contradictory; and

- the arbitration agreements are void, inoperative and incapable of being performed.

[66] The easiest and most economical way to address these findings is to return to the *ICAA*. As noted earlier, the exceptions enumerated in the *ICAA* arise where an arbitration agreement is null and void, inoperative or incapable of being performed. These are the exceptions applicable to this case. I point out that, in contrast to the language employed by the judge, the statute uses the word "or", not "and", such that any of the exceptions could apply.

[67] The terms "null and void", "inoperative" and "incapable of being performed" are not defined in the *ICAA*, but their meanings were canvassed in *Peace River* (see paras 136, 138-39, 144-45; see also *Lin v Uber Canada Inc*, 2024 FC 977 at para 111).

[68] An arbitration agreement will be considered void only in the rare circumstance where it is intrinsically defective (void *ab initio*), including when it is undermined by fraud, undue influence, unconscionability, duress, mistake or misrepresentation. However, a court should not grant a stay on the

basis an arbitration agreement is void except where the evidence is sufficiently clear to determine the matter on a summary basis (see *Peace River* at para 136).

[69] The term "inoperative" has no universal common law definition, but in an arbitration law context 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 (see *Peace River* at paras 138-39).

[70] An arbitration agreement will be considered incapable of being performed where the arbitral process cannot effectively be set in motion because of a physical or legal impediment beyond the parties' control. Physical impediments rendering an arbitration agreement incapable of being performed may include the following: (a) inconsistencies, inherent contradictions or vagueness in the arbitration agreement that cannot be remedied by interpretation or other contractual techniques; (b) the non-availability of the arbitrator specified in the agreement; (c) the dissolution or non-existence of the chosen arbitration institution; or (d) political or other circumstances at the seat of arbitration rendering arbitration impossible. In all of these circumstances, the arbitration agreement is incapable of being performed because it is impossible for the parties to obtain the specific arbitral procedures for which they bargained. Financial impecuniosity alone does not render an arbitration agreement incapable of being performed. As for legal impediments, one example could be where the subject matter of the dispute is covered by an express legislative override of the parties' right to arbitrate (see *Peace River* at paras 144-45).

[71] Applying these meanings to the inconsistencies, contradictions and flaws in the arbitration agreements as found by the judge, I disagree with the appellants' submission that the respondents failed to establish an exception on a balance of probabilities. The judge's finding that the arbitration agreements were inconsistent, contradictory and flawed, and thereby incapable of being performed, was a reasonable one. To overturn the judge's conclusion on this point, I would have to be satisfied a palpable and overriding error had occurred in her fact finding or in her application of the law to the facts. No such error has been established in respect of the "incapable of being performed" exception.

[72] To defeat the stay motion in regard to the arbitration agreements, the respondents need only establish one of the applicable statutory exceptions. They have done so: the provisions are incapable of being performed. However, I wish to make clear that I do not endorse the judge's conclusion that the respondents also established, on a balance of probabilities, that the arbitration agreements are null and void, and inoperative as per the meanings ascribed in *Peace River* (see paras 136, 138-39, 144-45). I also do not endorse any suggestion in the *reasons* that exceptions, other than those expressly set out in the *ICAA*, are relevant to the exception analysis in this case.

<u>Summary and Conclusion</u>

[73] To summarize, the judge did not err in dismissing the appellants' stay motion. More particularly, I uphold her findings that:

- the Manitoba courts have jurisdiction *simpliciter* to hear the actions;

- Manitoba is the most convenient forum in which to hear the actions; and

- the arbitration agreements in the finance agreements are incapable of being performed such that the court is competent to adjudicate the actions.

[74] Therefore, I would dismiss both appeals, with costs.

Kroft JA

I agree: Cameron JA

I agree: leMaistre JA