CITATION: *El-Halabi et al. v. Dr. Reslan et al.*, 2024 ONSC 5341
COURT FILE NO.: CV-23-00697749-0000
DATE: 20240927

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:		
Souheil EI-Halabi et al.	Plaintiffs	*Bryan Badali,* for the Plaintiffs (Responding Parties)
– and –		
Dr. Walid Abou Reslan et al.	Defendants	*Cameron Rempel,* for the Defendants (Moving Parties)
		HEARD: September 18, 2024

STEVENSON J.

REASONS FOR DECISION

Introduction

[1] This is a motion by the defendants to stay this action and refer the parties to arbitration in Dubai, UAE. The moving parties rely on ss. 5 and 9 of the *International Commercial Arbitration Act*, 2017, S.O. 2017, c.2, Sched. 5 ("ICCA"). The ICCA incorporates articles 1 and 8 from the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (1985). In short, the claim must be stayed if an arbitration clause applies to the dispute.

[2] The underlying dispute is between two shareholders of an Emirati company that operated a radiology clinic called the Advanced Radiology Centre and Clinical Laboratory (the "Centre") in Dubai from 2006 to 2022.

[3] The plaintiff Mr. El-Halabi and the defendant Dr. Reslan are two of five parties to a nine-page "shareholding" agreement ("SHA") signed December 25, 2011, which relates to the Centre.

[4] Section XV of the SHA provides that any dispute which arises over its interpretation must be determined based on UAE laws according to Dubai Chamber of Commerce Arbitration Practices.

[5] If the plaintiffs' claim involves the interpretation of the SHA, then it must be stayed and referred to Dubai (the possible exceptions do not apply).

[6] The plaintiffs say they are not suing in respect to the interpretation of the SHA. They say their claim is based on a guarantee in a separate, one-page, document which does not involve interpreting the SHA and does not involve all the parties to the SHA, although they were both dated the same day, December 25, 2011.

[7] The plaintiffs say this one-page is a guarantee between Ontario resident parties which ought to be litigated in Ontario.

[8] For the reasons that follow, I decide that the claim must be stayed and referred to arbitration in Dubai in accordance with the arbitration clause. The arbitrator will determine if they have jurisdiction over this dispute.

Background

[9] Dr. Reslan is a diagnostic radiologist who founded the Centre in 2006 and acted as the Chair of the Board until 2016. He met Mr. El-Halabi in 2011. At that time, Mr. El-Halabi owned five radiology clinics in Ontario. Dr. Reslan began working as a diagnostic radiologist in three of them; in Etobicoke, Whitby, and Oshawa.

[10] Mr. El-Halabi decided to purchase a 25% interest in the Centre. As a result, he signed the SHA dated December 25, 2011.

[11] The named parties to the SHA apart from Dr. Reslan and Mr. El-Halabi are Mr. Khaled Reslan, Mr. Bashir Reslan, and Dr. Hussein Amery.

[12] Bashir and Khaled are Dr. Reslan's brothers. Dr. Amery, a friend of Dr. Reslan's, is an Alberta physician who only has a 5% interest in the Centre.

[13] Mr. El-Halabi is described in the SHA as the "new partner" investing US$5,000,000 "towards his share". He was to get an annual profit distribution of at least 10% on his investment "regardless of profit situation (i.e., US$125,000 per year)".

[14] The final version of the SHA is nine pages, dated December 25, 2011.

[15] Concurrently with the drafting and execution of the SHA, Mr. El-Halabi proposed a one-page document, which he drafted without legal assistance. When Mr. El-Halabi forwarded the draft one-page, he called it a "related agreement".

[16] This one-page was included with the SHA when signed copies were exchanged.

[17] The plaintiffs say nothing turns on the fact that they were exchanged at the same time or that the one-page document appears as page number ten of ten.

[18] Mr. El-Halabi says he prepared this one-page document to protect himself.

[19] Mr. El-Halabi argues this is a guarantee, which is separate from the SHA. If this is the case, then, he says, it is governed by Ontario law and should be litigated in the Ontario courts.

[20] Mr. El-Halabi says that only he and Dr. Reslan are parties to the guarantee.

[21] This one-page was not signed by Bashir or Khaled (Dr. Reslan's brothers) or Dr. Amery, all of whom are express parties to the SHA, having signed the SHA.

[22] Bashir, Khaled, and Dr. Reslan did receive a copy of the (signed) one-page concurrently with the fully executed nine-page SHA. They also received it previously as a draft document. They did not comment on it.

[23] This one-page document is only signed by Dr. Reslan and Mr. El-Halabi.

[24] Mr. El-Halabi signed once only-above the typed words "Imaging Pro Ltd", which is Mr. El-Halabi's company and a predecessor to the corporate plaintiff.

[25] The corporate name, Imaging Pro Ltd, is above the typed words "Souheil El-Halabi".

[26] Dr. Reslan signed the one-page, but his signature does not expressly apply to his Professional Medicine Corporation even though that company is mentioned in the body of the document as providing a guarantee of the dividends, as is Dr. Reslan.

[27] In accordance with the one-page document but contrary to the SHA, Imaging Pro Ltd ("IPL") rather than Mr. El-Halabi got the dividends which are in issue.

[28] In accordance with this document but contrary to the SHA, IPL invested the US$1,250,000 rather than Mr. El-Halabi.

[29] In accordance with this document but contrary to the SHA, IPL's US$1,250,000 was invested in installments.

[30] In addition, this one-page document added details about the bank account which would receive the dividends, how the new funds invested by IPL would be used by the Centre, and Mr. El-Halabi's right to visit the Centre twice a year at the Centre's expense.

[31] The working relationship went well until 2016 when Dr. Reslan and Mr. El-Halabi discovered that Bashir was stealing from the Centre and making dubious financial and management decisions. Bashir was bought out. The business deteriorated. COVID-19 was the death knell for the business. The Centre was sold at a loss in April 2022.

[32] In a January 30, 2023 lawyer's letter, Mr. El-Halabi (but not IPL) demanded $927,000 from Dr. Reslan and his professional corporation pursuant to what they called the "guarantee agreement" or the "additional agreement" (the one-page). They alleged the SHA had been terminated because the Centre had been sold.

[33] Dr. Reslan demurred. Mr. El-Halabi and IPL sued in Ontario in April 2023. The plaintiffs claim the outstanding dividend payments that the Centre failed to pay for seven years.

[34] This motion was served in May 2023.

Analysis

[35] The question of whether this matter should be referred to arbitration is determined by applying the ICCA rather than the domestic *Arbitration Act*, 1991, S.O. 1991, c. 17. The applicants say this is because the parties have their places of business in different states, even though they both also carry on business in Ontario (see ICCA, Sched. 2, art. 1(3)). I find that the ICCA does apply, either for that reason or the following reasons.

[36] In the alternative, the ICCA applies because the arbitration agreement determines that the place of arbitration is Dubai (ICCA, Sched. 2, art. 1(3)(b)(i)); because the parties expressly agreed that the subject matter of their dispute relates to more than one country, Canada and UAE (ICCA, Sched. 2, art. 1(3)(c)); because the substantial part of their business was to be performed in Dubai (ICCA, Sched. 2, art. 1 (3)(b)(ii)); or because Dubai is the place most closely connected to the dispute (ICCA, Sched. 2, art. 1(3)(b)(ii)).

[37] Article 8 of Schedule 2 to the ICCA (the "Model Law") requires this court to refer the dispute to arbitration unless the agreement is null and void, inoperative or incapable of being performed. None of the exceptions apply with the result that the Ontario action must be stayed (s. 9 of the ICAA) if it is "arguable" that the dispute falls within the scope of the arbitration agreement: *Dancap Productions Inc. v. Key Brand Entertainment, Inc.,* 2009 ONCA 135, at para. 40 ("*Dancap*"); *Peace River Hydro Partners v. Petrowest Corp*., 2022 SCC 41; *Husky Food Importers & Distributors Ltd. v. JH Whittaker & Sons Limited*, 2023 ONCA 260, at paras. 23-29 ("*Husky Food*").

[38] The test for granting a stay is set out in *Husky Food*, at para. 24. The moving party must establish that:

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 moving party has brought the stay motion before taking a "step" in the court proceeding.

[39] This test has been met.

[40] There is an arbitration agreement in the SHA (art. XV). This proceeding has been commenced by a party to that agreement, Mr. El-Halabi and his corporation (Rayan Medical Services Inc.), which in 2014 acquired all the shares in IPL. His company, IPL, was brought into the scope of the SHA to receive dividends from the Centre. Dividends are paid in accordance with the SHA, as amended by the one-page document.

[41] While the one-page document also contains a guarantee, that does not mean the guarantee is free-standing and should be interpreted without regard to the SHA. The one-page document relied on by Mr. El-Halabi is signed by him, apparently on behalf of IPL. IPL took over his position as shareholder for the purpose of receiving dividends and is therefore subject to the SHA. He, IPL, and Rayan Medical Services Inc. are now suing on the basis he did not get the dividends he was promised. Determining the issue *prima facie* involves the interpretation of the SHA.

[42] The claims pleaded in the statement of claim arguably are covered by the SHA as amended by the one-page document. The arbitration agreement applies to "any dispute over the interpretation of" the SHA, language which must be widely construed consistent with the clear intention to rely on arbitration in Dubai to resolve disputes.

[43] While the statement of claim tries to avoid the application of the arbitration clause by suggesting the plaintiffs' claim is based only on a guarantee agreement (paras. 22-27), the legal and factual issues appear to require the interpretation of the contractual relationship established by the SHA. The parties appear to have agreed to arbitrate these disputes, but it is the Arbitrator who will make the decision on jurisdiction.

[44] The allegations here are based on either one agreement or two agreements which appear to be so intertwined that they can be treated as one for present purposes: *Bank of Nevis International Ltd. v. Kucher*, 2024 ONCA 240, at para. 11 (which involved a choice of forum clause).

[45] It is at least arguable that the one-page document was incorporated into and amended the SHA. It is arguably binding on the other shareholders. The latter never suggested that IPL was not a shareholder entitled to dividends in accordance with the SHA. IPL was paid dividends for years without objection by the other shareholders. This happened as required by the one-page document, which was applied in conjunction with the SHA.

[46] In accordance with the principles articulated in *Dancap*, I do not have to decide this issue definitively. I should leave it to the arbitrator to decide: see also *Dalimpex Ltd. v. Janicki*, 2003 CanLII 34234 (Ont. C.A.), at paras. 21-22.

[47] The general rule is that in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator: *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, at para. 84 ("*Dell Computer Corp.*") per Deschamps J. The exception will be where the question of fact or mixed law and fact requires only "superficial

consideration of the documentary evidence in the record": *Dell Computer Corp.*, at para. 85. This exception does not apply here. Indeed, a superficial review would suggest the arbitration clause would apply to this claim.

[48] Although the arbitration clause in the SHA refers to issues relating to the *interpretation* of the SHA, as opposed to, say, *relating to* the SHA, the determination of the scope of the arbitration clause in the context of these claims and the ten pages of "related" agreements clearly calls for more than a superficial review of the evidence.

[49] This stay is ordered without prejudice to the responding party's right to challenge the arbitrator's jurisdiction before the arbitrator. The court must take a deferential approach at this stage of the proceeding unless it is clear (it is not) on a superficial review of the record that the arbitrator has no jurisdiction.

[50] This is not a case where non-parties are clearly being forced into an arbitration to which they did not consent. Mr. El-Halabi signed the SHA and the one-page document concurrently. The latter appears to amend the former. The other shareholders appear to have implicitly accepted the amendments. Mr. El-Halabi wanted his company, IPL, to receive the dividends rather than himself personally. The SHA appears to have been amended in this respect and the other respects summarized above. In so doing it is not obvious that he was ousting the arbitration clause. To the contrary, he appears to have expanded its application to all aspects of the one-page document. The latter document needs to be interpreted in the context of the SHA.

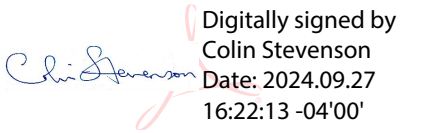
[51] This is not a case involving a non-party being compelled to submit to arbitration like *Electek Power Services Inc. v. Greenfield Energy Centre Limited Partnership*, 2022 ONSC 894, at para. 144 or *Novatrax International Inc. v. Hägele Landtechnik GmbH*, 2016 ONCA 771, at para. 32.

[52] The arbitrator will decide if he or she has jurisdiction to decide the allegations in the statement of claim. If the arbitrator takes jurisdiction, he or she will decide the case on the merits.

[53] For now, the Ontario claim is stayed. If any of the claims are not dealt with by the arbitrator, then the stay can be lifted.

[54] The moving parties shall make written submissions on costs within ten days of these reasons. These shall not exceed three pages plus any offers to settle plus the costs outline, already filed. The responding parties shall make their written submissions on costs within ten days of

receipt of those submissions. These too shall not exceed three pages plus offers plus costs outline, already filed.



Justice C. Stevenson

Released: September 27, 2024

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