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Choice-of-Law Principles and the Guarantees Acknowledgment Act

By Nicholas Rafferty

Cases Considered:

Can-Am Produce & Trading Ltd. v. Kan Yan Trading Co. Ltd., 2007 ABQB 738

Introduction

Alberta's *Guarantees Acknowledgment Act (G.A.A.)*, R.S.A. 2000, c. G-11, is a unique piece of legislation. It requires an individual guarantor in most cases to appear before a notary public and acknowledge that he or she is the person who executed the guarantee. The notary must then examine the person to satisfy him or herself that the guarantor is aware of the contents of the guarantee and understands its effect. Upon being so satisfied, the notary then issues a certificate to that effect which must be signed by the guarantor.

Since no other province has similar legislation, the statute has proved fertile ground for the creation of problems in the choice of law. The various cases that have arisen, however, have lacked a consistent approach to the resolution of the choice-of-law issues and it is not easy to rationalize them: see the excellent discussion by Vaughan Black, AThe Strange Case of Alberta's Guarantees Acknowledgment Act: A Study in Choice-of-Law Method@ (1987), 11 Dalhousie L.J. 208. The most recent decision on the topic is that of Master Wacowich in *Can-Am Produce & Trading Co. Ltd. v. Kan Yan Trading Co. Ltd. (Can-Am Produce)*, 2007 ABQB 738. Since the case concerned merely an application for summary judgment, it does not answer the difficult questions but it does provide a useful springboard for a discussion of some of the Conflicts problems associated with the legislation.

Facts and Decision

From the judgment the facts are somewhat sketchy but it appears that the plaintiff, which carried on business in British Columbia, supplied produce to the corporate defendant, which operated in Alberta. The corporate defendant executed the agreement in Alberta. Its obligations under the contract were guaranteed by the individual defendant, Yin Wa So (So), who resided in Alberta. She signed the guarantee in Calgary. The plaintiff sought summary judgment against both defendants. The case, however, centred on the plaintiff's claim against So. The guarantee failed to comply with the requirements of Alberta's G.A.A. For that reason, the guarantor argued that the guarantee had no binding effect. British Columbia law imposed no similar requirements. The question, therefore, was whether Alberta or British Columbia law governed the enforceability of the guarantee. The guarantee contained no express choice-of-law clause.

Master Wacowich considered a number of authorities, advanced by the parties, that dealt with the determination of the law governing a contract in the absence of an express choice-of-law

provision. He dismissed the plaintiff's application for summary judgment against So. There were insufficient facts to allow the court to determine the applicable law. Thus, there was a genuine issue to be resolved by a trial because the defendant had shown a legally arguable defence.

Governing Law

(i) Formal Validity of Contract

Can-Am Produce raised the question of the formal validity of a contract of guarantee. It is an accepted proposition that a contract will be formally valid if it complies with the formal requirements of either the law of the place where the contract was made or the proper law of the contract: see, for example, *Greenshields Inc. v. Johnston* (1981), 119 D.L.R. (3d) 714 (Alta. Q.B.), aff'd (1981), 131 D.L.R. (3d) 234 (C.A.). The rationale underlying the reference to the law of the place of contracting to uphold the formal validity of a contract appears to be the expectation that parties are likely to check the local law to ascertain what, if any, formalities are required to ensure the validity of their contract. In Can-Am Produce itself, the guarantee was apparently made in Alberta and, of course, it did not comply with the G.A.A. Thus, on the facts of Can-Am Produce, it would become imperative to determine the proper law of the contract of guarantee.

(ii) Proper Law of Contract

The proper law of a contract is traditionally defined as the law that the parties intended to apply to the contract. Thus, as a general rule, the parties are free to choose the law to govern their contractual relations. The only recognized limitation on the parties' autonomy is that the expressed intention must be bona fide and legal and there must be no reason for avoiding the choice on the ground of public policy: *Vita Food Products Inc. v. Unus Shipping Co.*, [1939] 2 D.L.R. 1, at 9 (P.C.)(N.S.). In the absence of an express choice, a court may be able to infer the parties' intention as to the governing law. A classic instance is where the contract contains an exclusive choice of forum provision. Thus, if the parties have agreed that all disputes under the contract should be referred to the courts of a particular jurisdiction, the law of that jurisdiction is more than likely to constitute the proper law of the contract.

Failing any express or truly implied choice of law, the courts turn to an objective test to determine the proper law of a contract. Thus, the proper law is typically defined as the law with which [the contract] appears to have the closest and most substantial connection: see, for example, *Imperial Life Assurance Co. of Canada v. Colmenares* (1967), 62 D.L.R. (2d) 138, at 143 (S.C.C.). Despite this apparent adoption of an objective approach, there is still a judicial reluctance to abandon altogether some reference to the need to ascertain the intentions of the parties. In the *Colmenares* case, for example, the Supreme Court could not resist justifying its conclusion that Ontario law was the proper law of an insurance contract on the following basis (at 144):

> I think it to be a reasonable inference that a person applying for insurance on a form prepared at the head office of an Ontario company would anticipate that the policies which he was to receive would be governed by the law of that Province, and I think that the form of the policies which were issued in the present case evidences the fact that the insurer intended to be governed by that law.

Moreover, as the following passage makes clear, the courts use both objective and subjective factors to determine the law with the closest connection to a contract:

> The court must take into account, for instance, the following matters: the domicil and even the residence of the parties; the national character of a corporation and the place where its principal place of business is situated; the place where the contract is made and the place where it is to be performed; the style in which the contract is drafted, as, for instance, whether the language is appropriate to one system of law, but inappropriate to another; … the economic connexion of the contract with some other transaction; … the nature of the subject-matter or its situs; the head office of an insurance company, whose activities range over many countries; and, in short, any other fact which serves to localize the contract. (Cheshire on Private International Law (7th ed. 1965), at 190, quoted in Can-Am Produce, at para. 7.)

(iii) Proper Law of Guarantee and G.A.A.

Master Wacowich pointed out (at para. 4) that, in Can-Am Produce itself, the guarantee contained no express choice-of-law clause. He seemed to assume that, had there been such a provision, then the issue as to the governing law would have been settled. In light of existing authority, that was a safe assumption. In *Greenshields Inc. v. Johnston*, above, for example, the Alberta courts enforced a guarantee that contravened the G.A.A. because the contract contained a choice-of-law clause in favour of Ontario law. Despite this authority, it is questionable whether the choice-of-law provision should have been enforced on the facts of Greenshields itself: see generally Black, above, at 221-223, 242-243. In Greenshields, an Alberta resident gave a guarantee to secure the debt of an Alberta company. The creditor, although an Ontario corporation, maintained an office in Alberta and it received the guarantee there. In those circumstances, it did not make much sense for Ontario law to apply to uphold the enforceability of the guarantee. Effectively, the court allowed the parties to contract out of the requirements of the G.A.A. On the facts of Greenshields, one would have thought that, within the dicta of the Vita Food Products case, above, the express clause should have been struck down as contrary to public policy.

Equally, it would have been interesting if the guarantee in Can-Am Produce had contained a choice-oflaw clause in favour of British Columbia law. While it was true that the creditor operated in British Columbia, it was selling its produce to an Alberta-based company and the guarantee was executed by an Alberta resident in Alberta. Again, a strong argument could be made that it would be contrary to the public policy expressed in the statute for an Alberta court, at least, to give effect to the clause and to enforce the guarantee.

When it comes to determining the proper law of a contract of guarantee, in the absence of an express choice, for the purpose of ascertaining the applicability of the G.A.A., no consistent approach has emerged from the case-law: see generally Black, above. On occasions, the courts have called in aid the so called principle of validation: see, for example, *Sharn Importing Ltd. v. Babchuk* (1971), 21 D.L.R. (3d) 349 (B.C.S.C.); *Morguard Trust Co. v. Affkor Group Ltd.* (1984), 55 B.C.L.R. 1 (C.A.). Pursuant to this principle, where there are at least two systems of law that are reasonably connected with a contract and one of those laws would uphold the contract and the other would strike it down, or part of it, then the governing law should be the law that would uphold the contract. The theory is that this principle accords with the intentions of the parties because they must have intended that their contract should be valid. It is questionable, however, whether the application of this principle makes sense in the context of

legislation like the G.A.A. Presumably, the statute is designed to protect potential guarantors by ensuring that they understand fully the nature and effect of the proposed transaction. In those circumstances, it may well make sense to apply Alberta's invalidating rule rather than to enforce the guarantee.

In some cases, the courts, in determining the proper law of a guarantee, have appeared to give too much weight to connections between a particular law and the principal debt. A good illustration is *Kenton Natural Resources Corp. v. Burkinshaw* (1983), 47 A.R. 321 (Q.B.), which was discussed by Master Wacowich, at paras. 6-7. In that case, the court held that Alberta law, and hence the G.A.A., did not apply even though the guarantee was executed by Alberta residents carrying on business in Alberta and had been made in favour of an Alberta creditor. The court stressed the contacts that existed between Tennessee law and the principal debt to conclude that the law of Tennessee was the proper law of the guarantee: see Black, above, at 225-227.

Can-Am Produce itself raised an interesting set of facts. On the one hand, the creditor was a British Columbia corporation carrying on business in British Columbia. Arguably, a foreign creditor should not be penalized for failing to comply with a unique Alberta statute. On the other hand, the guarantor was an Alberta resident, giving a guarantee for an Alberta company with which the plaintiff had chosen to do business. Perhaps not surprisingly, the decisions have not been consistent on facts like these: contrast *O'Donovan v. Dussault*, [1973] 3 W.W.R. 634 (Alta. C.A.), discussed by Black, above, at 218- 220 and by Master Wacowich, at para. 9, in which the guarantee was enforced, with *Jorges Carpet Mills Inc. v. Bondar*, [1981] 4 W.W.R. 470 (Alta. Q.B.), discussed by Black, above, at 223-224 and by Master Wacowich, at para. 10, in which the guarantee was struck down.

If the policy underlying the G.A.A. means anything, then, on the basis of the bare facts as they are presently available, should Can-Am Produce proceed to trial, So's guarantee should be unenforceable. An Alberta resident entering into a guarantee on behalf of an Alberta company in respect of the delivery of goods into Alberta should be entitled to the benefits of the Alberta legislation, at least in an Alberta court.

Conclusion

Conflicts decisions concerning the G.A.A. have exhibited a complete lack of consistency. It would have been helpful if the Act itself had covered the choice-of-law question and, in particular, the extent to which the protection of the Act should be available where an Alberta guarantor deals with a foreign creditor. At present, there are difficult unanswered questions as to how the governing law of a guarantee will and should be determined. Perhaps some clarity may be injected into the area if and when final judgment is rendered in the *Can-Am Produce* case.