CITATION: Lilydale Cooperative Limited v. Meyn Canada Inc., 2013 ONSC 5313
COURT FILE NO.: 06-CV-304380 PD1
06-CV-304380 00A1
DATE: 20131030

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Lilydale Cooperative Limited, Plaintiff/Respondent

AND:

Meyn Canada Inc., Mey-Can Equipment Ltd., Meyn Food Equipment Inc., EMK NV and Elboma Moortgat Konstruktie NV, Defendants/Moving Parties

AND:

Allied Boiler Services Inc. and Weishaupt Corporation, Third Parties

BEFORE: Pollak J.

COUNSEL: *Jamieson Halfnight/Anne Thompson*, for the Plaintiff/Respondent

B. Leanne Rapley/ Thomas Whillier, for the Defendants/Moving Parties Meyn Canada Inc., Mey-Can Equipment Ltd. and Meyn Food Equipment Inc.

Bradley E. Berg/ Erin Hoult, for the Defendants/Moving Parties EMK NV and Elboma Moortgat Konstruktie NV

HEARD: June 13, 2013 and August 13, 2013

ENDORSEMENT

[1] The Defendants Meyn Canada Inc., Mey-Can Equipment Ltd. and Meyn Food Equipment Inc. ("Meyn") contracted with the Plaintiff, Lilydale Cooperative Limited ("Lilydale") for the design, delivery, and start-up of a fryer and oven cooking system (the "System"). A boiler manufactured by the Defendants Meyn, EMK NV and Elboma Moortgat Konstruktie NV was part of this System. Lilydale alleges that a fire in its Edmonton plant was caused by defects in the boiler supplied by Meyn.

[2] Lilydale's claims against Meyn are for breach of contract and negligence and against EMK are for negligence. Meyn crossclaims against EMK.

[3] This Rule 22 motion is for a determination of whether Alberta or Ontario law applies to Lilydale's claims. EMK and Meyn plead that Alberta law governs this action. Lilydale submits

that Ontario law applies. If Alberta law applies to these claims, the parties have agreed that the claims are statute-barred and therefore that Lilydale's claims, and all cross-, counter- and third party claims arising therefrom, should be dismissed, with costs to be agreed or fixed by the Court.

[4] Justice Day denied a *forum non conveniens* motion brought by Meyn in 2007, and held that Ontario had *prima facie* jurisdiction to hear the action.

[5] Rule 22.01(2) provides for a decision on a question of law where "the judge is satisfied that the determination of the question may dispose of all or part of the proceeding." The parties submit and agree that these requirements are met.

[6] The Special Case is as follows:

THE FOLLOWING CASE is stated for the opinion of the Court:

A. **The Parties**

1. The plaintiff, Lilydale Cooperative Limited (now known as Lilydale Inc., its successor corporation; "**Lilydale**") was, at all material times, a corporation incorporated pursuant to the provisions of the Alberta Business Corporations Act, with its head office in Edmonton, Alberta. Lilydale operates a food processing business, including from time to time under the name of Van's Quality Foods. At all material times, Lilydale did not operate facilities in Ontario.

2. At all material times, Lilydale owned and operated a poultry processing plant located at 9620 56th Avenue, Edmonton, Alberta (the "**Plant**").

3. The defendant Meyn Canada Inc., formerly known as Mey-Can Equipment Ltd. and Meyn Food Equipment Inc. (these three defendants, collectively, "**Meyn**"), is a corporation incorporated pursuant to the provisions of the Canada Business Corporations Act, with its office in Mississauga, Ontario, and carries on business as a supplier of food processing equipment. At all material times, Meyn was located in Ontario.

4. The defendant Elboma Moortgat Konstruktie NV is a Belgian company based in Lochristi, Belgium ("**EMK**"). The defendant EMK NV is not a separate entity but an abbreviation of Elboma Moortgat Konstruktie NV. Prior to 1998, EMK manufactured industrial equipment, which included boilers for food processing.

5. The third party Weishaupt Corporation ("**Weishaupt**") is incorporated pursuant to the Ontario Business Corporations Act, and is a wholly owned subsidiary of Weishaupt GmbH of Germany. Weishaupt GmbH is in the business of manufacturing commercial burners, including for food processing. Burners sold to Canadian customers are imported to Weishaupt's Canadian subsidiary

located in Mississauga, Ontario. There, they are customized to meet local requirements.

6. The third party Allied Boiler Services Inc. ("**Allied Boiler**") is a corporation based in Edmonton, Alberta. It carries on the business of installing, inspecting and servicing heating equipment.

B. Overview of the Proceedings

7. This action concerns a fire at the Plant that occurred on January 29, 2004. Lilydale alleges the fire was the result of the negligence of Meyn and/or EMK, and/or a breach of contract by Meyn, in respect of an allegedly defective fryer and oven system that Lilydale purchased from Meyn. A component of that fryer and oven system (namely, a thermal oil boiler) was purchased by Meyn from EMK.

8. Both Meyn and EMK have made crossclaims against each other and issued third party contribution claims against Weishaupt, from whom another component of the fryer and oven system was purchased (namely, a burner as described below), and Allied Boiler, which participated in the installation of the fryer and oven system at the Plant.

9. By Endorsement dated July 19, 2010, Madam Justice Wilson dismissed the third party claims against Allied Boiler as being out of time. However, the crossclaim made by Weishaupt against Allied Boiler was not dismissed and therefore, Allied Boiler is still a party to the action.

10. Further, Lilydale commenced a separate, companion action against Allied Boiler and Weishaupt in or around June 2008. Lilydale discontinued its action against Allied Boiler in April 2009, but has maintained its claim against Weishaupt. Lilydale and Weishaupt have agreed that the choice of law governing the tort claims in this action will also govern the claims in the companion action.

C. Equipment in Issue – the Fryer and Oven System

11. In the summer of 1993, Lilydale solicited a proposal from Meyn for a fryer and oven system for use at the Plant in Edmonton. On August 6, 1993, Meyn faxed a proposal from Mississauga, Ontario, to Lilydale in Edmonton, Alberta, regarding the design and sale of a fryer and oven system by Meyn to Lilydale. The August 6, 1993, fax is attached as Exhibit "A" hereto.

12. Sometime between August 6, 1993, and August 18, 1993, the parties apparently discussed the accessories to the proposed fryer and oven system, making certain minor revisions to the proposal. Lilydale accepted Meyn's revised proposal and placed the order for the fryer and oven system (the "**Fryer and Oven System**") on or before August 18, 1993. No record of this communication has been found.

13. On August 18, 1993, Meyn sent an order confirmation and first invoice for the deposit amount from Mississauga, Ontario, to Lilydale in Edmonton, Alberta, regarding the Fryer and Oven System. The August 18, 1993, order confirmation and invoice are attached as Exhibit "B" hereto.

14. The Fryer and Oven System was comprised of a number of components which were ordered by Meyn from its office in Ontario for sale and delivery to Lilydale in Alberta. The listing of Meyn's purchase orders to suppliers is attached hereto as Exhibit "C". The components of the Fryer and Oven System included, among other things, the following:

(a) a number of components from its parent company, Meyn Machine Fabriek and a division thereof, Meyn Further Processing, both of which are located in the Netherlands;

(b) a thermal oil boiler (Thermiflow 400/40/300V) from EMK, located in Belgium, along with a motor and pump (the "Boiler");

(c) a burner from Weishaupt (the "Burner"), located in Ontario with its parent company in Germany;

(d) oil for the thermical oil boiler from Petro-Canada in Oakville, Ontario;

(e) a pen recorder for use on the Fryer and Oven System's electrical panel from Enercorp Instruments Ltd. in Islington, Ontario; and

(f) installation and start-up services from Allied Boiler, located in Alberta.

15. The contract between Meyn and Lilydale did not specify a governing law or choice of forum.

(i) The Boiler

16. Meyn ordered the Boiler from EMK via purchase order dated December 6, 1993, which is attached hereto as Exhibit E. Meyn requested that EMK supply a motor and pump in separate correspondence of December 13, 1993: see Exhibit "J" hereto.

17. EMK sent Meyn an order confirmation and guarantee documentation in respect of the Boiler, which is attached hereto as Exhibit "K".

18. Among other things, EMK and Meyn agreed on a delivery date of December 23, 1993. The sales agreement between Meyn and EMK was stated to be "ex works delivery". The parties agree that, in common industry usage, "ex works delivery" means that the purchaser is responsible for the transportation of the goods from the seller's location to the point of final delivery.

19. Meyn took possession of the Boiler from EMK at EMK's factory in Belgium on December 23, 1993, and then delivered the Boiler directly to Lilydale in Alberta.

(ii) The Burner

20. Weishaupt, from its Ontario office, provided Meyn, in Ontario, with a quotation dated December 9, 1993, for the Burner, which is attached hereto as Exhibit F. On December 16, 1993, Weishaupt ordered the Burner from its parent company in Germany. A copy of the purchase order from Weishaupt Canada to its parent company is attached hereto as Exhibit "L", and a copy of the order confirmation is attached hereto as Exhibit "M".

21. The Burner was shipped from Weishaupt's parent company in Germany to Weishaupt in Ontario for final inspections by Weishaupt and delivery to Meyn. Copies of the pre-delivery inspection reports are attached hereto as Exhibit "N".

22. The Burner was picked up by Meyn from Weishaupt in Ontario on January 24, 1994. A copy of the packing slip is attached hereto as Exhibit "O". Meyn then arranged for delivery of the Burner to the Plant in Alberta.

(iii) Other Components

23. The other components of the Fryer and Oven System referred to in paragraph 14 above were ordered by Meyn in Ontario from suppliers in Ontario, Alberta, and the Netherlands, to be delivered to Lilydale, in Alberta.

(iv) Installation of the Fryer and Oven System

24. The components of the Fryer and Oven System were delivered to the Plant in Edmonton and the Fryer and Oven System was assembled, installed and commissioned there.

25. Personnel from Lilydale and Meyn's parent company were in attendance at the Plant during the period that the Fryer and Oven System was assembled, installed and commissioned in 1994.

26. On February 11, 1994, Allied Boiler attended at the Plant and performed work. Allied Boiler's evidence was that the only work it performed on February 11, 1994, was mounting the Burner and gas train to the Boiler.

27. The Fryer and Oven System was commissioned and started up at the Plant by no later than the end of August 1994.

(v) Funding for the Fryer and Oven System

28. In this action, Lilydale has produced a letter dated September 27, 1993, addressed to the Alberta Agriculture Development Corporation regarding an application for an interest-free loan under the "Canada Alberta Partnership on Agri-Food" in respect of, among other things, the Fryer and Oven System. Attached as Exhibit "P" is Lilydale's letter in that regard.

D. **Fryer and Oven System in Use (1994 to 2004)**

29. The Fryer and Oven System was in use by Lilydale at the Plant in Alberta from 1994 until the fire in 2004. The Fryer and Oven System was operated and maintained by Lilydale during this period.

E. **Fire at the Plant**

30. On January 29, 2004, there was a fire at the Plant.

31. In this action, Lilydale alleges that the fire began in the Fryer and Oven System and that the defendants are liable for the damages caused by the fire as set out in the Statement of Claim.

F. **Legal Proceedings**

32. Lilydale commenced the present action in Ontario on January 19, 2006.

G. **Alberta Limitation Period**

33. Section 3(1)(b) of the Alberta *Limitations Act*, R.S.A. 2000, c. L.-12, as amended, specifies an ultimate limitation period of 10 years from the date the claim arose.

34. Based on the latest date by which the Fryer and Oven System was commissioned and started up at the Plant (namely, no later than the end of August 1994), the parties agree that the claim arose in or before the end of August 1994.

THE QUESTIONS for the opinion of the Court are:

35. On the facts of this case, what law applies to the plaintiff's claims? In particular:

(a) Does Ontario or Alberta law govern Lilydale's claims against Meyn in contract?

(b) Does Ontario or Alberta law govern Lilydale's claims against Meyn and EMK in tort?

THE RELIEF SOUGHT on the determination of the questions stated is:

36. To the extent that Alberta law applies to the plaintiff's claims, the parties request dismissal of those claims, including all counter-, cross- and third party claims, on consent, with costs of the motion and the action to be agreed or fixed by the Court.

37. To the extent that Ontario law applies to the plaintiff's claims, the parties request an order specifying that Ontario law applies to those claims, with costs of the motion to be agreed or fixed by the Court.

[7] The facts for the Court's consideration are set out in the "Special Case" with attached exhibits. Pursuant to rule 22.05(1) of the *Rules*, the parties also ask the Court to make inferences arising from the facts and exhibits in the Special Case. The parties do not agree on the inferences to be made. Their submissions on the requested inferences are conflicting and, in many cases, relate to the facts that the parties have agreed on in the Special Case. The parties are seeking to improve their positions on the facts they have "agreed to" in the Special Case through the incorporation of documents, and inferences to be made on them.

Issues

[8] The parties agree the issues are:

(a) Does Ontario or Alberta law govern Lilydale's claims against Meyn and EMK in tort?

(b) Does Ontario or Alberta law govern Lilydale's claims against Meyn in contract?

The Tort Claims

[9] All parties rely on the Supreme Court of Canada case of *Tolofson v. Jenson*, [1994] 3 S.C.R. 1022, and agree that as a general rule, the choice of law to be applied in torts is the law of the place where the activity occurred.

[10] The Defendants further submit that, as in this case, if the negligent acts happen in one jurisdiction and the consequences of the negligent acts happen in another jurisdiction, our courts have held that the law of the place of the consequences (Alberta in this case) should apply.

[11] They rely, in particular, on the case of *Leonard v. Houle* (1997), 36 O.R. (3d) 357 (C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 19, wherein the Court of Appeal held that Quebec law applied to a claim for damages from a car accident in Quebec resulting from a police chase starting in Ontario. Charron J.A. (as she then was) stated, at para. 20:

> It seems clear to me that the wrong occurred in the Province of Quebec because the injury occurred there. The plaintiffs are not suing because the Ottawa police breached their duty when they commenced a chase while they were in the Province of Ontario, nor are they suing because the Ottawa police failed to adequately warn the Quebec police authorities of the ongoing chase. They are suing because Leonard was injured in the resulting car accident in the Province of Quebec. *The activity which took place in the Province of Ontario, even if found to constitute a breach of duty on the part of the Ottawa police, does not amount to an actionable wrong. There is no actionable wrong without the injury. The place where "the activity took place" which gives rise to the action is in the Province of Quebec.* [Emphasis added.]

[12] In this case, all of Lilydale's damages were suffered in Alberta.

[13] Lilydale submits that the Supreme Court has changed the test in tort claims in the recent *Club Resorts Ltd. v. Van Breda,* 2012 SCC 17, [2012] 1 S.C.R. 572 case. The Defendants dispute this submission and argue that the *Club Resorts* case confirms that the test from the *Tolofson* case is still applicable.

[14] Lilydale submits that in the *Club Resorts* case the Supreme Court held:

(a) that the place of the tort is not necessarily determined by the place where the damage occurs; and

(a) that in considering the applicable law, the Court may consider a wider range of factors than just the place of the tort.

[15] To support this submission that the Court should consider a wider range of factors, Lilydale relies on the following quotation wherein LeBel J. (writing for the Court) stated, at para. 16:

> [T]he framework established for the purpose of determining whether a court has jurisdiction may have an impact on the choice of law and on the recognition of judgments, and vice versa. Judicial decisions on choice of law and the recognition of judgments have played a central role in the evolution of the rules related to jurisdiction. None of the divisions of private international law can be safely analysed and applied in isolation from the others.

[16] Lilydale therefore argues that this Court should consider a "wider range of factors" to determine the applicable law - such as the location of the negligent activity (Ontario) and the contractual relationship between the parties.

[17] Lilydale submits that the following factors should be considered and that these factors support the submission that Ontario law should be applied:

(a) With respect to claims against Meyn:

(i) Meyn was resident in, and carried on business from Ontario.

(ii) The contract between Meyn and Lilydale was made in Ontario.

(iii) The claims in negligence are for failures to notify, warn, or provide sufficient information to Lilydale in assembling, testing, inspecting, shipping, supplying and starting up the defective Fryer and Oven System. These actions occurred in Ontario.

(b) With respect to claims against EMK:

(i) The contract between Meyn and EMK was made in either Belgium or Ontario.

(ii) Having dealt with Meyn only in Ontario, and not having delivered their merchandise to, or otherwise having any presence in Alberta, the only forum and law that EMK could have reasonably expected to have responded to in this case is Ontario.

(iii) Claims in negligence are for failures in designing, fabricating, and testing the key components of the Fryer and Oven System, which occurred in Belgium.

(iv) The defective design and manufacture occurred in Belgium.

[18] Lilydale also submits that Belgian law applies to its tort claim against EMK. It argues that this Court should therefore find that the law of Ontario applies to its claim against EMK because Belgian law has not been pleaded or proven on this Rule 22 motion.

[19] The Defendants submit that if Belgian law applies to Lilydale's claim against EMK, this motion should be dismissed. It is noted that Lilydale relied on Rule 17.02(g) (a tort committed in Ontario) to serve EMK outside of Ontario. Lilydale has not abandoned its pleaded position that EMK committed a tort in Ontario.

[20] Further, in the alternative, it is submitted by the Defendants that as there is no required agreement with respect to the relief to be granted, this motion should be dismissed. A Rule 22 motion requires the parties to agree on the relief sought.

[21] No relief was agreed to in the Special Case in the event that this Court concludes that Belgian law applies to Lilydale's claims.

[22] I do not accept Lilydale's submissions with respect to the test to be applied to the tort claims. The *Club Resorts* case did not deal with the issue of choice of laws. Although some of the quotations relied on by Lilydale may form the basis for an alternate view on the choice of laws to be applied, it is noted that the jurisprudence I have referred to above specifically dealt with the choice of laws issue and with the issue in this case, which is the effect of the tortious

acts occurring in a different jurisdiction than the consequences of the acts. There is no indication from the Supreme Court of Canada in the *Club Resorts* case that this jurisprudence has been reversed.

[23] In my opinion, the judicial guidance from the *Leonard* case, which is on point, should be followed to apply the law of Alberta to the torts claims, as that is the place where all of the damage occurred. This result is consistent with reasoning of the Supreme Court of Canada case of *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393. In that case, Dickson J. summarized the law as follows, at p. 409:

> This rule recognizes the important interest a state has in injuries suffered by persons within its territory. It recognizes that the purpose of negligence as a tort is to protect against carelessly inflicted injury and thus that the predominating element is damage suffered. By tendering his products in the market place directly or through normal distributive channels, a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods. This is particularly true of dangerously defective goods placed in the interprovincial flow of commerce.

On this basis, I find that the law of Alberta applies to the tort claims. In accordance with the agreement of the parties, all of the tort claims are dismissed as they are statute barred.

The Contractual Claims

[24] The parties agree and rely on the Supreme Court of Canada's finding in the case of *Imperial Life Assurance Co. of Canada v. Segundo Casteleiro Y Colmenares*, [1967] S.C.R. 443, which set out the factors to be considered to determine the law that governs the contract.

[25] The parties agree that:

(1) The court must determine which system of law has the "closest and most real connection" with the contract.

(2) The factors to consider in determining which system of law has the "closest and most real connection" include:

(a) the place of performance of the contract;

(b) the nature and subject matter of the contract;

(c) the place of contracting; and

(d) the domicile and residence of the parties.

(a) the place of performance of the contract

[26] In the *Colmenares* case, the court stated, at p. 449, that:

> While it is clear that all relevant circumstances surrounding the making of a contract are to be given due weight in determining the locality with which it is most closely associated, I am of the opinion that in the present case the fact that both the applications and the policies were prepared in Ontario in a common, standard form which complied with the law of the Province, is to be regarded as of preponderating importance in determining the law governing the contracts.
>
> 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.

[27] Meyn relies on the case of *Rôtisserie May's Ltée v. Stoel-Tek Inc.*, (1990), 104 N.B.R. (2d) 255. It submits this case as authority for the proposition that if a contract is for delivery, installation and setup of a machine, the venue for the performance of these terms is an overwhelming consideration. It argues that as the performance of the contract was in Alberta, Alberta law should apply to the contract.

[28] Lilydale notes that this case is twenty-three years old and undefended. It submits further that the case is not applicable and is clearly distinguishable. In that case, the contract was for the sale, delivery, installation, and after-sales service of a machine worth approximately $6,000.

[29] Lilydale notes that this contract price was $579,000 for the design and supply of a complex system. Meyn had to design the System. It had to choose its components and arrange to obtain them. This was done from Ontario. It contracted with a third party, Allied Boiler, from its office in Ontario, for the start-up of the System. The contract did not provide for after-sales service or maintenance.

[30] Lilydale submits that all of the contract was performed by Meyn in Ontario. The contract excluded work that had to be done in Alberta and did not have any provisions for Meyn to perform any work in Alberta.

[31] Meyn asks the Court to make an inference that work was performed in Alberta, as the contract provided for the "start-up by qualified technician" which took place in Alberta. Lilydale submits that there is no evidence that Meyn's parent company performed work. As well, Meyn submits that this Court should make the following inference which it alleges is supported by its exhibits. The contract provided for delivery "FOB" – Freight on Board – at Lilydale's Plant in Alberta. Accordingly, Meyn was responsible for the risk of loss or damage to all of the goods provided in the contract until they arrived at Lilydale's plant in Edmonton. Meyn also submits that this Court should infer from the exhibits that Lilydale knew of the involvement of Meyn's Dutch parent company because its Proposal notes contact information for two persons while the

Meyn Canada representative was out of the office. I do not accept the submissions that such inferences should be made.

[32] I agree with the submissions of Lilydale, that a consideration of the factors noted above support that the "closest and real connection" is with Ontario, as most of the contract was performed by Meyn in Ontario.

(b) the nature and subject matter of the contract

[33] The contract was for the design, delivery, and installation of the System for Lilydale. Meyn argues that the System was fully assembled and operated only in Alberta. It relies on the case of *Miller Farm Equipment (2005) Inc. v. Shewchuk*, 2009 SKQB 170, 335 Sask.R. 111, and submits that the nature and subject matter of the contract "vested" entirely in Alberta.

[34] Lilydale submits that what is relevant is the place of performance of the contract (the design and supply of the System), which has been discussed above, and not the location of the component parts of the System.

[35] Again, relying on its exhibits, Meyn submits that the Court should infer that the majority of the components to be used in the System came from Meyn's production facilities in Holland. The court should infer further that the component parts were of existing designs, as evidenced by the references to their trade names in the Confirmation Documents. Meyn submits that because Lilydale knew that "the majority" of the System's components were to be sourced from Meyn's Dutch parent company and because the components were of existing designs, it follows that the contract was performed in Alberta.

[36] Lilydale denies there is evidence to support these conclusions.

[37] Meyn also relies on the "attendance of its representatives" of its parent company in Alberta when the System was started-up in February 1994.

[38] Lilydale again submits that there is no evidence that Meyn's parent company performed work in Alberta. It submits that in this case, the evidence is that the start-up of the System was only a small component of the contract with the bulk of the contractual requirements performed in Ontario. As well, it argues that the jurisprudence provides that where a contract has multiple places of performance, the place of substantial performance governs.

[39] I do not accept Meyn's submissions that the nature and subject matter of the contract support the proposition that Alberta has the "closest and most real connection" to the contract.

[40] Meyn further relies on its exhibits as follows:

(a) One of the exhibits shows that Lilydale requested financing for the System from the Alberta government. Meyn does not rely on any jurisprudence to support the submission that this is a relevant factor for this Court to consider. Lilydale relies on the *Colmenares* case, in which the Court did not consider that the payment of

the insurance premiums was a relevant factor to favour the application of one law over another. I do not consider Meyn's argument to be persuasive in this regard.

(b) Meyn again submits that this Court should infer from its exhibits that Lilydale knew of the involvement of Meyn's Dutch parent company. Meyn relies on its Proposal to Lilydale. This proposal includes contact information for two persons while the Meyn Canada representative was out of the office. I do not accept this submission that such inference can be made.

(c) Meyn further relies on the fact that start-up services were provided by Allied Boiler in Alberta. Meyn contracted with Allied Boiler to provide the start-up for the System. Lilydale relies on Allied Boiler's evidence, which is that the only work it performed was "mounting the burner and gas train to the Boiler." It submits that the System start-up was only a small portion of the contract, and the only portion of the contract that was, arguably, "performed" in Alberta. There is no evidence that Meyn performed any work under the contract in Alberta. I agree with the submissions of Lilydale.

[41] Meyn also further submits that the System was to be used only in Alberta. Lilydale counters that as the contract was for the "design and supply" of the System, and did not provide for any ongoing after-installation service, the fact that the System is located in Alberta is not determinative.

[42] I find that the consideration of the factors discussed above regarding the nature and subject matter of the contract supports the "closest and real connection" to Ontario.

(c) the place of contracting

[43] Lilydale submits that the place of contracting is the place where the offeror receives notification of acceptance. In this case, Meyn, operating only in Ontario, could only have received notification of Lilydale's acceptance in Ontario.

[44] Lilydale relies on documents that it submits show that the communication between the parties (Meyn by fax; Lilydale by telephone) and the short period of time between the date of Meyn's proposal (August 6, 1993) and the date of the order confirmation (August 18, 1993) make it highly unlikely that Lilydale would have accepted Meyn's offer by a method other than instantaneous communication, i.e. phone or fax.

[45] It also submits that, as there are no facts or documents to support Meyn's submission that Lilydale might have accepted Meyn's offer by regular mail, the proper inference to be made is that Lilydale accepted Meyn's offer by telephone or fax.

[46] Meyn disagrees and submits that as there is no evidence as to where, when and how Lilydale's acceptance of Meyn's revised proposal was communicated, this factor is neutral.

[47] I agree with Meyn's submission and find that this factor is neutral.

(d) the domicile and residence of the parties

[48] Meyn relies on its federal incorporation as support for the proposition that "no particular law is favoured or determined by its business status."

[49] Lilydale relies on the *Colmenares* case wherein, with respect to the factors of domicile and residence of the parties, the court considered the place of a company's principal place of business, and the location of an insurance company's head office. The Court did not consider the jurisdiction of incorporation as a relevant factor in its analysis.

[50] Lilydale submits that Meyn's only place of business in Canada is Ontario. Therefore, this factor is neutral in determining the proper law of the contract as Meyn is resident in Ontario and Lilydale was resident in Alberta. I agree that this factor is neutral.

[51] When all of the relevant factors are considered, I find that the contract has "the closest and real connection" to Ontario. On this basis, I find that the law of Ontario applies.

Costs

[52] Subject to any agreement between the parties, brief written submissions on costs are to be made within fifteen (15) days of the release of these reasons.

Pollak J.

Date: October 30, 2013