19-1288

No. 19-866

IN THE SUPREME COURT OF THE UNITED STATES

ALAN SINGER, *Petitioner*

v.

MONDEX CORPORATION, *Respondent*

On Petition For Writ Of Certiorari
To The Supreme Court of Arizona

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Arizona Supreme Court have subject matter to grant jurisdiction for attorney's fees on behalf of an appellee after it declined to grant review; (2) alternatively, did the Arizona Supreme Court have jurisdiction to grant attorney's fees in favor of an appellee who failed to file a cross-appeal?

2. Did the Canadian defendant waive its right to personal jurisdiction under the minimum contacts test, by its choice of law of Ontario, Canada, which has a less stringent test for invoking personal jurisdiction?

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED CASES

- *Alan Singer v. Mondex Corporation,* No. B8015CV201804018, Mohave County Superior Court for the State of Arizona. Judgment entered June 8, 2019.
- *Alan Singer v. Mondex Corporation*, No. 1 CA-CV 18-0346, Court of Appeals for the State of Arizona, Division One. Judgment entered May 2, 2019. (Memorandum Decision).
- *Alan Singer v. Mondex Corporation*, No. CV-19-0159-PR, Supreme Court of Arizona, Judgment entered December 5, 2019.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Alan Singer hereby petitions for a writ of certiorari to review the judgment of the Arizona Supreme Court issued on December 5, 2019.

OPINIONS BELOW

This case presents substantial legal issues dealing with matters of international importance, which will likely become more common in investor-state-dispute-settlement litigation after the ratification by Canada of the United States-Mexico-Canada Treaty ("USMCA"). Specifically, the question arises whether a Canadian party's choice of law may result in an implied waiver of the minimum contacts test for personal jurisdiction, when sued in the United States.

The question arises (1) whether a choice of law, freely bargained for, is enforceable against the party that drafted the contract; and (2) if it is, whether the choice of law provision partially waives personal jurisdiction and the provisions of the minimum contacts test set forth in *International Shoe v. Washington* (1945) 326 U.S. 310.

Since 2012, Canadian law has employed the less stringent "real and substantial connection" in the assumption of civil jurisdiction by Canadian courts. See *Club Resorts v. Van Breda*, 2012 SCC 17. Unlike the American minimum contacts test, the real and substantial connection test allows a plaintiff to sue where the injury occurred---irrespective of defendant's contacts with the forum. In addition, Canadian courts hold

that personal jurisdiction is presumed. The burden of proving lack of jurisdiction rests with the challenger, usually the defendant.

Petitioner Alan Singer, an Arizona resident, appealed the dismissal of his action for lack of personal jurisdiction. Mondex had successfully argued that it had insufficient contacts with Arizona for that state to exercise personal jurisdiction over it. The production of over a hundred e-mails from Mondex to Petitioner apparently did not constitute sufficient contact.

Respondent Mondex did not ask for attorney's fees at the superior court, and it failed to file a cross-appeal. For the first time, on appeal to the Arizona Court of Appeals, Mondex demanded attorney's fees, claiming that the action was brought without substantial justification or, alternatively, it was entitled to the fees "on contract" despite the fact that the contract did not have an attorney's fees provision (App. 4).

The Court of Appeals refused to grant Mondex attorney's fees, and concluded there *was* substantial justification for the action.

Petitioner appealed to the Arizona Supreme Court which refused jurisdiction, but nevertheless *sua sponte* granted attorney's fees "based upon contract" – even though the contract expressly denied attorney's fees for any party.

Despite raising the issue of the choice of law at the superior court, at the Court of Appeals, and at the Arizona Supreme Court, each and every court declined to rule on this vital legal issue.

Alternatively, Mondex claimed that the action was brought "without justification" and for "the purpose of harassment." In a Memorandum Decision, the Court of Appeals affirmed the dismissal, but refused to grant attorney's fees because it felt that the action was justified App. 2.

On December 5, 2019, the Arizona Supreme Court refused to grant review, but nevertheless granted Mondex Corporation attorney's fees, not only at the Supreme Court level, where Mondex filed a five-page brief opposing review, but also granted attorney's fees at the Court of Appeals level, where such fees were never granted by that court. The Arizona Supreme Court even went so far to award attorney's fees at the trial court level – where Mondex failed to ask for any attorney's fees at all.

Petitioner appealed to the Arizona Supreme Court which refused jurisdiction over the case, but nevertheless *sua sponte* granted attorney's fees "based upon contract" – even though the contract expressly denies attorney's fees for any party.

Since Arizona Supreme Court Rules do not provide for a rehearing or en banc review, Petitioner had only limited opportunity to object to, or challenge that court's decision to grant attorney's fees. This is clearly a denial of petitioner's due process rights.

Finally, on February 11, 2020, the Arizona Supreme Court partially reversed itself, agreeing that Mondex waived attorney's fees by failing to timely request them at the trial court. It also acknowledged that the Court of Appeals exercised its

discretion and denied the fees. The Arizona Supreme Court refused to grant review but nevertheless, granted Appellee's attorney's fees "on contract," a provision that did not exist.

JURISDICTION

The Arizona Supreme Court denied the Petition for Review on December 5, 2019. On February 3, 2020, Justice Kagan extended the time for filing to May 3, 2020.

The Court has jurisdiction over this case under 28 USC 1257(a).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

No federal statutes or constitutional provisions are involved.

INTRODUCTION AND STATEMENT OF THE CASE FOR REVIEW

Under Arizona law, appellate jurisdiction is purely statutory. Arizona Appellate Rule 21 (d) specifies:

"(d) Vacation, Reversal, Modification, or Affirmation. If the Supreme Court vacates, reverses, modifies, or affirms the Court of Appeals' decision, a party entitled to attorneys' fees and costs may file in the Supreme Court a statement of attorneys' fees and costs incurred in the Supreme Court and in the Court of Appeals."

Here, the Arizona Supreme Court denied the discretionary Petition for Review, while concurrently refusing to review the decision of the Court of Appeals.

The Arizona Supreme Court cannot have it both ways. It cannot refuse jurisdiction, and still award attorney's fees. Once it denied the Petition, the Arizona

Supreme Court no longer had subject matter jurisdiction. It no longer had the power or authority to render a decision on attorneys' fees.

Under the clear language of Rule 21, the Arizona Supreme could exercise jurisdiction over the issue of attorney's fees only if it assumed jurisdiction over the case and decided to vacate, reverse, modify, or affirm the decision of the Court of Appeals. Because the Arizona Supreme Court denied the Petition, it did not vacate, modify, reverse, or affirm the decision of the Court of Appeal. Therefore, according to the plain meaning of Rule 21(d), the Arizona Supreme Court did not have jurisdiction over this case and did not have subject matter jurisdiction over attorney's fees.

Once it denied the Petition, the Arizona Supreme Court no longer had subject matter jurisdiction. It no longer had the power or authority to render a decision on attorneys' fees.

The Arizona Supreme Court also had no subject matter jurisdiction over attorney's fees because, under Arizona Rule 13(b)(2), an appellate court may enlarge the rights of the appellee or reduce the rights of the appellant only if the appellee filed a cross-appeal. Mondex did not.

"Scope of Issues. The appellee's answering brief may include in the statement of issues presented for review and may discuss in the argument any issue that was properly presented in the superior court without the need for a cross-appeal, and the appellate court may affirm the judgment based on any such grounds. An appellate court, however, may modify a judgment to enlarge the rights of the appellee or reduce the rights of the appellant only if the appellee has filed a notice of cross-appeal."

[Emphasis added].

Either Rule 21(d) or Rule 13(b)(2), the Arizona Supreme Court did not have subject matter jurisdiction over attorney's fees.

Finally, in Paragraph 12 their contract, the parties agreed that Ontario law (where Mondex was incorporated and where its headquarters are located) would govern the agreement.

A "choice of law" provision ensures, or should ensure, that the contractual choice of law of a designated jurisdiction will govern the dispute, regardless of where the dispute is adjudicated. The question therefore naturally arises: is the choice of law provision enforceable against the party that drafted the contract? Did Defendant/Appellee's contractual choice of law result in an implied waiver of its jurisdictional defense.

Although Appellant raised this issue at his first opportunity in its opposition to a motion to dismiss in Superior Court, at the Court of Appeals, and at the Supreme Court, no court addressed this argument, and neither did Mondex.

Under the law of the United States, in order to exercise personal jurisdiction consistent with due process, a defendant must have created a minimum number of contacts with this forum. *International Shoe v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95(1945). Moreover, it is Plaintiff's burden to prove that sufficient contacts exist.

Application of Ontario law would likely have yielded the opposite outcome and

would likely have resulted in the exercise of personal jurisdiction over Mondex. Under Canadian law, jurisdiction may be based on where the harm was felt----in Arizona. *Club Resorts v. Van Breda*, 1 SCR 572, 2012 SCC 17, 2010 ONCA 547. Moreover, under Canadian law, the burden of proving lack of jurisdiction falls upon the party challenging jurisdiction, the defendant, a standard which Appellee clearly did not meet.

WHY THE COURT SHOULD GRANT REVIEW

The choice of law question is likely to recur and will affect a huge number of multinational market participants, especially those in the United States and Arizona.

Trade has certainly dominated the business news for many months. Trade between the United States and Canada is substantial and is likely to increase, especially when the USMCA is ratified by Canada.

Choice of law provisions in international commercial contracts are favored because they are "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." *Scherk v. Alberto-Culver Co.*, 417 US 506, 516-520 (1974). As the party with greater bargaining power and as a supposed sophisticated player on the world stage of inherited wealth, Mondex was represented by a well known law firm during contractual negotiations. Mondex cannot complain if the opposing party relies on the agreement that it created.

It would not only benefit all parties to have the rules clearly spelled out, it is a

requirement of due process. No one should have to litigate for years to find out that the court was without jurisdiction yet be forced to pay an opponent's attorneys fees.

Where a forum selection (or a choice of law clause) is held enforceable, the necessity for a due process analysis may be obviated because the party is deemed to have consented to personal jurisdiction. See *Petrowski v. Hawkeye Security Co.*, 350 U.S. 495 (1956)(upholding personal jurisdiction where both parties agreed to submit voluntarily to the jurisdiction of a given court without service of process).

Enforcement of such forum selection (or choice of law) provisions does not offend due process where they have been fully negotiated, and are not unjust and unreasonable. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, n. 14, 105 S.Ct. 2174, 2182, n. 14, 85 L.Ed.2d 528, 540 n. 14 (1985). That specific test, adopted in *M/S Bremen v. Zappata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972), has been embraced by Arizona. Please see also *Societe Jean Nicolas Et Fils v. Mousseux,* 123 Ariz. 59, 61, 597 P.2d 541, 543 (1979) (holding that contractual choice-of-law clause entered into without fraud or unfair bargaining will be enforced, so long as it is reasonable at time of litigation and does not deprive litigant of day in court).

Here, enforcement of the governing law provision would allow Mondex and Appellant to have their day in court.

"A general principle of contract law is that when parties bind themselves by a lawful contract the terms of which are clear and unambiguous, the court must give effect to the contract as written." *Grubb & Ellis Mgmt. Serv. Inc. v. 407417 B.C.,*

L.L.C., 213 Ariz. 83 [Emphasis added].

Clauses which are knowingly incorporated into a contract should not be treated as meaningless. *Morgan Bank (Delaware) v. Wilson*, 794 P.2d 959, 963.

Personal jurisdiction is a right which may be waived. A litigant may enter into a variety of legal arrangements in which express or implied consent to the personal jurisdiction of the court is given. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703, 102 S.Ct. 2099, 2105, 72 L.Ed.2d 492, 502 (1982). In view of present-day commercial realities, most courts recognize that parties may include contractual provisions for resolving controversies in a particular jurisdiction. *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 84 S.Ct. 411(1964).

The United States Supreme Court has held that enforcement of such forum selection provisions does not offend due process where they have been fully negotiated and are not unreasonable and unjust. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, n. 14, 105 S.Ct. 2174, 2182, n. 14, 85 L.Ed.2d 528, 540 n. 14 (1985). That specific test, adopted in *M/S Bremen v. Zappata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972), has been embraced by Arizona. *Societe Jean Nicolas Et Fils v. Mousseux*, 123 Ariz. 59, 597 P.2d 541 (1979).

In addition, where a forum selection clause (or choice of law clause) is held enforceable, the necessity for a due process analysis of the type and extent of the defendant's contacts with the forum is obviated. *Batton v. Tennessee Farmers Mut. Ins. Co.*, 153 Ariz. 268, 736 P.2d 2 (1987). See also *National Equip. Rental, Ltd. v. Polyphasic*

Health Sys's, Inc., 141 Ill.App.3d 343, 95 Ill.Dec. 569, 490 N.E.2d 42 (1986) (upholding consent to jurisdiction clause does not violate due process even though no minimum contacts existed between defendants and State of New York).

Ontario does not use the minimum contacts test, and there is a presumption of jurisdiction. Under Ontario law, a defendant may challenge jurisdiction. But the burden of rebutting the presumption of jurisdiction rests upon the party resisting jurisdiction, the defendant.

Since the tort of libel was committed in Arizona and since the contract was entered into in Arizona, Plaintiff therefore would be within his rights to assert jurisdiction in Arizona. See *Club Resorts v. Van Breda,* 1 SCR 572, 2012 SCC 17 (2012) for a review of the "real and substantial test" employed in Canada for exercising personal jurisdiction.

The facts of *Van Breda* are instructive. Two plaintiffs, residents of Ontario, sued a Bermuda corporation for injuries sustained in Cuba while vacationing there. The Canadian Supreme Court upheld jurisdiction over the corporation, Club Resorts, even though Club Resorts was a Bermuda corporation that had no contacts with Ontario and carried out no business in Ontario, but injured two Canadian residents. Ontario uses as one of its tests for assumption of jurisdiction *lex loci delecti* ("where the harm occurred.").