

Supreme Court of Canada Affirms Importance of Jurisdiction Agreements

In *Momentous.ca Corp v Canadian American Assn of Professional Baseball Ltd*, 2012 SCC 9 ([available here](#)) the court has affirmed its willingness to give effect to exclusive jurisdiction agreements in favour of a foreign forum.

The decision is brief (12 paragraphs) and was released only just over a month after the case was argued. It is a unanimous decision by the seven judges.

Academic commentary about the decision has been quite mixed. I am not aware that anyone thinks the decision is wrong. There is much consensus that the court reached the correct result: the defendant should have been able to rely on the jurisdiction agreement in favour of North Carolina to resist proceedings in Ontario. But there is much disagreement about the quality of the brief reasons.

One problem I have with the reasons is that I think the court confuses a dismissal of proceedings based on a lack of jurisdiction with a stay of proceedings. Despite the words used, my sense is that what the defendants were seeking was a stay, not a dismissal. The court's repeated references to discretion (paras 9 and 10) are because what the court is really considering is a stay. There is no discretion in the assessment of jurisdiction: the court either has it or does not have it as a matter of law. Yet the court repeatedly refers to the remedy as a dismissal rather than a stay. This is a mixing of two fundamentally different concepts. If we take the court at its word, there is now the discretion to hold a court lacks jurisdiction.

The court relies on Rule 21.01(3)(a) which deals with challenges based on the court's lack of subject matter jurisdiction. In my view, that is not the basis for motions seeking to enforce jurisdiction clauses. Such clauses do not deprive a court of jurisdiction over subject matter. Absent the clause the court clearly had jurisdiction over the subject matter of the dispute. If no one had invoked the clause the litigation would have carried on in Ontario. And is there any doubt that a jurisdiction clause in favour of Ontario, rather than a foreign forum, is a matter of territorial jurisdiction and not subject matter jurisdiction? Parties cannot confer subject matter jurisdiction on a court by contract. Yet in the wake

of this decision, we now have to grapple with the notion that jurisdiction clauses are about subject matter jurisdiction, not territorial jurisdiction.

There are many other interesting issues left unresolved by the court, so the brevity of the decision is a disappointment.