

— THE COURT OF APPEAL FOR SASKATCHEWAN

BWV INVESTMENTS LIMITED,
(Bennet & Wright Contractors)
(Plaintiff) RESPONDENT

and -

SASKFERCO PRODUCTS INC., et al.
(Defendants) RESPONDENT

and -

UHDE GMBH
APPELLANT

CORAM:

The Honourable Chief Justice Bayda
The Honourable Mr. Justice Cameron
The Honourable Madam Justice Gerwing

COUNSEL:

Mr. W.J. Kenny & Mr. W.F. Hood for the appellant
Mr. G. Kuski, Q.C. & Mr. M. Sawatzky for BWV
Mr. J. Hanley for Fuller Austin
Mr. R.W. Leurer for Saskferco

DISPOSITION:

Appeal Heard: 6 December 1993
Appeal Allowed: 25 November 1994
On Appeal From: Q.B. 285 of 1993, J.C. of Regina
Appeal File: 1504
Reasons by: The Honourable Madam Justice Gerwing
In concurrence: The Honourable Chief Justice Bayda
and The Honourable Mr. Justice Cameron

GERWING J.A.

This is an appeal from a decision in chambers of MacPherson C.J.Q.B. issued on 24 March 1993. The appellant, UHDE GmbH (UHDE), is an industrial engineering and construction contractor with its head office in Dortmund, Germany. The company is engaged in the performance of large industrial projects in approximately 80 countries throughout the world, including Canada. The respondent, BWV Investments Ltd. (BWV), operates under the firm name Bennett & Wright Contractors and has its head office in Toronto, Ontario. For the purposes of this appeal, UHDE was the project's contractor and BWV the subcontractor.

1 February 1990:

UHDE was engaged by Saskferco Products Inc. to perform the engineering, procurement and construction of a nitrogen fertilizer plant near Belle Plain, Saskatchewan.

1 October 1990:

By agreement, UHDE engaged a joint venture known as HMW-

Bennett & Wright Contractors Limited to perform the mechanical contracting work with respect to the construction of the Saskferco project. BWV was a 50% shareholder in the joint venture.

24 April 1991:

The original agreement with the joint venture was terminated due to the inability of the joint venture to provide the required bonds. BWV assumed the subcontract and supplied the necessary indemnity and bonds. The original subcontract was terminated and BWV became a party to a new subcontract under the same terms. The subcontract with BWV covered a major portion of the construction of the Saskferco plant.

The subcontract contained the following arbitration agreement in Article 9:

Arbitration and Applicable Law

9.1 All disputes arising in connection with the Sub-Contract that have not been previously settled by mutual agreement between the parties shall be referred to and finally settled by arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with the Rules.

9.2 The interpretation, application and performance of the Sub-Contract shall be governed by the Substantive Federal Law of Switzerland. Arbitration shall take place in Zurich.

May-October 1991:

The subcontract provided for the optional extension by UHDE of the scope of the work to include the installation and construction of control, measuring and electrical equipment and the performance of installation and painting. These options were exercised by UHDE and the obligation to carry out the work was assumed by BWV. Including optional work, the estimated contract price was \$45,440,492 (Canadian).

30 October 1992:

Pursuant to The Builders' Lien Act, BWV registered a claim of lien (Instrument No. 92MJ13430) against the lands upon which the plant was being built.

3 November 1992:

A Certificate of Substantial Performance with respect to the subcontract was issued.

5 November 1992:

BWV commenced the instant action by a statement of claim alleging it had performed the services required by the subcontract and had rendered its accounts to UHDE, but UHDE had refused or neglected to make full payment. The amount alleged to be owing is \$14,187,000. Further, BWV claims

against Saskferco and UHDE pursuant to the trust provisions of The Builders' Lien Act for monies received or held for the benefit of BWV. BWV also claims interest pursuant to The Pre-Judgment Interest Act.

Although no statement of defence has been filed, UHDE argues that BWV has been overpaid on the basis of the applicable unit rates for the work performed. UHDE also claims deficiencies in the work and irregularities in the submission of claims by BWV. UHDE further asserts a right of set-off against BWV for previous overpayment and damages incurred due to delay by BWV in completing the work.

25 November 1992:

By notice of motion, UHDE applied for an order pursuant to Article 8(1) of the Model Law incorporated within the International Commercial Arbitration Act, namely, that the matter be sent to arbitration in accordance with the subcontract and, further, for an order staying the BWV action until the resolution of that arbitration.

The following legislation is relevant:

A. The International Commercial Arbitration Act, S.S. 1988,

c. I-10.2 (the ICAA):

2(1) In this Act:

(b) 'International Law' means the Model Law on International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law on June 21, 1985, as set out in the Schedule to this Act.

(2) Words and expressions used in this Act have the same meaning as the corresponding words and expressions in the International Law.

3(1) Subject to this Act, the International Law applies in Saskatchewan.

(2) The International Law applies to international commercial arbitration agreements and awards, whether made before or after the coming into force of this Act.

9 Where, pursuant to article 8 of the International Law, a court refers the parties to arbitration, the proceedings of the court are stayed with respect to the matters to which the arbitration relates.

11(1) This Act shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the act in their context and in the light of its objects and purposes.

SCHEDULE

UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

Article 5. Extent of court intervention

In matters governed by this Law, no court shall intervene except where so provided in this Law.

Article 7. Definition and form of arbitration agreement
 (1) 'Arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

. . . .
 Article 8. Arbitration agreement and substantive claim before court

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

. . . .
 Article 28. Rules applicable to substance of dispute
 (1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. . .

.

 Article 35. Recognition and enforcement
 (1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

* * *

B. The Enforcement of Foreign Arbitral Awards Act,
 S.S. 1986, c. E-9.11 (the EFAA):

2 In this Act, 'convention' means the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards as set out in the Schedule.

3 Where there is conflict between this Act and any other enactment, this Act prevails.

. . . .

SCHEDULE

A.CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

. . . .

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

. . . .
 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall

at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.

* * *

C. The Builders' Lien Act, S.S. 1989-90, c. B-7.1 (the BLA)

85(1) Subject to subsection (1.1), where a dispute arises at any time during the construction of an improvement with respect to the payment of money, the dispute, with the consent of the parties to the dispute, may be referred to a single arbitrator chosen by the parties.

(1.1) Where a dispute arises:

(a) at any time during the construction of an improvement with respect to the failure or refusal to certify substantial performance pursuant to section 41; or

(b) with respect to the payment of moneys to a contractor or subcontractor who has obtained a certificate of substantial performance with respect to his or her contract or subcontract:

the person making the request, by personal service of a written notice in the prescribed form, may require that the dispute be referred to an arbitrator.

(1.2) Where the parties to the dispute are unable to agree on an arbitrator within three days of service of the notice pursuant to subsection (1.1), the person making the request may apply to the person specified in the regulations for the designation of an arbitrator.

(2) The arbitrator may be a lawyer, an architect, an engineer, a chartered accountant or any person with experience in the construction industry.

(3) The arbitrator:

(a) shall render his decision within seven days of hearing the matter or any further time as may be unanimously agreed to by the parties;

(b) shall give written reasons for his decision, but wherever possible the procedure shall be summary; and

(c) may certify that the contract or subcontract is substantially performed.

(4) The decision of the arbitrator is binding on the parties who have referred the matter to the arbitrator except that it may be appealed to the court on a question of law alone within 30 days of giving the decision.

(5) Unless otherwise agreed by the parties to the dispute,

all costs of the arbitration are to be borne by the unsuccessful party on the arbitration.

. . .

99(1) Any covenant in any agreement by any person who provides services or materials to an improvement that this Act or any provision of this Act does not apply is void.

(2) Every contract or subcontract related to an improvement shall be deemed to be amended in so far as is necessary to be in conformity with this Act.

The chamber judge below had no difficulty in finding the ICAA (and consequently the Model Law) applied to this dispute and Article 9 of the subcontract was an "international arbitration agreement" within the meaning of the Act. He then considered Article 8(1) of the Model Law, which requires a court to refer disputes to arbitration unless "the agreement is null and void, inoperative or incapable of being performed." Absent some conflict with Saskatchewan law, the learned judge stated he would be bound to refer this matter to arbitration in accordance with the agreement.

Recognizing that the UHDE - BWV dispute would ordinarily be resolved under the BLA, he narrowed the question to whether the ICAA can override the BLA and, if not, whether staying the BLA action and ordering the arbitration to proceed would contravene or infringe the BLA. In the event such a contravention or infringement were found, he concluded he would have to refuse UDHE's application in favour of BWV's normal builder's lien action. He then reviewed the Rules of Arbitration in the International Chamber of Commerce, the arbitral forum chosen by UDHE and BWV. He also considered the presence of the several third-party lienholders (the sub-subcontractors) who are granted rights under the BLA but, in his opinion, would "lose" these rights if arbitration were ordered. He further took notice of s.99(1) of the BLA, which makes void any agreement to waive rights under that Act. On this basis, the learned judge concluded the arbitration agreement between UHDE and BWV (Article 9 of the subcontract) was void under both s.99(1) of the BLA and Article 8(1) of the Model Law (attached as schedule to the ICAA).

As noted in the judgment below, this was the first time an application under the ICAA had been made in Saskatchewan. Disputes in construction matters have generally been resolved through builders' lien legislation, and there may be a temptation to seek refuge in the familiar when faced with alternatives that have not yet been tested in this province. Nevertheless, the legislative scheme for international commercial arbitration exists to be used and, by express agreement, the principal parties in this appeal have invoked this new alternative.

While new in Saskatchewan, international commercial arbitration is an important and growing area of the law. Although arbitration has existed as an alternative to litigation for hundreds of years, it has increasingly found favour among parties to commercial transactions in the latter half of this century. There are several obvious reasons for this trend, including the desire for greater certainty and for the participation of specialized professionals in the decision-making in the resolution of disputes that are becoming increasingly complex.

The rise of international commercial arbitration is marked by the dozens of international conventions that have been negotiated and signed, including the United Nations Commission on International Trade Law's Model Law on International Commercial Arbitration, 1985 (the Model Law). The federal government and most of the provinces have enacted legislation to incorporate the Model Law (federally, see the Commercial Arbitration Act, S.C. 1986, c. 22; like Saskatchewan, most provinces have styled their Acts as the ICAA).

The second most important international convention for our purposes is the New York Convention on the Enforcement and Recognition of Arbitral Awards, 1958 (the New York Convention). Canada signed the New York Convention on May 12, 1986, and shortly thereafter, the federal government and all provinces enacted legislation implementing the terms of the Convention (federally, see the United Nations Foreign Arbitral Awards Convention Act, S.C. 1986, c. 21). In Saskatchewan, the EFAA is an important component of the complete legislative scheme for international commercial arbitration.

To a great extent, the status of international commercial arbitration in Canada remains ill-defined. The Supreme Court of Canada has yet to speak in this area. Therefore, particularly in light of the international dimension to this appeal, it is appropriate that we consider how the law is evolving in other countries.

1. England

Legislatively, all commercial arbitration in England is governed collectively by the Arbitration Act 1950 (2 Statutes 535), Arbitration Act 1975 (2 Statutes 603) and Arbitration Act 1979 (2 Statutes 608). While the 1950 Act remains the principal statute, the later acts drastically expanded the scope of commercial arbitration and reduced the ability of English courts to interfere with the arbitral process or award. The New York Convention was adopted in England by the 1975 Act. A 1987 committee report (the Mustill Report) recommended the enactment of legislation based on the Model Law, but as far as I am aware, such legislation has not yet been enacted: see A.J. van den Berg, ed., *International Handbook on Commercial Arbitration* (Deventer, the Netherlands: Kluwer, 1993).

Article 24 of the 1979 Act authorizes the use of "exclusion agreements" whereby parties to an arbitration agreement may contract out of the judicial review of awards. Even where the parties have not agreed to exclude the jurisdiction of the courts, review of arbitral awards has proceeded on very restricted grounds. An award may be appealed only if both parties consent or the court grants leave, which will be granted only where the court finds that the arbitrator was "probably wrong" in interpreting a term of a contract or, in all other matters, the arbitrator was "so obviously wrong as to preclude the possibility of being right": see *Antaios Compania Naviera v. Salen Rederierna*, [1984] 3 W.L.R. 592 (H.L.) [the *Antaios*]. In general, the English experience would seem to indicate a trend of increasing autonomy for the international commercial arbitration process.

2. France

In France, international commercial arbitration is governed by the 1981 Decree to the Nouveau Code de Procedure Civile (Decree number 81-500 of 12 May 1981, [1981] *Journal Officiel de la Republique Frantaise* at 1398 to 1406). French courts are highly deferential to the arbitral process in order to foster international commercial activity and give effect to the party's choice of arbitration as a means of dispute resolution. There are few grounds upon which French courts can interfere with an arbitral award, and they are not permitted to set aside an award as being contrary to domestic public policy, but may look only to international public policy as a basis for interference. In practice, arbitral awards are rarely disturbed. France signed the New York Convention in 1958 and has concluded numerous bilateral treaties regarding the enforcement of arbitral awards: see van den Berg, *supra*, and W.L. Craig et al., *International Commercial Arbitration: International Chamber of Commerce Arbitration* (New York: Oceana, 1990) at 4.

3. The United States

The Arbitration Act applies to all international commercial arbitration in the United States (U.S.C. 9; first enacted in 1925, codified in 1947, and amended in 1954 and 1970). In spite of the fact international commercial arbitration has been recognized in legislation for 70 years, it is only relatively recently that American courts have shed their hostility toward arbitral proceedings.

The clearest elucidation by the United States Supreme Court of the advantages to international commercial arbitration came in *Scherk v. Alberto Culver* 417 U.S. 506 (1974) at 51: [U]ncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in

which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.

The last 20 years have shown the United States Supreme Court and other high courts to stand squarely in favour of arbitration on the well-trodden ground of freedom of contract: for example, see *Dean Witter Reynolds Inc. v. Byrd* 470 U.S. 213 (1985) at 219; *Volt Info Sciences Inc. v. Board of Trustees* 489 U.S. 468 (1989) at 478; and *Government of the United Kingdom of Great Britain v. Boeing Co.*, 998 F.2d 68 (2nd Circuit 1993). This approach favours holding parties strictly to their agreements to arbitrate, with little room for judicial intervention to the contrary.

Perhaps as a consequence of the increasing judicial deference shown toward arbitration, and certainly as a result of the increasing costs of litigation, arbitration is becoming a common means of resolving disputes in commercial transactions. The United States signed the New York Convention in 1970: see *Craig et al.*, *supra*, at 567-94.

Canadian courts have not had many opportunities to interpret and apply the new legislation. It would appear that, at the date of the oral argument in this case, the British Columbia Court of Appeal was the only appellate court to have spoken in this area and that no case had been taken to the Supreme Court. Since argument, the Ontario Court of Appeal has issued a judgment in *Automatic Systems Inc. v. Bracknell Corporation* (April 25, 1994).

As in the United States, the starting point in Canada for granting a broad sphere of autonomy to the arbitral process is the principle of freedom of contract. In *Boart Sweden A.B. v. N.Y.A. Stromnes A.B.* (1988), 41 B.L.R. 295 (Ont. H.C.), the court allowed an application for a stay of court proceedings pending arbitration. At 302 to 303, Campbell J. set the application in the following context:

Public policy carries me to the consideration which I conclude is paramount having regard to the facts of this case, and that is the very strong public policy of this jurisdiction that where parties have agreed by contract that they will have the arbitrators decide their claims, instead of resorting to the Courts, the parties should be held to their contract.

Faced with a similar stay application, the court in *Sand Bar Construction Ltd. v. Pacific Parkland Properties Inc.* (1992), 50 C.L.R. 74 (B.C.S.C.) followed the approach taken in *Boart*. A stay was ordered and the dispute was referred to arbitration in accordance with the agreement.

In *Automatic Systems*, supra, the Ontario Court of Appeal distinguished the Queen's Bench judgment under appeal in this matter on the facts, but again supported reference to arbitration. They said at pp. 21-22:

On its facts, the present case is closer to *Sandbar Construction Ltd. v. Pacific Parkland Properties Inc.* (1992), 50 C.L.R. 74 (B.C.S.C.). There again there were only two parties, the contractor and the owner. The contractor filed a builder's lien and commenced an action to preserve it. The owner filed a defence and a counterclaim for slander of title. The contractor then applied, pursuant to s. 15 of the British Columbia Commercial Arbitration Act, S.B.C. 1979, c. 40 for a stay, relying on the arbitration clause in the construction contract. Section 15(2) of that Act provides that:

(2) In an application under subsection (1), the court shall make an order staying the legal proceedings unless it determines that the arbitration agreement is null and void, inoperative or incapable of being performed.

In granting the stay, Saunders J., at pp. 81-82, referred with approval to *Boart Sweden AB v. NYA Stromnes AB* (1988), 41 B.L.R. 295 (Ont.H.C.) and in particular to the words of Campbell J. at pp. 302-303:

Public policy carries me to the consideration which I conclude is paramount having regard to the facts of this case, and that is the very strong public policy of this jurisdiction that where parties have agreed by contract that they will have the arbitrators decide their claims, instead of resorting to the Courts, the parties should be held to their contract ...

To deal with all these matters in a single proceeding in Ontario instead of deferring to the arbitral process in respect of part of the action and temporarily staying the other parts of the action would violate that strong public policy.

It would also fail to give effect to the change in the law of international arbitration which, with the advent of art. 8 of the Model Law and the removal of the earlier wide ambit of discretion, gives the Courts a clear direction to defer to the arbitrators even more than under the previous law of international arbitration.

In addition to holding parties to their contractual intentions, courts must be mindful of the need for consistency between jurisdictions in enforcing international commercial agreements: *Rio Algom Ltd. v. Sammi Steel Co. Ltd.* (1991), 47 C.P.C. (2d) 251 (Ont. Gen. Div.) at 257. Uniformity will foster predictability and in turn international commercial activity within each jurisdiction.

To date, the most forceful statement by a high court in Canada in favour of arbitral autonomy lies in *Quintette Coal Limited v. Nippon Steel Corporation*, [1991] 1 W.W.R. 219 (B.C.C.A.). In an agreement for the purchase of coal, the Canadian seller and the Japanese buyers stipulated that

disputes would be resolved by arbitration. Accordingly, when a dispute arose pertaining to the amount owing, it was sent to arbitration. The resulting award favoured the Japanese buyers, and the Canadian seller petitioned to have it set aside under British Columbia's ICAA, B.C. 1986, c.14. The application was dismissed and the seller appealed.

In a unanimous decision, the British Columbia Court of Appeal upheld the decision at trial. Drawing on the approaches taken in other countries to international commercial arbitration, the Court held that judicial interference in the process would be kept to a minimum. Referring to the judgment of Esson C.J.Q.B. at trial, Gibbs J.A. (speaking for the Court on this point) stated (at 227-28):

At p. 204 of his judgment Chief Justice Esson drew attention to the relationship between the domestic law of arbitration and the law which applies to international arbitrations and he referred to 'a world-wide trend toward restricting judicial control over international commercial arbitration awards'. Perhaps the strongest expression of that trend is to be found in the majority judgment of the Supreme Court of the United States in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985). At p. 629 Blackmun J. said:

. . . we conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in the domestic context.

And at pp. 638-39 he said:

As international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade. The controversies that international arbitral institutions are called upon to resolve have increased in diversity as well as in complexity. Yet the potential of these tribunals for efficient disposition of legal disagreements arising from commercial relations has not yet been tested. If they are to take a central place in the international legal order, national courts will need to 'shake off the old judicial hostility to arbitration.' *Kulukundis Shipping Co. v. Amtorg Trading Corp.* 126 F.2d 978, 985 (CA2 1942), and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal. To this extent, at least, it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration. See *Scherk*, supra.

In 1988 in *CBI NZ Ltd. v. Badger Chiyoda* (1989), 2 N.Z.R. 669, the New Zealand Court of Appeal was called upon to determine whether the award of an international

commercial arbitration carried out under the International Chamber of Commerce rules, which exclude any form of appeal, was immune from review by the New Zealand courts. The several lengthy judgments refer to international conventions and statutes, including the British Columbia statute, and review judicial pronouncements about the approach to be followed by domestic courts, including the remarks of Blackmun J. in *Mitsubishi*, supra. At p. 687 Richardson J., appearing to reflect the views of the other members of the court, speaks of the trend Chief Justice Esson referred to:

As to that, the trend in international commercial arbitrations is clearly towards giving greater emphasis to party autonomy and contracting judicial control over the legal content of the reference and the award.

Having reviewed the international authorities, Gibbs J.A. spoke of the need for judicial restraint in disturbing arbitration agreements freely reached between commercial parties. At 229, he states:

We are advised that this is the first case under the British Columbia Act [the International Commercial Arbitration Act, S.B.C. 1986, c.14] in which a party to an international commercial arbitration seeks to set the award aside. It is important to parties to future such arbitrations and to the integrity of the process itself that the court express its views on the degree of deference to be accorded the decision of the arbitrators. The reasons advanced in the cases discussed above for restraint in the exercise of judicial review are highly persuasive. The 'concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes' spoken of by Blackmun J. [in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614 (1985) (U.S.S.C.)] are as compelling in this jurisdiction as they are in the United States or elsewhere. It is meet therefore, as a matter of policy, to adopt a standard which seeks to preserve the autonomy of the forum selected by the parties and to minimize judicial intervention when reviewing international commercial arbitral awards in British Columbia. That is the standard to be followed in this case.

In my opinion, this is the proper approach to take in the instant appeal. The objectives behind the ICAA/EFAA legislative schemes that have arisen in each province can be succinctly stated:

1. to give effect to the intentions of the parties in choosing to submit to arbitration;
 2. to facilitate predictability in the resolution of international commercial disputes;
 3. to foster consistency between jurisdictions in the resolution of international commercial disputes;
- and
4. by encouraging the use of international commercial

arbitration as a dispute resolution alternative, to encourage international commercial activity.

In Saskatchewan, international commercial arbitration matters are governed by the two Acts mentioned previously, namely, the ICAA (adopting the Model Law) and the EFAA (adopting the New York Convention). There is no question these acts apply to the instant appeal. The ICAA/EFAA legislative scheme is replete with indications that the legislature intended courts to observe the pattern of judicial deference to arbitration that has become the international practice. For added certainty, Article 5 of the Model Law states that no court shall intervene except as permitted by the Model Law itself, and s. 3 of the EFAA states that where conflict exists with other Acts, the EFAA prevails.

It is well-recognized that parties may select the system of law by which disputes under a contract will be resolved: J.G. McLeod, *The Conflict of Laws* (Calgary: Carswell, 1983) at 475, and *James Miller and Partners Ltd. v. Witworth Street Estates*, [1970] A.C. 583. Here, the parties have selected Swiss law.

This Court must decide whether Article 9 in the subcontract constitutes a valid arbitration agreement and should be enforced pursuant to Article 8(1) of the Model Law (in the ICAA). As the learned judge found in the court below, Article 9 is an "international arbitration agreement" within the meaning of the ICAA; this finding has not been contested in this appeal and I see no reason to disturb it.

The real question is whether Article 9 is "null and void, inoperative or incapable of being performed" so as to deny its enforcement under Article 8(1) of the Model Law. If not, the court must grant UHDE's application to order the dispute to arbitration. Both Article 8(1) of the Model Law (ICAA) and Article II(3) of the New York Convention (the EFAA) state that a court "shall" refer disputes to arbitration once a valid arbitration agreement is found. This was acknowledged by the learned judge in the court below and was not disputed in this appeal. The validity of Article 9 depends upon the degree, if any, to which it conflicts with Saskatchewan's builders' lien legislation.

BWV's principal arguments in this appeal concern the alleged inconsistency between international commercial arbitration and The Builders' Lien Act (the BLA). In spite of having agreed to submit to arbitration, BWV now argues that the BLA contains certain substantive and procedural rights that will be lost if the arbitration agreement is enforced. The sub-subcontractors also make a similar argument. Evaluation of this argument requires a close examination of the true purpose behind builders' lien legislation.

This Court in *Town-N-Country Plumbing & Heating (1985) Ltd. v. Schmidt* (1991), 93 Sask R. 278, speaking through Cameron J.A. spelled out the purposes underlying the BLA (at 286):

The statute is primarily concerned with the commercial interests of persons who, under contract and on credit, contribute service or material to the improvement of real property, whether under contract to the owner, to the contractor engaged by the owner, or to any subcontractor. According to the law of contract, such persons have no recourse against the property should they go unpaid, and no recourse against anyone except the party with whom they have contracted. Limited as they are in those ways, the rights and remedies afforded by contract law were seen by the legislature as inadequate in this context, and so an elaborate scheme of supplementary rights and remedies was enacted, all with the purpose of better enabling such persons to recover the amounts owing to them. This is the primary purpose of the Act, and to the end of achieving that purpose, trusts were constituted in relation to amounts payable in connection with the improvement; liens and charges of various kinds were created; holdbacks and retentions of monies payable were provided for, and so on.

This, however, is not the only concern or purpose of the Act. It is also concerned with the commercial interests of others, including the owner and the financier, if any, of the improvement. In their interests, as well as in the interests of the contractor and the subcontractor, extensive provision was made allowing for monies to flow down the contractual chain without risk of liability to those providing the materials or services. The purpose of these provisions -- and hence the secondary purpose of the Act -- is to ensure business efficacy.

In *Defazio Bulldozing and Backhoe Limited v. W.A. Stephenson Construction (Western) Limited* (1986), 28 D.L.R. (4th) 291, the British Columbia Court of Appeal considered The Builders' Lien Act, R.S.B.C. 1979, c.40. At 293, the Court held the purpose of the legislation to be three-fold:

- 1.to preserve monies in a construction project, primarily through the trust and holdback provisions;
- 2.to direct these monies to the persons entitled to receive them; and
- 3.to prevent the owner from receiving the benefit of the work and material without paying for it.

In the domestic arbitration context, a decision of the British Columbia Supreme Court has recognized that arbitration is not inconsistent with builders' lien legislation. Relying on *Defazio*, the court in *Sand Bar Construction*, supra, stated that the quantum of monies owing under the contract could be determined by arbitration, and enforced by an action in contract, without abrogating the purposes of builders' lien legislation. Rather, the arbitral award would "set the outside parameters of the sum that may be secured by a builder's

lien" (at 84).

In my opinion these cases represent the correct view of builders' lien legislation. While it is true the BLA makes provision for determining the quantum of monies owing by and to parties involved in a construction project, the purposes underlying the legislation do not suggest this is an exclusive mechanism to determine quantum. In the face of a dispute regarding quantum, the issue is customarily determined by an ordinary action in contract. While an action such as the present one is typically called a "builders' lien action", there is nothing about the action that makes it unique to builders' lien matters aside from the nominal procedural rules that are set out in the legislation. However, these procedural entitlements are expressly restricted to actions taken under that legislation: see s. 86(1) of the BLA. There is nothing in the BLA that expressly or impliedly abrogates the right to use the mechanisms available prior to the passing of the Act for the determination of quantum in contracts where liens have arisen. In light of the general law, then, a builders' lien action is not the only route to a determination of quantum in relation to contracts where liens have arisen.

It follows that a clause in an agreement providing for arbitration to determine quantum where a dispute between parties to the agreement arises is not a "covenant...that this Act or any provision does not apply" within the meaning of s. 99(1) of the Act, even if one party happens to be a "person who provides services or materials to an improvement". In other words, to invoke an arbitration clause in these circumstances is to invoke what the general law makes available. It is not to invoke a procedure designed to undermine the purposes underlying the Act.

The presence in the BLA of s. 85 and its provision for arbitration in respect of certain kinds of dispute, kinds which do not specifically include a dispute regarding quantum, does not detract from my conclusion that a dispute regarding quantum may be excised from a builders' lien action, so that quantum can be determined by arbitration. The section, the object of which is to promote the "business efficacy" of which Cameron J.A. spoke in *Town-N-Country*, sets up a mechanism to expedite the resolution of the many disputes that may arise "during the course of construction" between suppliers, subcontractors and other parties involved in a construction project, and to obviate, as much as possible, the interruptions to the progress of construction which often follow the failure of parties to get paid promptly.

The section also concerns itself with disputes that arise "with respect to the payment of moneys to a contractor or subcontractor" at the completion stage of his or her contract or subcontract. It should be noted, however, that a dispute respecting "the payment of moneys",

given the holdback, trust and lien provisions of the BLA, is something quite different from a dispute respecting quantum.

In the final analysis s. 85 of the BLA does not "occupy the field" - to borrow a phrase from constitutional law - in such a way and to such a degree as to exclude an arbitration respecting quantum such as that facing the Court in the present case.

In the result, I find no inconsistency between the arbitration agreement in this appeal and Saskatchewan's builders' lien legislation. Article 9 of the subcontract is valid and must be enforced.

Procedurally, the dispute must be submitted in accordance with the rules of the arbitral forum chosen by the parties. Therefore, the submission must adhere to the Rules of Conciliation and Arbitration of the International Chamber of Commerce, but the precise form is the concern of the parties, not this Court: Sir M.J. Mustill and S.C. Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd. ed. (London: Butterworths, 1989) at 15.

There is no question that matters in dispute between the parties to arbitration are stayed pending the outcome of arbitration. This is the Canadian position in the arbitration of domestic commercial matters: see, for example, *The Arbitration Act, 1992*, S.S. 1992, c. A-24.1, s. 8, and *Roy v. Boyce* (1991), 57 B.C.L.R. 187 (S.C.). More importantly, pursuant to Article 8(1) of the Model Law (the ICAA), a stay of proceedings in international commercial matters is also mandatory once a matter is referred to arbitration. Consequently, at least in respect of the dispute between UHDE and BWV, court proceedings will be stayed pending the outcome of arbitration.

According to general condition 1.2 of the subcontract, BWV agreed to expressly provide in any sub-subcontract that the provisions of the subcontract (including the arbitration agreement) would apply to every sub-subcontractor. It is not entirely clear whether the sub-subcontracts actually did incorporate the provisions of the subcontract. This point was not addressed in the factums of either UHDE or BWV and no finding was made by the learned judge in the court below. Therefore, I am unable to conclude that the sub-subcontracts incorporated the arbitration agreement either directly or by reference. Consequently, the sub-subcontractors must be considered as true third parties in respect of the arbitration agreement between UHDE and BWV.

It is the normal practice in the United States in domestic construction matters involving multiple parties to stay third-party actions pending arbitration: see, for example, *Schulman Investment Company v. Olin Corp.*, 458 F.

Supp. 186 (S.D.N.Y. 1978); and J. Acret, *Construction Arbitration Handbooks* (Colorado Springs: McGraw Hill, 1985) at 92-94.

While there have not been many cases decided on this point in Canadian domestic arbitration, a lower court in *Fraser River Pile and Dredge Limited v. Victoria (City)* (1989), 34 C.L.R. 262 (B.C. Co. Ct.) held that court proceedings should not be stayed where there are parties to the litigation that are not parties to the arbitration. This short judgment was relied upon by learned judge below who, with respect, erroneously stated it was an international commercial arbitration case. It was in fact a domestic matter, and it can be distinguished from the instant case on numerous grounds. Not only were the policy considerations of the Model Law and the New York Convention absent, but the provincial statute applicable to the dispute expressly stated that the presence of third parties was a factor to consider in deciding whether to grant a stay: see the *Commercial Arbitration Act*, S.B.C. 1986, c.3, s.15(3)(f). Moreover, the case involved allegations of fraud that moved the dispute out of the purely commercial scope of the arbitration clause. Therefore, I find *Fraser River Pile* to be of little assistance in this case.

In Canadian international arbitration matters, there does not appear to be a consistent approach taken by courts with regard to stay orders given the presence of third parties. In *Gulf Canada Resources Limited v. Arochem International Limited* (1992), 66 B.C.L.R. 113, the British Columbia Court of Appeal interpreted that province's ICAA to mean the court retained the residual jurisdiction to refuse a stay in certain circumstances. In the end, however, the Court ordered that all actions be stayed: unless the case for a stay is very clear, the Court stated that all questions should be resolved in arbitration. With respect, I find it difficult to see the basis for judicial discretion in the *Gulf Canada* case, given the wording of the legislation and the fact that a valid arbitration agreement was found: section 8 of the ICAA, S.B.C. 1986, c.14 states that legal proceedings "shall" be stayed pending arbitration.

In my opinion, a better approach is that taken by the Ontario High Court in *Boart*, supra. In spite of the presence of parties in the litigation who were not parties to the arbitration agreement, the court demonstrated a sound understanding of international arbitration by issuing a two-part stay order. The court ordered that litigation with regard to matters within the arbitration agreement (and between the principal parties) be stayed pending arbitration. With regard to related matters not directly within the arbitration agreement (specifically, torts that were alleged by both a principal party and a third party against one of the principal parties), the court ordered a stay of proceedings for the estimated time it would take to complete the arbitration (4 months).

In making this order, the court relied on both the contractual intention of the principal parties and the need to be flexible in accommodating the interests of third parties [at (1988) 41 B.L.R. 295 at 303]:

To deal with all these matters in a single proceeding in Ontario instead of deferring to the arbitral process in respect of part of the action and temporarily staying the other parts of the action, would violate that strong public policy [of international commercial arbitration].

It would also fail to give effect to the change in the law of international arbitration which, with the advent of art. 8 of the Model Law and the removal of the earlier wide ambit of discretion, gives the Courts a clear direction to defer to the arbitrators even more than under the previous law of international arbitration.

I conclude that nothing in the nullity provisions of art. 8 prevents this Court from giving effect to the clear policy of deference set out in the article.

To conclude otherwise would drive a hole through the article by encouraging litigants to bring actions on matters related to but not embraced by the arbitration and then say that everything had to be consolidated in Court, thus defeating the policy of deference to the arbitrators.

In the result, I order that the actions of the sub-subcontractors be stayed pending arbitration. This will avoid the problem of multiple concurrent proceedings and there is every reason to expect that issues will be clarified through arbitration to the benefit of subsequent proceedings.

For the reasons set out above, I order the following:

- 1.that the appeal from the decision of MacPherson C.J.Q.B. dated 19 March 1993, be allowed;
- 2.that the dispute between UHDE GmbH and BWV Investments Ltd. be submitted to arbitration in accordance with Article 9 of their agreement (the subcontract), pursuant to Article 8(1) of the Model Law on International Commercial Arbitration, as set out in the schedule to The International Commercial Arbitration Act, S.S. 1988-89, c. I-10.2;
- 3.that the proceedings in Queen's Bench action No.285 of 1993, Judicial Centre of Regina, in their entirety, be stayed with respect to the matters submitted to arbitration, pursuant to s. 9 of The International Commercial Arbitration Act, S.S. 1988-89, c. I-10.2.
- 4.the appellant will have its costs of this appeal in the usual course on double Column V.

DATED at the City of Regina, in the Province of Saskatchewan, this 25th day of November A.D. 1994.

GERWING J.A.