ABN Amro Bank Canada v. Krupp MaK Maschinenbau GmbH et al.; Black, Third Party *

[Indexed as: ABN Amro Bank Canada v. Krupp MaK Maschinenbau GmbH]

21 O.R. (3d) 511
[1994] O.J. No. 3044
Action No. 92-CQ-29496

Ontario Court (General Division),
Haley J.
December 23, 1994

* Note: A motion for leave to appeal the following judgment of the Ontario Court (General Division) was granted on June 7, 1995 by Then J. See 24 O.R. (3d) 450 in this database.

Arbitration -- International commercial arbitration -- Stay of proceedings -- Meaning of "party" to arbitration agreement for purposes of International Commercial Arbitration Act -- Bank taking assignment of assets as security for loan -- Assets including technology licensing agreement with arbitration provision -- Bank not party to arbitration agreement -- Party must be signatory of agreement to arbitrate -- Party does not include a person claiming through or under a party -- International Commercial Arbitration Act, R.S.O. 1990, c. I.9, Schedule, art. 8.

Arbitration -- International commercial arbitration -- Stay of proceedings -- Request that dispute be referred to arbitration must be made to court -- Request must be made before party takes step in proceeding -- Request that matter be referred to arbitration cannot be made as part of statement of defence -- International Commercial Arbitration Act, R.S.O. 1990, c. I.9, Schedule, art. 9.

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The plaintiff bank agreed to make a loan to D Inc., which was a party to a technology licensing agreement with the defendant K GmbH. It was a term of the bank's loan that additional equity in the amount of $5 million be injected into D Inc. It was a further term of the loan that the technology licensing agreement be assigned to the bank, and although an assignment agreement, to which K GmbH would have been a party, was prepared, it was never signed. However, D Inc. did sign a general assignment of its assets to the bank. After the loan was made, the plaintiff alleged that B, the principal owner of D Inc., and K GmbH had conspired to deceive the bank about the injection of equity. The bank sued K GmbH for conspiracy and fraud.

K GmbH delivered a statement of defence which included a pleading that the court was without jurisdiction to adjudicate about the technology licensing agreement because of an arbitration agreement included as a term of the licensing agreement. K GmbH then moved to have the action stayed and referred to arbitration. It was conceded that there was an international commercial arbitration agreement within the meaning of the International Commercial Arbitration Act (ICAA).

Held, the motion should be dismissed.

Although art. 16 of the Schedule to the ICAA empowered the arbitration tribunal to determine whether it had jurisdiction to arbitrate, the court has jurisdiction to determine whether pre-conditions to arbitration have been met. Under art. 8 of the ICAA, a party to an arbitration agreement must be a signatory to the arbitration agreement, and a party does not include a person claiming through or under a party. The bank was not a party to the arbitration agreement contained in the technology licensing agreement and the general assignment of D Inc.'s assets to the bank did not make the bank a party to an agreement to arbitrate. Accordingly, the bank was not a party under the ICAA and without consent, non-parties to an arbitration agreement are not bound to arbitrate.

Further, under art. 8(1), it is a pre-condition to the court

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referring a matter to arbitration that a party so request not later than when submitting its first statement on the substance of the dispute. The request must be made to the court. Being generous and treating the statement of defence as a request, the request was not timely because a request, which indicates that a party's position is to deny the court's jurisdiction, cannot be made simultaneously with a pleading. By filing the pleading, the party attorns to the jurisdiction of the court and it loses its rights to dispute jurisdiction. The correct procedure would have been to bring a motion for a stay after receiving the statement of claim but before taking any step in the action.

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Cases referred to

Automatic Systems Inc. v. Bracknell Corp. (1994), 18 O.R. (3d) 257, 12 B.L.R. (2d) 132, 113 D.L.R. (4th) 449, 27 C.P.C. (3d) 56 (C.A.); Boart Sweden AB v. NYA Stromnes AB (1988), 41 B.L.R. 295 (Ont. H.C.J.); Bond v. Sixty-Four West St. Clair Ltd., [1940] O.W.N. 299, [1940] 3 D.L.R. 601 (S.C.O.); Kaverit Steel & Crane Ltd. v. Kone Corp. (1992), 87 D.L.R. (4th) 129, 85 Alta. L.R. (2d) 287, 40 C.P.R. (3d) 161, [1992] 3 W.W.R. 716, 4 C.P.C. (3d) 99 (C.A.); Rosenberg v. Goldberg, [1960] O.R. 162, 23 D.L.R. (2d) 283 (H.C.J.); Ruhrkohle Handel Inter GmbH v. Federal Calumet (The), [1992] 3 F.C. 98, 42 C.P.R. (3d) 414 sub nom. Ruhrkohle Handel Inter GmbH v. Fednav Ltd., 144 N.R. 70 (C.A.)

Statutes referred to

Arbitrations Act, R.S.O. 1990, c. A.24 [repealed by s. 58 of and replaced by the Arbitration Act, 1991, S.O. 1991, c. 17]
Commercial Arbitration Act, R.S.C. 1985, c. 17 (2nd Supp.)
Courts of Justice Act, R.S.O. 1990, c. C.43, s. 106
Foreign Arbitral Awards Act, 1986, S.O. 1986, c. 25 [repealed 1988, c. 30, s. 14], s. 1(1) "party"
International Commercial Arbitration Act, R.S.O. 1990, c. I.9, ss. 1(1) "Model Law", 13, Sched., arts. 7(2), 8 16(1)

Authorities referred to

Analytical Commentary, Report of the Secretary General of the United Nations Commission on International Trade Law, 18th Sess., items 3, 4

MOTION to stay an action and for referral to arbitration under the International Commercial Arbitration Act, R.S.O. 1990, c. I.9.

Harold Margles and James J. Holloway, for applicant (defendant), Krupp MaK Maschinenbau GmbH.

S. Gordon McKee, for respondent (plaintiff).

Frederick William Logan Black, third party, in person.

No one appeared for Collins Barrow (a defendant) against whom the action was stayed pending final determination of the action against Krupp by order of Master Donkin made in July 1993.

HALEY J.: -- This is a motion by the defendant Krupp (Krupp) to stay this action, or part thereof, and to refer to arbitration pursuant to a Technology Licensing Agreement (TLA) made between Krupp and NsC Diesel Power Inc. (Diesel) such matters in dispute as may arise from or concern the TLA. ABN Amro Bank Canada (the Bank) is a creditor of Diesel. Krupp is a German company which, inter alia, manufactures and markets marine propulsion equipment. Black is an entrepreneur having an interest in Diesel, a company incorporated in the Province of Nova Scotia.

The facts, which are somewhat complex, are usefully summarized in the reasons for decision of Master Donkin for his order staying the action against Collins Barrow, the other defendant. I quote from the reasons:

> The Government of Canada let a contract for the overhaul of a Canadian Coastguard ship. That project included the supply of a new propulsion system for this ship. That sub-contract

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was apparently awarded to the defendant Krupp Maschinenbau GmbH ("Krupp"). It appears that Krupp had agreed to assemble and test the engines in Nova Scotia. That was to be done by a company called NsC Diesel, a company owned by NsC Corporation. The individual who controlled these corporations was one Frederick Black. Black and his companies sought financing from the plaintiff, and the plaintiff agreed to make a loan providing certain conditions were met, including "evidence of full injection of equity (CAD 5 million) prior to draw-down". The defendant Collins Barrow is a firm of accountants which practised in Halifax, Nova Scotia. The plaintiff alleges that this firm provided a certificate which constituted the evidence of the injection of equity.

The plaintiff also alleges that in fact, neither Black nor any of his companies actually invested any equity, but that what happened was that by a series of loans and agreements and trust accounts, Krupp provided this money. The plaintiff further alleges that the defendant Collins Barrow was negligent in not ascertaining that in fact, there had been no real injection of equity. As against the defendant Krupp the plaintiff claims that it conspired with Black to bring about the appearance of an injection of equity without any actual equity existing.

Krupp has defended, and defends on the basis that it entered into certain agreements with Black's companies by which the technology owned by Krupp was made available to Black's companies. Krupp takes the position that there was no conspiracy; that the matter of the loan to Black's company and the payment for the licence were perfectly legitimate; and also, that they were known to the plaintiff. By way of counterclaim, Krupp claims against the plaintiff for certain losses incurred by Krupp in making advances to Black's companies shortly before those companies failed. It is alleged that they were encouraged by the plaintiff despite the fact that the plaintiff knew that the companies were bound to collapse.

Diesel is now bankrupt by virtue of an order of the Nova Scotia court. The Bank in its statement of claim pleads

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conspiracy and fraud, alleging that a $4 million fee paid by Diesel to Krupp as apparent consideration for technology under the TLA should be returned because the fee was set up between Diesel and Krupp to support the appearance of a $5 million equity investment into Diesel, which was a condition of the Bank's advancing its loan to Diesel.

Black has not been sued by the Bank in this action. Nor is the trustee in bankruptcy of Diesel a party to the proceedings. A number of other actions involving these players and related corporations, sometimes as plaintiffs, sometimes as defendants, have been instituted in various jurisdictions, viz: the Federal Court of Canada, Ontario and Nova Scotia.

In 1988 Ontario enacted [S.O. 1988, c. 30] the International Commercial Arbitration Act, R.S.O. 1990, c. I.9 (ICAA), which adopted the Model Law adopted by the United Nations Commission on International Trade Law on June 21, 1985. The Model Law is adopted by schedule to the ICAA. By s. 2(2) [now s. 1(1)] of the ICAA the Model Law "applies to international commercial arbitration agreements and awards, whether made before or after the coming into force" of the ICAA.

The TLA made between Diesel and Krupp is acknowledged by the parties to be an international commercial arbitration agreement within the meaning of the ICAA. It contains an arbitration agreement in the following terms:

Article 12: Arbitration Court/Rules of Arbitration

1) All disputes arising from on concerning this agreement shall be settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce Paris by three arbitrators appointed in accordance with the said Rules, to the exclusion of the ordinary courts.

2) The arbitration court shall sit in Zurich, Switzerland. Substantive Swiss law shall apply.

3) The decision of the arbitral tribunal shall be final and

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binding on both parties. The reference of a dispute to the arbitration court shall be no reason for discontinuing other obligations arising from this agreement.

Article 8 of the Model Law is designed to resolve issues where arbitration and court actions arise at the same time. It reads:

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.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

Since the enactment of the ICAA in Ontario and of similar provisions in other provinces in Canada the courts have been quick to recognize the importance of this legislation as a public policy statement showing the importance of encouraging agreement for dispute resolution adopted by the parties themselves and of the need for predictability, certainty and uniformity in the international comity.

The importance of these goals was confirmed by the Ontario Court of Appeal in Automatic Systems Inc. v. Bracknell Corp. (1994), 18 O.R. (3d) 257, 12 B.L.R. (2d) 132 (C.A.). Austin J.A. in delivering the judgment of the court commented at p. 264 O.R., p. 142 B.L.R.:

The purpose of the United Nations conventions and the legislation adopting them is to ensure that the method of resolving disputes, in the forum and according to the rules

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> chosen by the parties, is respected. Canadian courts have recognized that predictability in the enforcement of dispute resolution provisions is an indispensable precondition to any international business transaction and facilitates and encourages the pursuit of freer trade on an international scale . . .

As a result the court found that the application of the ICAA should be favoured unless there was clear reason why it should not be applied. Austin J.A. said at p. 266 O.R., p. 144 B.L.R.:

> Having regard to international comity, and to the strong commitment made by the legislature of this province to the policy of international commercial arbitration through the adoption of the ICAA and the Model Law, it should, in my respectful view, require very clear language indeed to preclude it.

Section 13 of the ICAA makes specific provision for the purposes of interpreting the Model Law for recourse, in addition to the aids to interpretation ordinarily available under Ontario law, to the Analytical Commentary contained in the Report of the Secretary General to the 18th Session of the United Nations Commission on International Trade Law. Reference will be made to this commentary in the consideration of the aspects of the Model Law applicable to this motion.

There are three further agreed factual situations which should be noted:

> The Bank required as a pre-condition of its advancing the loan to Diesel that it receive an assignment of the TLA. An Assignment from Diesel to the Bank with Krupp joining to consent to the assignment was prepared prior to the advance of the loan. The document was never executed by any of the parties.

> Also before the loan advance Diesel executed an Assignment of all of its "debts, accounts, claims, moneys and choses in action" to the Bank. Notice of the assignment was given by the Bank to Krupp in October, 1992, shortly before the Bank

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issued the Statement of Claim in this action.

The Statement of Defence and Counterclaim of Krupp, served about March 15, 1993, is the first statement Krupp has submitted on the substance of this dispute.

I turn now to a consideration of the motion before me.

Article 8 of the Model Law has reduced or eliminated the discretion in the court to decide whether or not to stay an action for arbitration contemplated in the former Arbitrations Act, R.S.O. 1990, c. A.24. The wording in art. 8 is "the court shall" and not "the court may". Austin J.A. in the Automatic Systems case referred to earlier said at p. 265 O.R., p. 143 B.L.R.:

> Where a stay was applied for under s. 7 of the old Arbitrations Act, the court had a broad discretion whether to grant it or not, in part by reason of the use of the word "may". Under s. 7(1) of the Arbitration Act, 1991, "may" has become "shall". Some discretion is still imported by the use of the word "may" in s. 7(2), but it could be argued that the range of that discretion has been considerably narrowed by the specification of grounds in s. 7(2). In the Model Law, however, not only is the word "shall" used, but in addition the court is limited in refusing to stay to three specific situations, namely, where it finds the agreement to arbitrate null and void, inoperative or incapable of being performed.

The respondent argues, however, that there are some basic hurdles the applicant has to get over before the questions of validity and performance are reached. The respondent says that the applicant has failed to bring itself within the requirements which precede the application of art. 8 in the following respects:

(a) no request for arbitration has been made;

(b) if the request has been made it was not made in a timely way;

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(c) the respondent is not a party to the arbitration and cannot be bound by it;

(d) that where entry into the arbitration agreement has been induced by fraud that agreement cannot operate between the parties.

The applicant denies any failure to meet these requirements and argues with regard to (c) and (d) that by art. 16 of the Model Law all of these matters are properly determinable by the arbitrator under the TLA. Article 16 reads in part:

Article 16. Competence of arbitral tribunal to rule on its jurisdiction

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

I am satisfied that there is concomitant jurisdiction in the arbitrator and the court for determining whether pre-conditions to the application have been met. The court in considering a request for a stay must address some of the issues to determine whether there is a basis for referring the matter to the arbitrator at all. Once that preliminary decision is made and the matter is referred to the arbitrator it is then the jurisdiction of the arbitrator alone to rule on his jurisdiction as permitted by art. 16.

Turning now to the specific objections raised by the respondent:

(a) Has a request referring the matters in the action, or some of them, been made pursuant to art. 8(1) of the Model Law?

The applicant says that the matter of arbitration was raised

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by it in correspondence with the respondent in February 1993 before service of its statement of defence. The letter to the respondent's solicitors read in part:

> It is abundantly clear that the Technology Licensing Agreement and any dispute arising from on concerning the Agreement must be settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce, Paris. We invite you to review your claim to see whether or not you are prepared to remove from your claim and submit to Arbitration all such aspects thereof.

The respondent's solicitor disagreed with the statement and offered dates on which he would be available for the applicant's motion to be brought.

Instead of bringing a motion the applicant served its statement of defence and counterclaim and thereafter brought this motion to stay. The statement of defence and counterclaim, after reciting the arbitration agreement in the TLA, pleads in para. 17:

> The Ontario Court is without jurisdiction to adjudicate on the issues relating to the TLA, the funds paid thereunder or the obligations of Mak thereto. The Arbitration Court in Zurich, Switzerland has sole and exclusive jurisdiction thereunder.

The applicant relies on the correspondence or the statement of defence and counterclaim, or both taken together, as a request for referring the matter to arbitration.

I am satisfied that the request for arbitration in the letter of February 1988 does not constitute a request for arbitration within the context of the litigation before the court. The purpose of the request is not to ask the respondent if it is willing before the applicant starts the arbitration process, nor is it a notice to the respondent that it intends to do so. It is a much more formal matter which communicates to the court that the position of the applicant is that the court's jurisdiction is to be replaced and that a stay of the court's

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process is sought. This is a step that arises out of the litigation and the request is to be made to the court and not to the opposing party.

As well I would adopt the reasoning of the Federal Court of Appeal which reached the same conclusion in Ruhrkohle Handel Inter GmbH v. Federal Calumet (The), [1992] 3 F.C. 98, 42 C.P.R. (3d) 414 sub nom. Ruhrkohle Handel Inter GmbH v. Fednav Ltd. under the federal Commercial Arbitration Act, R.S.C. 1985, c. 17 (2nd Supp.), which adopted the Model Law. Decary J.A. in giving the judgment of the court said at p. 104:

> In their view, the request for arbitration mentioned in article 8(1) need not necessarily be made to the Court and it is sufficient for a party to have made such request out of court to the other party before bringing the action. This contention has no merit. On a plain reading of article 8(1), the request therein contemplated is a request to the Court before which the action is brought asking that Court to refer the parties to arbitration. It may well be that a party has already requested arbitration at the time the action is brought, but unless that party formally requests the Court to refer the matter to arbitration, article 8(1) does not come into play (see Iberfreight S.A. et al. v. Ocean Star Container Line A.G. et al. (1989), 104 N.R. 164 (F.C.A.)).

I have some difficulty with taking the wording of the statement of defence and counterclaim as a request for referral to arbitration, especially since it stands alone without a motion to the court for a stay but I will give it a generous interpretation in the light of the importance of arbitration as a matter of public policy.

(b) Was the request a timely one?

However, that brings me to a consideration of whether the request, if properly made in the statement of defence and counterclaim, was a timely one. Article 8 of the Model Law provides that such a request must be made "not later than when submitting his first statement on the substance of the dispute". The parties are agreed that the statement of defence

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and counterclaim was the applicant's first statement.

The applicant says that para. 17 of the statement of defence and counterclaim was contemporaneous with its "first statement" and as such was a request made "not later than" its first statement. The respondent says that the request was not made until this motion was brought which was long after the first statement.

With regard to timeliness under art. 8 of the Model Law it is useful to refer to the Analytical Commentary on that point. Items 3 and 4 of the commentary under art. 8 say:

> 3. As under the 1958 New York Convention, the court would refer the parties to arbitration, i.e., decline (the exercise of its) jurisdiction only upon request by a party and, thus, not on its own motion. A time element has been added that the request be made at the latest with or in the first statement on the substance of the dispute. It is submitted that this point of time should be taken literally and applied uniformly in all legal systems, including those which normally regard such a request as a procedural plea to be raised at an earlier stage than any pleadings on substance.
>
> 4. As regard the effect of a party's failure to invoke the arbitration agreement by way of such a timely request, it seems clear that article 8(1) prevents that party from invoking the agreement during the subsequent phases of the court proceedings. It may be noted that the Working Group, despite the wide support for the view that the failure of the party should preclude reliance on the agreement also in other proceedings or contexts, decided not to incorporate a provision on such general effect because it would be impossible to devise a simple rule which would satisfactorily deal with all the aspects of this complex issue.

From this I understand that it is intended that the time requirement be construed literally and without latitude for the sake of uniformity in its application internationally.

The cases under the old Arbitrations Act indicate that the

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proper time for requesting a stay to permit arbitration was before the delivery of any pleading or the taking of any step to pursue the action: see for example, Rosenberg v. Goldberg, [1960] O.R. 162, 23 D.L.R. (2d) 283 (H.C.J.), and Bond v. Sixty-Four West St. Clair Ltd., [1940] O.W.N. 299, [1940] 3 D.L.R. 601 (S.C.O.). Does this equate to a person's first statement on the substance of the dispute? My view is that a request is a formal step before the court to advise the court of a party's position denying the jurisdiction of the court. It must be the first statement to the court. Any statement outside the court cannot have the character of a formal statement to the court. It is significant that art. 8(2) of the Model Law contemplates steps being taken to bring an arbitration while the issue of jurisdiction is pending before the court without prejudice to the party's right to make a request under art. 8(1).

I do not see how this applicant can take the definitive step of serving and filing a statement of defence and counterclaim in the action and say simultaneously that it seeks a stay for an arbitration to deny the jurisdiction of the court. It is similar to a party's filing a pleading in an action where it disputes the jurisdiction of the court. By filing the pleading the party attorns to the jurisdiction of the court and it loses its right to dispute the jurisdiction. By the same token when the applicant filed its statement of defence and counterclaim in this action, although the arbitration clause was mentioned in the pleading, it was waiving its right to arbitration.

I am satisfied that even on a generous interpretation of the wording in the statement of defence and counterclaim the service of the pleading amounted to a waiver of the right to request arbitration. The correct procedure would have been to bring a motion before the court following receipt of the statement of claim requesting referral to arbitration and a stay before taking any step in the action. Only in that way could the court have had assurance that the applicant was adopting a formal position and was not, as it would appear here, just keeping its options open. It is perhaps significant for that last point to recall that a number of other actions arising out of these transactions had been brought much earlier

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between the parties both in Ontario and in other jurisdictions, and in none of them did the applicant seek arbitration. Nor did the applicant take any steps to institute the arbitration process as it was open for it to do with the protections of art. 8(2) mentioned above.

I find that no timely request for arbitration was made by the applicant and there is therefore no basis for granting the relief by way of stay of the action as requested.

(c) Is the respondent a party to the arbitration agreement?

The respondent also says that it is not a party to the arbitration agreement and therefore it cannot be referred to arbitration by this court. The arbitration agreement is an agreement made between the parties to it. Without consent it is clear that non-parties should not be bound to arbitrate. This was the conclusion in Kaverit Steel & Crane Ltd. v. Kone Corp. (1992), 87 D.L.R. (4th) 129, 85 Alta. L.R. (2d) 287 (C.A.), where even derivative parties were found not to be referrable to arbitration. A similar conclusion was reached by Campbell J. in Boart Sweden AB v. NYA Stromnes AB (1988), 41 B.L.R. 295 (Ont. H.C.J.), who said at p. 304:

> They involve conduct and parties not governed by that agreement and causes of action unknown to the law of Sweden. Those parts of the action are therefore not subject to arbitration, and the statutes governing international commercial arbitrations have no application, and there is no basis on which they could be referred to arbitration.

The applicant says that the respondent has pleaded in its statement of claim it is entitled to the repayment of $4 million from Krupp because it has an assignment of Diesel's debts and accounts. It is, therefore, alleging an interest in the TLA and as such cannot be heard to say it is not a party to the TLA. I find this argument tenuous in the extreme. The assignment of the TLA to the Bank was never executed. Had it been the assignment may have made the Bank a party to the arbitration agreement contained in the TLA. (Such was the opinion of Campbell J. in the Boart case at p. 304 but there is

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no indication of the formal nature of that assignment in the judgment.) It is, however, difficult to see how any possible entitlement to return of monies under the TLA through an assignment of book debts can make the Bank a party to the arbitration agreement.

In any case I am persuaded by the wording of the Model Law that a "party" under art. 8(1) means a party to an arbitration agreement. Under art. 7(2) an arbitration agreement must be in writing with certain conditions:

> (2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

Thus if the agreement is by document in writing it must be signed by the parties. The Bank is not a signatory to the TLA. Nor can it be said that "party" in Article 8(1) refers to a party or those claiming under a party to such an agreement. In 1986 Ontario enacted the Foreign Arbitral Awards Act, 1986, S.O. 1986, c. 25. It defined [s. 1(1)] "party" to include "a person claiming through or under a party". That Act was repealed by the ICAA [1988, c. 30, s. 14] and the legislature when enacting the ICAA chose to limit art. 8(1) to "party". I conclude from that that the legislature intended to restrict the use of art. 8 to the party signatories to the arbitration agreement. This is not to say that an assignment executed by all the parties to an agreement might not be effective to pass the benefit of art. 8 to an assignee under an arbitration agreement but that is not the situation here. The Alberta ICAA also refers to parties signatory and was held not to extend to persons claiming under or through a party: see the Kaverits case, supra, at p. 132. Reference is made in that case to a

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United Kingdom statute which does use specific words of extension.

I find that the Bank is not a party to the TLA and is therefore not referrable to arbitration under the TLA.

(d) Fraud inducing entry into an arbitration agreement

The applicant has also put forward what it says is a prima facie case of fraud against Krupp who, it says, misrepresented the equity position of Diesel to the Bank by virtue of a conspiracy between it and Black. Krupp has put in no material in reply to these allegations on the motion. However, in view of my findings on the earlier aspects of the case which deny the motion to the applicant it is not necessary for me to deal with the issue of fraud for the exercise of any discretion I might have for staying the action on other grounds under s. 106 of the Courts of Justice Act, R.S.O. 1990, c. C.43.

The motion is dismissed. I may be spoken to regarding the costs of the motion if counsel are unable to agree on them.

Order accordingly.

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