

ABN Amro Bank Canada v. Krupp MaK Maschinenbau

Black v. AN Amro Bank Canada et al.

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

24 O.R. (3d) 450

[1995] O.J. No. 1772

Court File No. 92-CQ-29496

Ontario Court (General Division)

Then J.

June 7, 1995

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.

NOTE: A motion for leave to appeal the judgment of the Ontario Court (General Division) (Haley J.), reported at 21 O.R. (3d)

511, was granted on June 7, 1995 by Then J., whose endorsement was as follows:

THEN J.: -- The applicant Krupp MaK Maschinenbau GmbH ("Krupp") seeks (1) an order extending the time in which to seek leave to appeal the order of the Honourable Madam Justice Haley dated December 23, 1994; and (2) an order granting Krupp leave to appeal the order of December 23, 1994 of the Honourable Madam Justice Haley wherein she refused to stay all or part of these proceedings pursuant to the International Commercial Arbitration Act, R.S.O. 1990, c. I.9, as amended ["I.C.A.A."].

The respondent does not contest the granting of an extension of time within which to seek leave to appeal and I am otherwise satisfied that this is an appropriate case for the granting of an order extending the time within which to appeal and, therefore, an order shall go extending the time for the seeking of leave to appeal to the present day: *Frey v. MacDonald* (1989), 33 C.P.C. (2d) 13 (Ont. C.A.).

Rule 62.02(4) of the Rules of Civil Procedure sets out the criteria for the granting of leave to appeal to the Divisional Court. In essence, that rule states that leave to appeal shall not be granted unless: (a) there is a conflicting decision by another judge or court in Ontario; or (b) there appears to be to the judge hearing the motion, good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that leave to appeal should be granted.

Counsel for the applicant, Krupp, submits that Haley J. erred in law in her interpretation of art. 8 [Schedule] of the I.C.A.A. in two respects:

- (1) the necessary timing of the request for arbitration under art. 8; and
- (2) the meaning of a party under art. 8.

The Necessary Timing of the Request for Arbitration under Art. 8

Article 8 of the I.C.A.A. reads as follows:

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.

Haley J. acknowledged that the request for arbitration in the applicant's statement of defence and counterclaim was its first statement on the substance of the dispute within the meaning of those words in art. 8 of the I.C.A.A. but, nevertheless, held that the request for arbitration must be made prior to the filing of any pleading on the substance of the dispute and indeed held that by filing a pleading concomitant with a request for arbitration, the applicant Krupp had waived its right to seek arbitration by filing a statement of defence in the action.

In my view, there is reason to doubt the correctness of this ruling because the plain meaning of art. 8 requires that the request be made with or in the first statement on the substance of the dispute and since it is acknowledged that the statement of defence is the first statement on the substance of the dispute, the applicant, in my opinion, has complied with art. 8. Moreover, the interpretation adopted by Haley J. appears to disregard the U.N. analytical commentary which purports to explain the time requirements stipulated by art. 8 of the I.C.A.A. as follows:

. . . 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.

In my view, the analytical commentary allows for the request for arbitration to be made in pleadings provided these pleadings are the first statement on the substance of the dispute as is the situation in the present case. Moreover, in my opinion, the approach taken by Haley J. is not consistent with the general approach in favour of arbitration taken by Borins J. in *BAB Systems Inc. v. McLurg* (1994), Court File No. RE 4622/94 released December 21, 1994, at pp. 5 through 6. The public importance of the I.C.A.A. has been confirmed by Austin J.A. in *Automatic Systems Inc. v. Bracknell Corp.* (1994), 18 O.R. (3d) 257, 12 B.L.R. (2d) 132 (C.A.) and, accordingly, I have no doubt that the questions of interpretation with respect to the timing requirement for the request for arbitration under art. 8 of the I.C.A.A. raises a matter of general importance which ought to be resolved by the Divisional Court, especially in view of the different general approach taken by Borins J. in *BAB*, *supra*.

Whether the Respondent ABN bank, who is an Assignee of a Party to the Arbitration Agreement is a Party within the meaning of Art. 8 of the I.C.A.A.

Haley J. held that the respondent ABN Amro Bank Canada ("ABN") could not be bound by the arbitral submission because it was not a party to the arbitration agreement even though ABN was admittedly asserting rights derived from a party to that agreement by virtue of an assignment of book debts.

Haley J. found that the "party" under art. 8(1) means a party to an arbitration agreement which is defined in art. 7 as a written document signed by the parties. Accordingly, only signatories to an arbitration agreement may invoke s. 8. Haley J. found further support for her view that only signatories but not

assignees of those signatories were intended by the legislature to constitute a "party" under art. 8 of the I.C.A.A. because "party" had been defined to include a person claiming through or under a "party" in the Foreign Arbitral Awards Act, 1986, S.O. 1986, c. 25, since repealed [1988, c. 30, s. 14]. Accordingly, since the definition of party under the Foreign Arbitral Awards Act, 1986 has not been continued in the I.C.A.A., it may properly be inferred that the legislature did not intend that an assignee be deemed a party under the I.C.A.A.

Although there is some force in my view to the interpretation of art. 8 taken by Haley J. on this issue, I am nevertheless of the opinion that there is reason to doubt the correctness of that interpretation in view of the decision of Campbell J. in *Boart Sweden AB v. NYA Stromnes AB* (1988), 41 B.L.R. 295 (Ont. H.C.J.) at p. 304, which appears to stand for the proposition that where a litigant is an assignee of rights under an international agreement which contains an arbitration clause, that party is bound by the submission to arbitration. (See also *Fisser v. International Bank*, 282 F.2d 231, 233 n. 6 (2nd Cir. 1960) at p. 233; *Banque de Paris et des Pays-Bas v. Amoco Oil Co.*, 573 F. Supp. 1464, 1469 (S.D.N.Y. 1983) at pp. 1466, 1468-70, and 1473-74; and cf. *Barrowclough v. Kidder, Peabody & Co., Inc.*, 752 F.2d 923, 938 (3rd Cir. 1985) at pp. 938-939 and p. 941).

In my view, this aspect of the decision also raises a matter of general public importance and ought to be resolved by the Divisional Court.

The application for leave to appeal is granted, with costs, reserved to the Divisional Court.

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

S. Gordon McKee, for plaintiff (respondent), ABN Amro Bank Canada.

Frederick William Logan Black, appearing in person.