Ontario Court (General Division), Divisional Court

Citation: ABN Ambro Bank Canada v. Krupp Mak Maschihnenbau GmbH
Court File: 92-CQ-29496A
Date: 1996-05-07

Southey, Dunnet and Adams JJ.

Counsel:
James J. Holloway, for appellant.
S. Gordon McKee, for respondent.
Frederick William Logan Black, appearing on his own behalf.

[1] ADAMS J. (DUNNET J. concurring):—The issue in this appeal is whether the motions judge erred in refusing to refer a matter or part of a matter to arbitration in accordance with the terms of a Technology Licensing Agreement ("TLA") between certain parties and pursuant to either the *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9 (art. 8 of the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on June 21, 1985), or to stay the action under s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[2] The matter arises out of a contract for the overhaul of a Canadian coast guard ship. The project included the supply of a new propulsion system for the ship. A subcontract was awarded to appellant Krupp Mak Maschinenbau GmbH ("Krupp") who had agreed to meet the Canadian content requirements through NsC Diesel, a company owned by NsC Corporation. Both of these companies were controlled by Frederick Black, a Canadian businessman. Krupp had agreed to assemble and test the engines in Nova Scotia and this was to be done by NsC Diesel. However, NsC Diesel was simply a concept. It had no plant, staff or financing. Indeed, all the technical expertise was in Krupp, a large German company. Black had assisted Krupp in having the propulsion subcontract awarded to it and he had agreed to create and manage the required Canadian component of that contract.

[3] Black obtained financing from the plaintiff ABN Amro Bank Canada ("ABN") as well as from other sources including the Atlantic Canada Opportunity Agency ("ACOA"), Deutsche Bank and Krupp. The subcontract was dated September 30, 1988. ACOA agreed to finance 65% of the NsC Diesel construction project in the amount of approximately $11 million. The commitment letter from ABN was dated January 3, 1989. A condition of the loan was "evidence of full injection of equity (CAD 5 million) prior to drawdown". Collins Barrow, an accounting firm, was to provide a certificate to this effect. The amount of the loan was approximately $6 million. Krupp was not a party to this loan agreement. On March 6, 1989, NsC Diesel and Krupp entered into the TLA whereby Krupp granted exclusive manufacturing and shipment rights within North America along with a variety of other commitments by which NsC Diesel could draw on Krupp's technical expertise. This agreement was a condition of the ACOA loan. NsC Diesel was to pay Krupp $4 million for the transfer of technology. The TLA contained an arbitration clause which is in issue in these proceedings and explicitly contemplated assignment to ABN.

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[4] ABN received a general assignment of accounts dated February 24, 1989. By letter dated October 23, 1992, ABN notified Krupp of this fact and advised that the assignment included the TLA. The project failed. NsC Diesel is now bankrupt. Lawsuits, in several courts, are in abundance.

[5] This action was commenced November 18, 1992. In it ABN alleges that Black and his companies did not invest the required equity. Instead, a series of loans, agreements and trusts provided the money. It is alleged that the arrangement was to give the illusion of an equity injection and that Collins Barrow negligently failed to detect this fact. ABN alleges that it would never have advanced its money had it known the true state of affairs. Against the defendant Krupp, the plaintiff ABN claims that it conspired with Black to bring about the appearance of the equity injection.

[6] Krupp takes the position that the TLA was entirely proper as was the financing of it and that the arrangement was open and known to ABN. In turn, Krupp complains that the ABN encouraged it to continue making advances to Black's companies when ABN knew they were failing. Black has not been sued in this action.

[7] On February 23, 1993, counsel for Krupp wrote to the counsel for ABN pointing out the arbitration clause in the TLA and inviting that all aspects of it be submitted to arbitration. The letter concluded:

> ... If you are not so prepared, then we will have to bring a motion to have the portions of the action stayed. I suspect that such a motion would take more than two hours to argue, and we do not wish the action to be delayed. We look forward to an early reply so that if the matter must proceed, we can make the requisite appointment for a hearing date. I am unavailable generally in March. Subject to Court availability, I suspect that the earliest hearing date would be the latter part of April or May.

[8] Immediately beforehand, ABN's counsel advised he was requiring Krupp to file its statement of defence within the time-limits provided in the rules. On March 3, 1993, Krupp's counsel again wrote to counsel for ABN advising that the court did not have dates prior to late June or early July and requesting counsel's availability. Krupp served its statement of defence on March 12, 1993, in which it set out the terms of the arbitration clause found in the TLA and stated that the arbitration court in Zurich, Switzerland had sole jurisdiction thereunder. On March 26, 1993, counsel for ABN advised by letter of his availability for the motion. Counsel continued to co-operate to have the motion set down over April to June when a draft notice of motion was sent to counsel for ABN as requested. The formal notice was thereafter served but was not heard by Haley J. until December 2, 1994. Notwithstanding this delay, there is no suggestion that Krupp's counsel ever deviated from or took a step in the action contrary to his expressed intention of perfecting the motion for a referral to arbitration.

[9] Haley J. refused to refer to arbitration. She held that for the request to have been timely under art. 8 of the Model Law, the motion requesting referral and a stay had to have been brought by Krupp before the court following receipt of the statement of claim. She also held that ABN was not a party to the agreement to arbitrate and that this too was required by the Model Law. Finally, Haley J. refused to grant a stay under s. 106 of the *Courts of Justice*

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Act, and to refer to arbitration as a condition of granting the stay. ABN had put forward what it characterized as a *prima facie* case of fraud against Krupp and requested that the court find the arbitration agreement to be "null and void". Krupp did not file material in reply to this allegation. However, in light of her other conclusions, Haley J. did not find it necessary to deal with that issue.

[10] Article 8 of the Model Law does not obligate a court to deal with a claim that an arbitration agreement is inoperative or null and void. This is because the issues may be integrally related to the merits of a dispute that otherwise would have to be arbitrated and art. 16 provides an arbitrator with jurisdiction, concurrent to the courts, in respect of the validity of the arbitration agreement in order that, where appropriate, one forum might be available to resolve the entire dispute between the parties: *Gulf Canada Resources Ltd. v. Arochem International Ltd.* (1992), 43 C.P.R. (3d) 390, 22 W.A.C. 145, 66 B.C.L.R. (2d) 113 (C.A.). Therefore, not being obligated to entertain ABN's claim of fraud, I would decline to do so. A motions court, *prima facie*, is not a particularly appropriate forum to determine that issue. I note that ABN did not specifically plead fraud and Krupp, in its pleadings, clearly did not concede fraud. Nor did Black concede any impropriety in his dealings with Krupp. In my opinion, therefore, it was not unreasonable for Krupp to expect that the allegations of misrepresentation that were made by ABN would not be the focal point of a motion requesting arbitration. Had Krupp filed an affidavit which merely repeated its pleadings in response to Joseph Brown's affidavit, any serious pursuit of the misrepresentation allegation found in para. 17 of that affidavit would have required a trial of the entire action or Haley J. to assess credibility on affidavit and related transcript evidence. Moreover, in the absence of a determination by her on the issue, I am even less inclined, on appeal, to determine such a central and controversial allegation in the underlying action, given all the circumstances.

[11] The reason I have dealt first with whether, for the purposes of the motion and this appeal, a court is obliged to entertain and determine allegations going to the validity of the arbitration agreement is because it is my conclusion that Haley J. erred in holding Krupp's request for arbitration to be untimely and that ABN was not bound to arbitrate. Canadian courts have affirmed the mandatory application of the Model Law. These decisions reflect the important policy considerations in favour of a liberal approach to international commercial arbitration and judicial deference to arbitration agreements: *Automatic Systems Inc. v. Bracknell Corp.* (1994), 113 D.L.R. (4th) 449, 12 B.L.R. (2d) 132, 13 C.L.R. (2d) 171 (Ont. C.A.); *Nanisivik Mines Ltd. v. F.C.R.S. Shipping Ltd.* (1994), 113 D.L.R. (4th) 536, [1994] 2 F.C. 662, 167 N.R. 294 (C.A.).

[12] Article 8 of the Model Law provides:

> 8(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.

[13] Section 13 of the *International Commercial Arbitration Act*, to which the Model Law is a schedule provides that, as an aid to interpretation, recourse may be had to the Analytical Commentary contained in the report of the Secretary General to the 18th Session of the United

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Nations Commission on International Trade Law.

With respect to art. 8, the commentary reads:

> 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 regards the effect of a party's failure to invoke the arbitration agreement by way of such 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 of 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.

[14] I find that Krupp's statement of defence and counterclaim, in the context of the correspondence between counsel at the time, constituted a request "not later than when submitting [its] first statement on the substance of the dispute". The effect of Haley J.'s ruling is to require that a request be made before a party's first statement which is contrary to the express wording of both art. 8 and the commentary. Indeed, it is a return to the requirement of a procedural plea at an earlier stage than any pleading, a concept which the commentary makes clear has been done away with. With the greatest of respect, it is too technical to require that Krupp should also have served a notice of motion before pleading or actually have appeared before a court on or before filing its first pleading. Krupp was pursuing its motion to refer prior to, concurrent with and after filing its statement of defence. In fact, I do not understand that Krupp took any further step in the action in so far as it pertained to the matters Krupp sought to have referred to arbitration. Thus, it is untenable to contend that Krupp did not commit itself until it formally brought its motion or until it was actually before the court. If this was the position of counsel for ABN from the outset, Krupp's counsel should have been so advised, given the state of the correspondence between counsel at the time.

[15] ABN is, in law, a party to the arbitration agreement. It is a fundamental and, I think, universal commercial legal principle that an assignor is not entitled to divide that which is assigned amongst assignees so as to convey the benefits and nullify the burdens: *First City Capital Ltd. v. Petrosar Ltd.* (1987), 42 D.L.R. (4th) 738, 61 O.R. (2d) 193, 7 A.C.W.S. (3d) 112 (H.C.J.). Thus, a party seeking to enforce assigned rights under an agreement can only do so subject to the terms and conditions embodied therein: *Best v. Beatty* (1920), 53 D.L.R. 44, 47 O.L.R. 265, 18 O.W.N. 67 (C.A.); affirmed 58 D.L.R. 552, 61 S.C.R. 576. This principle has been applied, by this and other courts, to include arbitration clauses: *Boart Sweden AB v. NYA Stromnes AB* (1988), 41 B.L.R. 295, 14 A.C.W.S. (3d) 348 (Ont. H.C.J.); *Kaverit Steel and Crane Ltd. v. Kone Corp.* (1992), 87 D.L.R. (4th) 129, 40 C.P.R. (3d) 161, 4 C.P.C. (3d) 99

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(Alta. C.A.); *Fisser v. International Bank*, 282 F.2d 231 (2d Cir.); *Rumput (Panama) SA and Belzetta Shipping Co. SA v. Islamic Republic of Iran Shipping Lines (The "Leage")*, [1984] 2 Lloyd's Rep. 259. Accordingly, the appeal is allowed. The claims set out in Part B of the statement of claim (paras. 22-31) are referred to arbitration and the action, in those respects, is stayed.

[16] Finally, I find that Krupp was entitled, in the alternative, to the same order under s. 106 of the *Courts of Justice Act*, and Haley J. erred in this respect as well.

[17] Krupp shall have its costs payable by ABN fixed at $10,000 before Haley J., $2,500 before Then J., who granted leave to appeal 24 O.R. (3d) 450, 55 A.C.W.S. (3d) 1111, and $7,500 before this court. In view of the result, costs will not be awarded to or against Frederick Black.

[18] SOUTHEY J. (dissenting):—I have had the benefit of reading the clear and concise reasons of Adams J. For the reasons given by him, I agree with his conclusions that the learned motions court judge erred in holding that there had been no timely request for arbitration and that the plaintiff bank was not bound by art. 12 of the Technology Leasing Agreement ("TLA") respecting arbitration. But, with respect, I do not agree with his conclusion that no effect should be given in this court to the uncontradicted evidence of fraud on which the bank relies, and that part of the action should be stayed under s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. These were both matters which the learned motions court judge did not deal with. In the result, I would dismiss the appeal.

[19] This action and several other actions in Ontario and Nova Scotia, to which I shall refer later, arose out of a subcontract awarded to Krupp Mak Maschinenbau GmbH ("Krupp Mak") by Halifax Dartmouth Industries Ltd. ("HDIL") in 1988, for the supply of a diesel electric propulsion system to be installed in a ship owned by the Canadian government, named the CGS Louis St. Laurent. The price in the subcontract was $26,400,000.

[20] The diesel engines in the propulsion system were to be assembled and tested at a facility to be constructed by "NsC Diesel Power Incorporated" ("NsC Diesel") in Sheet Harbour, Nova Scotia. The plaintiff bank ("bank") agreed to lend NsC Diesel funds for the project under a loan commitment which required NsC Diesel to provide the bank "evidence of full injection of equity (CAD $5 million) prior to drawdown". The purpose of the requirement of equity injection was to demonstrate that NsC Corporation, the sole shareholder of NsC Diesel, and its president and principal shareholder, Frederick William Logan Black ("Black") had the financial substance and were willing to invest their own money in the project.

[21] In March, 1989, NsC Diesel provided the bank with an auditor's certificate, prepared by the defendant Collins Barrow, stating that, in their opinion, NsC Diesel had complied with the equity injection requirement in the loan commitment. The bank then advanced to NsC Diesel between March 31 and July 14, 1989, approximately $6.12 million. NsC Diesel defaulted on its loan, and the bank claims to have suffered damages in the amount of the loan together with interest and the cost of efforts to collect. The total damages claimed as of October 31, 1992, was more than $10.5 million.

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[22] The bank alleges that NsC Diesel and Black, in fact, did not inject equity into the project. Instead, it is alleged that $5 million was advanced by Krupp pursuant to a conspiracy to unlawfully misrepresent to the bank that the equity injection had been made. The money was then returned to Krupp. Part of that money, $4 million, was paid to Krupp as a fee for the TLA between NsC Diesel and Krupp.

[23] The bank claims that Collins Barrow was negligent in providing the certificate respecting the equity injection. The bank alleges that Collins Barrow ought to have determined by a proper investigation that the injection had not been made. The bank claims recovery of the full amount of its loss from Krupp and Collins Barrow as damages for conspiracy and negligence.

[24] The bank obtained a general assignment of accounts from NsC Diesel, executed February 24, 1989, as security for its loan. The bank alleges that NsC Diesel received no consideration from Krupp under the TLA, and that Krupp has repudiated the TLA. The bank, as assignee of the chose in action of NsC Diesel, makes a second claim in this action against Krupp alone to recover from Krupp the said $4 million. It is in respect of the second claim that Adams J. held that the action should be stayed.

[25] This action was commenced by a statement of claim dated November 18, 1992. Collins Barrow has not yet delivered a statement of defence in the action, but moved for, *inter alia*, an order staying the proceeding on the ground that Ontario was not the convenient forum. On July 23, 1993, Master Donkin made an order staying the action against Collins Barrow pending the final determination of the action against Krupp and the counterclaim therein on terms that Collins Barrow shall be bound by the findings of fact, if any, made at the trial of the action against Krupp.

[26] Krupp delivered its statement of defence and counterclaim on March 15, 1993. Its allegations include the following:

> i. The bank knew or ought to have known the true facts respecting the loss of $4 million from Deutsche Bank and that the funds were paid to Krupp for the licensing of its technology.
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> ii. The bank relied entirely on information from NsC Diesel and Black before lending money to NsC Diesel, and made no inquiries of Krupp. Krupp made no representation to the bank and its course of action was open.
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> iii. The bank was in breach of a fiduciary relation to Krupp which it breached by failing to disclose to Krupp in a timely fashion the precarious financial condition of Black and his companies and their misuse of funds.
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> iv. The technology licensed from Krupp by NsC Diesel under the TLA was very valuable. The TLA and the $4 million fee were known to and accepted by the bank before it advanced the loan to NsC Diesel.
>
> v. Krupp performed all of its obligations under the TLA that NsC Diesel was capable of

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utilizing. Krupp provided technology, supervision and training, and was and is willing to fulfil the balance of its obligations under the TLA as soon as the facility is completed by NsC Diesel so as to be capable of receiving further performance by Krupp.

vi. The $4 million fee has been earned by Krupp and its retention by Krupp is not a forfeiture.

vii. The assignment of book debts does not convey to the bank any right to recover the portion of the $4 million fee alleged by the bank to have been unearned. There has been no assignment to the bank of any rights under the TLA. Alternatively, if the bank is an assignee of the TLA, it is in breach of the agreement for failure to complete the facility and is liable for the damages Krupp has sustained because of such breach.

viii. Krupp did not conspire with Black. Krupp acted in good faith for the prosecution of its legitimate commercial interests and not for the purpose of injury to Black.

ix. The bank and Black conspired to injure Krupp by inducing it to advance funds for the benefit of NsC Diesel. To the knowledge of the bank, Krupp paid $6.5 million for the benefit of NsC Diesel, at the request and direction of Black, as an advance on the commission owing to Black's companies for their assistance in procuring the Louis St. Laurent contract.

x. The bank conspired with Black not to warn Krupp of the insolvency of NsC Diesel prior to September, 1989, with the intention of injuring Krupp.

xi. In April and June, 1992, in the Supreme Court of Nova Scotia, NsC Diesel sued the bank for conspiracy to induce breach of contract and fraud, and the bank sued Black in connection with the NsC Diesel transaction and facility. It is an abuse of the process of the Ontario court to make allegations of conspiracy against Black and add him as a defendant, in view of the actions for fraud between the bank and Black in Nova Scotia.

[27] On the basis of the allegations contained in its statement of defence, Krupp counterclaims against the bank for damages in the amount of $20 million and punitive damages of $100,000. Krupp alleges that it has suffered losses as a result of the failure or refusal of the bank to complete the NsC Diesel facility, and the conspiracy alleged in the statement of defence.

[28] Krupp proposes that its counterclaim be tried at Toronto.

[29] Krupp has taken third party proceedings against Black in the Ontario action for contribution and indemnity for all damages and costs for which Krupp may be held liable to the bank. Joined in the third party claim is a claim for $6.5 million damages for conspiracy against Black. Krupp proposes that its third party action be tried at Toronto.

[30] In a statement of defence and counterclaim, dated February 4, 1994, Black pleads in response to the bank's statement of claim in this action. Black claims against the bank general damages of $15 million for loss of reputation and his good name. Black claims from the

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defendants by counterclaim Corporation House Limited, Bruce Benn, Ronald Benn and Steelwood Consulting Inc., all of whom were retained by Black or his companies in connection with the Sheet Harbour project, damages for breach of fiduciary duties, damages for breach of contract, damages for interference with contractual relations, damages for inducing breach of contact and damages for conspiracy to induce breach of contract in the sum of $668,810,080, and other relief.

[31] Black counterclaims against Krupp for damages for breach of contract, loss of investments and investment income, loss of dividends, loss of expenses, loss of interest, loss of tax benefits and loss of interest-free contributions totalling $650 million, and other relief.

[32] Black proposes that the claims in his counterclaim be joined with an earlier action in the Ontario Court (General Division) commenced by him at Ottawa and with the Nova Scotia actions, and that the proceedings be tried at Ottawa.

[33] It is obvious that there is a great deal of duplication between the issues raised in this action and the issues in the actions commenced in Nova Scotia, and by Black in the Federal Court of Canada and in this court in Ottawa. I do not see how that duplication can be relieved by having the bank and Krupp go off to Switzerland to determine the lesser claim raised by the bank in this action for the return of the $4 million paid by NsC Diesel under the TLA. I see no error in the decision of the learned motions court judge not to stay this action under s. 106 of the *Courts of Justice Act*

[34] It was unnecessary for the learned motions court judge to deal with the issue of fraud because she decided against a reference to arbitration on the first two grounds raised by the bank. Having held that the learned motions court judge erred in her decision on both of those grounds, it is necessary for us to deal with the bank's submission that it was induced by fraud to enter into the TLA.

[35] As evidence of fraud, the bank filed the affidavit of Joseph Brown, a vice-president of the bank, who referred to allegations in a pleading by Krupp, answers given by a representative of Krupp on cross-examination, a letter written by Black and other documents. Brown made the following statements in his affidavit:

> 8. Based on the information and documents referenced in the following paragraphs, it would appear that Black and Krupp Mak entered into arrangements, the effect of which was to create the appearance that a technology licencing agreement between Krupp Mak and NsC Diesel had a value of $4 million and that Black had made an equity injection of $5 million, neither of which were true.
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> 13. Attached hereto and marked as Exhibit "M" is a letter dated December 2, 1989 from Black to NsC Diesel's representative Corporation House, which document I am advised by Gordon McKee and verily believe was obtained by him from Corporation House shortly before the commencement of this litigation. In that letter, Mr. Black states the following:

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"As you fully understand, the $4 million value for technology is a paper value, which we use to inflate the overall project costs. Mak will forward this money, by way of a loan to F.W.L. Black, who will then invest it in the corporation and pay it back to Mak for the purchase of the technology."

* * * * *

17. Based on the above, I believe that Krupp Mak agreed with Black to knowingly misrepresent the value of the technology agreement and assist Black in creating the appearance that he had the financial ability to inject $5 million of his money into NsC Diesel, which was not in fact the case.

[36] The evidence of Brown was not contradicted. It establishes that the TLA was part of a scheme in which Krupp was a participant to induce the bank to lend money to NsC Diesel by knowingly making a misrepresentation as to the injection of capital by Black into the Sheet Harbour Project. In these circumstances, in my opinion, the TLA is null and void as against the bank, because it was part of a scheme to defraud the bank and it caused loss or damage to the bank.

[37] Krupp submits that the court must refer the issues to arbitration under art. 8(1) of the Model Law, which applies in this case. Article 8(1) 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.

[38] Adams J. states that *prima facie* motions court is not an appropriate forum to determine issues of fraud. With respect, I do not think that general rule is applicable in the case at bar, where there is no conflict in the evidence respecting fraud.

[39] Article 8(1) contemplates that the court from which the reference is sought may find that the agreement is null and void. Perhaps it should not make that finding where there is a conflict in the evidence, but rather should leave that issue to be decided by the arbitrator. That is the view expressed by Adams J. But I do not think the court should shrink from giving the order appropriate to a situation of fraud, where the evidence is not in dispute. Here, the legal result flowing from the only evidence is that the agreement to arbitrate is null and void and I so find.

[40] As to the failure of the bank to use the word "fraud" in its statement of claim, it is enough that there is sworn evidence of facts sufficient to establish fraud and that the relief appropriate to a cause of action for fraud has been claimed. Paragraph 17 of the statement of claim reads:

17. The defendants thereby misrepresented that Black and NsC Corporation had the

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financial ability to inject $5 million of their own money for acquisition and construction of the project. At the time, Krupp Mak knew that misrepresentation to be untrue and the defendants knew or should have known in the circumstances that the plaintiff would advance funds to NsC Diesel in reliance on the misrepresentation and that injury to the plaintiff was likely to result.

[41] The bank goes on to allege that money was advanced to the plaintiff NsC Diesel in reliance on the misrepresentation by the defendants and by reason of the conspiracy with the result that the bank suffered damages when NsC Diesel defaulted on the loan. The bank used the words of a plea of fraud, even though the word "fraud" was not included.

[42] For the foregoing reasons, I would dismiss the appeal. Krupp will pay to the bank its costs here and below [21 O.R. (3d) 511, 52 A.C.W.S. (3d) 480], including the costs of the motion for leave before Then J. [24 O.R. (3d) 450, 55 A.C.W.S. (3d) 1111]. Such costs are fixed at $20,000, an amount to which counsel agreed. Mr. Black opposed the appeal and Krupp will pay his disbursements, hereby fixed at $1,500.

[43] Appeal allowed.

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