

COURT OF APPEAL FOR ONTARIO

MORDEN A.C.J.O., BLAIR and AUSTIN JJ.A.

IN THE MATTER OF THE *INTER-*
NATIONAL COMMERCIAL ARBITRATION
 ACT, R.S.O. 1990, c. I.9

IN THE MATTER OF THE
ARBITRATION ACT, 1991, S.O.
 1991, c.17

AND IN THE MATTER OF THE
CONSTRUCTION LIEN ACT, R.S.O.
 1990, c. C.30

B E T W E E N :

AUTOMATIC SYSTEMS INC.

Applicant
 (Appellant)

-and-

BRACKNELL CORPORATION
 carrying on business as CANAL
 CONTRACTORS and CHRYSLER
 CANADA LTD.

Respondents
 (Respondents)

Donald E. Short and
A.T. Little for the
 appellant

D.G. Christie and
S.P. McKenna for the
 respondent, Bracknell
 Corporation

Heard: February 17 and
 18, 1994

AUSTIN J.A.:

This is an appeal from a decision of Feldman J. dated December 16, 1993, dismissing an application to stay an action. The central issue is whether an agreement to arbitrate should be enforced where the claim in issue is made under the *Construction Lien Act*, R.S.O. 1990, c. C.30 ("*CLA*") and the

arbitration would fall within the *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9 ("ICAA").

FACTS

Automatic Systems Inc. ("Automatic") is a Missouri company. In 1991 it entered into a contract with Chrysler to supply and install a conveyor system at the Chrysler plant in Bramalea, Ontario. Automatic in turn subcontracted part of the work to Bracknell, an Ontario company. The subcontract provided that any claims arising under it would be arbitrated and that any such arbitration would be held in Missouri in accordance with Missouri law.

A claim was made by Bracknell against Automatic. It was not resolved and Bracknell registered a lien claim under the *CLA*. To enforce the claim, Bracknell commenced an action against Automatic and Chrysler by issuing a statement of claim, securing a certificate of action and registering that certificate against the title to Chrysler's land.

Instead of delivering a statement of defence, Automatic served upon Bracknell a demand for arbitration and a claim for damages. The subcontract expressly provides for a "demand for arbitration" and states that delivery of same "shall be deemed the commencement of the arbitration."

Bracknell declined to arbitrate and accordingly Automatic brought an application for an order staying the action and referring the parties to arbitration.

THE RELEVANT PARTS OF THE CONSTRUCTION LIEN ACT

The directly relevant sections of the CLA are ss.4, 5(1) and 62(6)(b). They read as follows:

4. An agreement by any person who supplies services or materials to an improvement that this Act does not apply to the person or that the remedies provided by it are not available for the benefit of the person is void.

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

...

62. ...

(6) The court may allow any person with a perfected lien,

...

(b) whose action was stayed by reason of an order under the *Arbitrations Act*,

to be let in to prove the claim at any time before the amount realized in the action for the satisfaction of the lien has been distributed, and where the claim is allowed, the judgment or report shall be amended to include the claim.

THE ORDER BELOW

Feldman J. found that because Automatic's place of business was Missouri, the arbitration is an "international" one within the meaning of the *ICAA*. No issue is taken with this or with the finding that any arbitration of the issues would be "commercial" within the meaning of that Act. It was common ground that because the subcontract involved construction on land in Ontario, the *CLA* applied. Section 4 of that Act prohibits contracting out of that statute.

Section 62(6)(b) of the *CLA* refers to "the *Arbitrations Act*." That latter Act, R.S.O. 1990, c. A.24, however, was repealed on January 1, 1992, and was replaced by the *Arbitration Act, 1991*, S.O. 1991, c.17. Section 2(1) of this Act provides that:

- 2. (1) This Act applies to an arbitration conducted under an arbitration agreement unless,
...
 - (b) the *International Commercial Arbitration Act* applies to the arbitration.

Feldman J. concluded that by virtue of the repealing of the *Arbitrations Act* and the enactment of the *Arbitration Act, 1991*, the reference in s.62 of the *CLA* to the *Arbitrations*

Act should now be considered a reference to the *Arbitration Act, 1991*. Accordingly, while the *CLA* contemplates and makes provision for domestic arbitrations, it now no longer makes any provision for international arbitrations. Feldman J. therefore concluded that an agreement for international arbitration of an Ontario lien claim was unenforceable. Accordingly, she refused to refer the matter to arbitration or to stay the action.

Automatic appeals from that order.

THE NATURE OF A LIEN ACTION

In argument, there was a good deal of discussion of the fact that a lien claim is a creature of statute and that the *CLA* sets up a special procedure for the protection and assessment of that right. The Act creates, in favour of a worker, supplier, contractor or subcontractor, a right against an "owner" of property, owner being very widely defined. A duty is placed upon an owner to retain in his hands funds equal to a certain percentage of the value of the work done. In addition, certain funds are impressed with trust characteristics and workers and others are given rights against those funds. An elaborate procedure, including strict time limits, is laid out for the preservation, perfection and prosecution of those rights.

In the present case, most of these features are redundant. Automatic has reduced the matter to the simplest basis possible. It has posted with the Accountant of the Ontario Court of Justice a letter of credit for the full amount of Bracknell's claim and the lien has been removed from the title to Chrysler's land. The letter of credit has replaced the land as security that the claimant will be able to recover the full amount owing to it. Chrysler and the land are therefore no longer at risk and the issue has resolved itself into a pure contract claim between Bracknell and Automatic. The amount of the holdback is irrelevant and there is no claim with respect to funds held in trust.

The more relevant sections of the Act are set out above. Sections 4 and 5, it was agreed, should be read together and so read prohibit contracting out. Counsel for Automatic argued strenuously that s.4 refers only to the "remedies" provided by the Act and that nothing in the Act was inconsistent with what he proposed, namely, assessment of the value or quantum of the claim by arbitration.

This argument finds some support in s.62(6)(b) which expressly contemplates arbitration. Commentary on this provision is found in the Report of the Attorney General's Advisory Committee on the Draft Construction Lien Act, April,

1982. The Act, formerly the *Mechanics' Lien Act*, was reviewed and revised and replaced by the *CLA* in 1983. This report records part of the process. The commentary at p.50 is as follows:

Subsection 64(6) (now s.62(6)) provides for the proving of claims by those lien claimants who were not before the court at the trial. This can occur as a result of the person supplying services or materials at the time of the proceedings and not having preserved his lien claim in time to be served with a notice of trial. It may also be because of an arbitration order staying his action and not permitting him to participate in the trial. Failure to permit a claimant to prove his claim at this time would mean that the claimant would be deprived of his rights.
[emphasis added]

There was no reference to arbitrations in the *Mechanics' Lien Act*, the predecessor of the *CLA*. It was argued by counsel for Automatic that no reference was necessary and that s.62(6)(b) was simply a codification of the decision of A.S. Marriott, Assistant Master in *Art Plastering Company v. Oliver and Excelsior Construction Co. Limited*, [1945] O.W.N. 41. The facts in that case were much the same as those in the present case, except that there was no international feature. The owner pleaded that the court had no jurisdiction to try the issue between owner and contractor as they had agreed to arbitrate. The contractor pleaded s.5 of the *Mechanics' Lien*

Act which provided that only by an express agreement could a person contract out of the Act and that the arbitration clause in that case was not such an express agreement. The Assistant Master commented as follows at p.42:

... This point does not appear to be the subject of any reported decision in Canada or the United States.

If the enforcement of the arbitration clause prevented the claimant from obtaining his lien rights there might be some force in the claimant's contention. But at least under our statute it can be clearly demonstrated that this is not so. Under s.21(1) of The Mechanics' Lien Act, a contractor may register a lien before or during the performance of the contract or within thirty days after its completion. It is not necessary that any moneys be due or that any cause of action should have arisen. So that if at any time from the commencement of the work until thirty days after the work has been completed any dispute arises between the owner and contractor, the latter may register his lien, and by so doing he preserves to himself, until the expiration of ninety days from the date the last work is done, any lien rights to which ultimately he may be found entitled. Under s.23 of the Act, a lienholder must commence his action and register a certificate thereof within ninety days after the work has been completed. This gives the contractor ninety days within which to have any dispute adjudicated upon by the arbitrators and an award made, after which, the condition precedent having been satisfied, the liability of the owner and a cause of action arises, and the contractor can commence his action and register a certificate thereof. Upon proving the award he would then be

entitled to judgment for a lien upon the interest of the owner and to any other relief provided for by the statute. Thus it will be seen that such an arbitration clause does not prejudice the contractor in obtaining the benefits given by The Mechanics' Lien Act. In a proper case it only takes away from the Court administering the said Act the right to adjudicate upon the dispute covered by the arbitration clause.

He concluded at p.45 as follows:

I therefore find that although The Mechanics' Lien Act does not make inoperative the arbitration clause contained in the contract in question herein, yet by delivering a statement of defence the defendant Excelsior Construction Co. Limited has lost its right to have such clause enforced, and the claimant Oliver is entitled to proceed with his action.

It is clear from the Assistant Master's comments that resolution of lien claims was a great deal swifter then than it is now. That, however, does not detract from the principle underlying his decision, namely, that arbitration and lien litigation can co-exist. The statutory action is not brought to an end by the stay but continues. The relationship of arbitration to lien litigation and the Canadian jurisprudence on that relationship are extensively discussed in Macklem and

Bristow, *Construction Builders' and Mechanics' Liens in Canada*, Carswell, (6th ed. 1990) §128, pp. 10-30.1 to 10-36.1.

One of the arguments of Bracknell was that resort to arbitration might lead to the dismissal of the action, pursuant to s.37(1)(b) of the *CLA*. This section provides that a perfected lien expires when the action is not set down for trial within two years of the commencement of the action. One answer to that argument would be to provide for the lifting of the stay long enough to set the action down, a solution suggested and consented to by counsel for Automatic.

The language of s.62(6)(b) and the decision in *Art Plastering* both support the proposition that arbitration and lien litigation can co-exist. It is obvious that in the case presently before the court there is no procedural handicap to proceeding by way of arbitration. Nor is it apparent that Bracknell will lose any right it presently has. In this regard, it was argued that its right to get information from Chrysler under s.39 of the *CLA* would somehow be lost. How, was not explained. The application asks for a stay of the action. No one raised the question whether any stay should be limited to Automatic but s.8 of the *ICAA* provides only for a stay "with respect to the matters to which the arbitration relates." The arbitration here relates to questions as between Automatic and

Bracknell. Accordingly, if any order is to be made, it should be made as between Automatic and Bracknell and should not involve Chrysler. The action would remain on foot as against Chrysler; Chrysler would remain a party and the action as against Chrysler would provide Bracknell with any rights it might need to secure information.

THE ARBITRATIONS ACT and THE ARBITRATION ACT, 1991

Prior to 1988 the *Arbitrations Act*, R.S.O. 1980, c.25 was the only Ontario statute governing the enforcement of arbitration. In referring to arbitration, it neither mentioned nor made any distinction as between domestic and international arbitrations. It appeared to be common ground between the parties to this proceeding that as there was no distinction drawn between them, that Act applied to both domestic and international arbitrations. That Act remained in force until January 1992. The subcontract with Bracknell is dated November 1, 1991, and by its terms became "effective" October 23, 1991. Had a claim been made within the following two months it could have been argued that s.62(6)(b) of the *CLA* applied to it and the counter argument now provided by s.2(1)(b) of the *Arbitration Act, 1991* would not have been available. That counter argument was relied upon by Feldman J.

THE INTERNATIONAL COMMERCIAL ARBITRATION ACT

In 1988 the Ontario Legislature passed the ICAA: 1988, c.30, now R.S.O. 1990, c.I.9. It applies to international commercial arbitration agreements, whether made before or after the coming into force of the Act. A commercial arbitration agreement is deemed "international" for the purposes of this Act in a variety of ways. In the present case, the fact that Automatic's base is in Missouri and Bracknell's is in Ontario is sufficient.

The ICAA declared that the UNCITRAL *Model Law* on International Commercial Arbitration (the "Model Law") as adopted by the United Nations Commission on International Trade Law on June 21, 1985, and set out in the schedule to the Act, was in force in Ontario. The Model Law, and specifically s.8 thereof, is closely modelled on the provisions of the United Nations Convention on Foreign Arbitral Awards adopted by the United Nations Conference on The Recognition and Enforcement of International Commercial Arbitration in New York on June 10, 1958 (the "New York Convention"), and specifically Article II(3) thereof. The New York Convention dealt with the enforcement of arbitral awards and was approved and declared to have the force of law in Canada by the enactment by the Parliament of Canada of the *United Nations Foreign Arbitral*

Awards Convention Act in 1986. See R.S.C. 1985, c.85 (2nd Supp.).

Legislation similar to the *ICAA*, adopting the *Model Law*, was enacted by the other provinces, providing for a uniform and universally consistent method of recognizing and enforcing commercial arbitration agreements between contracting parties in Canada and other countries adhering to the Convention. 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 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. *Kaverit Steel and Crane Ltd. v. Kone Corp. et al.* (1992), 87 D.L.R. (4th) 129 (Alta C.A.), at p.139.

Article 8 of the *Model Law* provides as follows:

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 of 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. [emphasis added]

It is to be noted that the Article says "shall." This is to be compared with the parallel section in the *Arbitration Act, 1991*, s.7(1) which also says "shall," and contrasted with the parallel section in the old *Arbitrations Act*, also s.7, which said "may." The change in verb suggests strongly that the Legislature is even more in favour of enforcing arbitration clauses in contracts than it was formerly.

It is also to be noted that Article 8(2) of the *Model Law* specifically contemplates an arbitration commencing or continuing while the action remains pending before the court, as in *Art Plastering*.

DISCUSSION

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 a stay to three specific situations, namely, where it finds the agreement to arbitrate null and void, inoperative or incapable of being performed. It is not clear from her reasons that Feldman J. found any of these phrases to be applicable. She said the arbitration clause was "unenforceable." A good deal of argument was directed to the interpretation of these three phrases. There is much jurisprudence on them, particularly in the United States of America, but in my view it is not necessary, in deciding this case, to rely on that jurisprudence.

The argument of Bracknell, as I understand it, is that the *Arbitration Act, 1991* is the successor statute to the *Arbitrations Act*, that s.62(6)(b) should be read as if it contained a reference to the 1991 Act and not the *Arbitrations*

Act and that by reason of s.2(1)(b) of the 1991 Act, international arbitrations were not to be included in s.62(6)(b). Feldman J. accepted that argument. She went on to find that the language of s.4 of the *CLA* against contracting out was sufficiently broad to cover the situation of a party who had agreed to international arbitration.

Automatic argues that Feldman J. should not have addressed the issue of referral to arbitration on the basis that possible infringement of the *CLA* prevents referral to arbitration. Instead, she should have addressed the issue as one of non-arbitrability, namely, whether the *CLA* made the dispute non-arbitrable and forbade the right to international arbitration. Given the strong public policy favouring international commercial arbitration, the learned judge ought to have asked whether the *CLA* expressly forbids international commercial arbitration.

I agree. It is clear from *Art Plastering*, the Report of the Attorney General's Advisory Committee on the draft *CLA*, and from s.62(6)(b) of the *CLA*, that that Act not only anticipates that some issues will be resolved by arbitration, but, in addition, expressly accommodates such resolutions. As a matter of principle, it is difficult to see why, in the context of the *CLA*, any distinction should be drawn between

domestic and international arbitration or, for that matter, between domestic and interprovincial arbitration. 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. No such language appears in the *CLA* or in any other statute referred to the court. At most, the failure to amend the *CLA* so that reference is made to the *Arbitration Act, 1991* and to the *ICAA*, instead of to the *Arbitrations Act*, may raise some doubt as to precisely what was intended. Having regard to the commitment of the Province to the *Model Law*, that doubt must be resolved in favour of support for the application of the *Model Law* and not otherwise.

Bracknell's subcontract provided that it would be governed by, construed, and enforced in accordance with the laws of Missouri and that any arbitration would take place in Kansas City, Missouri. No persuasive reason was suggested why those provisions should make any difference to the enforceability of the arbitration clause. It was argued that the award might purport to deal with an interest in land in Ontario, that such could not be permitted and that the provision for arbitration was as a result void. In the present

case, the posting of security here in effect removes the land from the ambit of the action so that this question need not be explored.

A good deal of argument was addressed to the question of the place of arbitration and the applicable law. As to place, no reason was suggested how the holding of an arbitration in Kansas City as opposed to Bramalea had anything to do with the enforceability of the arbitration clause. As to law, the *Mechanics' and Material Men's Lien Act* of Missouri was produced and some differences between it and the *CLA* were noted, but nothing was revealed which would be relevant to the enforceability of the arbitration clause in the circumstances of this case. More specifically, the claims between Bracknell and Automatic would appear to arise out of the performance or non-performance of the subcontract between them, and not out of the *CLA*.

Reference was made to *BWV Investments Limited (Bennett & Wright Contractors) v. Saskferco Products Inc., UHDE-GmbH et al*, [1993] 4 W.W.R. 553. That case involved the building of a fertilizer plant in Saskatchewan by a German company, UHDE, for the owner, Saskferco. UHDE subcontracted part of the work to BWV of Toronto. BWV did part of the work and registered a lien claim. Twenty-two others also registered

lien claims, the amounts of many of them already being included in BWV's claim.

There was an arbitration clause in the contract between UHDE and BWV; it provided for arbitration in Zurich and the application of the law of Switzerland. UHDE applied under Saskatchewan's *ICAA* to stay the action. The application was dismissed by MacPherson C.J.Q.B. This court was advised that the appeal from that decision had been heard but not yet decided. Among the findings of MacPherson C.J.Q.B. are the following:

- (1) If the arbitration agreement violates or infringes, directly or indirectly, Saskatchewan law, then the court could not refer the parties to arbitration and no stay could be granted.
- (2) Persons not parties to the arbitration agreement are not to be admitted to the arbitration proceedings.
- (3) The interests of the lien holders other than BWV closely parallel those of BWV.
- (4) The effect of the arbitration agreement and the terms of the Rules of Arbitration of the International Chamber

of Commerce, which that agreement imported, is to make many of the provisions of the Saskatchewan *Builders' Lien Act* inapplicable. The agreement is therefore void under both s.99(1) of the *BLA* and Article 8(1) of the *Model Law*.

- (5) If the arbitration procedure is followed, certain rights given to lienholders by the *BLA* will be lost, such as:
- (i) the right to have the trust funds and holdback held by UHDE determined by a court rather than by the award of an arbitrator;
 - (ii) the right of the lienholders other than BWV to participate in the action;
 - (iii) the right of lienholders to examine each other and to use such examinations at trial;
 - (iv) the right of the lienholders other than BWV to participate and have a complete disposition as contemplated by the *BLA*;
 - (v) by reason of the application of Swiss law, the lienholders other than BWV will lose their right to have a single action tried in Saskatchewan according to Saskatchewan law.

The situation in BWV was very different from the case before this court. Because of those differences and because

the appeal is still before the Saskatchewan Court of Appeal, further comment upon it is inappropriate beyond noting, first, that in the present case there are no other lien claimants; second, that holdback and trust funds are not relevant in the present proceeding; third, that s.99(2) of the *BLA* states that any agreement which provides that the *BLA* or any provision of that Act does not apply is void; and fourth, that the *BLA* has no equivalent of s.62(6)(b) of the *CLA*.

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.

CONCLUSION

For these reasons I would allow the appeal and set aside the order made below. In its place I would grant an order that the Bracknell action be stayed as against Automatic,

with leave to any person affected to apply for such relief as may from time to time appear necessary. I have in mind in this regard the time constraints imposed by the *CLA* and, in particular, the two-year limit for setting the action down for trial. There may be other reasons to seek relief.

I would award Automatic its costs here and below.

COURT OF APPEAL FOR ONTARIO

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BLAIR and AUSTIN JJ.A.

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J U D G M E N T
