F/M/48/91

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF FREDERICTON

COURT OF QUEEN'S BENCH
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AUG 19 1991
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FREDERICTON, N. B.

BETWEEN:

M.A. INDUSTRIES, INC.,

Applicant,

and

MARITIME BATTERY LTD.,

Respondent.

DATE OF HEARING: June 13, 1991

DATE OF DECISION: August 19, 1991

COUNSEL AT HEARING: John D. Townsend for the applicant;
Ray W. Dixon, Q.C., for the respondent.

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D E C I S I O N

STEVENSON, J.

M.A. Industries, Inc. ("MAI") and Maritime Battery Ltd. ("Maritime") entered into a contract dated March 9, 1989 whereby MAI agreed to manufacture and sell and Maritime agreed to buy certain equipment for US$361,550. The equipment was for use at Maritime's plant at Bathurst, New Brunswick. Maritime is described in the agreement as "a corporation organized and existing under the laws of New Brunswick, Canada".

The agreement contained the following provisions:

> 15. Arbitration. (a) Any and all disputes arising out of or in connection with the negotiation, execution, interpretation, performance or nonperformance of this Agreement shall be solely and finally settled by arbitration, which shall be conducted in Washington, D.C., by a single arbitrator selected by the parties. .... The arbitrator shall conduct the proceedings ... pursuant to the Rules of the American Arbitration Association ...
>
> (c) Judgment on the award of the arbitrator may be entered in any court having jurisdiction over the party against which enforcement of the award is being sought and in any court of the State of Georgia USA; and the parties hereby irrevocable (sic) consent to the jurisdiction of any such court for the purpose of enforcing any such award. The arbitrator shall divide all costs (other than fees of counsel) incurred in conducting the arbitration in his final award in accordance with what he deems just and equitable under the circumstances.
>
> ....

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> 27. Governing Law. Regardless of the place of contracting, place of performance or otherwise, this Agreement and all amendments, modifications, alterations or supplements hereto, and the rights of the parties hereunder, shall be governed by and construed and enforced in accordance with the laws of the State of Georgia.

A dispute did arise and was submitted to arbitration as agreed. In her decision of February 20, 1991 the arbitrator made an award as follows:

> 1) Respondent [Maritime] shall pay to Claimant [MAI] the sum of US$35,255, being the balance due under the Agreement;
>
> 2) Respondent shall pay Claimant interest on US$35,255 from January 2, 1990, the amount of that interest being that which has accrued from January 2, 1990 on the trust account established by Mr. Theriault in his letter of July 5, 1989;
>
> 3) The administrative fees and expenses of the American Arbitration Association shall be borne by the Respondent, which expenses will also include the expenses of the Arbitrator. Said fees and expenses shall be paid as directed by the Association.

Maritime has not satisfied or complied with the award. MAI applies to the court for leave to enter the award as a judgment of the court. It relies on section 18 of the **Arbitration Act**, R.S.N.B. 1973, c. A-10. and on **The Convention on the Recognition and Enforcement of Foreign Awards** ("the Convention") which, by virtue of the **International Commercial Arbitration Act**, S.N.B. 1986, c. I-12.2, applies in New Brunswick.

MAI has supplied the court with authentic copies of the agreement between MAI and

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Maritime and of the award, as required by Article IV of the Convention. The respondent has not attempted to establish any grounds under Article V of the Convention for the court to exercise its discretion against recognition and enforcement of the award.

In my opinion the applicant is entitled to succeed on any or all of three bases.

The Arbitration Act

Section 18 of the Arbitration Act provides:

> **18 An award on a submission may, by leave of the Court, be entered as a judgment of the Court and may, with taxed costs, be enforced in the same manner as a judgment or order to the same effect.**

Section 1 of the Act defines "submission" as meaning

> **a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.**

There is no reason why the award should not be enforceable under section 18 in the same manner as an award on a submission made under and governed by the provincial statute. **Russell on Arbitration**, 19th ed., page 409; **Dalmia Cement Ltd. v. National Bank of Pakistan** [1974] 3 All E.R. 189; **Re John Helmsing Schiffahrtsgesellsschaft M.b.H. and Marechart Ltd.** (1981), 121 D.L.R. (3d) 486.

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The Convention

The Convention applies in New Brunswick in respect of differences arising out of commercial legal relationships. It has been adopted by both the Legislature and Parliament. See the **United Nations Foreign Arbitral Awards Convention Act**, R.S.C. 1985, c. 16 (2nd Supp.), (found in the current looseleaf Statutes of Canada as chapter U-2.4). The following provisions of the Convention are relevant here:

Article I

...

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

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

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> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
>
> ....
>
> ARTICLE III
>
> Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

As already noted MAI has supplied the documents required by Article IV and Maritime has not brought the case within Article V.

The agreement of the parties

Maritime expressly agreed that judgment on the award of an arbitrator may be entered in any court having jurisdiction over it. Maritime is a New Brunswick company and carries on business here. The award could be enforced by an action on it. As there is no substantial dispute of fact the award can be enforced in a proceeding commenced by notice of application - see Rule 16.04(j).

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The respondent's arguments

The agreement provided that it and the rights of the parties thereunder should be governed by the laws of the State of Georgia. Counsel for the respondent submits that MAI must show that the State of Georgia is bound to apply the Convention in order to avail itself of the Convention here. As I read the Convention its application in New Brunswick is not dependent on the adoption of the Convention by any foreign state. All that is necessary is that there have been an arbitration arising out of a commercial legal relationship. A State adopting the Convention may declare that it will only apply the Convention to the recognition and enforcement of awards made in the territory of another contracting state. New Brunswick has not so declared.

While Article XIV says a Contracting State cannot avail itself of the Convention against other Contracting States except to the extent it is itself bound to apply the Convention, this is not a case involving Contracting States, but rather two private commercial entities.

Counsel suggests that a provision in paragraph 15 of the agreement purporting to put the award beyond judicial review is invalid. No attempt having been made to seek such review that argument is inappropriate on an enforcement application.

Counsel suggests the award should not be recognized under the Arbitration Act because

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the arbitrator did not take the oath prescribed by section 10 of the Act and cites the decision of the Court of Appeal in **Re Atlantic Sugar Refineries Ltd. and Bakery and Confectionery Workers International Union of America Local No. 443** (1960), 27 D.L.R. (2d) 310. Section 10 only applies to arbitrations in New Brunswick. If the respondent's argument were to prevail it would mean that an arbitrator would have to comply with the procedural requirements of every jurisdiction to which the parties might potentially look for enforcement.

Leave is granted to MAI to enter as a judgment of this court the award of Arbitrator Kathleen I. Wilson dated February 20, 1991. Maritime is ordered to pay to MAI costs of the application which I fix at $600.00 including disbursements. As provided by section 18 of the **Arbitration Act**, when the award has been entered as a judgment MAI may enforce it together with the order for costs in the same manner as a judgment or order to the same effect.

Ronald C. Stevenson

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