IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *H & H Marine Engine Service Ltd. v. Volvo Penta of the Americas, Inc.,* 2009 BCSC 1389

Date: 20091009
Docket: S088532
Registry: Vancouver

Between:

H & H Marine Engine Service Ltd.

Plaintiff

And

Volvo Penta of the Americas, Inc. and Volvo Group Canada Inc. and in French, Groupe Volvo Canada Inc. doing business as Volvo Penta Canada

Defendants

Before: The Honourable Madam Justice Dickson

Reasons for Judgment

Counsel for the Plaintiff:	C.A.B. Ferris
Counsel for the Defendants:	K. Martin
Place and Date of Hearing:	Vancouver, B.C. July 17, 2009
Place and Date of Judgment:	Vancouver, B.C. October 9, 2009

INTRODUCTION

[1] The defendants, Volvo Penta of the Americas, Inc. (“VPA”) and Volvo Group Canada Inc. (“VGC”), apply for an order staying these proceedings pursuant to s. 8 of the *International Commercial Arbitration Act*, R.S.B.C., 1996 c. 322 (the “*ICAA*”). In summary, they say the claims made by the plaintiff, H & H Marine Engine Service Ltd. (“H & H”), concern matters the parties agreed would be submitted to arbitration and the issue of whether such an arbitration agreement exists should be determined by an arbitrator.

[2] H & H opposes the application. It denies that it entered into an arbitration agreement with the defendants and says the Court should determine whether an arbitration agreement does or does not exist.

[3] On July 17, 2009 I dismissed the defendants’ application. These are my reasons for so doing.

THE FACTS

[4] H & H is a British Columbia company that manufactures marine engine parts in China and supplies them to customers in North America.

[5] VPA is a Delaware company that designs and manufactures marine engines. Its parent company is AB Volvo Penta (“ABVP”): a Swedish company with geographical divisions throughout the world.

[6] In the course of conducting business, VPA purchases marine engine parts from various suppliers across North America.

[7] VGC, operating as Volvo Penta Canada, is a Canadian company registered as an extra-provincial company that markets and distributes Volvo Penta products in Canada.

[8] In early 2006, H & H entered into a business relationship with VPA involving the production and supply of marine engine parts (the "Iron Manifold Project"). The Iron Manifold Project was a typical supply order contract for H & H.

[9] In undertaking the Iron Manifold Project, H & H agreed to provide VPA with cast iron engine manifolds bearing part numbers 3857579 and 3847773 (the "Parts"). H & H and VPA signed a Mutual Confidentiality, Non-Solicitation and Non-Compete Agreement, but they did not execute a formal contract governing the supply of the Parts. Instead, they conducted business by way of invoices issued by H & H and purchase orders issued by VPA. They also held regular teleconferences and communicated with one another by fax.

[10] In April, 2006, H & H also entered into discussions with VPA about developing and supplying VPA with aluminum engine parts (the "Aluminum Project"). Unlike the Iron Manifold Project, the Aluminum Project was not a typical supply order contract for H & H and lay outside of H & H's usual area of business and expertise.

[11] The Iron Manifold Project and the Aluminum Project were developed under separate purchase orders. The claims in these proceedings relate only to the Iron Manifold Project (the "Dispute"). They do not relate to the Aluminum Project.

[12] In the spring and fall of 2006 VPA issued purchase orders to H & H regarding the Parts and associated tooling costs on the Iron Manifold Project (the "Purchase Orders"). In August, 2006, H & H received payment for its tooling costs with respect to the Iron Manifold Project.

[13] The Purchase Orders for the Iron Manifold Project were transmitted via fax by VPA to H & H. The front page of the Purchase Orders was the only page that was faxed.

[14] The front page of the Purchase Orders contained no reference to arbitration. The following words, however, did appear:

> ... IMPORTANT BY ACCEPTING THIS ORDER, SELLER AGREES TO THE TERMS AND CONDITIONS SET FORTH ON THIS ORDER INCLUDING

> ALL INSTRUCTIONS, SPECIFICATIONS, DRAWING AND ADDITIONAL TERMS AND CONDITIONS REFERRED TO HERE IN AND/OR ATTACHED HERETO ... IF APPLICABLE, THIS DOCUMENT REPRESENTS A PORTION OF THE VPA PURCHASING AGREEMENT SEE PAGE TWO ATTACHED FOR TERMS AND CONDITIONS.

[15] After the Dispute arose, VPA delivered to H & H a copy of the General Purchasing Terms and Conditions found on the reverse side of the Purchase Orders (the "General Purchasing Terms and Conditions"). Pursuant to paragraph 11 of the General Purchasing Terms and Conditions, in the event of a dispute arising non-binding mediation is to be conducted. If agreement is not reached by mediation, however, paragraph 11 goes on to provide that an arbitration is to be held in Washington, D.C., subject to the commercial arbitration rules of the American Arbitration Association.

[16] There is no evidence that the General Purchasing Terms and Conditions were drawn to H & H's attention prior to the Dispute arising. There is also no evidence that H & H agreed to be bound by the General Purchasing Terms and Conditions.

[17] There is, however, evidence that, for risk management and contractual certainty reasons, VPA typically followed a standard procedure for contracting with its marine parts suppliers. That procedure was, at the relevant time, governed by a standard form set of General Purchasing Conditions (the "General Purchasing Conditions").

[18] The General Purchasing Conditions are not the same as the General Purchasing Terms and Conditions found on the reverse side of the Purchase Orders. Pursuant to section 36 of the General Purchasing Conditions the purchase agreement is governed by Swedish substantive law. Pursuant to section 37, disputes relating to the purchase agreement are to be settled by arbitration conducted in Gothenburg, Sweden in accordance with the rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

[19] The defendants rely upon the General Purchasing Conditions in their application for an order staying these proceedings. In their submission, the General Purchasing Conditions were incorporated in the Iron Manifold Project contract between VPA and H & H. There was, therefore, an agreement between the parties to submit the Dispute to arbitration in accordance with the rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

[20] The parties differ as to the circumstances and basis upon which the General Purchasing Conditions were delivered by VPA to H & H. According to the evidence presented by VPA, they were faxed to Mr. Wong of H & H in November, 2006 following a general discussion about the contractual terms under which H & H would receive payment for tooling. According to the evidence presented by H & H, they were faxed following a specific discussion about payment for tooling on the Aluminum Project alone.

[21] It is common ground between the parties that, shortly after the General Purchasing Conditions were faxed to H & H, VPA offered to vary their terms with respect to payment for tooling on the Aluminum Project. It is also common ground that H & H accepted this concession.

[22] H & H denies, however, that it ever agreed to be bound by the General Purchasing Conditions on the Iron Manifold Project, or at all.

[23] No evidence was presented to the effect that the General Purchasing Conditions are standard trading terms used in the marine engine parts industry.

[24] In October 2007 Mr. Kelleher of VPA wrote to Mr. Wong of H & H regarding the Dispute that is the subject of these proceedings. In his letter, he stated “Volvo Penta reserves its right to commence an arbitration against you in Washington, D.C., as provided in the purchase orders”. In October 2008 Mr. Kelleher provided Mr. Wong with a copy of the General Purchasing Terms and Conditions found on the reverse side of the Purchase Orders.

[25] VPA did not assert that its contract with H & H included an agreement to arbitrate in Sweden pursuant to the General Purchasing Conditions until after these proceedings were commenced in December, 2008.

[26] No evidence was presented regarding the rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

THE ISSUE

[27] The issue for determination is whether the defendants are entitled to a stay of proceedings under s. 8 of the *ICAA*.

THE LAW

[28] The *ICAA* was enacted in British Columbia in 1986 as part of an international trend to adopt the United Nations Commission on International Trade Law (UNICTRAL) Model Arbitration Law (the "Model Law"). Its purpose was to limit judicial intervention in international commercial arbitrations and thus to provide a hospitable legal environment in which they could be conducted: *Gulf Resources Ltd. v. Arochem International Ltd.* (1992), 66 B.C.L.R. (2d) 113 (C.A.).

[29] The limiting nature of the *ICAA* is apparent from its preamble and provisions. Section 5, for example, provides:

> Extent of judicial intervention
>
> 5 In matters governed by this Act,
>
> (a) a court must not intervene unless so provided in this Act, and
>
> (b) an arbitral proceeding of an arbitral tribunal or an order, ruling or arbitral award made by an arbitral tribunal must not be questioned, reviewed or restrained by a proceeding under the *Judicial Review Procedure Act* or otherwise except to the extent provided in this Act.

[30] Section 8 of the *ICAA* echoes Article 8 of the Model Law. Sections 8(1) and (2) provide:

> Stay of legal proceedings
>
> 8(1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may, before or after entering an appearance and before delivery of any pleadings or taking any other step in the proceedings, apply to that court to stay the proceedings.
>
> (2) If an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is null and void, inoperative or incapable of being performed.

[31] Section 7 of the *ICAA* sets out the definition of an "arbitration agreement". It provides:

> Definition of arbitration agreement
>
> 7(1) In this Act, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
>
> (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
>
> (3) An arbitration agreement must be in writing.
>
> (4) An arbitration agreement is in writing if it is contained in
>
> (a) a document signed by the parties,
>
> (b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or
>
> (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.
>
> (5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

[32] Section 16 of the *ICAA* is based on Article 16 of the Model Law. It embodies the "competence/competence" principle, which provides that arbitrators should generally be allowed to exercise their authority to rule first on their own jurisdiction. Sections 16(1), (6) and (7) provide:

> Competence of arbitral tribunal to rule on its jurisdiction
>
> 16(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,
>
> (a) an arbitration clause which forms part of a contract must be treated as an agreement independent of the other terms of the contract, and
>
> (b) a decision by the arbitral tribunal that the contract is null and void must not entail ipso jure the invalidity of the arbitration clause.
>
> ...
>
> (6) If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request the Supreme Court, within 30 days after having received notice of that ruling, to decide the matter.
>
> (7) The decision of the Supreme Court under subsection (6) is final and is not subject to appeal.

[33] Section 16 of the *ICAA* does not apply, however, if the place of arbitration is outside of British Columbia. Section 1(2), which is based on Article 1 of the Model Law, provides:

> 1(2) This Act, except sections 8, 9, 35 and 36, applies only if the place of arbitration is in British Columbia.

[34] In *Gulf Canada Resources Ltd., supra*, the British Columbia Court of Appeal dismissed an appeal from an order staying proceedings pursuant to s. 8 of the *ICAA* where the arbitration agreement provided for arbitration in Vancouver. In so doing, it developed an early version of the "*prima facie* analysis" test that applies to challenges of arbitral jurisdiction.

[35] The Court of Appeal held that a Court must be satisfied the requirements of s. 8(1) are met before a stay should be granted under s. 8(2) of the *ICAA*. To satisfy those requirements the applicant must show that a party to an arbitration agreement has commenced legal proceedings against another party to the agreement in respect of a matter agreed to be submitted to arbitration. If the jurisdictional challenge is arguable the stay should be granted and the challenge should be determined by the arbitrator. The Court retains a residual discretion to refuse a stay,

however, if it is clear that the challenge to the arbitrator's jurisdiction should succeed.

[36] In concurring reasons delivered in *Gulf Canada Resources, supra*, Southin J.A. expressed the view that, in some cases, the existence of an arbitration agreement may be a threshold issue for determination by the Court on a s. 8 stay application. She stated at ¶ 67:

> One can conjure up circumstances in which a plaintiff in an action asserts a contract which, on its version of the facts, contains no arbitration agreement and a defendant who asserts a contract which, on its version of the facts, does contain such a clause. If such a things were to happen, and because of s. 7(4)(b), it is not improbable, it is my tentative opinion that the defendant could not invoke s. 8 until the Supreme Court of British Columbia had decided whether there was, in law, an arbitration agreement within the meaning of s. 7.

[37] A similar conclusion was reached by Mandel D.C.J. in *Deco Automotive Inc. v. G.P.A. Gesellschaft fur Pressenautomation mbH*, 1989 CarswellOnt 3168 (Dist. Ct.) on a stay application based on an alleged agreement to arbitrate disputes under the auspices of the Economic Commission for Europe. He observed "If there is not an arbitration clause in the agreement then *cadi quaesitio*" and held the Court should determine whether such an agreement was in force. He went on to consider whether this approach was affected by statutory provisions that were, like the *ICAA*, based on the Model Law. In deciding it was not, he stated at ¶ 38:

> It is thus seen that Article 16 has no application because the pending arbitration is not in Canada. It is thus seen that where the arbitration is in Canada then the matter may proceed as set out in Article 16, but where it is not, then it does not apply and the common law applies. According to the common law, it is the courts that determine whether an arbitration clause applies.

[38] The decision in *Deco Automotive, supra*, has been questioned by some legal commentators: see, for example, Cecil O.D. Branson, Q.C., *The Enforcement of International Commercial Arbitration Agreements in Canada*, (2000) Arbitration International, Vol. 16, No. 1, LCIA, p. 19; Frederic Bachand, *Does Article 8 of the Model Law Call for Full or Prima Facie Review of the Arbitral Tribunal's Jurisdiction?*,

(2006) Arbitration International, Vol. 22, No. 3, LCIA, p. 463. In summary, they argue that Canadian courts should recognise the virtually universal principle of competence/competence as applicable to international commercial arbitrations and defer jurisdictional challenges to the arbitrator, regardless of where the arbitration is to be held. For example, Professor Bachand writes:

> ... As was mentioned earlier, *kompetenz-kompetenz* is – at least in its positive effect – a general principle of international commercial arbitration that has gained quasi-universal acceptance. In practically all cases, the law of the foreign jurisdiction in which the seat of arbitration is located will clearly affirm the tribunal's power to rule on its own jurisdiction. In other words, it can nowadays be safely assumed in any Model Law jurisdiction that a tribunal sitting in a foreign jurisdiction will have the same powers as those recognised in Article 16(1). Therefore, the fact that this provision is not listed in Article 1(2) does not justify limiting the operation of the *prima facie* approach to situations where the seat of arbitration is located within the territory of the enacting state.

[39] The Supreme Court of Canada reviewed the law on the competence of arbitrators to rule on their own jurisdiction in *Dell Computer Corp. v. Union des Consommateurs*, 2007 SCC 34 and *Rogers Wireless Inc. v. Murroff*, 2007 SCC 35. In so doing, the Court considered both domestic and international law. As to the latter, Deschamps J. noted, at ¶ 69-78, there is a lack of consensus in the international community regarding the appropriate degree of judicial scrutiny of an arbitrator's jurisdiction, although consensus is developing. She went on to find that, pursuant to the Quebec *Civil Code*, the competence/competence principle applied in the governing legal framework and endorsed a deferential approach.

[40] In *Dell, supra*, Deschamps J. cited the *prima facie* analysis test developed in *Gulf Canada Resources, supra* with approval. She stated:

> [84] First of all, I would lay down a general rule that in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator. A court should depart from the rule of systematic referral to arbitration only if the challenge to the arbitrator's jurisdiction is based solely on a question of law. This exception is justified by the courts' expertise in resolving such questions, by the fact that the court is the forum to which the parties apply first when requesting referral and by the rule that an arbitrator's decision regarding his or her jurisdiction can be reviewed by a court. It allows a legal argument relating to the arbitrator's

> jurisdiction to be resolved once and for all, and also allows the parties to avoid duplication of a strictly legal debate. In addition, the danger that a party will obstruct the process by manipulating procedural rules will be reduced, since the court must not, in ruling on the arbitrator's jurisdiction, consider the facts leading to the application of the arbitration clause.
>
> [85] If the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration, as arbitrators have, for this purpose, the same resources and expertise as courts. Where questions of mixed law and fact are concerned, the court hearing the referral application must refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence in the record.
>
> [86] Before departing from the general rule of referral, the court must be satisfied that the challenge to the arbitrator's jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding. This means that even when considering one of the exceptions, the court might decide that to allow the arbitrator to rule first on his or her competence would be best for the arbitration process.

[41] In *MacKinnon v. National Money Mart Co.*, 2009 BCCA 103, the British Columbia Court of Appeal considered whether the test articulated in *Dell, supra* and *Rogers, supra* applies to commercial arbitrations in British Columbia. Following a detailed review of the law and comparison of Quebec's arbitration legislation and British Columbia's *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55 (the "*CAA*"), the Court concluded that, by logical extension, it does.

[42] Section 15 of the *CAA* is virtually identical to s. 8 of the *ICAA*. In *Prince George (City) v. McElhanney Engineering Services Ltd.* (1995), 9 B.C.L.R. (3d) 368 (C.A.) the Court of Appeal held that the *prima facie* analysis test applies on a stay application brought pursuant to s. 15 of the *CAA*. In *MacKinnon, supra*, Newbury J.A. summarised *Prince George (City), supra* and noted that the power of the Court to intervene in arbitral proceedings is severely restricted by both the *ICAA* and the *CAA*. In this context, she stated:

> [51] However, the *CAA* was substantially amended in 1988 by the *Miscellaneous Statutes Amendment Act (No. 2)*, 1988, S.B.C. 1988, c. 46. In particular, s. 15 was amended to resemble more closely Art. 8 of the *Model Law*. The amended s. 15 now states ...
>
> ... As well, s. 22 was amended to provide that unless otherwise agreed by the parties to an arbitration agreement, the Rules of the British Columbia International Commercial Arbitration Centre apply to an arbitration...

> [52] The *CAA* does not, like the *Model Law* or the Quebec *Civil Code*, explicitly provide that an arbitrator may decide his or her own jurisdiction. However, R. 20 of the Rules of the International Commercial Arbitration Centre states that an arbitration tribunal "may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement."

[43] In Canadian courts, the rules of foreign law are considered a factual matter. If relevant, they must be proved by evidence or by admission. Judicial notice cannot be taken of foreign law: *Yordanes v. Bank of Nova Scotia*, [2006] O.J. No 280.

[44] As noted, s. 7 of the *ICAA* defines an "arbitration agreement". In *Repap British Columbia Inc. v. Electronic Technology Systems, Inc.*, [2002] B.C.J. No. 746 (S.C.), Kirkpatrick J. (as she then was) summarised the principles that apply to the question of whether standard terms and conditions are incorporated in a contract. At ¶ 11, she wrote:

> [F]rom my review of the extensive authorities provided to me by counsel, the following principles may be extracted from the authorities to assist in the determination of the legal issues posed:
>
> ...
>
> (e) It is not necessary for trading terms to be specifically set out in order for them to be incorporated into a contract, provided that they are common or usual terms in the relevant business. It is sufficient if adequate notice is given identifying and relying upon the condition and that they are available upon request. See: Circle Freight International Ltd. v. Medeast Gulf Exports, [1988] 2 Lloyd's Rep 427 (C.A.) at 433.
>
> (f) Where a clause is a usual one in the trade, and parties are of equal bargaining power, the clause may be included in the contract in the absence of a consistent previous course of dealing ...

POSITION OF THE PARTIES

[45] Counsel for the parties presented their positions in a thorough and thoughtful manner. I am grateful to both for their assistance in illuminating this developing area of the law.

[46] The defendants acknowledge that, pursuant to s. 1(2) of the *ICAA*, s. 16 does not apply where, as here, the place of arbitration is not in British Columbia. In their submission, however, the test articulated in *Dell, supra*, or alternatively *Gulf*

Resources, supra, should apply to a s. 8 stay application regardless of where the arbitration is to be held. Pursuant to the *Dell* test, they say the Court should determine a challenge to an arbitrator's jurisdiction only if the issue can be determined based solely on a question of law. Alternatively, they say that, pursuant to *Gulf Resources, supra*, the Court should determine a jurisdictional challenge only if the issue is not arguable.

[47] In this case, the issue for determination is whether the arbitration provision in the General Purchasing Conditions was incorporated into the contract between H & H and VPA. In other words, the issue is whether an arbitration agreement does or does not exist. According to the defendants, this is not a question of law and, therefore, pursuant to *Dell, supra*, it should be determined by the arbitrator. In the alternative, it is an issue of mixed fact and law and, pursuant to *Gulf Resources, supra,* it is, on the evidence, arguable. On either approach, the defendants say the issue should be referred to the arbitrator and not determined by the Court.

[48] H & H submits that s. 8 of the *ICAA* only applies if an arbitration agreement exists between the parties. In circumstances where the competence/competence principle applies, the issue of its existence, if arguable, should be referred to the arbitrator for determination. In this case, however, the deference normally paid to arbitrators allowing them to determine jurisdictional challenges does not apply because there is no evidence that under the rules of the Arbitration Institute of the Stockholm Chamber of Commerce the arbitral tribunal has the authority to determine its own jurisdiction. That being so, the common law applies and s. 8 of the *ICAA* cannot be invoked unless the Court has determined whether an arbitration agreement exists.

[49] H & H submits that, on a proper construction of its contract with VPA and taking into account s. 7 of the *ICAA*, the Court should determine that there is no arbitration agreement. In the alternative, the existence of an arbitration agreement is a question of mixed fact and law which is clear and can be determined in its favour in accordance with the general rule set out in *Dell, supra*.

DISCUSSION

[50] The Supreme Court of Canada in *Dell, supra* endorsed a highly deferential approach to arbitral jurisdiction. In so doing, it refined the *prima facie* analysis test and held that, as a general rule, the Court should allow the arbitrator to resolve a challenge to his or her jurisdiction first. This general rule applies unless the jurisdictional challenge is based on a question of law or a question of mixed fact and law where the factual questions at issue require only superficial consideration of the evidence.

[51] The Supreme Court's analysis is *Dell, supra* is, however, rooted in a particular legal context. The governing legal framework was the Quebec *Civil Code*, which incorporates the competence/competence principle. In these circumstances, a high degree of deference to the arbitrator's authority is appropriate for the reasons identified in *Dell, supra*. In other legal contexts, however, the *Dell* rule, and its underlying rationale, may not apply.

[52] In this case, there is no evidence regarding the governing legal framework. Although I accept that the competence/competence principle is likely incorporated in the rules of the Arbitration Institute of the Stockholm Chamber of Commerce, I do not accept that this is something I can assume. On the contrary, to do so would be to take impermissible judicial notice of an unproven legal fact: *Yordanes, supra*.

[53] I am fortified in reaching this conclusion by the Court's consideration, in *Dell, supra*, of the competence of arbitrators to rule on their own jurisdiction in international law. As Deschamps J. remarked, there are opposing schools of thought and, although consensus is emerging, it is not universal: *Dell, supra*. In addition, I note the Court in *MacKinnon, supra* referenced the fact that the competence/competence principle is incorporated in the *CAA* when explaining why the *prima facie* analysis test applies on a s. 15 stay application.

[54] I conclude that the refined *prima facie* analysis test in *Dell, supra* should be applied in all cases in which the competence/competence principle forms part of the

governing legal framework. This is so regardless of the seat of the arbitration and despite the fact that s. 16 of the *ICAA* does not extend to arbitrations conducted outside of British Columbia. It follows that I do not agree with Mandel D.C.J. in *Deco Automotive, supra* that the Court should determine whether an arbitration clause exists unless there are statutory provisions to contrary effect.

[55] In my view, this deferential approach to arbitral jurisdiction is consistent with the purpose of the *ICAA.* It is also consistent with the trend toward restricting judicial intervention in commercial arbitrations reflected in both domestic and international law. In the absence of an evidentiary or statutory basis for application of the competence/competence principle, however, I conclude that the Court should determine whether an arbitration agreement exists before s. 8 of the *ICAA* can be invoked.

[56] In this case, I am not satisfied that the existence of an arbitration agreement within the meaning of s. 7 of the *ICAA* has been established. On the contrary, it is clear on superficial consideration of the documentary evidence that no such agreement exists. That being so, I conclude that, regardless of whether the *prima facie* analysis test is applied or the Court is required to make the necessary determination, the defendants' stay application should be dismissed.

[57] There is no evidence that *consensus ad idem* was reached between the parties regarding incorporation of the General Purchasing Conditions on the Iron Manifold Project contract. There is also no evidence that those conditions were standard trading terms within the industry, upon which evidence a *Repap, supra* analysis might have been based. It is striking in this regard that the defendants asserted the existence of a different arbitration agreement based on different conditions until after these proceedings were commenced. It is also fatal to their s. 8 stay application. The application is dismissed.

"DICKSON J."