T1T2 Limited Partnership et al. v.
The Queen in Right of Canada

[Indexed as: T1T2 Limited Partnership v. Canada]

23 O.R. (3d) 66
[1994] O.J. No. 2614
Court File No. 94-CQ-55762

Ontario Court (General Division),
Borins J.
November 10, 1994

Civil procedure -- Stay of proceedings -- Arbitration -- Agreement between parties providing that any dispute or difference "except a dispute or difference involving a question of law" may be referred to arbitration -- "Question of law" including questions of mixed fact and law and not restricted to questions of pure law -- Motion to stay action for declaration that defendant had breached agreement dismissed.

The parties had entered into three contracts which together provided for the privatization of Terminals 1 and 2 of Lester B. Pearson International Airport. Each contract contained an arbitration clause which provided that "Any dispute or difference between the parties . . . except a dispute or difference involving a question of law may be referred to an arbitration tribunal". After the government introduced in the House of Commons Bill C-22, an Act purporting to declare that the contracts had not come into effect and had no legal effect, the plaintiffs commenced an action for a declaration that the defendant breached and repudiated the contracts, a declaration that the defendant was to save the plaintiffs harmless from all claims or proceedings brought against the plaintiffs by third parties, and an order directing a reference to an arbitration tribunal to assess the plaintiffs' losses and damages resulting

from the defendant's breach. The defendant moved, pursuant to s. 106 of the Courts of Justice Act, R.S.O. 1990, c. C.43, for an order staying the action on the ground that the plaintiffs were precluded from bringing the action as they had made a submission in accordance with the arbitration provisions contained in the contracts. In the alternative, the defendant asked the court to exercise its discretion under s. 106 to stay the proceedings.

Held, the motion should be dismissed.

The resolution of the disputes raised by the statement of claim would involve questions of mixed fact and law. The term "question of law" in the arbitration clause of the contracts included questions of mixed fact and law and was not restricted to pure questions of law. As the dispute involved a question of law, the motion to stay the action on the ground that the plaintiffs were prohibited by the arbitration provision from litigating arbitrable disputes had to be dismissed.

The action should not be stayed under s. 106 of the Courts of Justice Act on the ground that it was otherwise just to do so. This was not a case where the disputes would proceed simultaneously before two forums, the court and the arbitration tribunal, as the dispute in respect of damages would not get to arbitration unless, and until, the plaintiffs obtained the declaratory judgments sought in their statement of claim. In any event, art. 8(2) of the Commercial Arbitration Code contemplates simultaneous proceedings before the court and an arbitration tribunal in appropriate cases. To stay the action would effectively deprive the plaintiffs of any forum in which to assert their claims. As there would not be a multiplicity of proceedings, it followed that there would not be a possibility of inconsistent results. As the plaintiffs had moved for summary judgment, there was a risk that they would be deprived of a juridical advantage if a stay was granted because they might be deprived of being able to obtain judgment before Bill C-22 was proclaimed, if it should pass the Senate.

Cases referred to

Boart Sweden AB v. NYA Stromnes AB (1988), 41 B.L.R. 295 (Ont. H.C.J.); Canadian National Railway v. Bell Telephone Co., [1939] S.C.R. 308, [1939] 3 D.L.R. 8, 50 C.R.T.C. 10; Deluce Holdings Inc. v. Air Canada (1992), 12 O.R. (3d) 131, 98 D.L.R. (4th) 509, 13 C.P.C. (3d) 72, 8 B.L.R. (2d) 294 (Gen. Div.); Heyman v. Darwins Ltd., [1942] A.C. 356, [1942] 1 All E.R. 337, 111 L.J.K.B. 241, 166 L.T. 306, 58 T.L.R. 169 (H.L.); Kaverit Steel & Crane Ltd. v. Kone Corp. (1992), 87 D.L.R. (4th) 129, 85 Alta. L.R. (2d) 287, 40 C.P.R. (3d) 161, [1992] 3 W.W.R. 716, 4 C.P.C. (3d) 99 (C.A.), leave to appeal to S.C.C. refused (1992), 11 C.P.C. (3d) 18n; Nanisivik Mines Ltd. v. F.C.R.S. Shipping Ltd., [1994] 2 F.C. 662, 113 D.L.R. (4th) 536 (C.A.); S.L. Sethia Liners Ltd. v. State Trading Corp. of India, [1986] 1 Lloyd's Rep. 31, [1986] 2 All E.R. 395 (C.A.)

Statutes referred to

Arbitrations Act, 1991, S.O. 1991, c. 17, s. 7(1)
Commercial Arbitration Act, R.S.C. 1985, c. 17 (2nd Supp.)
Courts of Justice Act, R.S.O. 1990, c. C.43, s. 106

Treaties and conventions referred to

Commercial Arbitration Code, United Nations Commission on International Trade Law, June 21, 1985 (set out in Schedule to Commercial Arbitration Act), arts. 5, 7, 8, 16

Authorities referred to

Casey, International and Domestic Commercial Arbitration (Toronto: Carswell, 1993), pp. 3-5, 3-6 to 3-7
Nolan and Nolan-Haley, Black's Law Dictionary, 6th ed. abridg. (St. Paul: West Publishing Co.), "fact", "law", "question"
Words and Phrases, Vol. 22A, Permanent ed. (St. Paul: West Publishing Co., 1958), "involve"

Motion for a stay of proceedings.

Ivan G. Whitehall, Q.C., David Sgayias, Q.C., and Paul Vickery, for moving party (defendant).

Ronald G. Slaght, Q.C., for responding parties (plaintiffs).

BORINS J.: -- This is a motion brought by the defendant pursuant to s. 106 of the Courts of Justice Act, R.S.O. 1990, c. C.43, for an order staying the plaintiffs' action. It is the position of the defendant that the plaintiffs are precluded from bringing this action as they have made a submission in accordance with the arbitration provisions contained in what are described in this action as the Airport Contracts. In the alternative, the court is asked to exercise its discretion under s. 106 of the Act to stay the proceedings on grounds which will be discussed below. Central to the resolution of this motion is the proper interpretation of the arbitration provisions which, for convenience, will be referred to as the "arbitration provision".

There is no dispute between the parties as to the events leading up to this action. The Airport Contracts provide for the privatization of Terminals 1 and 2 of the Lester B. Pearson International Airport. From March through July 1993, the plaintiffs and the defendant negotiated and agreed upon the fundamental terms of the Airport Contracts. In August 1993, the federal Cabinet and the Treasury Board approved these terms. The Airport Contracts were signed by the plaintiffs and the defendant on October 7, 1993, and the transaction closed on that date. Although the Airport Contracts consist of approximately 40 agreements, there are three principal agreements -- the Ground Lease, the Development Agreement and the Management and Operations Agreement. Each of these agreements contain an identical arbitration provision. Comprehensively, the Airport Contracts deal with all aspects of the leasing, redevelopment and operation of Terminals 1 and 2 until 2030, with an option to extend the agreements to 2050.

After October 25, 1993, the Minister of Transport requested that the plaintiffs delay the takeover of Terminals 1 and 2, scheduled for November 1, 1993, and the commencement of the

first stage of construction, scheduled for December 1, 1993, in order to permit the defendant, which was then represented by a new government, to review the Airport Contracts. The plaintiffs agreed to this request. On December 3, 1993, the defendant, represented by the Prime Minister, announced that it intended to cancel the Airport Contracts forthwith, notwithstanding the absence of a cancellation provision in the agreements. Subsequent to this announcement, the defendant has not permitted the plaintiffs to occupy Terminals 1 and 2 with the result that the plaintiffs have been unable to perform their obligations under the Airport Contracts.

In April 1994, the government introduced in the House of Commons Bill C-22, which is described as "An Act respecting certain agreements concerning the redevelopment and operation of Terminals 1 and 2 at Lester B. Pearson International Airport". The Act purports to declare that the Airport Contracts had not come into force and to have no legal effect and provides that all existing legal recourse or entitlement to compensation from the Crown is negated, and purports to prohibit the plaintiffs from access to the courts in relation to the Airport Contracts. However, the Act authorizes the Minister of Transport, with the approval of the Governor in Council, to enter into agreements for the payment of amounts in connection with the coming into force of the Act. Some negotiations have taken place with Mr. Robert Wright concerning such payments. Bill C-22 was passed by the House of Commons on June 16, 1994, and was referred to the Senate. The Senate did not pass the Act, and recommended amendments deleting those provisions which deny the plaintiffs access to the courts. Bill C-22 has since been reaffirmed by the House of Commons and is, again, before the Senate.

The plaintiffs commenced their action with the issuance of their statement of claim on September 14, 1994. On September 16, 1994 the plaintiffs obtained an order under rule 20.01(2) of the Rules of Civil Procedure, on the ground of special urgency, granting leave to serve a notice of motion for summary judgment together with their statement of claim. On September 20, 1994 the defendant was served with the statement of claim, a notice of motion for summary judgment returnable November 21,

1994, and supporting motion materials.

The plaintiffs' claim is contained in para. 1 of the statement of claim which reads as follows:

> 1. The plaintiffs claim:
>
> (a) a declaration that the defendant committed a breach of the Airport Contracts on or about December 3, 1993, and has repudiated the Airport Contracts;
>
> (b) a declaration that the defendant shall save the plaintiffs harmless from and against all claims, demands, losses, costs, damages, actions, suits or proceedings brought against the plaintiffs by third parties with whom the plaintiffs contracted or with whom the plaintiffs entered into commitments or arrangements for the purpose of financing, designing, building, developing and operating the Terminals 1 and 2 complex and generally carrying out the duties and obligations of the plaintiffs under the Airport Contracts;
>
> (c) an order directing a reference to an arbitration tribunal appointed pursuant to the provisions of the Airport Contracts to assess the plaintiffs' losses and damages resulting from the defendant's breach, and judgment for the amount so determined by the arbitration tribunal . . .

Pursuant to the order of Conant J., granted on October 11, 1994, the plaintiffs provided particulars of the claim contained in para. 1(b).

As I understand the plaintiffs' action, the order requested in para. 1(c) referring the assessment of damages to an arbitration tribunal appointed pursuant to the provisions of Airport Contracts is sought because the plaintiffs are required by the arbitration provision to submit the assessment of damages to arbitration. Indeed, as I will explain below, on a proper interpretation of the arbitration provision it is

necessary that the court determine whether the defendant has committed a breach of the Airport Contracts and whether the defendant must legally indemnify the plaintiffs for damages which they have incurred to third parties by reason of their inability to perform the Airport Contracts consequent to the defendant's alleged breach. Therefore, the declaratory judgments which the plaintiffs claim in paras. 1(a) and 1(b) are required before they can ask the arbitration tribunal to assess their damages.

Typical of the arbitration provisions in the three principal Airport Contracts is Article 49 in the Ground Lease, which states:

ARTICLE 49

Arbitration

49.1

(a) Any dispute or difference between the parties hereto arising under this Lease except a dispute or difference involving a question of law may be referred to an arbitration tribunal for an award and determination by written submission signed by either the Landlord or the Tenant.

(b) The parties agree that the award and determination of the arbitration tribunal shall be final and binding on the parties hereto.

(c) The arbitration tribunal shall be governed by the Commercial Arbitration Code referred to in the Commercial Arbitration Act. (R.S.C. 1985 Chap. c-34.6).

49.2

(a) The arbitration tribunal shall consist of three (3) arbitrators, one (1) appointed by the Landlord, one (1) appointed by Tenant and the third appointed by the first two (2) arbitrators.

(b) The arbitration tribunal shall decide the dispute or difference in accordance with the laws referred to in Section 1.6. The arbitration tribunal shall not be authorized to decide ex aequo et bono or as amiable compositeur.

49.3

(a) The proceedings shall take place in the Province of Ontario, unless the parties hereto agree otherwise.

(b) The language to be used in the proceedings is English, unless the parties hereto agree otherwise.

(c) The parties hereto, and not the arbitration tribunal, may appoint experts to give evidence in the arbitration proceedings.

49.4 During the progress of arbitration, the parties hereto shall continue to perform their obligations under this Lease.

49.5 If the Landlord should not be subject to the Commercial Arbitration Act (R.S.C. 1985, Chap. c. 34.6), the corresponding arbitration statute of the Province of Ontario shall apply.

The Commercial Arbitration Code ("Code"), referred to in art. 49.1(c), is a schedule to the Commercial Arbitration Act, R.S.C. 1985, c. 17 (2nd Supp.). It is based on the model law adopted by the United Nations Commission on International Trade Law on June 21, 1985. Counsel for the defendant has placed reliance on the following articles of the Code:

Article 5

Extent of Court Intervention

In matters governed by this Code, no court shall intervene except where so provided in this Code.

. . . . .

Chapter II. Arbitration Agreement

Article 7

Definition and Form of Arbitration Agreement

(1) "Arbitration agreement" is 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. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

. . . . .

Article 8

Arbitration Agreement and Substantive Claim before Court

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

. . . . .

Chapter IV. Jurisdiction of Arbitral Tribunal

Article 16

Competence of Arbitral Tribunal to Rule on its Jurisdiction

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

It is a well-established and well-recognized principle of law, as Campbell J. pointed out in Boart Sweden AB v. NYA Stromnes AB (1988), 41 B.L.R. 295 (Ont. H.C.J.) at p. 303, "that where parties have agreed by contract that they will have arbitrators decide their claims, instead of resorting to the courts, the parties should be held to their contract". This principle is reflected in art. 8(1) of the Code and, in Ontario, in s. 7(1) of the Arbitrations Act, 1991, S.O. 1991, c. 17. These provisions require the court to stay any action brought in "a matter which is the subject of an arbitration

agreement". It is on the basis of this basic principle that the defendant submits the plaintiffs' action must be stayed, it being the position of the defendant that the claims found in para. 1(a) and (b) constitute matters within the scope of the arbitration provision and, in particular, art. 49.1(a). On the other hand, it is the submission of the plaintiffs that their paras. 1(a) and (b) claims come within the exception contained in art. 49.1(a).

Notwithstanding the elaborate submissions of counsel for the defendant, in my view the issue presented by this motion is straightforward. It requires the court to interpret the arbitration provision and then to analyze the plaintiffs' claims. If their claims, on a proper interpretation of the arbitration provision, fall within those disputes and differences which must be decided by the arbitration tribunal, art. 8(1) of the Code applies and the court must stay the plaintiffs' action. On the other hand, if the plaintiffs' claims are not in respect to matters which the parties have agreed to submit to arbitration, they are beyond the scope of art. 8(1). It then remains for the court to decide whether to exercise its discretion, outside of the parameters imposed by art. 8(1), and stay the action on other grounds: see Deluce Holdings Inc. v. Air Canada (1992), 12 O.R. (3d) 131 at pp. 149-51, 98 D.L.R. (4th) 509 (Gen. Div.), per R.A. Blair J. This proposition is found in the following passage contained in the speech of Lord Macmillan in the leading case of Heyman v. Darwins Ltd., [1942] A.C. 356 at p. 370, [1942] 1 All E.R. 337 (H.L.):

> Where proceedings at law are instituted by one of the parties to a contract containing an arbitration clause and the other party, founding on the clause, applies for a stay, the first thing to be ascertained is the precise nature of the dispute which has arisen. The next question is whether the dispute is one which falls within the terms of the arbitration clause. Then sometimes the question is raised whether the arbitration clause is still effective or whether something has happened to render it no longer operative. Finally, the nature of the dispute being ascertained, it having been held to fall within the terms of the arbitration

clause, and the clause having been found to be still effective, there remains for the court the question whether there is any sufficient reason why the matter in dispute should not be referred to arbitration.

It follows that on a motion to stay an action on the ground that the subject matter of the action is precluded by an arbitration provision or agreement, the court of necessity must, and accordingly has the jurisdiction to, interpret the arbitration provision or agreement: Kaverit Steel & Crane Ltd. v. Kone Corp. (1992), 87 D.L.R. (4th) 129 at p. 134, 85 Alta. L.R. (2d) 287 (C.A.), leave to appeal to the Supreme Court of Canada refused (1992), 11 C.P.C. (3d) 18n. This necessarily follows, as well, from the language of art. 8(1) of the Code. In other words, the court first must interpret the arbitration provision for the purpose of determining whether the action, to use the words of art. 8(1), "is brought in a matter which is the subject of an arbitration agreement". This does not, in any way, derogate from the power of the arbitration tribunal to subsequently interpret the arbitration agreement, as contemplated by the jurisdiction vested in the tribunal by art. 16 of the Code, should any dispute or difference be submitted to arbitration. Arts. 8 and 16 are mutually exclusive. It is only after the court has interpreted the arbitration agreement and determined whether the subject matter of the action comes within the scope of the agreement that the court is able to address the issue of a stay: Kaverit Steel, supra, at p. 137; DeLuce Holdings, supra, at p. 150; Nanisivik Mines Ltd. v. F.C.R.S. Shipping Ltd., [1994] 2 F.C. 662 at pp. 671, 672, 674, 113 D.L.R. (4th) 536 at pp. 541, 542 and 544 (C.A.); Boart Sweden AB, supra, at pp. 303-04.

Ordinary contract law applies to whether there is an arbitration agreement. As stated in Casey, International and Domestic Commercial Arbitration (Toronto: Carswell, 1993) at p. 3-5: "As it is a contract, the arbitration agreement can be drafted as narrowly or as broadly as the parties wish. For example, it can refer all matters of dispute under a certain amount to arbitration, with the balance of disputes going to court." The author continues at pp. 3-6 to 3-7:

> The arbitration agreement can be as broad or as narrow as the parties wish. At its broadest, the arbitration agreement can deal with all differences, disputes, claims or controversies between the parties, whether sounding in contract or tort, and can stipulate that the arbitral tribunal has full power to award damages, interest, costs and all forms of equitable relief including injunction and specific performance. The clause may extend to both contractual and non-contractual matters arising out of the commercial legal relationship. But, as the arbitral tribunal must take its jurisdiction from the arbitration agreement, it is important that the drafters spend time considering how broad or narrow the parties require the agreement. It is possible to have the arbitration agreement only cover certain matters, and to leave the balance of the disputes to the courts. For example, in a long term supply contract, the parties may wish to refer any disputes concerning the quality or suitability of the product to arbitration, but refer other matters dealing with contract interpretation to the courts.

Indeed, art. 7(1) of the Code, in defining an "arbitration agreement" as "an agreement by the parties to submit to arbitration all or certain disputes", recognizes that the contracting parties are free to draft the agreement as broadly or as narrowly as they wish. It is my view that, in doing so, it is to be assumed, as in this case, that they have directed their minds to the purpose to be served by the arbitration provision in the context of the contract in which it is contained.

The Deluce Holdings case, supra, contains an example of an arbitration provision limited in its scope. The provision, contained in a shareholders' agreement, called for arbitration in the event of a dispute over the value of the shares. At p. 150 R.A. Blair J. distinguished this provision from what he characterized as a "general `resort to arbitration' clause in the event of any dispute arising in connection with the agreement". An example of a general resort to arbitration clause is to be found in the Heyman case, supra, where the clause read as follows:

> f any dispute shall arise between the parties hereto in respect of this agreement or any of the provisions herein contained or anything arising hereout the same shall be referred for arbitration in accordance with the provisions of the Arbitration Act, 1889, or any then subsisting statutory modification thereof.

(Emphasis added)

Counsel for the defendant placed considerable reliance on the statement of principle contained in the speech of Viscount Simon L.C. in the Heyman case, supra, found in the paragraph commencing on p. 366, for his submission that the arbitration provision in art. 49.1(a) requires that the plaintiffs' claims in their entirety must go to arbitration. It is not necessary to reproduce this statement of principle, with which no issue can be taken. However, it is important to recognize that Viscount Simon L.C. confined his views to "the scope of an arbitration clause in a contract where the clause is framed in wide and general terms such as" the clause in the Heyman case.

I come now to consider the arbitration provision contained in art. 49.1(a) which, for convenience, I repeat:

> Any dispute or difference between the parties arising under this Lease except a dispute or difference involving a question of law may be referred to an arbitration tribunal for an award and determination by written submission signed by either the Landlord or the Tenant.

(Emphasis added)

But for the exception, this would be a general resort to arbitration clause which would have precluded the plaintiffs' access to the court for the resolution of their claims contained in paras. 1(a) and (b) of the statement of claim. The existence of the exception clearly indicates an agreement reached by the parties that only certain disputes or differences, not all disputes and differences, may be submitted to arbitration. It is necessary, therefore, to determine the meaning of the exception.

I begin by referring to the definitions of several words and terms found in Nolan and Nolan-Haley, Black's Law Dictionary (St. Paul: West Publishing Co., abridged 6th ed., 1991). At p. 410 are found the following definitions:

> Fact. A thing done; an action performed or an incident transpiring; an event or circumstance; an actual occurrence; an actual happening in time or space or an event mental or physical; that which has taken place. A fact is either a state of things, that is, an existence, or a motion, that is, an event. The quality of being actual; actual existence or occurrence.
>
> Fact and law distinguished. "Fact" is very frequently used in opposition or contrast to "law". Thus, questions of fact are for the jury; questions of law for the court. E.g., fraud in fact consists in an actual intention to defraud, carried into effect; while fraud imputed by law raises from the person's conduct in its necessary relations and consequences. A "fact", as distinguished from the "law", may be taken as that out of which the point of law arises, that which is asserted to be or not to be, and is to be presumed or proved to be or not to be for the purpose of applying or refusing to apply a rule of law. Law is a principle; fact is an event. Law is conceived; fact is actual. Law is a rule of duty; fact is that which has been according to or in contravention of the rule.

The following definition of law is at p. 612:

> Law. That which is laid down, ordained, or established. A rule or method according to which phenomena or actions co-exist or follow each other. Law, in its generic sense, is a body of rules of action or conduct prescribed by controlling authority, and having binding legal force. That which must be obeyed and followed by citizens subject to sanctions or legal consequences is a law. Law is a solemn expression of the will of the supreme power of the State. Calif. Civil Code, 22.

> The "law" of a state is to be found in its statutory and constitutional enactments, as interpreted by its courts, and, in absence of statute law, in rulings of its courts (i.e. case law).
>
> The word may mean or embrace: body of principles, standards and rules promulgated by government constitution or constitutional provision; statute or enactment of legislative body; administrative agency rules and regulations; judicial decisions, judgments or decrees; municipal ordinances; or, long established local custom which has the force of law.
>
> With reference to its origin, "law" is derived either from judicial precedents, from legislation, or from custom.

The following definitions are on p. 866:

> Question. A subject or point of investigation, examination or debate; theme of inquiry; problem; matter to be inquired into, as subject matter of civil or criminal discovery. A point on which the parties are not agreed, and which is submitted to the decision of a judge and jury.
>
> Question of fact. An issue involving the resolution of a factual dispute and hence within the province of the jury in contrast to a question of law.
>
> Question of law. Question concerning legal effect to be given an undisputed set of facts. An issue which involves the application or interpretation of a law and hence within the province of the judge and not the jury.

In Canadian National Railway v. Bell Telephone Co., [1939] S.C.R. 308 at pp. 316-17, [1939] 3 D.L.R. 8 at p. 15, Sir Lyman P. Duff C.J.C. discussed the meaning of the phrase "question of law":

> The phrase "question of law" which the Legislature has employed in this enactment is prima facie a technical phrase well understood by lawyers. So construed "question of law" would include (without attempting anything like an exhaustive

definition which would be impossible) questions touching the scope, effect or application of a rule of law which the Courts apply in determining the rights of parties; and by long usage, the term "question of law" has come to be applied to questions which, when arising at a trial by a Judge and jury, would fall exclusively to the Judge for determination; for example, questions touching the construction of documents and a great variety of others including questions whether, in respect of a particular issue of fact, there is any evidence upon which a jury could find the issue in favour of the party on whom rests the burden of proof. The determination of such a question seldom depends upon the application of any principle or rule of law, but upon the view of the Judge as to the effect of the evidence adduced. Nevertheless, it falls within the category described by the phrase "question of law".

In Words and Phrases, Vol. 22A, Permanent ed. (St. Paul: West Publishing Co., 1958) at p. 414, the following definitions of "involve" appear:

> "Involve" imports the idea of implicate, include, affect. Culver v. Kurn, 193 S.W. 2d 602, 604, 354 Mo. 1158, 166 A.L.R. 644.
>
> The word "involve" means "to imply"; "to include"; or "necessitate as a result or legal consequence." Baltimore & O.S.W.R. Co. v. Evans, 82 N.E. 773, 779, 169 Ind. 410, citing Stand. Dict.; 23 Cyc. pp. 352, 353.

At p. 440 the word "involving" is discussed: The word "involving" possesses connotations such as "implying", "including", "relating to", "growing out of", "necessitating as a result or legal consequence". Taub v. Bowles, Em. App., 149 F. 2d. 817, 820.

On analysis, there is a small, but vital, difference in the interpretation which the parties ask the court to place on the exception contained in the arbitration provision. It is common ground that the defendant has repudiated the Airport Contracts. It is also common ground that the resolution of the disputes

raised by paras. 1(a) and (b) of the statement of claim requires the court, or the tribunal, resolving them to apply principles of law to either undisputed facts or facts to be determined upon the evidence before the court or tribunal. It follows that the resolution of the disputes will involve both questions of fact and questions of law, i.e., questions of mixed law and fact. On the basis of the above definitions, counsel for the plaintiffs submits that the exception is to be interpreted as applying where the dispute includes a question of law. As the disputes necessarily include questions of law, counsel for the plaintiffs submit that they are precluded from submitting them to arbitration. Counsel for the defendant, however, submits that the exception is to be read as if the word "pure" appears before the phrase "question of law". As the disputes involve questions of mixed fact and law, counsel for the defendant submits that the action must be stayed and the disputes must be referred to arbitration pursuant to art. 8(1) of the Code.

As I understand the submission of the defendant's counsel, the interpretation which he has asked the court to place on the exception follows from a consideration of art. 49 as a whole when read in the context of the Airport Contract in which it is contained. In particular, he submits that this interpretation is compelled by art. 49.2(b) which requires the arbitration tribunal to decide the dispute in accordance with the law of Ontario. He submits that if the meaning of the exception prohibits the arbitration tribunal from deciding disputes involving a question of law, it would not have been necessary to include art. 49.2(b). That is why, he submits, the arbitration provision should be interpreted as permitting the tribunal to decide a dispute involving a question of mixed fact and law, but not to decide a dispute involving a pure question of law. Counsel for the defendant added that if the arbitration tribunal is not permitted to apply legal principles the arbitration provision becomes meaningless because, in his submission, only disputes or differences arising from the contract involving questions of fact can be arbitrated. In this regard, counsel stated that if his interpretation is not accepted, then the dispute in respect to the damages allegedly suffered by the plaintiffs as claimed in para. 1(c) of their

statement of claim cannot be referred to arbitration as the assessment of damages raises questions of fact and law. Counsel for the plaintiffs acknowledged that this may be correct. It is my view, however, that this does not represent a question to be answered on this motion.

In my view, it does not follow that because art. 49.2(b) requires the arbitration tribunal to decide disputes or differences in accordance with the law of Ontario that the tribunal can decide disputes involving a question of mixed law and fact, but cannot decide a dispute involving a pure question of law. All that art. 49.2(b) means is that the tribunal in deciding a dispute or difference based on disputed facts is required to do so "in accordance with" the law of Ontario. It is my opinion that art. 49.2(b) cannot be used to give the tribunal jurisdiction which the parties, by agreement, declined to give it in art. 49.1(a). In other words, art. 49.2(b) does not extend what, in my view, is the clear meaning and intent of the arbitration clause, which is the meaning advanced by counsel for the plaintiffs.

If it had been the intention of the parties to exclude from arbitration disputes involving pure questions of law, in my view, they would have used appropriate language to achieve their intent. The most obvious approach would have been to insert the word "pure" before "questions of law". Or they might have inserted the word "exclusively" after the word "involving". Or they might have drafted the exception to state "except a dispute or difference about or on a question of law". But they did not do so and, in my view, the court should not add words to, or redraft, what the parties have written.

It follows, therefore, that as the parties have agreed to litigate disputes involving a question of law, and as the disputes raised in paras. 1(a) and (b) of the statement of claim involve a question of law, the defendant's motion to stay the plaintiffs' action on the ground that they are prohibited by the arbitration provision from litigating arbitrable disputes must be dismissed.

It remains to be decided whether it is otherwise just that

the court should stay this action under s. 106 of the Courts of Justice Act, supra. As I understand the submission of counsel for the defendant, the court should, nevertheless, exercise its discretion and stay the action because not to do so will result in the disputes proceeding simultaneously before two forums -- the court and the arbitration tribunal. It is submitted that this would result in a situation similar to that which the court disapproved in S.L. Sethia Liners Ltd. v. State Trading Corp. of India, [1986] 1 Lloyd's Rep. 31, [1986] 2 All E.R. 395 (C.A.). I do not agree. This is not a case where the disputes will proceed simultaneously as the dispute in respect to damages will not get to arbitration unless, and until, the plaintiffs obtain a judgment in respect to the claims raised in paras. 1(a) and/or (b) of their statement of claim. For the same reason, this is not a case where permitting the action to continue might interfere with an ongoing arbitration as in the Boart Sweden AB case, supra. This submission ignores the fact that the parties by their agreement have determined that some disputes are to be arbitrated, while others are to be litigated. Indeed, this submission reflects what, in my respectful view, has been the major flaw in the position taken by counsel for the defendant on this motion -- the failure to recognize that art. 49.1(a) does not encompass arbitration of all disputes which may arise under the Airport Contracts. In any event, as I interpret art. 8(2) of the Code, it contemplates simultaneous proceedings before the court and an arbitration tribunal in appropriate cases.

There are several additional points advanced by counsel for the plaintiffs which enter into my decision not to exercise my discretion under s. 106 of the Courts of Justice Act to stay the action. The first point is the inconsistent position taken by the Crown in its motion for particulars and on this motion. On that motion the Crown asserted that it required further particulars to enable it to prepare its statement of defence and for purposes of trial. It now asserts that the plaintiffs are not entitled to a trial. It seems to me that it is difficult for the Crown to have it both ways. One must credit the Crown with a purpose for its motion for particulars.

To stay the action would effectively deprive the plaintiffs

of any forum in which to assert their claims. To permit the action to continue will not result in a multiplicity of proceedings because, as I have explained, there will be no arbitration unless the plaintiffs are successful in obtaining a declaratory judgment in respect to the defendant's liability under the Airport Contracts. It follows, as well, that there will not be a possibility of inconsistent results. As the plaintiffs have moved for summary judgment, there is the risk that the plaintiffs will be deprived of a juridical advantage if a stay is granted because it may be deprived of being able to obtain a judgment before Bill C-22 is proclaimed, if it should pass the Senate.

Having decided that a stay is not warranted on the interpretation which I have placed on the arbitration provision, I have not been provided with any ground upon which the court should exercise its discretion under s. 106 of the Courts of Justice Act to stay the plaintiffs' action.

In the result, the motion is dismissed. Counsel may make arrangements to speak to me with respect to costs and, if necessary, in respect to directions in regard to the plaintiffs' motion for summary judgment.

Motion dismissed.