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Quintette Coal Ltd. v. Nippon Steel Corporation, 1991 CanLII 5708 (BC CA)

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Court of Appeal of British Columbia
Quintette Coal Ltd. v. Nippon Steel Corporation
Date: 1990-10-24

J. Giles, Q.C., J. Jansen and A. Wade, for appellant.

J.D. McAlpine, Q.C., P. Bennett and P. Hildebrand, for respondents.

(Vancouver No. CAO12743)

[1] October 24, 1990. HUTCHEON J.A.:– I agree with the conclusion reached by Mr. Justice Gibbs in his reasons for judgment that the decision of the arbitration board was not a matter beyond the scope of the submission to arbitration and that the appeal must be dismissed. However, I arrive at those results by a different route which I shall attempt to explain. Briefly stated, I am of the view that the decision, insofar as it staged the reduction of the fixed component of the base price, was one justified under cl. 9 of the metallurgical coal-sale-purchase agreement.

[2] With the facts fully set out in the reasons of Mr. Justice Gibbs and of Chief Justice Esson reported at 1990 CanLII 304 (BC SC), 47 B.C.L.R. (2d) 201, I can go directly to a discussion of the issue.

[3] The crux of the objection taken to the decision by Quintette Coal Limited was that the arbitrators went beyond the scope of the submission to arbitration by staging a reduction of the fixed component over the four-year period. The precise changes in the fixed component are set out in this extract I have taken from App. A to the award:

Calendar Year Quarters	Awarded Fixed Component
1987.2	26.50
1988.2	23.50
1989.2	20.50
1990.2	18.50
1990.3	8.00
1990.4	7.00
1991.1	6.00

[4] According to Quintette, the fixed component at 1987.2 (1st April 1987) was the only dispute raised by the submission about the fixed component; under the terms of the agreement the fixed component was settled once every four years subject only to an adjustment under cl. 9. That result, it is said, is required by the language of the agreement and in particular by these two clauses:

> 7. *Price Review*
>
> The Base Price shall be reviewed during the four months prior to March 31, 1987, March 31, 1991 and March 31, 1995 at the request of either Seller or Buyer. The review shall be made taking into consideration the then prevailing market price of metallurgical coal being supplied and sold to Buyer from major Canadian suppliers under long term contracts and also the quality differential, if any, in comparison with those coals.
>
> 9. *Inequity Review*
>
> If any significant change in the metallurgical coal market takes place at any time during the term of the contract either party shall have the right to request a price review. The parties shall discuss the matter in good faith to reach a fair and reasonable adjustment.

The make-up of the base price is set forth in cl. 5. I quote the relevant parts:

> 5. *Base Price and Price Adjustment*
>
> 5.1 The Base Price as at April 1, 1980 shall be $75.00 per Ton.
>
> 5.2 The Base Price shall be subject to adjustment commencing April 1, 1980 in accordance with the following formula and principles:
>
> $$Px = Pl \times \frac{Lx}{Lr} + Pm \times \frac{Mx}{Mr} - Pd \times \frac{Dx}{Dr} + Pf$$
>
> Where:
>
> 5.2.1 “Px” is the adjusted Base Price to be applied from July 1, 1990 and every three months thereafter in respect of the Diesel Fuel component (Pd), the Labour component (Pl) and the Materials and Supplies component (Pm).
>
> 5.2.11 “Pf” is the fixed component of the Base Price not subject to escalation and is $35.00;
>
> 5.3 The Labour, Materials and Supplies and Diesel Fuel components will be adjusted every three months on July 1, October 1, January 1 and April 1 as provided in paragraphs 5.2.4 and 5.2.7 and 5.2.10.

[5] I can agree that cl. 7 is not a model of clarity. Indeed one of the first tasks of the arbitrators was to decide, as they did, that cl. 7 was a matter for arbitration. Quintette had taken the position that the price review was not arbitrable.

[6] But the striking thing about this dispute is that, according to the material supplied to us on the appeal, both parties had the same understanding of the meaning of cl. 7. Both understood cl. 7 to mean that the parties would emerge from a review of the price or from the arbitration with the amount of the fixed component set at 1st April 1987 for the delivery of all coal up to the next review in 1991, subject, of course, to cl. 9. That is a rational approach to cl. 7. At the very least, that common approach to cl. 7 is a strong indication that a dispute about staging the reduction of the fixed component through the four years and the decision by the arbitrators resolving that dispute (1) were not contemplated by the terms of the submission to arbitration, and (2) were beyond the scope of the submission. Those are the two tests for judicial review provided by s. 34(2)(*a*)(iv) of the International Commercial Arbitration Act.

[7] For the purpose of this appeal the relevant submission to arbitration is to be found in the notice of request for arbitration of November 1987 in this question:

> 1 .(b) What Base Price should be set pursuant to Clauses 7 or 9 of the Agreement, or both, for coal contracted to be delivered between March 31, 1987 and March 31, 1991?

[8] Before this notice was delivered, cl. 9 had been invoked in 1985, 1986 and 1987. In each case the fixed component had been reduced by agreement from $35 set out in cl. 5.2.11 to $26.50. In writing the award, the chairman, the Honourable N.T. Nemetz, relied upon that experience under cl. 9 as establishing "a pattern of price setting that in effect amounts to staging the price reduction".

[9] The reference by the award to the experience of the parties under cl. 9 and an earlier reference in the award to the requirement under cl. 9 for the parties "to discuss the matter in good faith to reach a fair and reasonable adjustment" lead me to the conclusion I have reached that the approach taken by the board of arbitration in staging the reduction of the fixed component is supportable under cl. 9.

[10] I recognize that the chairman stated "it is not necessary for me to make an order pursuant to Clause 9". The jurisdiction, however, to do what the arbitrators did was available to them in cl. 9, a clause invoked by the claimant in the submission to arbitration. That being so, I cannot agree that the decision was beyond the scope of that submission.

[11] I agree with Mr. Justice Gibbs in his discussion on the issue of judicial intervention under the International Commercial Arbitration Act. By way of addition, I would paraphrase a passage in *Parsons & Whittemore Overseas Co.,* 508 F. 2d 969 at 976 (1974), that Quintette must overcome a powerful presumption that the arbitral board acted within its powers. Applying that presumption, I find that the decision in this case was within the scope of the submission to arbitration.

[12] I would dismiss the appeal.

[13] October 24, 1990. GIBBS J.A. (PROUDFOOT J.A. concurring):– In a judgment reported at 1990 CanLII 304 (BC SC), 47 B.C.L.R. (2d) 201, Esson C.J.S.C. dismissed proceedings brought by the appellant Quintette Coal Limited ("Quintette") to set aside the award of an arbitration board setting the price to be paid by the respondent Japanese companies for coal deliveries made by Quintette between 31st March 1987 and 31st March 1991. This is an appeal from that judgment.

[14] In cl. 15 of their contract of 31st July 1981, entitled "Metallurgical Coal-Sale-Purchase Agreement", the parties agreed upon arbitration to resolve disputes:

> All unresolved disputes, controversies or differences between the parties arising out of or in connection with or resulting from this Agreement, or the breach hereof, any failure of the parties to reach agreement with respect to matters provided for herein and all matters of dispute relating to the sale of Coal by Seller to Buyer shall be finally determined by arbitration …

[15] The parties also agreed, in cl. 19.4, that the law of British Columbia would apply:

> This Agreement shall be construed and relations between the parties determined in accordance with the law of British Columbia, Canada.

[16] It is common ground that the statute law of British Columbia which has direct application is the International Commercial Arbitration Act, S.B.C. 1986, c. 14, in that the arbitration was an international commercial arbitration as defined in s. 1. The Act severely circumscribes the jurisdiction of the court to interfere with arbitrations to which it applies. The first limitation is in s. 5 which confines the court to intervention only where authorized by the statute:

> 5. In matters governed by this Act,
>
> (*a*) no court shall intervene except where so provided in this Act, and
>
> (*b*) no arbitral proceedings of an arbitral tribunal or an order, ruling or arbitral award made by an arbitral tribunal shall be questioned, reviewed or restrained by a proceeding

> under the *Judicial Review Procedure Act* or otherwise except to the extent provided in this Act.

[17] The second limitation is in s. 34 which specifies the narrow grounds upon which the court is empowered to set aside an "arbitral award". The ground relied upon by Quintette in this appeal is found in s. 34(2)(*a*)(iv):

> (2) An arbitral award may be set aside by the Supreme Court only if
>
> (*a*) the party making the application furnishes proof that
>
> (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside.

Specifically, the ground is that the arbitral award "contains decisions on matters beyond the scope of the submission to arbitration". That is apparent from Quintette's factum (the notice of appeal does not specify grounds). The factum states:

> ERROR IN JUDGMENT
>
> 41. The learned Chief Justice erred in failing to hold there was a ground for setting aside the Award to the extent it contained a decision on a matter beyond the scope of the submission to arbitration, namely …

[18] In order to ascertain the "scope of the submission", it is necessary to have recourse to three sources. The first is the notice of request for arbitration sent by the Japanese companies to Quintette on 16th November 1987. Of the three issues spelled out in the notice, only the second is relevant to the appeal. It is expressed as follows in the notice:

> 1. The Claimant requests that the following issues be finally determined by arbitration pursuant to Clause 15 of the Agreement:
>
> (b) What Base Price should be set pursuant to Clauses 7 or 9 of the Agreement, or both, for coal contracted to be delivered between March 31, 1987 and March 31, 1991?

[19] The second source is cl. 7 of the contract between the parties. Although the notice also refers to cl. 9, which is one of the pricing provisions, cl. 7 was the focus of the argument on the appeal and, evidently, before the Chief Justice. It provides:

> The Base Price shall be reviewed during the four months prior to March 31, 1987, March 31, 1991 and March 31, 1995 at the request of either Seller or Buyer. The review shall be made taking into consideration the then prevailing market price of metallurgical coal being supplied and sold to Buyer from major Canadian suppliers under long term contracts and also the quality differential, if any, in comparison with those coals.

[20] Base price is defined in cl. 5 of the contract. It has three variable components, labour, material and supplies, and diesel fuel, which are to be adjusted every three months according to specified indices. It also has a fixed component stated to be "not subject to escalation". The contract set the fixed component at $35 per ton but it is not contended that it had to remain at that level throughout the life of the contract. The words "not subject to escalation" merely removed the fixed price from the automatic three-month adjustments of the variable components.

[21] The third source for the scope of the submission is the pleadings exchanged between the parties. Section 23(1) of the Act requires the exchange of statements by the claimant and the respondent. In his statement the claimant (the Japanese companies) is obliged to "state the facts supporting his claim, the points at issue and the relief or remedy sought".

> 23. (1) Within the period of time agreed upon by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of those statements.

[22] By way of “relief or remedy sought” the Japanese companies put forward several pricing alternatives. The last of the alternatives is: “such other formula or method of adjustment as may be appropriate”.

[23] In the result, after some 142 days of hearings over a 2-year period, on 28th May 1990 the arbitration board delivered its award in the form of a schedule of prices for the period 31st March 1987 to 31st March 1991:

QUINTETTE COAL AND NIPPON STEEL

(1) Calendar Year Quarters	(2) Awarded Fixed Component	(3) Escalated Component	(4) Total Price Awarded	(5) Price Actually Received
1987.2	26.50	68.80	95.30	95.30
1987.3	26.50	68.42	94.92	94.92
1987.4	26.50	69.41	95.91	95.91
1988.1	26.50	70.18	96.68	96.68
1988.2	23.50	71.97	95.47	98.47
1988.3	23.50	72.00	95.50	98.50
1988.4	23.50	73.22	96.72	99.72
1989.1	23.50	72.56	96.06	99.06
1989.2	20.50	73.19	93.69	99.69
1989.3	20.50	74.36	94.86	100.86
1989.4	20.50	75.03	95.53	101.53
1990.1	20.50	75.93	96.43	102.43
1990.2	18.50	76.40	94.90	102.90
1990.3	8.00	*	**	
1990.4	7.00	*	**	
1991.1	6.00	*	**	

> * The formula for determining the escalated component for periods 1990.3, 1990.4 and 1991.1 shall continue as set out in Clause 5 of the contract.
>
> ** The sum of the awarded fixed component plus the escalated component for the periods 1990.3, 1990.4 and 1991.1.

[24] The first line of the schedule (for the calendar year quarter 1987.2) equates to 1st April 1987, and it also coincides, as does each line thereafter, with the quarterly adjustment of the variable components of the base price pursuant to cl. 5 of the contract. The award was delivered on 28th May 1990, midway between calendar year quarter 1990.2 and 1990.3. In substance, therefore, what had occurred before 1990.3 was history and what was anticipated to occur after 1990.2 must necessarily have been based upon projections, except the variable components which would automatically be determined from time to time in accordance with cl. 5.

[25] It was Quintette’s position before Chief Justice Esson, and before this court, that the arbitration board had no jurisdiction beyond determining the dollar values for

calendar year quarter 1987.2, and that everything after that was outside the mandate of the board. The Chief Justice described the Quintette submission in these words at p. 207:

> Quintette's contention is that the jurisdiction of the board was confined to fixing a base price "as of April 1, 1987" and that, in fixing a series of base prices for the 15 quarters after 30th June 1987, it did something which it was not asked to do and had no power to do. What flows from that, in the submission of Quintette, is that the only part of the award which is valid is the first line of App. A.

[26] Although Quintette challenges all of the award below the first line, the real focus is upon the downward adjustments in the fixed price component over the four-year period. Presumably the escalated component adjustments would have occurred in any event through application of the indices agreed upon in cl. 5. In respect of the fixed price component, Quintette contends that, when set as at 1st April 1987, upon a proper construction of cl. 7 of the contract, it must remain at that level for the ensuing four years. That is to say, that it cannot again be adjusted until 1st April 1991. The threshold question which must be answered however before embarking upon an assessment of the merits of the Quintette contention is whether, in the words of s. 34(2)(*a*)(iv) of the Act, "the arbitral award … contains decisions on matters beyond the scope of the submission to arbitration". If it does not, the court has no jurisdiction to set the award aside even if it could be shown that the arbitration board erred when interpreting the contract.

[27] At p. 204 of his judgment Chief Justice Esson drew attention to the relationship between the domestic law of arbitration and the law which applies to international arbitrations and he referred to "a world-wide trend toward restricting judicial control over international commercial arbitration awards". Perhaps the strongest expression of that trend is to be found in the majority judgment of the Supreme Court of the United States in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.,* 473 U.S. 614, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985). At p. 629 Blackmun J. said:

> … we conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in the domestic context.

And at pp. 638-39 he said:

> As international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade. The controversies that international arbitral institutions are called upon to resolve have increased in diversity as well as in complexity. Yet the potential of these tribunals for efficient disposition of legal disagreements arising from commercial relations has not yet been tested. If they are to take a central place in the international legal order, national courts will need to "shake off the old judicial hostility to arbitration." Kulukundis Shipping Co. v Amtorg Trading Corp. 126 F2d 978, 985 (CA2 1942), and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal. To this extent, at least, it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration. See Scherk, supra.

[28] In 1988 in *CBI NZ Ltd. v. Badger Chiyoda* (1989), 2 N.Z.R. 669, the New Zealand Court of Appeal was called upon to determine whether the award of an international commercial arbitration carried out under the International Chamber of Commerce rules, which exclude any form of appeal, was immune from review by the New Zealand courts. The several lengthy judgments refer to international conventions and statutes, including the British Columbia statute, and review judicial pronouncements about the approach to

be followed by domestic courts, including the remarks of Blackmun J. in *Mitsubishi,* supra. At p. 687 Richardson J., appearing to reflect the views of the other members of the court, speaks of the trend Chief Justice Esson referred to:

> As to that, the trend in international commercial arbitrations is clearly towards giving greater emphasis to party autonomy and contracting judicial control over the legal content of the reference and the award.

[29] The respondents cited two other United States cases, both at the Court of Appeals level, which found in favour of restraint upon domestic judicial review of international commercial arbitration awards: *Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier (RAKTA),* 508 F. 2d 969 (C.A., 2nd Circ., 1974), and *Mgmt. & Tech. Consultants S.A. v. Parsons-Jurden Int. Corp.,* 820 F. 2d 1531 (C.A., 9th Circ., 1987).

[30] Chief Justice Esson concluded that the views expressed in *CBI NZ Ltd.* and the cases therein referred to represented the "consensus" referred to in the preamble to the British Columbia Act. At p. 206, he said:

> While the *CBI NZ Ltd.* decision is not directly applicable to the issue in this case, I have quoted at length from the judgment of Richardson J. for its extensive analysis of authorities from various jurisdictions, all holding that courts should exercise restraint in reviewing arbitration awards in the international arena. The views expressed by those courts, in my view, are substantially the same as the "consensus" referred to in the preamble to our International Act, and thus reflect the purpose of that Act.

[31] This is the preamble clause which speaks of a "consensus":

> AND WHEREAS the United Nations Commission on International Trade Law has adopted the UNCITRAL Model Arbitration Law which reflects a consensus of views on the conduct of, and degree and nature of judicial intervention in, international commercial arbitrations.

[32] We are advised that this is the first case under the British Columbia Act in which a party to an international commercial arbitration seeks to set the award aside. It is important to parties to future such arbitrations and to the integrity of the process itself that the court express its views on the degree of deference to be accorded the decision of the arbitrators. The reasons advanced in the cases discussed above for restraint in the exercise of judicial review are highly persuasive. The "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes" spoken of by Black-mum J. are as compelling in this jurisdiction as they are in the United States or elsewhere. It is meet therefore, as a matter of policy, to adopt a standard which seeks to preserve the autonomy of the forum selected by the parties and to minimize judicial intervention when reviewing international commercial arbitral awards in British Columbia. That is the standard to be followed in this case.

[33] The disposition of the appeal turns upon whether what the arbitrators did amounted to a decision on "matters beyond the scope of the submission to arbitration". The matter within the scope of the submission was, as expressed in the notice of request for arbitration, "What Base Price should be set … for coal contracted to be delivered between March 31, 1987 and March 31, 1991". The arbitrators answered the question. As an alternative remedy they were asked to set the price by "such other formula or method of adjustment as may be appropriate". They did so by setting prices at quarterly intervals. They were called upon to construe cls. 7 and 9 of the contract within their context and they did so. Even applying the domestic test (*Shalansky v. Regina Pasqua Hosp. Bd. of Gov.* (1983), 83 C.L.L.C. 14,026, 1983 CanLII 117 (SCC), 145 D.L.R. (3d) 413, 22 Sask. R. 153, 47 N.R. 76 (S.C.C.)), their interpretation is one which the words of the contract can reasonably bear. The conditions precedent to

intervention by the court spelled out in s. 34(2)(*a*)(iv) of the Act have not been met. The language of the statute forecloses the court from intervention.

[34] Chief Justice Esson disposed of the application in these words:

> At p. 1 of his award, the chairman stated:
>
> "This tribunal was established under the provisions of clause 15 of the agreement to determine the unresolved price of coal for the period April 1, 1987 to March 31, 1991."
>
> That, I am satisfied, correctly states the agreed scope of the submission to arbitration. There is no merit in the suggestion that the board's jurisdiction was limited to fixing a base price as of the beginning of the period.
>
> At one stage, I was concerned by the question whether it was open to the board to alter the fixed component within the 4-year period rather than leaving it at a fixed level until the next 4-year review, as is arguably contemplated by some of the language of cl. 5 of the contract. But even if the board was wrong in its conclusion on that point, that would constitute mere error in interpreting the contract and would not, under the International Act, provide a ground for setting it aside. 1 will add that, despite my original doubts, I am now persuaded, essentially for the reasons stated by the learned chairman in his award, that the board did not err in its interpretation.

[35] Quintette has not shown the Chief Justice to have been in error. On the contrary, and with respect, his decision is correct in law and in accord with the standard to be followed in this kind of case.

[36] I would dismiss the appeal.

Appeal dismissed.