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Deco Automotive Inc. v. G.P.A. Gesellschaft Fur Pressenautomation MbH

Between
Deco Automotive Inc., Plaintiff, and
G.P.A. Gesellschaft Fur Pressenautomation MbH, Defendant

Ontario Judgments: [1989] O.J. No. 1805
Action No. 350858/89

Ontario District Court - York Judicial District
Toronto, Ontario
Mandel D.C.J.

October 27, 1989

T.S. Kent, for the Defendant-Applicant.

H.C. Walsh, for the Plaintiff-Respondent.

MANDEL D.C.J.:— This is an application by the defendant for an order

(A) Staying this action as it is alleged that the parties agreed to arbitrate any disputes between them under the auspices of the Economic Commission for Europe;

(B) Setting aside the service of writ ex juris upon the defendant; and staying this action as Ontario is not the convenient forum for hearing the dispute.

The plaintiff (hereinafter called Deco) is in the business of stamping metal parts for sale to automobile manufacturers and is located in Toronto. The defendant (hereinafter called GPA) is a Corporation located in West Germany and inter alia designs and manufacturers automated transfer systems. GPA entered into a contract with Marada Industries Inc. (hereinafter called Marada) to design, manufacture, deliver, assemble and put into operation a transfer system. Marada is an American Company situate in the State of Maryland. The contract was assigned by Marada to Deco. GPA offered to do the foregoing for the price as set out in quotation 3393-2/85 dated April 29, 1985 (see Exhibit D to the affidavit of Kenneth W. Chalmers). Such quotation contains inter alia the following:

"We offer you according to the terms of delivery ECE-188 as follows:"

"Guarantee: According to ECE-188"

There was a further quotation numbered 3393-3/85 dated May 6, 1985. Such quotation is not before me and could not be found by Deco. (See aforesaid Exhibit D). Marada issued a purchase order to GPA on May 9, 1985. Such purchase order and the letter under which such purchase order was forwarded to GPA were not among the voluminous documents originally filed on the application. However on consent of both counsel, such letter and purchase order were filed as part of the material to be used on the application. They are short documents and are attached to these reasons as Schedule A (the purchase order) [* See paper copy for Schedule A *] and Schedule B (the letter) [* See paper copy for Schedule B *]. When GPA received such documents it replied by letter (see Exhibit C to the affidavit of Alexander Sennecke). Such reply contains the following:

> "We thank you very much for your above-mentioned order which we are pleased to confirm in the following on the basis of the general conditions for the delivery of machine tools (ECE 188)"
>
> "Guarantee: According to ECE-188 conditions"

Marada assigned its contract with GPA to Deco and GPA was so informed. Deco in the Spring of 1986 complained of the delay in the delivery of the system and sent a letter to GPA dated June 11, 1986 (Exhibit B to the affidavit of Alexander Sennecke). Such letter complains of the delay and then states as follows:

> "We must now inform you that for the first delay we will charge you a penalty of 5% according to the contract (ECE 188), and for the new delay we will charge an additional charge of 0.5% for each week. This penalty is no compensation to us for the costs we will have for in-house manual production and work which we will have to contract out."

The transfer system was delivered in the Fall of 1986 and according to the agreement the assembly and putting into operation at Deco's Plant in Toronto was to be carried out by GPA's engineers. Deco was to provide a sufficient number of qualified helpers as well as adequate lifting facilities. There were differences between the parties which were not resolved. On May 9, 1988 GPA issued a claim at the I.C.C. Court of Arbitration for DM 452,230.745 against Magna Manufacturing a division of Magna Manufacturing International Inc., and Manfred Gingl. This claim was for the balance owing in respect of the transfer systems. It appears that Magna manufacturing is now known as Cosma International Inc. (Cosma) and Deco is a subsidiary of Cosma.

Cosma and Deco not only objected to the jurisdiction of I.C.C. to arbitrate the dispute, but also objected on the grounds that the wrong party was named in such arbitration. They filed a defence with I.C.C. without prejudice to raising such objections and on the basis that such filing and participation was not to be taken as and was not an attornment to the jurisdiction of the I.C.C. Subsequent thereto Deco and GPA entered an agreement whereby -

1. The general conditions for the supply of plant and machinery for export (ECE 188) form part of agreement in question and parties submit to jurisdiction of I.C.C. for the claim of GPA and the counter-claim of Deco.

2. All acts of Magna, Marada and Cosma are deemed to be the acts of Deco and Deco is a proper party to the arbitration.

3. GPA agreed to give security in the sum of D.M.500.000 on account of Deco's counter-claim and Deco agreed to give a like sum for security on account of GPA's claim. And

"4. If one of the conditions of this agreement is ineffective or unfulfilled, each party has the right to cancel the whole agreement."

There was delay in GPA giving its security. In March 1989 GPA informed Deco that it felt that it was no longer bound by the agreement to give security because it had discovered the letter of June 11, 1986 whereby Deco had claimed a penalty for late delivery according to the terms of ECE 188 and that Deco therefore

> "..... knew, that the general delivery conditions of ECE 188 had become part of the contract. The contrary allegations in the statement of defence and the counterclaim represent deliberate misrepresentation of the Court and the plaintiff".

Deco advised I.C.C. that GPA's position had no merit and that Deco would not participate further in the arbitration proceedings until I.C.C. entertained Deco's request for an interim award requiring GPA to post security. I.C.C. did nothing with regard to such request. (See letter of Pierre A. Karrer Exhibit (i) to affidavit of Alexander Sennecke).

In view of GPA's repudiation of the agreement, Deco commenced proceedings in District Court (see paragraph 28 of Stefan T. Proniuk's affidavit) claiming $182,615.00 special damages and "damages in the sum of $15,000,000.00", based on inter alia representations set out in the Statement of Claim that GPA "knew or was reckless in not caring that same were not true". (See paragraph 23 of Statement of Claim).

Before me the motion was argued on 2 basis; first that the action be stayed in that the parties had agreed to arbitrate any differnces in their original contract and there is presently an arbitration pending in Europe and secondly that Ontario is not the convenient forum to try the dispute.

STAY

It is Deco's position that the action should not be stayed because

(A) GPA fraudulently misrepresented substantial matters which led to the agreement to supply the transfer system and induced Deco to enter into the assignment and

(B) The ECE terms do not form part of the contract between the parties and in any event do not cover the claims set out in the Statement of Claim.

Although logically the matter of whether there was an agreement to arbitrate should be dealt with before the question of fraud, (for such latter question assumes that there was an agreement to arbitrate), because the issue of whether there was an agreement is more complex, I shall deal with the matters in reverse order, dealing first with the question of fraud.

(A) FRAUD

The affidavits filed and the transcript of the cross-examination thereon do not set forth any matters or facts of the alleged fraud. The allegations of fraud are solely contained in the Statement of Claim. The questions then arises whether this is sufficient to dismiss the motion to stay the action. Deco states that it is and relies on Canadian Motion Picture Production Ltd. v. Maynard Film Distributing Co. Ltd. (1949) 4 D.L.R. 458 (a decision of MacKay J. of Ontario High Court) at 468 where, following Monro v. Bognor Urban Dist. Council (1915) 3 K.B. 167, it is stated "I am of the opinion, notwithstanding that this may mean that the mere allegation of misrepresentation, fraud or undue influence is sufficient to remove that specific claim from the operation of the arbitration clause, that such is the case."

A contrary view also by an Ontario High Court Judge (Kelly J.) is found in Lamont v. Wright (1943) O.W.N. 11. The following is stated at page 12:

> "Further, if the mere allegation of fraud is sufficient to entitle the person making it to call upon the Court in the exercise of its discretion, to refuse to refer the dispute to arbitration, it would be a very easy way of getting rid of an arbitration clause. I think the Court, on an application to stay proceedings where fraud is alleged, should look to see on what the alleged fraud is based and should be satisfied that there is at least prima facie evidence of fraud."

There are then two conflicting decisions of Justices of the same Court, one of which follows an English Court of Appeal decision.

The Monro case was explained in Ashville Investments Ltd. v. Elmer Contractors Ltd. (1988) 2 LL.R.73, as being hard to understand.

The matter had been dealt with by Sir George Jessel M.R. in Russell v. Russell (1880) 14 CH. D. 471 at 481 where he stated:

> "The next question I have to consider is, what foundation there is for the charges, because if the mere making of a charge of fraud would entitle the person making it to call upon the Court, in exercise of its discretion, to refuse to refer to arbitration there would be a very easy way of getting rid of all those clauses of arbitration. I am satisfied that the mere making of a charge will not do that, even in a case where the Court ought to exercise its discretion by refusing to refer the case to arbitration. There must be sufficient prima facie evidence of fraud, not conclusive or final evidence, because it is not the trial of the action, but sufficient prima facie evidence."

The House of Lords referred to the Russell decision in Camilla Cotton v. Granadex (1976) 2 LL.R.10. The manner in which the House dealt with the Russell decision and the law in England was recently dealt with in Cunningham-Reid v. Buchanan-Jardine (1988) 1 W.L.R. 678 (C.A.) The following is found at page 691:

> "What is clear is that Lord Wilberforce (in Camilla Cotton) has approved Russell Russell. He has also said that any alleged fraud by the person seeking the stay is irrelevant. He said that there must be a concrete and specific instance of fraud

raised before an order can be made under Section 24(3) of the Act of 1950 (Stay) - not a mere bandying about of allegations. There must be a prima facie case with convincing evidence to support the allegations."

(Underlining and words in parenthesis are mine).

Furthermore there is a second point found in Russell v. Russell which was approved in the Camilla case and the Cunningham-Reid case. In Russell at 476-477 it is stated:

"I now come to the first ground, where personal fraud is in issue. Though I quite agree it is within the discretion of the court to say, where one of the two partners desires it, that a dispute shall not be referred to arbitration, yet I must consider for a moment which of the two partners does desire to exclude arbitration. Does the party charging the fraud desire it, or the party charged with the fraud desire it? Where the party charged with the fraud desires it, I can perfectly understand the court saying. "It seems to me in that case it is almost a matter of course to refuse the reference, but I by no means think the same consideration follows when the publicity is desired by the person charging the fraud. His character is not at stake, and the other side may say, 'The very object that I have in desiring the arbitration is that the matter shall not become public. It is very easy for you to trump up a charge of fraud against me, and damage my character, by an investigation in public.' There is a very old and familiar proverb about throwing plenty of mud, which applies very much to these charges made by members of the same family, or members of the same partnership, against one another in public. It must be an injury, as a rule, to the person charged with fraud to have it published, and I must say that I am by no means satisfied that the mere desire of the person charging the fraud is sufficient reason for the court refusing to send the case to arbitration. It may be that that must depend upon the circumstances of the case not forgetting both the evidence before the court when the motion is made, and the nature of the charge that is actually made. But I for one do not wish to countenance the doctrine that the mere fact of a partner, who has a contract in a deed to refer partnership disputes to arbitration, making a charge of fraud against a co-partner, is sufficient to prevent the co-partner insisting upon a reference to arbitration. As I conceive it, that rule ought only to be applied, as a matter of course, without investigating the circumstances, in cases where the person charged with the fraud desires the inquiry to be public.

And at page 691 of the Cunningham-Reid Report the following is stated:

A stay will be refused almost as of course if the party charged with fraud objects to a stay and wants to clear his name in open court, but I can see no escape from the conclusion that the House of Lords has laid down that, if the case is the other way round, that is to say, the party charged with fraud is seeking arbitration and the party charging fraud is opposing a stay, then, even if there is a strong prima facie case of fraud in specific respects made out, that is not by itself enough to warrant refusing a stay."

Having regard to the fact that the Monro case (upon which the Canadian Motion Picture

Productions Ltd. case was based) is considered doubtful; having regard to the law as laid down in Russell, is the law set forth in Lamont (the other Ontario decision) and that such law has been approved recently by the English Court of Appeal as well as the House of Lords; having regard to the reasoning set forth in the Russell case as well as Lamont which appeals to me, in my view a mere allegation of fraud in a pleading as is set forth in the case at bar is insufficient to refuse to stay where the parties have agreed to arbitrate the matter in dispute. There must be at least prima facie evidence of fraud as defined by the cases hereinbefore referred to. It is not necessary for me nor do I base my decision on the question of which party desires the stay.

(B) IS THERE AN AGREEMENT TO ARBITRATE?

As I have hereinbefore stated the question of fraud arises where an arbitration clause has been included in the contract between the parties. If there is not an arbitration clause in the agreement then cadit quaesitio.

The question arises as to whether it is sufficient merely to raise a doubt or an arguable issue as to whether there is or is not an agreement to arbitrate for the Court to refuse a stay and let the issue be determined at trial or whether the Court must determine the matter on the evidence before it and in fact determine whether the arbitration clause was part of the contract or not. In my view such question is determined by Modern Buildings Wales v. Limmer (1975) 2 LL. R. 318 (C.A.) at 322 where the following is stated:

> "In my judgment, that authority is not authority for anything further than that, in a case in which the party who seeks a stay fails to prove that there is an arbitration agreement in force between the parties, he cannot get a stay. That seems to me, with due respect to the argument of Counsel for the plaintiffs founded on that case, to be a fairly obvious proposition, and I think that the way in which it is stated in Russell on Arbitration is misleading. It is not sufficient, in my judgment, for the party who resists a stay merely to say: "Well there is some doubt as to how the contract between the parties should be construed and, therefore, it is proper for the court in the exercise of its discretion to refuse a stay." On the contrary, in my judgment, when an application is made by one party for a stay on the ground that there is in operation an arbitration agreement, it is incumbent on the Court to discover whether or not there is such an agreement in force; and if that involves determining a question of construction, that question of construction must be decided there and then.
>
> Counsel for the plaintiffs says that it is unsatisfactory that a question of this nature should be decided on an interlocutory basis, by which I understand him to mean in proceedings in Chambers on affidavit evidence. But, in my judgment, it is the duty of the Court to decide whether or not there is an arbitration agreement in force, and it has to be decided at an interlocutory stage in the action, because it has to be decided before the defendants take any other steps."

I must then determine whether there is an arbitration clause in the contract and if there is whether it covers the matters set out in the Statement of Claim. To do so I must determine to what extent if any the ECE conditions are incorporated into the contract between the parties.

ECE CONDITIONS

The conditions are Exhibit E to the affidavit of Mr. Sennecke. They are titled "General conditions for the supply of plant and machinery for export". It contains 13 conditions (with sub-conditions). There is a condition concerning delivery (condition 7) and one concerning guarantee (condition 9). However there are conditions governing other aspects of the dealings between the parties as preamble (conditions apply except as varied in writing); formation of contract; drawings and descriptive documents; packing; inspection and tests; passing of risk; payment; reliefs; limitation of damages; rights at termination; and finally arbitration and law applicable.

The arbitration and law applicable condition is as follows:

> "13.1 Any dispute arising out of the contract shall be finally settled, in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators designated in conformity with these Rules.
>
> 13.2 Unless otherwise agreed the contract shall be governed by the law of the vendor's country. 13.3 If the parties expressly so agree, but not otherwise, the arbitrators shall, in giving their ruling, act as amiables compositeurs."

It is seen that the wording in the arbitration clause is very wide and confers the widest jurisdiction, "any dispute arising out of the contract" (see Re Hehenzollen Act Fur Locomotivbahn and The City of London (1886) 54 L.T. 596 at 597 as to "dispute" and H.E. Daniel Ltd. v. Carmel Exporters and Importers Ltd. (1953) 2 Q.B. 242; Government of Gibraltar v. Kenney (1956) 2 Q.B. 410 at 421 as to "arising out of").

The question however is not the wording of the arbitration clause but whether it was incorporated into the contract. GPA's position is that it was; Deco's, that it was not because

> (i) The contract was formed by the purchase order of Marada which contained all of the terms and conditions and which could not be changed by the subsequent letter of confirmation and such purchase order makes no reference to ECE conditions.
>
> (ii) In the alternative if there is a reference in the contract to ECE conditions there is not an incorporation of all of the ECE conditions but only of the conditions as to delivery and guarantee.

(i) FORMATION OF THE CONTRACT

It is not necessary for me to determine when the contract was entered into. It matters not whether the offer originally came from GPA and the purchase order of Marada was an acceptance of that offer or whether the purchase order of Marada was the offer and the confirming letter of GPA was the acceptance. (In the latter case Deco states that the acceptance could not incorporate any part of ECE conditions because the purchase order stipulates the terms and conditions and the acceptance can only be on such terms and conditions and no other). It is however of interest to note that according to clause 2.1 of the ECE conditions the contract is "deemed" to be entered into when the vendor accepts the order of the purchaser. It is not necessary to determine when the contract was formed because the original "offer" of GPA as

hereinbefore set forth states:

"We offer you according to terms of delivery ECE 188" and

"Guarantee: According to ECE 188"

The purchase order attached as Schedule A to these reasons state "terms: as per terms on offer no. 3393-485 as per terms on offer no. 3393-". (The document filed by Deco's lawyer is an incomplete photocopy of the purchase order. I should have thought that knowing the importance of such document, an effort would have been made to provide the Court with a proper and true photocopy). The letter under which the purchase order was sent (which is attached as Schedule B) specifically refers to the two offers of GPA by their proper numbers. It is clear from the cross-examination, that there were only "two quotes" 3393-2 and 3393-3 and that the reference 3393-4 in the purchase order of Marada is a "typo". The terms then according to the purchase order are those referred to in "quotes" 3393-2 and 3393-3 which had the hereinbefore cited reference to ECE 188. The confirming letter sent by GPA after it received the purchase order in effect repeats the references to the ECE contained in the "quotes". It is thus seen that there are references to ECE in all the documents. This is fortified by the letter of Deco sent on June 11 1986 claiming a penalty for late delivery according to the terms of ECE 188. The important question and the one to be determined is to what extent are the terms of ECE 188 incorporated in the agreement. GPA's position is that all of the terms are incorporated; Deco's that only those dealing with delivery and guarantee and none others. As I have hereinbefore set forth the general conditions for the supply of plant and machinery for export of ECE 188 contain a number of terms. Some of those terms cover matters unrelated to "delivery" and "guarantee" as for example (and the following are not all inclusive) formation of contract, inspection and tests where the plant is manufactured. The contract between the parties is for GPA to design, manufacture, deliver, assemble and put into operation an automated transfer system. The word supply in common usage encompassses fully what GPA was obliged to do. In that regard see the Oxford English Dictionary at page 206 where the word supply is defined as -

"To fulfil, satisfy a need or want by furnishing what is wanted.

To furnish, provide, afford something needed, desired or used".

Deliver on the other hand, is not only one part of what GPA was obliged to do, but is also not as all encompassing as the word supply. In common usage the word deliver is the "action of handing over or conveying into the hands of another". See Oxford English Dictionary at page 168. Indeed in my view this is made clear on reading the terms of the general conditions. In my view the principle enunciated in MacLeod Ross v. Compagnie D'Assurance Generales L'Helvetia (1952) 1 LL. R. 12 (Eng. C.A.) is germane. In that case insurance was effected on open cover under general conditions which included an arbitration clause. However the certificate delivered to the insured contained only some and not all of such conditons and the arbitration clause was one of the conditions not referred to in the certificate. At page 15 of the Report the following is found:

> "The general conditions which are not set out (in the certificate) are not, I think, made part of the contract. If the defendants wished others (of the general conditions) to be applicable they should have made it clear that what appeared to

be a complete recital of relevant terms (in the certificate) was not."

(The words in parenthesis are mine).

Similarly in the case at bar. Although the words in the confirming letter are general conditions, those words refer to delivery and to guarantee and it is only the general conditions as to delivery and guarantee that apply and are incorporated and no other. If the general conditions in toto were meant by GPA to apply, then GPA would not have had to refer specifically to any one of the conditions in the quotes, or letter of GPA, as for example guarantee. All that would have had to be done is state that the general conditions for the supply of plant and machinery ECE 188 apply. As I have hereinbefore stated the word supply is wider than delivery and the word supply encompasses fully what GPA contracted to do whereas the word delivery does not. The words "general conditions for the delivery of machine tools (ECE 188)" and "guarantee : According to ECE conditions" as found in the confirming letter of GPA (see Exhibit C to affidavit of Alexander Sennecke) do not take the matter any further than the "quotes" and in my view such terms do not incorporate into the contract all of the conditions of ECE 188 and the arbitration clause does not form part of such contract. As for the letter of Deco claiming penalty for late delivery in accordance with ECE 188, the delivery provisions in ECE 188 (Condition 7) were made part of the contract by reference and such letter is proper (see Condition 7.3). However it does not follow, nor can it be said that because of such letter Deco agreed to the arbitration clause (which I have stated is very wide and grants jurisdiction to disputes arising as to matters dehores delivery and guarantee) applying and such letter cannot be said to incorporate all of the ECE conditions.

There is in the general conditions ECE 188 dealing with delivery (Condition 7) a reference to arbitration and that is

> "7.4. If the time for delivery mentioned in the Contract is an estimate only, either party may after the expiration of two thirds of such estimated time require the other party in writing to agree a fixed time.
>
> Where no time for delivery is mentioned in the Contract, this course shall be open to either party after the expiration of six months from the formation of the Contract.
>
> If in either case the parties fail to agree, either party may have recourse to arbitration, in accordance with the provisions of Clause 13, to determine a reasonable time for delivery and the time so determined shall be deemed to be the fixed time for delivery provided for in the Contract and paragraph 3 hereof shall apply accordingly."

In my view such a reference does not incorporate into the contract the condition that all disputes between the parties arising out of the contract shall be arbitrated. It is only in the fixing of a time for delivery where the time was originally estimated or not fixed and the parties have failed to come to an agreement, that the parties may arbitrate. It is only in a specific and very narrow instance that the parties by reference agreed that there may be arbitration. One cannot enlarge that instance to state that arbitration is to prevail in all disputes. In any event such clause is inapplicable because there was a fixed time set forth in the contract documents (see Exhibit D

to the affidavit of Kenneth W. Chalmers).

The question then arises as to whether the International Commercial Arbitration Act 1988 (1988 S.O.C. 30) which enacts a Model Law and came into force on June 8th 1988 and/or Commercial Arbitration Act S.C. 1986 C. 22 (which is in effect the Model Law and came into force August 10, 1986) effects the matter.

The Model Law applies only if there is an agreement to arbitrate. If there is no agreement, then there can be no arbitration. However there often arises disputes, as in the case at bar as to whether there is such an agreement. In such circumstance the Model Law provides

"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 to be noted that the arbitration clause is to be treated "as an agreement independent of the other terms of the contract". It is to be further noted that the arbitrator has jurisdiction to rule as to the existence of an arbitration agreement. Further it is to be noted that any participation by a party does not preclude such party from raising such plea (as was done in the case at bar). Lastly it is to be noted that the ultimate decision as to such jurisdiction does not rest with the arbitrator but with the Court. It is thus seen that the Legislation recognized that the ultimate determination as to jurisdiction is not the arbitral tribunal but the Court.

The question then arises as to whether the Court should stay an action commenced by one of the parties to await the outcome of the arbitrator's ruling as to his jurisdiction in the pending

arbitration.

Such question is answered by the Model Law itself. The scope of application of such law is set out in Article 1 of the Model Law [See also article 1(1) of Commercial Arbitration Act (Canada)]. Article 1 of the Model Law reads:

> "The provisions of this law except Articles 8, 9, 35 and 36 apply only if the place of arbitration is in the territory of this State."
>
> "This State" means Canada (See Section 1 of International Commercial Arbitration Act)."

Likewise the comparable section in Commercial Arbitration Act Canada reads:

> "Article 1(2). The provisions of this Code, except Article 8, 9, 35 and 36 apply only if the place of arbitration is in Canada."

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. [See Duke of Bucclech v. Metropolitan Board of Works 1870 L.R. 5 Exch. 221 at 222 on appeal (1872) L.R. 5 H.L. 418; Heyman v. Darwin Ltd. (1942) A.C. 356 at 366, 371, 384 and 398]. Moreover the filing of defence by Deco whilst objecting to the jurisdiction of the arbitrator is not an attornment by Deco (See Westminister Chemicals v. Eichholz and Loeser (1954) 1 LL.R. 99 at 105 Dalmia Dairy v. National Bank of Pakistan (1978) 2 LL.R. 223 at 233). Furthermore to await the award of the arbitrator is not only contrary to the law but would entail a great waste of money and of time. There is no question of risk of dilatory tactics on the part of Deco because the matter of whether the arbitration clause applies or not is determined immediately at an interlocutory stage and is not to be delayed until the trial of the action (Modern Buildings Wales v. Limmer supra).

GPA further refers to Article 5 of the Model Law (see also Article 5 of Commercial Arbitration Act which although not exactly the same wording is in paria materia)

> "In matters governed by this law no court shall intervene except where so provided in this law."

The place of arbitration not being in Canada, such provision for the reasons hereinbefore set forth does not apply.

In my view the International Commercial Arbitration Act and the Commercial Arbitration Act do not effect the matter before me; the subject matter of the action commenced by Deco which includes damages for misrepresentation (fraudulent or otherwise), breach of contract, inherently defective equipment and negligent performance of contract are not covered by an arbitration clause; the arbitration clause found in ECE 188 is not part of the contract between the parties; and the action commenced by Deco should not be stayed.

Turning to the other grounds in the Notice of Motion:

SERVICE WAS NOT EFFECTED PURSUANT TO RULE 17.05(1) OF THE RULES OF CIVIL PROCEDURE.

This ground appears in the original Notice of Motion and is based on information and belief. (See paragraph 2 of Alexander Sennecke the Toronto Solicitor that he was informed by the German Solicitor for the defendant that the Statement of Claim was delivered to the German Solicitors's office and that to the best of his knowledge and belief it was never served on the defendant). This ground was not proceeded with by GPA's counsel during submissions. This is not surprising having regard to paragraph 3 of the affidavit of Stefan Proniuk and the exhibit being an affidavit of service on the defendant attached thereto.

ONTARIO IS NOT A CONVENIENT FORUM

Acccording to the affidavit of Mr. Sennecke, the matter is complex. It would appear that this is common ground between the parties. Further, according to such affidavit, the following witnesses will or may be called:

Witness	Location
(i) Someone from Marada	Delaware, U.S.A.
(ii) Someone from Aida Engineering Inc.	Westminister, Maryland U.S.A.
(iii) Windsor Tool and Die	Windsor, Ontario
(iv) 6 employees of Defendant	Karlsrule, Fed. Rep. of Germany

According to the affidavit of Mr. Proniuk the number of witnesses the plaintiff may call (setting out the names which Mr. Sennecke does not) are 9 from Ontario (including one from Windsor Tool and Die) a witness from Aida Engineering (Chicago Ill. U.S.A. and not Westminister Maryland) and one from Montezuma Iowa.

This ground was not strenuously argued by GPA's counsel. What was strenuously argued was whether the arbitration clause and the proper law of the contract as set forth in ECE 188 applied. If it did then aside from the Court staying the action, the Court on the bases of Athens Equipment v. Wilhelm Layher Gmbh (1986) 53 O.R. (2d) 435 would set aside service ex juris. However that case is clearly distinguishable because I have found such clauses in ECE conditions do not apply. The plaintiff has shown that the action falls within rule for service out of the jurisdiction and more specifically R. 17.02(f)(iv) a breach of the contract has been committed in Ontario even though the breach was preceded or accompanied by a breach out of Ontario and R. 17.02(h) in respect of damage sustained in Ontario arising from a tort or breach wherever committed. The onus is on the defendant by showing under Rule 17.06(2) that Ontario is not a convenient forum.

The defendant has failed to show that the dispute is governed by what is contained in ECE 188. As for the witnesses who may be called, if one were to only count the numbers it is clear that the convenience is in favour of the plaintiff viz. 6 European witnesses as against 9 Ontario witnesses and 2 American witnesses whose residences are closer to Toronto than Europe. As for the question of the applicable law, having regard to the test set out in Imperial life v. Colmenares 62 D.L.R. (2d) 138 at 143 and 144 and the factors therein set forth, it appears to me that a contract having as its subject matter a transfer system designed for, delivered to, installed at and put into operation in a plant in Toronto, and the defendant's forces attending in Ontario in that regard, has its closest and most substantial connection with Toronto and thus the law that should apply is the Law of Ontario.

It is my view that Ontario is a convenient forum for the hearing of the action.

Accordingly the Motion is dismissed with costs to Deco.

MANDEL D.C.J.