Compania Maritima Villa Nova S.A. c. *Northern Sales Co.*

Federal Court of Canada - Court of Appeal
Heald, Mahoney and Stone JJ.

November 20, 1991.

Counsel:

Morse Silden and Mathew Bernard Nepon, for appellant (defendant).
Peter F.M. Jones, for respondent (plaintiff).
Lewis E. Levy, for intervenor.

Solicitors:

Kushner, Gordon & Silden, Winnipeg, for appellant (defendant).
Paterson, MacDougall, Toronto, for respondent (plaintiff).
Deputy Attorney General of Canada, for intervenor.

¶ 1 STONE J.:— This is an appeal from an order of the Trial Division [(1989), 29 F.T.R. 136] made on June 12, 1989, responding to certain questions posed by that Division by order of February 1, 1989, made pursuant to Rule 474 of the Federal Court Rules [C.R.C., c. 663 (as am. by SOR/79-57, s. 14)], in response to a request for directions for the determination of certain points of law raised in the pleadings.

¶ 2 The issues in this appeal centre on the enactment of the United Nations Foreign Arbitral Awards Convention Act [S.C. 1986, c. 21], (the "Act"), a federal statute, which was assented to June 17, 1986, and was proclaimed in force August 10, 1986. Scheduled to and approved in section 3 of the Act is the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (the "Convention") which was adopted by the United Nations Conference on an International Commercial Arbitration at New York June 10, 1958. Canada acceded to that Convention May 12, 1986. We were told that uniform legislation has been enacted by all of the provinces of Canada as well as by the Yukon and Northwest Territories for implementation of the Convention. In the Province of Manitoba, the implementing legislation has taken the form of The International Commercial Arbitration Act, S.M. 1986-87, c. 32, C.C.S.M., C151.

¶ 3 By subsection 4(2) of the Act, the Convention is to apply to "arbitral awards and arbitration agreements whether made before or after the coming into force of this Act".

¶ 4 The appellant company, which carries on business as a buyer, seller and supplier of grains, entered into a charterparty agreement on January 17, 1978, with the respondent as owner of the vessel Grecian Isles, for carriage of a cargo of grain from the port of Vancouver to the port of Bombay, India. Clauses 10 and 17 of the charterparty are relevant. They read:

10. "CENTROCON" ARBITRATION CLAUSE

> All disputes from time to time arising out of this contract shall, unless the parties agree forthwith on a single Arbitrator, be referred to the final arbitrament of two Arbitrators carrying on business in London who shall be members of the Baltic and engaged in the Shipping and/or Grain Trades, one to be appointed by each of the parties, with power to such Arbitrators to appoint an Umpire. Any claim must be made in writing and Claimant's Arbitrator appointed within 9 (nine) months of final discharge and where this provision is not complied with the claim shall be deemed to be waived and absolutely barred. No award shall be questioned or invalidated on the ground that any of the Arbitrators is not qualified as above, unless objection to his acting be taken before the award is made.

...

17. Demurrage and/or despatch at loading port to be settled between Owners and Charterers. Demurrage and/or despatch at discharging port to be settled Between Owners and Receivers. Charterers will remain responsible for settlement of demurrage but in any case such settlement to be effected not later than sixty days from completion of discharge, provided demurrage calculations have been agreed by all parties.

¶ 5 The Motions Judge, Strayer J., at page 138, set out the following additional facts:

> The defendant states that discharge of the cargo was completed on May 20, 1978, and that, in accordance with paragraph 17 as quoted above, any claim for demurrage which the plaintiff might have had against the defendant charterer would have arisen on July 20, 1978, sixty days after completion of discharge of cargo. It is apparent that the defendant disputed its liability to pay demurrage. The parties do not allege in their pleadings, nor did they indicate in court any agreement, as to when this dispute was referred to arbitration. They do, however, agree that it was so referred, that a hearing took place in London, England on May 13, 1985, at which the plaintiff was represented but at which the defendant made only a written submission, and that the award was released by the arbitrators on May 24, 1985. The claim presented by the plaintiff owner for demurrage was in the amount of (U.S.) $150,392.25. The arbitrators awarded the owner (U.S.) $53,168.40 together with interest and costs.

¶ 6 The action was instituted in the Trial Division on May 19, 1987, for enforcement of this arbitral award. The pleadings in that action gave rise to the points of law which were formulated as questions by the order of February 1, 1989, being namely:

(a) [I]s the Arbitration Award ("the Award") referred to in paragraph 5 of the statement of claim herein enforceable or maintainable in Canada under the provisions of the United Nations Foreign Arbitral Award[s] [Convention] Act, Stat. Canada 1986, c. 21?

(b) [C]an the Award be enforced or maintained in Canada if the plaintiff's original cause of action is statute barred under the laws of England?

(c) [C]an the Award be enforced or maintained in Canada if the plaintiff has failed to enforce its claim for demurrage under the Charter Party ("the Charter Party") dated the 17th day of January, 1978 against the receiver of the goods carried on board the Grecian Isle[s]?

(d) [D]id the Plaintiff's failure to enforce its claim for demurrage under the Charter Party against the receiver of the goods carried on board the Grecian Isle[s] deprive the arbitrators of jurisdiction?

¶ 7 After discussing the respective positions of the parties and expressing his views thereon, Strayer J. answered these four questions at pages 143-144 as follows:

(a) The award is enforceable in Canada and in this Court pursuant to the provisions of the United Nations Foreign Arbitral Award Act;

(b) the enforceability of the award in Canada would not be affected by the fact that the plaintiff's original cause of action was statute-barred under the laws of England when action was commenced in Canada for enforcement, provided that it would be open to a Canadian court to refuse recognition or enforcement of the award if the defendant provides proof that the arbitration was commenced (as defined in the U.K. Limitation Act, 1980) in England after the expiration of the relevant limitation period as defined by English law, and that the defendant pleaded or raised the limitation defence before the arbitrators;

(c) the award can be enforced and maintained in Canada notwithstanding the plaintiff's failure to enforce its claim for demurrage against the receiver; and

(d) the plaintiff's failure to enforce its claim for demurrage against the receiver did not deprive the arbitrators of jurisdiction.

¶ 8 After this appeal was launched, the appellant gave notice of the following constitutional question pursuant to Rule 1101 of the Federal Court Rules:

> Is the United Nations Foreign Arbitral Awards Convention Act, S.C. 1986, c. 21 ultra vires The Parliament of Canada by reason of its violation of Sections 92(13), 92(14), 92(16) of the Constitution Act, 1867?

This notice was served on the Attorney General of Canada and on the Attorney General of Manitoba. It led the Attorney General of Canada, with leave of the Court, to intervene in this appeal, to file a memorandum of facts and law and to appear by counsel. The Attorney General of Manitoba has not intervened.

¶ 9 In its written argument, the appellant attacks all four answers of the learned Motions Judge but restricted its oral submissions to answers (a) and (b) without abandoning its attacks on answers (c) and (d). I am able to deal with these two attacks

shortly. Article V 1(c) and (d) of the Convention were in question in relation to answers (c) and (d). They read:

Article V

> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> ...
>
> (c) The award deals with a difference 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, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
>
> (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

¶ 10 The learned Motions Judge stated, at pages 142-143:

> I will deal with these questions together because I believe they involve essentially the same issue. Like counsel for the defendant, I believe the permissible grounds to refuse recognition and enforcement must be found in Article V of the Convention. He relies on paragraph 1(c) of that article with respect to both of these questions, arguing in effect that if, as he alleges, the plaintiff owner should have settled the demurrage with the receiver as stated in paragraph 17 of the charterparty, then the determination by the arbitrators partially in favour of the plaintiff must not have given effect to the requirements of paragraph 17 and therefore, in the words of paragraph V 1(c) of the Convention
>
> > "[t]he award deals with a difference 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, ..."
>
> I am unable to conclude that if the plaintiff failed to enforce its claim for demurrage against the receiver paragraph V 1(c) would prevent the enforceability of the award. It appears to me that the "difference" contemplated by the submission to arbitration was the contested liability of the defendant to pay demurrage by virtue of paragraph 17 of the charterparty. What the defendant complains of instead is that a

> particular defence which it feels it had was not adequately taken into account by the arbitrators in the settlement of the "difference" which was referred to them. No authority has been cited to me, nor does it appear reasonable to conclude, that the failure, real or hypothetical, of the plaintiff to enforce its claim against the receiver precluded any determination by the arbitrators that the defendant was liable for a portion of the plaintiff's claim. It appears to me that the arbitrators decided the very "difference", namely the existence and extent of the defendant's liability under the charterparty for demurrage, which was referred to them by the parties. It was for them to decide what effect if any the plaintiff's failure to settle demurrage should have on the defendant's liability.
>
> For the same reason I am unable to conclude that this alleged failure of the plaintiff to enforce demurrage against the receiver deprived the arbitrators of any jurisdiction pursuant to the reference. The jurisdictional argument must also be justified, if at all, under Article V 1(c) of the Convention on the basis that the determination of liability of the defendant notwithstanding the plaintiff's failure was a matter not referred to the arbitrators in the submission. The terms of the submission must be taken to have been in accordance with paragraph 10 of the charterparty, quoted above, which was to govern "all disputes from time to time arising out of this contract". The contested liability of the defendant for demurrage was surely the "dispute" referred to the arbitrators: that was the very matter they were authorized to decide and did decide. The defendant's real complaint is that the arbitrators did not take into account a particular defence which it feels it had. That is not a basis for refusing recognition within the language of Article V of the Convention.

I am in respectful agreement with these views.

¶ 11 I turn now to the issues which arise out of answers (a) and (b). The issue in relation to the first of these answers is the constitutional question which I shall repeat here for the sake of convenience:

> Is the United Nations Foreign Arbitral Awards Convention Act, S.C. 1986, c. 21 ultra vires. The Parliament of Canada by reason of its violation of Sections 92(13), 92(14), 92(16) of the Constitution Act, 1867?

Although this question was not before the Trial Division, some argument was addressed to the learned Motions Judge as to the competence of Parliament to adopt the Act. The views he expressed were in the context of Article XI of the Convention, which he referred to as a "federal state clause". That Article reads:

Article XI

> In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

The learned Judge expressed himself as follows on the question of Parliament's competence, at page 140:

> Section 6 of the 1986 Act says that an application to enforce awards pursuant to the Convention "may be made to the Federal Court". As for the jurisdiction of Parliament to so provide, consistently with the "federal state clause" of the Convention Parliament must be taken to have legislated those aspects of the Convention which are within its jurisdiction. "Navigation and shipping" is a head of jurisdiction assigned to Parliament. There is ample jurisprudence to the effect that maritime law in a very broad sense is within that assignment of legislative power and that such laws can be considered "laws of Canada" within the meaning of the Constitution Act, 1867. The settlement of disputes over charterparties must be taken to be within "navigation and shipping".
>
> This means that Parliament had jurisdiction to give the Convention the force of law in areas within its authority such as "navigation and shipping", and that the Federal Court has jurisdiction because there has been a specific statutory grant of authority to it by Parliament to decide claims arising out of a law of Canada. [Footnote omitted.]

¶ 12 The vires of the Act is brought into question because it purports to deal with the enforcement of "foreign arbitral awards" simpliciter, not being limited in its scope to awards falling under heads of federal legislative competence. Section 6 provides the legal mechanism by which enforcement may be achieved. It reads:

> 6. For the purpose of seeking recognition and enforcement of an arbitral award pursuant to the Convention, application may be made to the Federal Court or any superior, district or county court.

¶ 13 The appellant advances three arguments for declaring the Act to be ultra vires. First, as a foreign arbitral award originates in contract its enforcement in Canada falls

within provincial competence under one or more of subsections 92(13), (14) or (16) of the Constitution Act, 1867 [30 & 31 Vict., c. 3 (U.K.) (as am. by Canada Act 1982, 1982, c. 11 (U.K.), Schedule to the Constitution Act, 1982, Item 1) [R.S.C., 1985, Appendix II, No. 5]] as a matter of: "Property and Civil Rights", "The Administration of Justice" or "a merely local or private Nature". Secondly, and in the alternative, the Act is ultra vires because it is overly broad in that it is not limited to matters falling within federal competence. Because of this, it runs afoul of the decision of the Privy Council in Attorney-General for Canada v. Attorney-General for Ontario [Labour Conventions Case], [1937] A.C. 326 (P.C.). Thirdly, and as a corollary to this last argument, while the Parliament of Canada may have legislative competence to enact laws for the recognition and enforcement of foreign arbitral awards, it may only do so by appropriate language that restricts the cause of action to enforcement of awards arising out of matters within federal legislative competence. Such language, it is said, is absent from the Act.

¶ 14 As for the first point, both the respondent and the intervenor submit that not all contracts fall within provincial competence although many clearly do so. Other contracts are governed by federal law and the Trial Division may be invested by Parliament with jurisdiction in relation to them. Section 6, they say, is to be read as creating a federal cause of action for the recognition and enforcement of foreign arbitral awards falling within federal legislative competence. This becomes all the more evident, it is contended, when it is seen that the provincial and territorial legislatures at the request of the Government of Canada have enacted corresponding legislation for the recognition and enforcement of awards falling within their respective fields of competence. What they are saying, in effect, is that by adopting the Act Parliament has done no more than honour Canada's federal legislative obligation in Article XI of the Convention.

¶ 15 I am persuaded by these submissions. In my view, Parliament did possess the power to adopt the Act as valid federal legislation for the recognition and enforcement in Canada of foreign arbitral awards having a federal character in a constitutional sense. Questions will no doubt arise in individual cases as to whether a particular award is one whose enforcement falls within the proper ambit of the legislation.

¶ 16 The second attack upon the vires of the Act is that it is overly broad given the generality of section 6 and the Convention itself which is for the enforcement of literally any "foreign arbitral award". Section 6, as the appellant points out, is not expressly limited to the recognition and enforcement of awards falling within the federal legislative sphere. The result, it is said, is that Parliament has not done that which the Privy Council required of it in the Labour Conventions Case, supra, where Lord Atkin stated, at page 352:

> It follows from what has been said that no further legislative competence is obtained by the Dominion from its accession to international status, and the consequent increase in the scope of its executive functions. It is true, as pointed out in the judgment of the Chief Justice, that as the executive is now clothed with the powers of making treaties so the Parliament of Canada, to which the executive is responsible, has imposed upon it responsibilities in connection with such treaties, for if it were to disapprove of them they would either not

> be made or the Ministers would meet their constitutional fate. But this is true of all executive functions in their relation to Parliament. There is no existing constitutional ground for stretching the competence of the Dominion Parliament so that it becomes enlarged to keep pace with enlarged functions of the Dominion executive. If the new functions affect the classes of subjects enumerated in s. 92 legislation to support the new functions is in the competence of the Provincial Legislatures only. If they do not, the competence of the Dominion Legislature is declared by s. 91 and existed ab origine. In other words, the Dominion cannot, merely by making promises to foreign countries, clothe itself with legislative authority inconsistent with the constitution which gave it birth.

The appellant contends that limiting words to the effect that the Act "shall only apply so far as this Parliament has jurisdiction to so enact", were required in order to save it from being declared ultra vires.

¶ 17 In my opinion, the Act should not be regarded as overly broad. The Supreme Court of Canada has made it clear that legislation which may, arguably, be ultra vires because of its generality is not to be automatically so viewed. In Di Iorio et al. v. Warden of the Montreal Jail, [1978] 1 S.C.R. 152, Dickson J. (as he then was) stated, at page 200:

> It is a well-recognized rule of construction that if words in a statute are fairly susceptible of two constructions of which one will result in the statute being intra vires and the other will have the contrary result the former is to be adopted: McKay et al. v. The Queen ([1965] S.C.R. 798), at p. 804. We should not lightly decide that enabling legislation is beyond the constitutional competence of the enacting body.

This same principle was re-stated by Beetz J. in The Canadian Broadcasting Corporation et al. v. Quebec Police Commission, [1979] 2 S.C.R. 618, at p. 641. His words are most instructive. He said:

> Many statutes are drafted in terms so general that it is possible to give them a meaning which makes them ultra vires. It is then necessary to interpret them in light of the Constitution, because it must be assumed the legislator did not intend to exceed his authority:
> There is a presumptio juris as to the existence of the bona fide intention of a legislative body to confine itself to its own sphere and a presumption of similar nature that general words in a statute are not intended to extend its operation beyond the territorial authority of the Legislature.
> (Fauteux J. -- as he then was -- in Reference re The Farm Products Marketing Act ([1957] S.C.R. 198), at p. 255.)
> In order to give effect to this principle a court may, in keeping with the Constitution, limit the apparently general scope of an enactment, even when the constitutionality of the provision has not been disputed and the Attorney General has not been impleaded. That is what this Court did in McKay v. The Queen ([1965] S.C.R. 798).

I am satisfied that this principle applies to the case at bar. Express language for limiting the operation of the Act was not necessary in the circumstances.

¶ 18 The appellant does not seriously contend that Parliament cannot provide by legislation for the enforcement of an award of the kind made May 24, 1985. I myself have no difficulty in this regard. Nevertheless, I should add here a few words on why it is that I am of this view. That award, as we have seen, was made pursuant to a clause in a charterparty agreement. The parties chose to provide in that agreement for resolution of disputes by binding arbitration in London pursuant to clause 10. A submission to arbitration was made by the respondent when the claim for demurrage was not settled within the 60-day time limit provided for in clause 17.

¶ 19 It is important to bear in mind the nature of an arbitration award at common law. In Doleman & Sons v. Ossett Corporation, [1912] 3 K.B. 257 (C.A.), at page 267, Fletcher Moulton L.J., had this to say in that connection:

> A complainant by taking out a writ can cause his opponent to be ordered to appear before the Court, and the parties must accept its decision. But it has long been a practice in certain classes of contracts for the contracting parties to name a private tribunal to whom contractually they give authority to settle disputes under that particular contract. If a dispute has been brought before the private tribunal thus constituted, and an award made, that award is binding on both parties and concludes them as to that dispute. In effect the parties have agreed that the rights of the parties in respect of that dispute shall be as stated in the award, so that in essence it partakes of the character of "accord and satisfaction by substituted agreement." The original rights of the parties have disappeared, and their place has been taken by their rights under the award.

¶ 20 Such an award is not, of course, self-executing. Clause 17 of the charterparty provides no mechanism for collecting the award. On the other hand, the courts have had no difficulty in finding that parties to an arbitration submission impliedly agree to honour an award and that this agreement affords a foundation for enforcing the award in the ordinary courts. The award coupled with the implied promise to pay it creates a fresh cause of action. This was recognized in Bloemen (F.J.) Pty. Ltd. v. City of Gold Coast Council, [1973] A.C. 115 (P.C.), where Lord Pearson stated, at page 126:

> It is true -- as the cases above referred to show -- that when an arbitrator fixes a sum to be paid by one party to the submission by way of damages for breach of contract the award creates a fresh cause of action superseding that arising out of the breach.

The same view was expressed in Agromet Motoimport v. Maulden Engineering Co. (Beds.) Ltd., [1985] 1 W.L.R. 762 (Q.B.D.), Otton J. discussed the effect of an arbitral award in the light of the decided cases, and then added, at page 772:

> In my judgment, the action on the award and the action to enforce an award is an independent cause of action. It is distinct from and in no

> way entangled with the original contract or the breach occurring from it, as reflected in the award. I have come to the conclusion that there is nothing repugnant in implying such a term into the contract.... In my view, therefore, there is such an implied term that an award will be honoured when it is made. That implied term is, of course, in the original agreement ... and the implied term continues, that if the award is not honoured, there is then a breach of that implied term....

See also Mustill and Boyd, The Law and Practice of Commercial Arbitration in England (London, 1982), at pages 568-569; Walton and Victoria, Russell on the Law of Arbitration, 20th ed., (London, 1982), at pages 357-358; 382-385.

¶ 21 It is well established that Parliament possesses broad power in respect of "Navigation and Shipping" under subsection 91(10) of the Constitution Act, 1867: Whitbread v. Walley, [1990] 3 S.C.R. 1273. As was pointed out by La Forest J. in that case, when a court is called upon to determine whether impugned provisions are in pith and substance legislation in respect of the body of uniform federal law known as "Canadian maritime law" it is to have regard to the decided cases dealing with the scope and content of the Trial Division's jurisdiction in respect of maritime and admiralty matters. In the course of his judgment, La Forest J. was at pains to point out that such cases have a bearing on the scope of Parliament's legislative jurisdiction over navigation and shipping. At pages 1289-1290 he stated:

> On the contrary, it must be remembered that the inquiry as to the validity and scope of the jurisdiction over maritime and admiralty matters granted to the Federal Court by s. 22 of the Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, has been conducted, in accordance with this Court's decisions in Quebec North Shore Paper Co. v. Canadian Pacific Ltd., [1977] 2 S.C.R. 1054, and McNamara Construction (Western) Ltd. v. The Queen, [1977] 2 S.C.R. 654, with reference to s. 101 of what is now the Constitution Act, 1867. That provision provides for the establishment by Parliament of a "General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada". As pointed out by Laskin C.J. in Quebec North Shore Paper Co. and McNamara (at pp. 1065-66 and p. 658 respectively), these words mean that a grant of jurisdiction to the Federal Court (or to any other court created under s. 101) will only be valid and effective if some "applicable and existing federal law" is necessary to its exercise. Put the other way round, s. 101 requires that any jurisdiction granted to the Federal Court be supported or nourished by an existing body of law that is subject to Parliament's legislative jurisdiction.
>
> In the case of the Federal Court's jurisdiction over maritime and admiralty matters, that body of law is referred to in s. 22 of the Federal Court Act as "Canadian maritime law". As already explained, this Court has ruled that such a body of law does exist. It has also found that it is federal law that comes within Parliament's power to legislate in respect of navigation and shipping under s. 91(10) of the Constitution Act, 1867: see ITO, at p. 777. It follows that an inquiry as to the scope and substantive content of the Federal Court's jurisdiction over Canadian

> maritime law is simultaneously an inquiry as to the scope and content of an important aspect of Parliament's exclusive jurisdiction over navigation and shipping.

¶ 22 The definition of "Canadian maritime law" in section 2 of the Federal Court Act [R.S.C., 1985, c. F-7] reads:

2. ...

> "Canadian maritime law" means the law that was administered by the Exchequer Court of Canada on its Admiralty side by virtue of the Admiralty Act, chapter A-1 of the Revised Statutes of Canada, 1970, or any other statute, or that would have been so administered if that Court had had, on its Admiralty side, unlimited jurisdiction in relation to maritime and admiralty matters, as that law has been altered by this Act or any other Act of Parliament.

Its content has been the subject of several recent decisions of the Supreme Court of Canada: Tropwood A.G. v. Sivaco Wire & Nail Co. et al., [1979] 2 S.C.R. 157; ITO--International Terminal Operators Ltd. v. Miida Electronics Inc., [1986] 1 S.C.R. 752; The Monk Corporation v. Island Fertilizer Limited (1991), 80 D.L.R. (4th) 58. In Monk, supra, Iacobucci J. speaking for a majority, summarized the reasons and conclusions of McIntyre J. in ITO, supra, insofar as they are relevant to the present discussion, at page 91 as follows:

> (1) The second part of the s. 2 definition of Canadian maritime law provides an unlimited jurisdiction in relation to maritime and admiralty matters which should not be historically confined or frozen, and "maritime" and "admiralty" should be interpreted within the modern context of commerce and shipping.
> (2) Canadian maritime law is limited only by the constitutional division of powers in the Constitution Act, 1867, such that, in determining whether or not any particular case involves a maritime or admiralty matter, encroachment on what is in pith and substance a matter falling within section 92 of the Constitution Act is to be avoided.
> (3) The test for determining whether the subject matter under consideration is within maritime law requires a finding that the subject matter is so integrally connected to maritime matters as to be legitimate Canadian maritime law within federal competence.

¶ 23 The maritime and admiralty law of Canada, though in many respects traditional and of ancient origins, is not to be cribbed and confined to the law which was administered by the Exchequer Court of Canada on its Admiralty side and which is recognized in the first part of the "Canadian maritime law" definition but, as the second part of that definition indicates, it has potential for growth albeit within acknowledged constitutional constraints. This was recognized in ITO, supra, and was the subject of the following additional observations of Iacobucci J. in Monk, supra, at pages 800-801:

> Finally, I would say that the claims of Monk are maritime in character and are not in any way an encroachment of what is in pith and substance a matter falling within s. 92 of the Constitution Act, 1867....
>
> I should also like to add that the approach I have taken in this matter corresponds with McIntyre J.'s urging that the terms "maritime" and "admiralty" should be interpreted within the modern context of commerce and shipping and should not be static or frozen. Such terms should rather be capable of adjusting to evolving circumstances unencumbered by rigid doctrinal categorization and historical straightjackets.

It thus seems to me to be entirely proper for a court, faced with determining whether an award may be recognized and enforced in accordance with the Act, to have regard to its origin in a charterparty agreement, an undoubted maritime contract, and to the underlying claim for demurrage, an undoubted maritime claim, for it is that agreement and that claim which allows for the award to be made and it is the existence of the award which opens the way to its enforcement by legal action.

¶ 24 In my opinion, the creation of a cause of action for the recognition and enforcement of the foreign arbitral award in issue, arising as it does from a breach of the charterparty agreement for payment of demurrage, is a maritime matter or is so integrally connected to a maritime matter as to be legitimate Canadian maritime law. The award derives indirectly from the charterparty, and amounts, in reality, to a finding of validity and proper quantification of the demurrage claim. If that agreement had not called for submission to arbitration, the respondent would have been entitled to sue on the original claim in the Trial Division which, as we shall see, has been invested with express jurisdiction over claims of that kind. So too would the appellant be entitled to sue in the Trial Division were the shoe on the other foot, in respect of, say, a claim for despatch. Indeed, an arbitration clause per se does not oust the jurisdiction of the Trial Division although it does provide a basis, in the interests of justice, for staying an action brought in contravention of it: Seapearl (The Ship M/V) v. Seven Seas Dry Cargo Shipping Corporation of Santiago, Chile, [1983] 2 F.C. 161 (C.A.). In my view, enforcement of the present award falls within federal legislative competence over navigation and shipping.

¶ 25 I am similarly of the view that Parliament had competence to invest the Trial Division with jurisdiction to entertain this cause of action. In Eurobulk Ltd. v. Wood Preservation Industries, [1980] F.C. 245 (T.D.), it was held that jurisdiction existed in the Trial Division to enforce a foreign arbitral award made pursuant to a charterparty agreement. See also Atlantic Lines & Navigation Co. Inc. v. Didymi (The), [1988] 1 F.C. 3 (C.A.). In ITO, supra, the Supreme Court of Canada summarized the three requirements for the existence of jurisdiction in the Trial Division of this Court. Speaking for the Court, McIntyre J. stated, at page 766, that to support such jurisdiction,

1. There must be a statutory grant of jurisdiction by the federal Parliament.
2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.

3. The law on which the case is based must be "a law of Canada" as that phrase is used in s. 101 of the Constitution Act, 1867.

¶ 26 These requirements, in my view, are satisfied in the case at bar. The statutory grant of jurisdiction by the Parliament of Canada is found in section 6 of the Act and in paragraph 22(2)(i) of the Federal Court Act, which reads:

22. ...

(2) Without limiting the generality of subsection (1), it is hereby declared for greater certainty that the Trial Division has jurisdiction with respect to any one or more of the following:

...

(i) any claim arising out of any agreement relating to the carriage of goods in or on a ship or to the use or hire of a ship whether by charterparty or otherwise;

The existing body of federal law essential to the disposition of the case and nourishing the jurisdiction is found in Canadian maritime law. That law is "a law of Canada". To repeat, I have no doubt that the kind of award with which we are here concerned falls within "Canadian maritime law" as this term is now understood, and that such law rests on the legislative competence of Parliament under section 91(10) of the Constitution Act, 1867.

¶ 27 In my opinion, the constitutional question should be answered in the negative.

¶ 28 The final issue arises from the learned Motion Judge's answer to question (b). The appellant contends that it was an error for the Judge to have held that the time limitation for bringing the action in the Trial Division is not governed by the laws of England. Alternatively, it is argued that the action is time barred by the laws of Canada.

¶ 29 Section 7 of the Limitations Act 1980, 1980, c. 58 (U.K.) is relied on by the appellant as laying down the applicable limitation period. It reads:

7. An action to enforce an award, where the submission is not by an instrument under seal, shall not be brought after the expiration of six years from the date on which the cause of action accrued.

The learned Motions Judge was of the opinion that Canadian law rather than English law governs. At page 8 of his reasons, he stated:

It is well-established in both Canada and English law that limitation statutes of this nature are procedural in character and the relevant provisions are those of the lex fori. Thus Canadian law governs the matter of the limitation period applicable to an action in a Canadian court to enforce an award. [Footnotes omitted.]

¶ 30 I respectfully agree with this view. The foreign arbitral award, as I have already stated, gave rise to a fresh cause of action which may be asserted in the Trial Division. Even if the U.K. statute applied, it provides a limitation for bringing an action to enforce an award. But no such award can exist until after it is made. It is only then that it may be enforced in the courts.

¶ 31 Counsel submits, in the alternative, that the matter of limitation is governed by the provisions of subsection 39(2) of the Federal Court Act, which reads:

39. ...

> (2) A proceeding in the Court in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.

In my view, the "cause of action arose" on the date of the award, May 24, 1985, at the earliest. The action in the Trial Division was instituted well within the six years limitation period prescribed by the subsection.

¶ 32 In summary, I would answer the constitutional question in the negative, confirm the answers given by the order of the Trial Division made June 12, 1989, and dismiss this appeal with costs to the respondent. As the intervenor does not seek costs, none should be allowed.

HEALD J.:— I agree.

MAHONEY J.:— I agree.