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*Mar. 12, 13
Dec. 16

NATIONAL GYPSUM COMPANY INC. (*Defendant*) ..... APPELLANT;

AND

NORTHERN SALES LIMITED (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, QUEBEC ADMIRALTY DISTRICT

Shipping—Charterparty—Arbitration clause in case of dispute—Motion to dismiss action on charterparty or stay proceedings—Jurisdiction of Exchequer Court to entertain action—Matter of substance or procedure—Whether arbitration clause void as against public policy—Whether arbitration proceedings in foreign country a bar to action in Canada—Admiralty Act, R.S.C. 1952, c. 1—Code of Civil Procedure, art. 94(3).

By a charterparty signed at New York, the defendant undertook that its ship would proceed to Montreal and there load a cargo of wheat. The vessel failed to do so, and the plaintiff, alleging that as a result it was unable to ship wheat it had contracted to deliver and was obliged to pay damages to the purchaser, sued for damages for breach of contract. The charterparty provided for the settlement of any dispute by arbitration at New York. The defendant moved before the Exchequer Court, Quebec Admiralty District, for the dismissal of the action on the main ground that the Court had no jurisdiction, or alternatively, for a stay of proceedings because of *lis pendens* in New York, where the Courts of that State had ordered the plaintiff to appoint an arbitrator. The

*PRESENT: Taschereau, Cartwright, Fauteux, Abbott and Ritchie JJ.

trial judge rejected the motion as unfounded. The defendant appealed to this Court.

Held (Cartwright and Ritchie JJ. dissenting): The appeal should be dismissed.

Per Taschereau C.J. and Fauteux and Abbott JJ.: Without the presence of the arbitration clause in the charterparty, the Court below had jurisdiction, both *ratione materiae* and *ratione loci,* to hear and determine this case by virtue of ss. 18(3)(*a*)(i) and 20(1)(*e*) of *The Admiralty Act,* R.S.C. 1952, c. 1, and Rule 20(*b*) of the General Rules and Orders in Admiralty. That jurisdiction could not be interfered with by the arbitration clause. The object of such a clause is not to modify the rights of the parties but to enforce them and how a right might be enforced is a matter of procedure. Procedure is governed by the *lex fori* which, in the present case, was the procedure in force in the Superior Court of the Province of Quebec, in the absence of any provision relating to such agreements in the Admiralty Rules or in the General Rules and Orders of the Exchequer Court. Under art. 94(3) of the *Code of Civil Procedure,* such a clause, even if valid, was ineffective to preclude the institution of this action before the Court in the territorial jurisdiction of which the whole alleged cause of action had arisen. The Court below being properly seized with this action, its jurisdiction could not be interfered with by the arbitration clause and the Court could not be asked to enforce an agreement which was invalid as being against public policy under the *lex fori, i.e.,* the law of Quebec. *Vinette Construction Ltée v. Dobrinsky,* [1962] Que. Q.B. 62. The clause, being vitiated by absolute nullity, could not be acted upon in the Court below to oust its jurisdiction, and any decision reached by a Board of arbitration in New York would not be *res judicata* in the Province.

Per Cartwright J., *dissenting:* The substantive law applied by the Exchequer Court on its Admiralty side—and which is the same throughout Canada—is the English Maritime Law, and by virtue of s. 18(1) of *The Admiralty Act,* R.S.C. 1952, c. 1, its jurisdiction is the same as "the Admiralty jurisdiction now possessed by the High Court of Justice in England". The question as to whether an arbitration clause, contained in a contract, is enforceable is one of substance or of procedure, falls to be decided, pursuant to s. 18(1) of *The Admiralty Act,* in like manner as would be done by the High Court of Justice in England in the exercise of its Admiralty jurisdiction. It is settled by the decision of the House of Lords in *Hamlyn and Co. v. Talisker Distillery,* [1894] A.C. 202, that this is a matter of substance and not procedural. In the case at bar, it was the intention of the parties that this clause was to be interpreted and governed by the law of the United States. In the absence of evidence to the contrary it must be assumed that the substantive law of the United States is the same as that of the Exchequer Court on its Admiralty side. There was no doubt that by the law administered in the High Court of Justice in England the clause would be found to be valid and enforceable. The material filed in this case supported the view that by the law of the United States the arbitration clause was also valid and enforceable. This was a case in which the proper course was to stay the procedings in the Court below. This will give effect to the expressed intention of the parties and is favoured by every consideration of convenience.

Per Ritchie J., *dissenting:* The trial judge had jurisdiction both *ratione materiae* and territorially over the matter by virtue of ss. 18(3)(*a*)(i)

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and 20(1)(*e*) of *The Admiralty Act*, R.S.C. 1952, c. 1, and s. 22(1)(*a*)(xii)(1) of the Schedule to the Act. Under the law of Quebec such an arbitration clause is null as being against public policy and is unenforceable in the Courts of that Province. However, although the contract was to be performed in part in Quebec where the breach was alleged to have occurred, the Court in which the action was brought was a statutory Court whose jurisdiction by virtue of s. 18(1) of *The Admiralty Act* was made coextensive with that "now possessed by the High Court of Justice in England". The substantive law to be applied by the Exchequer Court on its Admiralty side is required to be the same in the various Admiralty District Courts. Having regard, *inter alia,* to the jurisdiction now possessed by the High Court of Justice in England and existing by virtue of the *Arbitration Act,* 1950 (Eng.), c. 26, the clause here in question, whether it be treated as a condition precedent to the right of action or not, was not null and unenforceable. The question of whether or not an agreement is null and void as being against public policy is not one which is determined by the rules regulating practice and procedure in the forum where the action is brought. Since neither the rules of the Admiralty Court nor those of the Exchequer Court contain any reference to proceedings for the enforcement of an arbitration agreement and since such a clause is not recognized in the Province of Quebec, the proceedings for the enforcement of such an agreement in the Quebec Admiralty District Court were to be regulated by the procedure, if any, in force with respect to such matters in Her Majesty's Supreme Court of Judicature in England. This procedure is to be found in *The Arbitration Act,* which, by s. 4(1), gives the Court a discretionary power to stay an action instituted in breach of an arbitration agreement. The defendant was in a position to invoke the provisions of that section. The proper course here was to stay the proceedings.

APPEAL from a judgment of Smith, District Judge for the Quebec Admiralty District[1], dismissing a motion to have plaintiff's action dismissed or proceedings stayed. Appeal dismissed, Cartwright and Ritchie JJ. dissenting.

Roger R. Beaulieu, Q.C., and *Robert A. Hope,* for the defendant, appellant.

L. S. Reycraft, Q.C., for the plaintiff, respondent.

The judgment of Taschereau C.J. and Fauteux and Abbott JJ. was delivered by

FAUTEUX J.:—This is an appeal from a judgment of Smith D.J.A. in the Exchequer Court of Canada, the Quebec Admiralty District[1], rejecting as unfounded appellant's motion demanding the dismissal of respondent's action or alternatively the staying of all proceedings therein.

In its action, respondent alleges that by a charterparty, signed at New York on December 7, 1960, appellant under-

[1] [1963] Ex. C.R. 1.

took that its ship *Lewis R. Sanderson* would proceed with all convenient speed to Montreal and there load a cargo of wheat for carriage to Italy, and that in violation of this undertaking, the said vessel failed to do so in accordance with the terms of the agreement, with the result that respondent was unable to ship wheat it had contracted to deliver and was obliged to pay damages to the purchaser thereof. Respondent concludes that appellant be condemned to pay these damages, plus loss of profits and expenses, for breach of contract.

Appellant's motion for the dismissal of this action or alternatively for the staying of all proceedings therein rests mainly on the contention that owing to the following arbitration clause of the charterparty, the Canadian Court has no jurisdiction in the matter or, if it has any, the proceedings must be stayed because of *lis pendens* in New York:

NEW YORK PRODUCE EXCHANGE ARBITRATION CLAUSE

Should any dispute arise between owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men.

The record shows these facts:— Being requested to pay the above damages and advised that, failing payment, an action for their recovery would be instituted in the Exchequer Court of Canada, Quebec Admiralty District, appellant first asked for delay and eventually replied that according to the pre-cited clause, "the only forum for the determination of respondent's claim was by arbitration in New York city," that it had nominated one P. V. Everett as its arbitrator and that failing respondent to designate its own arbitrator on or before March 2, 1962, appropriate action would be taken. Respondent having abstained from doing so, appellant sought and obtained on March 7, an Order from the United States District Court, Southern District of New York, ordering respondent to show cause, on March 13, why it should not arbitrate. Respondent appeared in the United States District Court under protest and for the sole purpose of vacating the Order and obtaining the dismissal of the proceedings. Its objection to the jurisdiction of the Court was rejected on April 3, and it was ordered to appoint an arbitrator within ten days. Meanwhile, to wit, on March 9,

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respondent procured the issue of the writ of summons in the present action in which appellant appeared under protest. It is my understanding that the proceedings in the U.S. District Court are held in abeyance pending the disposition of the present appeal.

The submissions of the parties, which are generally the same in this Court as in the Court below, may be briefly stated. On behalf of appellant, it is contended that the Court below has no territorial jurisdiction; that the arbitration clause is valid and applicable, in the United States where the contract was executed, to maritime transactions and charterparties and that even if the Court had territorial jurisdiction, the arbitration clause is the law validly binding the parties thereto, in Canada as well as it is in the United States, hence, it is said, the Court below has no jurisdiction at all; that, in any event, the arbitration proceedings commenced in the New York jurisdiction preclude proceedings in Canada. Respondent's contentions, obviously challenged by appellant, are that the cause of action arose in Montreal and that of its nature the claim is one within the jurisdiction of the Exchequer Court of Canada, Quebec Admiralty District; that arbitration agreements and proceedings, as well as rules relating to *lis pendens* are of a procedural nature governed by the *lex fori* which, in the absence of any provision in the General Rules and Orders in Admiralty and of the Exchequer Court of Canada, is the law governing practice and procedure in the Superior Court of the Province of Quebec; that under the *lex fori,* this arbitration clause, admittedly a "clause compromissoire", is invalid as being against public policy, in violation of s. 13 of the *Civil Code* and thus totally ineffective to support appellant's motion.

If one consider the charterparty as if the arbitration clause was absent therefrom, the Court below, i.e., the Exchequer Court of Canada, Quebec Admiralty District, Montreal Registry, has clearly jurisdiction to hear and determine this case. *Ratione materiae,* the claim is in damages and arises out of an agreement relating to use or hire of a ship and, as such, a claim within the jurisdiction of the Court under s. 18, subs. 3(*a*)(i) of *The Admiralty Act,* 1934. This counsel for appellant conceded. His contention that jurisdiction *ratione loci* is lacking rests on the submission that the contract was not one to be performed at Mont-

real and that, even if it was, the alleged breach of the contract did not occur at Montreal; hence the action instituted within the territorial jurisdiction of the Court below and its service authorized to be made and actually made without that jurisdiction are invalid. Appellant's contention is untenable in view of the allegations of the statement of claim which incorporate by reference the charterparty and which, for the purpose of appellant's motion, must be deemed to be admitted. *Sternberg v. Home Lines Inc.*[1] The present action is one *in personam* and is founded on the breach, occurring within the Admiralty District where the action is instituted, of the primary and unseverable obligation which had to be performed in the said district within the period of time agreed upon. In the circumstances, the institution of the action in Montreal and the authorization to serve it and its service in New York are valid under s. 20(1)(*e*) of *The Admiralty Act,* 1934, and Rule 20(*b*) of the General Rules and Orders in Admiralty, respectively. The decision of the House of Lords in *Johnson v. Taylor Bros. and Company Ltd.*[2] does not assist appellant. The facts in that case are essentially different and the law, as stated therein by the House of Lords, supports, as I read it, respondent's contention which was accepted in the Court below.

On the view that, the arbitration clause being excluded from the consideration, the Court below has jurisdiction to hear and determine this case, the next question is whether that jurisdiction can be interfered with by the arbitration clause.

This clause requires no interpretation; it is clear. The parties have stipulated that should any dispute arise between them, they shall not have recourse to the ordinary Courts having, by law, jurisdiction to determine their rights under the charterparty, but undertook that they shall then refer the matter of dispute to three persons at New York who shall be commercial men and of whom the decision shall be final and the award made a rule of law for the purpose of its enforcement. Such an agreement to arbitrate any disputes that may arise pertains, as do agreements to arbitrate pending or impending disputes, to the law of remedies or procedure. The object of the clause is not to modify the rights of the parties under the charterparty but to enforce

[1] [1960] Ex. C.R. 218. [2] [1920] A.C. 144.

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them and how a right might be enforced is a matter of procedure. Procedure is governed by the *lex fori* which, in the present case, in the absence of any provision relating to such agreements in the Admiralty Rules or in the General Rules and Orders of the Exchequer Court, is the procedure in force in the Superior Court of the Province of Quebec according to Admiralty Rule 215 and Exchequer Court Rule 2(1)(*b*). That, under the *Code of Civil Procedure,* such a clause, even if valid, is ineffective to preclude the institution of this action before the Court in the territorial jurisdiction of which the whole alleged cause of action has arisen is settled by art. 94, para. 3, of the *Code of Civil Procedure.* In *Gordon and Gotch (Australasia) Ltd. v. Montreal Australia New Zealand Line Ltd.*[1], where the effect of art. 94 was considered by the Court of Appeal, St-Jacques J., with the concurrence of Létourneau, Bond and Galipeault JJ., said at p. 431:

> La loi a dit, et ce, d'une façon définitive qui ne me paraît pas souffrir de doute: Désormais, les tribunaux de la province, qui ont été institués en vertu de la prérogative royale et des dispositions du Code de procédure civile, ne tiendront aucun compte des «stipulations, conventions ou engagements» qui auraient pour objet de soustraire un litigant à la juridiction des tribunaux qui ont été institués dans cette province.

The clause in the latter case read as follows:

> It is also agreed that in the event of any dispute arising in connection with any claims, such dispute shall be decided by the Courts of the country of such final port of discharge and not by the Courts of any other country;

The Court below being properly seized with this action, its jurisdiction to try the merits of the case cannot be interfered with by the arbitration clause and the Court cannot be asked to enforce it if, as contended for by respondent and held by the Court of first instance, this arbitration agreement is invalid as being against public policy under the *lex fori,* to wit, the law of the Province of Quebec.

Admittedly, this arbitration agreement is, under the law of France and of the Province of Quebec, what is designated as a *clause compromissoire.* The validity of such a clause has given rise to conflicting jurisprudence, both in France and in the Province of Quebec. In France, this conflict was definitely resolved in 1843 when, in *Comp. l'Alliance v. Prunier, la Cour de Cassation* concluded to the invalidity of the clause, (*Sirey 1843.1.562*), except, of course, in mat-

[1] (1940), 68 Que. K.B. 428.

ters of maritime insurance in respect of which the clause was expressly authorized under art. 332 of *le Code du Commerce*. Received with satisfaction by certain jurists and dissatisfaction by others, this decision remained the law in France up to 1925. In 1925, the clause was, generally speaking, validated so far as commercial matters only were concerned, by art. 631 of *le Code du Commerce*. In the Province of Quebec, the clause is invalid as being against public policy, according to what appears to be the weight of jurisprudence and according to the more recent decision of the Court of Appeal of the Province of Quebec in *Vinette Construction Ltée v. Dame Dobrinsky*[1]. No useful purpose would be served in reciting and discussing here all the arguments advanced in favour of both the theses of validity and of invalidity of the clause. Sufficient it is to refer to Dalloz Répertoire, tome 4, verbo Arbitrage, p. 502, nos 454 et seq., where these arguments are collected, to the thesis favouring validity, written in 1945 by Walter S. Johnson, K.C., and to a summary of these arguments appearing in the dissent of Owen J. in the *Vinette* case, *supra,* at page 73.

Desirable as it may be in private international law, with respect to commercial matters, the Quebec legislature has not yet seen fit to make any enactment substantially similar to the one made in France to *le Code du Commerce*. And so far as it has expressed any policy in the matter, the legislature does not appear to favour the validity of such clause, as shown by the reasons for judgment of St-Jacques J. in *Gordon and Gotch (Australasia) Ltd. v. Montreal Australia New Zealand Line Ltd., supra.* After anxious consideration, I have formed the opinion that the *Vinette* case, *supra,* expresses the law of the Province in the matter and the arbitration clause pre-cited must, therefore, be held invalid as being against public policy.

In these views, the clause, being vitiated by absolute nullity, cannot obtain or be acted upon in the Court below either to oust or in any way interfere with its jurisdiction to be seized with and try the action on its merits. It also follows that whatever decision may be reached by the Arbitration Board in New York will not be *res judicata* in the Province, as held by the learned Judge of first instance.

Before closing, I should perhaps indicate that the above conclusions have not been reached without careful con-

[1] [1962] Que. Q.B. 62.

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sideration being given to the decisions referred to by my brothers Cartwright and Ritchie in support of their reasons for judgment. For the purpose of this case, all I care to say with respect to these decisions is that they do not, in my respectful view, affect the basis upon which the opinion I have formed has been reached.

I would dismiss the appeal with costs and order the record to be returned to the Court below for resumption of the proceedings.

CARTWRIGHT J. (*dissenting*):—This is an appeal from a judgment of the Honourable Mr. Justice Smith, sitting as District Judge in Admiralty of the Exchequer Court of Canada in and for the Admiralty District of Quebec[1], dismissing a motion whereby the appellant asked:

> for the dismissal of plaintiff's action sauf recours or in the alternative the staying of proceedings until the terms of the arbitration clause appearing in the charterparty dated New York, December 7, 1960, between the parties have been complied with;

The relevant circumstances and the contentions of the parties are set out in the reasons of my brother Fauteux and I shall endeavour to avoid unnecessary repetition.

For the purposes of this appeal I will assume, without deciding, that the statement of claim sufficiently alleges a breach within the Admiralty District of Quebec of the contract between the parties and that were it not for the arbitration clause which forms part of that contract the action in the Court below should proceed in the usual way.

It is first necessary to consider what is the law applied by the Exchequer Court in the exercise of jurisdiction on its Admiralty side. In *Robillard v. The Sailing Sloop St. Roch and Charland*[2], Maclennan D.L.J.A. said at pp. 134 and 135:

> The first important question to be decided is:—Is it the Maritime Law of England or the Canadian Law which governs the rights of the parties in respect to plaintiff's claim for title and possession of the sailing sloop St. Roch? The Exchequer Court of Canada as a Court of Admiralty is a court having and exercising all the jurisdiction, powers and authority conferred by the Colonial Courts of Admiralty Act, 1890 (Imp.), over the like places, persons, matters and things as are within the jurisdiction of the Admiralty Division of the High Court in England, whether exercised by virtue of a statute or otherwise, and as a Colonial Court of Admiralty it may exercise such jurisdiction in like manner and to as full an extent as the High Court in England.

[1] [1963] Ex. C.R. 1.

[2] (1921), 21 Ex. C.R. 132, 62 D.L.R. 145.

In the Gaetano and Maria, 7 P.D. 137, Brett L.J., at p. 143, said:—

'The law which is administered in the Admiralty Court of England is the English Maritime Law. It is not the ordinary municipal law of the country, but it is the law which the English Court of Admiralty, either by Act of Parliament or by reiterated decisions and traditions and principles, has adopted as the English Maritime Law.'

Although the Exchequer Court in Admiralty sits in Canada it administers the Maritime Law of England in like manner as if the cause of action were being tried and disposed of in the English Court of Admiralty.

By s. 35 of *The Admiralty Act,* 1934 (Can.), 24-25 George V, c. 31, the *Colonial Courts of Admiralty Act,* 1890, was repealed "in so far as the said Act is part of the law of Canada", and the matter is now governed by the provisions of the *Admiralty Act,* R.S.C. 1952, c. 1, subs. (1) of s. 18 of which reads as follows:

(1) The jurisdiction of the Court on its Admiralty side extends to and shall be exercised in respect of all navigable waters, tidal and non-tidal, whether naturally navigable or artificially made so, and although such waters are within the body of a county or other judicial district, and, generally, such jurisdiction shall, subject to the provisions of this Act, be over the like places, persons, matters and things as the Admiralty jurisdiction now possessed by the High Court of Justice in England, whether existing by virtue of any statute or otherwise, and be exercised by the Court in like manner and to as full an extent as by such High Court.

Sub-section (2) of the same section provides that, in so far as it can apply, s. 22 of the *Supreme Court of Judicature (Consolidation) Act, 1925,* of the United Kingdom, which is printed as Schedule A to the Act, shall be applied *mutatis mutandis* by the Exchequer Court on its Admiralty side.

While all jurisdiction formerly vested in the High Court of Admiralty now forms part of the Admiralty jurisdiction of the High Court of Justice the law administered is still the English Maritime law. In the article on "Admiralty" in Halsbury, 3rd ed., vol. 1, one of whose authors was Lord Merriman, it is said at p. 50, para. 92:

The law administered in Admiralty actions is not the ordinary municipal law of England, but is the law which by Act of Parliament or reiterated decisions, traditions, and principles, has become the English maritime law.

The substantive law applied by the Exchequer Court on its Admiralty side is, of course, the same throughout Canada and does not vary according to the Admiralty District in which the cause of action arises, but, by the combined effect of Admiralty Rule 215 and Exchequer Court Rule 2(1)(*b*), the practice and procedure, where it is not otherwise pro-

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vided by any Act of the Parliament of Canada or any general rule or order of the Court, shall:

(*b*) If the cause of action arises in the Province of Quebec, conform to and be regulated, as near as may be, by the practice and procedure at the time in force in similar suits, actions and matters in Her Majesty's Superior Court for the Province of Quebec; and if there be no similar suit, action or matter therein, then conform to and be regulated by the practice and procedure at the time in force in similar suits, actions and matters in Her Majesty's Supreme Court of Judicature in England.

Smith D.J.A. has taken the view that the questions raised on the motion are procedural in nature. The learned Judge says in part:

Arbitration agreements and proceedings, as well as the rules relating to lis pendens are procedural in nature. (C.P. 411 et seq; and C.P. 173) and, in the absence of any provision relating to same in the Admiralty Rules or in the General Rules and Orders of the Exchequer, they are governed by the practice and procedure in force in the Superior Court of this Province . . . .

It must be determined therefore whether the said arbitration clause is valid according to the laws of the Province of Quebec and is one which our Courts will enforce and give effect to.

With respect, I am of opinion that the learned Judge has erred in treating the question in issue as one of procedure rather than one of substance. Whether it is the one or the other falls to be decided, pursuant to s. 18(1) of the *Admiralty Act* quoted above, in like manner as would be done by the High Court of Justice in England in the exercise of its Admiralty Jurisdiction. That the question whether effect should be given to an arbitration clause contained in a contract is one of substance and not procedural appears to me to be settled by the decision of the House of Lords in *Hamlyn & Co. v. Talisker Distillery*[1]. The effect of that case is succinctly stated in the head-note as follows:

Where a contract is entered into between parties residing in different countries where different systems of law prevail, it is a question in each case, with reference to what law the parties contracted, and according to what law it was their intention that their rights either under the whole or any part of the contract should be determined.

A contract between an English and a Scotch firm, signed in London but to be performed in Scotland, contained this stipulation: 'Should any dispute arise out of this contract, the same to be settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way'.

In an action raised by the Scotch firm in Scotland for implement of the contract and for damages, the English firm pleaded that the action was

[1] [1894] A.C. 202.

excluded by the arbitration clause. The Scotch Courts held that the clause was governed by the law of Scotland inasmuch as that country was the locus solutionis, and that the reference, being to adbitrators unnamed, was therefore invalid:—

Held, reversing the decision of the Court of Session (21 Court Sess. Cas. 4th Series (Rettie) 204), that the contract was governed by English law, according to which the arbitration clause was valid, and deprived the Scotch Courts of jurisdiction to decide upon the merits of the case, unless the arbitration proved abortive.

The reasoning of this decision, applied to the facts of the case at bar, appears to me to establish (i) that the substantive law by which the parties intended that their rights under the contract should be determined was that of the United States of America, (ii) that the question whether the arbitration clause is enforceable is one of substantive law and not one of procedure and consequently, (iii) that if by the law of the United States of America the arbitration clause is valid and enforceable it should have been given effect in the Court below.

That the High Court of Justice in England in the exercise of its Admiralty jurisdiction would follow an applicable decision of the House of Lords goes without saying.

The speeches of all of the Law Lords who took part in the judgment bear on the questions with which we are concerned and it is difficult to refrain from unduly lengthy quotation.

At pp. 206 and 207, Lord Herschell L.C. said:

> It is not in controversy that the arbitration clause is according to the law of England, a valid and binding contract between the parties, nor that according to the law of Scotland it is wholly invalid inasmuch as the arbiters are not named. The view taken by the majority of the Court below is thus expressed by Lord Adam: 'So far as I see, nothing required to be done in England in implement of the contract. That being so, I am of opinion with the Lord Ordinary that the construction and effect of the agreement, and of all and each of its stipulations, is to be determined by the lex loci solutionis, that is, by the law of Scotland'.
>
> It is not denied that the conclusion thus arrived at renders the arbitration clause wholly inoperative, and thus defeats the expressed intention of the parties, but this is treated as inevitably following from the rule of law that the rights of the parties must be wholly determined by the lex loci solutionis. I am not able altogether to agree with the view taken by the learned Lord that everything required to be done in implement of the contract was to be done in Scotland, inasmuch as it appears to me that the arbitration clause which I have read to your Lordships does not indicate that that part of the contract between the parties was to be implemented by performance in Scotland. That clause is as much a part of the contract as any other clause of the contract, and certainly there is nothing on the

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face of it to indicate, but quite the contrary, that it was in the contemplation of the parties that it should be implemented in Scotland.

At pp. 208 and 209, Lord Herschell L.C. said:

Now in the present case it appears to me that the language of the arbitration clause indicates very clearly that the parties intended that the rights under that clause should be determined according to the law of England. As I have said, the contract was made there; one of the parties was residing there. Where under such circumstances the parties agree that any dispute arising out of their contract shall be 'settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way,' it seems to me that they have indicated as clearly as it is possible their intention that that particular stipulation, which is a part of the contract between them, shall be interpreted according to and governed by the law, not of Scotland, but of England, and I am aware of nothing which stands in the way of the intention of the parties, thus indicated by the contract they entered into, being carried into effect. As I have already pointed out, the contract with reference to arbitration would have been absolutely null and void if it were to be governed by the law of Scotland. That cannot have been the intention of the parties; it is not reasonable to attribute that intention to them if the contract may be otherwise construed; and, for the reasons which I have given, I see no difficulty whatever in construing the language used as an indication that the contract, or that term of it, was to be governed and regulated by the law of England.

At p. 211, Lord Watson after referring to the two pleas, '(1) No jurisdiction; (2) The action is excluded by the clause of reference', which had been repelled in the Courts below, said:

With reference to the two pleas which have been repelled, I wish to observe that, although they seem to have become stereotyped in cases like the present, they do not correctly represent the rights of a defender who relies upon a valid contract to submit the matter in dispute to arbitration. The jurisdiction of the Court is not wholly ousted by such a contract. It deprives the Court of jurisdiction to inquire into and decide the merits of the case, whilst it leaves the Court free to entertain the suit, and to pronounce a decree in conformity with the award of the arbiter. Should the arbitration, from any cause, prove abortive, the full jurisdiction of the Court will revive, to the effect of enabling it to hear and determine the action upon its merits. When a binding reference is pleaded in limine, the proper course to take is either to refer the question in dispute to the arbiter named or to stay procedure until it has been settled by arbitration.

At pp. 213 and 214, Lord Watson said:

It has never, so far as I am aware, been seriously disputed, that, whatever may be the domicile of a contract, any Court which has jurisdiction to entertain an action upon it must, in the exercise of that jurisdiction, be guided by what are termed the curial rules of the lex fori, such as those which relate to procedure or to proof. *Don v. Lippman* 2 Sh. & McL. 682, which is the leading Scotch authority upon the point, has settled that these rules include local laws relating to prescription or limitation. But all the rules noticed by Lord Brougham in his elaborate judgment as belonging to

that class refer to the action of the Court in investigating the merits of a suit in which its jurisdiction has been already established. I can find no authority, and none was cited to us, to the effect that, in dealing with the prejudicial question whether it has jurisdiction to try the merits of the cause, the Court ought to disregard an agreement to refer which is pars contractûs, and binding according to the law of the contract, because it would not be valid if tested by the lex fori. Without clear authority, I am not prepared to affirm a rule which does not appear to me to be recommended by any considerations of principle or expediency. One result of its adoption would be that, if two persons domiciled in England made a contract there containing the same clause of reference which occurs in this case, either of them could avoid the reference by bringing an action before a Scotch Court, if the other happened to be temporarily resident in Scotland, or to have personal estate in that country capable of being arrested.

All of the Law Lords held that the arbitration clause made it clear that it was the intention of the parties that its operation and effect should be governed by the law of England. In the case at bar, on reading the whole contract and particularly having regard to the wording of the "New York Produce Exchange Arbitration Clause" which forms part of it, I am of opinion that it was the intention of the parties that this clause, setting out the agreement for the settlement of disputes which might arise out of the contract, was to be interpreted and governed by the law of the United States.

In the absence of evidence to the contrary it would be assumed that the substantive law of the United States is the same as that of the Court in which this action is pending, that is the Exchequer Court of Canada on its Admiralty side. That by the law administered in the High Court of Justice in England in the exercise of its Admiralty jurisdiction the clause would be found to be valid and enforceable does not appear to me to admit of doubt. On this point it is scarcely necessary to multiply authorities but in addition to the *Hamlyn & Co.* case, *supra,* reference may be made to the decision of the House of Lords in *Atlantic Shipping and Trading Co. v. Louis Dreyfus and Co.*[1] The clause under consideration in that case reads as follows:

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 claimants' arbitrator appointed within three months of final discharge and where this

[1] [1922] 2 A.C. 250.

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provision is not complied with the claim shall be deemed to be waived and absolutely barred.

The Court of Appeal had taken the view that the meaning of the clause was that under no circumstances should a claimant be allowed to enter His Majesty's Courts at all and that it was bad in that it completely ousted the jurisdiction of the Court. With this the House of Lords unanimously disagreed, although the judgment of the Court of Appeal was affirmed on another ground which has no relevance to the question before us.

At pp. 255 and 256, Lord Dunedin said:

> My Lords, under the old law an agreement to refer disputes arising under a contract to arbitration was often asserted to be bad, as an ousting of the jurisdiction of the Courts, but that position was finally abandoned in *Scott v. Avery* 5 H.L.C. 811. As I read that case, it can no longer be said that the jurisdiction of the Court is ousted by such an agreement; on the contrary the jurisdiction of the Court is invoked to enforce it, and there is nothing wrong in persons agreeing that their disputes should be decided by arbitration. It follows that the clause here is not obnoxious so far as it provides for arbitration.

At pp. 258 and 259, Lord Summer said:

> I think the words do not exclude the cargo owner from such recourse to the Courts as is always open by virtue of the provisions of the Arbitration Act to a party who has agreed to arbitrate. If so, as of course the Court of Appeal would have been the first to recognize, the jurisdiction of the Courts is not ousted, so as to make this arbitration clause bad altogether. Its terms can be enforced.

In the case at bar, by a written agreement signed by the solicitors for the parties it was provided, *inter alia*:

> 2. That the Arbitration Act of the United States of America (Title Number 9—Arbitration) referred to in paragraph 3 of Defendant's amended motion is the applicable and binding law of the United States of America relating to the arbitration of maritime transactions and charterparties, and that the copy of the said law produced herewith as Defendant's Exhibit M-4 is a true copy thereof.
>
> 3. That the Plaintiff admits the appearance referred to in paragraph 4 of Defendant's amended motion but adds that the said appearance was specially, or under protest, for the sole purpose of vacating the order to show cause and for the dismissal of the proceedings before the said United States District Court.
>
> 4. The Plaintiff admits that pursuant to the decision of Judge Edelstein of the District Court of the Southern District of New York dated April 3rd, 1962, an Order issued from the said Court on April 12th, 1962, overruling the objection of the Plaintiff to the jurisdiction of the said Court and ordering the Plaintiff herein to appoint an arbitrator within ten days from the entry of the said Order and to proceed to arbitration within thirty days from the entry of said Order, and that said Order is a final judgment,

subject to appeal, according to the Federal Rules of Civil Procedure of the United States of America, a certified true copy of said Order, produced herewith as Defendant's Exhibit M-5.

A perusal of the statute referred to as Exhibit M-4 supports the view, which in the absence of evidence would have been presumed, that by the law of the United States the arbitration clause is valid and enforceable.

In the course of his reasons, Smith D.J.A. said:

> Counsel for the defendant argued however that the validity of the said arbitration clause must be determined in accordance with the laws of the United States, where the contract was made. It is no doubt true that our Courts in adjudicating in respect of contracts executed in foreign jurisdiction are obliged to give consideration to the lex loci contractus, but they will not enforce or give effect to a contract which, under the laws of this Province, is against public order, even though the said contract may be legal and binding in the jurisdiction in which it was made.

It is no doubt true that if an agreement made in a jurisdiction other than that in which it is sought to be enforced is opposed to a fundamental principle of the law of the country in the courts of which the action to enforce it is pending those courts will not enforce it. But the question as to whether or not the agreement is opposed to such a principle must be decided by the substantive law administered by the Court in which the action is pending. In the case at bar, that law, as has been pointed out above, is not the law of the Province of Quebec; it is the Maritime law of England. The enforcement of the arbitration clause with which we are concerned is not opposed to any principle of the last mentioned law.

Because of this I do not find it necessary to consider whether a clause which makes a reference to arbitration a condition precedent to the bringing of an action is opposed to any fundamental principle of the law of Quebec. Had we been called upon to examine that question it would have been necessary to consider the effect of many cases of which I shall mention only one, *Guerin v. The Manchester Fire Assurance Co*[1]., a decision of this Court on appeal from the Court of Queen's Bench for Quebec (Appeal Side). At pp. 151 and 152, Sir Henry Strong C.J. with whom Sedgewick and King JJ. agreed, said:

> Further the arbitration clause, added to the conditions by the variation to condition sixteen, provides that no action should be maintainable until after an award had been obtained pursuant to the terms of the conditions

[1] (1898), 29 S.C.R. 139.

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fixing the amount of the claim. The Court of Review considered this provision void as tending to oust the jurisdiction of the courts of law and so contrary to public policy. I do not think this view can be maintained. The law of England provides that any agreement renouncing the jurisdiction of legally established courts of justice is null, but nevertheless in the case of Scott v. Avery, 5 H.L. Cas. 811, the House of Lords determined that a clause of this nature and almost in the same words as that before us making an award a condition precedent, was perfectly valid and that no action was maintainable until after an award had been made. This decision, which has been followed in many later cases, though of course not a binding authority on the courts of Quebec, proceeds upon a principle of law which is as applicable under French as under English law. This principle applies not merely to cases where the amount of damages is to be ascertained by an arbitrator, but also to cases where it is made a condition precedent that the question of liability should first be determined by arbitration.

The learned Judge having held that as a matter of law he could not give effect to the arbitration clause did not find it necessary to exercise any discretion in the matter. A reading of the record makes it plain that it was the intention of the contracting parties that any dispute arising between them out of the terms of the contract should be settled by arbitration at New York and that the United States Arbitration Act, referred to above, should be the governing statute as to the conduct of the arbitration. The inconvenience of permitting the action in the Exchequer Court of Canada to proceed is manifest. In my opinion this is a case in which the proper course is to stay proceedings in the Court below in order that the matter in dispute may be settled by arbitration in accordance with the terms of the contract. This will give effect to the expressed intention of the parties and is favoured by every consideration of convenience. Such an order will leave the parties at liberty to apply to the Court in the event, which on the material before us appears to be unlikely, that the reference proves abortive.

For these reasons I would allow the appeal, set aside the order of the Court below, direct that an order be entered staying proceedings in the action until arbitration has been had in accordance with the terms of the agreement between the parties, and that the costs of the motion before Smith D.J.A. and of this appeal be paid by the respondent to the appellant forthwith after taxation thereof.

RITCHIE J. (*dissenting*):—The circumstances giving rise to this appeal have been fully described in the reasons for judgment of my brothers Cartwright and Fauteux, which I have had the advantage of reading, and I will endeavour to

confine any repetition of what they have said to such material as is necessary for the purpose of making my own views clear.

This is an action for damages arising out of the alleged breach by the appellant within the Quebec Admiralty District "of an agreement relating to the use and hire of a ship" and I agree with the learned trial judge that as the District Judge in Admiralty of the Exchequer Court of Canada for the Quebec Admiralty District, he had jurisdiction both *ratione materiae* and territorially over the matter by virtue of the provisions of ss. 18(3)(*a*)(i) and 20(1)(*e*) of the *Admiralty Act*, R.S.C. 1952, c. 1, and s. 22(1)(*a*)(xii)(1) of the Schedule to that Act.

The arbitration clause which the appellant seeks to invoke as a ground for the dismissal of this action or in the alternative for a stay of proceedings reads as follows:

> Should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men.

The reasons for judgment of my brother Fauteux and of the learned trial judge make it apparent that under the law of the Province of Quebec this clause is what is described as a "clause compromissoire" and that as such it is "vitiated by absolute nullity" as being against public policy and is unenforceable in the courts of that Province. I take the effect of this to be that the existence of such a clause, providing as it does that the decision of arbitrators appointed by the parties to the contract rather than by the court "shall be final" as to "any dispute" arising between the owners and charterers, is simply not recognized by the courts of the Province of Quebec. This appears to me to be borne out by the fact that there are no provisions in the *Code of Civil Procedure* for the enforcement of such a clause and that the articles of that Code dealing with arbitrators (see art. 411 *et seq*) are confined to arbitrators who are, whether by consent of the parties or otherwise, appointed by the court. The provisions of art. 94(3), read in the light of the decision of St. Jacques J. in *Gordon and Gotch (Australasia) v. Montreal Australia-New Zealand Line Limited*[1], serve to

[1] (1940), 68 Que. K.B. 428.

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further confirm the fact that such a clause is totally ineffective to supplant the jurisdiction of the courts of the Province of Quebec.

The peculiarity of the present case, however, is that although the contract in question was to be performed, at least in part, in the Province of Quebec where the breach is alleged to have occurred, the court in which this action is brought is not a court of that Province but a statutory court which is required by the provisions of s. 18(1) of the *Admiralty Act* to exercise its jurisdiction "in like manner and to as full an extent" as the same jurisdiction is exercised by the High Court of Justice in England notwithstanding the fact that the territorial limits of the Admiralty district within which such jurisdiction is exercised coincide with the boundaries of the Province of Quebec.

The history of the Admiralty Court in Quebec from the time of its organization in 1717 is recounted in the reasons for judgment of Girouard J. in *Inverness Railway and Coal Company v. Jones*[1], and in these reasons, after having dealt extensively with the early French law of Admiralty, Girouard J. described the situation as it existed in 1908 in the following terms at p. 55:

> After the cession of the country to Great Britain the ordinance and the French law generally ceased to be enforced in the Quebec admiralty court and the English law was substituted for them as part of the public law of Great Britain. By his commission, the first admiralty judge in Quebec, appointed in 1764, was empowered to hold a vice-admiralty court like the High Court of Admiralty in England, and, of course, according to the English laws. The Civil Code of Quebec, art. 2383, recognized that rule in express terms:
>
> > The provisions in this chapter (chapter 4th relating to privilege and maritime lien) do not apply in cases before the court of vice-admiralty.
> >
> > Cases in that court are determined according to the civil and maritime laws of England.
>
> Finally, the Imperial statute, 53 and 54 Vict. ch. 27, passed in 1890, empowering the legislature of a British possession to create colonial courts of admiralty, declares that the jurisdiction of such courts shall be
>
> as the admiralty jurisdiction of the High Court in England . . . .

The fact that these observations were made in the course of a dissenting opinion does not, in my view, in any way affect their accuracy.

By the *Colonial Courts of Admiralty Act,* 1890 (Imp.), the jurisdiction of the Admiralty Districts in Canada was

[1] (1908), 40 S.C.R. 45.

limited to the Admiralty jurisdiction of the High Court in England as it existed at the time of the passing of that Act, (see *The Yuri Maru*[1]) and this continued to be the situation until 1934 when the Parliament of Canada enacted the *Admiralty Act,* 1934 (Can.), 31 (now R.S.C. 1952, c. 1) whereby the jurisdiction was made coextensive with that "now possessed by the High Court of Justice in England", "whether by virtue of any statute or otherwise".

It appears to me to be clear from the *Admiralty Act* that the substantive law to be applied by the Exchequer Court of Canada on its Admiralty side is by the very nature of the jurisdiction conferred by that Statute required to be the same in the various Admiralty District Courts which have been established to exercise it.

In this respect the Admiralty jurisdiction of the Exchequer Court differs from that conferred upon it by the *Exchequer Court Act* as is indicated by the fact that in the exercise of the latter jurisdiction there are cases in which the liability of the Crown is to be determined by the law of the Province. (See *King v. Laperrière*[2]).

As was said by the District Judge in Admiralty in the recent case of *Savoy Shipping Limited v. La Commission Hydro-Electrique de Quebec*[3]:

> By Section 91 of the British North America Act the Parliament of Canada was given exclusive jurisdiction to legislate in respect of "Shipping and navigation". The Admiralty Court, although constituted as that part of the Exchequer Court having jurisdiction in Admiralty matters, is given a jurisdiction which is different and distinct from that vested in the Exchequer Court by the Exchequer Court Act.

For the reasons hereinafter stated, I do not consider that the clause here in question, whether it be treated as a condition precedent to the right of action under the contract or not, is such as to be "vitiated by obsolute nullity" and therefore unenforceable in the High Court of Justice in England having regard, *inter alia,* to the jurisdiction now possessed by that Court and existing by virtue of the *Arbitration Act,* 1950 (Eng.), c. 26.

The question of whether or not an agreement is null and void as being against public policy is not, in my respectful opinion, one which is determined by the rules regulating

[1] [1927] A.C. 906.
[2] [1946] S.C.R. 415 at 443, 3 D.L.R. 1.
[3] [1959] Que. R.L. 270 at 274, [1959] Ex. C.R. 292.

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practice and procedure in the forum where the action is brought although such rules undoubtedly control the means, if any, by which the agreement is to be enforced.

As has been pointed out by my brother Cartwright, the practice and procedure of the Exchequer Court on its Admiralty side, where it is not provided by an act of the Parliament of Canada or in the Admiralty rules or the General Rules and Orders of the Exchequer Court shall "if the cause of action arises in the Province of Quebec be regulated as near as may be by the practice and procedure at the time in force in similar suits, actions and matters in Her Majesty's Superior Court of the Province of Quebec; and if there be no similar suit, action or matter therein, then conform to and be regulated by the practice and procedure at the time in force in similar suits, actions and matters in Her Majesty's Supreme Court of Judicature in England." (See Admiralty Rule 215 and Exchequer Court Rule 21(*b*)).

Since neither the rules of the Admiralty Court nor those of the Exchequer Court contain any reference to proceedings for the enforcement of an arbitration agreement, and since a "clause compromissoire" is not recognized in the Province of Quebec and the only provisions in the *Code of Civil Procedure* of that Province relating to arbitrators are concerned with arbitrators appointed by the Court, it appears to me that the proceedings for the enforcement of such an agreement in the Quebec Admiralty District Court are to be regulated by the procedure, if any, in force with respect to such matters in Her Majesty's Supreme Court of Judicature in England. This, in my view, is borne out by what was said in another connection by Mr. Justice A. I. Smith in *Savoy Shipping Limited v. La Commission Hydro-Electrique de Quebec, supra,* at p. 273.

The law and practice in England with respect to arbitration clauses is concisely stated in Chitty on Contracts, 22nd ed. (1961), in para. 741 at p. 309, where it is said:

> Arbitration clauses in contracts are of two main kinds, namely bare arbitration agreements, when the parties agree that disputes arising out of the contract, or certain types of dispute, shall be referred to arbitration; and agreements making an arbitrator's award a condition precedent to any right of action under the contract . . . .
>
> Bare agreements to arbitrate were not specifically enforceable in equity; and while damages for breach of such an agreement could be granted at common law, it was difficult for the party seeking arbitration to prove more than nominal damages. It was therefore necessary for statute to

provide machinery for the indirect specific enforcement of bare arbitration agreements. This was first provided by the Common Law Procedure Act, 1854, now section 4(1) of the Arbitration Act, 1950, which gives the court a discretionary power to stay an action begun in breach of an arbitration agreement.

Section 4(1) of *The Arbitration Act,* 1950 (Eng.), reads as follows:

> If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or any judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

The appellant has delivered no pleadings nor taken any other steps in these proceedings and is accordingly in the position to invoke the provisions of this section.

The High Court of Justice in England exercises its jurisdiction in relation to such arbitration clauses by virtue of the *Arbitration Act* and that the procedure for which provision is made in s. 41(1) of that Act has been held to apply in the Exchequer Court on its Admiralty side is shown by the case of *Birks Crawford Limited v. The Ship Stromboli*[1]. In that case the parties to a bill of lading had agreed to litigate any dispute arising thereunder by Italian law at Genoa, Italy, and Sidney Smith, D.J.A. (B.C.) adopted the order made by Sir Samuel Evans in *The Cap Blanco*[2] and accordingly ordered that the proceedings in the action taken in the B.C. Admiralty District be stayed in order that the parties could litigate in Genoa, Italy, as they had agreed to do. In *The Cap Blanco, supra,* the clause in issue provided that "any disputes concerning the interpretation of the bill of lading are to be decided in Hamburg according to German law, and it was held that such a clause was to be treated as a submission to arbitration within the meaning of s. 4 of the *Arbitration Act* 1889" (now s. 4 of the *Arbitration Act,* 1950).

[1] [1955] Ex. C.R. 1. [2] [1913] P. 130.

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In the course of his reasons for judgment, Sir Samuel Evans said:

> In dealing with commercial documents of this kind, effect must be given, if the terms of the contract permit it, to the obvious intention and agreement of the parties. I think the parties clearly agreed that disputes under the contract should be deal with by the German tribunal, and it is right to hold the plaintiffs to their part of the agreement. Moreover, it is probably more convenient and much more inexpensive, as the disputes have to be decided according to German law, that they should be determined in the Hamburg Court.
>
> Although, therefore, this Court is invested with jurisdiction, I order that the proceedings in the action be stayed, in order that the parties may litigate in Germany, as they have agreed to do.

As the Exchequer Court of Canada, in the exercise of its Admiralty jurisdiction is a statutory court clothed with authority to exercise its jurisdiction in like manner and to as full an extent as the High Court of Justice in England, and as there is no practice or procedure in force in the Superior Court of the Province of Quebec relating to an arbitration clause such as is here sought to be invoked, I am of opinion that the court is required to conform to the practice and procedure in such matters in Her Majesty's Supreme Court of Judicature in England, and that this procedure is to be found in the *Arbitration Act,* 1950, s. 4(1).

I agree with my brother Cartwright that this is a case in which the proper course is to stay the proceedings in the court below, and I would dispose of this appeal in the manner proposed by him.

Appeal dismissed with costs, CARTWRIGHT *and* RITCHIE JJ. *dissenting.*

Solicitors for the defendant, appellant: Martineau, Chauvin, Walker, Allison, Beaulieu & Tetley, Montreal.

Solicitors for the plaintiff, respondent: Beauregard, Brisset, Reycraft & Chauvin, Montreal.