

CITATION: Inforica Inc. v. CGI Information Systems and Management Consultants
Inc., 2009 ONCA 642

DATE: 20090911

DOCKET: C49803 and M37192

COURT OF APPEAL FOR ONTARIO

Sharpe, LaForme and Watt JJ.A.

BETWEEN

Inforica Inc.

Applicant

(Respondent/Moving Party)

and

CGI Information Systems and Management Consultants Inc.

Respondent

(Appellant/Responding Party)

F. Paul Morrison and Christopher M. Hubbard, for the appellant/responding party

John A. Campion, J. Gardner Hodder and Guillermo Schible, for the respondent/moving party

Heard: June 24, 2009

On appeal from the order of Justice Sandra Chapnik of the Superior Court of Justice dated November 17, 2008, reported at 2008 CanLII 60706 (ON.S.C.) and on a motion to quash the appeal.

Sharpe J.A.:

[1] This appeal concerns the jurisdiction of an arbitrator to order security for costs and whether an application to set aside such an order lies to the Superior Court. The respondent, Inforica Inc. ("Inforica"), commenced arbitral proceedings against the appellant, CGI Information Systems and Management Consultants Inc. ("CGI"), pursuant to an arbitration term in their agreement. The arbitrator granted CGI's motion for security for costs, ruling that he had jurisdiction to make such an order under the *ADR Chambers Rules* and under the *Arbitration Act, 1991*, S.O. 1991, c. 17 (the "Act"). Inforica moved to set aside that order in the Superior Court. The application judge allowed Inforica's application on the ground that the arbitrator lacked jurisdiction to order security for costs.

[2] CGI appeals that order to this court, arguing that the application judge erred in law in finding that she had jurisdiction to entertain Inforica's application and, if she did have jurisdiction, that she erred in concluding that the arbitrator lacked jurisdiction to order security for costs. Inforica moves to quash CGI's appeal on the ground that pursuant to s. 17(9) of the Act, no appeal lies from an arbitral tribunal's ruling "on its own jurisdiction to conduct the arbitration", and that if an appeal lies pursuant to s. 49 of the Act, it is only by leave of this court and CGI has not sought leave. CGI responds to the motion to quash, *inter alia*, with a motion for leave to appeal pursuant to s. 49 if leave is required.

FACTS

[3] CGI and Inforica entered a "Subcontractor Agreement" in July 2004 whereby Inforica agreed to provide certain specialized services in connection with an agreement for the development of an information management system undertaken by CGI for a third party. The Subcontractor Agreement provided for the arbitration of all disputes under the Act. In June 2007, Inforica asserted a claim under the Subcontractor Agreement by way of Notice of Arbitration for \$14.4 million. CGI counterclaimed for \$9.3 million. The parties entered an Arbitration Agreement on August 31, 2007, agreeing to a named arbitrator and a timetable for the conduct of the arbitration.

[4] In May 2008, the arbitrator heard CGI's motion for security for costs. CGI submitted that Inforica was a corporation without the means to satisfy an order for costs. Inforica is closely held by four principals, each of whom stood to gain significantly if Inforica's claim succeeded and who did not dispute that they were in a position to provide security for costs. As the arbitration had been undertaken on a contingency basis, it was being conducted without significant financial risk to Inforica or to the four principals, but at significant financial risk to CGI. Inforica disputed the arbitrator's jurisdiction to order security for costs.

[5] The arbitrator concluded that he had jurisdiction to order security for costs pursuant to the *ADR Chambers Rules*, and under the terms of the Act.

[6] Section 8(1)(h) of the *ADR Chambers Rules* provides that the arbitrator may "order any party to provide security for the legal or other costs of any other party by way of a deposit or bank guarantee or in any other manner the arbitrator(s) thinks fit". The arbitrator rejected Inforica's position that the arbitration was not an ADR Chambers arbitration. Correspondence between counsel to arrange the selection of the arbitrator referred to him as being "of ADR Chambers" and indicated that ADR Chambers had been contacted to determine the arbitrator's availability. ADR Chambers responded to that request with detailed information regarding the structure for the arbitration, the arbitrator's availability, and the need for deposits to be paid to ADR Chambers. The arbitration agreement itself referred to the payment of deposits to ADR Chambers and the deposits were paid by both parties. ADR Chambers provided counsel with copies of the *ADR Chambers Rules*. The arbitrator concluded on this evidence that the arbitration was being conducted as an ADR Chambers matter and that the *ADR Chambers Rules* accordingly applied.

[7] The arbitrator also ruled that he had the authority to order security for costs pursuant to s. 20 of the Act, which provides that an arbitrator "may determine the procedure to be followed in the arbitration". The arbitrator ruled that as costs were a procedural matter, so too were orders made to ensure the ultimate payment of costs.

[8] The arbitrator found that Inforica did not have the ability to satisfy an order for costs, and that an order for security for costs was justified from the perspective "of assuring the integrity of the arbitral process". He ruled that Inforica should be required to post \$750,000 by way of an appropriate letter of credit as security for costs within 30 days, failing which CGI could move to have the arbitration dismissed.

LEGISLATION

[9] The relevant provisions of the Act are as follows:

Court intervention limited

6. No court shall intervene in matters governed by this Act, except for the following purposes, in accordance with this Act:

1. To assist the conducting of arbitrations.
2. To ensure that arbitrations are conducted in accordance with arbitration agreements.
3. To prevent unequal or unfair treatment of parties to arbitration agreements.
4. To enforce awards.

Stay

7. (1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.

...

No appeal

(6) There is no appeal from the court's decision.

Arbitral tribunal may rule on own jurisdiction

17. (1) An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration and may in that connection rule on objections with respect to the existence or validity of the arbitration agreement.

Independent agreement

(2) If the arbitration agreement forms part of another agreement, it shall, for the purposes of a ruling on jurisdiction, be treated as an independent agreement that may survive even if the main agreement is found to be invalid.

Time for objections to jurisdiction

(3) A party who has an objection to the arbitral tribunal's jurisdiction to conduct the arbitration shall make the objection no later than the beginning of the hearing or, if there is no hearing, no later than the first occasion on which the party submits a statement to the tribunal.

Party's appointment of arbitrator no bar to objection

(4) The fact that a party has appointed or participated in the appointment of an arbitrator does not prevent the party from making an objection to jurisdiction.

Time for objections that tribunal is exceeding authority

(5) A party who has an objection that the arbitral tribunal is exceeding its authority shall make the objection as soon as the matter alleged to be beyond the tribunal's authority is raised during the arbitration.

Later objections

(6) Despite section 4, if the arbitral tribunal considers the delay justified, a party may make an objection after the time limit referred to in subsection (3) or (5), as the case may be, has expired.

Ruling

(7) The arbitral tribunal may rule on an objection as a preliminary question or may deal with it in an award.

Review by court

(8) If the arbitral tribunal rules on an objection as a preliminary question, a party may, within thirty days after receiving notice of the ruling, make an application to the court to decide the matter.

No appeal

(9) There is no appeal from the court's decision.

Arbitration may continue

(10) While an application is pending, the arbitral tribunal may continue the arbitration and make an award.

Procedure

20. (1) The arbitral tribunal may determine the procedure to be followed in the arbitration, in accordance with this Act.

Appeals

Appeal on question of law

45. (1) If the arbitration agreement does not deal with appeals on questions of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that,

- (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and
- (b) determination of the question of law at issue will significantly affect the rights of the parties.

Idem

(2) If the arbitration agreement so provides, a party may appeal an award to the court on a question of law.

Appeal on question of fact or mixed fact and law

(3) If the arbitration agreement so provides, a party may appeal an award to the court on a question of fact or on a question of mixed fact and law.

Powers of court

(4) The court may require the arbitral tribunal to explain any matter.

Idem

(5) The court may confirm, vary or set aside the award or may remit the award to the arbitral tribunal with the court's opinion on the question of law, in the case of an appeal on a question of law, and give directions about the conduct of the arbitration.

Setting aside award

46. (1) On a party's application, the court may set aside an award on any of the following grounds:

1. A party entered into the arbitration agreement while under a legal incapacity.
2. The arbitration agreement is invalid or has ceased to exist.
3. The award deals with a dispute that the arbitration agreement does not cover or contains a decision on a matter that is beyond the scope of the agreement.
4. The composition of the tribunal was not in accordance with the arbitration agreement or, if the agreement did not deal with that matter, was not in accordance with this Act.
5. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.
6. The applicant was not treated equally and fairly, was not given an opportunity to present a case or to respond to another party's case, or was not given proper notice of the arbitration or of the appointment of an arbitrator.
7. The procedures followed in the arbitration did not comply with this Act.
8. An arbitrator has committed a corrupt or fraudulent act or there is a reasonable apprehension of bias.
9. The award was obtained by fraud.
10. The award is a family arbitration award that is not enforceable under the *Family Law Act*.

Further appeal

49. An appeal from the court's decision in an appeal of an award, an application to set aside an award or an application for a declaration of invalidity may be made to the Court of Appeal, with leave of that court.

APPLICATION JUDGE'S RULING

[10] CGI argued that the application judge had no jurisdiction to entertain the appeal under the Act as the order for security for costs was a procedural matter from which no appeal lies. The application judge did not deal with CGI's submission as to her jurisdiction in her reasons, but added, in a handwritten endorsement accompanying the release of her reasons, that "as I have found that the arbitrator exceeded his jurisdiction in making the order, it must be set aside, whether under s. 46(1) of the Act, or otherwise".

[11] The application judge held that the arbitrator had no jurisdiction to order security for costs. She concluded that an order for security for costs "may properly be placed in a specialized category of its own" and that such an order "is not merely a matter of procedure". Relying upon a line of authority starting with *Re Unione Stearinerie Lanza and Weiner*, [1917] 2 K.B. 558 (C.A.), she reasoned that as an order for security for costs "has nothing to do with the arbitrator ascertaining the

true position between the parties in order to determine the case”, but rather puts “an obstacle in the way of proceeding” until the plaintiff has posted security. Such an order cannot be described as procedural in nature within the meaning of s. 20(1) of the Act. The application judge also referred to several decisions, including *Toronto-Dominion Bank v. Szilagyi Farms Ltd.* (1988), 65 O.R. (2d) 433 (C.A.), holding that there is no inherent jurisdiction to order security for costs.

[12] With respect to the *ADR Chambers Rules*, the application judge concluded that, as they had not been expressly incorporated in the Arbitration agreement, they had no application.

ISSUES

[13] As the issues raised by CGI’s appeal and Inforica’s motion to quash are inextricably linked, I propose to deal with them together in the following manner.

(1) Did the application judge have jurisdiction to entertain the application to set aside the order for security for costs?

(2) Does this court have jurisdiction to entertain CGI’s appeal?

(3) If the application judge had jurisdiction to entertain the application, and if this court has jurisdiction to entertain the appeal from her decision, did she err in setting aside the arbitrator’s order for security for costs?

ANALYSIS

Issue (1) Did the application judge have jurisdiction to entertain the application to set aside the order for security for costs?

[14] It is clear from the structure and purpose of the Act in general, and from the wording of s. 6 in particular, that judicial intervention in the arbitral process is to be strictly limited to those situations contemplated by the Act. This is in keeping with the modern approach that sees arbitration as an autonomous, self-contained, self-sufficient process pursuant to which the parties agree to have their disputes resolved by an arbitrator, not by the courts. As Inforica states in its factum, “arbitral proceedings are presumptively immune from judicial review and oversight.” The Act encourages parties to resort to arbitration, “require[s] them to hold to that course once they have agreed to do so”, and “entrenches the primacy of arbitration over judicial proceedings ... by directing the court, generally, not to intervene”: *Ontario Hydro v. Denison Mines Ltd.*, [1992] O.J. No. 2948 (Gen. Div.), Blair J.

[15] Inforica’s motion to set aside the arbitrator’s order for security for costs was brought under ss. 17(8), 46(1) and, in the alternative, for leave to appeal pursuant to s. 45(1) of the Act. As I have noted, the application judge did not explicitly rule on CGI’s objection to her jurisdiction to entertain the application, but indicated by way of endorsement that she was granting the application “whether under s. 46(1) of the Act, or otherwise”. The application judge did not grant leave to appeal under s. 45(1). Accordingly, I need only consider ss. 17(8) and 46(1) as possible sources for the application judge’s jurisdiction.

(i) Section 17(8)

[16] To establish the application judge’s jurisdiction to entertain Inforica’s application under ss. 17(5), (7) or (8) as an application to set aside the arbitrator’s ruling “as a

preliminary question”, Inforica must bring the arbitrator’s ruling that he had jurisdiction to entertain the CGI’s application for security for costs within s. 17(1). Section 17(1) defines the parameters of s. 17, allowing an arbitrator to rule on his “own jurisdiction to conduct the arbitration”. In my opinion, on a fair reading of that language in light of the modern approach that respects the autonomy of the arbitral process and discourages judicial intervention, s. 17(1) is concerned with only the arbitrator’s jurisdiction to entertain the subject matter of the dispute. Asking an arbitrator to decide whether he has jurisdiction to order security for costs does not amount to asking him whether he has jurisdiction to conduct the arbitration. The words “jurisdiction to conduct the arbitration” in s. 17(1) connote jurisdiction over the entire substance or subject matter of the case, not jurisdiction to make interlocutory or procedural orders that do not determine the merits of the dispute and that are made along the way to final resolution of the issues.

[17] The arbitration clause in the Subcontractor Agreement reinforces the point that by resorting to arbitration, the parties acknowledged that until there has been a final determination on the merits, there is to be no recourse to the courts. The parties explicitly agreed to submit their disputes to arbitration and that: “Such dispute shall not be made the subject matter of an action in any court of law by any Party unless the dispute has been first submitted to arbitration *and finally determined by the arbitrator(s)*” (emphasis added).

[18] A significant feature of the modern approach limiting access to the courts to review decisions of arbitrators is that there are no appeals from procedural or interlocutory orders. In *Environmental Export International of Canada Inc. v. Success International Inc.*, [1995] O.J. No. 453 (Gen. Div.), at para. 14, MacPherson J. held: “There is nothing in the *Arbitration Act* providing for appeals from, or applications to set aside, decisions of arbitrators on procedural points. It would be wrong ... for the courts to invent such a remedy and inject it into the arbitration process”. This principle is reiterated in *Tescor Energy Services Inc. v. Toronto District School Board*, [2002] O.J. No. 74 (S.C.), at para. 30, where Lane J. held: “there is nothing in the Act to permit appeals from or the setting aside of decisions of arbitrators on procedural points”. This is a deliberate policy, “not a lacuna in our law”, to protect the autonomy of the arbitral process. The creation of a power by the courts to intervene on interlocutory rulings by arbitrators “would constitute a most serious reproach to the ability of our system of arbitration to serve the needs of users of the arbitral process”: *K/S A/S Biakh v. Hyundai Corp.*, [1988] 1 Lloyd’s Rep. 187 (Q.B. Com. Ct.) at p. 189, Steyn J..

[19] The application judge accepted Inforica’s argument that an order for security for costs is not a procedural order and Inforica relies heavily on *Re Unione Stearinerie Lanza and Weiner, supra*, in support of that proposition. In that case, the claimant challenged the arbitrator’s authority to make an order for security for costs under a general provision of the *Arbitration Act, 1889* (U.K.), 52 & 53 Vict., c. 49 that required the parties, “subject to any legal objection” to “do all other things which during the proceedings ... the arbitrators or umpire may require”. The arbitrator doubted his authority to make an order for security for costs, but agreed to state a point of law for the court under the *Arbitration Act, 1889*, s. 19. I pause to observe that the issue I am now considering, namely, whether the court had the jurisdiction to set aside an arbitrator’s order for security for costs, did not arise in that case. Section 19 of the 1889 Act provided an open-ended right of access “at any stage of the proceedings” on “any question of law”. This provision reflects a profoundly different approach to judicial intervention in the arbitral process than that prevailing in Ontario in 2009.

[20] The English Court of Appeal in *Re Unione Stearinerie Lanza and Weiner, supra*, held that the arbitrator’s general power to require the parties “to do all other things”

that the arbitrator might require did not include the power to order security for costs. Lord Reading C.J., at p. 562, considered it to be obvious that an arbitrator could not have all the powers of a judge and that the words of the 1889 Act had to be narrowly interpreted to limit the powers of the arbitrator to ordering the parties "to do all such things as he may require in order to assist him in arriving at a determination of the dispute". As the dispute could be resolved without an order for security for costs, the statutory power did not confer authority to order security for costs. As "[t]he object of the application for security for costs is not to enable the proceedings to continue" towards resolution on the merits, but rather "to put an obstacle in the way" of the claimant proceeding until he has posted security, Lord Reading C.J. concluded, at p. 562, that the order "has nothing whatever to do with the arbitrator ascertaining the true position between the parties in order to determine the case". Likewise, Lord Reading C.J. rejected the argument the authority to order stay the arbitration at the outset for failure to post security for costs flowed from the power to award costs at the conclusion of the arbitration.

[21] Inforica also relies on *Re Ramot Gil Dev. Corp. Ltd. and Precision Homes Corp. Inc.* (1979), 27 O.R. (2d) 199 (Div. Ct.), a case arising under the *Arbitrations Act*, R.S.O. 1970, c. 25. Again, that case came to the court by way of stated case pursuant to s. 26 of the Act that required an arbitrator to state a case for determination by the Divisional Court on "any question of law arising in the course" of the arbitration. Accordingly, there was no issue as to the jurisdiction of the court to entertain an application to challenge an arbitrator's authority to order security for costs. Relying on *Re Unione Stearinerie Lanza and Weiner, supra*, the Divisional Court, held that an arbitrator lacked the inherent power to order security for costs and that the power could not be inferred from the general power to require the parties to submit to examination, produce documents, "and do all other things during the proceedings on the reference that the arbitrators ... require".

[22] Neither *Re Unione Stearinerie Lanza and Weiner* or *Re Ramot Gil Dev. Corp. Ltd. and Precision Homes Corp. Inc.* are binding on this court. Both cases rest on legislation reflecting an approach to judicial intervention on arbitral matters that is significantly at variance with the modern Act and the modern approach to the autonomy of the arbitral process. They clearly do not stand for the proposition that a Superior Court judge has the jurisdiction to set aside an arbitrator's order for security for costs under today's very different statutory regime limiting recourse to the courts and respecting the autonomy of the arbitral process.

[23] As I have noted, the application judge did not deal with the issue of her jurisdiction to entertain the application in her reasons. It may perhaps be inferred that because she considered the order for security for costs to be not strictly procedural in nature, it was open to her to review it. If that was her decision, I respectfully disagree. The issue is not whether the order is, strictly speaking, procedural in nature – the issue is whether the order amounted to a ruling on the arbitrator's "own jurisdiction to conduct the arbitration". In my view, it did not and s. 17(8) did not apply to confer jurisdiction on the application judge, even if the order for security for costs was not, strictly speaking, procedural in nature.

[24] I would add, however, that even if it can be said that orders for security for costs do fall into a special category, that category is much closer to procedure than to substance. Such orders are made to protect the integrity of the dispute resolution process by preventing parties from structuring their affairs in a manner that immunizes them from the discipline of costs. They do not decide rights, but rather serve to ensure that parties are governed by the rules of the game.

[25] By way of analogy, for appeal purposes in ordinary civil proceedings, an order for security for costs is regarded as a procedural order from which there is no right of appeal. Such an order is interlocutory in nature, incidental to the resolution of the

subject matter of the dispute, and, accordingly, an appeal only lies to the Divisional Court with leave: see *Susin v. Chapman*, 1998 CanLII 3224 (ON C.A.); *Shuter v. Toronto, Dominion Bank*, 2007 CanLII 37475 (ON S.C.).

[26] I recognize that failure to satisfy an order for security for costs may lead to a dismissal of the claim, but the sanction for non-compliance with an order cannot alter the nature of the order itself. Many procedural or interlocutory orders – for particulars, for production of documents, for the payment of costs ordered in interlocutory proceedings – may carry the ultimate sanction of dismissal of the non-complying party’s claim. But if the claim is dismissed, the dismissal flows from the party’s failure to comply with the interlocutory or procedural order, not from the order itself, and does not alter the interlocutory or procedural nature of the order that led to dismissal: see *Laurentian Plaza Corp. v. Martin* (1992), 7 O.R. (3d) 111 (C.A.).

[27] I do not accept Inforica’s submission that finding the application judge’s order to have been made without jurisdiction violates the principle in administrative law, established in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, at p. 233, and repeated in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at para. 35, that courts should hesitate before branding administrative decisions as jurisdictional, thereby rendering them subject to curial review. In my view, that injunction is more directly applicable to how we should interpret the reach of ss. 17(1) and (8). It points towards a narrow construction of those provisions, limiting the scope for curial interference with the arbitral process, by limiting the reach of s. 17 to decisions as to the arbitrator’s jurisdiction to entertain the subject matter of the dispute.

[28] I conclude, therefore, that the arbitrator’s determination that he had the authority to order security for costs was not a ruling as to his “jurisdiction to conduct the arbitration” within the meaning of s. 17(1) and that therefore the application judge did not have jurisdiction to entertain the application to set aside the order pursuant to s. 17(8).

(ii) Section 46(1)

[29] In my view, the arbitrator’s order for security for costs was not an “award” within the meaning of s. 46(1). The arbitrator aptly labelled his order as a “Procedural Order” and not as an “award”. The Act does not define the term “award”, but the term has been held to connote the judgment or order of an arbitral tribunal that “disposes of part or all of the dispute between the parties”: *Environmental Export International of Canada Inc. v. Success International Inc.*, *supra*, at para. 13. J. Kenneth McEwan & Ludmila B. Herbst, *Commercial Arbitration in Canada*, (Aurora, Ont.: Canada Law Book, 2008) state at 9:30.10: “Only decisions determining the substantive issues should be termed ‘awards’. Matters relating to the conduct of the arbitration are not awards but, rather, are procedural orders and directions”.

[30] I conclude, accordingly, that the application judge did not have jurisdiction to entertain the application to set aside the order for security for costs pursuant to s. 46(1).

Issue (2) Does this court have jurisdiction to entertain CGI’s appeal?

[31] As the application judge had no jurisdiction to entertain the application to set aside the order for security for costs, this court has jurisdiction pursuant to s. 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C-43 to entertain an appeal from

her decision. In *Huras v. Primerica Financial Services Ltd.* (2000), 137 O.A.C. 79, this Court dealt with s. 7(6), which provides that there "shall be no appeal" from a decision on a motion for a stay pursuant to s. 7(1). Writing for the court, Finlayson J.A. held that if the motion court judge refuses to grant a stay on the ground that the matter was not subject to arbitration, s. 7(1) is not applicable and the prohibition against an appeal in s. 7(6) is equally not applicable. As the appeal is not barred by s. 7, it lies to this court pursuant to s. 6(1)(b) of the *Courts of Justice Act* if it is final order: see also *Brown v. Murphy* (2002), 59 O.R. (3d) 404 (C.A.), at paras. 1-8, Charron J.A.; *Smith Estate v. National Money Mart* (2008), 92 O.R. (3d) 641 (C.A.), at para. 29.

[32] In my view, the same reasoning applies to s. 17(9). If the application judge did not have jurisdiction to entertain the application under s. 17 in the first place, s. 17(9) does not bar an appeal from her decision.

[33] In my view, the application judge's order must be regarded as a final order for the purposes of s. 6(1)(b). The application to set aside the arbitrator's order was an originating proceeding. It was the only matter before the court. The application judge's order finally disposed of the originating proceeding. It must, therefore, be regarded as a final order for the purposes of appeal, even though it did not finally resolve the matters in dispute in the other forum, namely the arbitration: *Buck Bros. Ltd. v. Frontenac Builders Ltd.* (1994), 19 O.R. (3d) 97 (C.A.), Morden J.A.

[34] Accordingly, I conclude that this court does have jurisdiction to entertain the appeal from the application judge's order.

Issue (3) If she had jurisdiction to entertain the application, and if this court has jurisdiction to entertain the appeal from her decision, did the application judge err in setting aside the arbitrator's order for security for costs?

[35] As I have concluded that the application judge did not have jurisdiction to entertain the application, and that the appeal should be allowed on that basis, it is not necessary for me to consider this issue. I will not deal with the issue of whether s. 20 of the Act conferred jurisdiction on the arbitrator to order security for costs but, as the matter was fully argued and for the sake of completeness, I will offer the following observations on the arbitrator's ruling as to the application of the *ADR Chambers Rules*.

[36] Inforica submits that as the Arbitration Agreement did not explicitly incorporate the *ADR Chambers Rules*, they have no application and that the arbitrator erred by implying a term of the agreement in circumstances not warranted by the principles laid down in *Double N Earthmovers v. Edmonton (City)*, [2007] 1 S.C.R. 116, adopting the test set out in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711.

[37] I do not see this as a case of the arbitrator "implying" a term into the contract. Rather, the arbitrator found that through their actions and correspondence, the parties had in fact agreed to conduct the arbitration through ADR Chambers with an ADR Chambers arbitrator and they had thereby agreed to be bound by the terms set by ADR Chambers for arbitrations conducted under its umbrella.

[38] Counsel for both parties made explicit reference to ADR Chambers in their correspondence when setting up the arbitration. Counsel for CGI explained that they were "investigating the possibility of securing Mr. Thomas I.A. Allen, Q.C., of ADR Chambers as arbitrator" and that they had contacted ADR Chambers to enquire as to his availability. Counsel for Inforica later inquired whether they had "heard from ADR Chambers with respect to" the arbitrator's availability.

[39] ADR Chambers then wrote to both counsel providing information regarding the structure for the arbitration, the arbitrator's availability, his rate, a release in his

favour and in favour of ADR Chambers, and the need for deposits to be paid to ADR Chambers. The letter enclosed detailed information regarding ADR Chambers including the following:

ARBITRATION RULES AND ARBITRATION AGEEMENTS: The arbitration rules of ADR Chambers and any amendments thereto shall be deemed to have been made a part of any Arbitration Agreement which provides for arbitration by ADR Chambers and any arbitration which takes place with ADR Chambers.

[40] Both parties paid deposits to ADR Chambers and the Arbitration Agreement itself referred to ADR Chambers. The parties subsequently met with the arbitrator at ADR Chambers.

[41] In my view, it was clearly open to the arbitrator to conclude on this record that the arbitration was "tak[ing] place with ADR Chambers" and it was, therefore, subject to the *ADR Chambers Rules*. The arbitrator was well placed to determine this issue. He was familiar with the steps taken to set up the arbitration and he was familiar with the workings of ADR Chambers. There was a strong evidentiary basis to support his finding that the ADR Chambers Rules applied. This was either a finding of fact or a finding close to the fact end of the mixed fact and law spectrum with which a court should be reluctant to interfere. I find Inforica's submission that the application judge properly rejected it to be entirely unpersuasive.

CONCLUSION

[42] Accordingly, I would dismiss Inforica's motion to quash the appeal, allow the appeal, and restore the arbitrator's order for security for costs. CGI is entitled to its costs in the amounts agreed to by the parties, namely, \$15,000 for the appeal and \$25,000 for the motion in the superior court.

"Robert J. Sharpe J.A."

"I agree H.S. LaForme J.A."

"I agree David Watt J.A."