I. Kaverit Steel and Crane Ltd. v. Kone Corporation, 1992 ABCA 7 (CanLII)

Date:	1992-01-16
Docket:	9103-0326-AC
Parallel citations:	87 DLR (4th) 129; [1992] 3 WWR 716; 40 CPR (3d) 161; 85 Alta LR (2d) 287
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II. Legislation cited (available on CanLII)

- Eldorado Nuclear Limited Reorganization and Divestiture Act, SC 1988, c 41

III. Decisions cited

- ODC Exhibit Systems Ltd. v. Lee, 1988 CanLII 3297 (BC SC)

In the Court of Appeal of Alberta

Citation: Kaverit Steel and Crane Ltd. v. Kone Corporation, 1992 ABCA 7

Date: 19920116
Docket: 9103-0326-AC
Registry: Edmonton

Between:

Kaverit Steel and Crane Ltd.
299565 Alberta Ltd., and Kelly Viinikka
Eric Viinikka and James Caldwell

Respondents
(Plaintiffs)

- and -

Kone Corporation, Kone Holdings (Canada) Inc.,
Kone Inc. and Kone Cranes Incorporated

Appellants
(Defendants)

The Court:

The Honourable Mr. Justice Kerans
The Honourable Madam Justice Hetherington
The Honourable Mr. Justice Irving

Reasons for Judgment of The Honourable Mr. Justice Kerans
Concurred in by The Honourable Madam Justice Hetherington
And Concurred in by The Honourable Mr. Justice Irving

APPEAL FROM THE ORDER OF THE HONOURABLE MR. JUSTICE A. T. COOKE DATED THE 14TH DAY OF MAY, A.D. 1991 ENTERED THE 27TH DAY OF MAY, A.D. 1991

COUNSEL:

J. E. Redmond, Q.C. and Clive E. Mostert, for the respondents

Richard C. Secord and Norah B.R. Thompson, for the appellants

REASONS FOR JUDGMENT OF
THE HONOURABLE MR. JUSTICE KERANS

[1] The appellant and defendant Kone Corporation is a Finnish manufacturer of industrial cranes and hoists that holds international patents on some devices. The respondent and plaintiff Kaverit Steel and Crane Ltd., an Albertan corporation, operates an industrial supplies business throughout Western Canada. In 1983, the two firms entered into licence and distributorship agreements whereby, according to the statement of claim, the distributor Kaverit received the exclusive right to manufacture and sell materials of the design or manufacture of the licensor Kone.

[2] The distributor has commenced an action in Queen's Bench of Alberta alleging, among other matters, a breach of the agreement by the licensor. The substance of the complaint is that the licensor has, or its subsidiaries have, begun to

compete with the distributor in Western Canada in breach of the exclusive distributorship granted in the contract. No defence has yet been filed.

[3] The licence and distributorship agreement provides that Alberta law governs any dispute but also contains this arbitration clause:

> Any dispute arising out of or in connection with this Agreement shall be finally settled without recourse to the courts, in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, by one or more arbitrators designated in conformity with those Rules. The arbitrator or arbitrators shall have power to rule on their own competence and on the validity of the agreement to submit to arbitration. The place of arbitration shall be Stockholm, Sweden.

[4] The licensor sought a stay of the suit in Queen's Bench on the sole ground that the dispute should be referred to arbitration. It lost and appeals. Before us, some confusion arose about the request for a stay. One might stay a suit as a consequence of a reference to arbitration, or for many other reasons. I understand that the only relief sought here was a stay to achieve a reference to arbitration.

[5] The arbitration question is complicated by two factors. First, the suit adds parties, both defendant and plaintiff, who are not party to the agreement containing the arbitration clause. Second, the claim by the distributor contains allegations beyond simple breach of that contract.

[6] The resolution of these issues engages novel questions of law. The parties agree that the International Commercial Arbitration Act S.A. 1986 cap I-6.6 (assented to August 15, 1986) governs. This case brings that statute before this Court for the first time.

[7] The learned chambers judge decided that the submission, by which I mean the clause in the contract providing for arbitration, did govern some of the issues raised in the statement of claim, but not all. See [1991] Alta. D. 251-01. With some exceptions, with which I will later deal in detail, I agree with his analysis of what may and may not be within the scope of the clause. He then decided that, because of these other issues, nothing should go to arbitration. Faced with the prospect of inconveniently overlapping litigation and thus conflicting decisions, he decided that the prospect of this evil warranted a refusal to refer anything.

[8] With respect, I am of the view that the applicable provisions of the International Commercial Arbitration Act under review do not permit that approach. For the reasons I shall give, I am of the view that the statute commands that what may go to arbitration shall go. No convenience test limits references.

I

[9] The statement of claim expands upon the claim for breach of the contract both by adding parties arguably not privy and by adding issues arguably distinguishable.

[10] I shall first deal with the extra parties. The claim adds both parties plaintiff and defendant. The extra plaintiffs are 299565 Alberta Ltd., Kelly Viinikka, Eric Viinikka and James Caldwell. The numbered company is the sole shareholder of the distributor, and the individuals are shareholders in the numbered company.

[11] The extra defendants are three corporations that are, according to the statement of claim, wholly owned "subsidiaries" of the licensor. I take it this

allegation amounts to a claim that they are controlled by the licensor, and do its bidding.

[12] Before us, the licensor conceded that none of these extra parties was a party to the submission. The real thrust of the complaint of the licensor about the extra plaintiffs was that they had no cause of action because the claims they made were "derivative", meaning they relied only upon rights held by a corporation in which they were shareholders.

[13] This complaint is quite different from the demand for arbitration. As I said during argument, no motion to strike on this basis has been made. I will not deal with the issue. Beyond that, I agree with the learned chambers judge that he has no authority to order these other plaintiffs to submit their claims to arbitration. (I do observe that he can stay claims pending arbitration if indeed they are derivative and must await the arbitration decision.)

[14] Similarly, I agree with the learned Queen's Bench judge that he cannot send the distributor's claims against the licensor's subsidiaries to arbitration in the absence of consent by all the parties. Again, counsel for the licensor accepted this point during argument. (Again I note that a judge might stay a suit against them if the arbitration will effectively resolve the claim against them.)

[15] Associated and connected parties like subsidiaries, shareholders, directors, employees, agents and the like might be required to join an arbitration in one of three ways: by the governing law, by the submission itself, to the extent the parties to the contract can bind other parties, or by the later agreement of the other parties. None of these three yet applies here.

[16] Mr. Secord for the licensor cites Roussel-Uclaf v. G. D. Searle (U.K.) [1978] 1 L.L.R. 225 (Ch.) as authority for bringing associated parties into an arbitration over their objection. In that case, however, the English statute under review permitted a reference of all those claiming "through or under" a party to the submission. The Alberta International Commercial Arbitration Act, however, adopts the test in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, which is scheduled to the Act. The Convention applies, according to Article II s.1, only to "…an agreement in writing under which the parties undertake to submit to arbitration …". Article II s. 2 clarifies that "parties" are the parties signatory: "The term 'agreement in writing' shall include an arbitral clause in a contract … signed by the parties …".

[17] Alberta, like the United Kingdom, could have sent to arbitration claims by or against those who claim through or under an agreement containing a submission. It has not, and perhaps this is to be regretted.

[18] Mr. Secord also cites Isover Saint Gobain v. Dow Chemical France IX Yearbook (1984) 131 (1983) J.D.I. 899 to support his argument. That is the report of the arbitrators' decision to entertain the claims of Dow France, Dow U.S.A., Dow Zurich and Dow Europe against M. Gobain alleging that he alone was liable for the use of a product called Roofmate in France and must answer the claims pending in the French Courts against companies in the Dow family. He objected that he had not signed a submission with Dow France or Dow U.S.A., only the other Dow companies. The arbitrators nevertheless took jurisdiction over all claims on the ground that it had been the "mutual intention of all parties" that the other companies be "veritable" parties or that the contracts be for their benefit. See p. 136. In short, the decision turned on an interpretation of the submission in the circumstances of

that case. I accept that the tribunal also supported its conclusion on the ground that the rule it accepted was "sensible and practical".

[19] I can find nothing in the submission in this case, or in the surrounding circumstances, to warrant a similar conclusion. I accept that forcing the subsidiaries to partake in the arbitration may well be sensible and practical. I insist only that it is for the parties or the Legislature, not me, to decide what procedure is right for these cases.

[20] I think it prudent to emphasize the limited nature of this ruling. One must distinguish between jurisdiction to grant relief and jurisdiction to consider actions. The subsidiaries are not parties to the arbitration in the sense that the claimant might get relief against them directly. But arbitrators might nevertheless decide that, for the purpose of relief against the principal, they can rely upon what the subsidiaries did. Moreover, the arbitrators might decide that the actions of the subsidiaries make the principal liable, and might offer relief against the principal for what they did.

[21] I agree with the learned Queen's Bench judge that he cannot refer any of the claims of any of the "extra" parties to arbitration. I add only that he might nevertheless stay claims pending arbitration when it would appear just and equitable to do so. He might also strike a claim for failure to disclose a cause of action. Both opportunities await another day in Queen's Bench. Subject to the right to apply in Queen's Bench for another kind of stay, I would reject these grounds of appeal.

II

[22] I now turn to the question whether some issues raised in the statement of claim are arbitrable.

[23] They include a claim for inducing a breach of contract. The particulars allege that one of the defendants hired away an employee of one of the plaintiffs. The learned Queen's Bench judge held that this claim could not go to arbitration. Before us, counsel for the licensor accepted that this ruling was correct.

[24] The extra claims also include allegations against all the defendants of conspiracy to harm all plaintiffs. Mr. Redmond for the distributor says that this pleading relies on tort, not contract, and offers two alternatives: conspiracy to harm by unlawful acts and conspiracy to harm by lawful acts. Are either caught by the submission? The learned chambers judge, no doubt because he did not need to give his view of the case, did not deal with this issue separately. I must.

[25] The mere fact that a claim sounds in tort does not exclude arbitration. Section 2 of the International Commercial Arbitration Act limits its scope to "… differences arising out of commercial legal relationships, whether contractual or not …". This is permitted by Article 1 s. 3 of the Convention, which leaves to signatory states the decision whether the Convention applies to just those differences, as opposed to all manner of differences.

[26] The Convention and Act thus covers both contractual and non-contractual commercial relationships. They thus extend their scope to liability in tort so long as the relationship that creates liability is one that can fairly be described as "commercial". In my view, a claim that a corporation conspired with its subsidiaries to cause harm to a person with whom it has a commercial relationship raises a dispute "arising out of a commercial legal relationship, whether contractual or not."

[27] One must take care not to render this meaningless by equating "contractual" with "commercial". But I need not hazard an exhaustive definition of the test because, for the purposes of this case, it is enough to say that the relationship between these corporations as alleged in the pleadings was manifestly commercial and nothing but commercial. I reject the argument by Mr. Redmond that the dispute must turn on the terms of the contract and its breach. I therefore conclude that theAct and the Convention contemplate that claims like the claims based upon conspiracy to harm can fall for arbitration.

[28] The next step is to interpret the submission. This is because the Convention, and therefore the Act, contemplate a narrow submission. Not all arbitrable issues must be arbitrated. This is left for the parties to decide in their negotiation of the terms of the submission. Article II s. 1 of the Convention refers to agreements that submit "all or any differences". The parties might agree to submit not all but some.

[29] The submission before us limits itself to disputes "arising out of or in connection with" the contract. I agree with the comments of Evans, J. in Overseas Union Insce. v. AA Mutual [1988] 2 Lloyd's Law. Reports 63 (U.K.Q.B.) at p. 67. He first described a narrower form of submission, typically using only the words "under the contract", where only rights and obligations created by the contract can be referred. He contrasted that to the form of submission before us when he said, at p. 67:

> Conversely, if the parties agree to refer disputes arising 'in relation to' or 'in connection with' their contract, a fortiori if the clause covers disputes arising 'during the execution of this contract' (The Damianos, [1971] 1 Lloyd's Rep. 502; [1971] 2 Q.B. 588) or in relation to 'the work to be carried out hereunder', a common form in construction contracts, then both as a matter of language and of authority some wider category may be intended.

[30] In my view, this submission extends beyond rights and duties created by the contract. A dispute meets the test set by the submission if either claimant or defendant relies on the existence of a contractual obligation as a necessary element to create the claim, or to defeat it. Thus, the pleading here that relies upon a claim of a conspiracy by unlawful means to harm the distributor meets the test. This is because a breach of the contract is relied upon as the source of the "unlawfulness". That dispute should be referred to arbitration.

[31] With respect, I am not persuaded that ODC Exhibit Systems Ltd. v. Lee et al. 1988 CanLII 3297 (BC SC), (1988) 41 B.L.R. 286. (B.C.S.C.), upon which the distributor relies, is a contrary authority. In that case, two firms made, but later cancelled, a contract naming one firm as the exclusive sales agent of a product of the other. The cancellation agreement contained a submission. Later, the ex-agent sued several people in tort, alleging, among other things, that they conspired to induce the supplier to negotiate the cancellation agreement. The Court refused (at p.293) to make a reference on the terse ground that:

> The action here does not arise out of 'this agreement'. It arises out of something allegedly done by the defendants … before the conciliation agreement came into being. The plaintiff alleges that it was induced by their conspiracy, deceit and fraud to execute the conciliation agreement. It cannot be reasonably said that these allegations which induced the plaintiff to enter into

the conciliation agreement, were matters which the parties had agreed (or had even contemplated) as being among those to be settled by arbitration

….

[32] I grant that one might argue that the claim, or at least the defence, under review in that case relied upon the existence of the contract. On the other hand, one might argue that the claimant was caught by the rule in Heyman v. Darwins Limited [1942] A.C. 356 at 366: the validity of the submission itself is not arbitrable as boot-strapping. But in any event I see nothing in the reasoning in that decision that persuades me that I am wrong in my view.

[33] The alternative pleading raises greater difficulties. This is a claim for conspiracy to cause harm, but does not rely on any unlawful act. The pleading is:

> 20. Further, or in the further alternative to paragraphs 17 to 19, the Defendants KONE and KONE CRANES - ACM, USA have conspired with intent to harm the Plaintiff KAVERIT and have in fact harmed the Plaintiff KAVERIT:
>
> (a) by having the Defendant KONE CRANES - ACM, USA open and carry on in the Territory the business called "KONE CRANES Maintenance Services";
>
> (b) by holding out, in the advertisement by "KONE CRANES Maintenance Services" heretofore described, that the services offered by "KONE CRANES Maintenance Services" are superior to those offered by the Plaintiff KAVERIT; and
>
> (c) by holding out, in the advertisement by "KONE CRANES Maintenance Services" heretofore described, that KONE equipment can be obtained by customers at lower prices when purchased from "KONE CRANES Maintenance Services".

[34] The first particular I have quoted essentially alleges nothing more than that the defendants competed with the plaintiff. Mr. Redmond insisted that such a cause of action existed even if no unlawful means are employed. As I said before, no motion to strike is before us.

[35] I observe that the claim makes no obvious reference to or reliance on the agreement containing the submission. Is it a quite separate matter? Mr. Secord argued before us that, in cases of doubt, one should simply stay the suit and refer the question. If the arbitrators decline jurisdiction, the stay would be lifted. The simple answer to that is that the Court must do its work.

[36] In the absence of particulars, I can only say that the claim in question must be and is referred to arbitration if it relies upon the existence of a contract between the parties. If a claim can be made out free of that reliance, it can go to trial. The risk lies with the plaintiff. In effect, I read down the pleading to add the prefatory words "Apart from any contract or contractual obligations and without reliance upon them,". I should add that I am sceptical that the plea, so adjusted, discloses a cause of action. But that, as I have said, is for another day.

[37] The second and third particulars in that pleading do not rely on the existence of any contract between the parties. On the contrary, they are the sorts of claim that a competitor might make. Mr. Redmond will not deny that the facts relied

upon to support the claim might include some also relied upon to show a breach of contract. But I accept that they are qualitatively different sorts of claims.

[38] I cannot say that a dispute arises out of or in connection with a contract unless the existence of the contract is germane either to the claim or the defence. It is not enough to say that the events that give rise to the claim also give rise to a claim for breach of contract. One must be able to say that the other claim relies on the existence of the contractual obligation.

[39] Mr. Secord asks for a broader rule, and relies on several cases. He first cites Lonhro Ltd. (U.K.) et al. v. The Shell Petroleum Co. Ltd. (U.K.) et al. (1979) IV ICCA Yearbook Commercial Arbitration 320 (Ch D). The Court there referred all allegations to arbitration notwithstanding that the claims sounded in tort and other branches of the law, including treason. Brightman, J. held:

> In the present case the claims in tort have the closest possible connection with the Shippers' Agreement. If it is found that Shell and BP have complied in all respects with the terms of the Shippers' Agreement, the Plaintiffs can have no claims in tort against them.
>
> (p.321-322)

[40] For the reasons given, I cannot say that about all the pleadings in this case.

[41] In Landgericht Hamburg IV Yearbook Coram. Arb 261 (1979) a German Court faced a similar issue. The brief report says that the Court said that tort claims should go to arbitration because "It would be illogical to suppose that the parties would have wanted a "split" jurisdiction". See p. 262. I do not agree. Indeed, the argument might be used against a reference, as it indeed was in this case by the learned chambers judge.

[42] I can find nothing in Boart Sweden A.B. v. NYA Stromnes A.B. et al. (1989) 41 B.L.R. (295) (Ont. H.C.) to help the licensor on this point. On the contrary, Campbell, J. there refused to send the tort claims to arbitration. He did so because they "involve additional issues and parties outside the four corners of the agreement". Because he did not elucidate, I cannot tell whether his view is consistent or not with what I have said. He then stayed the tort suit pending the outcome of the arbitration, but that is not relevant to the issue under consideration.

[43] In Government of New Zealand v. Mobil Oil New Zealand (June, 1987) High Court of Wellington, N.Z., XIII Yearbook Comm. Arb. 638 (1988), the dispute between the parties was whether the contract, which included a submission, contravened a New Zealand statute prohibiting agreements that lessen competition. Notwithstanding that the submission dealt only with disputes "under" the agreement, Heron, J., after noting that the arbitrator was to decide legal questions on application of New Zealand law, held this implied that the enforceability or validity of the contract under New Zealand law was a matter for arbitration. Nothing in that persuades me that I am wrong.

[44] I therefore agree in part with the learned chambers judge that some of the non-contractual issues cannot go to arbitration. I am, however, of the view that the claim by the distributor for conspiracy to harm by unlawful acts, because the unlawful acts are alleged to be unlawful breach of contract, must go to arbitration.

Claims of interference with competition not based upon the existence of the contract may proceed in Alberta.

III

[45] I turn now to the key finding of the learned chambers judge. To him, the case did not turn on whether this or that issue was arbitrable. Rather, the question was whether the entire dispute conveniently could be resolved by arbitration. He said:

> The nub of the issue in this case is whether the Plaintiff has, by its Statement of Claim, proliferated the issues and thereby the parties with the result that the arbitration provision is frustrated. If so the Plaintiff's action should not deprive the Defendant of the stay. On the other hand, if litigants in this action, who are not party to the arbitration provision and who are not consenting to it, have raised legitimate causes of action which are connected to the main issue of breach of contract such that all matters should be tried in the same proceedings, then the arbitration provision is, in the words of the statute, inoperative or incapable of being performed. Since arbitration is consensual in nature persons not party to the agreement cannot be compelled to submit to the method of dispute resolution.

[46] With respect, the nub of the case is not whether the plaintiff raised "legitimate" causes that cannot go to arbitration. On the contrary, the agreement to arbitrate should be honoured and enforced whether or not the plaintiff displayed great imagination in the pleadings.

[47] The power to grant or withhold a reference under the International Commercial Arbitration Act is very limited, and the statute does not permit a decision on the test invoked by the learned chambers judge, which resembles the forum conveniens test. For the purpose of argument, I accept the possibility (albeit I suspect very slim) of two suits at the same time, and even contradictory findings. Nevertheless, that is the method chosen by the parties. The Act directs me to hold them to their bargain. Section 2(1) of the International Commercial Arbitration Act makes the Convention part of the law of Alberta. It says that the Convention "applies in the Province." The Convention Article II s. 3 provides that:

> 3. The court of a Contracting State … shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.
>
> [Emphasis added]

[48] The learned chambers judge relied upon the qualifying words. He held that an inconvenient reference was an "inoperative" one. I do not agree. It may not operate conveniently, but it cannot be said to be inoperative. The view taken by the learned chambers judge adds a gloss to the word that it cannot, in all the circumstances, reasonably bear.

[49] It is common ground that the evident purpose of Alberta's acceptance of the Convention is to promote international trade and commerce by the certainty that comes from a scheme of international arbitration. As Justice Potter Stewart said inScherk v. Alberto-Culver (1974) 417 U.S. 506 (1974) at p.516:

> …uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transactioh.

[50] That purpose would not be served by adopting an interpretation that puts the entire scheme at risk. The forum conveniens test almost always would defeat arbitration because, as Justice Stewart said in Scherk, it would invite "unseemly and mutually destructive jockeying". Indeed, one argument of the learned chambers judge relied upon the fact that, after arbitration, the parties might re-gurgitate some issues during enforcement proceedings in Alberta. This fear exists in every case, of course. If we yield to it, no dispute would go to arbitration. The same can be said of a leash on arbitration that is as short as the pleading of opposing counsel is long, which sacrifices certainty to wit. (I accept the statement of Mr. Redmond that the drafting of the statement of claim here occurred before the arbitration issue arose. Mr. Redmond will, I hope, take it as a compliment that I knew that before he told me: if driven, he has the skill to plead more nuanced issues than those under review.)

[51] In modern commercial disputes, it is almost inevitable that many parties will be involved and very unlikely that all parties will have an identical submission. The problem of multiple parties, which drove the decision of the chambers judge here, will exist in almost every case. There is no question that proliferation of litigation is a possibility. Redfern and Hunter, inLaw and Practice of International Commercial Arbitration (Street and Maxwell 1986) describe, at page 141 and following, the problems and some solutions, including a model submission. In any event, the Convention cannot reasonably be taken as having abandoned any attempt at arbitration when this problem arises.

[52] In my view, the proviso about "null and void, inoperative, and incapable of being enforced" simply preserves the rule in Heyman v. Darwins Limited cited earlier. The arbitrator cannot decide whether the submission is valid. Its validity and enforceability must be pronounced upon before the referring Court can enforce it by a reference and stay. It is not valid if it, or the contract in which it is found, is, by operation of domestic law in the referring tribunal, either void or unenforceable. The proviso is an echo of the law about void contracts ("null and void"), unenforceable contracts ("inoperative"), and frustrated contracts ("incapable of being enforced"). See Paczy v. Haendler & Naterman [1981] 1 Lloyd's Law Reports 302 at 307-8.

[53] In the result, I respectfully disagree with the decision of an Italian Court, the Tribunale di Milano, that took the opposite view in a case startlingly similar to this. See Sopac Italiana S.p.a. v. Bukama GmbH (FRG) and F.I.M.M. (Italy) (1977) II ICCA Yearbook Commercial Arbitration 248. Sopac sued for breach of a contract naming it as Bukama's exclusive vendor for Italy, and added as a defendant F.I.M.M., a subsidiary of Bukama operating in Italy in breach, Sopac said, of the contract. The contract between Sopac and Bukama contained a submission, but F.I.M.M. was not a party. The Court refused to refer the dispute on the ground that it could decide all the issues for all the parties without any risk of conflicting decisions. For the reasons given, I disagree.

IV

[54] In the result, I would allow the appeal and direct that all issues between the distributor and the licensor that rest upon the existence of the contract be stayed and referred for decision as directed in the submission. I would also remit to Queen's Bench any issues about consequent temporary stays of other aspects of the proceedings, and any attacks on pleadings as disclosing no cause of action.

DATED at EDMONTON, Alberta
this 16th day of JANUARY,
A.D. 1992