1ST CASE of Level 1 printed in FULL format.

COMPAGNIE DES BAUXITES DE GUINEE, Petitioner, v. HAMMERMILLS, INC., Respondent; HAMMERMILLS, INC., Counter-petitioner, v. COMPAGNIE DES BAUXITES DE GUINEE, Counter-respondents.

Civil Action No. 90-0169 (JGP)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

1992 U.S. Dist. LEXIS 8046

May 29, 1992, Decided
May 29, 1992, Filed

JUDGES: [*1] PENN

OPINIONBY: JOHN GARRETT PENN

OPINION: MEMORANDUM OPINION

In this action, petitioner Compagnie des Bauxites de Guinee ("CBG") seeks to vacate that portion of an arbitration award granting respondent Hammermills, Inc. ("Hammermills") the legal costs [*2] incurred in the arbitration, including attorneys' fees. The matter comes before the Court on the parties' cross-motions for summary judgment. For the reasons that follow, the Court concludes that there are no genuine issues of material fact and that respondent is entitled to judgment on its counterclaim for confirmation and enforcement of the arbitration award.

I. FACTS

In evaluating a motion for summary judgment, the Court must resolve genuine disputes of material fact in favor of the non-moving party. That is, the Court may grant summary judgment in favor of a party only if facts that are undisputed -- or that cannot genuinely be disputed -- demonstrate that the moving party is entitled to judgment as a matter of law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Washington Post Co. v. Department of Health & Human Servs., 865 F.2d 320, 325 (D.C. Cir. 1989). In this case, there is [*3] no genuine issue as to any of the following material facts.

Petitioner CBG is a Delaware corporation with its principal place of business in the Republic of Guinea, where it operates a bauxite mining and crushing facility. Respondent Hammermills is a dissolved corporation formerly organized under the laws of Missouri, that was engaged in the manufacture of ore-crushing equipment. In 1970, CBG and Hammermills entered into a contract for the purchase and sale of ore-crushing and handling equipment for use at CBG's bauxite-crushing facility. The contract provided, inter alia, that all disputes relating to interpretation of and performance under the contract would be settled through arbitration, pursuant to the Rules of Conciliation and Arbitration of the International Chamber of Commerce ("ICC"), by either one or a panel of arbitrators designated pursuant to such rules.

In May 1985, CBG initiated arbitration proceedings against Hammermills, alleging that Hammermills had breached the contract by provid[illegible]

"load data" that was used to build a faulty concrete support structure at CBG's facility, and seeking some $ 46 million in damages. In January 1986, Hammermills filed, [*3] in the United States Bankruptcy Court for the Northern District of Illinois, a voluntary petition for reorganization pursuant to Chapter 11 of the Bankruptcy Code. As a result of the filing of this petition, the arbitration proceeding was automatically stayed pursuant to section 362(a) of the Bankruptcy Code, 11 U.S.C. § 362(a).

In March 1987, CBG and Hammermills filed a joint motion to modify the automatic stay to permit the arbitration proceeding to go forward, on the ground that Hammermills' litigation costs in that proceeding were being covered by its insurer, Argonaut-Midwest Insurance Company ("Argonaut"), and therefore the bankrupt's assets would not be diminished by allowing the arbitration action to proceed. Argonaut's duty to defend Hammermills in the arbitration proceeding had been established in a declaratory judgment action brought by CBG against Argonaut in the United States District Court for the Western District of Pennsylvania. On March 17, 1987, the Bankruptcy Court granted the parties' motion and modified the automatic stay to allow the arbitration to go forward, on the condition that Argonaut "defends and continues to defend Hammermills in the Arbitration" [*4] as well as any confirmation proceedings.

Hearings on the merits of CBG's breach-of-contract claim were held before a single ICC Arbitrator between July 18 and August 10, 1988, during which the Arbitrator heard approximately 20 days of testimony from 18 witnesses. Following the hearings, the parties submitted post-hearing briefs and reply briefs. The matter remained under advisement before the Arbitrator for some time until, on September 29, 1989, counsel received by telefax a letter from the Arbitrator requesting a statement of each party's legal costs. By letter dated October 13, 1989, counsel for CBG responded to the arbitrator's request, reporting legal expenses totalling $ 1,968,802.24. n1 Counsel for Hammermills responded by letter dated October 18, 1989, stating that Hammermills had incurred legal costs totalling $ 1,073,220.60. n2 Counsel for CBG received its copy of Hammermills' counsel's October 18 letter on Saturday, October 21, 1989. On October 24, 1989, counsel for CBG contacted the ICC Court in Paris to inquire about the status of the Arbitrator's decision, and was advised that award had been approved by the ICC Court on October 19, 1989, and was final.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 A significant portion of these costs were incurred in connection with the declaratory judgment action against Argonaut and the bankruptcy proceedings, rather than the arbitration proceeding itself. [*5]

n2 Apparently, counsel for Hammermills did not immediately respond to the Arbitrator's September 29 letter, prompting a second letter from the Arbitrator dated October 17, 1989. CBG asserts strenuously in its memoranda that it was not provided with a copy of the Arbitrator's October 17 letter. The significance of this oversight, however, is never explained. It is undisputed that CBG received a copy of the Arbitrator's initial letter of September 29, as well as Hammermills' counsel's ultimate response on October 18.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

ICC Rules provide that the Arbitrator must submit a draft of his award to the ICC Court of Arbitration, which must approve the form of the draft prior to

issuance of the award. Specifically, Article 21 of the ICC Rules provides:

Before signing an award, whether partial or definitive, the arbitrator shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the award and, without affecting the arbitrator's liberty of decision, may also draw his attention to points of substance. No award shall be signed until it has been approved as to [*6] form.

Sometime prior to October 19, 1989, the Arbitrator submitted his draft award to the ICC Court for approval. The draft award denied CBG's claim against Hammermills in its entirety. On October 19, 1989, the ICC Court approved the draft award. Thereafter, the Arbitrator added to the award an assessment against CBG of Hammermills' "normal legal costs" amounting to $ 993,220.60, n3 in addition to the arbitration costs of $ 145,441.78. The arbitrator signed the award on or about October 26, 1989. On November 24, 1989, the parties were officially notified by the ICC Secretariat of the Arbitrator's decision and provided with copies of the Arbitrator's 103-page Award Sentence, dismissing CBG's claim in its entirety and assessing against CBG Hammermills' "normal legal costs" of $ 993,220.60 as well as the costs of arbitration.

- - - - - - - - - - - - - - - - - - -footnotes- - - - - - - - - - - - - - - - - -

n3 The precise manner in which the costs assessment was added to the award is not entirely clear from the record. CBG asserts that the draft award submitted to the ICC Court for approval contained no mention whatsoever of the assessment of legal costs against it. Hammermills, on the other hand, believes that the draft contained a provision assessing legal costs against CBG, but with a blank space for the amount of the assessment, which the arbitrator completed after the draft was approved. CBG argues that at the very least it should be entitled to discovery on this issue. For the reasons that follow, however, the Court does not find this issue to be material, and will assume for purposes of this opinion that CBG's version of events is what transpired.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*7]

On January 14, 1990, CBG initiated this action by filing a petition to vacate, modify or correct the arbitration award. CBG asserts that the award of Hammermills' legal fees against it cannot stand for two principal reasons. First, CBG claims that it was denied due process because it was deprived of adequate notice of the Arbitrator's intention to assess legal fees against it and had an opportunity to be heard on the issue. Second, CBG claims that the Arbitrator's addition of the fee assessment subsequent to approval by the ICC Court violated ICC procedures. CBG also claims that Hammermills is not the "real party in interest" in this litigation under Fed. R. Civ. P. 17(a). n4 Hammermills has filed a counter-petition seeking recognition and enforcement of the arbitral award.

- - - - - - - - - - - - - - - - - - -footnotes- - - - - - - - - - - - - - - - - -

n4 CBG has raised numerous arguments in its lengthy papers, and the Court has addressed the principal contentions in this opinion. The other arguments not specifically addressed have been reviewed and considered, but deemed not to affect the ultimate result.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - -

[*8]

II. THE STANDARD OF REVIEW

The parties agree that this action falls within the scope of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), as implemented, 9 U.S.C. §§ 201-08. n5 The statute implementing the Convention authorizes the parties to a foreign arbitration to bring an action in federal court seeking confirmation of the award. 9 U.S.C. § 207. The statute directs that the reviewing court "shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said convention." 9 U.S.C. § 207. Thus, a reviewing court may refuse to recognize and enforce an arbitral award only if the party seeking such refusal establishes one of the grounds specified in the Convention.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n5 See 9 U.S.C. § 202 ("An agreement or award . . . which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless [the legal relationship between the parties] involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states."); Bergesen v. Joseph Muller Corp., 710 F.2d 928, 932 (2d Cir. 1983) (award subject to Convention if it is "pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction").

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - -

[*9]

The grounds for refusal to enforce an arbitral award are specified in Article V of the Convention. As pertinent to this case, Article V provides that recognition and enforcement of an award can be refused only if the party asserting such refusal furnishes proof that:

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

. . .

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties. . . .

Convention, Article V, §§ 1(b), (d).

The principal purpose of the Convention and its implementation by Congress was to "remove pre-existing obstacles to enforcement" of foreign arbitration awards. Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier, 508 F.2d 969, 973 (2d Cir. 1974). To facilitate this policy, which applies with special force in the field of international commerce, see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985), the courts have developed a "general [*10] pro-enforcement bias."

 5] Reported in Yearbook XVII (1991) pp 624-629 / 115 to 105

Parsons & Whittemore Overseas Co., 508 F.2d at 973, under which the burden of proof rests on the party challenging the arbitration award, Dworkin Cosell Interair Courier Servs., Inc. v. Avraham, 728 F. Supp. 156, 158 (S.D.N.Y. 1989); Overseas Private Invest. Corp. v. Anaconda Co., 418 F. Supp. 107, 110 (D.D.C. 1976), and the grounds for refusing to recognize arbitral awards are narrowly construed, Parsons & Whittemore Overseas Co., 508 F.2d at 976-77.

~~III. CBG'S DUE PROCESS ARGUMENT~~

[4] Under ~~section 1(b) of Article V~~ Art. II(1)(b) of the Convention, enforcement of an arbitration award may be refused if it can be shown that "the party against whom the Award is invoked was not given proper notice of . . . the arbitration proceedings or was otherwise unable to present his case. . . ." ~~Convention, Article V, § 1(b).~~ CBG claims that it did not receive proper notice of the arbitrator's intent to impose legal costs against it, and was therefore "unable to present its case" in opposition to such costs. ~~n6~~ 6]

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

[1] ~~n6~~ Specifically, the "case" that CBG claims it was unable to present is the argument that Hammermills is not entitled to collect legal costs under ICC Rules because those costs were incurred not by Hammermills but rather by its insurer, Argonaut. CBG argues that ICC Rules authorize the Arbitrator to assess only "normal legal costs incurred by the parties," ICC Rules, Art. ~~cle~~ 20(2) (emphasis added). Because Hammermills' costs were paid by Argonaut, CBG's argument goes, they were not costs "incurred by [a] party."

This argument appears to be dubious, at least as a matter of American law. The prevailing rule is that an insured may recover attorneys fees from a third party (where there is some duty on the party of the third party to pay such fees, such as a duty of indemnification or a litigation rule authorizing a court to assess fees) notwithstanding the fact that technically the fees have been incurred by the insurer rather than the insured. See, e.g., Manor Healthcare Corp. v. Lomelo, 929 F.2d 633, 639 (11th Cir. 1991) (holding that, under Fed. R. Civ. P. 54(d), costs could be awarded to prevailing party even though those costs were paid by party's insurer; to hold otherwise, court reasoned, "would allow plaintiffs to bring lawsuits against insured defendants without incurring litigation costs after losing on the merits"); Safeway Rental & Sales Co. v. Albina Engine & Machine Works, Inc., 343 F.2d 129, 135 (10th Cir. 1965) (noting that "it is difficult to find a distinction between subrogation to the right to recover the amount of the judgment which was paid by another, and subrogation of the right to recover fees"); Boiler Engineering & Supply Co. v. General Controls, Inc., 443 Pa. 44, 277 A.2d 812, 814 (1971) (overruling prior decision and noting that "weight of authority" favors allowing recovery of fees under these circumstances); Howard P. Foley Co. v. Employers-Commercial Union, 15 Ariz. App. 350, 488 P.2d 987 (1971). As a matter of policy, the fact that Hammermills has taken the precaution of purchasing insurance should not excuse CBG from a liability for legal costs that would otherwise be assessed against it. Ultimately, of course, the costs are recovered by the insurer pursuant to its subrogation right, so there is no "windfall" to the insured. CBG, citing John F. Wanamaker, New York, Inc. v. Otis Elevator Co., 228 N.Y. 192, 126 N.E. 718 (1920), urges that under New York law (which CBG claims to control this issue) an insured cannot recover attorneys' fees from a third party where those expenses were actually incurred by the insurer and not by the insured. There is considerable authority, however, for the proposition that New York has moved

away from the Wanamaker result and now allows recovery of legal costs despite insurance coverage. See Dankoff v. Bowling Proprietors Ass'n of America, Inc., 69 Misc. 2d 658, 331 N.Y.S.2d 109 (1972) (citing, inter alia, Crowley's Milk Co. v. American Mutual Liab. Ins. Co., 313 F. Supp. 502, 507-08 (S.D.N.Y. 19--)); see also Sassower v. Field, No. 88 Civ. 5775 (S.D.N.Y. Aug. 12, 1991) (not discussing Wanamaker, but calling "absurd" the argument that costs cannot be awarded in favor of prevailing party because the insurer actually incurred the costs); Boiler Engineering & Supply Co., 443 A.2d at 814 (noting that validity of Wanamaker decision "is open to serious question in light of several decisions of the New York courts").

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*11] 7/ See fn. 3.

[5] The few courts to address this provision of the Convention have concluded that the provision "essentially sanctions the application of the forum state's standards of due process." See Parsons & Whittemore Overseas Co., 508 F.2d at 975; Geotech Lizenz AG v. Evergreen Systems, Inc., 697 F. Supp. 1248, 1263 (E.D.N.Y. 1988) (citing Parsons & Whittemore Overseas Co.). Due process requires notice "reasonably calculated, under all the circumstances, to apprise interested persons of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

[6] The Court is convinced that CBG was afforded sufficient notice that the assessment of legal fees was an issue in the arbitration to comport with due process. First, the ICC Rules themselves expressly placed CBG on notice that the assessment of legal costs would necessarily be incident to the final disposition of the proceeding. Article 20 of the ICC Rules states in relevant part:

1. The Arbitrator's award shall, in addition to dealing with the merits of the case, fix the costs of ~~[*12]~~ the arbitration and decide which of the parties shall bear the costs or in what proportions the costs shall be borne by the parties.

2. The costs of the arbitration shall include the arbitrator's fees and the administrative costs fixed by the [ICC] Court . . ., the expenses, if any, of the arbitrator, the fees and expenses of any experts, and the normal legal costs incurred by the parties.

[7] Second, the "Arbitrator's Terms of Reference," the document "defining . . . the issues to be determined" in the arbitration, ICC Rules, Article 13(c), which was signed by counsel for both parties, stated in part:

[sic]

IV. The basic issues in this arbitration are as follows:

1. to decide on the claims submitted by the parties.

2. to fix the costs of the arbitration and decide which of the parties shall bear the costs or in what proportions of the costs shall be borne by the parties.

[8] "Costs of arbitration" is a term of art under the ICC Rules which includes the "normal legal costs incurred by the parties." ICC Rules, Article 20(2).

[9] Third, at the conclusion of its post-hearing brief, which was filed and served on CBG in October 1988, a full year before the award was issued, [*13] Hammermills urged the Arbitrator to enter an award in favor of Hammermills, including the costs of arbitration, such as Hammermills attorneys' fees and expert witness fees. Hammermills' Post-Hearing Brief (October 26, 1988) at 111. Finally, CBG was again put on notice that the assessment of legal costs was an issue when it received the Arbitrator's September 29, 1989 letter requesting the parties to submit their legal costs. This letter, in its entirety, states:

Dear Sirs:

I would appreciate if each of you would kindly send me by fax the statement of his client's legal costs, according to art. 20(2) last part [sic] of the ICC Rules of conciliation and arbitration.

CBG responded to this letter by submitting an itemization of its own legal costs, without requesting an additional opportunity to be heard or raising any concerns regarding this issue.

- - - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - - - -

n7 It is important to note that CBG is not claiming that it did not have an opportunity to challenge the amount of legal costs imposed by the Arbitrator. Rather, CBG claims that it was denied the opportunity to challenge the propriety of the assessment of legal costs vel non. Thus, there is no merit to the argument that CBG was not placed on notice of this issue until October 21, 1989, when it received its copy of Hammermills' counsels' letter to the Arbitrator specifying the amount of costs Hammermills was seeking.

- - - - - - - - - - - - - - - - - - End Footnotes - - - - - - - - - - - - - - - - - -

[*14]

[10] Thus, despite actual notice that the Arbitration was empowered to assess legal costs in the final award, that Hammermills was seeking an award of such costs, and that the Arbitrator had solicited cost information from the parties, CBG did not once raise before the Arbitrator its argument that Hammermills was not entitled to recover its legal costs because those costs were being paid by Argonaut. n8 Under these circumstance, the Court is convinced that the notice requirements of the due process clause were satisfied.

- - - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - - - -

n8 It is undisputed, of course, that CBG was aware throughout the arbitration that Hammermills' costs were being paid by Argonaut, because it was CBG itself that had secured Argonaut's duty to defend. Moreover, it is also undisputed that the Arbitrator was well aware that Hammermills' legal costs were being paid by Argonaut. After the parties secured the modification to the automatic stay that allowed the arbitration to proceed, the Arbitrator stated in a June 1987 letter to the parties:

"As I understand the Bankruptcy Court order of March 17th, 1987, the modification of the automatic stay of the arbitral proceedings is subject to the condition that Argonaut-Midwest defends Hammermills."

[*15]

n9 CBG relies on Beatrice Foods Co. v. New England Printing & Lithographing Co., 899 F.2d 1171 (Fed. Cir. 1990), for the proposition that it was denied due process. It is true that the Federal Circuit concluded that the imposition of sanctions in that case violated the sanctioned party's due process rights to notice and an opportunity to be heard. The court's brief description of this issue, however, does not contain any discussion of the procedures in the district court prior to the imposition of sanctions or the extent to which, if at all, the sanctioned party was placed on notice. See id. at 1176. As far as one can ascertain from the district court opinion, it appears that the district court imposed sanctions sua sponte without any prior indication to the parties that such a ruling was under consideration. See Beatrice Foods Co. v. New England Printing & Lithographing Co., No. B-80-335 (D. Conn. July 24, 1988). Moreover, the district court's imposition of sanctions rested on a factual finding that counsel had "multiplied the proceedings unreasonably and vexatiously." See 899 F.2d at 1176. In this case, the Arbitrator's assessment of costs did not rest on any such factual finding of bad faith; rather, it was an ordinary incident of the termination of the arbitration pursuant to ICC Rules.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[*16]

IV. COMPLIANCE WITH ICC PROCEDURES

[10] CBG next contends that the Arbitrator violated ICC procedure by inserting into the award the amount of the legal costs to be assessed against it after the draft award had been approved by the ICC Court. CBG argues that this procedural violation gives rise to a defense to the award under section 1(d) of Article V of the Convention, which provides that recognition and enforcement may be refused if "the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties. . . ." CBG reasons that the arbitration clause in its contract with Hammermills provided for arbitration according to the Rules of Conciliation and Arbitration of the [ICC], and therefore any procedural violation of ICC Rules necessarily violates "the agreement of the parties" under the Convention.

[11] The Court does not believe that section 1(d) of Article V was intended, as CBG argues, to permit reviewing courts to police every procedural ruling made by the Arbitrator and to set aside the award if any violation of ICC procedures is found. Such an interpretation would directly conflict with the "pro-enforcement" bias [*17] of the Convention and its intention to remove obstacles to confirmation of arbitral awards. See Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Int'l, Ltd., 683 F. Supp. 945, 956 (S.D.N.Y. 1988) ("A major purpose of the Federal Arbitration Act is to avoid delay and unnecessary expense to the parties . . ., and the delay that would result from reviewing procedural rulings of the arbitrators would be substantial."); cf. Parsons & Whittemore Overseas Co., 508 F.2d at 973 ("An expansive construction of this defense [section 2(b) of Article V] would vitiate the Convention's basic effort to remove pre-existing obstacles to enforcement."). Rather, the Court believes that a more appropriate standard of review would be to set aside an award based on a procedural violation only if such violation worked substantial prejudice to the complaining party. Whatever the scope of section 1(d), however, the Court concludes that it is not applicable here because CBG has not met its burden of establishing that a violation of ICC procedure occurred.

CBG's theory is that the Arbitrator's actions violated Article 21 of the ICC Rules, which provides: [*18]

Before signing an award, whether partial or definitive, the arbitrator shall submit it in draft form to the [ICC] Court. The Court may lay down modifications as to the form of the award and, without affecting the arbitrator's liberty of decision, may also draw his attention to points of substance. No award shall be signed until it has been approved as to form.

[12] CBG observes that Article 20(1) states that the arbitrator's award "shall . . . fix the costs of the arbitration." Therefore, CBG argues, when Articles 21 and 20(1) are viewed in conjunction, they require that the draft submitted to the ICC Court for approval include the costs assessment.

[13] The Court believes that at most the rules relied upon by CBG give rise to some ambiguity as to whether the assessment of legal costs must be included in the draft award submitted to the ICC Court. Material submitted by both parties from experts on ICC procedures, however, convinces the Court that CBG has not established that there was a violation of ICC rules in this case. After the final award was issued, the parties wrote to Benjamin Davis, Counsel at the Secretariat of the ICC, requesting that he explain, inter alia, the [*19] procedures under the ICC Rules for fixing of the costs of the arbitration and for awarding attorneys' fees. Hammermills has submitted to the Court Mr. Davis' sworn response to the parties' inquiries, which includes, in question-and-answer format, the following information:

(. . .)

1. Please explain the procedures under the ICC Rules for the fixing of the costs of arbitration.

In an arbitration that proceeds to a final award, at the time the draft award is submitted to the [ICC Court] for scrutiny in accordance with Article 21 of the ICC Rules, in the event the Court approves the final award pursuant to this Article, it also fixes the administrative charge of the ICC and fees of the Arbitral Tribunal . .

Pursuant to the ICC Rules (Article 20(2)(i)) it is the responsibility of the Arbitral Tribunal itself to determine the "normal legal costs" incurred by the parties.

2. Please explain the procedures under the ICC Rules for awarding attorney's fees.

There are no required procedures for the awarding of normal legal costs, i.e. attorney's fees. Pursuant to Article 20(2) of the ICC Rules these amounts are not fixed by the [ICC] Court. They are, as already explained, fixed [*20] by the Arbitral Tribunal.

. . .

[14] The substance of Mr. Davis' letter, therefore, is that while the assessment of costs of the arbitral tribunal and the administrative charge of the ICC is the responsibility of the ICC Court, the assessment of "normal legal costs", which includes legal fees, is within the "exclusive competence" of the Arbitrator, and there are no formal procedural requirements governing that assessment. This conclusion is buttressed by an affidavit, submitted by CBG itself, of William Park, co-author of a treatise on ICC arbitration, in which Professor Park states that "there is no provision of the ICC Rules which dictates a specific

procedure for the arbitrator to follow in addressing the award of legal costs. . . .' Park Affidavit, P16. Professor Park confirms Mr. Davis' statement that 'unlike arbitrator's fees and ICC administrative costs, which are fixed by the ICC Court, the quantum of legal costs is fixed by the arbitrator himself.' Id. at P18, n10

- - - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

[11] The gist of Professor Park's affidavit is that in his view CBG should have had a greater opportunity to present its arguments against the assessment of costs. The Court, however, for the reasons already explained, believes that the opportunity accorded CBG satisfied due process. Although Professor Park states in his affidavit that he is 'not aware of any other case where the arbitrator added $ 1,000,000 to the award after it had been approved by the Court of Arbitration', Park Affidavit at P20, Professor Park does not conclude in his affidavit that the procedures utilized by the Arbitrator in this case actually violated ICC Rules. Such a conclusion, however, is a prerequisite for refusing to enforce the award under section 1(d) of Article V under CBG's own interpretation of that section.

- - - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - -

[*213]

[15] Given the undisputed proposition that there are 'no required procedures' governing the assessment of legal costs, it is difficult to see how this Court could conclude that CBG has met its burden of establishing that the procedures used by the Arbitrator to assess costs in this case were in contravention of ICC Rules.

~~IV. REAL PARTY IN INTEREST~~

[16] Federal Rule of Civil Procedure 17(a) provides that 'every action shall be prosecuted in the name of the real party in interest.' CBG argues that Argonaut, not Hammermills, is the 'real party in interest' in this case under Fed. R. Civ. P. 17(a), because Argonaut has paid Hammermills' defense costs and under the subrogation provision in the insurance agreement will be the ultimate beneficiary of enforcement of the award. CBG cites persuasive authority for the proposition that an insurer-subrogee is the 'real party in interest' under Rule 17(a) where the insurer has paid in full under its policy and is completely subrogated to the insured's claim. [n11] See, e.g., United States v. Aetna Casualty & Surety Co., 338 U.S. 366, 380-81 (1949); see also 6A C. Wright, A. Miller & M. Kane, Federal Practice & Procedure [*214] § 1545 at 354 ('The general rule in the federal courts is that if the insurer has paid the entire claim, it is the real party in interest and must sue in its own name' (footnote omitted)).

- - - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

[n11] In this case it is not entirely clear whether Argonaut has a right of subrogation to the entire assessment of legal costs. It is conceivable (as CBG acknowledges) that certain of the costs could have been incurred prior to the declaratory judgment action and could have been borne exclusively by Hammermills. Presumably, however, Argonaut would have covered those costs as well once its duty to defend was established, and Hammermills does not dispute that Argonaut has a complete right of subrogation with respect to the entire

fee award.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Rule 17(a), however, goes on to provide that "a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought." In the typical insurer/subrogee case, in which the insurer is generally held to be the real party in interest under ~~f.r.23~~ Rule 17(a), there is no statute specifically authorizing the insured to bring suit. The statute implementing the Convention, however, provides: "Any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration." 9 U.S.C. § 207. It appears, therefore, that Hammermills, a "party to the arbitration" in this case, is expressly authorized to sue in its own name.

CBG nevertheless argues that the "authorized by statute" provision in Rule 17(a) is not satisfied by 9 U.S.C. § 207, relying on Rock Drilling, Blasting, etc. Local Union v. Mason & Hanger Co., 217 F.2d 687 (2d Cir. 1954), cert. denied, 349 U.S. 915 (1955). In Rock Drilling, a labor union was held not to be the "real party in interest" under Rule 17(a) in an action for money damages on behalf of its member employees, despite section 301(b) of the Labor Management Relations Act ("LMRA"), which provided, "Any labor organization which represents employees in an industry affecting commerce . . . may sue or be sued as an entity and in behalf of the employees it represents in the ~~f.c.24~~ courts of the United States." The Second Circuit concluded that this provision of the LMRA established merely that a labor organization had a capacity to sue and be sued in the federal courts, which, as an unincorporated organization, it would not otherwise possess under the common law. See id. at 691. The court found section 301 to be "a capacity statute and nothing more. No substantive rights whatever are affected thereby." Id. at 692. ~~n12~~

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n12 The court noted that section 301(a) of the LMRA specifically enumerated the types of substantive claims that could be asserted by the labor organizations, which would have been unnecessary if section 301(b) were intended to authorize the organizations to bring suit in all cases. See 217 F.2d at 692-93.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The Court believes that 9 U.S.C. § 207 is much more than the "simple capacity statute" at issue in Rock Drilling, 217 F.2d at 693. Section 207 creates a substantive right on behalf of a party ~~f.c.25~~ to an arbitration proceeding to bring a federal action for confirmation of that award, and establishes an entitlement to confirmation unless certain narrow statutory defenses are established by the party seeking to avoid the award. Indeed, neither Hammermills nor CBG, corporations both, need a federal statute merely to establish their capacity to litigate in their own names. Accordingly, the Court believes that Rock Drilling is inapposite and that Hammermills is "authorized by statute" to bring an action for confirmation within the meaning of Rule 17(a).... ~~See Compton v. Atwell, 207 F.2d 139 (D.C. Cir. 1939) (Rule 17(a) satisfied by District of Columbia statute providing that choses in action "may be assigned in writing, so as to vest in the assignee a right to sue for the same in his own name"); Galanta v. Quigg, 696 F. Supp. 677, 679 (D.D.C. 1988) (Rule 17(a)~~

satisfied by statute providing that "an applicant dissatisfied with the decision of the Board of Appeals may . . . have remedy by civil action. . . ."). n13

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n13 The principal purpose of Rule 17(a) is to protect a defendant from a subsequent action by a non-party who is actually entitled to the relief at issue, and to ensure that the judgment has full res judicata effect. See 6A C. Wright, A. Miller & M. Kane, Federal Practice & Procedure § 1541 at 322. In interpreting section 17(a), it is important to keep this purpose in mind. In this case, although CBG suggests that it is at risk of a second action by Argonaut asserting its subrogation right to collection of the fee award, it is difficult to see how such a suit could be maintained. CBG's only conceivable legal obligation to pay these fees arises under the arbitral award. As CBG itself recognizes, under 9 U.S.C. § 207 only the parties to the arbitration -- which Argonaut was not -- have a right to bring an enforcement action. The Court, moreover, notes that this action was originated by CBG against Hammermills alone. If CBG were truly concerned about the threat of a separate suit by Argonaut, it is curious that CBG did not attempt to join Argonaut as a defendant at the outset.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*26]

V. PRE-JUDGMENT INTEREST

Hammermills requests that it be awarded pre-judgment interest running from the date of the arbitral award to the date of the judgment in this action. Section 15-108 of the District of Columbia Code provides:

"In an action in the United States District Court for the District of Columbia . . . to recover a liquidated debt on which interest is payable by contract or by law or usage the judgment for plaintiff shall include interest on the principal debt from the time when it was due and payable, at the rate fixed by contract, if any, until paid."

D.C. Code § 15-108. Courts have consistently allowed prejudgment interest in actions brought to confirm arbitral awards. See Reefer Express Lines Pty., Ltd. v. General Authority for Supply Commodities, 714 F. Supp. 699, 699 (S.D.N.Y. 1989) ("Pre-judgment interest on an arbitration award is at the discretion of the district court, but is usually permitted, and should be granted 'in the absence of exceptional circumstances,'" (quoting Larsen v. A.C. Carpenter, Inc. 620 F. Supp. 1084, 1125 (E.D.N.Y. 1985), Aff'd, 800 F.2d 1128 (2d Cir. 1986))); Fort Hill Builders, Inc. v. National Grange Mutual Ins. Co., 866 F.2d 11, 14-15 (1st Cir. 1989); Waterside Ocean Navigation Co. v. International Navigation, Ltd., 737 F.2d 150, 153-55 (2d Cir. 1984). Accordingly, the Court believes that pre-judgment interest is payable "by law or usage" under section 15-108, and is appropriate in this case. The judgment in this action shall therefore include pre-judgment interest running from November 24, 1989 (the date on which the Arbitrator's award was notified to the parties) to the date of judgment herein at the rate of six percent per annum.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n14 See District of Columbia v. Pierce Assocs., Inc., 527 A.2d 306 (D.C. 1987) (rate of interest under D.C. Code § 15-108 limited to six percent per annum).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

VI. CONCLUSION

[21] For the foregoing reasons, the Court concludes that CBG has not established any ground under the Convention for refusing to recognize and enforce the arbitral award. Accordingly, an order will issue ~~f.R.Civ.P.~~ confirming the arbitral award and entering judgment thereon and in favor of respondent in this action.

DATED: MAY 29, 1992

JOHN GARRETT PENN

Chief Judge

ORDER

Upon consideration of the cross-motions for summary judgment filed herein, and the memoranda and exhibits in support and opposition thereto, and for the reasons set forth in the Memorandum Opinion issued on this date, it is hereby

ORDERED that the motion for summary judgment of petitioner and counter-respondent Compagnie des Bauxites de Guinee is DENIED, and it is further

ORDERED that the motion for summary judgment of respondent and counter-petitioner Hammermills, Inc. is GRANTED, and JUDGMENT is hereby entered in favor of Hammermills, Inc. in this action, and it is further

ORDERED that the Award of the Arbitrator of the International Court of Arbitration in Compagnie des Bauxites de Guinee v. Hammermills, Inc., No. 5316/RP/BGD, is hereby confirmed and JUDGMENT is hereby entered thereon, together with interest on the Award from November 24, 1989 to the date of this Order at the rate of six percent per annum.

IT IS SO ORDERED.

DATED: MAY 29, 1992

JOHN GARRETT PENN

Chief Judge