1997 , No. A12848

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

BETWEEN

WESTCO AIRCONDITIONING LIMITED Plaintiff

and

SUI CHONG CONSTRUCTION & ENGINEERING CO LIMITED Defendant

Before The Hon Mr Justice Findlay, in Chambers

Date of hearing: 27 January 1998
Date of handing down of judgment: 3 February 1998

Mr Paul Lam, instructed by Messrs So Keung Yip & Sin, for the plaintiff.
Mr Anthony KK Chan, instructed by Messrs Siao Wen Liu & Leung, for the defendant.

JUDGMENT

The plaintiff is taking proceedings against the defendant on the basis of a construction sub-contract dated 9 August 1993. The defendant resists this claim, both on the merits and on the basis that this contract was replaced by another contract between the plaintiff and another company. Both contracts contain an arbitration clause that provides that any dispute of the nature raised here shall be referred to the architect, and, if either of the parties is unhappy with the architect's decision, or if the architect fails to make a decision within 90 days, it may require the matter to be referred to arbitration.

The defendant has issued a summons seeking an order that all further proceedings be stayed. It relies on section 6 of the Arbitration Ordinance (Cap. 341). This section incorporates article 8 of the Model Law. This says -

> "A court before which an action is brought in a matter which is the subject of the arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."

One might have thought that was the beginning and end of the argument: The plaintiff has brought before the court a matter concerning disputes that are subject of an arbitration agreement, the defendant has requested that these be referred to arbitration, and it is not obvious that the agreement is null and void, inoperative or incapable of being performed. But Mr Lam argues that the arbitration is subject to a condition precedent; that is, that, before the matter may proceed to arbitration, the architect must decide the matter, or the time for him to make a decision must have elapsed, neither of which has happened. This means, says Mr Lam, that the arbitration agreement is "inoperative".

My initial reaction to this was that this was not a good argument. I thought that the initial reference to the architect was part of the arbitration process, and certainly not inconsistent with it. But Mr Lam, with his usual assiduity, has found authority that supports what he says.

In **Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd** [1992] 1 QB 656, which featured an arbitration agreement that required a dispute to be referred, in the first place, to a panel of three person (acting as experts but not as arbitrators) before proceeding to arbitration, Staughton, LJ, with whom Woolf, LJ and Neill, LJ agreed, said -

> "Many types of contract provide for some preliminary step to be taken before there is an arbitration. I cannot see that this entitles a party to disregard the arbitration procedure altogether and start an action at law, merely because the preliminary step has not been taken. In many cases, the arbitration could be altogether bypassed if that were permitted."

It would have seemed to me that this passage was good law and good sense, but this case then went on appeal to the House of Lords. The decision is reported in [1993] AC 334. In that forum, Lord Mustill considered this same

question. Unlike the Hong Kong legislation, the UK Act of 1975 does not follow the New York Convention, 10 June 1958. The Act says -

> "If any party to an arbitration agreement . . . commences any legal proceedings . . . in respect of any matter agreed to be referred . . . the court shall make an order staying the proceedings."

Lord Mustill considered the formula in the Convention, which is essentially the same as the wording of our legislation, and said -

> "What springs to mind at once is that the application of this formula to [the arbitration clause] requires the court to do the impossible, namely to refer the dispute to the arbitrators, whereas it is to the panel of experts that the matter must first be sent if it is to be sent anywhere at all. If the English legislation had followed the Convention, as strictly speaking it should have done, it would have been hard to resist the conclusion that the duty to stay does not apply to a situation where the reference to the arbitrators is to take place, if at all, only after the matter has been referred to someone else."

For the purposes of our legislation, " 'Arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement".

There is no definition of "arbitration" in our statute, but its generally understood meaning is the settlement of a dispute by a person or persons chosen in a manner agreed by the parties outside proceedings in the courts of law.

Lord Mustill had some difficulty in finding that the clause in the contract with which he was concerned was "an arbitration agreement". He said that there was "substantial force" in the argument that it was not, but was an agreement to submit the dispute to a panel of experts, "the arbitrators providing no more than a contingent form of appeal". I must say that I find myself in no such difficulty with the clause before me. The parties agreed to submit their disputes to the architect in the first instance. That reference may not be to

arbitration because the architect may not give a decision at all, and, if he does, it may not be binding. But, whatever the outcome of the reference to the architect, the parties have the right to refer the dispute to what is undoubtedly an arbitration. An agreement that requires that the parties submit their disputes ultimately to arbitration, although it may also require the parties in the first instance to follow a procedure - such as, attempting an amicable settlement - is, to my eyes, an arbitration agreement. A first instance procedure such as this is not in any way inconsistent with the concept of arbitration, or with our statutory definition of "arbitration agreement".

There is, therefore, as I see it, a clear "agreement by the parties to submit to arbitration" their disputes. It matters not, it seems to me, that the parties must, firstly, take some other step before this is done. It cannot possibly have been the intention of the parties that, if one of them issues a writ before that step is taken, their joint wish to avoid proceedings at law is frustrated. And it would make a complete nonsense of the arbitration agreement if it were so that one party could issue a writ on the eighty-ninth day, and the court was not bound to grant a stay then, but it must grant it on the ninety-first day because the period has then expired. I have no doubt that I have before me an arbitration agreement, and, that being the case, I am required by the statute to refer the parties to arbitration.

In my view, what the statute means when it says "refer the parties to arbitration" is not "refer the dispute to the arbitrators", as Lord Mustill suggests in relation to the Convention, but refer the parties to the process of arbitration that the parties have agreed to undertake, and, if this involves a preliminary step that the parties have agreed, to complete that step. Accordingly, I find that the arbitration agreement is not "null and void, inoperative or incapable of being performed.", and I am bound, in terms of the statute, to refer the parties to the arbitration to which they agreed.

The remarks of Lord Mustill were not necessary for the decision taken by the House; the case was decided in favour of a stay on the basis of the inherent jurisdiction of the court. In any event, the UK legislation is not the

same as ours. And I take that, since 30 June 1997, it is no longer so that I should regard decisions of the House of Lords as binding on me, although the Basic Law provides that I may refer "to precedents of other common law jurisdictions". The views of Lord Mustill are, of course, entitled to great respect; especially in the field of arbitration, in which he is an acknowledged expert, but I cannot, in all conscience, follow them in this case.

If my view on this aspect is wrong, Mr Lam accepts that I have an inherent jurisdiction to stay the proceedings as a matter of discretion. In this event, Mr Lam submits that I should exercise my discretion against a stay. He says this because one of the disputes between the parties is whether or not the contract on which the plaintiff sues has been replaced by another contract with another company. Mr Lam argues convincingly that this is a dispute that the court is much better equipped to handle, and should be decided as a preliminary issue. If that issue is decided in favour of the plaintiff, the matter should then be referred to arbitration. If it decided in favour of the defendant, the action should be dismissed.

This argument is attractive, especially having regard to the fact that, if the arbitral tribunal rules on the question of whether or not it has jurisdiction as a preliminary question, either party may ask the court to decide the matter. This, I think, is likely to happen. So why not, the argument runs, decide that question before referring the matter to arbitration?

If I had found that the matter was one for my discretion, I would probably have refused a stay at this stage, and invited the parties to frame a preliminary issue for trial. But that is not the case; I have no discretion, and I must hold the parties to their agreement.

In the result, the parties are referred to arbitration. This necessarily involves a stay of these proceedings so that stay is granted.

The matter of costs has not been argued, but, if my decision stands, that is the end of these proceedings. It seems, on the face of it, that the defendant should have its costs. I make an order nisi that the plaintiff pay the costs of the proceedings and this application.

JK FINDLAY
Judge of the High Court
Court of First Instance