

Court of Appeal for British Columbia

BETWEEN:

THE CITY OF PRINCE GEORGE

PLAINTIFF
(RESPONDENT)

AND:

A.L. SIMS & SONS LTD.

DEFENDANT
(APPELLANT)

AND:

McELHANNEY ENGINEERING SERVICES LTD.

DEFENDANT

Before: The Honourable Mr. Justice Macfarlane
The Honourable Mr. Justice Cumming
The Honourable Madam Justice Prowse

C.J. O'Connor, A. Gunn

Counsel for the Appellant

R.J. Stewart, R.H. Foulston,
C. Hughes

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia
June 13, 1995

Place and Date of Judgment:

Vancouver, British Columbia
July 4, 1995

Written Reasons by:

The Honourable Mr. Justice Cumming

Concurred in by:

The Honourable Mr. Justice Macfarlane
The Honourable Madam Justice Prowse

Court of Appeal for British Columbia

THE CITY OF PRINCE GEORGE

and:

A.L. SIMS & SONS LTD.

and:

McELHANNEY ENGINEERING SERVICES LTD.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE CUMMING:

THE APPEAL

- 1 This is an appeal, brought pursuant to leave granted 26 January 1995 by a justice of this Court, from the order of Parrett J. pronounced 30 December 1994, refusing to stay that part of the action brought by the plaintiff/respondent, the City of Prince George (Prince George), against the defendant/appellant, A.L. Sims & Sons Ltd. (Sims). The application to stay was brought under s.15 of the *Commercial Arbitration Act*, S.B.C. 1986, c.3 which provides that the court shall stay proceedings in respect of a matter agreed to be submitted to arbitration unless the court determines that the arbitration agreement is "null and void, inoperative or incapable of being performed".

2 Parrett J. determined that the arbitration agreement had become "inoperative". I shall set out later, in extenso, his reasons for reaching this conclusion.

BACKGROUND FACTS

3 On 5 August 1993, Sims entered into a contract with Prince George for the construction of a buttress and related earth works for University Way in Prince George, made necessary following an earlier landslide which occurred during the construction of the road by another contractor. McElhanney Engineering Services Ltd. (McElhanney) was nominated by Prince George as the "consultant" under the contract. The contract between Sims and Prince George contained a mandatory arbitration clause which provided:

S.C.8 SETTLEMENT OF DISPUTES

8.1 In the event of a dispute between the Owner and the Contractor, either party shall have the right to give notice to the other, requiring that the matter be referred to an arbitrator. This shall be deemed to be a submission to arbitration within the meaning of the Arbitration Act. The decision of the arbitrator shall be final and binding on both parties.

4 Difficulties were experienced in the performance of the contract. The amount of waste material rose from an estimated 40,000 cubic metres to in excess of 200,000 cubic metres. The work was delayed and performed in winter months at additional and increased costs to Sims.

5 In December of 1993, Prince George replaced McElhanney as consultant under the contract with its own chief engineer, Mr. Halldorson.

6 On 24 January 1994, Prince George commenced proceedings against McElhanney, claiming damages for the expenses and costs incurred by Prince George in completing the work, including the work performed by Sims. There is no arbitration agreement in the contract between Prince George and McElhanney.

7 Throughout the course of the work, Sims made it known to Prince George that it intended to present a claim for its increased costs. By letter dated 7 February 1994, Sims provided details of the claim it intended to present, including particulars of the circumstances giving rise to the claim.

8 On 16 March 1994, Sims presented a claim to Prince George entitled "A Request for Additional Compensation". The claim related to the increased volume of waste material under the contract and its impact with respect to time and costs. On 29 March 1994, Prince George rejected the claim and indicated it "shall submit this claim to arbitration" under the contract.

9 On 3 May 1994, Prince George notified Sims of its intent to claim against it and confirmed that arbitration "was the most expedient method of resolving these issues".

10 On 13 June 1994, Prince George asked the B.C. Arbitration and Mediation Institute to appoint an arbitrator for Sims' impact claim and Prince George's counterclaim. Mr. Tom White was appointed as arbitrator.

11 Prince George objected to the appointment of Mr. White on the grounds of possible bias. On 30 September 1994, Prince George provided a list of acceptable arbitrators to replace Mr. White and threatened to have one of its candidates appointed by court order. Shortly thereafter, Mr. White resigned.

12 On 3 November 1994, Prince George agreed to the appointment of Mr. Mullen as arbitrator. Mr. Mullen accepted the appointment and requested counsel arrange a conference to discuss preliminary matters.

13 Prince George issued a Certificate of Total Performance on 3 November 1994. On 2 November 1994, Prince George delivered a claim in writing to Sims for damages for breach of contract in excess of \$2 million for delay and failure to follow the contract specifications.

14 Prince George commenced this action against Sims and McElhanney on 10 November 1994. Prince George's claim against Sims is for damages for delay in construction, breach of contract and negligent performance of work required pursuant to the contract.

The claim against McElhanney is for damages in the design and supervision of construction of the work done by Sims.

15 By notice of motion dated 24 November 1994, Sims applied for an order pursuant to s.15 of the *Commercial Arbitration Act* staying the action brought by Prince George on the ground that Prince George and Sims were parties to an arbitration agreement. Sims did not seek any stay of Prince George's action against McElhanney.

16 The application came on for hearing before Parrett J. on 5 December 1994. Reasons for judgment were delivered on 30 December 1994.

17 Parrett J. refused the stay application on the basis, shortly put, that:

- (a) the arbitration clause was inoperative or incapable of being performed because the plaintiff's actions raised broader issues against the co-defendant McElhanney which were inter-related with the arbitrable issues between the plaintiff and the defendant Sims; and
- (b) in the alternative, the court would exercise a residual jurisdiction to refuse the stay where there was a risk of multiple proceedings and inconsistent results.

18 In his reasons for judgment the learned judge below, after reviewing the judgment of this Court in *Gulf Canada Resources Ltd. v. Arochem International Ltd.* (1992), 66 B.C.L.R. (2d) 113, observed:

It should be noted that Hamilton, J., of this court, refused a stay of proceedings in reasons which considered the *Gulf Canada* decision in *Afton Operative Corporation v. Canadian National Railway Company*, (January 13, 1994) Vancouver Registry No. C921353. Leave to appeal that decision was granted by Legg, J.A., (February 21, 1994) Vancouver Registry No. CA018322. In granting leave the learned chambers judge said at p. 5 of his reasons:

Only in British Columbia, I am informed by counsel, has a residual discretion been permitted to a trial judge to refuse to grant a stay where the provisions of s. 8(2) or s. 15(2) apply.

This appeal has since been abandoned.

19 Parrett J. continued:

The City argues initially that Sims has failed to meet the threshold tests contained within s. 15(1).

The foundation of this submission is the argument that Sims has neither presented a claim of their own, nor disputed that advanced by the City, as a result they maintain that there is no dispute to trigger the arbitration clause of the agreement.

While this submission is intriguing, a determination of the present application would serve little purpose but to postpone the present issue while the reality of the dispute was crystallized.

In my respectful view, the object of both the litigation process and that of arbitration is but one thing, the resolution of disputes between parties. The amendments in 1988 were intended to recognize the right of parties, to bind themselves in contract to a particu-

lar method of dispute resolution, and in doing so to recognize the sanctity of contract as an expression of the parties wishes.

The language of s. 15(2):

In an application under subsection (1), the court shall make an order staying the legal proceedings unless it determines that the arbitration agreement is null and void, inoperative or incapable of being performed.

expresses in mandatory language the honouring of the parties expressed contractual wishes unless the court determines:

- (a) that the arbitration agreement is null and void;
- (b) inoperative, or
- (c) incapable of being performed.

In my view, the answer to the present application is to be found in (b) and (c).

Inoperative is defined in the Shorter Oxford English Dictionary as:

Not operative; not working; in Law, without practical force, invalid.

This language is to be considered in the light of the object of the legislation namely the determination or resolution of the dispute between the parties.

Even if, for the purpose of this application, one accepts the existence of a discrete dispute between the City and Sims that dispute must be viewed in the context in which it arose. This broader context encompasses both actions and the broader issues raised with respect to the role of McElhanney and the City in the various design phases of the overall project as well as the specific project forming the substance of the contract with Sims.

The issues of negligence and breach of contract alleged in the main action appear to me at this stage to subsume and incorporate within the damage claims advanced damages which may have flowed from the difficulties encountered in the performance of the contract with Sims.

It is obvious that a resolution of any dispute between the City and Sims will require a consideration of the broader issues and the interrelations of all of the principal parties involved.

In view of the many areas of dispute, and the early stage of this proceeding it is neither desirable nor necessary to seek to analyze in detail the nature of these disputes, it is sufficient to find that the arbitration process envisioned in the agreement between the City and Sims cannot possibly resolve or determine the dispute between them given the broader issues which would remain undetermined by the arbitration process and the absence of a similar provision in the agreements between the City and McElhanney.

In the result, I find that the arbitration agreement in this case is both inoperative and incapable of being performed. I view that language as not merely reflecting some academic exercise but as containing an inherently practical limitation. Unless the arbitration process contemplated, is capable of resolving the dispute, it becomes the source of multiple actions, increased cost and potential delay, creating precisely the difficulties it is intended to avoid.

Arbitration clauses are entitled to the utmost respect both because they reflect a process with a proven record of success and, more importantly, because where such a clause has been incorporated within the agreement of the parties it is their chosen method of dispute resolution, but the existence of such a clause must, to be effective, be capable of resolving the dispute. This is not possible in the present circumstances.

If I am incorrect in my interpretation of the language of s. 15(2), I would, in any event, find that in this case the circumstances are such as to invoke the residual jurisdiction identified by Hinkson, J.A. The dispute between the City and Sims is but one aspect of the broader issues arising in the main action and will require, for a full and effective resolution, an adjudication of those broader issues and a careful examination of the roles of all of those involved. At least one of the principals is not a party to the arbitration agreement or, indeed, any arbitration agreement. This party, McElhanney, occupied a position of importance within the contractual framework serving as "the consultant" as defined within the contract documents. The absence of McElhanney from the arbitration process would render it

difficult if not impossible to achieve the intended results even if the broader issues did not exist.

ISSUES

20 In its factum, Sims submits that the learned chambers judge erred in refusing Sims a stay of proceedings under s.15 of the *Commercial Arbitration Act* as follows:

- (a) in construing "inoperative" as meaning "inconvenient" or importing a *forum conveniens* test in an application for a stay of proceedings; and
- (b) in the alternative, applying, in effect, a residual discretion to refuse a stay in circumstances of multiple issues and multiple parties by misinterpreting *Gulf Canada Resources Ltd. v. Arochem International Ltd.*, *supra*.

DISCUSSION

21 Section 15 of the *Commercial Arbitration Act* provides:

15 (1) Where a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may, before or after entering an appearance and before delivery of any pleadings or taking any other step in the proceedings, apply to that court to stay the legal proceedings.

(2) In an application under subsection (1), the court shall make an order staying the legal proceedings unless it determines that the arbitration agreement is null and void, inoperative or incapable of being performed.

22 There are three prerequisites to the application of s.15.

They are:

- (a) the applicant must show that a party to an arbitration agreement has commenced legal proceedings against another party to the agreement;
- (b) the legal proceedings must be in respect of a matter agreed to be submitted to arbitration; and
- (c) the application must be brought timely, i.e. before the applicant takes a step in the proceeding. (*Gulf Canada Resources Ltd. v. Arochem International Ltd.*, *supra*, at 119-120).

23 As to (a), it is common ground that Sims and Prince George are parties to an arbitration agreement. This was so found by the learned chambers judge. However, as noted above, the contract between Prince George and McElhanney contained no provision for arbitration.

24 As to (b), it was contended on behalf of Prince George that, for a variety of reasons, there was no evidence before Parrett J. of the existence of a dispute between the parties and therefore nothing to arbitrate. Counsel for Prince George submitted, among other arguments, that Sims had not made a claim against Prince George, that it had failed to follow the claims procedures contained in the general conditions of their contract, and that its claim, if any, was out of time as not having been made during the construction period and was barred by the issuance, unilaterally on the part of Prince George and without application by Sims therefore, of a Certificate of Total Performance. In response, counsel for Sims submitted that compliance with the prescribed claims procedures had been waived by Prince George and that issues of this sort were, in any event, for the arbitrator and not the court to determine.

25 It is apparent that all of these arguments focus upon the claim advanced, or to be advanced, by Sims against Prince George and are totally irrelevant to the question before us which is: does the claim made by Prince George in its action against Sims raise a dispute which falls within the arbitration agreement? The learned trial judge in the passage I have quoted refrained from reaching any conclusion on this point.

26 In my respectful opinion, it is clear beyond peradventure that there exists a dispute between the parties which involves matters agreed to be submitted to arbitration.

27 Under the arbitration agreement, disputes are matters which were agreed to be submitted to arbitration. A dispute is defined in section GC7 of the contract as:

7.1 Differences between the parties to the Contract as to the interpretation, application or administration of this Contract or any failure to agree where agreement between the parties is called for, herein collectively called disputes, ...

28 Prince George has a dispute with Sims. Prince George has commenced these proceedings seeking damages in excess of \$2 million for breach of contract or the negligent performance of obligations under the contract. We were advised by counsel that the statement of claim filed on behalf of Prince George in this action advances the same claims as those contained in the claim for damages it delivered to Sims on 2 November 1994. While it is true that the issues raised may be refined and defined more precisely in the defence to be filed by Sims in response, that step had not been taken for the simple reason that, if it had been taken, Sims would forego its right to have the matter arbitrated. (See *Stancroft Trust Ltd. v. Can-Asia Capital Co.* (1990), 43 B.C.L.R. (2d) 341 per Southin J.A. at 346). Nonetheless, the very fact that Sims moved for a stay of

proceedings leads inexorably to the conclusion that it does not accept but, on the contrary, disputes the claims made against it in the lawsuit Prince George has commenced. I note, as well, that it has done so in a timely way by launching its motion for a stay some two weeks after the writ was issued.

29 I turn now to the question of whether the arbitration agreement was "inoperative" or "incapable of being performed". Parrett J. concluded that it was inoperative or incapable of being performed because of the existence of broader issues between Prince George and McElhanney which were inter-related with the issues between Prince George and Sims, and which would remain undetermined by the arbitration process given the absence of an arbitration clause in the contract between Prince George and McElhanney.

30 In considering this question, we have the advantage of having been referred to a number of authorities which were not cited to the learned judge below.

31 In *Kaverit Steel and Crane Ltd. v. Kone Corp.* (1992), 87 D.L.R. (4th) 129, 85 Alta. L.R. (2d) 287, the Alberta Court of Appeal considered legislation essentially identical to s.15 of the *Commercial Arbitration Act*. The facts in that case are set out in the headnote [D.L.R.]:

A distributorship agreement contained a clause providing that: "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 s.2 of the *International Commercial Arbitration Act*, S.A. 1986, c. I-6.6, the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, a Schedule to the Act, applies in Alberta. By art. II, s.3 of the Convention: "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 ... agreement is null and void, inoperative or incapable of being performed." The distributor commenced an action in Alberta alleging, among other things, a breach of the agreement by the licensor, which sought a stay and a reference to arbitration. The judge refused the stay on the grounds that some of the issues in the action fell outside the scope of the arbitration clause, and that some parties to the action were not parties to the arbitration agreement.

32 In giving the judgment of the Court, Kerans J.A. said, at 138-
140:

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, art. 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.)

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.

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 in *Scherk v. Alberto-Culver*, 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 transaction.

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 regurgitate 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.)

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, in *Law and Practice of International Commercial Arbitration* (Sweet and Maxwell, 1986), describe, at p. 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.

In my view, the proviso about "null and void, inoperative, and incapable of being enforced" simply preserves the rule in *Heyman v. Darwins Ltd.* cited earlier. [[1942] A.C. 356 (H.L.)]. 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 & Natermann*, [1981] 1 Lloyd's Rep. 302 at pp. 307-8.

* * *

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.

33 The learned chambers judge was not referred to M.J. Mustill & S.C. Boyd, *The Law and Practice of Commercial Arbitration in England*, 2d ed. (London: Butterworths, 1989) at 464-465 where the learned authors said:

The expression "inoperative" has no accepted meaning in English law, but it would seem apt to describe an agreement which, although not void ab initio, has for some reason ceased to have effect for the future. Three situations can be envisaged in which an arbitration agreement might be said to be 'inoperative'. First, where

the English Court has ordered that the arbitration agreement shall cease to have effect, or a foreign court has made a similar order which the English Court will recognize. Second, as is discussed in Chapter 32, there may be circumstances in which an arbitration agreement might become 'inoperative' by virtue of the common law doctrines of frustration, discharge by breach, etc. Third, the agreement may have ceased to operate by reason of some further agreement between the parties. But the fact that issues in the arbitration overlap issues in proceedings between parties who are not bound by the arbitration agreement does not make the agreement 'inoperative'. (emphasis added)

34 The learned chambers judge was also not referred to J.B. Casey, *International and Domestic Commercial Arbitration* (Carswell, 1993) at 4-14 where the learned author said:

To find that an arbitration agreement is inoperative is again to deal with the situation in which there is an agreement, but for some reason it is no longer enforceable. For example, it may be alleged that the parties have by subsequent agreement or conduct determined to suspend the operation of the arbitration agreement, or another court has declared the agreement to be unenforceable ... It is not sufficient to say that because the court action raises issues outside the scope of the arbitration agreement per se, or because the action involves some parties that are not parties to the arbitration agreement, that the agreement should be considered "inoperative". (emphasis added)

35 With respect to "incapable of being performed", Casey says:

According to Mustill & Boyd, "incapable of being performed" connotes something more than mere difficulty or inconvenience or delay in performing the arbitration. For example, it is not sufficient to say it is incapable of being performed where one party could not or would not come up with the deposit necessary to pay the arbitrator.

The incapacity must come from something beyond the control of the parties; for example, where the arbitration agreement specifies a particular arbitrator must hear the matter, but he or she is not available.

36 In *Boart Sweden A.B. v. N.Y.A. Stromnes A.B.* (1988), 41 B.L.R. 295 (Ont. H.C.), the court allowed an application for a stay of proceedings pending arbitration where there were multiple parties and multiple issues. The court said at 302-303:

Public policy carries me to the consideration which I conclude is paramount having regard to the facts of this case, and that is the very strong public policy of this jurisdiction that where parties have agreed by contract that they will have the arbitrators decide their claims, instead of resorting to the Courts, the parties should be held to their contract.

* * *

To deal with all these matters in a single proceeding in Ontario instead of deferring to the arbitral process in respect of part of the action and temporarily staying the other parts of the action, would violate that strong public policy.

It would also fail to give effect to the change in the law of international arbitration which, with the advent of art. 8 of the Model Law and the removal of the earlier wide ambit of discretion, gives the Courts a clear direction to defer to the arbitrators even more than under the previous law of international arbitration.

I conclude that nothing in the nullity provisions of art. 8 prevents this Court from giving effect to the clear policy of deference set out in the article.

To conclude otherwise would drive a hole through the article by encouraging litigants to bring actions on matters related to but not embraced by the arbitration and then say that everything had to be consolidated in Court, thus defeating the policy of deference to the arbitrators.

37 These authorities establish that, as a general principle, the mere fact that there are multiple parties and multiple issues which are inter-related and some, but not all, defendants are bound by an arbitration clause is not a bar to the right of the defendants who are parties to the arbitration agreement to invoke the clause.

38 There are numerous authorities to the same effect, of which the following are some:

Lonrho Ltd. (U.K.) v. Shell Petroleum Co. (U.K.), January 31, 1978, Court Decisions on New York Convention 1958, 320 (Ch.D.)

Roy v. Boyce (1991), 57 B.C.L.R. (2d) 1987 (S.C.)

Stancroft Trust Ltd. v. Can-Asia Capital Co., *supra*

Sandbar Construction Ltd. v. Pacific Parkland Properties (1992), 66 B.C.L.R. (2d) 225 (S.C.)

BWV Investments Ltd. v. SASKFERCO Products Inc. (1994), 119 D.L.R. (4th) 577 (Sask. C.A.)

39 For these reasons I would give effect to the appellant's first ground of appeal.

40 Finally, I turn to the question of the jurisdiction of the court to refuse to order a stay of proceedings in a situation where the prerequisites of s.15(1) of the *Commercial Arbitration Act* (the "domestic act") have otherwise been met. This will require an

examination in some detail of precisely what was decided by this Court in *Gulf, supra*.

41 In this regard, Prince George sets out its position in the following passage of its factum:

It is submitted that the learned trial judge did not err in exercising his discretion to refuse a stay in the circumstances of this case. Although there may be many situations where the court should exercise its discretion and grant the stay it is submitted that where arbitration will be incapable of resolving the dispute between the parties and where there are third parties to the action who are not subject to the arbitration agreement a stay should never be granted. The learned chambers judge cited multiplicity of proceedings, possible inconsistent results and extra expense as his reasons for refusing the stay in these circumstances. All of those considerations are relevant if the intent of Supreme Court Rule 1(5) is to be honoured.

(emphasis added)

42 Additionally, Prince George sought to draw a distinction between arbitrations under the domestic act and international arbitrations conducted under the *International Commercial Arbitration Act*, S.B.C. 1986, c.14, subsections 8(1) and (2) of which are cast in terms identical to subsections 15(1) and (2) of the domestic act. I shall deal with this latter submission first.

43 In its factum, Prince George asserted:

In the matter of judicial intervention in arbitrations the Legislature in B.C. has made a significant

distinction between domestic and international arbitrations. The International Commercial Arbitration Act, in Section 5, provides as follows:

"5. In matters governed by this Act,

(a) no court shall intervene except where so provided in this Act, and

(b) no arbitral proceedings of an arbitral tribunal or an order made by an arbitral tribunal shall be questioned, reviewed or restrained by a proceeding under the Judicial Review Procedure Act or otherwise except to the extent provided by this Act."

This very severe restriction on the powers of the court is not found in the Commercial Arbitration Act.

Both the domestic and the international acts were assented to on June 17, 1986. Section 15 of the domestic act was amended in 1988. That amendment further restricted the powers of the court to intervene in domestic arbitrations. Neither at the time the two acts were enacted nor at the time Section 15 was amended did the legislature see fit to include in the domestic act a provision similar to Section 5 of the International Act. There must be a reason for this distinction. It is submitted that the reason is that the Legislature intended to allow the courts more discretion in domestic arbitrations than in international arbitrations.

* * *

As noted there are compelling reasons for limiting judicial intervention in international arbitrations. There are however compelling reasons for declining to follow the same procedure in domestic arbitrations. Rule 1(5) directs the courts of British Columbia "to secure the just, speedy and inexpensive determination of every proceeding on its merits." In particular it is submitted that, in domestic arbitrations, a stay should seldom be granted when there are parties to the action who are not parties to the arbitration agreement since it will be a rare situation where the arbitration will be able to determine the rights of the third parties. A stay of the court proceedings will seldom lead to a just, speedy and inexpensive determination of every proceeding. In fact it will almost always result in delay and additional expense and, where there are different results in the two proceedings, it will lead not to a just determination but

to an exceedingly unjust determination with the resultant disrespect for the administration of justice.

44 However, these submissions overlook the fact that in 1988 the domestic act was also amended by the addition of s.31.1 [S.B.C. 1988, c.46, s.16] as follows:

Extent of judicial intervention

31.1 No arbitral proceedings of an arbitrator and no order, ruling or arbitral award made by an arbitrator shall be questioned, reviewed or restrained by a proceeding under the *Judicial Review Procedure Act* or otherwise except to the extent provided in this Act.

45 It is apparent that there is no difference in substance between the two statutes. I conclude that the distinction which Prince George attempts to draw between them is without foundation and I would reject it.

46 In the *Gulf* case, *supra*, the defendant refused to take delivery of 375,000 barrels of crude oil, as the price at the time of delivery had fallen by \$10 a barrel. The plaintiff notified the defendants that it accepted their repudiation of the contract. Both defendants replied, stating that one of them was not a party to the contract. Although the contract contained an arbitration clause, the plaintiff sued for damages. The defendants obtained a stay under s.8 of the *International Commercial Arbitration Act*, and the plaintiff appealed.

47 Hinkson J.A., in his reasons for judgment, reviewed the history of the legislation. After setting out the preamble to the *International Commercial Arbitration Act*, enacted in 1986, he said, at 116-117:

16 Prior to this legislation the *Arbitration Act*, R.S.B.C. 1979, c.18 contained in s.6 a provision which conferred a discretion on a court to refuse a stay of proceedings although the parties had agreed to arbitrate their differences arising out of the agreement into which they had entered. Section 6 provided:

Court may stay legal proceedings

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

17 It was the exercise of discretion by the court to refuse a stay of proceedings pursuant to s.6 that led the legislature to regard such a refusal as judicial intervention in commercial arbitrations.

18 Section 6 was first enacted in British Columbia in 1893 and was based on the English *Arbitration Act*, 1889 (U.K.), 52 & 53 Vict., c.49.

19 To accomplish its purpose the legislature in the Act of 1986 enacted a number of new provisions with a view to limiting judicial intervention in international commercial arbitrations.

48 He then set out the provisions of ss. 5, 8 and 16 of the *International Commercial Arbitration Act* and continued at 118:

23 There is certain common ground among the parties with respect to the effect of the provisions contained in the Act. To begin with, the parties agree that the discretion formerly exercised by the court pursuant to s.6 of the *Arbitration Act* has been eliminated and does not appear either in s.8 or any other section of the Act. Further the parties agree that for the first time the arbitral tribunal may rule on its own jurisdiction including ruling on the existence or validity of the arbitration agreement.

49 Hinkson J.A. then went on at 119-121:

31 In interpreting s.8 of the Act, it is necessary to consider the context in which it is found in the Act. Section 8(2) is mandatory in its terms and requires the court to grant an order staying legal proceedings unless it determines that: (1) the arbitration agreement is null and void; (2) it is inoperative; or (3) incapable of being performed. Viewing subs. (2) standing by itself, it might be contended that absent those three considerations the court must make an order staying the legal proceedings.

32 However, in my view, it is necessary to have regard to the words contained in subs. (1). When an application is made pursuant to s.8(1) of the Act seeking to have the court exercise its jurisdiction to grant a stay of the legal proceedings, the applicant must show that a party to an arbitration agreement has commenced legal proceedings against another party to the agreement in respect of a matter agreed to be submitted to arbitration. The subsection also contains a time limit for making the application.

33 Before exercising its jurisdiction to grant a stay, the court must be satisfied that the applicant has met the requirements set out in subs. (1) of s.8. It is only if the court is satisfied that those matters have been established that it must then grant the stay, subject to the provisions of subs. (2).

34 In order to obtain a stay of the legal proceedings, it will not be enough for an applicant to point to an arbitration agreement and assert that the plaintiff and the defendant are parties to that agreement and that the dispute is within the terms of the agreement.

35 The court continues to have some residual jurisdiction to exercise on an application for a stay of legal proceedings pursuant to s.8 of the Act.

36 Thus, if the court concludes that one of the parties named in the legal proceedings is not a party to the arbitration agreement or if the alleged dispute does not come within the terms of the arbitration agreement or if the application is out of time, the court should not grant the application.

37 In the present proceedings, the appellant Gulf contends that the agreement does not cover the claim or claims being advanced by Gulf in the legal proceedings, that there is no dispute between the parties and that A.I.I. takes the position that it is not a party to the agreement. These issues are subsidiary to the principal argument advanced on behalf of the appellant, namely, that the court continues to enjoy a jurisdiction to determine the matters referred to in s.8(1) of the Act.

38 While I have concluded that the court does have such jurisdiction, I regard it as more limited than the jurisdiction contended for on behalf of the appellant.

39 Considering s.8(1) in relation to the provisions of s.16 and the jurisdiction conferred on the arbitral tribunal, in my opinion, it is not for the court on an application for a stay of proceedings to reach any final determination as to the scope of the arbitration agreement or whether a particular party to the legal proceedings is a party to the arbitration agreement because those are matters within the jurisdiction of the arbitral tribunal. Only where it is clear that the dispute is outside the terms of the arbitration agreement or that a party is not a party to the arbitration agreement or that the application is out of time should the court reach any final determination in respect of such matters on an application for a stay of proceedings.

40 Where it is arguable that the dispute falls within the terms of the arbitration agreement or where it is arguable that a party to the legal proceedings is a party to the arbitration agreement then, in my view, the stay

should be granted and those matters left to be determined by the arbitral tribunal.

50

And, at 121-122:

46 What precisely is in dispute will depend to some extent on the way the claim of Gulf is ultimately framed. In my opinion, enough emerges from the material before the court to indicate that there is a dispute between these parties which may fall within the terms of the arbitration agreement.

47 Turning to the fourth issue, this involves the defendant A.I.I. Initially, in the correspondence which was exchanged following the refusal of the defendants to accept delivery, A.I.L. and A.I.I. took the position that A.I.I. was not a party to the contract. In *Heyman v. Darwins Ltd.*, *supra*, Viscount Simon L.C. said at p. 341:

If the respondents were denying that the contract had ever bound them at all, such an attitude would disentitle them from relying on the arbitration clause which it contains ...

48 The appellant contends that is the position of A.I.I. However, the initial position of A.I.I. was altered on the application for the stay of proceedings. Mr. McMichael's affidavit of February 13, 1991, was filed. In it he deposed:

8. While not agreeing that it is a party to any contract as alleged by Gulf nor waiving any rights or defenses it may have against Gulf, all of which are expressly reserved, A.I.I. requests that the Supreme Court of British Columbia stay the proceedings in the action herein pursuant to s.8 of the British Columbia *International Commercial Arbitration Act*.

49 In the statement of claim Gulf asserts that A.I.I. is a party to the contract of November 26, 1990. Alternatively, it is asserted that A.I.I. is a party to a contract with Gulf of October 12, 1990. The latter contract contained no arbitration clause.

50 Upon the basis of the material presently before the court, it is not clear as to whether or not A.I.I. is a party to the contract of November 26, 1990. Again that is a matter that falls within the jurisdiction of the arbitral tribunal for determination. Therefore it is not appropriate to attempt to resolve that dispute at this stage of the proceedings.

Conclusion

51 I conclude that while the court has a residual jurisdiction pursuant to the provisions of s.8(1) of the Act, the appellants have not established that the chambers judge erred in exercising his jurisdiction to grant a stay in respect of both defendants.

51 In my respectful view, the submissions on behalf of Prince George are the result of an excessively literal construction of the language found in para. 36, standing alone and overlooking the context in which it was employed.

52 It is clear, reading the judgment in *Gulf, supra*, in its entirety, that there is no such discretion as Parrett J. appears to have assumed. Paragraph 36 must be read in conjunction with para. 39. The final words of para. 39 set forth the circumstances in which the court may be said to have a residual jurisdiction to refuse a stay:

Only where it is clear that the dispute is outside the terms of the arbitration agreement or that a party is not a party to the arbitration agreement or that the application is out of time should the court reach any final determination in respect of such matters on an application for a stay of proceedings.

53 Thus if a party is alleged to be a party to an arbitration agreement, but that party clearly establishes that it is not a party to such an agreement, the court has a residual jurisdiction to refuse a stay. This is no more than a jurisdiction to satisfy itself that the prerequisites of s.8 of the Act have, in fact, been met. If those prerequisites clearly have not been met, then the court should refuse a stay. If it is arguable whether the prerequisites have been met, then the stay should be granted and the issue can be resolved in the arbitration. These principles apply equally to s.15 of the ***Domestic Act***.

54 In my view, nothing in the reasons of Hinkson J.A. supports the view that if any of the named litigants, on whichever side of the record they are found, are not party to the arbitration agreement, the one who is must be denied the right to invoke the arbitration clause in the agreement to which it is a party.

55 For these reasons I would allow the appeal and direct that a stay of the proceedings brought by Prince George against Sims be granted.

56 The appellant should be entitled to its costs.

"THE HONOURABLE MR. JUSTICE CUMMING"

I AGREE: "THE HONOURABLE MR. JUSTICE MACFARLANE"

I AGREE: "THE HONOURABLE MADAM JUSTICE PROWSE"