

HCA003032/1992

1992, No. A3032

H E A D N O T E

International arbitration agreement - applications for judgment and to stay - Article
8(1) of UNICITRAL Model Law - proper construction and effect.

1992, No. A3032

IN THE SUPREME COURT OF HONG KONG
HIGH COURT

BETWEEN

GUANGDONG AGRICULTURE COMPANY LIMITED Plaintiff

and

CONAGRA INTERNATIONAL (FAR EAST) LIMITED Defendant

Coram: The Hon. Mr. Justice Barnett in Chambers

Date of Hearing: 9th September 1992

Date of Delivery of Judgment: 24th September 1992

J U D G M E N T

(Published with consent of the parties.)

By contract dated 11th September 1991 the Plaintiff agreed to buy and the

Defendant to sell approximately 35,000 metric tons of urea. The quantity was subsequently reduced to some 28,000 metric tons. The Plaintiff now claims damages quantified at US\$78,429.88 for short and delayed delivery. By summons dated 21st May 1992 the Plaintiff applied for final judgment under Order 14. For the purpose of that application it does not pursue its claim for delayed delivery. By summons dated 10th June 1992 the Defendant applied for a stay of the action pending arbitration.

The relevant clause in the contract signed by the parties reads :

"11. Arbitration

All disputes in connection with this contract or the execution thereof shall be settled by amicable negotiations. In case no settlement can be reached, the case under dispute can then be submitted to the chartered loss adjuster for arbitration. The arbitration shall take place in Hong Kong and shall be executed in accordance with rules of Hong Kong and the decision made by the adjusters shall be accepted as final and binding upon both parties for settling the disputes. The fees for arbitration shall be borne by the losing party unless otherwise awarded."

It is not in dispute that in so far as this clause constitutes an arbitration agreement, it is an international arbitration agreement and therefore subject to the UNCITRAL Model Law. Article 8 of the Model Law provides:-

"Article 8. Arbitration agreement and substantive claim before court

(1) A court before which an action is brought in a matter which is the subject of an 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."

Is there An Arbitration Agreement?

For the Plaintiff Mr. Jat submitted that clause 11 is not a valid or binding arbitration agreement and is therefore "null and void, inoperative or incapable of being performed". He pointed out that in the event of there being no amicable settlement "the case under dispute can then be submitted (for arbitration)". He said that the use of the word "can" indicates that the clause is no more than declaratory of the parties' intent and does not create any binding obligation or agreement; it is simply an agreement to agree or the provision of an option for either party should negotiations fail. He said words such as "shall", or "will", which impose a binding obligation, were not used.

Mr. Jat then pointed to the phrase "the chartered lost and adjuster", which he said plainly refers to one man but does not make clear who that man is. He said that the phrase is in any event contradicted by the later reference to "the adjusters" which would appear to contemplate a multi-party tribunal. Next, Mr. Jat said that the arbitration is stated to be executed "in accordance with rules of Hong Kong", a provision which is hopelessly vague as to which rules are to be applied, there being a number of possible candidates, for example, the rules of the Hong Kong International Arbitration Centre and the Uncitral Arbitration Rules. He said that it is important that there should be certainty because there are material differences between the rules. For example, the HKIAC Rules provide for security for costs while the Uncitral Rules do not.

Mr. Jat argued that the clause is so vague and uncertain that it does not create any binding effect and is therefore "null and void" or "inoperative". Further, he said that where an action is stayed and the matter is referred to arbitration, the claimant is left with no other effective means of pursuing its claim. The power to stay should therefore only be exercised if arbitration can be effectively, conveniently and speedily obtained. If the arbitration agreement is unclear, these objects can not be obtained and the agreement is incapable of being performed.

For the defendant Mr. Smith said that all that is required for there to be an effective arbitration agreement is that the parties should have shown a clear intention to go to arbitration. He argued that the initial use of the word "shall" in the phrase "shall be settled" demonstrates that the parties agreed upon an alternative method of

resolving any dispute. Failing an initial amicable settlement then, and only then, can either party refer the dispute to arbitration. But the plain intention is that relief should be obtained from arbitration and not from ordinary litigation.

In so far as there is any imposition about the number of arbitrators or the rules to be followed, Mr. Smith submitted that the Arbitration Ordinance makes provision for the resolution of such matters.

I am satisfied that Mr. Smith is correct in his argument. It is plain to me that, taken as a whole and having regard not least to the title to clause 11, the parties plainly agreed to settle any dispute by arbitration. In my judgment that, is all that is required in order to establish a binding arbitration agreement. Should the ties be unable to agree the precise number of arbitrators or the rules to be followed, the Model Law will assist them. Article 10 provides for 3 arbitrators if the parties cannot otherwise agreed. Article 19 provides for rules of procedure.

Construction of Article 8(1)

The parties agreed that, in broad terms, the law as it stands now is that if a plaintiff can show that he is entitled to judgment under Order 14, there is no dispute to be referred to arbitration and therefore no requirement to stay the proceedings. That principle, however, has been developed on the basis of Section 1 of the Arbitration Act 1975 and Section 6A of the Arbitration Ordinance. Section 6A(1) of the Ordinance (which is identical to Section 1 of the Act) reads

" 6A (1) If any party to an arbitration agreement to which this section applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings and the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with

regard to the matter agreed to be referred, shall make an order staying the proceedings."

It will be seen that the words underlined are omitted from Article 8(1). It is Mr. Jat's contention that, notwithstanding the difference in wording, the existing principle should remain applicable. Mr. Smith contended that the court is now obliged to order a stay unless it is apparent that a defendant has admitted any claim against him. He said it is no longer appropriate for the court to investigate the degree to which it might be said that there is no genuine dispute between the parties.

It is necessary, I think, to examine how the present approach has developed. In Sethia Liners Ltd. v. State Trading Corporation of India [1985] 1 WLR 398 Kerr L.J. at p.1401 said:

" The submissions of both parties have proceeded on the basis that the summonses under 0.14 and s.1 are the reverse sides of the same coin, and we have been referred to Mustill and Boyd, Commercial Arbitration (1982), pp. 90-92. Without expressing any concluded view on everything which is stated there, it seems to me that the position can be summarized as follows. If a point of law is raised on behalf of the defendants, which the Court feels able to consider without reference to contested facts simply on the submissions of the parties, then it is now settled that in applications for summary judgment under 0.14 the Court will do so in order to see whether there is any substance in the proposed defence. If it concludes that, although arguable, the point is bad, then it will give judgment for the plaintiffs. This course will also be adopted where there is a counter-application for a stay of the action. If the contract between the parties contains an arbitration clause to which s.1 of the 1975 Act applies, then the Court is not thereby precluded from considering whether there is any arguable defence to the plaintiffs' claim. If the Court concludes that the plaintiffs are clearly right in law then it will still give judgment for the plaintiffs. In the same breath, as it were, it will then have decided that in reality there was not in fact any dispute between the parties. If the Court is satisfied that the plaintiffs are clearly right in law, and that the defendants have no arguable defence, then it will not avail the defendants to

have raised a point of law which the Court can see is in fact bad. In those circumstances the defendants cannot be heard to say that there was a dispute to be referred to arbitration. But if the Court concludes that the plaintiffs are not clearly entitled to judgment because the case raises problems which should be argued and considered fully, then it will give leave to defend, and it is therefore then bound to refer the matter to arbitration under s.1 of the 1975 Act."

The position was perhaps slightly refined in Home & Overseas Insurance Co. Ltd. v. Mentor Insurance Co. (U.K.) Ltd. (1990] 1 WLR 153 where Parker L.J. said at p.158

" The purpose of O.14 is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim. If the defendant's only suggested defence is a point of law and the Court can see at once that the point is misconceived the plaintiff is entitled to judgment. If at first sight the point appears to be arguable but with a relatively short argument can be shown to be plainly unsustainable the plaintiff is also entitled to judgment.. But O.14 proceedings should not in my view be allowed to become a means for obtaining, in effect, an immediate trial of an action, which will be the case of the Court lends itself to determining O.14 applications points of law which may take hours or even days and the citation of many authorities before the Court is in a position to arrive at a final decision.

In cases where there is an arbitration clause it is in my judgment the more necessary that full scale argument should not be permitted. The parties agreed on their chosen tribunal and a defendant is entitled prima facie to have the dispute decided by that tribunal in the first instance, to be free from the intervention of the Courts until it has been so decided and thereafter, if it is in his favour, to hold it unless the plaintiff obtains leave to appeal and successfully appeals.

In the case of a commercial arbitration the above remarks apply with even greater force, perhaps especially when the dispute turns upon

construction, or the implication of terms or trade practice. Arbitrators and umpires in the same business or trade as the parties are certainly as well or better able than the Court to judge what the parties must be taken to have meant or intended by the words or phrases they have used, to judge what the parties would at once have replied if an innocent bystander had asked what was to happen in a certain event not dealt with by the contract, and to know what are the practices in the trade. Not only is the defendant entitled to have the dispute decided in the first instance by such persons but the Court should not in my view, save in the clearest of cases, decide the question without the benefit of their views."

The matter was again considered by Saville J. in Havter v. Nelson [1990] 2 Lloyd's Rep. 265. First, he dealt with the meaning of the word "dispute" and "difference" as found in an arbitration agreement. At p.276 he said

" In some cases the suggestion seems to be made that if it can be shown that a claim under a contract is indisputable, i.e a claim that simply cannot be resisted on either the facts or the law, then there is no dispute or difference within the meaning of the arbitration clause in that contract. For example, in Ellis Mechanical Services Ltd. v. Wates Construction Ltd. [1978] 1 Lloyd's Rep. 33 at p. 37 Lord Justice Bridge, as he then was, said this:

To my mind the test to be applied in such a case is perfectly clear. The question to be asked is: is it established beyond reasonable doubt by the evidence before the Court that at least £X is due from the defendant to the plaintiff? If it is, the judgment should be given for the plaintiff for that sum, what ever X may be, and in a case where, as here, there is an arbitration clause the remainder in dispute should go to arbitration. The reason why arbitration should not be extended to cover the area of the £X is indeed because there is no issue, or difference, referable to arbitration in respect of that amount.

To the extent that such observations are intended to define what is or is

not a dispute or difference within the meaning of an arbitration clause of the kind under consideration, I am respectfully unable to agree with them-more importantly they seem to me to be in conflict with the decision of, the Court of Appeal in *Ellerine Brothers (Pty.) Ltd. v. Klinger*, [1982] 1 W.L.R. 1375. In my view, to treat the word "disputes" or the word "differences" in the context of an ordinary arbitration clause as bearing such a meaning leads not only to absurdity, but also involves giving those words a meaning which (though doubtless one the words are capable of bearing) in context is difficult to support.

The proposition must be that if a claim is indisputable then it cannot form the subject of a "dispute" or "difference" within the meaning of an arbitration clause. If this is so, then it must follow that a claimant cannot refer an indisputable claim to arbitration under such a clause; and that an arbitrator purporting to make an award in favour of a claimant advancing an indisputable claim would have no jurisdiction to do so. It must further follow that a claim to which there is an indisputably good defence cannot be validly referred to arbitration since, on the same reasoning, there would again be no issue or difference referable to arbitration. To my mind such propositions have only to be stated to be rejected-as indeed they were rejected by Mr. Justice Kerr (as he then was) in *The M. Eregli*, [1981] 2 Lloyd's Rep. 169, in terms approved by Lords Justices Templeman and Fox in *Elerine v. Klinger* (sup.). As Lord Justice Templeman put it (at p. 1383): -

There is a dispute until the defendant admits that the sum is due and payable.

In my judgment in this context neither the word "disputes" nor the word "differences" is confined to cases where it cannot then and there be determined whether one party or the other is in the right. Two men have an argument over who won the University Boat Race in a particular year. In ordinary language they have a dispute over whether it was Oxford or Cambridge. The fact that it can be easily and immediately demonstrated beyond any doubt that the one is right and the other is wrong does not and

cannot mean that that dispute did not in fact exist. Because one man can be said to be indisputably right and the other indisputably wrong does not, in my view, entail that there was therefore never any dispute between them

In my view this ordinary meaning of the word "disputes" or the word "differences" should be given to those words in arbitration clauses."

The judge then turned to the further submission that there was not in fact any dispute between the parties with regard to the matter agreed to be referred within the meaning of section 1 of the Act because the claims were indisputable both in fact and law. At p.269 the judge said

" This reasoning involves reading the words "there is not in fact any dispute between the parties" as meaning "there is not in fact any defence to the claim", i.e. as confining the word "dispute" in that context to disputable matters. Presumably, by parity of reasoning, a respondent to an arbitration who asserts that he has an indisputable defence to the claim could start legal proceedings claiming a declaration to that effect and resist a stay on the same grounds. Be that as it may, Mr. Edelman accepted that his submission involved giving the word "dispute" in the Act a different meaning from that which (for the reasons given earlier in this judgment) he agreed must apply to the word when used in ordinary arbitration clauses.

The phrase in question does not appear in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards although the 1975 Act, by its title, purports to give effect to that Convention. The phrase did not appear in the original Arbitration Clauses (Protocol) Act, 1924, bringing into effect the League of Nations Protocol of Septa 24, 1923, nor in that Protocol, but was introduced by way of amendment to the 1924 Act by the Arbitration (Foreign Awards) Act, 1930, whence it founds its way into s.4(2) of the Arbitration Act, 1950 before that sub-section was repealed by s.8(2) of the 1975 Act, when the New York Convention replaced the League of Nations Protocol.

There seems little doubt that the phrase "or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred" was inserted into the 1924 Act by later amendment as a result of a recommendation by the MacKinnon Committee on The Law of Arbitration whose report was presented to Parliament in March 1927 - see Russell on arbitration, 12th Ed. (1931) at p. 519. The recommendation in question is to be found in par. 43 of this Report (Cmd. 2817) in the following terms:

Our attention has been called to a point that arises under the Arbitration Clauses (Protocol) Act 1924. Section 1 of that Act in relation to a submission to which the Protocol applies deprives the English Court of any discretion as regards granting a stay of an action. It is said that cases have already not infrequently arisen, where (e.g.) a writ has been issued claiming the price of goods sold and delivered. The defendant has applied to stay the action on the grounds that the contract of sale contains an arbitration clause without being able, or condescending, to indicate any reason why he should not pay for the goods, or the existence of any dispute to be decided by arbitration. It seems absurd that in such a case the English Court must stay the action, and we suggest that the Act might at any rate provide that the court shall stay the action if satisfied that there is a real dispute to be determined by arbitration. Nor would such a provision appear to be inconsistent with the protocol.

I have not been able to find any report of the cases to which the Committee referred, so that it is not possible to examine the grounds on which a stay was ordered in those cases. On the face of it, if indeed the applicant for a stay could not or did not indicate "the existence of any dispute to be decided by arbitration" then the claims made in the legal proceedings could hardly be "in respect of any matter agreed to be referred" within the meaning of the 1924 Act, so no question of a stay could arise at all, since (under an ordinary arbitration clause) it is only disputes (or differences) that the parties have agreed to refer. What therefore the Committee may have had in mind (though this is speculation) were cases where there was a dispute (or

difference) within the meaning of the arbitration clause, so that the legal proceedings were "in respect of a matter agreed to be referred", but where the party disputing the claim put forward no good grounds for doing so. In such cases, as the Committee put it, there was no "real dispute" in the sense of there being nothing disputable about the claim.

The words inserted into the 1924 Act are, as a matter of pure construction, very difficult to understand. On their face the words appear to indicate that there can be a matter agreed to be referred even though there is not in fact any dispute between the parties - but as I have already pointed out, if there is in fact no dispute between the parties then there is very likely indeed to be nothing agreed to be referred, since it is only disputes (or differences) that the parties have agreed to refer. In the end I have concluded that this apparent absurdity can only be resolved by treating the word "dispute" in this context as indeed meaning something different from the word used in ordinary arbitration clauses, so that reading the phrase as a whole the words "there is not in fact any dispute" mean "there is not in fact anything disputable".

The judge then dealt with Sethia and Home and Overseas and, after citing the passage from Parker L.J. to which I have already referred, at p.271 said:

" That case was concerned with an application for a stay under s.4 of the Arbitration Act, 1950, where of course the Court has a discretion, but to my mind the approach of the Court of Appeal must be at least equally if not more applicable to s.1 of the 1975 Act, since in the latter case there is no discretion given to the Court at all. It seems to me to be clear from the passage quoted from Lord Justice Parker's judgment, that when considering an application for summary judgment, a factor to be taken into account is the existence of an arbitration agreement between the parties; so that only in the simplest and clearest cases, i.e. where it is readily and immediately demonstrable that the respondent has no good grounds at all for disputing the claim should that party be deprived of his contractual right to arbitrate. In context of the 1975 Act. This means that only in such cases can the Court be satisfied that there

is not in fact any dispute between the parties with regard to the matter agreed to be referred."

The passage underlined was cited by Staughton L.J. in Channel Tunnel Group Ltd and Anr v. Balfour Beatty Construction Ltd and Ors (1992) 2 W.L.R. 741 at p.749. It was implicitly accepted and approved.

In the John C Helmsing [1990] 2 Lloyd's Rep. 290, the Court of Appeal was dealing with the provisions of order 73, rule 7(1) and whether the word "difference" in an arbitration clause in that context meant a genuinely disputable issue. The reasoning of Saville J. as to the meaning of "dispute" where it appears in an arbitration agreement was cited, as were the passages from the judgments of Kerr L.J. and Parker L.J. to which I have already referred. At p. 296 Bingham L.J. said

" The differing submissions of the parties reflect different approaches to this question in the decided cases. Given the modern attitude to arbitration and if the matter were free from authority, I would for my part be much impressed by the arguments of logic and principle deployed by Mr. Justice Saville and Mustill and Boyd. But the matter is not free of authority and the defendants have a body of authority on their side. The Courts have treated the plaintiffs demonstration of a clear case under O. 14 as a reason for not granting a stay, even where the defendant disputes the claim. If there is no dispute when the plaintiff's claim is obviously good, it is difficult to see why there should be a dispute when the plaintiff's claim is obviously bad."

It is important to bear in mind that that opinion, which was obiter, was not expressed in relation to section 1 of the Act. Further whatever Saville J's reasoning, his ultimate decision was, in my view, wholly consonant with the decisions in Sethia and Home and Overseas. The judge was simply trying to emphasise the reluctance of the courts to interfere in all but plain and obvious cases. My view happily has the support of Kaplan J. who, in Icos Vibro Ltd. v. S.F.K Construction Management Ltd. and Another Construction List No. 9 of 1991, in a judgment dated 26th February 1992 (as yet unreported), attempted to pull these threads together in dealing with a domestic arbitration. He said that he had to consider whether the

decision of Saville J. was in conflict with Home and Overseas. He said:

" Having read and re read both Havter and Home and Overseas I am satisfied that Havter can sit comfortably with the latter. Consequently I find nothing new or startling in Havter Saville is reminder of Templeman LJ's words in Ellerine v. Klinger serve only to remind practitioners that stays will only be refused where the claimant can show clearly and emphatically that the respondent has no grounds for disputing the claim. Saville judgment is a timely warning for those who try to circumvent the arbitration clause by resort to O.14. Applications where one party seeks a stay and the other judgment under O.14 are commonplace in the Construction List. These cross summonses are usually very heavy with extensive evidence being put in by both sides. Such summonses take a little time to be ready to be heard. When they do come on for a hearing they frequently last for more than a day as was the case in the present matter. Appeals are, unrestricted and commonplace. much time, energy and money is spent at this stage. If the dispute had immediately gone to arbitration, as agreed, the arbitrator could have made arrangements to hear the allegedly indisputable part of the case at an early stage and render an interim award and proceed to hear the remainder of the case. I should add that there has been a recent tendency in the Construction List for Plaintiffs to launch very ambitious O.14 applications with the inevitable result that they deflect energy and resources from the substantive hearing whether it be in court or in arbitration.

It follows therefore that, subject to the position of the 2nd defendant which is tied into the question of discretion and to which I will return, I propose to take the position that a stay will only be refused where the Plaintiff has shown quite clearly that the respondent has no grounds for disputing the claim."

From this survey, it seems to me 2 points emerge. First, the judges were united in their abhorrence of becoming involved in a detailed examination of the "dispute". Second, while Saville J. and Kaplan J. expressed in general terms the approach to be adopted, Kerr L.J. and Parker L.J. confined any examination to a

point of law, Parker L.J. emphasising that it should be a short point and that "full scale argument should not be permitted."

Those sentiments have my full support. It is debatable, however, whether the decisions have achieved their purpose. What is "short" or "simple and clear" regrettably admits of varied interpretation. Further, assuming a plaintiff can establish a point of law as being unarguable, I cannot in logic see why he should be deprived of the opportunity of doing so simply because he requires to canvass extensive authorities and material. The underlying principle remains the same. To shut out such a plaintiff because he cannot establish the point within a prescribed time or by reference only to a prescribed number of authorities would be wholly arbitrary.

The question arises, therefore, whether Article 8 remedies the situation. It is, as I said earlier, Mr. Jat's contention that notwithstanding the words missing from Article 8(1), the Court should continue to adopt the existing approach. He said that those words were added to section 6A of the Ordinance and section 1 of the Act to emphasise that there must be a "dispute" to be referred to arbitration so that, even without them, the Article bears the same meaning. He referred me to Professor Van Den Berg's work on the New York Arbitration Convention of 1958. Article II(3) of the Convention is identical to Article 8(1). At p. 146 of his work, Professor Van Den Berg said

"There must be a dispute

It is obvious that arbitration can take place only if there is a dispute between the parties. The Convention underscores this by providing in Article II(1) "to submit to arbitration all or any differences" (which may semantically be considered the same as disputes). Also, paragraphs 1 and 3 of Article I mention awards arising out of "differences". Accordingly, a court is not obliged to refer the parties to arbitration if there is not a dispute between them. As explained before, this condition of Article II(1), like the other conditions mentioned in paragraphs 1 and 2 of Article II, are incorporated in paragraph 3 of Article II through the words "an agreement within the meaning of this article" in the latter paragraph.

Some implementing Acts, however, explicitly list the condition that there be a dispute. Thus, the English Arbitration Act of 1975 provides in Section 1(1): "... unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred ...". (emphasis added) The same wording can be found in Section 3 of the India implementing Act of 1961.

This explicit wording has some advantages in that it sets more clearly the conditions that there be a dispute, although its omission would not have been fatal as the condition is self-evident. It should, however, not be readily assumed that a dispute does not exist."

Further, Mr. Jat reminded me that Saville J.'s judgment as to the meaning of "dispute" has been doubted by Bingham L.J. in the John C. Helmsing. He also said that following the existing practice will provide consistency as otherwise there will be different tests depending upon whether the arbitration agreement is domestic or non-domestic.

Mr. Smith pointed out that Saville J. gave two interpretations of the word "dispute". First, where it appears in the arbitration agreement itself. Second, where it appears in the relevant sections of the Ordinance and Act. He said that the words have now been omitted from Article 8(1) and that the Article should not be re-written as though the words had been included. He argued that the Article should be given a literal interpretation based upon that of Saville J. in order to prevent the mischief to which Kaplan J. referred and in order to achieve certainty. He pointed out that if it becomes plain that the interpretation of Saville J. is being applied, i.e. that there is a dispute unless a defendant has admitted the claim against him and that in the absence of an admission all matters will be referred to arbitration, the costly and time-consuming Order 14 and other applications will be avoided.

I cannot accept that the missing words were inserted in s.1 of the Act and s.6A of the Ordinance simply for emphasis. In my judgment, they were intended to

convey some independent meaning. I am, however, unable to arrive at any construction other than that of Saville J. It seems to me they were intended as a filter to ensure that there is a "real" dispute requiring resolution rather than a case of a defendant simply playing for time. Whether the filter has proved satisfactory is, as I said, another matter.

I think it plain that the whole tenor of the Model Law is to restrict to a minimum the part which the Courts have to play when parties have agreed to arbitration. It is also plain, as I hope I have demonstrated, that the Courts are increasingly reluctant to become involved in disputes between parties to an arbitration agreement. That judicial reluctance, however, has been obstructed by the legislature which has left it open to the courts to examine (often in some detail, I am afraid) the nature and extent of the dispute. That seems to me to be a wholly unsatisfactory state of affairs.

I am persuaded, therefore, that the proper construction of Article 8(1) is that a Court should refer to arbitration a claim which has not been admitted by the party against whom it is made. It will then be for the arbitrator to examine the merits on either side. This will provide the certainty which Mr. Smith seeks and avoid the type of situation deplored by Kaplan J. I have no doubt that in an appropriate case an arbitrator will swiftly make an interim award or indeed a full and final award upon the claimant showing that there is no real defence or answer to his claim or part thereof.

I reject the suggestion that a finding of this nature will have the effect of discouraging arbitration. It was, as I was understood it, the contention that carefully drawn arbitration clauses will be required, something which parties may not be prepared to undertake. I confess I find myself at a loss to understand why this should be so. Whilst, of course, it is desirable that the parties should agree and include in their arbitration clause as many details of the arbitral machinery as possible, it still remains the fact that as long as the parties demonstrate a clear intention that their disputes are to be resolved by arbitration then arbitration can take place. In an increasing number of jurisdictions the Model Law will fill any gaps that may have been left in the arbitration agreement itself.

Should These Proceedings be stayed

It has not been suggested that the Defendant has admitted or acknowledged the claim for short delivery. In view of my earlier ruling therefore this part of the claim must be stayed so that the parties can proceed to arbitration.

For completeness, however, I outline my views on the matter. Upon discharge, the goods were measured by the China Commodity Inspection Bureau (CCIB). That measurement showed that there was a shortage of 184.73 metric tons. The Plaintiff claims reimbursement for that shortfall by virtue of clause 10 of the contract which is asserted to be an adjustment clause. It reads

"(10) Weight Terms: 0.5 Pct of the B/L weight shall be deducted as good weight from the invoice. Buyer has the right to claim any shortage only in excess of 0.6 Pct good weight per CCIB Inspection Certificate."

Mr. Smith argued that clause 10 is far from clear and in any event should be read in conjunction with clause 8B of the general conditions which reads:-

"B. The buyer has the right to re-inspect the goods after discharge of the goods in completed at the port of destination. Such re-inspection shall be conducted by the relevant China Commodity Inspection Bureau under the state administration of Import and Export Commodity Inspection. The re-inspection fee therefrom shall be borne by the buyer. Should the specification of the goods and/or quality and/or quantity be found to be not in conformity with the provisions of this contract, the buyer has the right to lodge the claim against the seller for compensation (including compensation for the re-inspection fee)."

Mr. Smith contended that there is no adjustment clause as to be found in Krohn and Company v. Mitsui and Company Europe G.M.B.H. [1978] 2 Lloyd's Rep. 419. He said that clause 10 simply emphasizes that the buyer can only make a claim if

the shortage is in excess of 0.6%. Clause 8 governs the parties rights, permitting the buyer to seek compensation, i.e. damages, rather than a price adjustment.

As something of a fallback position, I think, it was suggested that in any event the Plaintiff has adduced evidence of a shortage for which it should be reimbursed. Even now the Defendant has not condescended to indicate how or on what basis it can or might challenge the CCIB measurement. Mr. Smith rather faintly suggested that the fact that the CCIB measurement differs from the measurement on the Bill of Lading is in itself sufficient to warrant a proper investigation by the Court. He acknowledged, however, that perhaps the Defendant has not done quite enough in response to an Order 14 application and that the appropriate order would be one of conditional leave to defend.

Whilst it is arguable as to whether or not there is a genuine adjustment clause, for my part I would have given judgment for the Plaintiff for the shortfall. The Plaintiff has adduced evidence of the shortage from the body contemplated by clause 8 of the general conditions. The Defendant by affidavit by its solicitor has said nothing beyond that it is likely to adduce evidence in the future. From the Bar, Mr. Smith told me that the Defendant has experienced difficulty in obtaining information from its suppliers which might throw some light on the problem. What Mr. Smith said, of course, is not evidence. I would have expected that by now the Defendant would have been able to give some hint of the manner in which it could challenge the CCIB measurement which took place between 23rd and 28th November 1991.

In the circumstances I grant the relief sought by the Defendant and stay the proceedings. I make an order nisi that the Defendant has the Costs of the action to-date, those costs to be taxed and paid.

(N.J. Barnett)

Judge of the High Court

Representation:

Mr. S.T. Jat inst'd by Ng Lie Lai & Chan for Plaintiff.

Mr. C. Smith inst'd by Holman Fenwick & Willan for Defendant.