HCCL000023/1993

Construction List No. 23 of 1993

IN THE SUPREME COURT OF HONG KONG

HIGH COURT

BETWEEN

GAY CONSTRUCTIONS PTY LTD	1st Plaintiff
SPACEFRAME BUILDINGS (NORTH ASIA) LTD	2nd Plaintiff
and	
CALEDONIAN TECHMORE (BUILDING) LIMITED	Defendant
and	
HANISON CONSTRUCTION CO. LTD	Third Party

Coram: The Hon. Mr. Justice Kaplan in Chambers

Date of hearing and judgment: 11 November 1994

Date of delivery of reasons: 17 November 1994

HEADNOTE

Arbitration - whether Article 7(2) of the Model Law has been complied with - does the record of the agreement have to refer specifically to the arbitration clause - Held: - Article 7(2) had been complied with and it was appropriate to grant a stay.

J U D G M E N T

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1. On 11th November 1994 I granted the Third Party (Hanison) a stay of the Third party proceedings under section 6 of the Arbitration Ordinance Cap. 341. I said that I would briefly reduce my reasons into writing which I now do.

2. Hanison was the main contractor appointed by China Dyeing Holdings Limited to undertake the construction of a dyeing factory at Yuen Long in the New Territories. The Defendant was a nominated sub-contractor for the design and supply of structural steel frames and external cladding. This work was sub-contracted by the Defendant to the First Plaintiff, Gay Constructions Pty. Ltd. who appeared to have sub-contracted some or all of this work to the Second Plaintiff.

3. The contract between the Plaintiff and the Defendant was in writing and was signed by Hanison on 12th March 1992. It was not signed by the Defendant. It contained an arbitration clause.

4. Prior to entering into the agreement with Hanison the Defendant submitted a form of tender to Hanison and signed it on 10th December 1990. Paragraph 1 of this tender states:-

> "Having inspected the Site, examined the Drawings, Conditions of Sub-Contract, conditions of Main Contract and Specification for the execution of the above-named Sub-Contract Works, I/we offer to execute, complete and maintain the whole of the said of the Sub-Contract Works in conformity with the Drawings, conditions of Sub-Contract, Conditions of Main Contract (insofar as they refer to Nominated Sub-Contractors) and Specification for the sum of Dollars Thirty Seven Million One hundred Eighty Three Thousand and Thirty Only ($37,183,030.00) or such sum as may be ascertained in accordance with the Conditions of Sub-Contract and relevant Conditions of Main Contract."

Paragraph 4.01 of the form of tender provided as follows:-

> ""The Standard Conditions of Sub-Contract" means the Standard Conditions of Sub-Contract together with its Appendix issued under the sanction of The Hong Kong Institute of Architects, The Royal Institution of Chartered Surveyors (Hong Kong Branch) and The Society of Builders, Hong Kong, First RICS (HK Branch) Edition 1986 for use where the Sub-Contractor is nominated under the Standard Form of Building Contract for Hong Kong."

This form of contract contains an arbitration clause.

5. In due course the sub-contract was signed by Hanison but not by the Defendant. Works commenced and thereafter there are copious references in the correspondence passing between Hanison and the Defendant which make ample reference to a number of the clauses in the written sub-contract.

6. As a preliminary point Mr. Franklin for the Defendant contends that there has been no compliance with Article 7(2) of the Model Law which by virtue of section 2(1) of the Arbitration Ordinance has application equally to domestic as to international cases.

7. Article 7(2) provides as follows:-

> "(2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract or a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract."

Clearly the agreement is not signed by both parties and the issue is whether there are exchanges of letters which provide a record of the agreement and whether there is an exchange of a statement of claim in which the existence of the agreement is alleged and not denied.

8. Mr. Franklin's short point is that none of the references in the correspondence actually refer to the arbitration clause contained within the written agreement and thus he submits Article 7(2) cannot possibly be complied with.

9. This raises the question whether a reference to clauses of the written agreement are sufficient even though they do not specifically refer to the arbitration clause.

10. The first of the Sixth Schedule documents to which the Court may have regard in interpreting the Model Law is a report to the Secretary General of UNCITRAL dated 25th March 1985 and entitled "An Analytical Commentary on the Draft Text of the Model Law on International Commercial Arbitration" and the second of the Sixth Schedule documents is a report to the United Nations Commission on International Trade Law on the work of its 18th session (3-21 June 1985). A commentary on Article 7(2) in the Analytical Commentary can be found at page 747 in Hong Kong and China Arbitration published by Butterworths in May 1994. Paragraph 8 states:-

> "The second addition, contained in the last sentence, is intended to clarify a matter, which, in the context of the 1958 New York Convention, has led to problems and divergent court decisions. It deals with the not infrequent case where parties, instead of including an arbitration clause in their contract, refer to a document (eg. general conditions or another contract) which contains an arbitration clause. The reference constitutes an arbitration agreement if it is such as to make that clause part of the contract and, of course, if the contract itself meets the requirement of written form as defined in the first sentence at paragraph (2). As the text clearly states, the reference need only be to the document; thus, no explicit reference to the arbitration clause contained therein is required."

11. Holtzmann and Neuhaus in their "Guide to the UNCITRAL Model Law" comment on this point at page 263/4 where they state:-

> "40. *Reference in a written contract to a document containing an arbitration clause if the reference makes the clause part of the contract.* This sentence was added to make clear that when an arbitration clause is not contained in a written contract but rather a document referred to therein - such as general conditions of contract or another contract - the arbitration agreement may be deemed to be "in writing". The contract containing the reference must be in writing. This probably means that it must meet the requirements contained in the second sentence of the paragraph. That is, the contract probably must be either signed or contained in an exchange of letters, telexes, etc. Otherwise as already noted, the parties could, merely by placing the arbitration clause in a separate document, avoid the requirements of a written assent from each party.
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> The meaning of the requirement that "the reference (be) such as to make (the arbitration) clause a part of the contract" may raise questions. The Working Group made clear that it did not mean the contract had to make explicit reference to the arbitration clause itself. The requirement was adopted as a middle ground between two position: one view was that the text of the arbitration agreement had to "be before both parties" in order to bind them; another view was that only a "reference" in the contract to general conditions or other documents containing the arbitration clause was enough. The language adopted appears to mean that the general conditions, prior contract or other document must have been intended to be incorporated into the contract, and not merely referred to in, for example, a "whereas" clause or as background to the agreement."

Aron Broches in his commentary on the Model Law states at page 41:-

> "11. Thirdly, they clarified the effect of a reference in a contract to another document which contains an arbitration agreement provided the contract is itself in writing and the reference is such as to make that clause part of the contract. In adopting this language at his final session, the Working Group agreed that it should not be understood as requiring an explicit reference to the arbitration clause in the other document."

12. In Astell-Peiniger Joint Venture -v- Argos Engineering & Heavy Industries Co. Ltd., (Construction List No. 14 of 1994 judgment handed down 18th August 1994) I dealt with a similar point and referred to the same materials as I have set out above. I am quite satisfied that it is possible to comply with the last sentence of Article 7(2) without an explicit reference to the arbitration clause. To require a specific reference to the arbitration clause wold be far too restrictive and clearly was not intended by those drafting the Model Law.

13. On the facts of this case, it is perfectly obvious that although the Defendant did not sign the written agreement it relied upon various parts of it to support the various claims that it was making and no doubt denying claims that were being made against it. I have no doubt on the facts of this case that there are ample exchanges of letters which provide a record of the agreement. However, the matter does not end there. In due course the Defendant put in a contractual claim for loss and expense to Hanison in December 1992. This is a detailed and complex document and attached to this claim document are a number of provisions of the sub-contract including, interestingly enough, the arbitration clause itself. This document which was sent to Hanison provides the clearest possible record of the written agreement and reference to the arbitration clause itself. I have no difficulty in concluding that despite its length, this document when sent to Hanison comes within the definition of a letter. If I were wrong about that, I would be prepared to hold that this document was in fact an exchange of statements of claim in which the existence of the agreement was alleged by the Defendant themselves and certainly never denied by Hanison. The phrase "statements of claim and defence" in Article 7(2) of the Model Law is not defined and I see no reason why they should be read as referring only to pleading in the formal sense once an arbitration has commenced. This claim document is headed "contractual claim for loss and expense" and I have no doubt that when arbitration proceedings commence it will either be treated as the statement of claim or form the basis of another document which will incorporate virtually all of its content. In this case the Defendant had ample knowledge in advance that the form of sub-contract contained an arbitration clause and when it came to make its claim it actually included the arbitration clause as part of its documentation. To conclude that Article in 7(2) had not been complied with would be an absurdity on the facts of this case. I am therefore quite satisfied that Mr. Franklin's short preliminary point fails and that Article 7(2) has been complied with.

14. I now turn to consider Mr. Franklin's submissions which were intended to persuade me not to exercise my discretion in favour of granting the stay.

15. The law on this subject was carefully reviewed and set out by Mantell J. in Wharf Properties Limited -v- Eric Cumine Associates (1984) HKLR 211 where the learned judge observed, in a similar situation, that a person in the position of the Defendant has to show a very strong or very good reason why the matter should not be referred to arbitration. The circumstances of the case should be considered by the Court with a strong bias in favour of maintaining the bargain between the parties.

16. This case raises a point which frequently arises in practice. There can be an arbitration clause in the contract between the employer and the main contractor but not one between the main contractor and the sub-contractors. The same arguments are wheeled out every time. It is contended that there could be inconsistent findings of fact and there would be multiplicity of proceedings. The answer in most of these cases is that parties entering into sophisticated agreements of this nature, which involve more than two parties, should take care to ensure that there is a common thread in the dispute resolution mechanisms agreed upon. If A and B enter into a detailed contract containing an arbitration clause why should B be deprived of that bargain merely because A has entered into another contract relating to the same project but which does not contain an arbitration clause. When this point arises there is frequent reference to the case of Taunton Collins -v- Cromie (1964) 1WLR 663. That was very much a special case and had nothing to do with the sort of sophisticated and complex building contract with which I am dealing in this present case.

17. I do not wish to get involved in a discussion about the perceived advantages of arbitration over litigation. However, there are certain obvious advantages in arbitration which I am quite certain parties have in mind they enter into complex construction contracts. The first is that an arbitration clause enables them, or an appointing authority, to agree upon a technical arbitrator rather than a judge of the circumstances are appropriate. Secondly and, perhaps, most importantly and not a factor which appears to have been taken account of in the previous cases is that one can only appeal an arbitral award with leave of the Court. Since 1982, when the leave to appeal provisions were introduced in Hong Kong, there have only been three or four successful applications for leave. That means that in almost all cases where an arbitrator has rendered an award that award is final. This is of course in sharp contradistinction to the situation which pertains in litigation. There are no restrictions on appeal in litigation whether of interlocutory or final decisions of a first instance judge. It is possible that a final decision will be appealed to the Court of Appeal and there is provision in cases involving more than $500,000 for an appeal to the Privy Council as of right. A third point which often arises but which may not be so relevant in this case is that an arbitration clause usually gives power to the arbitrator to open up, revise and review certificates and directions of the engineer whereas there is strong authority to support the view that the Court has no such similar power.

18. I have chosen these three factors which are not intended to be exclusive. However, they are all actual or perceived advantages which the arbitral process enjoys over litigation. It seems to me that very strong grounds indeed need to be made out to deprive a party of his contractual bargain of arbitration over litigation. I am not to be taken as saying that there can never be cases where it would be appropriate to refuse a stay. In Telford Development Limited -v- Shui On Construction Limited unreported, HC Action 1946 of 1987, 21st February 1989 reported at page 26 of Hong Kong Arbitration - Cases and Materials Godfrey J. (as he then was) refused to grant a stay relying upon multiplicity of proceedings and inconsistent findings of different tribunals. However with great respect to that learned judge he failed to consider at all the various matters which I have referred to and I am bound to say that the points that he relied upon must inevitably arise in every multipartite case where the party who has the means to exercise control has failed to ensure that there are back to back dispute resolution provisions.

19. I think that the above comments are sufficient to indicate the reasons why I felt constrained to exercise my discretion in favour of granting the stay. Mr. Graham who appeared on behalf of Hanison also relied upon the unfairness which would attach to his clients if they were forced to remain in the proceedings bearing in mind that the hearing was fixed for May 1995 and it is going to be very difficult for his clients to get ready in time and there was also the possibility of joining other parties. I do not think that this is a matter of which I can really take much notice. It is either right or it is not right for me to grant a stay. Had I not granted a stay and the matter remained in Court, then it would be up to the Judge in charge of the Construction and Arbitration list to decide whether any unfairness would be suffered by Hanison if they had to keep to the present timetable. I am quite confident that if Hanison were able to show a risk of unfairness or prejudice the judge would make an appropriate order.

20. Finally, I ought to deal with the suggestion which was made in the written argument on behalf of the Defendant namely that the Third Party had no defence and therefore there was nothing to go to arbitration. The claim made against Hanison is for an indemnity in the event that the Defendant should be held liable (which the Defendant denies). I agree with Mr. Graham when he says that this is manifestly not a case where the claimant can clearly show that the Third Party has no grounds for disputing the claim. In all the circumstances, therefore, I was quite satisfied that this was an appropriate case to exercise my discretion under section 6 and stay these proceedings as the parties have agreed upon arbitration. I am also quite satisfied that Article 7(2) has been fully complied with.

21. I conclude this judgment with the following observation. Time and time again this court has been faced with a similar problem. The problem is simply that those responsible for drafting multipartite contracts do not appear to focus on the importance of having dispute resolution clauses in the various linked contracts which are not inconsistent with each other. In this case Hanison were the main contractor and the Defendant was a nominated sub-contractor on a standard form of contract which contained an arbitration clause. If the Defendant then wishes to sub-contract the works it surely is his responsibility to ensure that he imposes an arbitration clause upon his sub-contractor so that the present problem is avoided. If there were back to back arbitration clauses, with this being a domestic arbitration, there would be ample scope for an application for consolidation under section 4 of the Arbitration Ordinance.

22. There is no need to make any directions on the Third Party proceedings. After hearing Counsel I ordered the Defendant to pay Hanison's costs of this application for a stay.

(Neil Kaplan)

Judge of the High Court

Representation:

Mr. Haley of McKenna & Co. for the Plaintiff

Mr. Stephen Franklin instructed by Robin Bridge & John Liu for the Defendant

Mr. Peter Graham instructed by Herbert Smith for the Third Party