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In the Supreme Court of Bermuda

CIVIL JURISDICTION 1982 : NO. 6

BETWEEN :

BELVEDERE INSURANCE COMPANY LIMITED Plaintiff

and

C.S.C. ASSURANCE LTD. Defendant

J U D G M E N T

This is an application by the Defendant for a stay of the proceedings in this action notwithstanding that the notice of motion seeks relief in the form of setting aside the writ of summons. The application is brought pursuant to the provisions of the Arbitration Act, 1924, Title 8, item 75, and pursuant to the provisions of the Arbitration (Foreign Awards) Act, 1976, Title 8, item 76 of the Revised Laws of Bermuda. The Plaintiff and the Defendant are both Bermuda Exempted Companies, incorporated and carrying on the business of insurers and reinsurers in Bermuda.

2. It is my view, having heard Mr Coles Driel, attorney for the Defendant, and Mr Narinder Bargon, attorney for the Plaintiff, that the application is brought and the relief sought under the provisions of section 2 of the Arbitration (Foreign Awards) Act, 1976, (hereinafter referred to as "the Act").

3. By an exchange of telexes the parties entered into an agreement whereby the Plaintiff would provide the Defendant with Aggregate Excess of Loss Reinsurance coverage for the period 1st January, 1979 to 31st December, 1979, in respect of certain workmen's compensation coverage. In their agreement the parties have, inter alia, provided a formula for the cancellation of the agreement and have provided machinery for the settlement of disputes between them by arbitration.

4. Article 2 of the agreement states:

"TERM AND CANCELLATION

This Agreement shall apply to losses occurring during the period commencing January 1, 1979, and ending January 1, 1980, both days at 12.01 A.M., Eastern Standard Time.

This Agreement may be cancelled at any time by the Reinsurer, but only for reasons of fraud, misrepresentation, or non-payment of

premium. The Reinsurer must give to the Reassured seven (7) days prior written notice of cancellation. In the event of cancellation, all reinsurance premium which has been paid to the Reinsurer by the Reassured under the terms of Article 7 of this Agreement shall be returned to the Reassured, and no liability shall be deemed to have attached hereunder."

5. Article 11 of the agreement states:

"ARBITRATION

Arbitration proceedings shall be the sole remedy for any dispute arising between the parties hereto with reference to any and all transactions or terms and conditions under this Agreement, and shall be referred to three disinterested arbitrators, one being chosen by the Reassured, one chosen by the Reinsurer, and the third chosen by the two aforesaid arbitrators before they enter into arbitration. In the case the arbitrators so chosen do not agree to the third arbitrator within one month after both shall have accepted service, the third arbitrator shall be chosen by the General Manager of the American Arbitration Association. Should either party hereto fail to qualify its arbitrator within one month after receipt of written notice from the other party requesting it to do so, the requesting party shall name both arbitrators and they shall proceed in all respects as above stipulated. Each party shall submit its case to the arbitrators within thirty days of the appointment of the arbitrators.

The arbitrators shall consider this Agreement an honorable engagement rather than merely a legal obligation; they are relieved of all judicial formalities and may abstain from following the strict rules of law. The award of the majority of the arbitrators shall be final and binding upon both parties. Judgment may be entered upon the award of arbitrators in any court having jurisdiction.

The said arbitrators shall be active or retired executive officers of insurance or reinsurance companies not under the control or management of either party to this Agreement. Arbitration shall take place in Newport Beach, California, unless otherwise agreed, and the expense of arbitration shall be borne and paid as directed by the arbitrators.

This Article shall survive the termination of this Agreement."

6. Section 2 of the Arbitration (Foreign Awards) Act, 1976, enacted:

"Stay of court proceedings where arbitration agreement exists.

2. (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 the 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.

(2) Subsection (1) applies to every arbitration agreement -

(a) which provides expressly or by implication for arbitration outside Bermuda; or

(b) to which an individual who is an alien or who is habitually resident outside Bermuda is a party at the time proceedings are commenced;

(c) to which a body corporate incorporated in or controlled from any place outside Bermuda is a party at such time,

and every award resulting from an arbitration agreement to which subsection (1) applies is hereby declared to be a domestic award in Bermuda for the purposes of the New York Convention.

(3) When subsection (1) applies to an arbitration agreement then section 4 of the Arbitration Act 1924 shall not apply to it."

7. An "arbitration agreement" as defined in the Act means an agreement in writing (including an agreement contained in an exchange of letters or telegrams) to submit to arbitration present or future differences capable of settlement by arbitration.

8. In my opinion, having examined the statement of claim, the notice of motion and the affidavits filed herein, the following facts emerge which are not contested:

- (a) The parties to the action are parties to an arbitration agreement (Article 11 of the Contract).
- (b) Legal proceedings have been commenced - (the writ of summons and statement of claim filed).
- (c) An appearance has been entered by the Defendant (conditional).
- (d) The Defendant has not delivered any pleadings or taken any other steps in the proceedings (apart from the present application).
- (e) The Defendant has applied to stay the proceedings.
- (f) The arbitration agreement provides for arbitration outside Bermuda.

9. Mr Coles Diehl for the Defendant now contends that:

- (a) the subject matter of the present action is a matter agreed by the parties to be referred to arbitration, and
- (b) the Court must grant the order staying the proceedings, unless the Plaintiff satisfies the Court "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".

10. Mr Narinder Margun for the Plaintiff contends that:

- (a) the relief sought by the Defendant cannot be granted because the Court has no jurisdiction to grant in these proceedings the relief presently sought since the misrepresentation alleged by the Plaintiff as rendering the contract void ab initio is a matter of construction coming within the

arbitration clause, and

(b) the arbitration clause in the contract does not apply because the purported agreement has been avoided by the Plaintiff ab initio because of misrepresentation.

11. I was referred by counsel to a number of pertinent authorities concerned with arbitration and I can do no better than to use the words of Lord Denning, M.R., in the case of Eagle Star Insurance Co. Ltd. v. Yuval Insurance Co. Ltd., Lloyd's Law Reports (1978) vol.1, p.257 at p.360-1, to express the modern day approach of the courts to arbitration:

"I turn now to the question of arbitration. At one time the Courts used to be very jealous of arbitrations. They used to find all sorts of reasons for interfering with arbitrators and their awards. But the approach to arbitration has changed in modern days. The Courts welcome arbitrations in commercial disputes. They encourage references to arbitration by commercial men in the City of London. They do not lightly interfere with their awards.

It seems to me that if a defendant who is being sued in the Courts asks that a matter should go to arbitration in accordance with their agreement, prima facie that agreement ought to be honoured; the action should be stayed and the matter should be allowed to go to arbitration. Subject to this statutory qualification: If the defendant has taken a 'step in the proceedings', then he is too late. He can no longer apply for the Court proceedings to be stayed.

In order to ask for the Court proceedings to be stayed, the defendant must apply to the Court:

... at any time after appearances and before delivering any pleadings or taking any other steps in the proceedings."

12. The agreement under review involves complex matters of Insurance and Re-Insurance on an International scale. The parties themselves recognised this and included in their agreement the qualifications required for the arbitrators. They also intended that the arbitrators be given a very wide scope in the procedure to be followed in their arbitration proceedings and they also legislated that the arbitrators "shall consider this Agreement an honorable engagement rather than merely a legal obligation". (All this is set out at Article 11).


13. It is my understanding that this Court should not seek technical objections and frivolous means of avoiding the arbitration agreement but should, if at all possible, encourage the parties to give effect to the arbitration agreement. It is true that the Court or some other tribunal of fact may have to decide at some time in the future whether the contract has been avoided ab initio. This will certainly have to be decided by the tribunal by reference to the proper law of the contract and with an understanding of the use of certain technical terms in the insurance business. But until that time arrives it seems to me that the arbitration clause is valid and has to stand - The *Blackburn* (1961) 3 A.E.R. p.661.

14. I do not accept the argument of counsel for the Plaintiff that the arbitrators cannot decide the present dispute. Surely the arbitrators can decide whether there has been misrepresentation and whether or not the misrepresentation was such as to give the Plaintiff a right to repudiate the contract in the context of the insurance contract. Depending on the submission to the arbitrators their award may or may not terminate the contract. If for example the arbitrators' award turned out to be such that it was in respect of matters not capable of settlement by arbitration we could in Bermuda refuse to enforce the award. See section 5(3) of the Act. Application could also in such circumstances be made to our courts to set aside the award. This would be no reason at the present time to refuse to grant a stay of the proceedings because it may turn out that the award is unenforceable.

15. Based on the very limited information at my disposal I find that the dispute between the parties is a dispute contemplated by the parties in their contract to be referred to arbitration for settlement. The Plaintiff has not satisfied me on a balance of probability that the arbitration agreement is null and void, imperative 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.

16. I grant the stay of the proceedings as prayed in the notice of motion.

23rd March, 1982


Sir James Antwool
Chief Justice.