YBXV-Bermuda 2

IN THE COURT OF APPEAL FOR BERMUDA

CIVIL APPEAL NO. 21 OF 1987

DUPONT SCANDINAVIA A.B.
(Formerly known as ARA-bolagen AKTIE BOLAGET) Appellant

and

COASTAL (BERMUDA) LIMITED Respondent

Mr. Dunch for the Appellant

Mr. Hargun for the Respondent

JUDGMENT

FACTS

In today's world of rapid communication thousands of contracts are concluded daily by telex. We are concerned with one such contract made between two oil traders. In mid-December 1981, a ship loaded with a cargo of straight run fuel oil left Rangoon, Burma and proceeded to sea. At that moment neither Dupont Scandinavia AB ("Dupont") nor Coastal (Bermuda) Ltd. ("Coastal") had any proprietary interest in the oil. However, as a result of the activities of brokers while the oil was in transit it was acquired by Coastal and sold to Dupont by brokers acting on behalf of Coastal.

The vessel proceeded to Norkkopping in Sweden. The oil was discharged. Subsequent testing showed it had considerable fresh water content in excess of specification, which clearly made it less valuable; in addition, there was a shortage in quantity. In consequence a claim was made against Coastal for breach of contract and damages.

The contract between the two parties is recorded in two telexes of ~~the~~ 13~~th~~ and 14~~th~~ January 1982. The telex of 13~~th~~ January contained the terms of the sale. ~~They are set out in full in the Statement of Claim.~~ One of those terms reads as follows:

LAWS AND ARBITRATION	:	SWISS LAW TO APPLY.

These are the words which have given rise to the dispute between the parties in this case.

The record shows that certain telexes and a letter passed between the interested parties or their representatives. (I shall have occasion to refer to these later in my judgment). At this stage it is sufficient to say that Coastal denied liability, and in July 1986 Dupont issued a specially endorsed writ claiming damages in the sum of US$2,141,160, together with interest and costs, before the Supreme Court of Bermuda.

On 20th August 1986, Coastal issued a summons asking, inter alia, that the proceedings in Bermuda court be stayed and that the issues be referred to arbitration pursuant to Swiss law in accordance with the terms of the agreement between the parties referred to in the Statment of Claim endorsed upon the Writ of Summons.

The application came on for hearing before Mr. Justice Austin Ward on 24th August 1987. His ruling was reserved and given on the 11th September 1987, the Supreme Court (Hon. Mr. Justice Austin Ward) ~~The learned judge~~ ordered that the proceedings be stayed and further that pursuant to Article II(3) of the New York Convention the parties be referred to arbitration. ~~Dupont has appealed from this order.~~ The Court of Appeal affirmed the Supreme Court's decision for the following reasons: Chief Justice Da Costa

Excerpt

[1] «The application was made to the [Supreme Court] ~~learned judge~~ under ~~section~~ Sect. 8 of The Arbitration Act 1986 of Bermuda and Article II(3) of The New York Convention 1958. (....) The appeal from (rightly) ~~For ease of reference I set out the relevant provisions.~~

Section 8(1) reads as follows:

"If any party to an arbitration agreement to which this section applies... commences any legal proceedings in any court against any other party to the agreement... 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."»

The Court of Appeal noted that this section applies to non-domestic international agreements. The Court further noted that Section 2 of the Act states that an "arbitration agreement":

"means an agreement in writing (including an agreement contained in exchange of letters, telegrams, telex messages or any other means of communication used in general business

practice) to submit to arbitration present or future differences capable of settlement by arbitration whether an arbitrator is named therein or not."

The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Award forms the First Schedule to the Act.

Article II(2) of the Convention states:

"the term 'agreement in writing' shall include the arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

Article II(3) which in substance corresponds to Section 8 of the Bermuda Act reads:

"The court of the Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, 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."

[1] The appeal from the learned trial judge is essentially as to whether his interpretation of Swiss law on the particular issues involved was correct. Foreign law is treated as a "question of fact of a peculiar kind" (Parkasho v. Singh P. (1968)p. 233 at 250).

As Cheshire and North observe:

"To describe it as one of fact is no doubt apposite, in the sense that the applicable law must be ascertained according to the evidence of witnesses, yet there can be no doubt that what is involved is at bottom a question of law. This has been recognized by the courts. The rule, for instance, in a purely domestic case is that an appellate court will disturb a finding of fact by the trial judge only with the greatest reluctance, but this is not so when the 'fact' that has been found in the court below is the relevant rule of a foreign legal system. In such a case the role of the appellate court has been described as follows:

'I think it is our duty... to examine the evidence of foreign law which was before the justices and to decide for ourselves whether the evidence justifies the conclusion to which they come.'" (Cheshire and North, Private International Law, 11th Edn pp. 106-107; Parkasho v. Singh P.(1968 p. 233 at 250 per Cairns J.; ibid. at p. 254 per Sir Jocelyn Simon P.; (1967) 1 All.E.R. 737,749).

[2] «In this case although the grounds of appeal are many, in reality they cover three issues. The first is whether the formal validity of the arbitration agreement is governed by the New York Convention as applied by Swiss courts. The second is whether the learned judge was right in his conclusion as to the essential

validity of the arbitration agreement having regard to the Swiss substantive law. The third is whether the learned judge was right in concluding that he was not satisfied that the agreement was inoperative or incapable of being performed.

[3] « After arguing the question of essential validity of the agreement (I shall come to this shortly) [counsel for du Pont] ~~Mr. Dunch~~ intimated that on the question of formal validity he was in some difficulty. Coastal's case before the learned judge was that a Swiss Court in deciding the issue of formal validity would apply ~~Article~~ II(2) of the Convention to every international arbitration. DuPont, on the other hand, contended that the Concordat was paramount. The learned judge heard experts on Swiss law and one cannot say, mirabile dictu, they differed. Experts seldom agree. However, having considered their evidence, he came to the conclusion that the Convention was paramount and accordingly that the agreement in telex form was binding. [counsel for du Pont] ~~Mr. Dunch~~ conceded that here the judge having considered Swiss law did make a finding of fact and that posed a difficulty for him and he desisted from arguing the point further.

[4] « However, on the issue of essential validity, ~~Mr. Dunch~~ [counsel for du Pont] submitted that the learned trial judge erred because he failed to determine the question of whether there was an intention on the part of the parties to refer their differences to arbitration having regard to the principles of Swiss law which must be applied to that issue. In short, [counsel's] ~~Mr. Dunch's~~ complaint was that the judge did not apply Swiss law to his enquiry, but rather applied English law. I find this a bold proposition and it is a tribute to [counsel's] ~~Mr. Dunch's~~ powers of advocacy that he could make a rather fragile point assume a semblance of solidity. I say it is a bold proposition for this reason. Before the learned judge both [counsel for Coastal and counsel for du Pont] ~~Mr. Hargun and Mr. Dunch~~ submitted that the issue of essential validity was governed by Swiss law. It was common ground. Now it would be extraordinary behaviour on any judge's part if he simply jettisoned the argument of two experienced counsel, who are ad idem on a point, and then went off on a

frolic of his own and nowhere in his judgment mentions the fact that he has not accepted the common submission of counsel and state his reasons for rejecting their submission. While, admittedly the judge did not set out the arguments in detail which led him to his conclusion, in my judgment he was clearly aware that the question was to be decided according to Swiss law and it was the principles of that law he applied in arriving at his conclusion which he stated in these terms:

> "There is no ambiguity in the use of the word 'arbitration' and the parties' intent is clear. Were the position otherwise the plaintiff in the period of 4½ years between the telex containing the phrase and the issue of the writ would have raised objection. As stated by Van den Berg in Volume XI of the Commentary on Court Decisions on the Convention, 'the validity of the arbitration clause has to be evaluated in the light of the circumstances of the particular case. Both the parties as oil traders would have appreciated the effect of the incorporation of the word 'arbitration' in their contract.'

[5] "In this case both in Bermudian and Swiss law the essential question is: what is the meaning usually given to the word "Arbitration" at the time the contract was entered into by the class of persons to whom the parties belonged? There is no doubt what is the answer in English law, which is the same in Bermudian law. As Salmon L.J. (as he then was) said in Hobbs Padgett & Co. v. J.C. Kirkland Ltd. (1969) 2 LL.R. 547 at 549:

> "I cannot think that if the clause in that contract had merely stated 'Arbitration' without the words 'to be settled in London' it would have made the slightest difference" (and see ibid. p. 550).

Mr. Munch however contends the position is different in Swiss law.

One therefore turns to consider the evidence of the experts. They had both sworn affidavits in support of their respective views before they gave evidence before the learned judge. Their evidence shows no important departure from the views to which they had committed themselves in their affidavit evidence. I therefore largely confine myself to dealing with their viva voce evidence.

Mrs. Evelyn Werner-Carciente, who gave evidence on behalf of Coastal, said Swiss law requires two essential elements for the validity of an arbitration agreement. They are:

(1) intention of parties to resort to arbitration; and

(2) an arbitration clause should cover an individually legally determed relationship e.g. under a contract.

Then she amplifies her views by stating-

"As to (1) Swiss Judge would refer back to Swiss contractual principles. According to those, to have a contract there must be a manifestation of assent. There must be an offer containing the essential elements by which offeror indicates to the other party an intention to enter a determined relationship. Then there must be acceptance. In this case the Defendant has offered Plaintiff to enter into contract for sale of oil. Contract includes arbitration clause. Offer was accepted by telex in response to offer. Plaintiff's acceptance covered all terms and conditions including arbitration clause. Swiss Judge would have to interpret how the person who received offer understood it in accordance with good faith principle and he would take into consideration all circumstances of case which means that clause was contained in a telex and wording cannot be same as in normal contract. Also seat of trade and that both parties are traders and that it is usual to conclude contracts in such a form. Also the question of arbitration clause - its existence or validity was not raised during negotiations for extension of time... Word 'arbitration clause' is enough as to the validity of the arbitration clause. Intent of parties to resort to arbitration. Clause covers contractual relationship. There is a consensus to arbitrate."

Later in her evidence she emphasized as proof of intent:

"(1) key words used.
(2) parties are seasoned businessmen - traders.
(3) usual in this sort of contract to resort to arbitration to resolve disputes. Confirmatory telex answering all the terms."

Mr. Bruno M. Boesch gave evidence for Dupont. His affidavit evidence is somewhat clearer than his viva voce evidence. Before going to the latter I cite paragraph 4(d) from his affidavit of 22 September 1986. It reads as follows:

"Under Swiss law, arbitration is considered as an exception to the constitutional law rules giving exclusive jurisdiction over all civil disputes to state ordinary courts. As such, arbitration may therefore never be presumed and can only be inferred from the parties' clear and unequivocal expression of their intent to arbitrate. In case of doubt, one must consider that there is no arbitration agreement (see, Jolidon, op. cit. p. 132). Although the clause at stake mentions the word 'ARBITRATION', it does not clearly and unambiguously state that the parties have chosen arbitration to the exclusion of the ordinary courts. I am therefore of the opinion that the wording and the circumstances which surround its conclusion do not seem to satisfy the requirement set under Swiss law as to the contents of arbitration clauses. The onus to prove the reverse would be on the defendant."

In his evidence he is recorded as saying:

"First question is whether there was an agreement to arbitrate. Swiss Court in determining this issue, be-

in mind strict test applicable would look first at wording of clause. He would consider whether word 'arbitration' is sufficient. Refer to Jolidon page 135. He would say that it is not enough. Disagree with Carciente when she said a Swiss Judge would apply general principles in interpretation of contracts in evaluation of phrase. Also disagree as to test. It is stricter. Judge would look at format of contract. Telex format. Telegraphic style. Every word should be given a particular weight. Equally every omission should be given a particular weight. Do not agree that use of word 'arbitration' signifies an intention to arbitrate."

Then later under cross-examination he says:

"Agree that the use of the term arbitration implies in principle the choice of arbitral jurisdiction. . . one is entitled to look at the conduct of the parties prior to raising question of validity of the arbitral clause. In Swiss law there is a similar doctrine of estoppel.

Then in re-examination he goes back to original position and says:

"Word 'arbitration' at bottom of telex would not by itself under Swiss law indicate an intention of parties. Arbitration is a serious deviation from natural forum. Parties must say they want to arbitrate and the law applicable to the arbitration."

Mr. Boesch is not really a very convincing expert. What he does not tell us is - if the word 'arbitration' does not mean arbitration, than what does it mean? To take an illustration. In a building contract the word "arbitrator" may appear in a particular context. One party might possibly argue that the word "arbitrator" in the particular context does not really mean an arbitrator with the full powers of an arbitrator but merely "a certifier". In brief, an alternative meaning, is propounded. Here if Mr. Boesch is right the meaning of the word "arbitration" is left hanging in the air.

« [Counsel] ~~Mr. Dunch~~ for the appellants submitted that under Swiss law the onus is on Coastal to establish existence of an arbitration agreement and they failed to discharge the onus. The only evidence before the learned judge was the correspondence and the conflicting evidence of experts. It was difficult for the judge to come to the conclusion that the plaintiff was a party to agreement to arbitrate differences. Nowhere, [counsel for Defendant] said ~~Mr. Dunch~~, is it stated that the Defendants had agreed to submit to arbitration. The agreement was concluded between brokers and neither party ever addressed their mind to the question. It is therefore important to analyse the effect of words in telex

* [7] The Court of Appeals then examined Coastal's allegation that Du Pont was estopped from denying the validity of the arbitration clause since it had referred in a telex to the "useless cost" in case of arbitration the dispute were to be settled by arbitration. The Court held that:

having regard to the relevant Swiss law. The judge, he submitted, failed to have regard to Swiss law as to whether these words amounted to an arbitration agreement. [Counsel for Du Pont] complained that the learned judge was given all the factors that a Swiss Court would pay attention to but he ignored them. *

Mr. Hargun, for the Respondents was good enough to hand in written submissions. I take his own words, lest I do him an injustice in paraphrasing his arguments.

He said:

> "In our submission the concept of arbitration agreement is no different under Swiss law as it is under Bermuda law. It is a matter of common sense and what is required is an agreement to arbitrate any future disputes. Both experts agreed that the word 'arbitration' means in principle submission to arbitration. This is not surprising because that is what is said by Professor Jolidon. Position is no different under English law. See: Hobbs Padgett (1969) 2 Ll LR 547. The ratio of that case is that one tries to give a sensible meaning to a term commonly used by businessmen.
>
> In our submission the word 'arbitration' must have a meaning: it cannot be ignored. The only possible meaning it could have is that the future dispute in relation to that contract must be resolved by way of arbitration. The fact that it was accepted without any reservation must indicate that the Appellants knew what they were accepting. They could not be accepting a term they do not understand. They could not be accepting it on the basis that it was unenforceable at law or that it was meaningless. If there was any ambiguity in their minds they surely would have come back and clarified its meaning. Werner-Carciente said Swiss law applies principle of good faith, i.e. parties are presumed to have entered into legally enforceable obligations.
>
> It is a fact that no-one has sworn to date that they did not intend to enter into an arbitration agreement. The Appellants have had their lawyers swear Affidavits saying it is ambiguous but no-one has ever said that they did not intend to enter into arbitration clause."

On this aspect of the case Mr. Hargun made one further submission to the Court. He submitted that having regard to the conduct of the Appellants in this matter they are estopped from denying the validity of the arbitration clause.

> "This dispute was notified to the Respondents by letter from the Appellants dated the 28th December 1982. By telex dated the 10th January 1983 the Respondents informed the Appellants that as this was a CIF contract and as all the documents were in order they had no claim whatsoever against them and that in those circumstances they should be pursuing their own insurers. In any event in the penultimate paragraph of that telex the respondents stated 'we cannot of course actually stop you from suing Coastal (Bermuda) Limited (the contract specifies Swiss law and arbitration), but please, before you do so take legal advise in Switzerland to test the validity of what we have said and to

ascertain the amount of good money which we firmly believe would be thrown after bad in the shape of useless costs if we do arbitrate'. This statement was never refuted until these proceedings were commenced. On the 21st January 1983 the Appellants sought extension of time for the purposes of bringing proceedings and at no time did the Appellants maintain that the proceedings would be any other method except arbitration. On the 4th July 1983 the appellants lawyers pressed to defer the extension in this matter up to and including 31st December 1983.

This correspondence is a continuation of the correspondence commenced by the Appellants letter of the 28th December 1982 and which includes telex of 11th January 1983 which specifically sets out the Respondents case that these proceedings are governed by arbitration. Again in their telex of 4th July 1983 they do not maintain that these proceedings are not governed by arbitration. By telex of 6th July 1983 that extension is granted to the Appellants. It is perfectly clear that the Appellants received two extensions for the purposes of commencing proceedings by way of arbitration. (See Para 7 of Affidavit of Victoria Glynn). It is not right that they should now allege in these Courts that there is no valid arbitration agreement. As Swiss law applies the doctrine of estoppel (evidence of Boesch) the Appellants are estopped from maintaining that there is no valid agreement to arbitrate."

There was some difference of recollection between Counsel as to the extent to which the question of estoppel was raised before the learned judge. I am, however, satisfied that Mr. Boesch accepted that the doctrine of estoppel also applies in Swiss law and the learned judge also accepted his evidence on this point.

I agree ~~too~~ with Mr. Haryun's oral submission that the extensions were only granted on the basis that the dispute was to be settled by arbitration. This is clear for two reasons. Coastal had said so and it was never disputed. Second, it is quite clear that the Swiss Courts would not have the jurisdiction to determine the dispute itself.

I would only add that, in my view, [cont'd] the result of this appeal would not be affected even if one excluded the operation of the doctrine of estoppel. Speaking for myself, although delivered in terse terms, I am not satisfied that the learned judge did not apply the relevant principles of Swiss law, and correctly too. Had I entertained any doubt, then bearing in mind the approach adumbrated by Sir Jocelyn Simon P. in Parkasho v. Singh (1967) 1 All E.R. 737 at p. 749 I should not have had any difficulty in concluding that under Swiss law there was an agreement to arbitrate. We live in a world in which in the words of Lord Justice Kerr, "the business of resolving international commercial disputes by arbitration has become a new forensic and

* [9] The Court noted that on this point the experts differed, and concluded that: bbp 12

commercial industry in its own right". (Kerr L.J. - "Commercial Disputes Resolution; the Changing Scene", in Liber Amicorum for Lord Wilberforce, p. 128). I cannot think that when by the telex dated 14th January 1982 Dupont, an international trader, confirmed the terms contained in the telex of 13th January 1982 from Coastal's brokers they entertained any doubt that they were committing themselves to the process of arbitration should any dispute arise between the parties.

[8] "The third issue is whether the learned judge was right that he was not satisfied that the arbitration agreement was inoperative or incapable of being performed. Near the conclusion of his judgment the learned judge said:

> "Nor have I been persuaded that the failure of the Defendant to nominate a seat for the arbitration renders the relevant phrase meaningless or the agreement inoperative or incapable of being performed... According to the Law and Practice of Commercial Arbitration in England by Mustill and Boyd, 1982 Edition, it is for the applicant to prove the existence of the agreement to submit the dispute to arbitration and the burden then shifts to the Plaintiff to show that the agreement is null and void, inoperative or incapable of being performed... In my judgment the Defendant has proved the existence of the arbitral agreement but the plaintiff has not discharged the onus placed on it under Section 8 of the Act."

One would have thought that the simple, short and common sense answer to this question is that one could not say that an arbitration agreement was inoperative or incapable of being performed unless the party submitting the agreement is not capable of performance could demonstrate that even given the willingness of both parties to perform it, the agreement cannot be performed." *

Here again the experts differ. Mr. Boesch in paragraph 4(a) of is affidavit of 24th September 1986 says:

> "The Defendant invokes the existence of a binding arbitration clause in order to challenge the jurisdiction of the Bermudian courts, i.e. the ordinary courts of its domicile. Such an objection is referred to under Swiss law as 'arbitration objection'. When raised, Swiss case law considers that ordinary courts may reject such 'arbitration clause' if it is established that the arbitration clause is of no effect under the law applicable at the seat of the arbitral tribunal (see, Jolidon, Commentaire du Concordat suisse sur l'arbitrage, p. 137 and quoted cases). However, the arbitration clause at stake here is totally silent as to the seat of the arbitral tribual, the number or appointment of arbitrators or even the governing law or even rules of the arbitration.

Prima facie, there is no indication in the clause itself nor in the circumstances surrounding its conclusion which would point to an arbitration seat in Switzerland. Neither the parties to nor the object of the contract have any connection whatsoever with Switzerland. Moreover, the main contract was concluded through a broker and not by the parties themselves."

In his evidence he said:

"If Arbitrators were nominated but were unable to agree to an umpire under Swiss law, an application would have to be made to the Court for the appointment of an umpire. If no seat is agreed, party who wished to appoint umpire would be at a loss as to which Court application should be made. In the absence of agreement no canton or court would assume jurisdiction... seat of arbitration is very important. Lack of designation of seat could render arbitral procedure of no effect."

The obvious implication from that statement is that if the parties are in agreement and cooperate there is really no barrier to arbitration.

Miss Werner-Carciente however disagrees with the position taken by Boesch and in her first Affidavit relies on Professor Jolidon when she says:

"If parties agreed on the principle of arbitration to settle any dispute, it should not be easily admitted that the implementation of such agreement became impossible... the rule is that the arbitration should be upheld and the exception is that such agreement gets extinguished".

Miss Werner Carciente concludes by saying

"even if the choice of Zurich as the seat of arbitration could not be clearly ascertained, it is my opinion that the Zurich Judge would not easily set aside the arbitration agreement; he would certainly expect the claimant to prove that the Defendant had actually refused to submit to arbitration when notified of the claimants intention to have recourse to arbitration by omitting in particular to participate in the constitution of arbitral tribunal. Consequently it should be proven that the implementation of such clause is impossible. I am not aware that claimants have given any notice of arbitration, to the Defendants and never before in their correspondence with the Defendants, have the claimants contended that they consider arbitration as invalid."

In her evidence she said:

"If both parties were to nominate arbitrators, the arbitrators themselves could determine the seat of arbitration according to the Concordat. There would be no practical difficulties in progress of arbitration. They could obtain help of court in cases under the concordat... It does not make any difference when the parties agree. Seat can be chosen at any time. Options are agreement by parties or decisions of arbitrators as to the seat of arbitration. Our arbitration clause complies. There is no ambiguity, not necessary to provide rules of arbitral procedure. Option of content is opposed to essential elements. Absence of option requirements would not affect the validity of the arbitral agreement."

« [The jurists appear to support Miss Werner-Carciente's viewpoint. Professor Jolidon considers the selection of "the seat of the arbitration tribunal" as optional. Failure to provide a seat of arbitration is not fatal to the operation of the agreement. Eugen Bucher in his Introduction to Arbitration in Switzerland says at p. 134:

> "When the parties have constituted an arbitral tribunal but have not designed the seat of the tribunal, the arbitral tribunal itself may designate the seat. Of course, it also has the authority to designate the seat if the parties have designated the seat in too unclear a manner, for example if they have agreed that the 'arbitral tribunals shall have its seats in Switzerland'. In such case the arbitrators shall be free to choose the seat themselves anywhere within Switzerland." (emphasis added)

Clearly implicit in Bucher's statement is the conclusion that failure to provide for a seat of the arbitral tribunal is not fatal to the operation of such an agreement. In any event, if it can be said the parties have chosen "Switzerland" as the seat, the arbitrators, failing agreement of the parties, select a particular seat within Switzerland.

[10] « [Counsel for Coastal] ~~Mr. Horgan~~ submitted that you cannot say that an agreement is inoperative unless the parties have attempted to arbitrate on the basis of that agreement. It is no good saying that in theory there may be problems and therefore the agreement is inoperative. It is perfectly possible to have an arbitration under the present circumstances if the parties try. Unless and until the parties have tried to operate the agreement it is not possible to say that the agreement is inoperative. See James Fazzy v. Haendler (1981) 1 Ll L.R. p. 302. This court should not say that the agreement is inoperative simply because one of the parties to the agreement asserts that it will make every effort to wreck the agreement and make it unworkable. That would be wholly contrary to the letter and spirit of Section 8 of the Arbitration Act 1986 and the good faith principles underlying Swiss law relating to the enforcement of contractual obligations.

[11] « In my judgment when considering the question of whether an agreement is incapable of performance the Court must consider the actual obstacles and not potential or theoretical barriers to its

operation. A party submitting that the agreement is incapable of performance must demonstrate that the agreement cannot be performed, even if both parties are able and willing to perform it. Further, in such circumstances a party clearly cannot urge his unwillingness to perform the agreement. Again the reality of the situation here is that it is in the interest of the Respondents that the arbitration agreement should be successfully operated; otherwise, the Appellants would be free to make application for the removal of the stay. Equally, it is in the interest of the Appellants to be reasonable and not obstructive; for failure on their part to act reasonably would naturally lead the court to conclude that the arbitration agreement is capable of being performed were they but reasonable. As matters stand it is quite impossible to say that the Agreement is incapable of performance.

In my judgment the learned judge was clearly right in the conclusion at which he arrived. Accordingly I would dismiss the appeal with costs.

H. da Costa

Dated the 9th day of November, 1988.

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and

COASTAL (BERMUDA) LIMITED Respondent

JUDGMENT

I have had the opportunity of reading in draft the judgment of my learned brother Mr. Justice daCosta. I agree with it and can add nothing to it.

Dated this 9th day of November, 1988.

K. C. Henry, J.A.

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J U D G M E N T

I have had the privilege of reading in draft the judgment which my Brother, Mr. Justice da Costa, has handed down.

I agree that the appeal should be dismissed for the reasons which have been so clearly and fully set out by my Brother. There is nothing which I could usefully add to what my Brother has said.

SIR ALASTAIR BLAIR-KERR, P.

DATED the 9th day November, 1988.