BANKAMERICA TRUST AND BANKING CORPORATION (CAYMAN) LIMITED v. TRANS-WORLD TELECOM HOLDINGS LIMITED and HELLENIC TELECOMMUNICATIONS ORGANISATION S.A.

GRAND COURT (Smellie, C.J.): March 15th, 1999

Arbitration—foreign arbitral award—stay of Cayman proceedings—interpleader proceedings—Foreign Arbitral Awards Enforcement Law (1997 Revision), s.4 applies with Arbitration Law (1996 Revision), s.7 to application to stay interpleader proceedings involving competing claims by parties to foreign arbitration agreement

Arbitration—foreign arbitral award—stay of Cayman proceedings—under Foreign Arbitral Awards Enforcement Law (1997 Revision), s.4 onus on party opposing stay of local proceedings to show no real or genuine dispute to be referred to arbitration—suitability of dispute for trial and costs considerations normally irrelevant

Arbitration—foreign arbitral award—stay of Cayman proceedings—scope of dispute—construction of provisions for claims under contract and warranties may be "dispute" for purposes of Foreign Arbitral Awards Enforcement Law (1997 Revision), s.4

The applicant bank applied for interpleader relief in respect of moneys held in the accounts of the second claimant.

The second claimant, OTE, entered into a contract with TWT for the purchase of a national telephone company, containing warranties given by TWT and secured by a charge over the assets of the first claimant, its Cayman-registered parent company, TWTH. The contract also contained provisions for the reference of "any claim, dispute or difference" to arbitration in the United Kingdom. Any claim by the OTE under the warranties was to be notified to TWT, TWTH, TWTA (a US subsidiary) and the bank, with an estimate of loss relating to the claim, before a specified release date.

A notice of claim dated three days before the release date was faxed to TWT and TWTA, but the fax number given in the contract for TWT was inoperative. Fax cover-sheets referring to the notice of claim and stating the amount of the claim were sent to the bank and to TWTH, but OTE omitted in each case to attach the notice itself. Both also received a hard copy the day before the release date, but once again only a covering letter had been dispatched and the notice was absent. TWTA was closed for

business on that day and received its copy two days after the release date. TWT's copy was further delayed for other reasons.

The bank, considering itself to have been put on notice of a claim, refused to release to TWTH funds from the accounts containing moneys allocated for the payment of claims. Both TWTH and OTE threatened proceedings against the bank, which sought interpleader relief under the Grand Court Rules, O.17. Once the arbitration process was commenced, OTE applied for the interpleader proceedings to be stayed.

The court ordered an interim stay of the interpleader proceedings and an injunction restraining the claimants from taking further proceedings against the bank pending its decision on whether there was a dispute which should be referred to arbitration.

TWTH submitted that (a) since OTE had given no proper notice of its claim, its obligations to OTE had been discharged on the release date and there was no real or genuine dispute to be referred to arbitration; (b) accordingly, for the purposes of s.6 of the Arbitration Law (1996 Revision), OTE could show no sufficient reason for a stay of the interpleader proceedings to allow the matter to be so referred and the court should not exercise its discretion under s.7 to order the contract to be complied with; (c) the removal of the need to show a genuine dispute for resolution by arbitration, which had occurred in English law since the enactment of the Arbitration Law (1996 Revision) here, was not a part of Cayman law; and (d) the court should proceed to deal with the matter by summary judgment under O.14.

OTE submitted in reply that (a) since both TWTH and the bank had been notified of the existence and magnitude of the claim by the fax cover sheet and covering letters which they had received before the release date, there was at least an arguable dispute as to whether a claim had been made, which according to the contract should be referred to arbitration; (b) since the Foreign Arbitral Awards Enforcement Law, s.4 (rather than the Arbitration Law, s.6) applied when the arbitration was not a domestic one, the court was obliged to stay the interpleader proceedings, unless satisfied by TWTH that there was no dispute to be referred.

Held, ordering a stay of the interpleader proceedings:

(1) Since the agreement specified that arbitration was to take place in the United Kingdom, the Foreign Arbitral Awards Enforcement Law (1997 Revision), s.4 and not s.6 of the Arbitration Law (1996 Revision) governed whether the court should stay proceedings in the Cayman Islands to allow the arbitration to go ahead. In interpleader proceedings (in the absence of a parallel provision in the Foreign Arbitral Awards Enforcement Law) this applied together with s.7 of the Arbitration Law, conferring a discretion on the court to order that the opposing claimants' dispute be determined in accordance with the contract (page 121, line 45 – page 122, line 7).

(2) Under s.4 and in contrast to s.6, the onus lay on TWTH to show

that there was no dispute between the parties, failing which the court was obliged (rather than having a discretion as under s.6) to impose a stay. In common with s.6, however, only a real or genuine dispute would suffice for these purposes and, in practice under either statute, a stay would be granted unless no such dispute existed. The discretion under s.7 was to be exercised in the same way. Neither the suitability of the particular dispute for trial by a court nor considerations of costs were usually relevant to the court's decision. Developments in English law under the 1996 Arbitration Act were not part of Cayman law (page 119, lines 8–33; page 121, lines 19–44; page 122, lines 8–15; page 123, line 8 – page 124, line 3).

(3) There was a real and genuine dispute as to whether a claim under the warranties had been made by OTE, since TWTH and the bank had had actual notice before the release date of the existence and amount of such a claim, and the contract did not express the form of the notice to be crucial to the payment of a claim from retained funds. The failure to notify TWT was partly the result of its having provided an inoperative fax number and, in the light of the above, was arguably not strictly necessary. It was quite possible, therefore, in the interests of giving commercial effect to the parties' intentions at the time of the contract and in line with recent practice in the English courts, that an English arbitrator would construe the notice provisions broadly. Accordingly, the court would stay the interpleader proceedings pending the outcome of the arbitration and grant an injunction restraining the claimants from bringing further proceedings against the bank (page 124, lines 6–25; page 125, lines 9–18; page 125, line 31 – page 126, line 2).

Cases cited:

(1) *Ellerine Bros. (Pty.) Ltd.* v. *Klinger*, [1982] 1 W.L.R. 1375; [1982] 2 All E.R. 737, not followed.

(2) *Halki Shipping Corp.* v. *Sopex Oils Ltd.*, [1998] 1 W.L.R. 726; [1998] 2 All E.R. 23, not followed.

(3) *Investors' Compensation Scheme Ltd.* v. *West Bromwich Bldg. Socy.*, [1998] 1 W.L.R. 896; [1998] 1 All E.R. 98.

(4) *Mannai Inv. Co. Ltd.* v. *Eagle Star Life Assur. Co. Ltd.*, [1997] A.C. 749; [1997] 3 All E.R. 352, followed.

(5) *Nova (Jersey) Knit Ltd.* v. *Kammgarn Spinnerei G.m.b.H.*, [1977] 1 W.L.R. 713; [1977] 2 All E.R. 463, applied.

(6) *Phoenix Timber Co. Ltd.'s Application, In re*, [1958] 2 Q.B. 1; [1958] 1 All E.R. 815, applied.

(7) *Reardon Smith Line Ltd.* v. *Hansen-Tangen*, [1976] 1 W.L.R. 989; [1976] 3 All E.R. 570.

Legislation construed:

Arbitration Law (1996 Revision) (Law 2 of 1974, revised 1996), s.6: The relevant terms of this section are set out at page 120, lines 8–19.

s.7: The relevant terms of this section are set out at page 120, lines 20–25.

Foreign Arbitral Awards Enforcement Law (1997 Revision) (Law 30 of 1975, revised 1997), s.3: The relevant terms of this section are set out at page 122, lines 6–7.

s.4: The relevant terms of this section are set out at page 120, lines 28–39.

Grand Court Rules, O.17, r.8:

"Subject to the foregoing rules of this Order, the Court may in or for the purposes of any interpleader proceedings make such an order as to costs or any other matter as it thinks just."

Mrs. A.L. Pereguino for the applicant bank;
S.R. Andrew for the first claimant;
J.R. McDonough and *A. Walters* for the second claimant.

SMELLIE, C.J.: Even when set in the context of the usual international scope of litigation coming before this court, the present matter could hardly be described as commonplace. The national telephone company of Armenia, owned jointly by the Armenian Government and Trans-World Telecom Ltd. ("TWT"), a Guernsey company, was bought by the Hellenic Telecommunications Organisation ("OTE"). Certain of the representations and warranties given under the purchase agreement to OTE by TWT were guaranteed and secured by a charge over assets of TWT's parent company ("TWTH"), a Cayman Islands company which also owns another interested subsidiary in the United States ("TWTA"). Of pivotal importance to the present application are the provisions in the share purchase and guarantee and charge agreements for the reference of any disputes arising to arbitration by the International Chamber of Commerce in London.

The issue before me now is whether competing claims between OTE and TWTH under these agreements give rise to a dispute which should be referred to that process of arbitration.

Interpleader relief

The matter comes before this court on the bank's application for interpleader relief. The affidavit of Mr. Farrington, the Managing Director of the bank, gives the background. TWTH is a client of the bank and has been required, pursuant to the guarantee and charge agreement ("the GCA") to retain moneys and securities which it has on deposit with the bank. These assets are required to be retained in restricted accounts to secure any relevant claim arising under the GCA or the share purchase agreement ("the SPA") which OTE might properly bring and be awarded by arbitration against TWTH. The bank came to be in that position having been given notice of the existence of the GCA and informed that TWTH was not permitted to withdraw any of the principal sums in the restricted accounts nor any of its charged investment securities without the prior written consent of OTE.

The maximum liability secured by the GCA was expressed at one time as being tens of millions of dollars but is now reduced to the maximum amount of the only claim which has arisen and which is described below. The GCA operates as a fixed and floating charge respectively over the moneys and securities in the restricted accounts. This security provided by the GCA is set to expire on its final release date, which was set by the GCA itself at 270 days from its execution on March 3rd, 1998, *i.e.* November 28th, 1998.

The GCA provides that any relevant claim raised by OTE as arising under the SPA must be served by notice in a manner and form prescribed by the GCA in the following terms:

> "'Relevant claim notice' means a written notice addressed to TWT and copied to TWTH of a relevant claim against TWT (such relevant claim to be made by OTE only in good faith and based upon reasonable grounds), together with OTE's reasonable estimate of the loss relating to such relevant claim."

A "relevant claim" is defined by cross-reference to the SPA where the definition appears in the following terms:

> "'Relevant claim' shall mean, without limitation, any loss which the buyer (or any person claiming under or through the buyer) may sustain, suffer or incur as a consequence of or in connection with, any breach or misrepresentation or otherwise [by] any seller of any or all of the terms and or conditions of this agreement."

OTE has asserted a relevant claim by which it claims principal amounts of loss of approximately $12.75m. in respect of alleged breach of warranties and representations, as well as some $4.7m. in consequential loss, *i.e.* interest, fees and so on.

TWT and TWTH deny that circumstances giving rise to a relevant claim have genuinely arisen and—the point immediately at issue here—that an effective relevant claim notice had been served by OTE before the final expiry or release date of the GCA.

On November 25th, 1998, three days before the final release date of the GCA, OTE attempted to serve relevant claims notices upon the bank, TWT, TWTA and TWTH. However—and this is admitted by the firm of Bird & Bird, the lawyers acting on behalf of OTE—those attempts fell short of meeting the specific notice provisions contained within the GCA, which are quoted above. OTE none the less asserts that the forms of notice which they did serve are to be treated as effective notices of relevant claims, satisfactory for all practical purposes to give commercial efficacy to their notice obligations under the GCA.

What actually transpired involved procedural mistakes which are candidly described in a letter from Bird & Bird dated January 11th, 1999 to Green & Hall (a Californian law firm acting for the TWT interests):

> "We note your summary of the 'facts' concerning the service of the relevant claims notice. We are still investigating the precise position and cannot as yet respond directly to all of the points made in your letter. We accept, however, that there do appear to have been some mistakes made in sending out the notices.
>
> We believe that the position, as supported by the records of our client and of the courier company, UPS, is as follows:
>
> 1. The notice was addressed to TWT at the address stated in the share purchase agreement. It was copied on its face as required by cl. 10.10, to Trans-World Telecom America Inc.
>
> 2. The notice was dated November 25th, 1998.
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> 3. The notice was sent by fax to TWT and TWTA on November 25th. The fax number stated for TWT in cl. 10.10 of the share purchase agreement was, however, inoperative. Subsequent inquiries with British Telecom have confirmed that the TWT fax number is no longer operative.
>
> 4. At the same time it was intended to copy the notice to TWTH and to BankAmerica as required by cl. 5.3 of the [GCA] (and, indeed, by the definition of a relevant claim notice contained in cl. 1.1 of the [GCA]). This intention is evidenced by the fax cover-sheets which were sent to and received by TWTH and BankAmerica on November 25th, 1998. The cover-sheets were addressed in accordance with the notice provisions in cl. 9 of the [GCA] and clearly refer to the notice. Unfortunately, however, a mistake occurred and the notice itself was not attached.
>
> 5. Hard copies of the notice were dispatched by courier to TWT and to each of the three copy recipients, TWTA, TWTH and BankAmerica on November 25th, 1998.
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> 6. The courier company tracking summaries confirm the following:
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> (a) that the TWTH hard copy was delivered at 5.02 p.m. on November 27th, 1998;
>
> (b) that the TWTA hard copy was delivered at 9.13 a.m. on November 30th, 1998. (The tracking record also confirms that a delivery was attempted on November 27th, 1998, but that TWTA was closed for business on that day.)
>
> (c) that the BankAmerica hard copy was delivered at 3.17 p.m. on November 27th, 1998.
>
> 7. It is not entirely clear when or whether the TWT hard copy was delivered, as the last entry on the tracking sheet dated December 1st, 1998 states that the package was being held for censorship review by a government agency.
>
> 8. Unfortunately, it would appear that the notice itself was omitted from the TWTH and BankAmerica hard copies and that as with the copies, only the covering letter was received."

Those admissions notwithstanding, Bird & Bird go on to make the following argument:

"Thus, although there were mistakes made in serving the copies of the relevant claim notice on TWTH and BankAmerica, both entities were on notice as of November 25th, 1998 not only of the existence of a relevant claim, but also of the estimated scale of the loss and, thereby, the importance of ensuring that appropriate action be taken. Attention was drawn in the covering letter to the relevant provisions of the [GCA] which, in itself, provided information as to the nature and content of the relevant claim."

Having first received the fax cover-sheet on November 25th and the hard copy cover letter on November 27th, 1998, the bank regarded itself as being on notice of a relevant claim and took "appropriate action" to reverse internally transactions (by which it had desegregated the restricted accounts) to the extent of the amount of OTE's claim of $12.75m. plus consequential losses. Regarding itself as thus being on notice, the bank has since refused TWTH's instructions to release the restricted accounts. TWTH has threatened to sue the bank. Being aware of TWTH's stance, OTE has also issued a threat of legal action against the bank should it release the restricted accounts before OTE's claim is settled or otherwise resolved by the process of arbitration or through this court.

The bank claims no interest in the restricted accounts—the subject-matter of the dispute between the rival claimants, OTE and TWTH. The bank denies any collusion either with TWTH or OTE and stands ready to deposit the money and securities into court or to dispose of them in such other manner as the court may direct.

The bank being faced with the threat of legal action by the two opposing claimants and taking the position described above, Mrs. Peccarino classifies the bank's application as stakeholder as coming within Grand Court Rules, O.17 for the grant of interpleader relief. The bank would, however, agree to a stay of its application and to the retention of the accounts, pending the outcome by whatever proceeding the court directs. On behalf of OTE and TWTH respectively, Mr. McDonough and Mr. Andrew agreed, provided the stay of the interpleader proceedings is imposed and the assets secured until the final resolution of the competing claims.

During the hearing I accepted Mrs. Peccarino's submissions and ordered that the interpleader proceedings be stayed pursuant to Grand Court Rules, O.17, r.8, with the bank remaining as stakeholder—some assets in the nature of securities being better managed in the custody of the bank than by payment into court—and granted an injunction to prevent either claimant from instituting any further action against the bank until further order. This was expressed to be an interim stay by consent of the parties pending the decision on the further issue which I now describe. The hearing before me then continued as I turned to consider whether the opposing claims of OTE and TWTH constituted "a

dispute" within the meaning of that term in the SPA and the GCA and if so, whether the dispute should be resolved by reference to arbitration in London.

Genuine dispute for arbitration

The SPA and the GCA both provide for the resolution of disputes by arbitration in the following terms:

"The parties irrevocably agree as follows:

(i) they submit to the exclusive jurisdiction of the arbitration court of the International Chamber of Commerce, of London, England for the resolution of any claim, dispute or difference. Any final award rendered by ICC arbitration in respect of any such claim, dispute or difference shall be enforceable in any court of competent jurisdiction within the Republic of Armenia or within the jurisdiction of TWT's incorporation or principal place of business, or within the jurisdiction of the buyer's incorporation or principal place of business and any other jurisdiction in which assets of any party are located;

(ii) they hereby waive any and all rights they may now or hereafter have to challenge the enforcement of any final award rendered as above with respect to such claim, dispute or difference in any of the jurisdictions referred to in sub-para. (i) above.

All disputes in connection with this agreement, which dispute cannot be solved amicably within 30 days, shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce (ICC). The arbitration will take place in London, England and shall be conducted in the English language. The arbitration will be conducted by three arbitrators. Appointment of any arbitrators under this sub-section shall be effected by the Secretariat of the ICC in Paris, France and any such arbitrator shall not be of Armenian, Greek, French or United States of America nationality or residence. The final judgment or decisions of the arbitrators shall be given in writing. The losing party shall pay all costs associated with such arbitration."

Notwithstanding that TWTH invoked and initiated the arbitration process provided under the agreements by referring the matter (including the dispute whether OTE has a relevant claim to begin with) to the ICC on February 11th, 1999, it now argues that there is in reality no genuine dispute to be referred to arbitration and invites this court in the present context of the interpleader proceedings to direct that the present issue is one suitable for resolution pursuant to the summary judgment procedure provided under the Grand Court Rules, O.14.

I note in parenthesis here that the procedure that TWTH seeks to

invoke is different from the summary trial procedure provided by the Grand Court Rules, O.17, r.5(2) within the context of interpleader proceedings themselves, which requires, among other things, that the only issue to be tried is one of law. TWTH has notified the ICC that the present issue, which Mr. Andrew refers to as "the notice point," is one which it would prefer to have resolved before this court.

TWTH's practical ground of objection to arbitration on the point is that if there has been no service of a valid and effective relevant claim notice as required by the GCA, then the security by way of charge which the GCA provided would have been discharged on the final expiry date of November 28th, 1998, and with it TWTH's obligations to OTE. Accordingly, TWTH should not be required to go through the protracted process of arbitration, and so suffer the prejudice involved in the delay, before having access to its assets which the bank now holds as a stakeholder.

Mr. Andrew further submitted that as there was admittedly no service of a formal relevant claim notice addressed in the manner strictly and formally required by the GCA, there can be no genuine dispute for reference to arbitration and that, in accordance with ss. 6 and 7 of the Arbitration Law (1996 Revision), this court in its discretion should allow the matter to be tried summarily and not stay proceedings so as to allow the matter to proceed to arbitration. This became the pivotal issue before me. At one stage of the proceedings Mr. Andrew had described TWTH's concerns somewhat differently; that as the agreements are an arm's-length commercial arrangement between competing interests, TWTH was entitled to insist on their strict formalities so as to be free to dispose of its assets and even if this meant that OTE, after the arbitration proceedings, had successfully established a relevant claim which it would no longer be able to enforce against secured assets.

As this implicitly involved the notion that this court should exercise its discretion so as to enable a party to evade a proper judgment debt for which it might in due course become liable, I immediately expressed that concern. In the result Mr. Andrew withdrew this aspect of his argument; and in the light of his further instructions that TWTH had other substantial assets, he was also obliged to resile from another argument that TWTH would be "crippled in its operations" by the continued restraint of the restricted account pending arbitration.

A further acknowledgement was made by Mr. Andrew during the arguments, which was that the ICC arbitrator would likely proceed, if requested by both sides, by taking the "notice point" as an early preliminary issue. This served further to allay any proper concerns that TWTH might be prejudiced by OTE's protraction of the arbitration proceedings.

Finally, as to the factors to be weighed and having regard to the foregoing, sending the matter off to arbitration would therefore not

necessarily result in OTE achieving "by the back door," as Mr. Andrew put it, the effect of a charge which they have already lost. To the extent that the matter would fall to be resolved in my discretion at the end in deciding whether to allow the matter to be resolved by arbitration, these were all factors which I was invited to consider.

[2] *The legal principles*

The governing principle is that the court will not ordinarily intervene to try a dispute which is one provided by the agreement between the parties to be resolved by reference to arbitration. The principle applies *a fortiori* when the contract provides exclusively for arbitration, as it does in this case.

The rationale is straightforward: the parties, when they made their bargain, included as a part of it the provision for arbitration, and so should ordinarily be required to stick to their bargain: see *In re Phoenix Timber Co. Ltd.'s Application* (6). In that case it was also decided that the mere fact that the dispute is of a nature eminently suitable for trial in court is not a sufficient ground for refusing to give effect to what the parties have agreed. And it follows that the onus is on the party seeking the court's intervention to show the exceptional circumstance why a stay should not be entered in the court proceedings (or restraining any others to be brought) so that the arbitration might proceed on a dispute arising within a valid and subsisting arbitration agreement.

Not surprisingly, the rule is that such an exceptional circumstance will arise where a party can show that there is no real or genuine dispute to be referred to arbitration. Indeed, a highly persuasive line of authority to be considered below is to the effect that absent such a real dispute to be referred to arbitration, there is no jurisdiction in the court to stay its own proceedings in deference to arbitration. For the sake of completeness I note in passing that although impecuniosity of a party (which is not an issue here) may be a relevant consideration, in general, matters such as the additional costs or burdens of arbitration are irrelevant: see 1 *Chitty on Contracts*, 27th ed., para. 15-018, at 729 (1994). There are three provisions of Cayman statute in point here; ss. 6 and 7 of the Arbitration Law (1996 Revision) (a Law based on the 1950 English Arbitration Act) and s.4 of the Foreign Arbitral Awards Enforcement Law (1997 Revision).

A further significant point in the arguments before me was whether the fundamental change to English statute law, introduced there by the superseding 1996 Arbitration Act, generally reflects the present state of Cayman law. There (by s.9 of the 1996 Act) the court is no longer required to be satisfied that "there is not in fact any dispute between the parties" and must allow the stay so that arbitration can proceed unless the court finds the arbitration agreement to be null and void, inoperative, or incapable of being performed. And so once there is a dispute of a kind

referable to arbitration, it must be allowed to go irrespective of its merits: *Halki Shipping Corp.* v. *Sopex Oils Ltd.* (2).

I consider that the reasons will become plain enough from what follows, why, in my view, the present state of Cayman law remains such as to require this court to be satisfied whether there is in fact a real or genuine dispute. Sections 6 and 7 of the Cayman Arbitration Law (1996 Revision) state:

> "6. If any party to an arbitration agreement 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 those legal proceedings may, at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court, *if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement*, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, *may* make an order staying the proceedings.
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> 7. When relief by way of interpleader is granted and it appears to the Court that the claims in question are matters to which an arbitration agreement, to which the claimants are parties, applies, the Court *may* direct the issue between the claimants to be determined in accordance with the agreement." [Emphasis supplied.]

Section 4 of the Foreign Arbitral Awards Enforcement Law (1997 Revision) states:

> "If any party to an arbitration agreement, 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." [Emphasis supplied.]

The most immediately applicable provision in this matter is, of course, s.7 of the Arbitration Law (1996 Revision), as it is in the context of the bank's interpleader action that the matter comes before this court.

The inter-relationship between ss. 6 and 7 for defining the similarity of approach to be taken by the court under both may well also be regarded as a matter of settled law. In considering the mirror-image provisions in

ss. 4 and 5 of the 1950 Arbitration Act of the United Kingdom in *In re Phoenix Timber* (6) Lord Evershed, M.R., in a case brought before the court for interpleader relief, stated ([1958] 1 All E.R. at 818):

> "It is quite true . . . that in s.4 some guide to a conclusion is given by the parliamentary language; for it will be remembered that the section says that the court
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> 'if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement. . . .'
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> words which are not repeated in s.5. The absence of any repetition in s.5 does not persuade me, however, that the discretion in s.5 is to be exercised for some different, still less opposite, reason. In my judgment, the discretion in s.5 is to be exercised on similar grounds as the discretion in s.5. Section 5 is only dealing with a different procedural occasion in which an issue arises which has been previously the subject of an arbitration contract. There seems to be no ground of principle why there should be a different basis for deciding that question in the one case from that to be applied in the other."

I accept that reasoning: interpleader proceedings being but a particular procedural route for the resolution of competing claims and for giving relief to a stakeholder, there is no good reason why the discretion whether to refer a dispute coming up within that context should be differently exercised than had the matter arisen in the context of another type of proceeding—say an O.14 summary judgment application.

However, there are issues arising over which statutory provisions apply in this case. Section 6 of the Cayman Arbitration Law (1996 Revision) states the principles differently than s.4 of the Foreign Arbitral Awards Enforcement Law (1997 Revision), which is based on wording originally introduced in the English Arbitration (Foreign Awards) Act 1930, s.8 and later re-introduced in the United Kingdom in s.1 of the 1975 Act.

The provision in the latter that reads "unless satisfied" (of the existence of one or other of the premises defined) the court shall stay its own proceedings in order to allow the arbitration to proceed, is emphatic in recognizing the paramountcy of the arbitration proceedings, in contrast to s.6 of the Arbitration Law (1996 Revision), which uses the discretionary "may." But here too the practice appears to be settled: the power is to be exercised in the same manner whether under s.6 of the Arbitration Law (1996 Revision) or under s.4 of the Foreign Arbitral Awards Enforcement Law (1997 Revision), and in either case, whether the arbitration is "foreign" or "domestic," in practice the courts have always assumed that a stay will not be imposed if there is in fact no dispute to be referred to arbitration: see Mustill & Boyd, *Commercial Arbitration*, 2nd ed., at 122 (1989) and *Nova (Jersey) Knit Ltd. v. Kammgarn Spinnerei GmbH* (5) ([1977] 1 W.L.R. at 718).

Notwithstanding the similarity of approach, I take use of the

Arbitration Law (1996 Revision) as referring only to local arbitration proceedings and s.4 of the Foreign Arbitral Awards Enforcement Law (1997 Revision) as being here directly on point as applying, with s.7 of the Arbitration Law (1996 Revision), to a case such as this. Section 3 of the Foreign Arbitral Awards Enforcement Law sets these parameters in providing that "section 4 shall apply to [foreign] arbitration proceedings in lieu of section 6 of the Arbitration Law (1996 Revision)."

An important difference that arises by applying s.4 of the Foreign Arbitral Awards Enforcement Law (1997 Revision) here is a matter already noted: the reversal of the onus of proof from that applying under s.6, thus requiring the party arguing against the stay to satisfy the court that there is nothing about which to arbitrate: see *Mustill & Boyd* (*op. cit.*, at 465–466, including footnote 8). In the matter before me it therefore fell to Mr. Andrew on behalf of TWTH to show that the local proceedings should not be stayed so as to allow the arbitration to proceed.

A further important difference that arises on the application in this case of s.4 of the Foreign Arbitral Awards Enforcement Law (1997 Revision) is the recognition of the mandatory terms in which it is expressed. For although it is already noted that a stay will in practice be imposed or refused under either statutory provision, depending on whether a real or genuine dispute is shown, the mandatory provision which applies where there are foreign arbitration proceedings is not without its peculiar practical significance.

The following extract from *Mustill & Boyd* underscores the practical difficulties which can arise with particular acuteness when the agreement provides for a foreign arbitration but the matter is determined by the local court (*op. cit.*, at 123):

> "Whatever might be the position as regards a defence which is manifestly put forward in bad faith, there are strong logical arguments for the view that a bona fide if unsubstantial defence ought to be ruled upon by the arbitrator, not the court. This is especially so where there is a non-domestic arbitration agreement, containing a valid agreement to exclude the power of appeal on questions of law [such as is the case here]. Here the parties are entitled by contract and statute to insist that their rights are decided by the arbitrator and nobody else. . . . Moreover, in all but the simplest of cases the court will be required not merely to inspect the defence, but to enquire into it; a process which may, in matters of any complexity, take hours or even days. . . . The defendant might well object that this kind of trial in miniature by the court is not something for which he bargained, when making an express contract to leave his rights to the sole adjudication of an arbitrator."

I have no doubt that such considerations influenced the law-making process so as to be reflected in the mandatory requirement of a stay in the Foreign Arbitral Awards Enforcement Law (1997 Revision), s.4, when

once a real or genuine dispute is shown to arise. Mr. McDonough argued even more radically that I need only first be satisfied that there is a "dispute," in the barest sense; the existence of a dispute in that sense being the only condition precedent to the right to arbitrate under the agreements themselves.

The arbitration clauses in the SPA and GCA refer to "any claim, dispute or difference" and provide that "all disputes" shall be settled by arbitration. The English courts have held (even before the introduction of the 1996 Act there) that until a defendant admits that a disputed sum was due and payable there is a "dispute" within the meaning of an arbitration clause and this was without reference to how implausible or unsustainable his defence might appear to be: *Ellerine Bros. (Pty.) Ltd. v. Klinger* (1) ([1982] 2 All E.R. at 743).

Notwithstanding that minimalist requirement of the existence of a dispute (arrived at in that case in my view peculiarly on its own facts) and whatever the logical commercial merits for the strict application of an arbitration clause, I conclude that the legislation, as it stands in the Cayman Islands, requires the showing of a real or genuine dispute before a stay can be imposed. Conversely, if the court is satisfied that there is in fact a genuine dispute, s.4 of the Foreign Arbitral Awards Enforcement Law (1997 Revision) dictates that it "shall" order a stay. In the *Nova (Jersey) Knit Ltd.* case (5) in the House of Lords, Lord Wilberforce stated the position in respect of foreign arbitration proceedings in these terms ([1977] 1 W.L.R. at 718):

> "There is no doubt that the relevant arbitration agreement is not a domestic arbitration agreement so that, prima facia, section 1 (1) [of the 1975 Act (here s.4 of the Foreign Arbitral Awards Enforcement Law)] applies and a stay is mandatory. It remains however open to the appellants to show, the onus being upon them, that 'there is not in fact any dispute between the parties with regard to the matter agreed to be referred.' If they succeed in this, the stay will be refused. Either way, no discretion enters in the matter and the, unknown, merits of the respondents or demerits of the appellants are irrelevant."

This marks the conceptual departure from s.6 of the Arbitration Law (1996 Revision), which applies to domestic arbitration proceedings and which speaks in terms of a discretion in the court to stay the proceedings even where a real dispute is shown to exist.

As a matter of principle that discretion no doubt exists: see *In re Phoenix Timber* (6). But as we have also already seen, in practice that discretion is exercised to bring about the same result as prescribed by the statutory provisions relating to foreign arbitration proceedings. A stay will be imposed where there is a genuine dispute for arbitration: see *Mustill & Boyd* (*op. cit.*, at 122). Mandatory though the outcome may be under the Foreign Arbitral Awards regime, once the court [illegible]

there is a genuine dispute for reference abroad, before arriving at any conclusion on whether there is in fact any dispute, some weighing of the merits is none the less inevitable in this case.

In deciding whether OTE has an arguable defence and whether there is, in fact, a "real or genuine" dispute for arbitration, I accepted Mr. McDonough's submissions. TWTH and the bank did in fact receive notice that OTE had a relevant claim within the deadline of November 28th, 1998. This was not only notice of the existence of a claim and of the formal notice which OTE had intended to send, but also of the amount of the relevant claim, as OTE had also set that out on the fax cover-sheets.

In the absence of a binding intention by the parties to prescribe a mandatory form of notice as a *sine qua non* of the security provided under the GCA, I regard the notice point to be clearly arguable. A further element, that TWT never got the fax or hard copies at all within the deadline, is also moot, given that in TWT's case the fax number given for it in the SPA was inoperable and no fax number appears to be provided for TWT under the GCA. It will therefore be an arguable point whether notice to TWT should be regarded as critical to the agreement of the parties, particularly when the primary obligor, TWTH, had actual, though not formal, notice of the claim.

The modern case law suggests a move away from the strict construction of the formal requirements of contracts toward a reasonable practical construction which seeks to give commercial efficacy to what the parties really intended.

In a recent case, the House of Lords reaffirmed this preference for "commercial interpretation" in holding that where a tenant served a notice purporting to exercise his contractual right to determine a lease, that notice would be effective to do so notwithstanding the fact that it contained a minor mis-description, provided that, construed against its contextual setting, it would unambiguously inform a reasonable recipient how and when it was to operate: *Mannai Inv. Co. Ltd. v. Eagle Star Life Assur. Co. Ltd.* (4).

By an extension by analogy of the modern construction of commercial contracts (enunciated by Lord Wilberforce in the *Reardon Smith* case (7)) to contractual notice requirements, Lord Steyn in *Mannai* formulated three propositions ([1997] 3 All E.R. at 569):

> "First, in respect of contracts and contractual notices the contractual scene is always relevant. Secondly, what is *admissible* as a matter of the rules of evidence under this heading is what is arguably relevant. But admissibility is not the decisive matter. The real question is what evidence of surrounding circumstances may ultimately be allowed to influence the question of interpretation. That depends on what meanings the language read against the objective contextual scene will let in. Thirdly, the inquiry is objective: the question is what reasonable persons, circumstanced as the actual parties were, would have had in mind."

And further (*ibid.*): "Prima facie one would expect that if a notice unambiguously conveys a decision to determine [a lease] a court may nowadays ignore immaterial errors which would not have misled a reasonable recipient."

The *Mannai* decision has since been applied and followed by the House of Lords in *Investors Compensation Scheme Ltd. v. West Bromwich Bldg. Socy.* (3). Given that the governing law of the arbitration proceedings will be English law, this modern approach to construction to give reasonable commercial efficacy to the intention of the parties, is a highly relevant factor to bear in mind now.

I conclude that there is in fact a real or genuine dispute whether sufficient notice reached TWTH and the bank—OTE's respondent parties under it—within the deadline set by the GCA. In this regard the test of reasonableness to be applied will take into account, among other things, the fact that the bank regarded itself as having sufficient notice, and as being on notice of a relevant claim, upon receipt of the faxed cover-sheet. As to the requirement that the notice be addressed to TWT, the evidence does suggest that that was what happened with the faxed cover sheets. While notice appeared not to have actually reached TWT until after the final release date deadline of November 28th, 1998, it is to be noted that receipt by TWT is not expressed in the GCA as a pre-requisite to validity of the notice. On the other hand, the significance of receipt within the deadline by TWTH is that it triggers the provisions of cl. 5.3 of the GCA.

These are all matters properly to be considered in arriving at the "commercial interpretation" of the agreements between the parties. The process of construction will involve also a consideration of the practical consequences of the failure to meet the strict notice requirements. Such matters are bound to be contextual. Upon that conclusion a real or genuine dispute arises and it follows that I am obliged by s.4 of the Foreign Arbitral Awards Enforcement Law (1997 Revision) to make a further order staying the present proceedings beyond the interim stay granted during these proceedings pending the outcome of the arbitration and, I am also satisfied, to make an order enjoining any further proceedings by TWTH against OTE in regard to this matter, pending arbitration.

I should also note that given the settled practice which would none the less apply under s.6 of the Arbitration Law (1996 Revision), the result would be the same notwithstanding its discretionary terms. And, in the light of my conclusions after consideration of the merits, had the matter fallen to my discretion under s.6 I would have resolved the matter in the same way. I take the trouble to record this last finding in deference to the arguments before me which proceeded on the basis that s.6 and [illegible] of

the Foreign Arbitral Awards Enforcement Law (1997 Revision), was the applicable provision.

Orders accordingly, with costs herein, as between TWTH and OTE, to follow the event. As to the bank's costs, separate provisions are to be made.

Proceedings stayed.

Attorneys: *Maples & Calder* for the applicant; *W.S. Walker & Co.* for the first claimant; *Bruce Campbell & Co.* for the second claimant.

IN THE MATTER OF OMNI SECURITIES LIMITED (No. 4)

GRAND COURT (Smellie, C.J.): March 31st, 1999

Civil Procedure—pleading—amendment—time-barred claims—new cause of action barred by Limitation Law (1996 Revision), s.41(3) is new allegation of new loss or injury for which new remedy sought—alleged breach of contract or duty of care may be new claim even though coincided in time with breaches already pleaded and in same legal category

Civil Procedure—pleading—amendment—time-barred claims—no leave to amend under Grand Court Rules, O.20, r.5(2) and (5) to introduce otherwise time-barred claim if minimal overlap with issues already pleaded and extensive new factual inquiries required to answer allegations

Civil Procedure—pleading—amendment—time-barred claims—leave granted to amend under Grand Court Rules, O.20, r.5(2) and (5) to restore abandoned cause of action outside limitation period if original case reasonably pleaded upon legal advice and amendment in interests of justice—potential disruption to proceedings and closeness to trial date to be balanced against benefit to plaintiff in raising all relevant matters

The plaintiff brought an action to recover damages from the defendants for breach of contract and negligent misstatement in the preparation of audit reports.

The second defendant, DH&S (Cayman), was appointed as the plaintiff's auditor. In practice, DH&S (Cayman) merely signed off the

accounts and answered various statutory inquiries, and the preparation of the annual audit report was carried out by its associated firm in Switzerland, the eighth defendant, D&T (Zurich). In proceedings against the two firms and their various partners following the plaintiff's liquidation, it alleged in its statement of claim that DH&S (Cayman) had acted in breach of its contract and that both firms had breached their duty of care in tort in failing to alert it to the financial consequences of unsecured loans which it had made to or obtained on behalf of other affiliated companies during 1988 and 1989. The plaintiff claimed for losses in relation to these loans and to payments made after the issue of the 1989 audit report to the owner of the Omni Group, Werner Rey, and private companies owned by him. The general endorsement on the writ included a claim in contract against D&T (Zurich) which was omitted from the statement of claim.

The plaintiff applied to amend its statement of claim (i) to correct or clarify factual matters, (ii) to allege (outside the statutory limitation period) breach of contract by D&T (Zurich) and its principals, (iii) to include claims (also potentially time-barred) for further losses arising from loans or advances to Rey and his private companies during 1988 and 1989, and (iv) to allege that since these transactions were unauthorized by its board and since Rey was a shadow director or agent of the company, they were performed in breach of fiduciary duty and contrary to Cayman law.

The plaintiff submitted that (a) the further claims in respect of the Rey transactions did not represent new causes of action for the purposes of s.41(1) and (3) of the Limitation Law (1996 Revision), since they were merely further examples of, and had occurred simultaneously with, causes of action already pleaded, namely, breach of contract and negligence; (b) even if the claims did constitute new causes of action, which were time-barred, the court should grant them leave to amend their pleading under the Limitation Law (1996 Revision), s.41(4) and (5) and the Grand Court Rules, O.20, r.5(2) and (5), since the losses had arisen from the factual circumstances already pleaded; (c) although the contractual claim against D&T (Zurich) had been omitted from the statement of claim upon erroneous advice, it had not been abandoned and could now be restored, since the defence alleged that a contractual relationship existed between D&T (Zurich) and the plaintiff's parent company, and therefore no great inconvenience or expense would be occasioned in answering the claim; and (d) the remaining amendments would simply correct or further particularize existing claims.

The defendants submitted in reply that (a) the claims arising from the Rey transactions did not fall within the causes of action already pleaded even though they arose at the same time and were founded in contract and tort; (b) therefore these new causes of action, which were time-barred under the Limitation Law, could not now be pleaded and the court should not grant the plaintiff leave to do so under s.41(4) and (5) and O.20, r.5(2) and (5), since the alleged breaches of duty and resulting losses raised