

1983 October 25

[HADJIANASTASSIOU, J.]

LA SOCIETE MAURITANIENNE D'ASSURANCES ET DE  
REASSURANCES,

*Plaintiffs,*

v.

ALKOSTAR SHIPPING CO. LTD., AS OWNERS AND  
CHARTERERS OF THE SHIP "ANNITA",

*Defendants.*

*(Admiralty Action No. 404/78).*

5 *Arbitration—Stay of proceedings—Section 8 of the Arbitration Law,  
Cap. 4—Discretion of the Court—Principles applicable—Claim  
for loss of goods carried by sea—Arbitration clause in charter  
party—Defendants did not encourage plaintiffs to proceed ac-  
cording to the terms of the arbitration clause—But they left them  
with no choice but to institute legal proceedings—Stay refused.*

10 Following the filing of an action by the plaintiffs against the  
defendant, by virtue of which they claimed damages for goods  
alleged to have been lost during their carriage by the ship  
"Annita", the defendants by invoking section 8 of the Arbitration  
Law, Cap. 4 applied for an order of the Court staying the pro-  
ceedings.

15 The application was based on term 30 of the charter party  
which, so far as relevant, provided that "any dispute that may  
arise under this charter to be settled by arbitration". All terms  
and conditions of the charter party, including the clause, were  
deemed to be incorporated in the bill of lading.

20 The plaintiffs opposed the application mainly on the ground  
that the defendants were not ready and willing to do everything  
necessary to refer the case to arbitration.

Held, that the power of a judge to stay an action, under s.8  
of Cap. 4 is discretionary and such discretionary power is very  
wide; that since on the facts the applicants-defendants did not

encourage the plaintiffs to proceed according to the terms of the contract for arbitration, but on the contrary they left the plaintiffs in some way with no choice but to institute legal proceedings, and thus they did not act in the manner and willingness required, this Court, in the exercise of its discretionary power, will dismiss the application. 5

*Application dismissed.*

Cases referred to:

- The Annefield* [1971] 1 All E.R. 394;  
*Skaliottou v. Pelekanos* (1976) 1 C.L.R. 251; 10  
*Bienvenido Steamship Co. Ltd. v. Georghiou*, 18 C.L.R. 215  
 at p. 219;  
*Heyman and Another v. Darwins Ltd.* [1942] 1 All E.R. 337 at  
 p. 355.

**Application.** 15

Application by defendants under s.8 of the Arbitration Law, Cap. 4 for an order of the Court staying the proceedings of an admiralty action brought against them for damages for the loss of 755 boxes of sugar which the vessel "Annita" was to carry from France to Mauritania. 20

*C. Hadjioannou*, for respondent-plaintiff.

*L. Papaphilippou*, for applicant-defendant.

*Cur. adv. vult.*

HADJIANASTASSIOU J. read the following judgment. The defendants are the owners and/or possessors and/or charterers of the vessel "ANNITA". The defendants by an application which they filed immediately after their first appearance, pray by virtue of section 8 of the Arbitration Law, Cap. 4 for an order of the Court staying the proceedings of the action which the plaintiffs brought against them, for damages C£3,623.200 for the loss of 755 boxes of sugar which the vessel "ANNITA" was to carry from Marseilles in France to Nouakchott in Mauritania. 25 30

The application is based on term 30 of the charter agreement which provides as follows:

"Any dispute that may arise under this charter to be settled by arbitration, each party appointing an Arbitrator, and should they be unable to agree the decision of an umpire 35

selected by them to be final. The Arbitrators and umpire are all to be commercial men and resident in London and the arbitration to take place there. This submission may be made a rule of the High Court of Justice in England by either party.”

According to term 29 of the Bill of Lading “All terms and conditions of charter party dated 29th September 1977 are deemed to be incorporated herein including the arbitration clause.”

10      The plaintiffs opposed the said application and the reasons of the opposition, as they have been ascertained by the addresses before the Court, can be summarized as follows:

- 15      (1) That the subject matter does not fall within the provisions of the section providing for reference to arbitration.
- (2) The defendants were not ready and willing to do everything necessary to refer the case to arbitration.

20      The existence and the enforcement of the arbitration term seems to be accepted by both parties, and its valid embodiment in the Bill of Lading has not been disputed. (See *Scrutton on Charter Parties* 18 Ed. p. 66 Ar. 36 and *The Annefield* [1971] 1 All E.R. p. 394).

25      Therefore the question on which the Court is asked to decide is limited as to whether the presuppositions for the stay of the proceedings of the main action do warrant the reference of the case to arbitration, by virtue of the terms of arbitration. Section 8 of the Arbitration Law which regulates the powers of the Court for the stay of proceedings reads as follows:

30      “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 arbitration agreement or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking

35      any other steps in the proceedings apply to that Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration

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.”

This question has been dealt before by the Court in previous cases and in the case of *Scaliotou v. Christoforos Pelecanos* (1976) 1 C.L.R. 251 having the opportunity to analyse in detail the provisions of the said section I stated the following:

“We think our Arbitration Law, Cap. 4, s.8 makes the power of a Judge to stay an action under the arbitration clause a matter of discretion. Even though the dispute is clearly within the arbitration clause the Judge may still refuse to stay the action if on the whole that appears to be the better course.

The Court must however be satisfied on good grounds if it ought not to stay to show some sufficient reasons why the matter should not be referred.”

The same position was adopted by the Court in the case of *Bienvenido Steamship Co. Ltd. v. Georghios Chr. Georghiou and Another*, C.L.R. XVIII at p. 215 where at p. 219 the following were noted:

“It is well established by English authorities dealing with the corresponding provisions of the English Arbitration Act 1889 s. 4 that when a Court is asked to stay legal proceedings in order that a dispute may be referred to arbitration in accordance with an agreement between the parties the power of the Court to stay the proceedings is discretionary.”

It must be noted that the boundary of the discretionary power of the Court as to whether to refer or not a case to arbitration is very wide as Lord Wright noted in the case of *Heyman and Another v. Darwins Ltd.* [1942] 1 All E.R. 337 at p. 355,

“The Arbitration Act 1889 s. 4 makes the power of the Court to stay an action under the arbitration clause a matter of discretion an no ex debito justitiae.

Though the dispute is clearly within the arbitration

clause the Court 'may' still refuse to stay it, on the whole, that appears to be the better course."

Coming back to the reasons of the defendants' opposition which they have already been mentioned above, we have to discuss the following: (1) Whether the subject matter falls within the provisions of the clause for arbitration.

The provisions of section 30 of the charter agreement, which regulates the matter are very wide and concern "any dispute that may arise under this charter .....". In the case of *Heyman and another v. Darwins Ltd.* (supra) the Court in deciding whether the difference falls within the term of arbitration, in that case, said the following at p. 343:

"If however, the parties are of one in asserting that they entered into a binding contract, but a difference has arisen between them as to whether there has been a breach by one side or the other or as to whether circumstances have arisen which have discharged one or both parties from further performance, such differences should be regarded as differences which have arisen 'in respect of' or 'with regard to' or under the contract and an arbitration clause which uses theirs or similar expression, should be construed accordingly."

With those principles in mind there is no doubt that the appellant claims for damages for goods alleged to have been lost in breach of a bill of lading, does fall within the matters which by virtue of section 30 of the charter agreement must be referred to arbitration.

(2) If the applicant for the stay of proceedings 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 as the law".

The respondents' allegation is that the applicants were not ready and willing to do everything necessary to refer the case to arbitration, as required by law.

In paragraph 3 of the affidavit of Mr. Petros Michael clerk in the law office of plaintiffs' advocate, which is attached to the opposition we read the following:

“We immediately established from the registrar of companies that the registered office of the aforementioned company is the Law office of Messrs. L. Papaphilippou & Co. and I personally phoned the said office and talked to Mr. S. Papadopoulos asking him for an extension of time, after I confirmed that they are the registered office of ALKOSTAR Shipping Co. Ltd. and are authorised to act on their behalf. I also told him that if no extension of time is given we would have to bring an action to protect the claim from becoming time barred. He told me that no extension of time is granted and to bring the action. He said, and I quote ‘Den echi paratasi kina agogi’. Following this we immediately brought the action.”

The allegation is contradicted by the defendants who on the contrary state that they were and continue to be willing to take every necessary step to put in motion the proceedings for arbitration. But they do not deny nevertheless the telephone communication and the fact that they refused to consent to the proposal of the plaintiffs. Paragraph 5 of the affidavit of Mr. S. Papadopoulos reads as follows:

“The phrase which Mr. P. Michael tries to put in my mouth is incorrect because from what I remembered I told him that we could not grant an extension of time and they could do what they liked. I could not specify nor could I dictate to him what to do.”

At the time when the telephone conversation was made it was known to both parties that the time of commencement of arbitration proceedings had elapsed and the commencement of such proceedings was not possible without the extension of time.

The conclusion which could be derived is that there was discouragement of the plaintiffs to proceed with the arbitration. It is apparent that the reason of the plaintiffs’ choice to institute legal proceedings was the clear and firm refusal of the applicants.

Under the circumstances as they are stated above the Court is of the opinion that the applicants did not encourage the plaintiffs to proceed according to the terms of the contract for arbitration, but on the contrary they left the plaintiffs in some way with no

choice but to institute legal proceedings. Under the circumstances, they did not act in the manner and willingness required.

Having in mind the principles as they have been stated in the aforesaid legal authorities and by exercising its discretionary  
5 power the Court dismisses the present application.

Let there be no order as to costs.

*Application dismissed. No order as to costs.*