1986 December 5

[PIKIS, J.]

TRADAX GRAANHANDEL B. V.,

Plaintiffs.

v.

QUEENSEA MARINE COMPANY LIMITED.

Defendants.

(Admiralty Action No. 327/84)

Arbitration clause—Object of—"Dispute"—Meaning of—Inability to meet contractual obligations—Does not give rise to a "dispute"—Clause inapplicable.

Arbitration clause—Stay of proceedings, application for—Discretion of the Court.

The defendants, though they admitted liability, applied for stay of proceedings, relying on an arbitration clause providing that "(a) All disputes.... shall .... be referred to the final arbitrament of two arbitrators carrying on business in London .... and (b) Any claim must be made in writing and claimant's arbitrator appointed within nine months of final discharge and where this provision is not complied with the claim shall be deemed to be waived and absolutely barred ....". The plaintiffs' answer was that in the absence of any dispute as to the nature and extend of defendants' liability the said clause is inapplicable.

Held, dismissing the application: (1) The very object of an arbitration is to provide alternative machinery to that of the judicial process for the resolution of disputes arising under the contract. A dispute presupposes disagreement about facts relevant to liability of the parties or the implications of such facts in law. In this case there is no dispute. Inability on the part of the defendants to meet their contractual obligations does not give rise to a dispute

between the parties. It follows that the arbitration clause is inapplicable.

(2) In any event, even if the clause had been applicable, the application would have been dismissed in the light of the circumstances of this case. It is sufficient to mention that recourse to arbitration in this case serves no other purpose than to enable the defendants to rely on the time-bar-an advantage that should be denied them in view of their repeated promises to pay and the forbearance shown by the plaintiffs in response thereto.

Application dismissed with costs.

Cases referred to:

Pissouri Plantations v. *Adriatica* (1985) 1 C.L.R. 290.

Application.

Application by defendants for the stay of the proceedings in an Admiralty Action brought against them as despatch money under three charterparties.

X. Xenopoulos, for the plaintiffs.

C. Saveriades, for the defendants.

Cur. adv. vult.

PIKIS J. read the following judgment. At the initial stage of the hearing of the case defendants admitted liability confining their defence to the justiciability of the subject matter in view of an arbitration clause incorporated in charterparties that bound the parties to refer disputes arising thereunder to arbitration. The statement made on behalf of the defendants was the following:

Liability is admitted subject to the legal questions affecting -

(a) the jurisdiction of the Court, and

(b) the question of time-bar.

Also, we have agreed on the amount, namely U. S. $12,012.50. The amount is precisely that claimed

by the plaintiffs as 'despatch money' under three charterparties upon which the claim of the plaintiffs is founded."

On a subsequent appearance the charterparties were produced (exhibits 1a - 1c), as well as three telexes addressed to the plaintiffs on behalf of the defendants (exhibits 2a - 2c), acknowledging liability of the defendants to pay the amount hereinabove admitted, praying at the same time for the indulgence of the plaintiffs on account of inability to meet their obligations at the time, promising to do so as soon as their financial difficulties were over.

In view of the admission of liability, the only other matter calling resolution is the application of defendants for stay of the proceedings founded on the aforementioned arbitration clause. So far as material to the application for stay, the arbitration clause provided that -

"(a) All disputes from time to time arising out of the contract shall, unless the parties agree forthwith on a sigle arbitrator, be referred to the final arbitrament of two arbitrators carrying on business in London...."

and

"(b) Any claim must be made in writing and claimants arbitrator appointed within nine months of final discharge and where this provision is not complied with the claim shall be deemed to be waived and absolutely barred...."

Premising their submission on the above clause defendants argued the proceedings should be stayed or, more appropriately, be dismissed as plaintiffs failed to refer the dispute to arbitration within the nine-month period envisaged therein.

Given the admission of liability, it is evident that the principal object of the invocation of the arbitration clause is to enable the defendants to take advantage of the time-bar provided therein. The answer of plaintiffs is that the arbitration clause is inapplicable in the absence of any

dispute between the parties as to the nature or extent of the liability of the defendants. Admission of liability in these proceedings and earlier acknowledgment of liability on the part of the defendants, confirmed the absence of any dispute between the parties, rendering the arbitration clause inapplicable. Counsel contended the existence of a dispute as to liability is a prerequisite to the application of the arbitration clause. He supported his submission by reference to *Russell on Arbitration*[1], where it is explained, on a review of the caselaw, that the duty to refer a matter to arbitration is dependent on the prior emergence of a dispute as to the obligations of the parties under the agreement. The very object of arbitration, I may add, is to provide alternative machinery to that of the judicial process for the resolution of disputes arising under the contract. An arbitration clause does not oust the jurisdiction of the Court nor could such a proposition be countenanced in view of Article 30.1 of the Constitution guaranteeing access to the Court. But the Court may stay the proceedings in appropriate circumstances to enable the parties to resolve their dispute in the forum chosen in their agreement.

A dispute presupposes disagreement about facts relevant to liability of the parties or the implications of such facts in law. In this case there was neither disagreement about the facts nor their effect in law as to the liability of the defendants to pay the "despatch money" provided for in the charterparties. Nor was the amount owing, in dispute. Inability on the part of the defendants to meet their contractual obligations did not give rise to a dispute between the parties. The object of arbitration is not to provide a substitute for the coercive powers of the Court to order the discharge of contractual or other obligations. Arbitration is merely an alternative forum for the elucidation of the facts and establishment of the contractual liabilities of the parties. In this case, no question ever arose between the parties about the liabilities of the defendants nor is presently a dispute pending between them. In the absence of a dispute the arbitration clause was inapplicable and the

[1] (19th ed., p. 85).

right of the plaintiffs to have recourse to the Court cannot be suspended or defeated by reference thereto.

Supposing the arbitration clause was applicable, again I would decline to order stay in view of the circumstances of the case that countervail the prima facie right of a defendant to insist on observance of an arbitration clause. It is unnecessary to refer to the principles relevant to the exercise of the discretionary powers of the Court in this area, thoroughly reviewed by the Full Bench in *Pissouri Plantations* v. *Adriatica*[1]. I need only mention that recourse to arbitration would, in the circumstances, serve no purpose other than allow the defendants to take advantage of the time-bar—an advantage that should be denied them in view of repeated promises to meet their obligations and the forbearance shown by the plaintiffs in response thereto.

The application for stay is dismissed with costs.

Application dismissed with costs.

[1] (1985) 1 C.L.R. 290.