

**YEE SANG METAL & BUILDING SUPPLIES CO LTD v SHANGHAI JIN
JIANG SHIPPING CORP LTD - [1991] 1 HKC 371**

HIGH COURT
KAPLAN J

MISCELLANEOUS PROCEEDINGS NO 4010 OF 1990

30 January 1991

Arbitration -- Security for costs -- Whether court has power to stay arbitration pending provision for security for costs -- Arbitration Ordinance (Cap 341) s 14(6)(a)

The plaintiff, who was the respondent in a non-domestic arbitration agreement, sought an order for security for costs under s 14(6)(a) of the Arbitration Ordinance (Cap 341). The defendant did not appear in court. The only issue for the court was whether, as ancillary to that order, the court had the jurisdiction to stay the arbitration pending compliance with the order for security for costs.

Held, granting an order for a stay: The court's jurisdiction to grant a stay of the arbitration pending compliance with a court order for security is derived from a combination of s14(6)(a) of the Arbitration Ordinance and O 23 r 2 of the Rules of the Supreme Court. If the court has the same powers for making orders for security for costs in relation to a reference, then the usual court order for a stay pending compliance is just as applicable to an arbitration as it is to litigation. The stay may not be a stay in the ordinary sense of that word, for it is intended only to 'freeze' the arbitration for the limited time necessary to comply with the order for security. Without such provision, the court's order could be ignored and there would be no sanction whatsoever. The granting of a stay in these circumstances had no effect on the authority of the arbitrators or the arbitration agreement.

Cases referred to

Argenpuma, the; Dorval Tankers Proprietary v Two Arrows Maritime & Port Services (Pakistan Edible Oils Corp, intervening) [1984] 2 Lloyd's Rep 563

Legislation referred to

(HK) Arbitration Ordinance (Cap 341) ss 6, 14(6)(a)

(HK) Arbitration (Amendment No 2) Ordinance 1990

(HK) Rules of the Supreme Court O 23

Other legislation referred to

Mustill & Boyd *The Law and Practice of Commercial Arbitration in England* (2nd Ed) p 337

Summons

This was an originating summons by the plaintiff, who was the respondent in an arbitration, for an order for security for costs under s 14(6)(a) of the Arbitration

[1991] 1 HKC 371 at 372

Ordinance (Cap 341) and to stay the arbitration pending compliance with the order for security for costs. The facts appear sufficiently in the following judgment.

AS Hughes (Richards Butler) for the plaintiff.

Defendant absent.

KAPLAN J

The plaintiff in this originating summons is respondent in an arbitration and they seek an order for security for costs under s 14(6)(a) of the Arbitration Ordinance (Cap 341). The defendants, who are claimants in the arbitration, did not appear before me although it is fair to say that they are actively pursuing the arbitration.

Mr Hughes persuaded me to make an order for security in the sum of \$222,000 and the only issue which has been argued is, whether as ancillary to that order, I have jurisdiction to stay the arbitration pending compliance with the order for security for costs.

I should add that this is a non-domestic arbitration agreement entered into before 6 April 1990 and is, thus, governed by the Arbitration Ordinance prior to the coming into effect on 6 April 1990 of the Arbitration (Amendment No 2) Ordinance 1990.

Section 14(6) of the Ordinance provides, so far as is material, as follows:

The court shall have, for the purpose of and in relation to a reference, the same power of making orders in respect of:

(a) Security for costs

...

Provided that nothing in this subsection shall be taken in to prejudice any power which may be vested in an arbitrator or umpire of making orders with respect to any of the matters aforesaid. (This section is identical to s 14 of the Arbitration Act 1950.)

The subsection is, thus, silent about a stay. Section 6 of the Ordinance, which deals specifically with stays, relates only to stays of court proceedings brought in defiance of an arbitration agreement and does not relate to stays of arbitration proceedings properly commenced.

Order 23 of the Rules of the Supreme Court deals with security for costs. One of the grounds of application is where the plaintiff is ordinarily resident outside the jurisdiction, which is the ground upon which I ordered security in this case. Order 23 r 2 provides:

Where an order is made requiring any party to give security for costs, the security shall be given in such manner, at such time *and on such terms* (if any) as the *court may direct*. (My emphasis.)

Mustill & Boyd's *The Law and Practice of Commercial Arbitration in England* (2nd Ed) p 337 states that:

[1991] 1 HKC 371 at 373

It is usually a term of an order for security that all further proceedings in the arbitration shall be stayed until the security has been provided.

The authors, then, go on to make the point that:

The court does not have a general discretion to stay an arbitration as distinct from restraining the parties by injunction from proceeding with it.

It seems clear to me that the jurisdiction to grant a stay of the arbitration pending compliance with a court order for security is derived from a combination of s 14(6)(a) and O 23 r 2. If the court has the same powers for making orders for security for costs in relation to a reference, then, the usual court order for a stay pending compliance is just as applicable to an arbitration as it is to litigation. It may not be a stay in the ordinary sense of that word for it is intended only to 'freeze' the arbitration for the limited time necessary to comply

with the order for security. Without such provision, the court's order could be ignored and there would be no sanction whatsoever. The granting of a stay in these circumstances has no effect on the authority of the arbitrators or the arbitration agreement.

Happily, the matter is not free from authority. In *the Argenpuma; Dorval Tankers Proprietary v Two Arrows Maritime default & Port Services (Pakistan Edible Oils Corp, intervening)* 1984 2 Lloyd's Rep 563, Eveleigh LJ said at pp 555-556 in relation to a similar factual situation:

The stay of proceedings is an integral part of the order for security for costs and consequently, whether or not there should be a stay is a question relating to or connected with the relief claimed by the plaintiff.

Kerr LJ at p 567, said this:

The second issue is whether Mr Justice Leggat had jurisdiction to order a permanent stay of the arbitration. In my view, he did. *Bremer Vulkan, Schiffbau and Maschinenfabrik Corp Ltd v South India Shipping Corp Ltd* default [1981] 1 Lloyd's Rep 253; [1981] AC 909 decided that the court has no power to dismiss an arbitration for want of prosecution. The present case illustrates the need for a statutory power to this effect, as has recently been enacted in Hong Kong: Arbitration Ordinance (Cap 341) s 29A. In the absence of such a power, an arbitration can remain in a permanent state of coma. The limiting powers under s 5 of the Arbitration Act 1979, such as they are, provide no answer in theory; since the arbitration is stayed, there is no order which the arbitrator, appointed nearly six years ago, could in any event make to provide a foundation for the operation of this provision.

The present case differs radically from the position in *Bremer Vulkan* default and *The Hannah Blumenthal* default [1983] 1 Lloyd's Rep 103; [1983] 1 AC 854 since it turns on express powers of the courts concerning arbitrations which are conferred by statute and under the rules of court. Part I of the Arbitration Act 1950 confers a number of powers upon various parts of our court system to make orders in relation to arbitrations. The present case is concerned with s 12(6)(a) which confers power upon the High Court to make orders for the security for

[1991] 1 HKC 371 at 374

the costs of arbitrations in the same way as in relation to actions in the High Court. Section 28 of the Act provides:

'Any order made under this Part of the Act may be made on such terms as to costs or otherwise as the authority making the order thinks just.'

In relation to orders for security for costs, O 23 r 2 of the Rules of the Supreme Court provides for a similar discretion to impose terms. A stay of the proceedings in relation to which an order for security is made, pending the provision of the security, is commonplace, if not invariable in the absence of consent because further unsecured costs may be incurred in the interim. The power to impose a stay of the arbitration in this case, which was exercised ex parte on 5 February 1982 and inter partes on 2 April 1982, is therefore not open to doubt.

Having ordered a stay of the arbitration, it is equally within the power of the court to decide whether the stay should be lifted or maintained if -- as happened here -- the security is not provided within the prescribed time. This is reflected in para (2) of the order made on 2 April 1982, that:

'... the arbitration not be proceeded without the leave of the court.'

I am satisfied that I do have jurisdiction to grant a stay of the arbitration pending compliance with my order for security for costs and that, in the circumstances of this case, it is appropriate to so order.

The order I propose to make is as follows. The defendants do, by 4.30pm on 19 February 1991, provide security for the plaintiff's costs of the arbitration in the sum of \$222,000 in a form acceptable to the plaintiff or to the court and that all further proceedings in the arbitration be stayed pending compliance with this order.