

Arbitration Act 1996 Stay of Proceedings

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The Arbitration Act 1996 s. 9 introduced substantial changes. This article examines the interpretation so far of s. 9 by the courts and briefly compares it with the law in Switzerland.

THE ARBITRATION ACT 1996 ss 9 and 86

Previous Arbitration Acts allowed a party to an arbitration agreement to have a dispute heard in court if it was not covered by the arbitration agreement or if that party could convince the court that there was no defence to the claim, and thus there could be no dispute. The courts therefore heard many cases which arose out of contracts incorporating an arbitration clause.

The 1996 Act as a whole emphasises the autonomy of arbitrators and makes clear that, where parties have agreed to arbitration, it should be the forum for dispute resolution and that courts will interfere only in rare cases. Be that as it may, the courts may find certain procedural behaviour to be a waiver of the right to seek a stay.

Section 9 of the 1996 Act (enacting Article II.3 of the 1958 New York Convention and corresponding to Article 8 (1) of the Model Law) provides for a mandatory stay of legal proceedings in favour of the parties' arbitration agreement. It applies wherever the seat of the arbitration may be. If the arbitration has its seat in England and Wales or Northern Ireland, s. 9 applies to it in any event, in accordance with s. 2(1). If elsewhere, the stay rules apply in exactly the same way under s. 2(2), so that the English courts must stay proceedings brought before them on a non-domestic agreement wherever the seat of the arbitration happens to be. There are no distinctions between domestic or international arbitration or between parties from within or without England.

Section 9(1), like its predecessors, applies to

both arbitration clauses and submission agreements. It confers upon a party being sued the right to apply to the court for a stay. The Court of Appeal in *Etri Fans Ltd v NMB (UK) Ltd*¹ has affirmed that only the party that is actually sued (and not 'any party') can apply for a stay. Moreover, earlier provisions gave any person claiming 'through or under' a party to arbitration proceedings the right to seek a stay, which was held to include assignees but to exclude others with lesser derivative rights, for example, mortgagees. This provision has been transferred to s. 82(2) of the Act and now applies for all purposes under the Act, including the right to seek a stay.

Finally, the section now also applies to counterclaims. The appearance requirement has been abandoned.

Section 9(2) is new and allows an application for a stay to be made even though the matter cannot be referred until some condition has been met.

Section 9(3) provides that the earliest date on which an application may be made is that of acknowledgement of service. Applications are barred once the applicant has taken any step in the judicial proceedings, such as an attempt to defend the claim on its merits.

Section 9(4) sets out the rule that a stay is to be granted 'unless (the court is) satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed'. The 1975 Act also required that there was no dispute between the parties. This ground, which does not exist in the New York Convention, has been repealed.

Section 9(5) is new. It provides that, where the court refuses to stay the legal proceedings, any term making an award a condition precedent to the

¹ [1987] 1 WLR 1110; [1987] 2 All ER 763.

bringing of legal proceedings (known as a *Scott v Avery* clause) will cease to have effect. This avoids a situation where the arbitration clause is unworkable, yet no legal proceedings can be successfully brought.

The fourth ground for refusing a stay under the 1950–1975 Acts, namely, the absence of any ‘dispute’ between the parties with regard to the matter agreed to be referred, has been abolished by the 1996 Act.

Section 86 sets the conditions for obtaining a stay in domestic arbitration. The arbitration agreement must be between two nationals of the United Kingdom and the seat of arbitration must be within the United Kingdom. But ss. 85 to 87 are not in force and probably never will be. They are excluded by an Order made under s. 109. The effect of the exclusion, coupled with the repeal of the corresponding provisions in the previous law, is that there is no longer any distinction between domestic and international arbitration agreements, except for those arbitrations still governed by the previous law. The distinctions may well be incompatible with Articles 5 and 59 of the Treaty of Rome. Applications for a stay of domestic proceedings are governed by s. 9 exclusively.

THE PRESENT STATUS OF CASE LAW

a) The Court should stay judicial proceedings if there is an arbitration agreement

That the court should stay judicial proceedings if there is an arbitration agreement is shown, for example, by the unreported case *Bankers Trust Co v PT Jakarta International Hotels & Development* of March 1999, where an antisuit injunction was granted restraining the defendant from pursuing court proceedings in Indonesia in breach of an agreement which provided for arbitration in London.

This was confirmed by the *Halki* case², where the plaintiff, although bound by an arbitration clause, contended that the vast majority of the claim was indisputably due (s. 1(1) of the 1975 Act). Clarke J granted the stay, considering that, as a consequence of s. 9: ‘The correct approach is now ... to leave to the arbitrators that which it was agreed should be referred to the arbitrators without interference from

the courts’. The Court of Appeal upheld that decision. Although the 1975 Act s. 1(1) provided that, if there was nothing disputable the court could refuse a stay and give judgment under Order 14, this section had been repealed by the 1996 Act. As stated by Swinton Thomas LJ: ‘Accordingly the court no longer has to consider whether there is in fact any dispute between the parties but only whether there is a dispute within the arbitration clause of the agreement’. This construction was confirmed in *Ahmad Al Naimi*,³ where Judge Bowsher QC held that where there were genuine disputes between parties to a contract which might or might not be covered by the arbitration clause in the contract, the court should order the stay of court proceedings.

However, there is a fine line between that declaration and its application in other cases. Thus, in *Birse Construction Ltd v St David Ltd*⁴ and confirmed in *Thomas Dobbie Thomson Walkinshaw & Ors v Pedro Paulo Diniz*,⁵ the court decided that it was competent to decide whether there was a valid arbitration clause under s. 5. The general competence given to the arbitrators to decide on their jurisdiction by s. 30 does not prevent the court from deciding on this issue. Otherwise, there may be a real danger that there will be two hearings: the first before the arbitrator pursuant to s. 30, and the second before the court on the challenge under ss 6 and 7. It must be stressed here that in *Walkinshaw* the Commercial Court decided on the arbitral tribunal’s jurisdiction whilst the same issue was pending with the arbitral tribunal.

Swiss Private International Law (PIL), which applies to Article 7 arbitration submitted to the Swiss Law on Arbitration and Article II(3) of the New York Convention, which applies to other arbitration cases, both require the court to deny jurisdiction where there is an arbitration clause. Swiss law does not allow for the stay of proceedings in such a case.

b) The validity of the arbitration clause: implicit acceptance by the defendant

An arbitration clause is valid and binding under s. 5 even where the parties have not formally executed

² *Halki Shipping Corp. v Sopex Oils Ltd* CA, NCD, 19 December 1997.

³ *Ahmad Al Naimi (T/A Buildmaster Services) v Islamic Press Agency Inc.* QBD Official Referees’ Business (HH Judge Bowsher QC) 2 October 1998.

⁴ (1999) 89 BLR 194.

⁵ Commercial Court (Thomas J) 19 May 1999.

the contract. Acceptance may be inferred from the parties' conduct, in starting work, or continuing to work, or permitting the contractor to continue to work. In such a case, considered objectively, there is a contract. In the absence of any material reservations by either party during the negotiation process, the contract, including its arbitration clause, is binding upon the parties and valid pursuant to s. 5. This principle, declared in *Birse Construction Ltd*,⁶ confirmed earlier approaches taken by the courts, in particular in *Percy Trentham*.⁷

Such a broad approach is shared by French case law and confirmed by the Swiss Supreme Court, which held that behaviour may be a substitute for the written form required by Article II of the New York Convention, by virtue of rules of good faith. However, the majority of scholars do not accept that a tacit acceptance of an arbitration clause satisfies Article II of the New York Convention.

c) Scope of the arbitration clause and third party's claim in tort

The arbitrator has jurisdiction under standard form arbitration agreements between a contractor and subcontractor to order contribution or indemnity in a personal injury action. In such a case, it is correct to order a stay under s. 9. The principle of non-intervention of the English court in the arbitral process, except as the 1996 Act provides, was established in *Christine Wealands v CLC Contractors Ltd & (1) Key Scaffolding Ltd (2) Alan C. Bennet & Sons Ltd*.⁸ This was an action brought by the widow of a workman killed whilst working on Hammersmith Bridge when scaffolding supplied under subcontract by the scaffolders collapsed. The court held that the arbitration clause contained in the subcontract between CLC and the scaffolders was wide enough to include both a claim in tort and a third party's claim for personal injury.

In Swiss law it is doubtful whether a third party, not party to an arbitration clause, would be admitted in arbitration proceedings without the consent of all the parties concerned.

d) Contractual alternative dispute resolution procedures must provide a complete procedure for the assessment of the parties' rights

In *Davies Middleton & Davies Ltd v Toyo Engineering Corporation*,⁹ a construction dispute, Toyo's general conditions contained an arbitration clause. Besides, the parties had agreed that, in cases of disputes on the amounts claimed or due, a panel of experts constituted of representatives chosen by both parties would be set up to finalise the final account, which 'was intended' to be binding on the parties. The panel did not succeed in completing its work, part of the sums claimed having however allegedly been agreed upon by the experts. Davies sued for all these allegedly admitted sums as well as for all the remaining claims not agreed upon by the experts. Toyo applied for a stay under s. 9. The Court of Appeal denied the stay, on the grounds that parties who intend to introduce alternative dispute resolution procedures into their contractual relationships to avoid litigation (or arbitration) must produce a scheme providing for a complete procedure for the assessment of the parties' rights by independent experts of an objective standard. In the case of a consensual alternative dispute resolution procedure not amounting to expert determination, the objective standard remains.

The contractual alternative dispute resolution procedures consisting in finalising a (binding) final account of the claims would be characterised under Swiss law as 'arbitral expertise' which confers on the experts the power to decide finally issues of fact submitted to them, but does not entitle them to grant a claim with enforceable effect, nor the power to amend the parties' rights and obligations.

e) Commencement of arbitration proceedings does not prevent a claim before the courts

The fact that both arbitration and court proceedings were commenced by the same claimant is irrelevant to the effect of acceptance or refusal of a stay of proceedings. The court in *Zealander & Zealander v Laing Homes Ltd*¹⁰ refused the stay of proceedings requested by the constructor Laing.

The question might be raised here whether the solution adopted is correct with respect to the fact

⁶ See above n. 4.

⁷ *G. Percy Trentham Ltd v Archital Luxfer Ltd* (1992) 63 BLR 44.

⁸ CA, 22 July 1999.

⁹ (1998) 85 BLR 59.

¹⁰ Technology and Construction Court (HH Judge Harvey QC) 19 March 1999.

that arbitration proceedings were commenced by the claimants before bringing the action to court. Section 9(3) provides that a party which has already taken substantial steps in the arbitration proceedings is barred from applying for a stay. Conversely, one can wonder whether a party which already commenced arbitration proceedings claiming damages can thereafter bring an action before the courts.

f) An appeal can be lodged against a court decision under s. 9

The 1996 Act makes no express provision for any right of appeal from a decision under s. 9 (or elsewhere in Part 1). This would normally imply that there is no possible appeal based on a decision under s. 9. However, the Court of Appeal decided it had jurisdiction to hear appeals from the decisions of a judge or a court under s. 9. In *Inco Europe Ltd v First Choice Distribution*¹¹ the court said: 'If some provision of Part 1 does not exclude it, the right of appeal remains [...] there is nothing in s. 9 which excludes the jurisdiction of the Court of Appeal'.

Legal writers contested the court's construction, in that a number of sections in Part 1 specify that the leave of the court is required for any appeal based on a decision of the court under that section, while s. 9 does not provide anything in this respect.

Under Swiss law, a court decision on the existence and validity of an arbitration agreement can be appealed before the Court of Appeal and the Supreme Court, it being emphasised that:

- Where the arbitration clause at issue provides for the arbitration to be held in Switzerland, the decision of the court will be limited to a *prima facie* examination under PIL Article 7;
- Where the arbitration clause at issue provides for an arbitration to be held abroad, the court is empowered with full cognition (of the New York Convention Article II.3).

While concluding this rapid overview of the courts' interpretation of s. 9, a foreign (and civil law) jurist can only observe a real and encouraging opening in English law on arbitration to more generally accepted principles on the matter. However, as is usually the case everywhere, changes in practice will take longer than enacting a new Act.

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¹¹ [2000] 1 WLR 586.