Legal proceedings stayed in favour of mediation in accordance with Arbitration Act

September 15 2016 | Contributed by Lennox Paton

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In a recent decision, the Supreme Court determined that legal proceedings should be stayed based on the construction of the dispute clause in an arbitration agreement.

The case concerned a dispute arising from the development of the Royal Island Resort on Royal Island near the island of Eleuthera in the Bahamas. The plaintiff commenced an action by a specially endorsed writ of summons, seeking special damages of $2,684,000 in interest and costs for breach of contract. On entering an appearance to the action, the defendant applied for a stay of the proceedings pursuant to Section 9 of the Arbitration Act 2009 and the inherent jurisdiction of the court. The defendant submitted that the proceedings ought to be stayed on the basis that the plaintiff made no attempt to refer the matter to arbitration before filing suit, notwithstanding the fact that this provision was contained in the dispute clause.

Section 9 of the act provides:

> "*(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.*
>
> *(2) An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.*
>
> *(3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.*
>
> *(4) On application under this section the court shall grant a stay unless satisfied that the arbitration is null and void, inoperative, or incapable of being performed.*"

In considering *Albon (trading as NA Carriage Co) v Naza Motor Trading Sdn Bhd* ([2007] 2 AER (Comm) 513), the court assessed whether an arbitration agreement had been concluded. Despite submissions by the plaintiff to the contrary, the court held that it had. Further, in examining whether the dispute clause must be read as simply entitling the parties to resolve any disputes by arbitration or legal proceedings in the alternative, as argued by the plaintiff, the court held that the intention of the parties was to be determined in reading the contract as a whole and by giving words their natural and ordinary meaning, without inquiring into the parties' state of mind.

The court considered the condition precedents to be proven on an application for a stay**(1)** as follows:

" (i) There must be a valid agreement to have the dispute concerned settled by arbitration

(ii) Proceedings in the Court have been commenced

(iii) The proceedings have been commenced by a party to the agreement or a person claiming through or under him, against another party

(iv) The proceedings are in respect of a dispute so agreed to be referred

(v) The application to stay is made by a party to the proceedings

(vi) The application is made after appearance by that party and before he has delivered any pleading or taken any step in the proceedings

(vii) The party applying for a stay was and is ready and willing to do all things necessary to the proper conduct of the arbitration."

In *Royal Island*, it was held that in the arbitration agreement the word 'shall', as opposed to the word 'may', informed the dispute clause, which subjected the parties to mediation as a condition precedent to arbitration or the institute of legal or equitable proceedings. The court considered Section 3(3) of the Interpretation and General Clauses (Amendment) Act 2011, which provides that "the word 'may' is to be construed as being directory or empowering and the word 'shall' or 'must' is to be construed as being mandatory or imperative".

The court held that there is persuasive authority even where an arbitration clause is discretionary rather than mandatory, and that a party retains the option of invoking it.**(2)** It was therefore reasonable to conclude that referral to mediation was contemplated before arbitration or any legal or equitable proceedings could be pursued. In the circumstances, it was held that Section 9(2) of the Arbitration Act entitled the defendant to apply for a stay, notwithstanding the fact that the dispute was subject to other dispute resolution procedures before a referral to arbitration was made.

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Endnotes

(1) As outlined in *South Riding Point v Allied Ethanol Ltd* [1997] BHS J 1, which cited the conditions enumerated in *Russell on the Law of Arbitration*, 9th edition.

(2) *Anzen et al v Humes One Limited*, BVIHCMAP 2014/001333.

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