Arbitration

Court powers to stay litigation because of arbitration agreements

by Professor J E Adams

Prior to 31 January 1997, court powers to stay litigation because of an agreement to arbitrate a dispute derived from the *Arbitration Act* 1950, s. 4 or the *Arbitration Act* 1975, s. 1. The former related to domestic contracts (as defined) and was discretionary; the latter related to non-domestic and was mandatory. The earlier statute prescribed no grounds for grant of a stay, although case law had shown the likely factors, but s. 1 of the 1975 Act laid down the restricted grounds that:

'the arbitration agreement is null and void, inoperative or incapable of being performed or ... there is not in fact any dispute between the parties with regard to the matter agreed to be referred.'

A common situation could arise where one party to a contract sought to claim a sum from the other and, despite an arbitration clause in the agreement, issued proceedings and sought summary judgment, under O. 14 of the *Rules of the Supreme Court* (RSC, O. 14), on the basis that no defence to the claim could be raised. The O. 14 summons and the defendant's summons to stay the proceedings would be heard together. If a prima facie defence was established, a stay was likely; if not, there was no obstacle in s. 4 (1950) or s. 1 (1975) to an immediate order for summary judgment. If judgment were given for only part of the claim, a stay could be granted for the balance. This procedure was frequently used in construction disputes.

NEW LEGISLATION

When, after some three years gestation, the *Arbitration Act* 1996 came into force on 31 January 1997, s. 4 of the 1950 Act was effectively reproduced in s. 86 and s. 1 of the 1975 Act in s. 9. This was meant to preserve the domestic/ non-domestic distinction; the discretionary/mandatory differentiation continued. However a challenge under the Treaty of Rome to the acceptability of distinguishing domestic agreements in the *Consumer Arbitration Agreements Act* 1988 had succeeded in the Court of Appeal in *Phillip Alexander Securities and Futures Ltd v Bamberger* (Times Law Reports, 22 July 1996) on the basis of wrongfully discriminating against EC litigants. As a consequence, s. 86 was not brought into force with the rest of the 1996 Act; it now seems likely that it never will be. So s. 9 now governs the whole range.

The first three 1975 grounds for refusing a stay – that the reference to arbitration is null and void, inoperative or incapable of being performed – still appear in the section. The phrases are taken verbatim from the *New York Convention* 1958 (the UK's accession to it being the reason for the passing of the 1975 Act). The final provision of the old s. 1 ('... there is not in fact any dispute etc.') was not carried into the new s. 9. The Report of the Departmental Advisory Committee (DAC), the 'sponsor' of the bill, pointed out that the provision was not in the Convention and moreover, was 'confusing and unnecessary.' This was said to be so for the reasons given in *Hayter v Nelson* [1990] 2 Ll Rep 265 but no more indication of what lay behind the omission was given, although the reference to the elements discussed in the 1990 case is briefly expanded in the discussion of s. 86. A later Supplementary Report, just before the Act came into force, made no further reference to the issue.

GROWING CONCERNS

In the period since the act took effect, mounting dissatisfaction has emerged. Practitioners do not share the optimism of the DAC that:

'if in truth there is no defence to the claim, then it should not take more than a very short time for an arbitral tribunal to deal with the matter and produce an award.'

The very steps of initiating an arbitration, appointing a tribunal, appraising it of the dispute and proving the absence of any defence involve time and extra expense – both absent from the former practice of issuing proceedings followed by the O. 14 procedure, given that the reluctant party has to participate in the arbitral process, and has every incentive to be obstructive or at least dilatory. On a more fundamental level, the willingness of arbitrators to give summary relief remains untested and is a good example of the new attitudes required by the new act.

ARBITRATION HAZARDS

The very steps of initiating an arbitration, appointing a tribunal, appraising it of the dispute and proving the absence of any defence involve time and extra expense.

More specific problems affect construction disputes. Following the lead in major construction contracts, there is increasing provision for interim adjudication processes to provide provisional resolution of disputes, followed by formal arbitration at a later stage, sometimes only following final completion of the project. *The Housing Grants, Construction and Regeneration Act* 1996 will make adjudication compulsory in many construction contracts. Under s. 9 of *the Arbitration Act* 1996, initial proceedings will be stayed to permit the possibility of arbitration. There are possible counter-arguments, suggesting methods of enforcing an adjudicator's award which by-pass s. 9 (or more accurately, the express invocation of s. 9 – for it is not self-activating) but none is obviously conclusive or even convincing.

The Arbitration Act 1996 has certainly not outworn its initial welcome, but the family squabble during the honeymoon period has not settled. The unfortunate 'mismatch' of the two acts and its incompatibility with the practical needs of the construction industry surely deserve urgent attention.

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