



High Court upholds arbitration agreement in cargo handling services agreement



September 14 2016 | Contributed by Bowmans

Shipping & Transport, South Africa

☉ Introduction

☉ Facts

☉ Decision

Introduction

It is a general principle of South African law that the High Court's jurisdiction cannot be limited by a clause in a contract to refer disputes to arbitration.

While the court has discretion to decide whether to uphold an arbitration clause, the burden of proof rests on the party seeking to avoid arbitration (in favour of court proceedings). This burden – according to case law – is not easily discharged.

In the context of admiralty proceedings, the legislation governing South African admiralty procedure and practice grants the court express discretion to stay proceedings where the relevant parties agree that the disputed matter should be referred to arbitration or if, for any other sufficient reason, the court believes that the proceedings should be stayed.

Facts

Against this background, in the recent Eastern Cape Local Division of the High Court case of *Transnet SA Ltd v Hotazel Manganese Mine Ltd*, the plaintiff commenced a court action against Transnet, alleging that a breach of contract had occurred when its cargo of manganese ore was contaminated by manganese ore of a different grade which was owned by a third party and which, in turn, caused the plaintiff to suffer damages.

The relationship between the parties was governed by a written services agreement for cargo handling, which included a dispute resolution clause. The clause contained, among other things, a referral of disputes to arbitration under the rules of the Arbitration Foundation of Southern Africa.

It was alleged that the breach of contract had occurred on or around June 20 2012. In the subsequent 18 months, various attempts were made by the parties to negotiate a possible settlement, all of which were unsuccessful. From December 5 2013 to May 5 2015 no further steps were taken by any of the parties to

deal with the matter. By this stage, the three-year prescription period (ie, the time bar) to commence legal proceedings was looming and in light of Transnet's refusal to agree to an extension, Hotazel, in its own words, adopted a "safety first approach and issued summons in... Court."

The commencement of court proceedings prompted Transnet to bring an application to stay Hotazel's admiralty action pending resolution of the matter by arbitration.

Decision

The following points arose from the court's judgment:

- The court had to be convinced that there were sufficient reasons not to exercise its discretion to stay the court proceedings, even if Transnet's motives to stay the action might have been to facilitate a defence of prescription in the arbitration proceedings.
- The court fully accepted that Transnet had no legal obligation to accede to the request for a time extension. According to the judge:

"An indulgence was sought and the indulgence was refused, which the Applicant was, in my view, plainly entitled to do. I also do not regard the refusal to give an extension of time as a breach of the good faith provisions of clause 28 of the contract."

- The question before the court did not concern prescription, but rather whether Transnet had established that it had a right to stay the court proceedings because it had a vested right to refer the matter to arbitration.
- The court upheld the earlier decision in *MV Achilleus*, in which it was remarked that "the fact that proceedings... would be defeated by a time bar does not afford the slightest reason for refusing a stay of the action instituted in South Africa".

The court proceeded to consider the grounds relied on by Hotazel not to order a stay and found that they provided no compelling reasons for excusing it from its obligation to comply with the dispute resolution clause.

The court found that the following factors were relevant in exercise of its discretion:

- all the facts and circumstances of the matter;
- the burden of proof which rested on Hotazel;
- the sanctity of the contract concluded by the parties;
- the absence of any suggestion that the stay of the action could have led to a multiplicity of suits in different forums;
- the nature of the issues between the parties in relation to the question of whether the dispute could be settled by arbitration;
- the convenience for the parties and their witnesses; and
- the interests of justice.

The court was ultimately unconvinced that Hotazel had discharged its burden of proof to justify a refusal to stay the action and ordered that the action be stayed pending resolution of the matter by arbitration.

For further information on this topic please contact Jeremy Prain at Bowman by telephone (+27 21 480 7800) or email (j.prain@bowman.co.za). The Bowman website can be accessed at www.bowman.co.za.

The materials contained on this website are for general information purposes only and are subject to the disclaimer.

ILO is a premium online legal update service for major companies and law firms worldwide. In-house corporate counsel and other users of legal services, as well as law firm partners, qualify for a free subscription.



Jeremy Prain