NEW SOUTH WALES SUPREME COURT

CITATION: Hallen v Angledal [1999] NSWSC 552

CURRENT JURISDICTION: Commercial

FILE NUMBER(S): 50055/99

HEARING DATE{S): 07/06/99

JUDGMENT DATE: 10/06/1999
PARTIES:

Lars Hallen - First Plaintiff
Sten Unnerstedt - Second Plaintiff
Sven-Olov Angledal - First Defendant
Margaretha Irene Angledal - Second Defendant

JUDGMENT OF: Rolfe J

LOWER COURT JURISDICTION: Not Applicable

LOWER COURT FILE NUMBER(S): Not Applicable

LOWER COURT JUDICIAL OFFICER: Not Applicable

COUNSEL:
Mr P.M. Wood - Plaintiffs
Mr A.I. Tonking - Defendants

SOLICITORS:
Clayton Utz - Plaintiffs
Letherbarrow Lawyers - Defendants

CATCHWORDS:
Summons by plaintiffs to enforce an arbitral award made in Sweden.
Application by the defendants for an adjournment of the proceedings, because of the institution of proceedings before a competent authority in Sweden to set aside the award pursuant to s.8(8) of the International Arbitration Act 1974.
Held the factual matters necessary to found the stay and for the exercise of discretion not made out, and that no evidence of a prima facie case.
Held no basis to grant a stay because Stamp Duty not paid on the agreement sued on.
Held that no limitation point under s.20 of the Limitation Act 1969 was available: Brali v Hyundai Corporation (1988) 15 NSWLR 734 noted.

ACTS CITED:

DECISION:
Defendants' Notice of Motion dismissed with costs.

JUDGMENT:

THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION
COMMERCIAL LIST

ROLFE J

THURSDAY, 10 JUNE 1999

50055/1999 - HALLEN & ANOR v ANGLEDAL & ANOR

JUDGMENT

HIS HONOUR:

Introduction

1 The plaintiffs, for whom Mr P.M. Wood of Counsel appeared, commenced these proceedings by a Summons filed on 28 April 1999, whereby they sought leave to enforce, in the same manner as a judgment of this Court, the Arbitral Award, ("the Award"), made in Stockholm, Sweden, on 10 July 1996 in an arbitration between the plaintiffs and the defendants, for whom Mr A.I. Tonking of Counsel appeared, in respect of the sums found by the Arbitrators to be due by the defendants to the plaintiffs. The plaintiffs also sought an order that judgment be entered in their favour in respect of those sums and an order for costs.

2 The plaintiffs pleaded that on 20 July 1983 Medipac Pty Limited, ("Medipac"), was registered as a proprietary company in Australia and sold medical products, and that prior to 19 February 1993 the plaintiffs and the defendants each owned four shares in it. It was pleaded that on 19 February 1993 the parties entered into a written agreement in the Swedish language, ("the Agreement"), of which it was an express term that the plaintiffs would transfer their shares to the defendants in consideration of a payment to be made by the defendants to the plaintiffs, and that it was a further express term that should any dispute arise with regard to the validity, interpretation or suitability of the Agreement, that would be decided by arbitration in Stockholm, Sweden, in accordance with applicable legislation.

3 The pleading continued that a dispute arose; that Arbitrators were appointed, although the defendants made no such appointment; and that on 10 July 1996 the Arbitrators made the Award, a copy of which was forwarded to the parties on or about 22 July 1996. It is not in issue that the defendants have not paid the amounts referred to in the Award.

4 The plaintiffs' contentions are that the Award constituted a "foreign award" pursuant to the **International Arbitration Act 1974** (Cth), ("the Act"); that it was made pursuant to the Agreement; and that it may be recognised and enforced in this Court.

5 On 2 June 1999 the defendants filed a Notice of Motion seeking the following relief:-

> **"1. The proceedings be adjourned pursuant to s.8(8) of the International Arbitration Act 1974 pending the final determination of the Swedish Court proceedings referred to in the affidavit of the second defendant sworn on 2 June 1999.**
>
> **2. Further or in the alternative, the proceedings be stayed until such time as the plaintiffs have complied with s.28 of the Stamp Duties Act 1920.**
>
> **3. The proceedings be removed from the Commercial List of the Equity Division."**

6 On the hearing of that Notice of Motion the plaintiffs filed a Notice of Motion seeking an order that the defendants provide security in their favour in the amounts claimed or, in the alternative, in such amount and in such manner as the Court may determine.

The Evidence On The Notice Of Motion

7 The defendants relied upon the affidavit of the second defendant, Mrs Margaretha Irene Angledal, sworn on 2 June 1999. No objection was taken to this affidavit and she was not required for cross-examination.

8 Mrs Angledal deposed that she received from her solicitors a copy of the Award in about August 1996, and that she annexed a true copy of a translation of the Agreement upon which the plaintiffs proceeded.

9 In paragraph 4 she said that without admitting that it was a binding or enforceable Agreement, that at no time did the plaintiffs tender any Transfer of Shares in Medipac to the defendants or anyone acting on their behalf and, since she received a copy of the Award and until she was served with the Summons, neither the plaintiffs nor anyone acting for them had made any demand on the defendants for payment of the sum of $307,288. In paragraph 6 she deposed:-

> **"I have instructed my solicitors to engage Advokatbolaget, a firm of lawyers in Sweden to commence proceedings on behalf of my husband and myself seeking to have the 'Share Transfer Agreement' declared invalid or unenforceable under Swedish law and to set aside the Award. Annexed hereto and marked 'B' is a true copy of a facsimile transmission from Hans Ohlin of Advokatbolaget dated 1 June 1999 the document initiating those proceedings."**

The annexure comprises a letter in the English language from Mr Ohlin to the solicitors for the defendants dated 1 June 1999, which states:-

> **"I have now prepared a Summons for Application, a copy of which is attached, who has been filed in Karlstads tingsratt this day. That Summons is a Summons to Set Aside the Arbitral Award based on The Swedish Contracts Act, Article 36."**

The Summons is, apparently, in the Swedish language and I have not been furnished with a translation of it. As I am unable to read that language the document is of no assistance in the resolution of these proceedings.

10 In paragraph 7 Mrs Angledal stated that the defendants disputed:-

(a) The enforceability of the Agreement;

(b) The validity of the Award; and

(c) The plaintiffs' entitlement, in the event of the Agreement and the Award being enforceable, which was not admitted, to interest up to the date of the commencement of the proceedings and the plaintiffs claim for costs of these proceedings.

11 The evidence on behalf of the plaintiffs was contained in the affidavit of their solicitor Mr Alister John Abadee, sworn 28 April 1999. Mr Abadee annexed a copy of the Award, a copy of the Agreement in the Swedish language, and a translation of the arbitration clause, which reads:-

> **"Arbitration Should any dispute arise with regard to validity, then an interpretation, or the suitability of this agreement, or a settlement of the dispute which arisen in connection with it, shall be decided upon by the Arbitrator in Stockholm in accordance with the applicable legislation affected."**

12 It was not disputed that this was an agreement to refer disputes under the Agreement to arbitration in Stockholm, nor that the dispute had been properly so referred.

13 Mr Abadee's affidavit annexed various documentation showing that Sweden was at the time the Award was made, and remains, a Convention country, within the meaning of s.3(1) of the Act, and certain other formal matters in relation thereto, none of which matters were in issue.

The International Arbitration Act 1974

14 The Act is based on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article I(1) of which provides:-

> **"This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."**

15 Article VI provides:-

> **"If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security."**

The Defendants' Notice Of Motion

16 The first claim for relief was that the proceedings be adjourned pursuant to s.8(8) of the Act pending the final determination by the Swedish Court of the proceedings instituted by the defendants.

17 Section 8(1) provides:-

> **"Subject to this Part, a foreign award is binding by virtue of this Act for all purposes on the parties to the arbitration agreement in pursuance of which it was made."**

18 Sub-section (8) provides:-

> **"Where, in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the Court is satisfied that an application for the setting aside or suspension of the award has been made to a competent authority of the country in which, or under the law of which, the award was made, the court may, if it considers it proper to do so, adjourn the proceedings, or so much of the proceedings as relates to the award, as the case may be, and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security."**

19 Mr Tonking submitted that there were three basic reasons why the Court should exercise its powers, which he conceded were discretionary in nature, under sub-s.(8), namely:-

(a) The existence of the Swedish proceedings, which I should infer were made to "a competent authority" in a proper and timely manner and had, at least prima facie, prospects of success;

(b) The existence of an issue under the **New South Wales Limitation Act 1969**, or the general law, as to whether part of the amount comprised in the Award, namely $9,000, was payable more than six years after it was due; and

(c) The delay by the plaintiffs from July 1996 until the institution of these proceedings in making a demand for payment.

20 Mr Wood submitted that sub-s.(8) could only be availed of if the Court is satisfied that an application for the setting aside or suspension of the Award has been made to a competent authority in Sweden, in which case it "may, if it considers it proper to do so, adjourn the proceedings …". He submitted that the Court could not be satisfied of those matters, or of further matters relevant to the exercise of discretion, for the following reasons:-

(a) There is no evidence that the Court to which some application has been made in Sweden is "a competent authority", nor what constitutes "a competent authority" in Sweden.

On this matter he pointed to the concluding words of the Award, which stated:-

> **"6. The Parties are reminded of the provision of section 25 of the swedish Arbitration Act which reads in translation:**
>
> > **If a party is dissatisfied with a decision by the arbitrators relative to the compensation due to them, he may bring the matter before the court provided that he commences his action within sixty days from the time when he received the award. Each of the arbitrators has a similar right as regards compensation claimed by him; but the time for commencing action shall be reckoned from the day on which the award was given. The award shall clearly specify the procedure to be followed by a party whishing (sic) to proceed against the decision of the arbitrators.**
> >
> > **The name and address of the court referred to in section 25 is: Stockholms tingsratt, Box 8307, 104 20 Stockholm Sweden."**

Mr Wood drew attention to the fact that whatever application had been made by Mr Ohlin, it had not been made to that Court, i.e. Stockholms tingsratt, and that there was no evidence that the tribunal to which it had been made was either a competent authority or in some way authorised to receive any application on behalf of that specified in the passage I have just quoted. The absence of any such evidence is critical to the operation

of sub-s.(8), as there must be an application to a competent authority before reliance can be placed on it.

(b) He submitted that whatever application has been made, there is no evidence that it has been made within any applicable time limitation. This submission divided into two. Firstly, there is no evidence as to whether or not there is a time limitation and, secondly, if there is, there is no evidence that the application was made within it. This point obtains force from the reference in the passage quoted from the Award that proceedings must be commenced within sixty days from the time when the party complaining about the Award receives it. Accordingly, on this aspect, there is no evidence that whatever application has been made to whatever authority is competent from a time point of view.

(c) Thirdly, Mr Wood submitted that in so far as one could make any sense of the application made in Sweden, it is one based on Article 36 of the **Swedish Contracts Act**, which, at least prima facie, reflects a position opposite to that taken by the defendants before the Arbitrators, when they asserted that the proper law to be applied was that of Australia: pp.14 and 15 of the Award. At p.21 the Arbitrators found that the law of Sweden was the applicable law. That change of position is relevant to note although, on its own, it is not, in my opinion, decisive.

(d) Mr Wood submitted that there is no evidence of the factual basis upon which the application has been made to the Swedish Court, other than the reference to Article 36 of the **Swedish Contracts Act**, nor is there any evidence of what that Article provides nor what is necessary to sustain a submission that it should be applied, in some unarticulated way, to the Agreement. Mr Tonking submitted that the Court should infer that as a member of the Swedish Bar has prepared the application, it is one which has some prospects of success. However, not only is that not said, but this Court is left with no idea of the nature of the claim, other than it is to set aside the Award. Notwithstanding what Mr Ohlin has written Mrs Angledal, in paragraphs 6 and 7 of her affidavit, makes it clear that that which is being attacked is the Agreement and, by virtue of that attack, the

Award and its validity. The failure of Mr Ohlin to state the nature of the application, other than in the terms to which I have referred, and to express any opinion as to its validity and prospects of success is very strange. He is the very person one would expect to speak favourably about it. His failure to do so not only does not assist the defendants in discharging the onus, but leads to the conclusion that he may not be able to say anything about it which will assist the defenants.

(e) This led to Mr Wood's next submission that the Court does not know whether the attack is on the Agreement or the Award via an attack on the Agreement.

(f) In view of the width of the arbitration clause it is not clear, and the defendants have produced no evidence to show, that the validity of the Agreement was not susceptible of attack in the arbitration proceedings. Indeed the reference to the validity of the Agreement would indicate that, at least prima facie, the Arbitrators had power to consider whether it should be set aside.

(g) Mr Wood submitted that there was no evidence of the grounds on which it is alleged that the Agreement is invalid, which is obviously so, nor is there any evidence that even if its validity is impugned the arbitration clause would fall. There is no evidence that any of these points were taken before the Arbitrators, and the effect, if any, on the defendants' present application to the Swedish Court.

(h) It was nextly submitted that there is no evidence when the matter will be heard and that there is no offer of security made. Mr Tonking submitted that the first point was not significant as the Court could maintain some type of supervisory role over the proceedings and, if the matter is not heard expeditiously, cease the adjournment. The prospect of this Court acting in that way in relation to a foreign Court has obvious objectionable features, the more so as there is no evidence of the time delays, if any, in that Court and the pressure of work on it.

(i) Finally Mr Wood submitted that the Court should have regard to the Award itself. He conceded that there will no doubt be cases where such an Award, on its face, would give rise to doubts as to its inherent validity and worth from which a Judge may be able to draw a conclusion that it is not satisfactory. However, he contended that the present Award is well reasoned, balanced and in certain respects in favour of the defendants in so far as they have made points with which the Arbitrators agree. I should pause here to note that although the defendants did not appear at the hearing, they none-the-less made written submissions and furnished other material to the Arbitrators and in the Award, which covers some twenty four pages, the Arbitrators appear, if I may say so with respect, to deal with the matters in issue with great care.

21 In all these circumstances Mr Wood submitted that there was no evidence that the operation of sub-s.(8) was activated and, even it was, there was nothing to attract the exercise of discretion in favour of the defendants, it not being in issue that the making of an order involves essentially discretionary considerations.

22 In my respectful opinion, Mr Wood's submissions must be accepted. For all the reasons he has outlined I do not consider that the defendants have established that the necessary application has been made to a competent authority in Sweden and, even if I were to take the view that the application to which Mr Ohlin referred was an appropriate one to attract sub-s.(8), I cannot be satisfied, for all the reasons advanced, even at a prima facie level, that it has any prospects of success, such that I should adjourn the proceedings.

23 Mr Tonking submitted that it would be a wrong exercise of discretion not to take that course in circumstances where there was an application before some tribunal in Sweden, which could be rendered nugatory by not granting an adjournment. Mr Wood submitted, correctly in my opinion, that sub-s.(8) does not demand that an adjournment be granted without more. It not only specifies a certain matter, which must be met before an adjournment is granted, but it invests the Court with a general discretion. It does not authorise the Court to grant an adjournment merely because an application in relation to the Award has been made in the country in which the Award was made. More must be established than that.

24 Counsel advised me that their researches had not disclosed any Australian cases bearing on this point. I was referred to several overseas authorities. In **Fertiliser Corporation of India et al v IDI Management Inc** (1981) 517 FD 948 proceedings were brought in the United States to enforce an award made in India. The Court was of the view that the award must be confirmed unless one of the defences raised by the defendant was found to exist, or the Court chose to adjourn the proceedings "under Article VI". After referring to the various defences the Court turned to the question of adjournment. After quoting Article VI, it said:-

> **"This appears to be an unfettered grant of discretion; the court has been unable to discover any standard on which a decision to adjourn should be based, other than to ascertain that an application to set aside or suspend the award has been made. Here, it is undisputed that IDI has made such an application in India."**

25 It is disputed in the present case that the defendants have made the appropriate application in Sweden, and the defendants have not proved that they have.

26 At p.962 it was stated:-

> **"Nevertheless, in order to avoid the possibility of an inconsistent result, this Court has determined to adjourn its decision on enforcement of the Nitrophosphate Award until the Indian Courts decide with finality whether the award is correct under Indian law. FCI, of course, may apply to this Court for suitable security, as provided by Article VI.**
>
> **When we are informed that the Indian Courts have reviewed the Nitrophosphate Award and rendered a decision, we will proceed to either grant or deny enforcement, based on that decision."**

27 As I have said in that case there was no issue but that an appropriate application had been made to a competent authority in India, and the Court seems to have been of the view that the proper exercise of discretion, in order to avoid the possibility of an inconsistent result, was to grant the application, subject to a counter application for security.

28 This decision was reviewed in an article: "Staying Enforcement of Arbitral Awards Under the New York Convention", "Arbitration International" at p.209.

29 At p.222 the author stated:-

> **"It is submitted that the appropriate standard for applying Article VI of the New York Convention should not be the mere possibility or even the probability of inconsistent results, but rather a balancing of the relative prejudices to the parties. Prejudice inures to the winning party to the arbitration in almost every case: that party is deprived of substantial sums of money owed, often for many years, from the date of the initial breach of the obligation, through not only the arbitral proceedings but also judicial proceedings contesting the validity of the award."**

30 The reason for coming to the first mentioned conclusion appears on p.221, where it was written:-

> **"Moreover, even if an award is set aside in the country of origin after it is enforced elsewhere, the result would not be legal chaos because the judgement setting aside the award would most likely be recognised abroad to recover any monies collected under the award."**

31 In **Hebei Import & Export Corp v Polytek Engineering Co Limited** (High Court of Hong Kong - 1 November 1996 - unreported) a far higher onus was imposed upon the defendant by Leonard J, who adopted, at least to some extent, a discussion by Jan Van den Berg in "The New York Arbitration Convention of 1958: Towards a Uniform Interpretation". After referring to what had been written, his Lordship continued:-

> **"The burden must be on the defendant in this case to show that the application has been made to the Chinese Court and that it is a bona fide application, not made only with a view to delaying payment. If it appears that the application is hopeless and bound to fail, this Court will not grant an adjournment. It is for the defendant to show that it has some reasonably arguable grounds which afford some prospects of success. I think it is going too far to say that the defendant must show that he is likely to succeed. There is no doubt that the application has been made and that it has been accepted by the Beijing No 2 People's Court. Mr Tang submits that the very fact that the application has been accepted indicates that the Chinese Court thinks that there is something in it worthy of consideration. There is no expert evidence on the matter but it is perhaps reasonable to suppose that before it issued its Notice of Acceptance, the Court must have carried**

out some sort of examination of the contents of the application before accepting it.

There is some prima facie evidence that there is some prospect of success for the applicant in Beijing. It is to be found in the affirmation of Mr Lau .. who says that the defendant's legal advisers in Beijing have advised that the defendant has an arguable case for setting aside the award on certain grounds which he sets out in his affidavit. He does refer to certain parts of the Law of Arbitration in China but he is not an expert witness and it is not possible for me to make any findings of fact as to what the law actually is. Nevertheless, having regard to the fact that he speaks of having received advice from Beijing lawyers, what he says in his affidavit does afford some prima facie evidence of their views."

Subsequently his Lordship said:-

"Taking into account all the circumstances, I have decided in my discretion to accede to the defendant's application to adjourn the hearing of the Summons of 13 August 1996, sine dei, pending the outcome of the application which is currently before the Beijing No 2 People's Court, with liberty to restore. I am conscious of the fact that so far as this Court is aware no date has yet been set for the hearing in China. If there were to be a substantial delay in the progress of proceeding in China, it may be that the plaintiff would want to come back to this Court to ask it to re-consider the question as to when the Summons ought to be heard."

32 His Lordship made the points that the defendant had the obligation of showing some reasonably arguable grounds, which afforded it "some prospect of success". He also had a situation before him that the application had been accepted, it not being in issue that an application had been made to the competent authority, and he was prepared to infer that some sort of examination had been made before such acceptance. Further, and significantly in my view, there was some evidence, albeit, perhaps, of less than a satisfactory nature, that the defendant had an arguable case.

33 It is the absence of all these indicia in the present case, which support the submissions of Mr Wood that for want of proper evidence and as a matter of discretion the application should be refused. In my opinion the defendants have not established that the existence of some proceedings in Sweden can or should cause this Court to grant the adjournment sought either as a matter of fact or discretion.

The Limitation Act Point

34 **The Limitation Act** point must, in my opinion, fail. Section 20 is not concerned with a limitation on components of the cause of action giving rise to the arbitration, but with the cause of action to enforce an award by the institution of proceedings, rather than by the method provided in s.33 of the **Commercial Arbitration Act 1984**. So much is made clear not only by the opening words of s.20(1), which are concerned with a cause of action "to enforce an award of an arbitrator", but also by the terms of sub-ss.(2) and, more especially, (3). In the end, whilst I did not understand Mr Tonking to abandon his submission on this point, it became clear that it was no longer pressed with any enthusiasm.

35 In **Brali v Hyundai Corporation** (1988) 15 NSWLR 734 Rogers CJ at CommD dealt, inter alia, with the cause of action, noting that a person wishing to enforce an award may either bring an action on it or follow the summary procedure in s.33(1).

36 At p.743 his Honour said:-

"In the absence of argument from the defendant, I am content to proceed on the hypothesis that an action may lie on an implied promise in the award itself …"

His Honour cited authority, and continued:-

> **"The Court does have jurisdiction to allow or to confirm service on a defendant outside the jurisdiction on the cause of action arising from an award deemed to have been made within the jurisdiction. This conclusion is consistent with one of the principal purposes of the New York Convention."**

This is the cause of action with which s.20 is concerned, and it was not submitted that it was time barred.

The Absence Of Any Demand For Payment

37 The third matter upon which Mr Tonking relied was the absence of any demand for payment. In my opinion this does not provide a discretionary basis for denying the plaintiff's the right to enforce the Award. There is no evidence that, in consequence of the delay, the defendants have suffered any prejudice. Rather, it would seem, they have not exercised any right they may have to set aside the agreement until recently.

The Stamp Duty Point

38 Mr Tonking submitted that prima facie the Agreement needed to be stamped and that, as it does not appear that it has been, the plaintiffs cannot rely on it in these proceedings, as they are seeking to do. His submission was that s.29(1) of the **Stamp Duties Act 1920** provides that "except as aforesaid", an instrument shall not be used in proceedings, other than criminal proceedings, "for any purpose whatsoever, unless it is duly stamped in accordance with the law enforced at the time when it was first executed".

39 Mr Tonking submitted that it will be necessary for the plaintiffs to rely upon the Agreement in the main proceedings because, pursuant to s.9(1)(b) of the Act, the plaintiffs must produce in any proceedings to enforce the Award a duly authenticated original Award or duly certified copy thereof, and the original Arbitration Agreement under which the Award purports to have been made or a duly certified copy thereof.

40 In these circumstances Mr Tonking submitted that the plaintiffs would not be able to prove their case. Mr Wood responded that, firstly, the submission was not open to Mr Tonking because a copy of the Agreement was put in evidence through the affidavit of Mrs Angledal and therefore, in so far as it is relevant at the moment, the document has been put in evidence by the defendants. That may not necessarily overcome the position on a final hearing.

41 Secondly, Mr Wood submitted that at the time of the hearing the document would be admissible, notwithstanding that it is not stamped, by virtue of s.29(4). Sections 27 and 28 provide for circumstances in which an unstamped document may be admitted into evidence, and s.29(4) provides:-

> **"Sections 27 and 28 and this section do not apply to an instrument or a copy of an instrument tendered as evidence on behalf of a party (not being a person who is primarily liable to duty in respect of the instrument) if the court is satisfied:**
>
> **(a) that the party has informed, or will in accordance with arrangements approved by the court inform, the Chief Commissioner of the name of the person primarily liable to duty in respect of the instrument; and**

(b) that the party will, in accordance with arrangements approved by the court, lodge the instrument or a copy of the instrument with the Chief Commissioner."

42 Section 7 provides that the Schedules to that Act, and everything contained within them, shall be read and construed as part of the Act. The Schedule, under a heading "Transfer of Shares", makes the transferee, i.e. the defendants, the persons primarily liable for the payment of stamp duty.

43 Accordingly, Mr Wood submitted that on the hearing of his clients' Summons, if it was necessary to tender the whole of the Agreement, that would be a tender by the persons not primarily liable to duty in respect of it and, thereupon, the plaintiffs would be able to satisfy the Court that they would inform the Chief Commissioner that the defendants are primarily liable to duty in respect of it and that they would, in accordance with arrangements approved by the Court, lodge the instrument with the Chief Commissioner.

44 In these circumstances it would seem that the time for being concerned about the payment of stamp duty has not arisen and, if and when it does, it will be a matter which the plaintiffs will be able to overcome without difficulty.

45 Mr Wood's third submission is that it may not, in any event, be necessary for the plaintiffs to tender the whole of the Agreement, because the relevant portion of it is that which provides for arbitration and the Summons may only need to rely upon the Agreement as pleaded in paragraph 3 of the Nature of Dispute and paragraph 5 thereof. If those paragraphs are admitted there will be no need to tender the Agreement.

46 For the reasons, and more particularly the second reason, submitted by Mr Wood I do not consider that there is any justification to stay the proceedings until the plaintiffs have paid stamp duty.

Transfer Of The Proceedings

47 Mr Tonking submitted that the proceedings should remain in the general Equity Division List rather than being transferred to the Commercial List in the Equity Division. The basis for this submission was that the proceedings did not give rise to any matter of trade or commerce requiring the specialist attention of the Commercial List.

48 I do not agree with this submission. Matters involving arbitral awards are frequently heard in the Commercial List. The present case raises a somewhat novel point and, although in a slightly different context, Rogers CJCommD had no difficulty with the concept that the matter should be heard in the Commercial Division in **Brali v Hyundai Corporation**.

49 In my opinion there are ample reasons why the present proceedings should be heard in the Commercial List.

Matters In Reply

50 Mr Tonking submitted that the submissions of Mr Wood in relation to the exercise of discretion pursuant to s.8(8) were directed to the absence of evidence from the defendants about the proceedings they had instituted in Sweden. He submitted that this Court should not go behind the Award at this stage. The difficulty those submissions raise are that the onus is on the defendants to demonstrate that the proceedings should be adjourned pending the final determination of the proceedings in the Swedish Court. It seems to me fundamental, if the defendants are to discharge that onus, that they demonstrate, at least at a prima facie level, that the Swedish proceedings are proceedings, which fall within s.8(8). Firstly, they must be proceedings to a competent authority. Secondly, they must be proceedings for the setting aside or suspension of the Award. Thirdly, there must be some evidence to show that there is a prima facie or reasonably arguable case. This has a number of other requirements, including that the proceedings are brought within time and are otherwise competent. The defendants' submission was that I should infer from Mr Ohlin's letter that these requirements had been met and, to some extent, the submission was made that as the matter had come on as one of urgency there had not been sufficient time to obtain other evidence in

relation to the nature of the proceedings. I do not consider that it is appropriate to draw the inference from Mr Ohlin's letter for which the defendants contend. There is absolutely no reason why Mr Ohlin could not have produced some material, which would have indicated that the proceedings were of the appropriate nature, brought within time and such as to show a prima facie case. Further, in this case, the proceedings in Sweden are brought in relation to the validity of the Agreement and there is no evidence to suggest how that is necessarily related to setting aside or suspending the Award.

51 So far as the question of time available to obtain further evidence is concerned, I raised expressly with Mr Tonking that there was no application for an adjournment by the defendants to produce further evidence, and he made no such application. Accordingly, the proper course is to determine his clients' Notice of Motion on the available evidence.

Conclusions

52 In my opinion the defendants' Notice of Motion filed on 2 June 1999 must be dismissed with costs. In these circumstances it becomes unnecessary to consider the plaintiffs' Notice of Motion for security. I think, however, that it is appropriate to stand that over lest there be an appeal from my decision, the result of which renders it necessary for consideration to be given to that aspect of the matter.

Orders

53 I order that:-

(a) The defendants' Notice of Motion filed on 2 June 1999 be dismissed with costs.

(b) The plaintiffs' Notice of Motion filed on 7 June 1999 be stood over to 11 June 1999.

(c) The proceedings be stood over to 11 June 1999 for directions.

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LAST UPDATED: 10/06/1999