5.5.97

IN CHAMBERS

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 694/96

BETWEEN:	I.N.E.C. ENGINEERING COMPANY LTD.	PLAINTIFF
AND:	RAMOIL HOLDING CO. LTD.	DEFENDANT

For the plaintiff: Mr. D. Murray
For the defendant: Ms. A. Pecarrino

BEFORE DOUGLAS, J.

R U L I N G

Both parties to these applications are corporations. The plaintiff INEC Engineering Company Ltd. ("INEC") is registered in England. The defendant Ramoil Holding Company Ltd. ("Ramoil") has its registered office in the Cayman Islands. Hence the jurisdiction of this court to hear these applications.

By an agreement in writing dated 30th September 1993 between the parties, INEC appointed Ramoil as contractor in connection with the

construction of a business centre in Surgat, Russia.

In November 1996 INEC stopped working on the project and thereafter initiated arbitration proceedings pursuant to Clause 17.1 of the Agreement.

Before me are two summonses, the first, under Order 14 of the Cayman Islands Grand Court Rules, was filed on 16th January 1997 by INEC seeking Final Judgment against Ramoil in the sum of US$221.789.40. Ramoil has taken no step in these proceedings and therefore has not subjected itself to this jurisdiction in this matter.

The other summons, filed on 17th February 1997 on behalf of Ramoil, seeks an order pursuant to Section 6 of the Arbitration Law (1996) Revision, that INEC's action be stayed. In view of the nature of this latter summons it is imperative that it be given priority.

Section 6 of the Arbitration Law (supra) gives a party to an arbitration agreement against whom any legal proceedings have been commenced by any other party to the agreement the right to apply to the Court to stay the proceedings and the Court may make such an order.

This section will not play a role of any significance in the determination of this matter, accordingly I have taken the liberty to abridge it. My reason for doing so is that it is subsumed by the provisions of Sections 3 and 4 of the Foreign Arbitral Awards

Enforcement Law (30 of 1975). The relevant sections are as follows:

> (3) This law has no application to domestic arbitration agreements but section 4 applies to other agreements in lieu of Section 6 of the Arbitration Law, 1974.
>
> (4) If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to to be referred, shall make an order staying the proceedings.

It must be observed that the power granted to the Court by Section 4 is mandatory and not discretionary as that to be exercised under Section 6 of the Arbitration Law. Under the Foreign Arbitral Awards Enforcement Law the court is obliged to make the order unless satisfied, inter alia, that the agreement is null and void, or that there is not in fact any dispute between the parties. The conditions which would operate to obviate the making of the order staying the proceedings are specifically stated. Section 4 (supra) limits the parties to matters agreed to be referred. These are delineated by Clause 17.1 of the Agreement.

17.1 The parties shall endeavour to settle all matters through friendly negotiations. If the parties are unable amicably to resolve a dispute of differences arising out of, or in relation to, this Agreement or the interpretation or performance thereof, such matter shall be finally and exclusively settled by arbitration in Stockholm, Sweden, without recourse to the courts of law.

This Clause widens the scope of matters which are to be referred, and encompasses any dispute of differences arising out of, or in relation to the agreement or the interpretation or performance of it. These are the matters which the parties have agreed that they shall refer to the arbitrator. The conclusion is that every dispute between the parties regarding the Agreement must be so referred, without recourse to the court of law.

In view of the exclusionary nature of the clause the issue of the Agreement's validity arises (see Section 4 of the Foreign Arbitral Awards Enforcement Law (supra). It is an axiomatic principle of our law that if parties seek, by agreement, to take the law out of the hands of the court into the hands of a private tribunal without any recourse at all to the courts in case of error of law, then the agreement is to that extent contrary to public policy. (See Chitty on Contract 24th Ed. 935). Accordingly, our law does not allow the court's jurisdiction to be ousted by a mere arbitration clause, and any attempt to do so would be considered invalid.

At this point it must be determined whether, by virtue of the objectionable nature of the Clause, a court of law is in any way obliged to recognise the Agreement. At a glance it would appear that under Article 11 (1) The Text of the Convention on the Recognition and Enforcement of Arbitral Awards, the court is obliged to recognise any such agreement. This article reads -

> "Each contracting state shall recognise an agreement in writing under which the parties undertakes to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."

We have already seen that by Section 4 of the Foreign Arbitral Awards Enforcement Law the court is precluded from ordering a stay of proceedings if it finds the arbitration agreement null and void. However the position changes when the article is read in conjunction with Clause 17.2.

This Clause provides as follows:-

> "The rights and obligations of the parties under this Agreement shall be construed in accordance with the terms and conditions of this Agreement and the substantive law of Sweden (excluding choice of law rules)."

The result is that notwithstanding the offensive nature of Clause 17.1 a court in this jurisdiction cannot declare it, or the Agreement to be null and void. The determination of any matter pertaining to the Agreement must be construed under Swedish Law by the Arbitrator. However

it still remains for this court to determine whether or not there is a dispute between the parties arising out of the Agreement, and if so determined, make an order staying INEC's proceedings by virtue of the powers granted under Section 4 of the Foreign Arbitral Awards Enforcement Law (supra). If, or when this is done the plaintiff's only recourse would be to refer the matter to the arbitrator, provided it has not already done so.

The parties have argued strenuously whether the action brought by INEC'S constitutes a dispute. INEC contends that the debt owed by Ramoil is one documented by invoices approved by Ramoil, and accordingly, cannot be regarded as such. On the other hand Ramoil has linked its reluctance to pay the amount owed with INEC's failure to put in place an irrevocable advance payment guarantee in accordance with Clause 6.1 of the Agreement. Both these contentions essentially relate to the rights and obligations of the parties. INEC's right to be paid the amount due, Ramoil's obligation to put in place the guarantee, and Ramoil's right to be protected by same. This obviously constitutes a dispute between the parties regarding the performance of the Agreement, which, pursuant to Clause 17.1 (supra) must be referred to arbitration. Having found this to be the situation, there is one more aspect of this matter which requires my comment.

As I have already stated in November 1996 INEC initiated proceedings before the arbitrator in Sweden on the ground that there is a dispute with Ramoil. Its actions against Ramoil in this jurisdiction now means that notwithstanding the provisions of Clause 17.1, INEC now has two

concurrent proceedings against the other party to the agreement in two different forums. The nature of the dispute before the arbitrator remains undisclosed. However, it is obvious that INEC has not acted in good faith. The contract between the parties is now well advanced. Already INEC has received over three million dollars in payment from Ramoil. It must be fully aware that should faulty workmanship be discovered after all payments have been made, the only safeguard available to Ramoil would be the irrevocable advance payment as provided for by Clause 6.1 (supra) and which INEC has failed to put in place. The fact that Ramoil has gone so far with the construction does not necessarily mean that it has permanently waived its right to the guarantee and left itself unprotected. It is certainly entitled to take any available step to have the Clause complied with before the job is completed. Having failed to fulfill with its obligation to put the guarantee in place, INEC has now come to this court seeking an order which, if granted, would effectively deprive Ramoil of the only safeguard at its disposal.

Ramoil has also contended that there are other breaches on the part of INEC. By virtue of Clause 16.3 of the Agreement Ramoil has the right to suspend the payments in the event of any essential breach by INEC. However, under that Clause Ramoil is required to give written notice of such breaches to INEC, and there is no indication that such has been done. This is a matter for the arbitrator and in the meantime Ramoil is perfectly at liberty to treat the issues giving rise to these contentions as a dispute of difference relating to the agreement, which accordingly, can only be determined by arbitration. I therefore find

that the issue resulting in INEC's Summons for Final Judgment is a matter for the arbitrator. Accordingly Ramoil's application to stay these proceedings is hereby granted.

Costs of this application to defendant to be agreed or taxed.

Kipling Douglas
Judge of the Grand Court

Dated 15th May 1997

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