

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO. 939 OF 2000**

BETWEEN

ELIZE FUNG

1st Plaintiff

LANDMARK INVESTMENTS
TRADING LIMITED

2nd Plaintiff

and

WELL LUCK INTERNATIONAL
HOLDINGS LIMITED

1st Defendant

JOYFUL LUCK
INVESTMENTS LIMITED

2nd Defendant

WINCO INTERNATIONAL
GROUP LIMITED

3rd Defendant

GLOBAL FAITH
INVESTMENTS LIMITED

4th Defendant

Before: Hon Chung J in Chambers

Date of Hearing: 3 February 2000

Date of Judgment: 3 February 2000

J U D G M E N T

This is an action taken by the Plaintiffs against 4 BVI Companies. Mr Harris representing D4 appeared before me and informed me that the 4 Defendants were served with the Writ herein and other documents on 2 February 2000 BVI Time. Further, D4 has taken out an application asking for a stay of these proceedings pursuant to s. 6 of the Arbitration Ordinance Cap. 341. That application is opposed by the Plaintiffs.

There is no need to go into the details of the parties' dispute for the purpose of the stay application save that the Plaintiffs do not dispute for the purpose of this application that their case against D4 was that D4 breached a shareholder agreement dated 27 June 1999. Further, the parties to the stay application do not dispute (for the purpose of the stay application) that: -

- (a) Clause 10 of the shareholder agreement provides that:

“THIS AGREEMENT shall at all times be read in conjunction with and shall be an integral part of the Company's Articles of Incorporation, Company's Memorandum, the Company's Minutes and any other pertinent Company documents required in the course of the Company's business and good standing with the Company Registrar in Hong Kong.”

- (b) Article 103 of D4's Articles of Incorporation provides that:

“Whenever any difference arises between the Company on the one hand, and any of the members, their executors, administrators or assigns on the other hand touching the

true intent and construction or the incidence or consequences on these presents of the Ordinance, touching anything done or executed, omitted or suffered in pursuance of the Ordinance, or touching any breach or alleged breach or otherwise relating to the premises or to these presents or to any Ordinance affecting the Company or to any of the affairs of the Company, such difference, shall, unless the parties agree to refer the same to a single arbitrator, be referred to two arbitrators, one to be chosen by each of the parties to the difference and the arbitrators shall before entering on the reference appoint an umpire.”

- (c) The validity of D4’s argument that in such a case the court must grant the application for a stay, relying on the observation in *Tai Hing Cotton Mill v. Glencore Grain* [1996] 1HKC 363 at 373 H-I which reads:

“Under Article 8(1) of the Model Law, the court is not concerned with investigating whether the Defendant has an arguable basis for disputing the claim. If the claim is made against him in a matter which is the subject of an arbitration agreement and he does not admit the claim, then there is a dispute within the meaning of the article. And if he seeks a stay of the action, the court must grant a stay unless the Plaintiff can show that the arbitration agreement is null and void, inoperative or incapable of being performed.”

- (d) There was or were difference(s) between the parties within the meaning of Article 103 of D4’s Articles of Incorporation.

Mr Wong for the Plaintiffs argues that no stay of proceedings should be granted because D4 has acted in a way as to lead a reasonable person to the conclusion that it did not intend to abide by the arbitration agreement. He argues that D4 did so by indicating in two letters respectively dated 15 January 2000 and 19 January 2000 from its solicitors to the effect that legal action would be commenced. Mr Wong further

argues that such amounted to an anticipatory breach of the arbitration agreement which the Plaintiffs accepted by instituting this action.

After reading the relevant letters from D4's solicitors and a letter dated 19 January 2000 from the Plaintiffs' solicitors, I agree with Mr Harris that the references to legal action in the two letters from D4's solicitors cannot reasonably be understood to refer to a legal action relating to the shareholder agreement dated 27 June 1999.

I therefore do not accept Mr Wong's argument that D4 was in anticipatory breach of the arbitration agreement. The Plaintiffs have not advanced any other grounds of objection to the stay application and I do not find that there is any other reason not to grant the stay asked for. There will therefore be an order in terms of the D4's application for stay.

(Andrew Chung)
Judge of the Court of First Instance

Mr Johnathan Wong, instructed by Messrs King & Co., for the Plaintiffs

1st-3rd Defendants in person, absent

Mr Johnthan Harris, instructed by Messrs Alvan Liu & Partners, for the 4th
Defendant