

THOMAS J. DAVIS, INC.
vs.
MICRONESIAN HOTEL
CORPORATION

Appellate No. 83-9017
District Court NMI
Appellate Division

Decided June 11, 1985

1. Arbitration - Parties

Where contract incorporated by reference the American Arbitration Association Rules, which rules provide for an arbitration proceeding in the absence of a party, the arbitrator was not acting in excess of his powers by proceeding to arbitration in defendant's absence.

2. Arbitration - Compelling

Where the contract of arbitration makes it clear that the arbitrator can proceed when one party neglects or refuses to participate, one need not apply to a court for an order to compel before commencement of arbitration. Guam Code Civ. Proc. §2112.

3. Arbitration - Compelling

Although language in a contract providing that the agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law would allow resort to a court to compel arbitration in the event of one party's unwillingness, it cannot be interpreted as mandatory in every instance merely because it is available. Guam Code Civ. Proc. §2112.

4. Arbitration - Confirmation of Award

Where statute provides that where no court is specified in the agreement of the parties, application for an order confirming an arbitration award may be made to the

Superior Court of Guam, such statutory language is permissive and not exclusive and thus application for confirmation may be made to another court with subject matter jurisdiction. Guam Code Civ. Proc. §2112.

5. Arbitration - Confirmation of Award

A final arbitration award gives rise to a cause of action sounding in contract and an action to confirm an award is in essence an action for specific performance of a contract.

6. Arbitration - Confirmation of Award

The designation by the contracting parties of the law governing the contract does not prevent confirmation by the courts of a jurisdiction other than that specified; such courts will simply apply the laws of the designated jurisdiction.

7. Arbitration - Confirmation of Award

The Commonwealth Trial Court had common law jurisdiction to confirm an arbitration award even though the award was executed in another jurisdiction.

1 The material facts giving rise to this appeal are not
2 in dispute. On May 15, 1979, MHC as owner, and Davis, as
3 architect, entered into a written agreement requiring Davis to
4 design condominium units to be added as an extension to the
5 existing Royal Taga Hotel in Susupe, Saipan, CNMI. The contract
6 utilized was the Standard American Institute of Architects form
7 which included an arbitration provision at Article 11. That
8 provision provided that any disputes arising out of the contract
9 would be decided "by arbitration in accordance with the
10 Construction Industry Arbitration Rules of the American
11 Arbitration Association (AAA) then obtaining unless the parties
12 mutually agree otherwise." Article 11 of the contract contained
13 the following language which is critical to the issues presented
14 in this appeal:

15 "This Agreement to arbitrate and any agree-
16 ment to arbitrate with an additional party or
17 parties duly consented to by the parties
hereto shall be specifically enforceable
under the prevailing arbitration law."

18 At all times herein relevant, Guam law included the
19 Guam Arbitration Act codified at Guam Code of Civil Procedure
20 §§2110 et. seq. The Guam Arbitration Act includes a provision
21 for obtaining an order to compel arbitration in situations where
22 one party to an arbitration agreement refuses to participate.

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1 Guam Code of Civil Procedure § 2112.^{1/} The Guam Arbitration Act
2 also provides that jurisdiction to confirm an award into a
3 judgment may be made with the Superior Court of Guam unless the
4 parties otherwise agree. Guam Code of Civil Procedure § 2116.^{2/}

5 As a result of a dispute between Davis and MHC with
6 respect to services and payments for those services under the
7 contract, a demand for arbitration was filed by Davis with the
8 AAA. By letter dated December 22, 1981, the American Arbitration
9 Association accepted arbitration and so notified both Davis and
10 MHC. At various times from December 22, 1981, through the final
11 arbitration award on March 28, 1983 both Davis and MHC were kept
12 apprised of the actions of the AAA with respect to selection of
13 an arbitrator, place of arbitration and jurisdictional objec-
14

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16 ^{1/}Guam Code Civ.Proc. § 2112 provides in pertinent part:

17 A party aggrieved by the alleged failure, neglect, or
18 refusal of another to arbitrate under a written agree-
19 ment for arbitration may petition the court in Guam
20 having jurisdiction, for an order directing that such
arbitration proceed in the manner provided in such
agreement... .

21 ^{2/}Guam Code Civ.proc. § 2116 provides in pertinent part:

22 If the parties in their agreement have agreed that a
23 judgment of the court shall be entered upon the award
24 made pursuant to the arbitration, and shall specify the
25 court, then at any time within one (1) year after the
26 award is made, any party to the arbitration may apply
to the court so specified for an order confirming the
award If no court is specified in the agree-
ment of the parties, then such application may be made
to the [Superior] Court of Guam.

1 tions. MHC refused to attend the arbitration hearing which
2 proceeded in its absence. On March 17, 1983 an "award of arbi-
3 trator" was executed awarding Davis \$110,220.63 on its claim
4 together with all administrative fees and expenses of the AAA and
5 all fees, costs and expenses of the arbitrator.

6 Prior to the arbitration Davis did not file any action
7 to compel arbitration pursuant to Section 2112, Guam Code of
8 Civil Procedure, nor did MHC file any action enjoining the
9 arbitration proceedings.

10 On May 19, 1983, Davis brought the instant action in
11 the Commonwealth Trial Court requesting judicial confirmation of
12 the arbitration award. MHC answered and asserted two affirmative
13 defenses arguing essentially that a judicial order compelling
14 arbitration was a jurisdictional prerequisite to the maintenance
15 of the arbitration where one party was absent.

16 The trial court granted summary judgment in favor of
17 Davis. In rejecting MHC's arguments regarding the failure of
18 Davis to seek an order compelling arbitration, the trial judge
19 noted that the language of § 2116 of the Guam Code of Civil
20 Procedure was merely permissive allowing the preliminary issuance
21 of such an order but not requiring it. The decision did not
22 address the issue of the trial court's subject matter jurisdic-
23 tion which was raised only at the hearing of the motions.

24 MHC appeals from this judgment, arguing that: (a) the
25 arbitrator had no jurisdiction to enter the award absent an order
26 from the Superior Court of Guam compelling arbitration; (b) the

1 Commonwealth Trial Court lacks subject-matter jurisdiction to
2 confirm the arbitrator's award.

3 The first issue to be resolved is whether the arbitra-
4 tion agreement was self-executing such that the arbitrator could
5 proceed: (a) in the absence of MHC; and (b) without first
6 obtaining a court order compelling arbitration.

7 [1] Rule 29 of the AAA rules, which were incorporated by
8 reference into the American Institute of Architects standard form
9 contract, provides for an arbitration proceeding in the absence
10 of a party. Thus, the arbitrator was not acting in excess of his
11 powers when proceeding to arbitration in MHC's absence. Mitchum,
12 Jones & Templeton, Inc. v. Chronis, 72 Cal.App.3d 596, 601-602,
13 140 Cal.Rptr. 160, 163 (1977).

14 [2] Appellant argues that, because of the provision for
15 specific enforcement of the agreement to arbitrate in Article 11,
16 Davis was obligated to obtain a court order before proceeding to
17 arbitration. The law is to the contrary. Where the contract of
18 arbitration makes it clear that the arbitrator can proceed where
19 one party neglects or refuses to participate, one need not apply
20 to a court for an order to compel prior to commencement of arbi-
21 tration. See N.A.M.E.S. v. Singer, 90 Cal.App.3d 653, 657, 153
22 Cal.Rptr. 472, 473-474 (1979); Kustom Kraft Homes v. Leivenstein,
23 14 Cal.App.3d 805, 810 92 Cal.Rptr. 650, 654 (1971); Smith v.
24 Campbell & Facciolla, Inc., 202 Cal.App.2d 134, 137, 20 Cal.Rptr.
25 606, 608 (1962).

26 [3] Further, Guam Code Civ.Proc. § 2112 provides that a

1 party "may" petition a court in Guam to compel arbitration where
2 the other party neglects or refuses to submit to arbitration.
3 This permissive language does not impose an obligation on the
4 aggrieved party to invoke § 2112. Thus, while the language of
5 Article 11 certainly would allow resort to a court to compel
6 arbitration in the event of one party's unwillingness, it cannot
7 be interpreted as mandatory in every instance merely because it
8 is available.

9 [4] Similarly, Guam Code Civ.Proc. § 2112 provides that
10 where no court is specified in the agreement of the parties,
11 application for an order confirming an arbitration award may be
12 made to Superior Court of Guam. This language, like that of the
13 federal arbitration statute, is permissive and not exclusive.
14 See 9 U.S.C. § 9. Thus, the application for confirmation may be
15 made to another court with subject-matter jurisdiction.^{3/}
16 Since January 10, 1983, and at the time this action was
17 commenced, the Commonwealth Trial Court has had original
18 jurisdiction over all civil and criminal matters arising under
19 the laws of the Commonwealth.^{4/} The enactment of this latter

20
21 ^{3/}Article 11.3 of the contract provides:

22 The award rendered by the arbitrators shall be final,
23 and judgment may be entered upon it in accordance with
applicable law in any court having jurisdiction thereof.

24 ^{4/}1 CMC § 3102(b):

25 Effective January 10, 1983, the Commonwealth Trial
26 Court shall have the original jurisdiction over all civil
and criminal matters arising under the laws of the Common-
wealth of the Northern Mariana Islands.

1 provision made the Commonwealth Trial Court the court of general
2 jurisdiction in the Northern Mariana Islands. The issue becomes
3 whether the trial court had subject matter jurisdiction to
4 confirm the arbitration award. This question is readily answered
5 in the affirmative.

6 [5-7] The principles of arbitration existed at common law and
7 were enforceable by courts exercising common law jurisdiction.

8 See Hart v. State Farm Mutual Automobile Insurance Co., 431 A.2d
9 283, 285 n.5 (Penn. 1981); Robinson v. Navajo Freight Lines,
10 Inc., 70 N.M. 215, 372 P.2d 801, 807 (N.M. 1962); Finez v.
11 Pickrell, 81 Ariz. 313, 305 P.2d 455, 458 (Ariz. 1956); Chillum-
12 Adelphi Volunteer Fire Dept., Inc. v. Button & Geede, Inc., 219
13 A.2d 801, 805 (Md. 1963). A final arbitration award gives rise
14 to a cause of action sounding in contract. An action to confirm
15 an award is in essence an action for specific performance of a
16 contract. Chillum-Adelphi Volunteer Fire Dept., Inc., supra, at
17 805; Stermer v. Modiano Construction Co., Inc., 44 Cal.App.3d
18 264, 272, 118 Cal.Rptr. 309, 315 (Cal.App. 1975). The
19 designation by the contracting parties of the law governing the
20 contract does not prevent confirmation by the courts of a
21 jurisdiction other than that specified; these courts will simply
22 apply the laws of the designated jurisdiction. Foley Co. v.
23 Grindsted Products, Inc., 233 Kan. 339, 662 P.2d 1254, 1257 (Kan.
24 1983). Nor does the fact that the award was executed in another
25 jurisdiction deprive the forum court of subject-matter
26 jurisdiction. Id. at 1263-1264. Accordingly, the trial court

1 had common law jurisdiction to confirm the arbitration award in
2 this case.

3 The arbitration agreement is self-executing, the
4 arbitrator's award was proper in this case, and the Commonwealth
5 Trial Court has jurisdiction over this matter.

6 Summary judgment confirming the arbitration award was
7 proper.

8 AFFIRMED.

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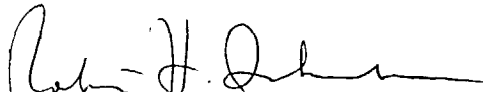
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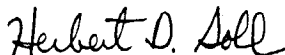
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ALFRED LAURETA
District Judge



ROBERT H. SCHNACKE
District Judge



HERBERT D. SOLL
Designated Judge