ANANDA NON-FERROUS METALS LTD v CHINA RESOURCES METAL AND MINERALS CO LTD - [1993] HKCU 0668

High Court (In Chambers)
Kaplan, J.

Construction & Arbitration List No. 10 of 1993

22 June 1993, 12 July 1993

Kaplan, J.

It could be said that the issue I have to decide in this case is "when is an international arbitration not an international arbitration."

The plaintiffs, who were the respondents to an arbitration, seek my leave to appeal against an interim award of Mr. Anthony Dicks made on 26th April 1993. As a matter of interest, this is the first application I have received for leave to appeal against an arbitral award in the almost 3 years that I have been the judge in charge of this list. In fact, I am not aware of any such application since the case of *P.T. Dover Chemical Company v. Lee Chang Yung Chemical Industry Corporation* [1990] 2 HKLR 257 which related to an award rendered on 29th February 1988.

Mr. Joseph Fok, who appeared before me for the defendants (the successful claimants in the arbitration) supplied me with a skeleton argument which was, of course, served on Mr. Neville Sarony, Q.C. who appeared for the plaintiffs. In that skeleton, Mr. Fok took the point that I had no jurisdiction to hear this application as this was an international arbitration agreement to which the Model Law applies and under that law there is no right of appeal. It was agreed quite sensibly that I should first hear the argument limited to jurisdiction because if I found there was no jurisdiction, then clearly there was no point going into the other matters which had been raised

The Model Law was incorporated into Hong Kong law with effect from 6th April 1990. The arbitration clause in this case is contained in a Sales Confirmation dated 24th July 1991 and thus it falls to be considered whether the Model Law applies.

Both parties are Hong Kong companies having their places of business in Hong Kong. However, regard must be had to Article 1(3) of the Model Law. That provides that an arbitration is international if the parties have their place of business in different States (not the case here) or if "one of the following places is situated outside the State in which the parties have their place of business;

> (5) (i) ....
> (ii) *any place where a substantial part of the obligations of the commercial relationship is to be performed ...*" [emphasis added]

The contract

The Sales Confirmation dated 24th July 1991, signed by both parties, provided that the plaintiff (respondent in the arbitration) would sell to the defendant 40 metric tonnes more or less of Cadmium Ingots CD 99.99 per cent minimum CIF Rotterdam at US$1.63 per pound.

As appears from the award and the documents placed before me, the Cadmium went from Hunan via Guangzhou to Hong Kong where it was packed, as provided in the contract, into wooden boxes and shipped to Rotterdam on board M.V. Ville de Virgo on 27th August 1991.

On 21st August 1991, the defendant entered into a contract with another Hong Kong Company for the Sale of 40 tonnes of Chinese Cadmium Ingots packed in wooden cases at the price of US$1.80 per pound "in warehouse Rotterdam".

On or about 17th September 1991, the defendant paid the plaintiff US$143,690.25 under the terms of the contract.

The goods arrived in Rotterdam on 9th October 1991 and were discharged into a warehouse. Following an inspection, the issue was raised as to whether the goods complied with their description contained in the contract. That was the issue in the arbitration as was the effect to be given to other contractual terms.

Clause 11 of the Sales Confirmation was headed "Claim for loss, breakage of packing, shortage, weight and inferior quality." The latter part of this clause provided as follows;

"The parties shall endeavour to settle amicably any claims or dispute which may arise under this contract failing which the dispute shall be referred to and finally settled by an Arbitration under the Laws of Hong Kong. The award shall be final and binding on both parties.".

***Was a substantial part of the obligations of the commercial relationship to be performed outside Hong Kong*?**

Whilst not conceding this point, Mr. Sarony had little to submit on this issue. The factors that satisfy me that a substantial part of the obligations of the commercial relationship were to be performed outside Hong Kong are as follows and I take these from Mr. Fok's helpful skeleton argument.

(1) The contract was on CIF Rotterdam terms.
(2) A seller's obligation under a CIF contract is to procure shipping documents for goods of the contract description either by shipping the goods himself or by buying the goods afloat *(see Benjamin's Sale of Goods* (4th *ed.))* para.19-010,, *page* 1079).

Under this particular contract, it was clearly implied that the Cadmium Ingots were to come from China. One of the requisite documents against which payment was to be made was a CCIB Certificate. This could only indicate that the goods were to originate from China. Mr. Fok points out that the plaintiff's case emphasized most strongly the alleged finality of this CCIB Certificate.

The plaintiff was obliged under this contract to procure the goods from China to be shipped within the shipment period on board a vessel bound for Rotterdam. It is clear from the documents I have been shown that the plaintiff did this.

Mr. Fok pointed out that the delivery obligation under a CIF Contract consists of three stages.

(a) Even though the seller may be entitled to payment on tender of documents, he remains under an obligation not to prevent physical delivery of the goods at the destination;
(b) When the goods have arrived, the buyer is entitled to a reasonable opportunity to examine them (which in effect is what Clause 11 of the Sales Confirmation says).

The CIF buyer has a right to re-check the goods upon delivery and this is separate and successive to its right to reject the shipping documents (see *Gill and Duffus v. Berger & Co. Inc.* [1984] 1 AC 382);

(c) If the goods are not in conformity with the contract, the buyer is entitled to reject the goods even though he has been obliged to accept and pay for the shipping documents;
(d) Where the buyer has so rejected the goods (as the arbitrator found the defendant had done in this case), the buyer is entitled to damages for non-delivery under s. 53(1) of the Sale of Goods Ordinance (Cap. 26). This was the very nature of the claim made by the defendant in the arbitration.

In the light of the above, Mr. Fok submitted that both at the "procuration" stage and at the "delivery" stage of this CIF contract, a substantial part of the obligations of the commercial relationship was to be performed outside Hong Kong.

Mr. Fok relied upon a previous decision of mine in *Fung Sang Trading Ltd. v. Kai Sun Sea Products and Goods Co. Ltd.* [1992] 1 HKLR 40. That case was remarkably similar to the present. In that case, both buyer and seller were Hong Kong companies with their place of business in Hong Kong. One agreed to sell to the other a quantity of soya beans. Hong Kong Law applied and there was a Hong Kong arbitration clause. Payment had to be made in Hong Kong. However, I held that this was an international arbitration agreement because delivery of the soya beans had to take place in China and I was thus satisfied that a substantial part of the obligations of the commercial relationship was to be performed outside Hong Kong.

The only difference between the **Fung Sang** case and the present case was that in **Fung Sang** I was dealing with a FOB Contract whereas here I am dealing with a CIF Contract. However, I do not consider that this makes any real difference on the facts of this case because I am quite satisfied that a substantial part of the obligations of this commercial relationship to be performed by the seller was to be perfommed outside Hong Kong. As Mr. Fok pointed out the fact that the goods came to Hong Kong and were transhipped may have simply been because there was no direct liner route between the port of origin and Rotterdam. In any event, the fact that the goods did arrive in Hong Kong and were packed into wooden boxes and transhipped does not in any way detract from the substantial obligations which had to be performed by the seller outside Hong Kong, namely, delivering goods of the contract description to Rotterdam.

In all the circumstances, therefore, I am quite satisfied that, all other things being equal, this was an international arbitration agreement to which the Model Law applies.

Are the defendants estopped from contending that the Model Law applies?

This is really Mr. Sarony's main point. He submits that this arbitration was conducted throughout by both parties on the basis of it being a domestic and not an international arbitration. This point was not raised until the service of the defendant's skeleton argument on 23rd June 1993. Mr. Sarony submits that the defendants are estopped from raising this issue now, alternatively, have waived any right to claim that this is an international arbitration agreement to which the Model applies. Still, alternatively, he submits that by operation of ss. 2M and 34A(2) of the Arbitration Ordinance and by reference to the dealings between the parties, they had agreed in writing either that:

(a) the agreement is, or is to be treaded as, a domestic arbitration agreement; or
(b) that the dispute is to be arbitrated as a domestic arbitration and that the Model Law does not apply by virtue of s. 34A(2).

In support of all these submissions, Mr. Sarony relies upon 3 documents.

By a letter dated 14th April 1992, Messrs. Slaughter and May appearing for the claimants in the arbitration wrote to the solicitors on the other side and stated *inter alia;*

"Would you please therefore accept this letter as formal notice to your clients to request and require them to concur in the appointment of an arbitrator pursuant to Clause 11 of the agreement dated 24th July 1991 between our respective clients.

In the absence of such concurrence within 10 clear days of the date of this letter, we have instructions to apply to the High Court to appoint an arbitrator pursuant to s. 12 of the Arbitration Ordinance."

By a summons dated 17th November 1992, the plaintiffs issued a summons for an appearance before the arbitrator for an application that they be at liberty to serve interrogatories the claimants. This summons was headed;

"Pursuant to s. 14(1) of the Arbitration Ordinance."

By a summons dated 24th November 1992, Slaughter & May for the claimants in the arbitration, issued a summons returnable before the arbitrator in relation to discovery and they also headed their summons;

"Pursuant to s. 14(1) of the Arbitration Ordinance."

Mr. Sarony submits that each of the above documents specifically invoked or relied upon the provisions of sections under Part II of the Ordinance and neither party challenged the propriety of so doing from which it is reasonable, he submits, to draw the only possible inference that both parties were agreeing in writing to treat

the agreement as a domestic arbitration alternatively that the dispute was to be arbitrated as a domestic arbitration.

It seems to me fairly clear that neither side applied their minds at the time of the arbitration as to whether this was an international or a domestic arbitration. I put this point to both counsel and neither were prepared to dissent from this view. It is clear that the reference to s. 12 of the Arbitration Ordinance was an incorrect reference if this was an international arbitration to which the Model Law applied because the Court's power to appoint arbitrators is contained in Article 11 of the Model Law. However, I have to point out that I deal with approximately two applications each week to appoint arbitrators under the Model Law and the documentation in support is often ambiguous as to whether the application is under the Ordinance or under the Model Law and quite frequently the application is put in the alternative. I believe the reason for this is that, despite the fact that the Model Law has been part of Hong Kong's law of arbitration for over 3 years, it has not yet sufficiently sunk in that there are two quite separate regimes and parties do not apply their mind to this issue until it becomes relevant to do so. I am not prepared to place a great deal of weight on the references to s. 12 of the Arbitration Ordinance in Slaughter & May's letter and I do not think it correct or reasonable to construe it as an agreement to opt into the domestic regime from what was otherwise an international arbitration agreement.

It is also clear that the reference to s. 14(1) of the Arbitration Ordinance in the two summonses is also an incorrect reference because, in so far as the Model Law is concerned, it is only ss. 14(4), (5) and (6) of s. 14 that are relevant. (see the Arbitration (Amendment) Ordinance 1991 which so provides). I do not think it reasonable to construe the reference to s. 14(1) as an agreement to opt into the domestic regime. In particular, I note that it was the plaintiffs' solicitors who first referred to s. 14(1) in the heading to their summons which was simply followed by Slaughter & May in their summons a few days later.

I am not prepared to hold that these documents indicate an agreement by the parties to opt into the domestic regime as they have the power so to do under the Ordinance. If I was looking for an agreement, I would have the greatest possible difficulty in seeing how these parties were ad idem in the light of the irresistible inference that neither party applied their mind to this issue at all. Section 2M of the Arbitration Ordinance, which permits opting out of the Model Law into the domestic regime, can only be invoked if the parties agree in writing. I am not satisfied that any of the documents relied upon are a sufficient agreement in writing to come within s. 2M.

I now turn to consider Mr. Sarony's contention that in the light of the events that have happened and the documents to which I have referred, the defendants have waived any right to claim that this is an international arbitration agreement. I reject this submission as being unsustainable. It is perfectly plain that in order for there to be a waiver of a particular right, it is necessary for the person who is alleged to have waived that right to have knowledge as to the particular right which is being waived [See *Halsbury's Laws of England,* Vol. 16 pare. 922] On the evidence before me, the plaintiffs get nowhere near to establishing that the defendants had knowledge that they were dealing with an international arbitration and by these documents, or by their conduct, they unequivocally waived the rights ensuing therefrom.

I now turn to consider Mr. Sarony's primary submission that the defendants are now estopped from pursuing this issue at this stage. Before an estoppel can be established it is necessary to show that there was a representation by the defendant upon which the plaintiff relied in acting to his detriment. I fail to see what representation can be relied upon in this case. The representation must be clear and unequivocal. [see *Halsbury's Law of England* Vol. 16 paras. 1038-1048] The first representation can only be the erroneous reference in Slaughter & May's letter to s. 12 of the Arbitration Ordinance. I cannot believe that this was a representation that they would not rely on the Model Law nor do I believe that it was acted upon in any way by the plaintiffs. The next matter is the heading which the plaintiffs themselves placed upon their summons for discovery. That cannot be a representation made to them nor do I accept that it, in any way, stems from the reference to s. 12 in Slaughter & May's letter. I reiterate that neither party applied their mind to the particular issue now before me and I am quite satisfied that this particular document does not avail the plaintiffs. Similarly, merely because the defendants copied the heading of the plaintiffs' summons and referred to s. 14(1) of the Arbitration Ordinance that, in my view, cannot amount to a sufficient representation in law that the defendants were treating this arbitration as a domestic arbitration. The simple and plain fact of the matter is that both parties were under a misapprehension of the legal situation in which they found themselves. Their references to inappropriate sections cannot justify an estoppel in this case.

In the light of the above, I find myself in agreement with Mr. Fok's submission, namely, that there is nothing in the documents, conduct or submissions placed before me which justifies the deprivation of the defendants of a jurisdictional argument. I am quite satisfied that it cannot be said that the defendants have lulled the plaintiffs into any false sense of security. The defendants have not misled the plaintiffs nor have they misrepresented the position to them. If a misrepresentation is sought to be relied upon then it must be clear and unequivocal and there is nothing to justify such a conclusion.

Mr. Fok also submits that there is no evidence that the plaintiffs have acted to their detriment. Mr. Sarony attempts to counter this by submitting that they have lost their right of applying for leave to appeal. I fail to appreciate this argument because if I am right and this is, and always has been, an international arbitration agreement, they never had a right to apply for leave to appeal and thus have not been forced to act in any way to their detriment. At the very least, all that can be said on behalf of the plaintiffs is that, had they appreciated the position, and had they thought it to their advantage to attempt to opt out of the Model Law into the domestic regime, they could only have done so with the express consent of the defendants and I find it difficult to see why the defendants should have so agreed.

In all the circumstances, therefore, I am quite satisfied, that I do not have jurisdiction to consider the plaintiffs' application for leave to appeal against Mr. Dicks' award on the basis that, under the Model Law, there is no such provision.

There is, of course, a lesson to be learned from this application. As I made it clear in the **Fung Sang** case, since the introduction of the Model Law definition of international arbitration, many arbitration agreements which were clearly previously domestic are now to be treated as international. This is particularly so given Hong Kong's role as an international, trading and financial centre. The move away from a manufacturing base to a service base is going to ensure that more and more arbitration agreements are covered by the Model Law. In those circumstances, it is essential that the parties should consider the consequence of this at the earliest possible stage. If the parties are required to apply to the court for a stay of court proceedings brought in defiance of the agreement to arbitrate or if they have to apply for the appointment of an arbitrator then they have to focus early on the very point in issue in this case. However, whereas in this case there was an agreement on a sole arbitrator (the Model Law providing for three arbitrators unless the parties agreed on one), there was really nothing to focus the parties' attention on whether this was an international or a domestic case. I do not know, but it may be the case that Mr. Dicks, emminent though he is, did not focus on this particular distinction and indeed there really is no reason why he should have done so. If these parties had been unable to agree upon the identity of an arbitrator and the matter had to come to me to make an appointment, even if the application had been expressed in the terms of s. 12, I would certainly have pointed out that the party was applying under the wrong section and would have made them put it right as I have done several times.

It seems to me essential that all practitioners in this field should consider, at the earliest opportunity, in every arbitration with which they are dealing whether it is a domestic or an international arbitration. If there is any doubt about this matter, then such doubt can easily be resolved by virtue of an application to the court seeking the appointment of an arbitrator because the court, in such application, would be required to rule whether such appointment is being made under the domestic or international regime. It seems to me to be sensible for practitioners in this situation to clarify with each other at the earliest opportunity as to whether they are agreed on whether their arbitration is international or domestic and if there is a dispute about it, they should get such dispute resolved by the court as quickly as possible by using the most convenient vehicle for such a decision. It would be wholly undesirable for neither party to raise the question with one thinking it was international and the other thinking it was domestic, with the one thinking that he had at least the right to apply for leave to appeal being disappointed in the event of an adverse award. Although in this case I am quite satisfied that a substantial part of the commercial obligations were to be performed outside of Hong Kong, there may well be cases where the amount of the obligation to be performed outside Hong Kong is of questionable substance. That is the sort of case which ought to be resolved at an early stage so that the parties know precisely where they are. In addition to testing the matter in an application to appoint, I can see no reason why one party could not apply for a declaration that the arbitration is domestic. That would not be an application which would be made under the Model Law because Article 6 specifies expressly the functions that are to be performed by the High Court in relation to the Model Law and giving a declaration such as that suggested is not one of them. However, an application for a declaration that the arbitration is domestic is an application

which can be made to this Court and, if such relief is refused on the ground that the arbitration is international, the parties will have achieved a ruling on this issue at the earliest possible stage. An application such as that just envisaged could be made very quickly to the judge in charge of the Construction and Arbitration List and I would imagine it could be decided extremely quickly.

For the reasons above stated, this application is dismissed and I make a costs order *nisi* in favour of the defendants.