H SMAL LTD v GOLDROYCE GARMENT LTD - [1994] 2 HKC 526

HIGH COURT
KAPLAN J

MISCELLANEOUS PROCEEDINGS NO 908 OF 1994

13 May 1994

Arbitration -- Appointment of arbitrator -- Whether there was an arbitration agreement under art 7 of the Model Law

The plaintiff and defendant had previous business dealings. The plaintiff had sent to the defendant a purchase order in respect of certain goods. A Hong Kong arbitration clause was contained therein which referred to arbitration being conducted under the rules of the Hong Kong General Chamber of Commerce. The purchase order was signed by the plaintiff but no copy signed by the defendant had been produced, although a former employee of the defendant said that the defendant had signed and kept a copy.

The plaintiff made this application to appoint an arbitrator under s 12 of the Arbitration Ordinance (Cap 341) (the Ordinance). The issue between the parties was whether there was an arbitration agreement within the terms of art 7 of the Model Law as incorporated in the Fifth Schedule of the Ordinance. The plaintiff contended that evidence relating to the signing of the purchase order by the defendant had met the threshold requirement of art 7 and that there was an underlying contract between the parties which contained an arbitration clause.

Held, dismissing the application:

(1) The evidence by the former employee that the defendant had signed and kept a copy of the purchase order was hearsay and, therefore, little weight should be attached to it. As a consequence, the evidence did not meet the necessary threshold for art 7 to be complied with. *Pacific International Lines v Tsinlien Metals & Minerals* 1993 2 HKLR 249 applied.

(2) The doctrine of separability, being accepted as law in Hong Kong, rendered the arbitration agreement contained in another written agreement a life of its own. Under art 7(2), the arbitration agreement should be in writing and signed by both parties or contained in an exchange of letters or other means of telecommunication which provided a record of the agreement. The only document which was relevant in this context was the compensation agreement which did not refer to an arbitration clause. The arbitration agreement could not be established by a course of dealing or conduct of the parties. *Zambia Steel & Building Supplies v Clark (James) & Eaton* 1986 2 Lloyd 's Rep 225 distinguished.

(3) Even if compliance with art 7 was established, the discretion to appoint an arbitrator under s 12 of the Arbitration Ordinance (Cap 341) would not be exercised because the state of evidence was unsatisfactory and if the parties were forced to arbitrate, there would be difficulties which would far outweigh the importance and value of the claim.

Per curiam:

The Hong Kong General Chamber of Commerce had no rules for arbitration, had nothing whatever to do with the arbitration and, for some years now, had

referred all arbitration matters to the Hong Kong International Arbitration Centre. Parties who were using standard terms and conditions which made reference to the rules of Hong Kong General Chamber of Commerce or possibly to appointment in default by the Hong Kong General Chamber of Commerce were strongly

advised to change those terms because the Chamber would not assist with regard to arbitration any more. Reference should, of course, be made to the Hong Kong International Arbitration Centre and their rules.

Cases referred to

Pacific International Lines v Tsinlien Metals & Minerals [1993] 2 HKLR 249

Zambia Steel & Building Supplies v Clark (James) & Eaton [1986] 2 Lloyd's Rep 225

Legislation referred to

(HK) Arbitration Ordinance (Cap 341) ss 2, 12

(UK) Arbitration Act 1950 [UK] s 7

Other legislation referred to

Uncitral Model Law, Fifth Schedule, art 7

Application

This was an application by the plaintiff for an appointment of an arbitrator under s 12 of the Arbitration Ordinance (Cap 341) before Kaplan J. The facts appear sufficiently in the following judgment.

Alan Ng (Fairbairn Catley Low & Kong) for the plaintiff.

Henry Lo (Stevenson, Wong & Co) for the defendant.

KAPLAN J

I have before me an application made by the plaintiff for me to appoint an arbitrator under s 12 of the Arbitration Ordinance (Cap 341), this being clearly a domestic arbitration.

The definition of arbitration agreement contained in art 7 of the Model Law is by reason of s 2 of the Arbitration Ordinance also applicable to domestic arbitrations.

The defendant objects to the appointment of an arbitrator on the grounds that there has been no compliance with art 7 of the Model Law.

Briefly, what happened was this: the plaintiff and the defendant clearly had previous business dealings, although these are not fully specified in the evidence. However, they sent to the defendant a purchase order dated 12 June 1992 in respect of certain goods. Clause 7 of the terms and conditions of that purchase order contains a Hong Kong arbitration clause. I note in passing that this arbitration clause refers to the arbitration being conducted in accordance with the rules of the Hong Kong General Chamber of Commerce. I have to point out that the Hong Kong General Chamber of Commerce has no rules for arbitration, has nothing whatever to do with the arbitration and, for some years now, has referred all arbitration matters

to the Hong Kong International Arbitration Centre. I would strongly urge parties who are using standard terms and conditions which make reference to the rules of Hong Kong General Chamber of Commerce or possibly to appointment in default by the Hong Kong General Chamber of Commerce to change those terms because it will not find that the chamber will assist with regard to arbitration any more. Preference should, of course, be made to the Hong Kong International Arbitration Centre and their rules.

Be all that as it may, this document, the purchase order, was signed by the plaintiff but it is common ground that it was not signed by the defendant. When I say it was not signed by the defendant, I mean that no copy signed by the defendant has been produced. In fact, it has been stated on behalf of the plaintiff that a former employee, a Mr Echo Ng, who has now gone to Canada, did tell the plaintiff that he knew that the defendant had signed his copy of the purchase order and had kept a copy.

Mr Alan Ng, who appears on behalf of the plaintiff, has submitted, firstly, that I should decide that the evidence relating to the signing of the purchase order by the defendant in the circumstances I have just outlined is sufficient to meet the minimum threshold required for me to be satisfied that art 7 has been complied with. I cannot accept that submission. This evidence is hearsay. We do not know where it was signed or in fact by whom, on behalf of the defendant, it was signed. I am not suggesting that this is no evidence because a hearsay notice could be put in, but when one comes to consider the question of the weight to be attached to such evidence, I think it is almost inevitable that the court or an arbitrator would attach little weight to this in the absence of hearing from Mr Echo Ng. In my judgment, this evidence does not meet the necessary threshold to which I referred to in *Pacific International Lines v Tsinlien Metals & Minerals* 1993 2 HKLR 249.

The next way in which Mr Ng puts his case is that he submits that there clearly was a binding contract between these parties. He relies upon the fact that the goods were duly delivered and that disputes as to quality arose and that when those disputes arose, the defendant made an offer of compensation which was contained in a document, exhibited as LYL-9. He submits that it is clear beyond doubt that there was a contract between these parties and that contract contained an arbitration clause, and I should therefore appoint an arbitrator.

The problem with this argument is that it does not take into account that the arbitration agreement contained in another written agreement has a life of its own. The doctrine of separability has now been enshrined in the Model Law and has been fully accepted in case law in England and Hong Kong. Article 7(2) of the Uncitral Model Law states that the arbitration agreement shall be in writing and goes on to add that it is in writing if it is contained in a document signed by the parties. That is not the position here because only one party signed it. However, the arbitration agreement

is also in writing if is contained in an exchange of letters, telex, telegrams or other means of telecommunication which provide a *record* of the agreement, and the agreement there referred to is the agreement to arbitrate and not the agreement in relation to the underlying contract and Mr Ng, who has put his case extremely fairly and as attractively as possible, has been forced to concede that the only document to which he can refer in this context is, in fact, LYL-9, the compensation agreement, which makes no reference whatsoever to the arbitration clause.

Mr Ng has referred to and relies upon the well-known English Court of Appeal decision in *Zambia Steel & Building Supplies v Clark (James) & Eaton* 1986 2 Lloyd 's Rep 225. It has to be pointed out that that case concerned the definition of arbitration agreement contained in s 7 of the 1950 Arbitration Act which states:

> Arbitration agreement means an agreement in writing including an agreement contained in an exchange of letters or telegrams to submit to arbitration present or future differences capable of settlement by arbitration.

I do not propose to go into any detail about this case but it is worth noting that at p 235, at the end of his judgment, Ralph Gibson LJ stated this:

> Once it is clear that the assent to the written terms or evidence of it is not required to be contained in the written agreement but that assent to the written terms may be proved by other evidence, then, in my judgment, any evidence which proves that the parties agreed to be bound by an agreement to submit contained in a document or documents is sufficient to make the document or documents an agreement in writing within the 1975 Act.

It does not seem to me that this approach can be applied in quite the same way to art 7(2) of the Model Law if the other evidence is not written. The agreement to arbitrate has either to be in writing signed by the parties or contained in another document which provides a record of the agreement.

There is no basis for arguing that the arbitration agreement can be established by a course of dealing or the conduct of the parties. I have looked at the UNCITRAL reports in relation to art 7 and I am quite satisfied that art 7 cannot be complied with unless there is a record whereby the defendant has in writing assented to the agreement to arbitrate.

In all those circumstances therefore, it seems to me that the plaintiff has not established compliance with art 7 of the Model Law. Even if I were wrong about any of the matters to which I have just adverted, I would still be reluctant to exercise my discretion in favour of appointing an arbitrator because the state of the evidence

is really most unsatisfactory and I believe that if the parties were forced to arbitrate, there would be difficulties which would far outweigh the importance and value of this claim. This claim is just within the High Court limit. It is not a difficult claim and I think the plaintiff should be left to pursue its remedies through the litigation process.

I would like to complete this judgment by making the following comment. If parties really believe that arbitration is something which they want when disputes arise, then, it is incumbent upon them to ensure that art 7 is complied with. In the present case, it would have been very simple for the plaintiff to insist on a signed copy of the purchase order being returned to them by the defendant. If that simple precaution had been taken, then, the plaintiff would have been in possession of an arbitration agreement signed by the parties which complied with art 7. This is an elementary step and I urge all those in commerce and industry who are interested in ensuring that they arbitrate their disputes when they arise to make sure that their documentation complies with art 7 of the Model Law. It is not a difficult thing to ensure but it does prevent arguments such as have been submitted to me during the course of this hearing.

In all the circumstances therefore, this summons will be dismissed with costs to be taxed if not agreed.