NG KIN KENNETH v HK FOOTBALL ASSOCIATION LTD - [1994] 1 HKC 734

HIGH COURT
KAPLAN J

ACTION NO 2383 OF 1994

3 June 1994

Arbitration -- Arbitration agreement -- Arbitration clause in articles of association of company -- Whether member of company party to the agreement -- Companies Ordinance (Cap 32) s 23(1) -- Uncitral Model Law art 7(2)

Arbitration -- Arbitration agreement -- Construction -- Arbitration clause in articles of association of company -- Dispute between company and member -- Whether dispute envisaged by arbitration article

Arbitration -- Stay of proceedings -- Relevant factors in considering application -- Dispute relating to the suspension of a member by defendant association

The plaintiff was a football referee and a member of the defendant, a sports association, through his membership of member clubs of the defendant. The council of the defendant made a decision that the plaintiff was unwelcome to take part in their activities or to register himself as an official of the defendant or its member clubs. The plaintiff objected to such decisions and submitted that in making them, the defendant acted ultra vires its rules and that it had no power under its articles or rules to pass those sanctions. He issued a writ claiming, inter alia, a declaration that the said decision of the council was null and void and in breach of its rules. He also sought an interlocutory injunction. The defendant applied for a stay of the proceedings under the Arbitration Ordinance (Cap 341) by relying on art 49 of its articles of association which stated that 'members of the association ... shall submit and refer all differences and questions coming within the provisions of ... the rules of the association to the decision of the council who may determine the same or ... appoint... other persons for the purpose of hearing and determining the same and the fact of membership ... shall constitute an agreement to refer ... such differences ... in accordance with the rules of the association, and shall be enforceable as an agreement under the Arbitration Ordinance.'

In resisting the defendant's application for a stay, the plaintiff argued that art 49 did not envisage and made no provision for arbitration of disputes between the defendant itself and its members, and that the dispute did not come within the defendant's articles of association. It was also argued that the dispute did not arise from a commercial contract. He further submitted that the fact that injunctive relief was being claimed rendered it inappropriate to grant a stay.

Held, dismissing the defendant's summons:

(1) An agreement to arbitrate contained in articles of association of a company incorporated in Hong Kong under the Companies Ordinance (Cap 32) was a valid arbitration agreement within art 7(2) of the Uncitral Model Law by reason of s 23(1) of the Companies Ordinance. The whole purpose of s 23(1) was to create a binding agreement between the company and its members.

(2) Article 49 of the defendant's articles of association did not envisage and did not make any provision for arbitration of disputes between the defendant itself and its members; it envisaged disputes between members. This followed from the fact that if a dispute of the sort envisaged by art 49 did arise, it was the defendant who would make a decision either directly or through

some other person. It would seem unlikely that it was ever intended for the defendant to arbitrate disputes involving allegations of its own wrongdoing. There was, therefore, no agreement to arbitrate the dispute which had in fact arisen.

(3) The fact that the dispute did not arise from a commercial contract but from the rules of a sport association in itself was insufficient to oppose a stay if the claim was otherwise sustainable. Such a dispute as was set out in the statement of claim was arbitrable and it could be said that it was better to arbitrate such disputes rather than have them heard out in the full glare of publicity with possible damage to the sport in question.

(4) An arbitrator cannot grant an injunction but under s 14(6) of the Arbitration Ordinance, the court can grant an injunction for the purposes of and in relation to a reference to arbitration. The fact that injunctive relief was claimed was therefore not a factor which rendered it inappropriate to grant a stay.

(5) The fact that the defendant's decision impugned the plaintiff's reputation and that he was therefore entitled to a public trial, and the fact that the dispute involved allegations of impropriety which would be better resolved in court proceedings were relevant factors in deciding whether or not to grant the stay.

(7) On balance, it would not have been a proper exercise of discretion to grant the stay even if the matter had not been decided on the construction of art 49 itself.

Cases referred to

Hickman v Kent or Romney Marsh Sheep Breeders Association [1915] 1 Ch 881

Legislation referred to

(HK) Arbitration Ordinance (Cap 341) ss 2, 6, 14(6)

(HK) Companies Ordinance (Cap 32) s 23(1)

(UK) Arbitration Act 1889 [UK] s 27

Other legislation referred to

Uncitral Model Law art 7, 7(2)

Summons

This was a summons taken out by the defendant seeking a stay of proceedings initiated by the plaintiff under s 6 of the Arbitration Ordinance (Cap 341). The facts appear sufficiently in the following judgment.

Martin Liao (KB Chau & Co) for the plaintiff.

*Lawrence KF Ng (Daniel Wong & Partners)*for the defendant.

KAPLAN J

I have before me an application made by the defendant for a stay of these proceedings under the provisions of s 6 of the Arbitration Ordinance (Cap 341).

[1994] 1 HKC 734 at 736

The defendant is a sports association. The plaintiff is, inter alia, a football referee and is a member of the defendant through his membership of member clubs of the defendant.The plaintiff is president of the Shek Kip Mei Sport Association and he is also secretary of the Wah Hung Athletic Association. He was a FIFA International referee. Both Shek Kip Mei Sport Association and Wah Hung Athletic Association are member clubs of the defendant.

On 30 December 1993, the council of the defendant made a decision that the plaintiff was unwelcome to take part in their activities or to register himself as an official of the defendant or its member clubs.

The plaintiff objects to these decisions and submits that in making them, the defendant acted ultra vires its rules and that it had no power under its articles or rules to pass those sanctions. On 12 March 1994, he issued a writ claiming, inter alia, a declaration that the said decision of the council is null and void and in breach of its rules. He has also sought an interlocutory injunction.

The defendant bases its application for a stay on art 49 of its articles of association which states as follows:

> *All members of the association* including member clubs and associate member clubs and members thereof respectively shall submit and refer all differences and questions *coming within* the provisions of the laws of the game or the rules of the association to *the decision of the council* who may determine the same or may appoint committees or commissions or other persons for the purpose of hearing and determining the same, and the fact of membership as aforesaid shall constitute an agreement to refer all such differences and questions *in accordance with the rules of the association*, and shall be enforceable as an agreement under the Arbitration Ordinance. [Emphasis added.]

It is important to have regard to art 7 of the Uncitral Model Law which by reason of s 2 of the Ordinance contains the definition of 'arbitration agreement' which applies to both domestic and international cases.

Article 7 provides as follows:

> Definition and form of arbitration agreement
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> (1) 'Arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
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> (2) The arbitration agreement shall be in writing.An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the
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> *[1994] 1 HKC 734 at 737*
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> contract is in writing and the reference is such as to make that clause part of the contract.

No document has been produced which contains the plaintiff's signature nor is there before me any document which indicates that the plaintiff has assented to the arbitration clause. In normal circumstances, the absence of such a signature or document would be sufficient to defeat this application. However, Mr Ng, who appeared for the defendant, referred me to s 23(1) of the Companies Ordinance (Cap 32), which provides as follows:

> Subject to the provisions of this Ordinance, the memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles.

No doubt this section gives effect to *Hickman v Kent or Romney Marsh Sheep Breeders Association* default [1915] 1 Ch 881, in which Astbury J after considering various conflicting decisions decided that articles of association of a company do in fact constitute a contract between the company and its members in respect of their ordinary rights as members. On this basis, the judge held that an article providing for the reference of disputes to arbitration was a sufficient submission in writing within the Arbitration Act 1889.

Section 27 of the 1889 Act provided that:

> 'Submission' means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.

Section 27 of the 1889 Act is, of course, different from art 7 of the Uncitral Model Law, which insists upon a signed agreement or a record of the agreement to arbitrate contained in an exchange of letters, etc.

The first issue I have to decide is whether art 7(2) has been complied with, for if it is not, there can be no question of there being an arbitration agreement in support of which the stay can be granted.

In my judgment, an agreement to arbitrate contained in articles of association of a company incorporated in Hong Kong under the Companies Ordinance is a valid arbitration agreement within art 7(2) of the Uncitral

Model Law by reason of the effect of s 23(1) of the Companies Ordinance. The whole purpose of s 23(1) is to create a binding agreement between the company and its members, and the reference to signing and sealing is, in my judgment, dispositive of this issue. (In other cases, there may well be additional documents that contain a record of the agreement to arbitrate.)

Mr Martin Liao, who appeared for the plaintiff, has made a number of submissions which, he submits, should lead me to conclude that it would not be appropriate to grant the stay. It is common ground that I have a discretion under the section.

Mr Liao's first point is that art 49 does not envisage and makes no provision for arbitration of disputes between the defendant itself and its

[1994] 1 HKC 734 at 738

members. Rather, he submits, it envisages disputes between members concerning the rules or the laws of the game. This conclusion, he submits, follows from the words used. Furthermore, this contention would seem to follow from the fact that if a dispute of the sort envisaged by art 49 does arise, then it is the defendant itself who makes the decision either directly or through a commission, committee or other person. It would seem unlikely that it was ever intended for the defendant to arbitrate disputes involving allegations of its own wrongdoing.

In my judgment, there is much force in this argument and I feel bound to conclude that, ex facie, art 49 does not cover the situation which has arisen in this action and, thus, there is no agreement to arbitrate the dispute which has in fact arisen.

This view is sufficient to dispose of the whole matter but out of deference to counsel's helpful and careful argument, and lest this matter should go further, I will express my views briefly on the remaining points.

Mr Liao's next point, which also seems a good one, is that the present dispute is not one coming within the rules. The whole basis of the action commenced by the plaintiff is that the defendant has acted outside the rules.

The defendant has appreciated a problem with art 49 because Mr Lee in para 60 of his affirmation, in order to deal with the partiality point (the defendant deciding a dispute where they are a party), said this:

> To ensure impartiality, the council has decided that the present dispute should be heard before an arbitrator to be appointed by the Hong Kong International Arbitration Centre. Alternatively, the association can agree with Ng as to who is a suitable person to hear and determine the dispute.

I am sure that this course of action was intended to deflect any possible charge of bias or partiality but the fact remains that the article means what it says and this cannot unilaterally be altered by the defendant in order to avoid this particular problem. In any event, as I have held, this point is of great assistance on the question of the construction of art 49.

Mr Liao relied upon the fact that this dispute did not arise from a commercial contract but from the rules of a sport association. This in itself is insufficient, in my judgment, to oppose a stay if the claim was otherwise sustainable. Such a dispute as is set out in the statement of claim is arbitrable and it could be said that it is better to arbitrate such disputes rather than have them heard out in the full glare of publicity with possible damage to the sport in question.

Next, it is said that injunctive relief is claimed and that this factor renders it inappropriate to grant a stay. I disagree. I accept that an arbitrator cannot grant an injunction but under s 14(6) of the Arbitration Ordinance, the court can grant an injunction for the purposes of and in relation to a reference to arbitration.

[1994] 1 HKC 734 at 739

Mr Liao submits that I should exercise my discretion against granting a stay because the dispute involves allegations of impropriety and, thus, it would be better to have the matter resolved in court proceedings rather than arbitration.There is some force in this submission and if I had got to the stage of exercising discretion, this is a factor which would have led me, I believe, to exercise my discretion against granting a stay.

Rule 33(3)(g) provides in effect that no legal representation is allowed in an enquiry or disciplinary proceedings. This, submits Mr Liao, should lead me to exercise my discretion against granting a stay. I disagree. If

the parties are bound to arbitrate and if they have agreed that there should be no legal representation, I see no hardship in requiring them to comply with their contractual bargain.

Next, it is said that there is no dispute and, thus, nothing to go to arbitration. This is an extravagant proposition and I reject it.

The plaintiff submits that he is entitled to a public trial because the defendant's decision impugns the plaintiff's reputation. This is a factor which I would have taken into account.

In conclusion, I am satisfied that on balance it would not have been a proper exercise of discretion to grant a stay and had I not decided this matter on the construction of art 49 itself, I would have dismissed the summons for a stay.

For all these reasons, therefore, this summons is dismissed and I make a costs order nisi in favour of the plaintiff.

Postscript

On Friday, 27 May, after this judgment was prepared, Mr Denis Chang QC, who leads for the defendant, asked for an urgent appointment to inform me of certain new developments of which he wanted me to be aware prior to delivering this judgment.

As I mentioned earlier in this judgment, the plaintiff was seeking an interlocutory injunction. That application came on before Mayo J, I believe, on 23 May. By the time that application came on, the defendant had passed a resolution purporting to expel the plaintiff from the defendant. In light of this development, the plaintiff abandoned his claim for an injunction which was directed towards his previous purported suspension.

Mr Liao told me that the plaintiff will challenge the expulsion on the grounds that the plaintiff is not a member of the defendant for the purposes of art 11 of the articles of association. He also told me that the plaintiff will still contest the suspension.

I am grateful to counsel for providing this update. However, none of these new matters affects my decision to decline the stay.