MING KEE SHIPPING SERVICE CO LTD v AUTOGAIN LTD, CHARLIE & STANLEY CO LTD - [1992] HKCU 105

SUPREME COURT OF HONG KONG HIGH COURT
NEIL KAPLAN, J

1992, MP NO.1017

30 April 1992

Arbitration -- Procedure -- Applicant involved in arbitrations with both respondents -- Same arbitrator appointed for both arbitrations -- Applicant and respondent sought for order that arbitrations be held together -- Whether consolidation could not be ordered because three parties were involved -- Whether this was an appropriate case for High Court judge to exercise his discretion -- Arbitration Ordinance (Cap 341) s 6B

Mrs. J. Spruce instructed by Sit Fung Kwong & Shum for the Applicant.

Mr.M. Wong of Kut & Co. for Autogain.

Mr. D. Fung of Bernard Wong & Co. for Charlie & Stanley.

JUDGMENT

The applicant is the claimant in an arbitration against the 1st respondent (Autogain). The applicant is also the respondent in an arbitration where the 2nd respondent (C&S) is claimant. Both the applicant and C&S invite the court to make an order under section 6B of the Arbitration Ordinance, Cap. 341 to the effect that both arbitrations be heard at the same time. Mr. Alexander Hamilton, a most experienced arbitrator, has already been

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appointed as an arbitrator in *both* arbitrations. Despite opposition from Autogain, on 30th April 1992 I made such an order and stated that I would reduce my reasons into writing which I now do.

Section 6B is conveniently referred to as a consolidation section, but it is to be noted that consolidation is only one of the orders the court can make under that section. It can also order that the two (or more) arbitrations be heard at the same time or one immediately after another or the court may stay one until after the determination of the other.

Mr. Wong, who appeared for Autogain, took the point that as the summons sought consolidation and as consolidation could not be ordered because three parties were involved, it was not open to the applicant to claim an order that both arbitrations should be heard together.

The marginal note to the summons indicates that it is made pursuant to section 6B of the Arbitration Ordinance. Although para. 1 of the summons does seek an order that the two arbitrations be consolidated, it is necessary to bear in mind that para. 2 seeks an order that "the terms on which the arbitrations be consolidated be that the aforesaid arbitrations be heard together".

In my judgment, there is nothing in Mr. Wong's ultra technical point. Firstly, an order was sought that the two arbitrations be heard together. It is true that

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the word 'consolidation' was used in the summons, but that is, after all, what section 6B is called - a consolidation section. No one could have imagined that a formal order for consolidation could have been made because of the tripartite nature of the dispute. In any event, if there was anything in this point it could have been

cured by an amendment to the summons which I would have readily granted had it been necessary. Nobody was under any misapprehension as to what the applicant was seeking by this summons. The court's valuable time should not be wasted by points such as this which have no merit whatsoever.

I do not propose to go into the facts in any great detail. However, the following summary is sufficient for my purpose. In 1989, the applicant sold six used oil fired generating units and associated equipment to Autogain for $36,800,000.00. By a further agreement dated 4th April 1990, the applicant agreed to dismantle the generators and pack the same for onward shipment for the sum of $34,000,000.00.

By an agreement dated 11th April 1990 made between the applicant and C&S, the applicant engaged C&S to carry out the dismantling and packing works for $24,000,000.00

The applicant contends that Autogain still owes it nearly $9m. The applicant commenced arbitration proceedings and the President of the Hong Kong Institution of Engineers appointed Mr. Alexander Hamilton as the

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arbitrator. He has held preliminary meetings and made various orders for directions. Points of claim have been served but no defence has yet been forthcoming.

Autogain have alleged that damage was caused to the plant during dismantling and are making a claim in respect of damage and also loss of some of the parts.

A dispute also arose as between the applicant and C&S, and the latter too commenced arbitration and Mr. Alexander Hamilton was again appointed arbitrator by the President of the Hong Kong Institution of Engineers. Directions have been given and pleadings have been served.

This short synopsis is virtually dispositive of this application. The two disputes are about the very same plant and equipment. The applicant sub-contracted its contract with Autogain to C&S. The witnesses in the two arbitrations are likely to be the same. The same or similar issues are likely to arise in both arbitrations. Inconsistent findings of fact will be avoided by hearing the two arbitrations at the same time. Such an order will save the applicant and C&S considerable costs. It may, however, be that Autogain will incur some extra costs by having to be present throughout the hearing of the two arbitrations but the arbitrator may be able to ameliorate this and if he cannot, the extra costs to Autogain is far outweighed by the factors that go the other way. Mrs. Spruce relied upon 10 factors and I have referred to some of them although there is force in them all.

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Another factor to be considered is that the arbitrator himself has suggested this very cause of action after he was appointed in both disputes. This was a considered suggestion by an experienced arbitrator after consideration of the issues involved and a perusal of some of the documents.

It was difficult to identify the precise reasons why Autogain opposed this order. The basic submission was that it had not been made out that the two contracts were back to back and thus identical. They clearly were not identical because the price was different, but I am satisfied that if they were not identical there is sufficient similarity between them to make it appropriate to hear both arbitrations at the same time.I do not propose to go into all the matters set out in Autogain's affidavit evidence because none of it detracts from the obvious good sense that the same arbitrator should hear these two arbitrations about the dismantling of the same plant and machinery at the same time.

I am satisfied that the application is made at the appropriate time. It is not necessary to wait until after close of pleading. (See *Re Shui On* [1986]HKLR 1177.) This is not a case where the applicant has delayed to such an extent that it would be inappropriate to make the order (as in *Harlifax v. Transatlantic* - unreported HCMP 1229 of 1988 reported at page 103 of Hong Kong Arbitration Cases & Materials.)

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The court has a discretion under section 6B. Taking into account all the matters raised in the evidence and argument, I am quite satisfied that this was an appropriate case in which to exercise my discretion.

I would like to deprecate one of the arguments raised in Autogain's evidence and repeated before me by Mr. Wong. It was suggested that the applicant had in some way prejudiced the President of the Hong Kong In-

stitution of Engineers and Mr. Hamilton by contending wrongly that the issues in the two arbitrations were substantially the same. This is a nonsensical allegation. This is one of the issues Mr. Hamilton will have to decide. If there are differences between the two contracts he will have to decide what effect these differences will have upon the liability of the parties before him. But to suggest that Mr. Hamilton, let alone the President of the Hong Kong Institution of Engineers, could be prejudiced in any way is to lose sense of reality. Mr. Hamilton will, I know, decide the issues in both arbitrations on the basis of the relevant contractual documents and the evidence adduced before him. The sooner Autogain get to grip with the real issues in their arbitration the better for them and the other parties concerned.

At the conclusion of the hearing, I awarded the costs of this application to the applicant to be taxed and

paid forthwith. I made no order in favour of C&S even though Mr. Fung did attend out of courtesy to the court.