PACIFIC INTERNATIONAL LINES (PTE) LTD AND ANOTHER v TSINLIEN METALS AND MINERALS CO (HK) LTD - [1993] HKCU 0559

High Court (in Chambers)
Kaplan,J.

Miscellaneous Proceedings No. 1343 of 1992

6 July 1992, 30 July 1992

Kaplan, J.

I have before me an application by the plaintiffs for the court to appoint an arbitrator on behalf of the defendants pursuant to Article 11(4) of the Model Law. In view of the fact that this is the first time the court has had to consider the provisions of Article 7 of the Model Law I propose to deliver this judgment in open court.

The plaintiffs' case is that they entered into a charter party on the Gencon form with the defendants and that Clause 29 thereof provided as follows:

"Any dispute arising under this charterparty to be referred to arbitration in Hong Kong and English Law to apply. One arbitrator to be nominated by the Owners and the other by the Charterers. In case the arbitrators so chosen shall not agree then an umpire to be appointed by them and the award of the arbitrators and umpire to be final and binding upon both parties."

The plaintiffs claim US$171,060.58 under the charterparty and when that sum was not paid they appointed Mr. Julian Lister to act as their arbitrator. Mr. Lister duly accepted the appointment.

The defendants was given notice of Mr. Lister's appointment and was called upon to appoint a second arbitrator. The defendants failed to do so - hence this application under Article 11(4) for the Court to appoint an arbitrator for and on behalf of the defendants.

Originally this application was framed under Article 11(3) but it is common ground between the parties that it is Article 11(4) which is, in fact, relevant.

Mr. Houghton for the defendants invited me not to appoint an arbitrator on the grounds that there was no charterparty entered into between the plaintiff on the one hand and the defendant on the other. If I were to be against him on that submission then he invited me to give the defendants 7 days in which to make an appointment failing which he accepted that I would have to make one for the defendants. The plaintiffs have proposed that Mr. Alistair Inglis be appointed for the defendants.

It is always more appropriate for a Defendant in this position to be given a final opportunity to make an appointment once the court has dealt with any objection in substance. This is particularly so as, under Article 11(5) of the Model Law, there is no appeal from my decision If I decide that there was a charterparty entered into between the parties then it would be right and proper to give the defendants a last chance to appoint their own arbitrator. One must try and avoid a situation which might cause a defendant a sense of grievance which might infect the whole arbitration process.

The first plaintiffs (PIL) are in fact the managers of the relevant vessel, the "Kota Abadi" [he second plaintiffs (Chinacord) are in fact the owners of the vessel. On an earlier occasion] gave leave to add Chinacord as a second plaintiff to this summons. Both plaintiffs are Singaporean Companies and the defendant is a Hong Kong Company. It is common Ground that the Model Law is applicable.

I reserved judgment on this matter because this application raised, for the first time in Hong Kong, a consideration of Article 7 of the Model Law. This Article is crucial as it deals with the need for an arbitration agreement under the Model Law to be in writing and it specifies how that requirement can be met. This is a new definition from that which previously existed before 6th April 1990. (See, however, the transitional provisions

of the Arbitration 'Amendment) (No. 2) Ordinance 1989, now set out as a note to s. 31 of the Arbitration Ordinance).

Before dealing with Article 7, let me first dispose of Article 11.

Article 10 provides that the parties are free to determine the number of arbitrators. If they fail to determine then the number of arbitrators is 3.

By Article 11(2) the parties are free to agree on a procedure of appointing the arbitrator arbitrators subject to Articles 11(4) and (5).

Articles 11(3) and (4) provide as follows:

"

(3) Failing such agreement,
  (a) in an arbitration with 3 arbitrators, each party shall appoint one arbitrator, and the 2 arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within 30 days of receipt of a request to do so from the other party, or if the 2 arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;
  (b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

(4) Where, under an appointment procedure agreed upon by the parties,
  (a) a party fails to act as required under such procedure, or
  (b) the parties, or 2 arbitrators, are unable to reach an agreement expected of them under such procedure, or
  (c) a third party, including an institution, fails to perform any function entrusted to it under such procedure. any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment."

The court specified in Article 6 is the High Court.

Article 11(5) deals with finality by providing that:

"A decision on a matter entrusted by pares. (3) and (4) of this Article to the court or other authority specified in Article 6 shall be subject to no appeal."

If I appointed an arbitrator on behalf of the defendants then the 2 arbitrators will have to consider what they should do in relation to the appointment of the further arbitrator or umpire. The arbitration clause provides for the appointment of an umpire if the 2 arbitrators cannot agree. If they do agree, can the two of them render an effective award? I do not see why not as Article 10 leaves it to the parties to determine the number of arbitrators. If they cannot agree then they will have to appoint a third arbitrator/umpire which will again be in accordance with the parties agreement.

It is to be noted that the phrase 'arbitration agreement' has the same meaning for domestic and international arbitration. This is because of s. 2 of the Arbitration Ordinance which gives to the phrase "arbitration agreement" the same meaning as in Article 7(1) of the Model Law.

Under the Law that existed prior to the 6th April 1990 (and which will still apply to arbitrations arising under agreements entered into before that date) the definition of "arbitration agreement" was,

"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 whether an arbitrator is named therein or not;" (Section 2 of the pre 1989 Ordinance)

Article 7 of the Model Law provides as follows:

""Article 7."Definition and form of arbitration agreement

(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.

(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 contract is in writing and the reference is such as to make that clause part of the contract."

Some concern has been expressed at the change which has taken place. The emphasis in Article 7(2) of a signature or exchange of documents is thought to have a narrowing effect on the definition of arbitration agreement. The Mustill Committee in England when recommending not to adopt the Model Law for England said this about Article 7(2).

"In particular, the Model Law requires a signature on the document containing the contract. This could leave most Bills of Lading, many brokers' contract note and other important categories of contracts outside the scope of the Model Law."

Whether these fears are justified in fact remains to be seen. However, the issue in the present case whilst fairly and squarely coming within Article 7(2) of the Model Law does not raise this precise point as will become apparent when I turn to the facts, which I now do.

The Facts

This is a very curious case because one thing is certain and that is that the defendant did agree to charter, and did charter, this particular vessel and they have paid some sums to the account of PIL. However, they say that their charterparty was with World Ace Shipping Agency Ltd. and not with the owners or managers of the vessel who deny ever having given World Ace any right or authority in this matter.

I have been taken through the pre-fixture telexes and it is abundantly clear to me that the plaintiffs Hong Kong and Singapore agents were negotiating a charter with a charterer through the agency of World Ace. One only has to read the documents to see that this was in fact the position. Mr. Houghton for the defendant submitted that there is no evidence before the court showing that the defendants ever held out World Ace as their agents. However, I am entitled to take into account the commercial reality of the situation. No useful purpose will be served by going into the documents in any great detail. However, on 4th September 1991 the plaintiffs' Hong Kong agents telexed World Ace, inter alia, in the following (reconstituted) terms:

"Following firm indication from owners which please let us have charterer's firm offer if of interest..."

Later in this telex after setting out a lot of details one finds the words "sub Gcon dtls" which means "subject to Gencon charter party details".

This telex is wholly inconsistent with World Ace being the charterer. There are numerous other similar instances including later that day when World Ace telex back saying:

"Now charterer have confirmed."

On 5th September, the plaintiffs' Hong Kong agents faxed to World Ace the plaintiffs' pro forma charter party for charterer's confirmation. Clause 29 of this charter party contained an arbitration clause. On the same day World Ace telexed the plaintiffs' Hong Kong agents in the following terms:

"We herewith confirm on behalf of charterer accepted all terms and condition on fixture note and recaps meantime pls furnish us working c/p for signature between owner and charterers." *(sic*)

World Ace then proceeded to give the full style and title of the defendants for the charterparty.

Again, late on the 5th September, the plaintiffs' Hong Kong agents faxed World Ace a copy of the owner's charter party for charterer's confirmation. On the covering letter, there appears the signature of Mr. Lam of World Ace confirming the charterparty at eleven o'clock on the 6th September 1991. This charterparty, which he confirmed, contained the arbitration clause in Clause 29.

It is common ground that this charterparty was not signed by the plaintiffs nor the defendants. It had been sent to World Ace to be signed but it was never signed by them. In the affidavit in support of this application the plaintiffs' solicitor exhibits the completed charter party with all the details which have been agreed but it is not signed by either party.

Somewhat surprisingly, the solicitor for the defendants was able to exhibit exactly the same charterparty but this time signed by World Ace as owner and the defendants as charterers. It is common ground that this document contained an arbitration clause.

No satisfactory explanation has been given as to why World Ace signed this charterparty. There is no suggestion that they were authorized to do so by the plaintiffs or the plaintiffs' agent.

Mr. Fok put his case in two ways. Firstly, he submits that Article 7(2) of the Model Law has been complied with by the charterparty signed by the defendant and World Ace when read with the plaintiffs' unsigned charterparty which complies with the terms agreed in the correspondence. Alternatively, he submits the correspondence leading to the fixture shows clearly an agreement by the Defendant, in writing, to the terms of the charter party on Gencon form including Clause 29. The pro forma of that charterparty was referred to and sent to the defendants' agent in the course of communication leading to this fixture.

Mr. Fok goes further and says that I do not really have to be a 100% satisfied that there was an arbitration agreement which satisfies Article 7 of the Model Law. He accepts that the plaintiffs have to meet a threshold which may be less than conclusive proof. He submits this because of the terms of Article 16 on the Model Law which empowers the Tribunal to rule on its own jurisdiction "including any objections with respect to the existence or validity of the arbitration agreement." Article 16 then continues by enshrining the doctrine of separability by stating:

"For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the Arbitral Tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause."

A plea that the arbitral tribunal lacks jurisdiction has to be raised before the submission of the defence. The tribunal is empowered to deal with this either as a preliminary question or in an award on the merits. If the Tribunal rules as a preliminary question that it does jurisdiction the other party has 30 days from receiving that ruling to request the High C, decide the matter. There is no further appeal from the High Court.

It follows, therefore, that if I am satisfied that there is a plainly arguable case to support proposition that there was an arbitration agreement which complies with Article 7 of the Model Law, I should proceed to appoint the arbitrator in the full knowledge that defendants will not be precluded from raising the point before the arbitrator and having matter re-considered by the court consequent upon that preliminary ruling.

Conclusion

I am quite satisfied that the plaintiffs have made out a strongly arguable case in support arbitration agreement which complies with Article 7 of the Model Law. It seems to me that the correspondence leading to the fixture shows quite clearly that there was an agreement by the defendant in writing to the terms of the charter party on Gencon form. In addition think there is force in the argument that Article 7(2) has been complied with by virtue charter party signed by the defendant with World Ace when read with the plaintiffs unsigned charter party which clearly complied with the terms of the correspondence between parties. Obviously it has not been possible for me to go into this in any great detail and i the whole matter has been dealt with on affidavit evidence. Despite the fact that there document before me which shows that World Ace were held out or authorized by defendant to act for them in relation to this fixture, I cannot believe that such documentation does not exist. The arbitrator will have to go into this matter and sort it out but for m and I am satisfied at this stage that Article 7 of the Model Law has been complied wit that there is an arbitration agreement between

these parties and that in normal with should appoint the defendants' arbitrator in the light of their failure to do so.

Having indicated my firm views on this matter, I propose to take no steps to appoint arbitrator on behalf of the defendants and will allow them 7 days from the delivery judgment to appoint their own arbitrator. If they fail to do so, I will then appoint an arbitrator on their behalf. In that eventuality I will appoint Mr. Inglis.

Costs

I propose to make a costs order *nisi* of these proceedings in favour of the plaintiffs.