PHILIPS HONG KONG LIMITED TRADING AS EASTERN ELECTRONICS CO v HYUNDAI ELECTRONICS INDUSTRIES CO LTD - [1993] HKCU 0607

High Court (in Chambers)
Kaplan, J.

Miscellaneous Proceedings No.3337 of 1992

22 December 1992, 7 January 1993

Kaplan, J.

I have before me an application to appoint an arbitrator pursuant to the provisions of s. 12 of the Arbitration Ordinance (Cap. 341). The agreement between the parties which contains the Arbitration Clause is dated 21st October 1986 and thus pre-dates the coming into force of the Model Law on 6th April 1990. This application, which would otherwise be considered under the Model Law regime for international arbitrations, falls to be considered under the domestic regime.

The Arbitration Clause in the contract is somewhat curious and I must set it out in full.

"Arbitration:

All disputes, differences or questions at any time arising between the parties as to the construction of this Agreement or as to any matter or thing arising out of this Agreement or in any way connected therewith and remain unsolved by mutual consultation shall be referred to the arbitration of a single arbitrator, who shall be agreed between the parties or who failing such agreement shall be appointed at the request of either party by the Chairman of the Hong Kong General Chamber of Commerce, or in accordance with the Rules of Conciliation and Arbitration *then* obtaining of the International Chamber of Commerce.

The arbitration shall be in accordance with the Arbitration Ordinance and any statutory modification or re-enactment thereof for the time being in force. The award of the arbitrator shall be final and binding between the parties."

Mr. Horace Wong who appears for the plaintiffs, who wish an arbitrator to be appointed, takes two basic points. His first point relates to the construction of s. 12 of the Ordinance and his second point relates to the Arbitration Clause itself and the rules of the International Chamber of Commerce (ICC).

Section 12 of the Arbitration Ordinance provides as follows:

"Power of Court in certain cases to appoint an arbitrator or umpire

(1) In any of the following cases:
  (a) where an arbitration agreement provides that the reference shall be to a single arbitrator, and all the parties do not, after disputes have arisen, concur in the appointment of an arbitrator; (Amended 64 of 1989 s. 10)
  (b) if an appointed arbitrator refuses to act, or is incapable of acting or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied and the parties do not supply the vacancy;
  (c) where a party or an arbitrator is required or is at liberty to appoint, or concur in the appointment of, an umpire or an arbitrator and does not do so; (Replaced 17 of 1984 s. 2)
  (d) where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy,

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint, or, as the case may be, concur in appointing, an arbitrator, umpire or third arbitrator, and if the appointment is not made within 7 clear days after the service of the notice, the Court or a judge thereof may, on application by the party who gave the notice, appoint an arbitrator, umpire or third arbitrator who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.

(2) In any case where:
(a) an arbitration agreement provides for the appointment of an arbitrator or umpire by a person who is neither one of the parties nor an existing arbitrator (whether the provision applies directly or in default of agreement by the parties or otherwise); and
(b) that person refuses to make the appointment or does not make it within the time specified in the agreement or, if no time is so specified, within a reasonable time,

any party to the agreement may serve the person in question with a written notice to appoint an arbitrator or umpire and, if the appointment is not made within 7 clear days after the service of the notice, the Court or a judge thereof may, on the application of the party who gave the notice, appoint an arbitrator or umpire who shall have the like powers to act in the reference and make an award as if he had been appointed in accordance with the terms of the agreement. (Added 10 of 1982 s. 6).

[cf. 1950 c. 27 s. 10 U.K.; 1979 c. 42 s. 6(3) & (4) U.K.]"

Mr. Wong's first point is that he contends that he can bring this application within the terms of s. 12(1). He submits that:

(1) the agreement provides for a single arbitrator; and
(2) disputes have arisen; and
(3) after disputes have arisen the parties have not concurred in the appointment of an arbitrator; and
(4) the defendants have failed to concur after written notice has been served upon them.

Because the se pre-conditions have been met, Mr. Wong submits that it is competent for the plaintiffs to apply to the court and for the court to exercise its discretion to appoint an arbitrator.

Miss Hazledine of Allen and Overy who appears for the defendants submits that this construction of s. 12(1) cannot be correct because it ignores the provisions of s. 12(2) which deal expressly with the situation where a third party named in the arbitration clause as the appointor refuses or fails to do so.

The facts relevant to this agreement are as follows. The Hong Kong General Chamber of Commerce were invited to appoint but declined to do so on the grounds that for some time they had not appointed arbitrators but had instead transferred their appointing functions to the Chairman of the Hong Kong International Arbitration Centre. This appears not to have been done formally and I would respectfully suggest that the position be regularized as soon as possible and that all parties be informed of this change. Be that as it may, the Hong Kong General Chamber of Commerce has declined to appoint an arbitrator.

It is also common ground that the ICC have not been approached.

It is therefore submitted that this application should fall to be considered under s. 12(2) and as the second appointing authority has not yet refused or failed to make an appointment this application is premature and should be dismissed.

Mr. Wong's answer to this argument, apart from his interpretation of s. 12(1), relates to the role of the ICC itself and to this point I will have to return when I have decided his first point.

I am quite satisfied as a matter of construction of s. 12 as a whole that, subject to Mr. Wong's argument about the inappropriateness of the ICC as an appointing authority in this case, his construction of s. 12(1) cannot be correct.

It seems to me that s. 12(1) deals with cases where there is no provision for appointment by a third party where the parties have failed to concur. If the parties cannot agree then the court steps in to prevent the arbitral process from being rendered nugatory. I accept the submission of Mr. Wong, based on observations at p. 178 in Mustill and Boyd on *Commercial Arbitration* (2nd ed.) that it is not necessary under s. 12(1) for the parties to have attempted to agree first because the wording refers to the parties not concurring in the appointment of an arbitrator as opposed to having failed to agree.

However, s. 12(2) clearly posits a situation where the parties have provided for either simple appointment by a third party or a default provision for appointment by a third party if they cannot, or do not, concur in an appointment themselves.

It is true that s. 12(2) does not refer in terms to a default procedure, i.e. only if the parties do not concur. Some clauses provide simply that the appointment shall be by a third party such as the President of an Institution. Other clauses, such as the present, provide for agreement between the parties but failing that appointment by a third party.

If I were to read s. 12(1) as Mr. Wong suggests, I would be ignoring the provisions of s. 12(2) and further would be ignoring the clear agreement of these parties that if they could not agree on the appointment of an arbitrator either of the two named default appointors should appoint. As a matter of construction it seems clear to me that s. 12(2) governs the present position because the arbitration agreement does in fact provide "for the appointment of an arbitrator by a person who is neither one of the parties..." It does not cease to so provide merely because it sensibly provides that initially the parties should attempt to agree.

Mr. Wong's second line of attack is to submit that the reference to appointment by the ICC is surplussage and should be ignored and that in those circumstances I should appoint. This argument stems from the words "in accordance with the Rules of Conciliation and Arbitration then obtaining of the International Chamber of Commerce.

Mr. Wong submits that if appointment is made in accordance with those rules then the whole panoply of an ICC arbitration would come into play and this would conflict with the parties' express agreement that the arbitration should be considered in accordance with the Arbitration Ordinance.

Mr. Wong has pointed to a number of ICC rules which he says would be quite inapplicable to an arbitration conducted under the Arbitration Ordinance. He refers, inter alia, to provisions about deposits for costs, arbitrator's fees, security for costs, approval of the award by the ICC court and the time limit for rendering an award. One can, of course, think of many examples of how an ICC administered arbitration would differ to an arbitration conducted under the Arbitration Ordinance.

However, it is necessary to refer to Appendix III para. 4 of the ICC Rules which provides as follows:

"A registration fee of US$1,000 is payable by the requesting party in respect of each request made to the ICC to appoint an arbitrator for any arbitration not conducted under the ICC Rules of Arbitration. No request for appointment of an arbitrator will be entertained unless accompanied by the said fee, which is not recoverable and becomes the property of the ICC."

There is thus specific provision in the ICC Rules for appointment to be made by the ICC in an arbitration not conducted or administered under the ICC rules. This must have been what the parties intended and I do not propose to allow the plaintiffs to deviate from that expressed intention by semantic arguments about what precisely is meant by the phrase "in accordance with the rules". Appendix III para. 4 is part of the rules referred to and that deals with ICC appointments simplicter. It ill behoves the plaintiffs, who freely entered into this arbitration agreement, now to attempt to circumvent its clear provisions by semantic argument.

The simple fact of the matter is that the ICC has never been asked to appoint. Even if there had been no para. 4 of Appendix III, I would still have considered that the ICC should have been asked to appoint on the basis that it was not to be a full ICC arbitration. Had they refused to do so, then the court's default power could have been properly invoked.

As there is express provision in the ICC rules dealing with appointment only, I can see no reason why the ICC should not be invited to exercise that power. If they should decline or if they should, for some reason,

insist that they will only do so in relation to an ICC administered arbitration, then this can be taken as a refusal.

I have little doubt that if asked and provided the appointment fee is paid, the ICC will appoint an arbitrator. The fact that a fee is payable is irrelevant. Both parties are deemed to have contemplated that the ICC does not act for nothing.

As a final argument Mr. Wong inquired somewhat rhetorically, on whom should the s. 12(2) notice be served if the ICC did not agree to appoint? Who is the person referred to in s. 12(2)? In my judgment that question does not have to be decided unless and until the ICC refuses to appoint. However, I would have thought such notice, if ever necessary, should be addressed to the Court of Arbitration of the ICC who must on any footing be considered a body of persons and thus be "the person in question" for the purpose of s. 12(2).

I therefore conclude that as a matter of law this application to the court for the appointment of an arbitrator is premature because the plaintiffs have not exhausted the contractual mechanism for appointment and I do not consider that they can rely on s. 12(1). Regardless of my view of the legal position I would have refused to exercise my discretion to appoint unless and until some approach had been made to the ICC and their reaction discovered.

All of the above is very interesting and the point has been well and succinctly argued on both sides. However, I cannot help noting that there is an arbitration clause, a dispute has arisen and an arbitrator is going to be appointed. This application and its opposition have only served to put off the time when an arbitrator will in fact be appointed. It seems to me a great pity that two such internationally renowned companies should not be able to sort this matter out by agreement.

I therefore dismiss this summons with costs.