TIANJIN MEDICINE & HEALTH PRODUCTS IMPORT & EXPORT CORP v JA MOELLER (HONG KONG) LTD - [1994] 1 HKC 545

HIGH COURT
KAPLAN J

ACTION NO 11228 OF 1993

27 January 1994

Arbitration -- Stay of proceedings -- Use of permissive word 'may' in arbitration clause -- Whether arbitration clause binding on parties

Arbitration -- Stay of proceedings -- No admission of claim or payment of contract sum by defendant -- Whether facts sufficient to give rise to dispute to be referred to arbitration -- Uncitral Model Law art 8

By three contracts of sale, one dated 14 October 1992 and two dated 18 November 1992, the plaintiff agreed to sell and the defendant agreed to purchase various chemical products. The value of the contract was US$58,442.50. The plaintiff was a company incorporated and carrying on business in the People's Republic of China. The defendant was a company incorporated and carrying on business in Hong Kong. By a writ issued on 10 December 1993 in the High Court of Hong Kong, the plaintiff claimed $58,442.50, the full price due under the contract. By a summons issued on 14 January 1994, the defendant sought a stay of the proceedings on the ground that each contract contained an arbitration clause which provided that in every case, a dispute 'may' be submitted to arbitration in the People's Republic of China under the auspices of the 'Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade' (now the China International Economic and Trade Arbitration Commission). The plaintiff argued that the arbitration clause was not binding because of the use of the permissive word 'may' and that there was no dispute or difference to go to arbitration.

Held, granting a stay:

(1) When the defendant elected to proceed by way of arbitration, in the present case, by issuing the summons, arbitration became mandatory for both parties. The arbitration clause was also contained in the plaintiff's standard terms and conditions of contract and it would not be proper to allow the plaintiff to ignore it and insist on litigation whenever it thought fit. *China State Construction Engineering Corp Guangdong Branch v Madiford* [1992]1 HKC 320 applied.

(2) In the absence of any admission as to liability and quantum, the fact that the defendant had not paid the sum due under the contract was sufficient to give rise to a dispute to go to arbitration and art 8 of the Uncitral Model Law was duly satisfied. *Guangdong Agriculture Co v Conagra (Far East)* [1993] 1 HKLR 113 and *Zhan Jiang E & T Dev Area Service Head Co v An Hau Co* [1994] 1 HKC 539 applied.

Cases referred to

China State Construction Engineering Corp Guangdong Branch v Madiford [1992] 1 HKC 320

Ellerine Bros v Klinger [1982] 1 WLR 1375

Guangdong Agriculture Co v Conagra International (Far East) [1993] 1 HKLR 113

Zhan Jiang E & T Dev Area Service Head Co v An Hau Co [1994] 1 HKC 539

Legislation referred to

(HK) Uncitral Model Law art 8

Summons

This was an application by the defendant for a stay of proceedings brought by the plaintiff pursuant to a writ dated 10 December 1993 on the ground that the three contracts of sale which gave rise to the proceedings each contained an arbitration clause. The facts appear sufficiently in the following judgment.

Brian Tse (Woo, Kwan, Lee & Lo) for the plaintiff.

Nick Mallards (Hampton, Winter & Glynn) for the defendant.

KAPLAN J

The plaintiff is a company incorporated under the laws of the People's Republic of China which carries on business at premises at Tianjin. The defendant is a Hong Kong incorporated company which carries on business at Citibank Plaza, Garden Road, Hong Kong.

By three sales contracts, dated respectively 14 October 1992, 18 November 1992 and 18 November 1992, the plaintiff agreed to sell and the defendant agreed to purchase various chemical products from the plaintiff at a total cost of US$58,442.50.

By a writ dated 10 December 1993, the plaintiff has issued proceedings in the High Court of Hong Kong claiming the sum already due of US$58,442.50.

By a summons dated 14 January 1994, the defendant seeks a stay of these proceedings on the grounds that the three sales contracts each contain an arbitration clause. I heard this matter on 19 January 1994 and ordered the stay but said that I would give my brief reasons which I now do.

Each of the sales contracts contains a clause to the following effect:

> *Arbitration*
>
> All disputes in connection with this contract or the execution thereof shall be settled amicably by negotiation.In case no settlement can be reached, the case under dispute may then be submitted to the 'Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade' for arbitration. The arbitration shall take place in China and shall be executed in accordance with the provisional rules of procedure of the said Commission and the decision made by the Commission shall be accepted as final and binding upon both parties for settling the disputes.

Mr Brian Tse of Messrs Woo, Kwan, Lee & Lo, for the plaintiff, took two points in opposition to the summons for stay. Firstly, he relied upon the permissive word 'may' in the arbitration clause. He submitted that that

was not a binding agreement to refer disputes to arbitration. I reject this submission. Firstly, I have already found to the contrary in *China State Construction Engineering Corp Guangdong Branch Ltd v Madiford Ltd* default[1992] 1 HKC 320 . I do not propose to repeat what I said in that judgment but for the reasons given there, I am quite satisfied that when the defendants elected to proceed by way of arbitration as they have by the issue of this summons, then arbitration became mandatory for both parties. I also note that this arbitration clause is contained in the plaintiff's own standard terms and conditions of contract and this clause is, in my judgment, the clearest indication of an intention by both parties to submit disputes to arbitration in China. It is also worth noting that the arbitration clause commences with the provision requiring amicable settlement by negotiation and it is only if settlement cannot be reached that the dispute 'may then be submitted to'. It would seem a little strange if the plaintiff, having included this arbitration clause in their standard form of sales contract could, when a dispute arose, ignore it completely and insist on litigation, wherever it was appropriate for them to commence it.

I am quite satisfied that the terms of art 8 of the Uncitral Model Law have been complied with and that there is nothing in this case which justifies me refusing the stay.

The second point that was taken was that the defendant in the solicitors' affirmation in support of the stay did not condescend the particulars of the defence. All that para 5 of the affirmation states is that the defendant denies the allegations and that, therefore, there is clearly a dispute between the parties. I think that what Mr Tse was trying to submit was that there was no dispute or difference to go to arbitration. This is an unsupportable submission in the light of the decision of Barnett J in *Guangdong Agriculture Co Ltd v Conagra International (Far East) Ltd* 1993 1 HKLR 113 where the learned judge, in dealing with an application under art 8 of the Uncitral Model Law, stated:

> A court should refer to arbitration a claim which has not been admitted by the party against whom it is made.

I asked Mr Tse quite specifically whether the defendant has admitted the claim and he was unable to point to any material to that effect.

In *Zhan Jiang E & T Dev Area Service Head Co v An Hau Co Ltd* [1994] 1 HKC 539 , judgment handed down on 21 January 1994, I expressed my whole-hearted agreement with the observations of Barnett J and also went on to make it clear that when one is talking about the defendant having admitted the claim, one is talking about both liability and quantum. As there has been no material placed before me showing an admission as to liability and quantum, the fact that the defendant has not paid the sum claimed by the plaintiff is enough to satisfy me that there is a dispute to go to arbitration. (See the important observation of Templeman LJ in *Ellerine*

Bros v Klinger 1982 1 WLR 1375: 'There is a dispute unless the defendant admits that the sum is due and payable.')

No ground has been made out to justify the refusal of the mandatory provisions of art 8 of the Uncitral Model Law, and that is why I granted a stay and ordered the plaintiff to pay the defendant's costs.