YF ENTERPRISES LIMITED v WISE GLOBAL DEVELOPMENT LIMITED - [1994] HKCU 146

SUPREME COURT OF HONG KONG HIGH COURT
NEIL KAPLAN, J

MISCELLANEOUS PROCEEDINGS NO. 2781 OF 1994

22 November 1994

Arbitration -- Arbitrator -- Application that Hong Kong International Arbitration Centre be appointed as the Arbitration Authority made by originating summons Whether procedure was correct -- Whether words the International Arbitration Centre were meant to refer to the Hong Kong International Arbitration Centre Arbitration Ordinance (Cap 341) s 12(1)(a)

Mr. Gabriel Leung-Jackson-Lipkin of Lee, Ng & Lam, Solicitors for the Plaintiff.

Defendant absent.

HEADNOTE

Arbitration - Whether a reference to the International Arbitration Centre as appointing authority is a reference to the Hong Kong International Arbitration Centre - procedure to be adopted in cases of doubt - Held: in the context of this contract between Hong Kong parties it was such a reference and the Centre should appoint.

I have before me an Originating Summons taken out by the Plaintiff on the 5th day of October 1994 purportedly under Section 12(1)(a) of the Arbitration Ordinance, Cap.341 for an order that the Hong Kong International Arbitration Centre be appointed the Arbitration Authority pursuant to Clause 24 of a Purchase Contract dated 5th July 1993 entered into by the Plaintiff as the seller and the Defendant as the buyer.

At the short hearing before me, I made it clear that the Plaintiff had taken the wrong procedure and I refused to make any order but said that I would reduce my reasons into writing so that the correct procedure could be set out, and I do this in the hope that it will make the task of the Hong Kong International Arbitration Centre easier in this case.

The agreement which is in writing and which is signed by both parties contains a number of clauses. Clause 24 of which deals with arbitration and I propose to set it out.

[1994] HKCU 146 at 2

"24. Arbitration:

(a) Any dispute, controversy, or claim arising out of the relating to this contract, or the breach, termination or invalidity thereof, shall be settled firstly through friendly negotiations. In case no settlement could be reached, shall be settled by Arbitration Rules in force at the date of contract.

(b) The appointing authority shall be the International Arbitration Centre.

(c) Any such arbitration shall be administered by the International Arbitration Centre in accordance with its procedures for arbitration.

(d) The parties agree to exclude any right of application or appeal to the courts in connection with any question of law arising the course of the arbitration or with respect to any award made.

(e) The language(s) to be used in the arbitral proceedings shall be English." (sic)

The agreement dated the 5th July 1993 is between two companies who have their offices and places of business in Hong Kong. Under the contract, the seller agreed to sell and the buyer agreed to buy prime deformed steel bars to be shipped by 31st July 1993 at the latest. The port of loading was said to be "One C.I.S. Port, Fast East (Posiet) and the destination port was Zhangjiang Port, China. Clearly, this is an international arbitration to which the Model Law applies even though both parties have their place of business in Hong Kong. There is no express choice of law clause contained within the contract, but I would be surprised if it could be argued that any other law than Hong Kong law were to apply to this contract.

[1994] HKCU 146 at 3

The only real problem with the arbitration clause is that it refers to the appointing authority as "the International Arbitration Centre" and not to the Hong Kong International Arbitration Centre. However, I am quite satisfied that in the context of this contract entered into between two Hong Kong companies, it was clearly intended that the words "the International Arbitration Centre" were meant to refer to the Hong Kong International Arbitration Centre.

What should have happened in a case such as this is as follows. As soon as a dispute arose and a party to the contract wished to have an arbitrator appointed, that party should have written to the Hong Kong International Arbitration Centre enclosing a copy of the contract which contained the arbitration clause. The Hong Kong International Arbitration Centre would then have looked at the arbitration clause and would have two choices. Either it could have been satisfied, as I am, that Clause 24(b) refers to the Hong Kong International Arbitration Centre and they could have appointed an arbitrator. If, on the other hand, the Hong Kong International Arbitration Centre had any serious doubts about the clause then it could have declined to appoint (absent any agreement by both parties) and in that eventuality, the claimant could have then applied to the court under Article 11(4)(c) of the Model Law inviting the court to make the appointment because the appointing authority had refused or failed to do so.

Appointing authorities faced with this situation, which is not uncommon, have to look at the clause and have to make a prima facie determination as to whether they are properly referred to as the appointing authority. If they are satisfied that on a fair reading of the clause they are referred to, then they should appoint. If anybody wishes to object to that appointment in due course, then, of course, that party is free to do so. If, on

[1994] HKCU 146 at 4

the other hand, the arbitral authority has a serious doubt as to whether they are properly referred to in the contract, then they should decline to appoint and leaving it to the claimant to go to the court under Article 11 which can be dealt with fairly speedily. The only problem with that course of action is, if the other party is outside Hong Kong, then leave to serve out of the jurisdiction has to be applied for and this can sometimes take time and cause expense.

Unfortunately, in the present case, the Plaintiff did not write any letter to the Hong Kong International Arbitration Centre. I was told that the Plaintiff's solicitors had some telephone conversation with someone at the Centre and I was given some indication of the nature of the conversation, but this, of course, is most unsatisfactory. All that was required was a simple letter to the Hong Kong International Arbitration Centre inviting them to appoint. They would either appoint or decline to appoint. In the latter eventuality, an application can be made to the court.

The application before me is not even an application that I appoint an arbitrator under Article 11 of the Model Law, but, instead, it seeks some sort of declaration from the court, that the Hong Kong International Arbitration Centre be appointed the arbitration authority. I think that what the Plaintiff's solicitors were getting at was an attempt to seek a declaration from the court to the effect that Clause 24(b) of the contract between the parties was a proper reference to the Hong Kong International Arbitration Centre.

By the terms of this judgment it is clear that I am agreeing with that contention but I do not propose to make any formal declaration. What

[1994] HKCU 146 at 5

should now be done is that the Plaintiff should invite the Hong Kong International Arbitration Centre to appoint pursuant to Clause 24 of the agreement and they should send with their letter of application for appointment a copy of this judgment which makes clear that this court is satisfied that Clause 24 is a proper reference to the Hong Kong International Arbitration Centre even though the words "Hong Kong" have been omitted. What has to be done in a case such as this is to give effect to the intention of the parties. It is clear

from a proper reading of the whole agreement that the parties must have intended the reference to be to the Hong Kong International Arbitration Centre and therefore, in my judgment, they are the proper authority to appoint pursuant to the contract entered into between these parties. It follows from the above that the reference to Section 12(1)(a) of the Arbitration Ordinance in the Originating Summons is an error as the relevant reference is Article 11 of the Model Law.

It was for these reasons, therefore, that I made no order on the Plaintiff's Originating Summons, and I make no order as to costs.

I should have made clear that although the Defendant was served with the Originating Summons and the notice of date of the hearing of the Originating Summons, they declined to attend or to make any written submissions to the court.