ZHAN JIANG E & T DEV AREA SERVICE HEAD CO AN HAU CO LTD - [1994] 1 HKC 539

HIGH COURT
KAPLAN J

ACTION NO 10781 OF 1993

21 January 1994

Arbitration -- Stay of arbitration -- Whether there was live issue for arbitration -- Whether defendant admitted claim -- Whether admission has to cover quantum as well as liability -- Uncitral Model Law art 8

Words and Phrases -- 'Dispute'

The defendant contracted to sell to the plaintiff a shipment of wire rod in coils c & f Zhan Jiang port in China. Payment was to be by way of confirmed irrevocable transferable and divisible letter of credit in favour of the defendant. Clause 7 of the agreement provided for all disputes in connection with the agreement to be submitted to arbitration in China. The plaintiff brought an action against the defendant for failure to pack and deliver the shipment on time. The defendant applied for a stay of the proceedings pursuant to art 8 of the Model Law. The defendant contended that because the plaintiff unilaterally added a term requiring the provision of a performance bond after the contract had been made and refused to give up that term from the letter of credit, the shipment fell through. The defendant further contended that apart from liability being in dispute, quantum was also not agreed and there was a live issue for arbitration. The plaintiff contended that there was no defence to the action and as a letter dated 25 May 1993 from the defendant constituted an admission of liability, there was nothing to go to arbitration.

Held, allowing the application:

(1) Article 8 of the Model Law applied to the case at hand because an international arbitration agreement was involved. Article 8 is mandatory in terms and requires the court to refer the matter to arbitration unless it finds that the agreement is 'null and void, inoperative or incapable of being performed'.

(2) Refusing a stay when the defendant had admitted the claim was a proper course to adopt; most arbitration clauses only bite once there is a dispute. But if there is no admission, it cannot be right for the court to get involved in evaluating the strength of the parties' respective cases. *Guangdong Agriculture v Conagra Industries* [1993] 1 HKLR 113 applied.

(3) Until both liability and quantum of compensation payable was admitted, the parties were in dispute. An unequivocal admission as to both is required before a stay of action can be granted. It is not enough for a defendant to admit the claim without also admitting what sum is due as a result of that claim. It would be quite wrong for the court to conclude that merely because liability is admitted, it should arrogate to itself the task, difficult in some cases, of assessing what damages are payable as a result of the breach of contract which has been admitted.

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Cases referred to

Ellerine Bros v Klinger [1982] 1 WLR 1375

Guangdong Agriculture v Conagra Industries [1993] 1 HKLR 113

Guangdong New Technology Import & Export v Chiu Shing t/a BC Property & Trading Co [1991] 2 HKC 459

Shenzhen Nan Da Industrial & Trade United Co v FM International [1992] 1 HKC 328 ; [1992] HKLD C6

Legislation referred to

(HK) Rules of the Supreme Court O 14

Other legislation referred to

Uncitral Model Law art 8

Application

This was an application by the defendant pursuant to art 8 of the Model Law for a stay of proceedings brought by the plaintiff. The facts appear sufficiently in the following judgment.

Nelson Miu (Ko & Co) for the plaintiff.

Andrew Chung (Patrick Chung & Co) for the defendant.

KAPLAN J

I have before me an application by the defendant for a stay of these proceedings pursuant to art 8 of the Model Law.

By an agreement in writing dated 2 March 1993, the defendant agreed to sell to the plaintiff 10,000 mt of wire rod in coils at US$303.50 per mt c & f Zhan Jiang port in China. Payment was to be by way of confirmed irrevocable transferable and divisible letter of credit in favour of the defendant which had to reach the defendant by 8 March 1993.

Clause 7 of the agreement provided for all disputes in connection with this agreement to be submitted to arbitration in China. No point is taken that the arbitration clause refers to the former name of the China International Economic & Trade Arbitration Commission (CETAC), nor could it in the light of the authorities (see *Guangdong New Technology Import & Export v Chiu Shing t/a BC Property & Trading Co* default [1991] 2 HKC 459), a judgment of Barnes J delivered on 30 July 1991, and *Shenzhen Nan Da Industrial & Trade United Co v FM International* [1992] 1 HKC 328 , a judgment of Kaplan J delivered on 2 March 1992 also noted in [1992] HKLD C6.

No point has been taken as to the validity of the arbitration agreement and the only point raised before me is whether there is in fact any dispute which requires referring to arbitration.

The defendant's defence to this action is that they were unable to deliver the wire rods because the plaintiff unilaterally added a term requiring the provision of a performance bond after the contract had been made, which term the defendant alleges they never accepted, and when the

plaintiff refused to give up that term from the letter of credit, the shipment fell through. Further, the defendant contends that apart from liability being in dispute, quantum is also not agreed, and thus, there is a live issue for the arbitration.

Mr Nelson Miu, who appeared for the plaintiff, took me most helpfully through the documents in order to attempt to show that the documents are quite inconsistent with the defendant's position that they never agreed to the performance bond. He made out a strong case on the documents. However, at the end of the day, there is still the raging issue as to whether there was in fact an oral agreement for the inclusion of the term relating to the performance bond.

Mr Miu has in effect invited me to approach this matter as if it were an O 14 summons, and he invited me to adopt what I might term the *Murjani*approach to the consideration of the documentary evidence in this case when comparing it to the oral evidence. Is this approach permissible?

Article 8 of the Model Law applies to this case because this is an international arbitration agreement. Article 8 is mandatory in terms and requires me to refer the matter to arbitration unless I find that the agreement is 'null and void, inoperative or incapable of being performed'. Clearly, none of these factors apply. So how does Mr Miu put his case?

Mr Miu contends that I should be satisfied that there is no defence to this action and thus there is nothing to go to arbitration. This is, with respect, a somewhat simplistic approach. The only way I can be satisfied that there is no dispute to go to arbitration is if the defendant has admitted that the sum claimed is due.

As Templeman LJ (as he then was) said in *Ellerine v Klinger* 1982 1 WLR 1375:

> There is a dispute unless the defendant admits that the sum is due and payable.

This whole topic was extensively and helpfully discussed by Barnett J in *Guangdong Agriculture v Conagra Industries* default [1993] 1 HKLR 113. Having reviewed all the relevant cases, Barnett J concluded at p 124:

> I think it plain that the whole tenor of the Model Law is to restrict to a minimum the part which the courts have to play when parties have agreed to arbitration. It is also plain, as I hope I have demonstrated, that the courts are increasingly reluctant to become involved in disputes between parties to an arbitration agreement. That judicial reluctance, however, has been obstructed by the legislature, which has left it open to the courts to examine (often in some detail, I am afraid) the nature and extent of the dispute. That seems to me to be a wholly unsatisfactory state of affairs.

I am persuaded, therefore, that the proper construction of art 8(1) is that a court should refer to arbitration a claim which has not been admitted by the party against whom it is made. It will then be for the arbitrator to examine the merits on either side. This will provide the certainty which Mr Smith seeks and avoid the type of situation deplored by Kaplan J. I have no doubt that in an

appropriate case, an arbitrator will swiftly make an interim award or indeed a full and final award upon the claimant showing that there is no real defence or answer to his claim or part thereof.

I agree entirely with these observations. Refusing a stay when the defendant has admitted the claim seems a perfectly proper course to adopt. Most arbitration clauses only bite once there is a dispute. But if there is no admission, it cannot be right for the court to get involved in evaluating the strength of the parties respective cases. There are a number of reasons for this. (1) The parties have agreed that an arbitral tribunal would evaluate any claim or cross-claim. (2) The parties have agreed that this tribunal shall be in China. (3) As arbitration in China is final, there will be no appeal to the courts. (4) If this case was to remain in the Hong Kong court system, the unsuccessful party could appeal all the way to the Privy Council as of right, which would be in sharp contrast to the arbitral procedure agreed in the contract. (5) It is quite possible that a Chinese arbitral tribunal might approach the relationship between the oral and documentary evidence in this case in a way quite different to that of a Hong Kong court. (6) By agreeing to arbitration, the parties would have the benefit of the New York Convention which deals with the enforcement of foreign arbitral awards and now extends to 125 states or territories throughout the world. There is no reciprocal enforcement of civil judgments as between Hong Kong and China. Although this may not be a relevant point in the present case because the defendants are being sued in their own territory, this may not always be the case.

At the end of the day, what is being guaranteed by the terms of art 8 is that parties to arbitration agreements will be made to honour their agreement.

Now, in the present case, Mr Miu submits that the defendant has admitted the claim and thus he can legitimately bring himself within the observation of Barnett J, to which I have just made reference.

He has referred me to a letter dated 25 May 1993, from the defendant to the plaintiff which I ought to set out in full.

> *An Hau Co Ltd*
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> Regarding your request for compensation made on 21 May, we, having considered, hereby propose to settle the matter as follows:

Firstly, we understand that the failure of packing and delivering this shipment of goods on time to your company caused damages, but your company's proposed amount of compensation against us is too high. The damages caused by the failure of packing and delivering the shipment to our company are quite large. We specifically sent a representative to the place of origin (Romania, Bulgaria) to confirm this shipment. We informed your company to amend the letter of credit after checking and ascertaining the source of the goods. We have never mentioned any problem on the supply of the goods. On the terms of the letter of credit, disputes arose. We could not eventually reach a compromise. As a result, the goods could not be packed and delivered on time.

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Our Bulgarian supplier has already paid the deposit to the manufacturer to confirm this shipment after signing the contract with us.

Hope we can satisfactorily settle this matter on the basis of mutual understanding. We would agree to bear US$3 per tonne as compensation. Please amend the letter of credit No GDBZJ930016 to the second shipment of 10,000 mt wire rods in coil under contract No 93APR/STC/007AH and deduct US$3 from the unit price 'US$315'. The contractual price is therefore US$312 per tonne. In the alternative, we have now a shipment of white sugar, information of which is shown in the annexure hereto. Looking forward to receiving your cooperation. Hoping this transaction can compensate your damages. We hope that General Manager Yuan could understand. Awaiting reply.

Regards,

An Hau Co Ltd

25 May 1993

carbon copy: Zhen Hing Development Co Ltd

Liu Yun Dung, Manager

Mr Andrew Chung for the defendant denies that this letter can be construed as a sufficient admission of liability to justify refusing the stay. He submits that it is clearly a proposal to settle a commercial dispute which goes on to make reference to future business between the parties. He points out that the letter specifically alleges that a dispute arose as to one of the terms of the letter of credit and that the parties could not agree on it. The offer made in the letter is in any event one of US$3 per mt where the claim is for US$14.50 per mt.

I am satisfied that this letter is not an unequivocal admission of liability but is merely a commercial offer to settle. Even if I were wrong about that, there is clearly no admission as to the quantum of the claim.

When I refer to not staying an action because there has been an admission, I refer to an unequivocal admission as to liability and quantum. It is not enough for a defendant to admit the claim without also admitting what sum is due as a result of that claim. That is, no doubt, why Templeman LJ referred to an admission 'that the sum is due and payable.'

If the quantum of a claim is not admitted, then this is a matter which the parties have agreed should be decided by arbitration. It would be quite wrong for the court to conclude that merely because liability is admitted, it should arrogate to itself the task, difficult in some cases, of assessing what damages are payable as a result of the breach of contract which has been admitted.

I am, therefore, quite satisfied that not only is the letter of 25 May 1993 not an admission of liability, but it is most certainly not an admission as to quantum which, in my judgment, must be determined in the manner agreed by the parties in their contract. Even if it was easy to prove the quantum of the claim, it is still a matter to be decided by the arbitral

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tribunal and not by the court. Until it is so determined, the parties are in dispute as to what sum is actually payable by the defendant to plaintiff.

For these reasons, therefore, I grant the stay sought by the defendant and I order the plaintiff to pay the defendant's costs to be taxed if not agreed.