

KATRAN SHIPPING CO LTD v KENVEN TRANSPORTATION LTD - [1992] 1 HKC 538

HIGH COURT
KAPLAN J

CONSTRUCTION LIST NO 7 OF 1992

29 June 1992

Arbitration -- Mareva injunction -- Jurisdiction of court -- Agreement that disputes be settled by application of British maritime law -- Whether Mareva injunction considered an interim measure of protection -- Arbitration Ordinance (Cap 341) Fifth Schedule art 9 -- Uncitral Model Law

Words and Phrases -- 'Interim measure of protection' -- Uncitral Model Law art 9

The plaintiffs and the defendants entered into a time charterparty agreement on the Baltimex form whereby the defendants agreed to time-charter a vessel 'Anh Dao' for an initial period of six months. Clause 45 of the charterparty provided that 'any dispute will be settled before Hong Kong arbitrators and under British maritime law will be applied' (sic). A dispute having arisen between the parties, the plaintiffs obtained an ex parte Mareva injunction. On the return day for the inter partes summons, the defendants did not appear despite having been served with the original order and inter partes summons.

Held, granting the injunction to continue until trial or further order:

- (1) Although both parties were Hong Kong companies and had their places of business in Hong Kong, the dispute was covered by the Uncitral Model Law which appeared in the Arbitration Ordinance (Cap 341) Fifth Schedule. *Fung Sang Trading v Kai Sun Sea Products & Food Co* 1992 1 HKLR 40 applied.
- (2) The court had jurisdiction under art 9 of the Model Law to grant an interim measure of protection, which was clearly intended to be of wider application than a mere order preserving the subject matter of the dispute.
- (3) On the basis of the clear language used, 'an interim measure of protection' was wide enough to cover a Mareva injunction. The protection afforded by a Mareva injunction was the reduction in the risk of the amount of the claim or part of it, being dissipated or otherwise put out of the plaintiffs' reach before the resolution of the dispute. If such an injunction was granted and obeyed, the plaintiffs would be protected until trial against any steps the defendants may take to render the judgment against them nugatory.
- (4) In this regard the jurisdiction of the court is identical with the jurisdiction of the court to grant a Mareva injunction under s 14(6) of the Arbitration Ordinance in support of a domestic arbitration being carried out in Hong Kong.

Cases referred to

Channel Tunnel Group v Balfour Beatty Construction [1992] 1 QB 656

Fung Sang Trading v Kai Sun Sea Products & Food Co [1992] 1 HKLR 40

[1992] 1 HKC 538 at 539

Legislation referred to

(HK) Arbitration Ordinance (Cap 341) ss 2(3), 14(6), Fifth Schedule arts 1(3)(b)(ii), 9, 17

Other legislation referred to

Broche, Aron Commentary on the Model Law pp 51-52

Holtzmann and Neuhaus Guide to the Uncitral Model Law pp 332-333

Application

This was an application by the plaintiffs to Kaplan J for an order that a Mareva injunction, granted ex parte, continue until trial or further order. The facts of the case are sufficiently set out in the following judgment.

Jonathan Rostron (Sinclair Roche) for the plaintiffs.

No appearance by the defendants.

KAPLAN J

On 19 June 1992, I granted the plaintiffs an ex parte Mareva injunction. The return day for the summons was 29 June 1992. The defendants did not appear despite having been served with the original order and inter partes summons. I continued the injunction until trial or further order.

I was satisfied that the plaintiffs were entitled to the order they sought and I have prepared this judgment to deal with a jurisdictional issue under art 9 of the Model Law.

I am satisfied that, despite the fact that both parties are Hong Kong companies and have their places of business in Hong Kong, this dispute, which they agreed should go to arbitration, is covered by the Uncitral Model Law which appears as the Fifth Schedule to the Arbitration Ordinance (Cap 341).

Article 1(3)(b)(ii) of the Model Law provides that an arbitration is international if:

... any place where a substantial part of the obligations of the commercial relationship is to be performed ...

is situate outside of Hong Kong.

In the present case, the plaintiffs and the defendants entered into a time charterparty agreement on the Baltimore form on 28 January 1992. By this charterparty, the defendants agreed to time charter the general cargo vessel 'Anh Dao' for an initial period of six months.

The plaintiffs' vessel received voyage instructions on 24 April 1992 from its Hong Kong broker which passed on the defendants' instructions to proceed to Qingdoo, China, to load a cargo of cement and discharge at Mongla/Chittagong Bangladesh.

Clause 45 of the charterparty provided that 'any dispute will be settled before Hong Kong arbitrators and under British maritime law will be applied' (sic).

[1992] 1 HKC 538 at 540

Relying upon the terms of art 1(3) and also upon my decision in *Fung Sang Trading v Kai Sun Sea Products and Food Co Ltd* default [1992] 1 HKLR 40, Mr Rostron of Sinclair Roche, for the plaintiffs, accepted, in my judgment correctly, that this arbitration agreement was governed by the Model Law. That being the case, it is necessary for me to consider the terms of art 9 which provides:

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such a measure.

It is further relevant to note the terms of art 17 which provides:

Unless otherwise agreed by the parties, the Arbitral Tribunal may, at the request of a party, order any party to take such interim measure of protection as the Arbitral Tribunal may consider necessary in respect of the subject-matter of the dispute. The Arbitral Tribunal may require any party to provide appropriate security in connection with such measure.

Section 2(3) of the Arbitration Ordinance enables the court to have regard to the international origin of the Model Law and the need for uniformity of interpretation and further to have specific regard to the Sixth Schedule documents which include the *travaux préparatoire* of the Model Law including the report of the Commission on the work of its 18th session.

The interim measure of protection referred to in art 9 is clearly intended to be of wider application than a mere order preserving the subject matter of the dispute.

On the basis of the clear language used, I have no difficulty whatsoever in concluding that 'an interim measure of protection' is wide enough to cover a Mareva injunction. The protection afforded by a Mareva injunction is the reduction in the risk of the amount of the claim, or part of it, being dissipated or otherwise put out of the plaintiffs' reach before the resolution of the dispute. If such an injunction is granted and, if obeyed (and assuming that there was in fact sufficient assets in the defendants' possession to cover the plaintiffs' claim or part thereof), the plaintiffs are protected until trial against any steps the defendants may wish to take to render the judgment against him nugatory. This clearly protects the plaintiffs during the period between the application and the resolution of the claim.

Paragraph 96 of the Commission Report dated 21 August 1985 states as follows:

The Commission adopted the policy underlying the article and confirmed the view that the range of measures covered by the provision was a wide one and included, in particular, pre-award attachment. It was pointed out that the interim measures compatible with an arbitration agreement might, for example, also relate to the protection of trade secrets and proprietary information. It was understood that art 9 itself did not regulate which interim measures of protection were available to a party. It merely expressed the principle that a request for

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any court measure available under a given legal system and the granting of such measure by a court of 'this State' was compatible with the fact that the parties had agreed to settle their dispute by arbitration.

Holtzmann and Neuhaus in their comprehensive *Guide to the Uncitral Model Law* at pp 332-333 put the matter in this way:

Article 9 is not limited to any particular kind of interim measures. Thus it applies to measures to conserve the subject matter of the dispute; measures to protect trade secrets and proprietary information; measures to preserve evidence; pre-award attachments to secure an eventual award and similar seizures of assets; measures required from third parties; and enforcement of any interim measures ordered.

At pp 51-52 of *Aron Broche's Commentary on the Model Law* it is stated:

At its fourth session, the Working Group agreed that the interim measures of protection would include measures of conservation of the subject matter of the dispute and measures in respect of evidence as well as pre-award attachments, but that it was not necessary to list the various measures. A general formula such as adopted in the 1961 Geneva Convention would be more appropriate. At its last session, the Working Group preferred the expression 'interim measures of protection', which was taken from the Uncitral Arbitration Rules. It noted that the range of measures was much wider than the interim measures of protection which an arbitral tribunal might grant under art 18 of the draft (now art 17 of the Law). The latter are limited to measures 'in respect of the subject matter of the dispute'.

I am thus wholly satisfied that I have jurisdiction under art 9 of the Model Law to grant a Mareva injunction as an interim measure of protection. In this regard, the jurisdiction of the court under the Model Law is identical to the jurisdiction of the court under the Arbitration Ordinance in relation to domestic arbitration. Section 14(6) gives the court power for the purpose of and in relation to a reference the same power of making orders in respect of 'securing the amount in dispute in the reference' and 'interim injunction' as the court has for the purpose of and in relation to an action or matter in the court.' It is quite clear that the court has jurisdiction to grant a Mareva injunction in support of a domestic arbitration being carried out in Hong Kong. The issue whether either under s 14(6) of the Arbitration Ordinance or under art 9 of the Model Law, the court can grant an injunction in support of an arbitration whose seat is outside Hong Kong is not raised by the instant case. The decision of the English Court of Appeal, which held there was no such jurisdiction, in *Channel Tunnel Group v Balfour Beatty Construction Ltd* default [1992] 1 QB 656 is about to be considered by the House of Lords.