

**OONC LINES LIMITED v SINO-AMERICAN TRADE ADVANCEMENT CO
LTD - [1994] HKCU 35**

SUPREME COURT OF HONG KONG HIGH COURT
NEIL KAPLAN, J

MISCELLANEOUS PROCEEDINGS NO. 50 OF 1994

2 February 1994

Arbitration -- Model Law -- Whether article 7(2) complied with -- Whether sufficient evidence of agreement in writing to comply with article 7(2) -- Whether necessary for court to be completely satisfied that there was an arbitration agreement -- Whether arbitrator should be appointed -- The Model Law article 7, 7(2), 11, 16

Mr. William Stone instructed by M/s Ng & Partners for the Plaintiffs.

Mr. Andrew Chung instructed by M/s Charles Chiu & Co. for the Defendants.

HEADNOTE

Arbitration - Model Law - Article 7(2) - agreement in writing - charterparty - whether arbitrator shall be appointed - Article 16.

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There is before the court an originating summons dated 7th January 1994 seeking the appointment of an arbitrator on behalf of the Defendants pursuant to Article 11 of the Model Law.

The claim which the Plaintiff wishes to make against the Defendant arises out of a charterparty. The matter is governed by the Model Law because although both parties have their place of business in Hong Kong, a substantial part of the obligations of the commercial relationship was to be performed outside Hong Kong (see Article 1).

The issue is whether Article 7(2) of the Model Law has been complied with. Article 7 provides as follow:

"(1) "arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document

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containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract."

The Plaintiffs allege that a fixture was agreed, but when the Defendants were unable to obtain a cargo, they then denied that a fixture had ever been agreed.

The form of charter sent out by the Plaintiffs, which they contend was agreed, was in Gencon form. This form does not contain an arbitration clause as a standard clause. However, on the version sent to the Defendant, which the Plaintiffs say was agreed, there were a number of riders, clause 32 of which was a Hong Kong arbitration clause. It is common ground that neither party signed the charterparty.

A considerable body of telexes and faxes have been placed before me on behalf of the Plaintiffs to attempt to show compliance with Article 7(2). A diary entry has been produced which shows an entry made on 24th May 1991 by Mr. Lai of Echo Tsusho Co. Ltd. who were the Plaintiffs' agents. This entry is strong prima facie evidence that Mr. Lai spoke to Mr. Yau on behalf of the Defendants on this date and that Mr. Yau confirmed that the terms of the charterparty sent previously to him were agreed. Although this is strong evidence, if accepted, that a voyage was concluded, it is not evidence that can be used for the purposes of Article 7(2) as it is essentially self-serving and is not a writing emanating from the Defendants.

On 22nd May 1991, Echo faxed the Defendants for the attention of Mr. Yau with a copy to the Plaintiffs. This fax referred to an earlier telecon

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and it preceded to recapitulate various details which had been discussed. It gave full details of the vessel, the "Ya Zhou Hai". It specified the cargo and the load and dispatch ports. The laycan was specified as were the freight, demurrage and dispatch rates.

Under the heading "C/P DTLS" one finds the following:

"BSS CHTRS OR OWN PROFORMA GENCON DETAILS"

I take this as meaning "basis charterers or own proforma Gencon details". As I have said before the Gencon form does not contain an arbitration clause, although I understand that the Baltic and International Maritime Council (BIMCO) are reconsidering this issue.

On the same day, the Defendants replied to Mr. Lai of Echo (copied to the Plaintiff) in the following terms:

"Re: 25,000 MT BULK UREA EX. YUZINY/ZHANJIANG"

Refer to your fax ETC/BIZ - 91/05/344 dated 22 May, 1991. We hereby confirm acceptance of vessel "Ya Zhou Hai" PRC flag built 1977 as for the terms mentioned.

Pls prepare the contract asap and advise detail of your appointed agent enabling us to proceed further. Pls note the above cargo under export licence No. ... in USSR.

.....

B. Rgds

Allan Yau"

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This was responded to on the same day by Mr. Lai of Echo in the following terms:

"Many thanks your fax ... 5/22/91 and contents fully noted.

Pls be advd that vsl now disch in Constantza (in Black Sea) with ETCD 28/May thence proceed to Yuziny for loading with ETA 29/May and we are now checking full style of agent in Yuziny and will revert result soonest possible.

Thank you again for your kind assistance and cooperation and we are firmly believed that the shipment will be proceeded smoothly under our joint operation. (Sic)

With Best Rgds

H.S. Lai"

On about 23rd May 1991, the Defendants were sent a working copy of the Charterparty by fax. The covering fax stated:

"Refer telecon we have the pleasure enclosing herewith one set of C/P in "working copy" for your ready reference.

Please let us have your acceptance and agreement to said C/P as soon as the terms/conditions being checked in order. (Sic)

With Best Rgds

H.S. Lai"

On 23rd May 1991, Mr. Yau of the Defendants faxed Mr. Lai of Echo with a copy to the Plaintiffs. This referred to their previous telephone conversation and it was a request to instruct the master of the vessel in [1994] HKCU 35 at 6

question to issue a certificate in the terms as stated in the rest of the letter. The letter concluded, after the certificate details, with the following paragraph:

"Please note the certificate will be collected by us directly at port of loading. Pls adv the procedure of collecting the certificate."

I now turn to the charterparty dated 22nd May 1991 sent to the Defendants on or about 23rd May 1991. The Plaintiffs are shown as disponent owners and the Defendants as charterers. The other basic details of the ship, cargo and rates are all as specified in the previous fax.

Clause 21 states "Rider clauses from No. 22 to 47 are deemed to be incorporated in the charterparty." (Clause 32 is the arbitration clause) Mr. Yau has written in box 21 in his own hand writing the following:

"TO: OONC LINE

WE CONFIRM TO RETURN BACK THE ORIGINAL OF THE CHARTER PARTY BY NEXT TUESDAY (24.5.91). IF POSSIBLE, WE WILL SEND ALONG WITH THE ENQUIRY TO THE USSR PARTY REGARDING THE CARGO MATTER.

SINO AMERICAN

ALLAN YAU (dated)"

This was faxed to the Plaintiffs and/or Echo.

On 24th May 1991, Mr. Lai of Echo faxed the Defendants informing them that the original charterparty in triplicate was speedposted that day for the Defendants' execution and return.

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After this, problems arose with the Defendants' cargo because they were never in a position to load any cargo onto the vessel. The Plaintiffs/Echo wrote to the Defendants many times but to no avail and now that these proceedings have been commenced, the Defendants deny they ever entered into a charter and specifically deny that the Plaintiffs have complied with Article 7(2). The Plaintiffs characterize the Defendants' present position as transparently opportunistic.

As I said in *Pacific International Lines (Pte) Ltd. & Another v. Tsinlien Metals & Minerals Co. (HK) Ltd.* [1993] 2 HKLR 249, all that a plaintiff in these circumstances has to do is to satisfy the court that sufficient evidence has been placed before it which meets the necessary threshold for the invocation of Article 7(2) of the Model Law. In that case, I accepted that it is not necessary for the court to be completely satisfied that there was an arbitration agreement which satisfies Article 7, but on the other hand, there must be material placed before the court from which it must be reasonably arguable that Article 7(2) has been complied with. In that case, I went on to point out that the terms of Article 16 of the Model Law empower the tribunal to rule on its own jurisdiction "including any objections with respect to the existence or validity of the arbitration agreement". It follows therefore that if the court appoints an arbitrator and the panel is thus constituted, it is still open to either party to raise before the tribunal any issue that goes to the jurisdiction of the tribunal. In this case, if I appoint an arbitrator, there is nothing to stop the Defendants from taking the point before the tribunal that there never was a charter and there never was a compliance with Article 7(2), and if the tribunal rules that it does have jurisdiction then the aggrieved party may bring the matter back before the court for a decision provided he

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applies within 30 days and under Article 16 the court may make a final ruling on the matter.

I wish to make it clear that that it is not appropriate merely to pay lip-service to the provision of Article 7. Whether one is happy with the philosophy behind Article 7 or not, this is irrelevant to the task which the court has to undertake in deciding whether Article 7(2) has been complied with. To some, it may seem strange that, whereas most systems of law acknowledge the validity of oral contracts which frequently run into millions of dollars, nevertheless, for the purposes of establishing one clause in a contract, namely the arbitration clause, the Model Law requires some record in writing of the agreement to arbitrate. It has already been

pointed out by the Departmental Advisory Committee in England that the terms of Article 7(2) might create difficulties in relation to Bills of Lading, Charterparties and broker's notes. Although this court has not been swamped with problems concerning Article 7(2), nevertheless there have been a few cases on this topic. Whether the law requires amending in the light of experience is a matter for others to decide in due course. Some might contend that Article 7(2) ought to make reference to trade usage, custom and a course of dealing. In many forms of standard contracts, arbitration clauses appear as a matter of course. However, in the present case as I have already pointed out, the Gencon form does not contain an arbitration clause, and thus I have to be satisfied that there is a written record of the Defendants' agreement to arbitrate any disputes which might arise.

I have given this matter very careful considerations. I have considered with care Mr. Andrew Chung's very helpful oral and written submissions on this topic. Mr. William Stone, with his characteristic realism,

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has stated that it is really a matter of impression for the judge as to whether these documents complied with Article 7(2).

At the end of the day, I am quite satisfied that there is sufficient material to comply with Article 7(2) of the Model Law. I believe that Mr. Yau's hand-written note on the working copy of the charterparty in the very box where the riders are referred to, one of which was the arbitration clause, is very strong evidence that the Defendants accepted the terms of the charterparty which included the arbitration clause. There was clearly an ongoing contractual build-up and it is certainly arguable in relation to the arbitration clause that the same was accepted by Mr. Yau's hand-written note. Of course, in relation to the issue whether there was ever a charter agreed at all, the Plaintiffs will further be able to rely upon the terms of the alleged oral discussion to which I have made reference. However, that does not assist me in relation to Article 7(2). I believe, in this case, the arbitration agreement is in writing because it is contained in an exchange of faxes which do provide a sufficient record of the agreement to justify my appointment of an arbitrator on behalf of the Defendants.

The originating summons does not seek the appointment of a specific person as arbitrator. On Wednesday the 2nd February 1994, the parties' solicitors appeared before me whereupon I announced that I was satisfied that Article 7(2) had been complied with and I was prepared to appoint an arbitrator and my reasons which were almost ready would be sent to them in a day or two. Mr. Luk of Charles Chiu & Co. for the Defendants stated that his clients had no particular views about the identity of the arbitrator and was prepared to leave the matter to me. Mrs. Thomson who appeared on this occasion for the Plaintiffs, suggested that it would be

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preferable if I appointed Mr. Julian Lister as arbitrator because he had been appointed arbitrator in the head arbitration between Vast Prosperity and these Plaintiffs. The present arbitration is very much a back to back situation provided the Plaintiffs can establish the Defendants did in fact enter into a charter. It seems to me that there was a lot to be said in having the same arbitrator because at the end of the day it must be more convenient and likely to save costs. How that will work out in practice I leave to the good sense and experience of Mr. Lister.

Mrs. Thomson invited me to award the Plaintiffs' costs on an indemnity basis following previous cases where such an order had been made where an appointment was made on behalf of a Defendant. However, those cases were ones in which the Defendants, not only failed to appoint their arbitrator in accordance with their contractual obligations to do so, but they also failed to respond in any way at all to the court proceedings properly served on them. This case is very different. The Defendants came along and opposed the application and put forward an argument which, although I have rejected it, cannot be categorised as an abuse of process or vexatious or frivolous. In those circumstances, the proper order is that the Plaintiffs have the costs of these proceedings on the usual basis of taxation.