Canada Packers Inc. et al. v. Terra Nova Tankers Inc. et al.

[Indexed as: Canada Packers Inc. v. Terra Nova Tankers Inc.]

11 O.R. (3d) 382
[1992] O.J. No. 2035
Action No. 92-CQ-22196

Ontario Court (General Division),
Day J.
October 1, 1992

Arbitration -- Application of International Commercial Arbitrations Act -- Act applying to both contractual and non-contractual disputes -- International Commercial Arbitration Act, R.S.O. 1990, c. I.9, s. 8.

The International Commercial Arbitration Act, which incorporates the UNCITRAL Model Law on Commercial Arbitration, extends to both contractual and non-contractual matters arising out of a commercial legal relationship; that a claim sounding in tort does not exclude arbitration.

Kaverit Steel & Crane Ltd. v. Kone Corp. (1992), 87 D.L.R. (4th) 129, 85 Alta. L.R. (2d) 287, [1992] 3 W.W.R. 716, 4 C.P.C. (3d) 99, 40 C.P.R. (3d) 161 (C.A.); leave to appeal to S.C.C. refused September 1, 1992, folld

Other cases referred to

Stancroft Trust Ltd. v. Can-Asia Capital Co. (1990), 67 D.L.R. (4th) 131, 43 B.C.L.R. (2d) 341, [1990] 3 W.W.R. 665, 39 C.P.C. (2d) 253 (C.A.)

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Statutes referred to

International Commercial Arbitration Act, R.S.O. 1990, c. I.9, s. 8

Conventions and treaties referred to

Convention on the Recognition and Enforcement of Foreign Arbitral Awards , 1958, R.S.O. 1990, c. I. 9, Schedule, art. 8(1)

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MOTION for a stay of proceedings under the International Commercial Arbitration Act , R.S.O. 1990, c. I.9, s. 9.

Peter F.M. Jones, for the applicants (defendants).

William M. Sharpe, for the respondents (plaintiffs).

DAY J. (orally):--By a voyage charter-party made as of April 30, 1991, Canada Packers Inc., as charters, agreed with "Cob Shipping Canada Inc., as agents for Terra Nova Tankers Inc.", as owner, to charter the ship "Tove Cob" to carry vegetable oils from East Asian ports for discharge at Montreal and Toronto.

The voyage charter-party included an arbitration clause which provided: "Any dispute arising from the making, performance or termination of the Charter Party shall be settled" by arbitration as further provided in s. 31 of the voyage charter-party clause.

The respondents have pleaded that the applicants in this motion, but not the defendant DMD Enterprises Pte. Ltd., were parties to the voyage charter-party. This is not disputed. The respondents have pleaded that the applicants are in breach of contract under the voyage charter-party. Whether or not they are in breach of contract is not the subject of this

application.

The respondents have also pleaded against all applicants the following tort causes of action:

a) failure to disclaim liability as principal;

b) deliberate or negligent misrepresentation;

c) breaches of collateral warranties;

d) failure to warn; and

e) wrongful preference of commercial interest.

The respondents have, in addition, pleaded wrongful interference with contractual relations against all applicants and the defendant DMD Enterprises Pte. Ltd.

In respect of all of those tort allegations regarding all parties except DMD Enterprises Pte. Ltd., the genesis would appear to come from the contract itself.

The International Commercial Arbitration Act, R.S.O. 1990, c. I.9, incorporates into Ontario law as its schedule the UNCITRAL Model Law on International Commercial Arbitration, including art. 8(1) as follows:

> 8(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(Emphasis added)

Section 8 of the said Act provides:

> 8. Where, pursuant to article 8 of the Model Law, a court refers the parties to arbitration, the proceedings of the

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court are stayed with respect to the matters to which the arbitration relates .

(Emphasis added)

Counsel for the respondent referred to Stancroft Trust Ltd. v. Can-Asia Capital Co. (1990), 67 D.L.R. (4th) 131, 43 B.C.L.R. (2d) 341 (C.A.), Southin, J.A., to support the position that the potential application of art. 8(1) of the Model Law must be considered against each party individually. In this respect I understand his argument to be that DMD could not be included in such an order. I agree with this position.

It is not disputed between counsel in their arguments that Mr. Gilje is a principal charter-party and as such he will be bound by the order given herein.

I refer to the decision of Kaverit Steel & Crane Ltd. v. Kone Corp. (1992), 87 D.L.R. (4th) 129, 85 Alta. L.R. (2d) 287 (C.A.), Kierans J.A., and particularly at p. 133 D.L.R., p. 293 Alta. L.R., as follows:

> The extra claims also include allegations against all the defendants of conspiracy to harm all plaintiffs. Mr. Redmond for the distributor says that this pleading relies on tort, not contract, and offers two alternatives: conspiracy to harm by unlawful acts and conspiracy to harm by lawful acts.

And further at p. 134 D.L.R., p. 293 Alta. L.R.:

> The mere fact that a claim sounds in tort does not exclude arbitration. Section 2 of the International Commercial Arbitration Act limits its scope to ". . . differences arising out of commercial legal relationships, whether contractual or not". This is permitted by art. 1, s. 3, of the Convention, which leaves to signatory states the decision whether the Convention applies to just those differences, as opposed to all manner of differences.
>
> The Convention and Act thus covers both contractual and non-contractual commercial relationships. They thus extend

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their scope to liability in tort so long as the relationhip that creates liability is one that can fairly be described as "commercial". In my view, a claim that a corporation conspired with its subsidiaries to cause harm to a person with whom it has a commercial relationship raises a dispute "arising out of a commercial legal relationship, whether contractual or not".

Counsel for the applicant pointed out that the word "commercial" while in the Alberta Act is not included in the Ontario statute. Nonetheless, I take it that the concept "commercial" is picked up in the Convention and I would ascribe the same basis as if the word "commercial" were included in the Ontario Statute in order for consistency in the Convention.

For the above mentioned reasons, I order that any dispute arising from the making, performance or termination of the charter party be referred to arbitration in New York in accordance with s. 31 of the charter-party dated April 30, 1991. In making this finding, it shall apply to the parties of this action with the exception of DMD Enterprises Pte. Ltd. for the reasons above set out.

As a result, this action is stayed to the extent necessary to give effect to this order.

The plaintiffs shall be at leave to reapply to this court for further determination if there should be a finding that the arbitration tribunal lacks jurisdiction with respect to any of the parties to which this order applies or on any of the causes of action pleaded in the statement of claim dated June 15, 1992 in this action.

Costs to the moving parties in the arbitral cause provided that if the arbitration tribunal finds that it does not have jurisdiction as to these costs then party-and-party costs shall be paid to the applicant on assessment.

Order accordingly.

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