COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Pan Liberty Navigation Co. Ltd. v. World Link (H.K.) Resources Ltd.,*** 2005 BCCA 206

Date: 20050408
Docket: CA032234

Between:

Pan Liberty Navigation Co. Ltd. and Blue Arctic Shipping Co. Ltd.

Respondents (Plaintiffs)

And

World Link (H.K.) Resources Limited

Appellant (Defendant)

Before: The Honourable Mr. Justice Esson
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Oppal

M. Sachs — Counsel for the Appellant

T. S. Hawkins and A. T. Keagan — Counsel for the Respondents

Place and Date of Hearing: Vancouver, British Columbia, February 10, 2005

Place and Date of Judgment: Vancouver, British Columbia, April 8, 2005

Written Reasons by:
The Honourable Mr. Justice Esson

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Oppal

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Reasons for Judgment of the Honourable Mr. Justice Esson:

[1] The defendant, to which I will refer as World Link (H.K.), appeals with leave from an order of Mr. Justice Blair pronounced August 4, 2004, refusing to stay the action on the ground that further proceedings in it should take place in England.

[2] The plaintiffs, to whom I will refer as "Pan Liberty" and "Blue Arctic", are ship owners who carry on business in Cyprus. Pan Liberty was, in November 2000, the owner of the ship "PANLI", and Blue Arctic was the owner of the ship "ARCTIC". Both ships flew the flag of Cyprus. In that month, the ships were chartered to a company referred to in each charter party as "Worldlink Transport Co. Ltd. of Beijing". I will hereafter refer to that entity, as the plaintiffs do in their statement of claim, as the "defaulting charterer".

[3] Both charters provided:

> 17. Any dispute arising out of or in connection with this Charter Party shall be governed by English Law and referred to Arbitration in London. One arbitrator to be nominated by the Owners and the other by the Charterers and in case those arbitrators shall not agree then the decision of an Umpire to be appointed by them....
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> * * *
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> Clause 48 – Addition to Arbitration Clause [from Rider Clauses]
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> If one party fails to appoint an arbitrator either originally or by way of substitution as aforesaid, for seven (7) clear days after the other party having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference and the award shall be binding on both parties as if he had been appointed by consent.

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[4] In 2001, the defaulting charterer not having met its obligation to pay the hire, both owners launched arbitration proceedings before Mr. Hardee, a London arbitrator. Notice was given to the defaulting charterer in accordance with the charter party, but it did not respond in any way. Accordingly, in August 2001, Mr. Hardee issued a "final award" in favour of Pan Liberty for some $224,000.00 U.S. plus interest and costs, and in favour of Blue Arctic for some $131,000 U.S. plus interest and costs.

[5] Over the next two years, through their London solicitor, Mr. Hicks, the owners sought without success to enforce the awards. Mr. Hicks' efforts to track down the defaulting charterer led him to develop, by November 2003 if not earlier, a theory that if any entity bearing the name Worldlink Transport Co. Ltd. of Beijing existed at all, that entity was a worthless shell which had been used by the appellant to obtain the benefit of the charter without paying for it.

[6] By that time, Mr. Hicks was in correspondence with Hai Tong & Partners, of Beijing, the solicitors for World Link (HK). In a letter of November 21, 2003, Mr. Hicks responded to Hai Tong's assertion that there was "no relation or association whatsoever" between their client and the defaulting charterer by saying that he did not accept "this extraordinary assertion" and would be taking steps to "arrest bunkers" on a vessel chartered to World Link (HK) Transport & Trading Ltd. Hai Tong had ended its letter of November 10, 2003, denying any link, with the admonition, "Please don't deflect from the correct direction in exercising your rights!" The response, as the saying goes, was on the letterhead of the Supreme Court of British Columbia.

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[7] By that time, Mr. Hicks had become aware that a ship named the "EIRINI" was under charter to the appellant and was about to arrive in British Columbia. This action was commenced with a view to obtaining a Mareva injunction against the ship's fuel and bunkers on the basis, as stated in the affidavit of Mr. Hicks sworn on November 30, 2003 (para. 35), that:

> The bunkers onboard the "EIRINI" are owned by the Defendants. In virtually all time charter arrangements, the charterers are responsible for purchasing and payment of fuel and bunkers. For example see clause 2 of the charterparty between World Link and the Plaintiff Pan Liberty at Exhibit "D" above.

[8] The style of cause in the action named four defendants, described in the statement of claim as follows:

> 3. The Defendant, World-Link (H.K.) Transport & Trading Limited ("World Link HK"), is a company duly incorporated under the laws of Hong Kong, having its office at Flat F, 20th Floor/1311, Lucky Plaza, 315 – 321 Lockhart Road, Wanchai, Hong Kong.
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> 4. The Defendant, World-Link (HK) Transport & Trading Limited dba World Link Transport Co. Ltd. ("World Link HK"), is a company duly incorporated under the laws of Hong Kong, having its office at Flat F, 20th Floor/1311, Lucky Plaza, 315 – 321 Lockhart Road, Wanchai, Hong Kong.
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> 5. The Defendant, Worldlink Transport Co. Ltd. (the "Defaulting Charterer"), is an entity which purports to have an office at Room 1309, Beiao Plaza, No. 2 Huixin Dong Street, Chaoyang District, Beijing, PRC, 100029.
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> 6. The Defendant, Worldlink (H.K.) Resources Limited ("World Link Resources"), is a company duly incorporated under the laws of Hong Kong, having its office at Flat F, 20th Floor/1311, Lucky Plaza, 315 - 321 Lockhart Road, Wanchai, Hong Kong and is the successor of World Link HK, which changed its name on 31st October 2003 to World Link (HK) Resources Limited.

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Paragraphs 3 and 6 in the statement of claim both refer to the appellant. Paragraph 5 refers to the defaulting charterer. Paragraph 4 would appear also to be an alternative reference to the appellant. It therefore appears that what seems to be a naming of four defendants is four different ways of naming one defendant. In any event, only World Link (H.K.) Resources Limited is an appellant in this Court and any reference in my reasons to the "appellant" will be to that entity.

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[9] The injunction was granted *ex parte* by Paris J. on November 30, 2003. On December 4, 2003, World Link (H.K.) applied for and was granted an order that, upon payment into court of C$850,000.00 as security, the injunction should be lifted. That amount was promptly paid into court, thus permitting the departure of the "EIRINI" and her bunkers to other parts of the world. The amount paid in remains in court.

[10] The statement of claim is a lengthy document but the essence of the plaintiffs' case appears to be as stated in this paragraph of the statement of claim:

> 16. The Defendants [*sic*] say, and the fact is, that World Link HK was the directing mind and alter ego of the Defaulting Charterer and at all times material made use of the Defaulting Charterer as a mere façade concealing the true facts and undertook a campaign to defraud the Plaintiffs Pan Liberty and Blue Arctic of the amounts due under the Charterparty Agreements, particulars of which campaign include but are not limited to the following:
>
> (a) the Charterparty Agreements record that the Defaulting Charterer was "of Beijing" as drafted by World Link HK's brokering agents, Simpson Spence & Young when that was untrue. In fact there is no company registered in Beijing with the name of the Defaulting Charterer;
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> (b) at all times material, World Link HK operated the Defaulting Charterer from its office in Beijing using the same telephone and fax numbers;

(c) Mr. Wen Jianming controls World Link HK and the Defaulting Charterer from Beijing;

(d) World Link HK paid hire due from the Defaulting Charterer during the course of the "PANLI" charterparty with Pan Liberty;

(e) in response to the London Baltic Exchange's investigation of the default of the Defaulting Charterer under the Charterparty Agreements, World Link HK, through its Beijing solicitors, on or about November 19, 2003, denied that World Link HK had any connection with the Defaulting Charterer which was untrue and designed to defraud the Plaintiffs from the sums due to them;

(f) World Link HK through its solicitors admitted on or about November 19, 2003 that the Defaulting Charterer operated from the same office as World Link HK and used the same contact details, such as telephone and fax numbers;

(g) World Link HK through its Beijing solicitors, further stated on or about November 19, 2003 that the Defaulting Charterer had moved from the Beijing office before commencement of the London arbitrations, which statement was untrue and intended to deceive and defraud the Plaintiffs from the sums justly due and owing to them;

(h) the fact is that in or about June and September 2003 the Beijing office of World Link HK responded to inquiries made to the Defaulting Charterer as represented by Ms. Rebecca Gu, and World Link HK responded by paying an arbitration award against the Defaulting Charterer;

(i) World Link HK, although a registered Hong Kong company, charters vessels on the basis that it is "of Beijing" or a Beijing company with all contact details being the same as the Defaulting Charterer.

[11] The word "Defendants" at the beginning of paragraph 16 is obviously intended to be "Plaintiffs".

[12] On June 30, 2004, the appellant applied for a stay, seeking in its notice of motion the following relief:

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1. That this action be stayed pursuant to the *Commercial Arbitration Act*, R.S.C. 1985 c. 17 (2nd Supp.)

2. That should the Plaintiffs fail within 30 days to take steps in England before the arbitrator or the English courts to determine the liability of Worldlink (HK) Resources Limited under the charter parties that are the subject of this matter that the $850,000 paid into Court as security by Worldlink (HK) Resources Limited be released and paid together with any interest thereon to Giaschi & Margolis in trust;

3. That the parties be at further liberty to apply with respect to the disposition of the security paid into court;

4. That Worldlink (HK) Resources Limited be awarded costs of this motion.

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[13] On August 4, 2004, the chambers judge delivered reasons dismissing that application [(4 August 2004) Vancouver L033404 (B.C.S.C.)]. His reasoning was set out in these paragraphs:

> [5] Counsel for World Link (H.K.) submits that this court is the wrong forum for what is essentially an enforcement of the two arbitration awards made by Mr. Hardee in London, England, and that the matter should be referred back to the arbitrator, and, if necessary, the English courts to determine whether the arbitration awards ought properly be amended to include World Link (H.K.) and perhaps other named defendants. Counsel applies for an order that this B.C. action be stayed until the matters have been addressed by arbitration or the English courts.
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> [6] Plaintiffs' counsel submits that the claims advanced in B.C. are part of an enforcement action, not matters properly brought through arbitration in which a judgment has already been obtained. The plaintiffs submit that arbitration is limited to disputes arising out of the charter agreements, not issues of deceit and fraud as alleged in the pleadings filed in this action which take the claim beyond the charter agreements and the arbitration process. Further, there are parties involved in the B.C. action not named in the arbitration proceedings.
>
> [7] I have, since hearing this matter last week, reviewed the affidavit material and the extensive briefs of authorities filed by the parties. In the result, I concur with the plaintiffs' position and conclude that this action falls outside the arbitration provisions of the charter agreements.

> The plaintiffs' claims as set out in the pleadings are connected to British Columbia through the payment of the $850,000 security and these courts appear to be a convenient forum for determination of the many issues raised by the plaintiffs in their statement of claim. The application brought by World Link (H.K.) is dismissed. Costs will be in the cause.

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[14] The reference in paragraph 6 of the reasons to parties "not named in the arbitration proceedings" is presumably based on the statement of claim which refers to four defendants but, as explained in paragraph 8 of these reasons, appears on closer examination to name one defendant in four ways. That being so, that cannot be a ground for refusing to grant a stay.

[15] A more significant issue is whether the chambers judge erred in holding that arbitration is not available because the present dispute does not arise out of the charter agreements. The appellant's position is that the plaintiffs' allegations in this action do not fall outside the arbitration provisions, but rather that they fall squarely within it because the real issue is whether World Link (H.K.), although not named in the charter party, is the "defaulting charterer". I agree with that position. The dispute is, in the words of clause 17 of the charter party, one "arising out of or in connection with this Charter Party."

[16] The respondents seek to meet that submission by contending that the arbitrator, having delivered a "final award", has no remaining jurisdiction in the matter. That is a question which, in my view, can only be determined by the English arbitrator and by the application of English law.

[17] Having concluded that the issues raised by the British Columbia action fall outside the arbitration provisions of the charter agreements, the chambers judge made no reference to the application to stay having been brought under article 8 (1) of the schedule to the ***Commercial Arbitration Act***, R.S.C. 1985 (2nd Supp.), c. 17. That legislation applies because this is a matter falling within the federal power over navigation and shipping (a point not in dispute). Article 8 (1) states:

> 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.

[18] The leading authority in this Province with respect to article 8(1) is the decision of this Court in ***Prince George (City) v. McElhanney Engineering Services Ltd.*** (1995), 9 B.C.L.R. (3d) 368 (C.A.). In defining the approach to be taken by a court called upon to apply that article, Cumming J.A., for the Court, at para. 36, adopted this passage from the reasons of Mr. Justice Campbell in ***Boart Sweden AB v. NYA Stromnes AB*** (1988), 41 B.L.R. 295 (Ont. H.C.) at 302-303:

> Public policy carries me to the consideration which I conclude is paramount having regard to the facts of this case, and that is the very strong public policy of this jurisdiction that where parties have agreed by contract that they will have the arbitrators decide their claims, instead of resorting to the Courts, the parties should be held to their contract...
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> To deal with all these matters in a single proceeding in Ontario instead of deferring to the arbitral process in respect of part of the action and temporarily staying the other parts of the action, would violate that strong public policy.
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> It would also fail to give effect to the change in the law of international arbitration which, with the advent of art. 8 of the Model

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> Law and the removal of the earlier wide ambit of discretion, gives the Courts a clear direction to defer to the arbitrators even more than under the previous law of international arbitration.
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> I conclude that nothing in the nullity provisions of art. 8 prevents this Court from giving effect to the clear policy of deference set out in the article.
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> To conclude otherwise would drive a hole through the article by encouraging litigants to bring actions on matters related to but not embraced by the arbitration and then say that everything had to be consolidated in Court, thus defeating the policy of deference to the arbitrators.

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[19] In my respectful view, for a British Columbia court to conclude on the facts of this case that it is open to these plaintiffs to pursue this action would fall directly within the evil described in the last paragraph of the passage quoted by Cumming J.A. Clearly, the question between these parties is, in the words of paragraph 17 of the charter party, a "dispute arising out of or in connection with this Charter Party". It is governed by English law and is to be referred to arbitration in London. There is a curious anomaly in the facts of this case in that each of the respondent owners, although a party to the respective charter party, contends that the dispute does not arise out of the charter party, whereas the appellant, which contends that it is not a party to the charter party, contends that the dispute arises under the charter party. The dispute is, however, as to whether the present appellant, although not named in the charter party, is nevertheless the charterer. That is clearly a dispute under the charter party.

[20] A decision of this Court which is more directly in point on its facts, although it does not arise under the ***Commercial Arbitration Act***, is ***Gulf Canada Resources Ltd. v. Arochem International Ltd.*** (1992), 66 B.C.L.R. (2d) 113 (C.A.). That

appeal was from a decision of a chambers judge granting a stay of proceedings pursuant to s. 8 of the ***International Commercial Arbitration Act***, S.B.C. 1986, c. 14, which is not materially different from article 8(1) of the federal Act. It reads, in part:

> Stay of legal proceedings
>
> 8. (1) Where a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may, before or after entering an appearance and before delivery of any pleadings or taking any other step in the proceedings, apply to that court to stay the proceedings.
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> (2) In an application under subsection (1), the court shall make an order staying the legal proceedings unless it determines that the arbitration agreement is null and void, inoperative or incapable of being performed.

[21] The facts and the essence of the decision are conveniently set out in the headnote, which reads:

> The plaintiff made a contract with one or both of the defendants for the sale of 375,000 barrels of crude oil. The contract contained an arbitration clause. Before the time for delivery, the price fell by $10 a barrel and the defendants refused to take delivery under the terms of the contract. The plaintiff wrote to the defendants, advising that it accepted their repudiation. Both defendants replied, stating that one of them was not a party to the contract. The plaintiff sued for damages. The defendants obtained a stay under s. 8 of the *International Commercial Arbitration Act*. The plaintiff appealed.
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> Held – Appeal dismissed.
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> In order to obtain a stay of proceedings, it is not enough to point to an arbitration agreement and assert that the parties are parties to the agreement and that the dispute is within its terms. The court continues to have some residual jurisdiction. Thus, if the court concludes that one of the parties named in the legal proceedings is not a party to the arbitration agreement, or if the alleged dispute does not come within the terms of the agreement, or if the application is out of

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> time, the application should not be granted. But it is not for the court, on a stay application, to reach any final determination as to the scope of the arbitration agreement or whether a particular party to the legal proceedings is a party to the agreement. Those are matters within the jurisdiction of the arbitral tribunal. Only where it is clear that the dispute falls outside the agreement, or that a party is not a party to it, or that the application is out of time, should the court make a final determination. In this case, the fact that the defendants had not performed the contract at all did not mean that the issue between the parties was not in relation to the "performance" of the contract as that term was used in the agreement. Whether the dispute fell within the agreement and whether both defendants were parties to it would fall to be determined in the arbitration.
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> [Emphasis added.]

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[22] Counsel for the respondents submits that the authorities to which I have referred do not apply because here there has been a final award from which it follows that the jurisdiction of the arbitrator is exhausted. He also points to the element of fraudulent conduct asserted by the plaintiffs as taking the matter outside the scope of arbitration. The essence of the plaintiffs' case is, however, that, by whatever means, the owners were persuaded to enter into a charter party, either with a non-existent party or with one that was not the true charterer. In any event, having regard to the general policy of the law in this area, I would not presume to define the scope of the arbitrator's authority. This action has served and continues to serve the purpose of securing the plaintiffs' claim in a very effective way. The issue now is whether the appellant is the party indebted to the owners under the charter party. To that extent, the appellant properly seeks to be treated as a party so that the issue can be resolved in the appropriate arena.

[23] We were favoured with interesting and learned arguments from counsel for the respondents based largely on the very long and learned reasons of Prothonotary

Tabib in ***TMR Energy Ltd. v. State Property Fund of Ukraine*** (2003), 244 F.T.R. 1, 2003 FC 1517. Strictly speaking, that does not now rate as a decision; a judge of the Federal Court, subsequently upheld by the Court of Appeal, ruled that the prothonotary had no jurisdiction in the matter. However, it is not for that reason that I decline to embark on a discussion of it. The facts and circumstances, which are complex arising as they do out of an arbitration in Sweden dealing with the question whether an aircraft seized in Canada was the property of the State of Ukraine but assigned to an aviation organization called Antonov, are substantially removed from those in the case at bar.

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[24] To the extent that the "new and more enlightened" view of the powers which the prothonotary proposes should be exercised by a court which becomes involved through enforcement proceedings may foreshadow a lessening of the principle of deference to arbitrators, it would seem to be counterbalanced by a recent decision of the Queen's Bench Division of the United Kingdom Commercial Court. That decision is ***Norsk Hydro ASA v. State Property Fund of Ukraine***, [2002] EWHC 2120 (Comm.) (BAILII), which deals with issues somewhat similar to those discussed in the ***TMR Energy Ltd.*** case and has the interesting note of similarity in that the Republic of Ukraine was party to both actions. The view taken by Gross J. is, I think, more in accord with the approach which has been followed in decisions which are binding upon us. I quote one passage:

> 17. Ss. 100 and following of the Arbitration Act 1996 ("the 1996 Act") provide for the recognition and enforcement of New York Convention Awards. There is an important policy interest, reflected in this country's treaty obligations, in ensuring the effective and speedy enforcement of such international

> arbitration awards; the corollary, however, is that the task of the enforcing court should be as "mechanistic" as possible. Save in connection with the threshold requirements for enforcement and the exhaustive grounds on which enforcement of a New York Convention award may be refused (ss. 102-103 of the 1996 Act), the enforcing court is neither entitled nor bound to go behind the award in question, explore the reasoning of the arbitration tribunal or second-guess its intentions. Additionally, the enforcing court seeks to ensure that an award is carried out by making available its own domestic law sanctions. It is against this background that Issue (I) falls to be considered.

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[25] I would allow the appeal and grant to the appellant the relief sought in its notice of motion, *supra* para. 12, but with some modification of the second paragraph. I would fix 60 rather than 30 days as the time for taking steps in England and, rather than providing for the money in court to be paid out at the expiration of that period should no steps be taken, would provide that World Link (H.K.) would then be at liberty to apply in the Supreme Court for payment out of the security.

[26] I would allow the appeal accordingly.

"The Honourable Mr. Justice Esson"

I agree:

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Mr. Justice Oppal"

Signed: April 6, 2005