HCMP002635/1993

The judge has authorised publication of this judgment.

1993, No. MP 2635

IN THE SUPREME COURT OF HONG KONG

HIGH COURT

MISCELLANEOUS PROCEEDINGS

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IN THE MATTER OF THE

ARBITRATION ORDINANCE

AND IN THE MATTER OF

AN INTENDED ARBITRATION

BETWEEN

SAFOND SHIPPING SDN BHD (Claimant in the intended arbitration)	Plaintiff
AND	
EAST ASIA SAWMILL CORP (Respondent in the intended arbitration)	Defendant

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Coram: The Hon. Mr. Justice Kaplan in Chambers

Date of hearing: 6 October 1993

Date of delivery of judgment: 6 October 1993

H E A D N O T E

Arbitration - Model Law - Article 11 - Appointment by Court where Defendant ignores contractual provision and originating process - indemnity costs.

J U D G M E N T

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1. On 6th October 1993, upon the application of the plaintiffs, under the provisions of Article 11 of the Model Law, I appointed Mr. Robin Peard, as arbitrator on behalf of the defendants. I also made an order that the defendants pay the plaintiffs' costs of these proceedings on an indemnity basis.

2. I have decided to give my reasons in writing for awarding indemnity costs because so far this year I have appointed some 34 arbitrators under the Model Law and most of the cases bear a striking similarity to the present case. I hope this judgment will be of assistance to parties and the practitioners.

3. On 12th March 1992, the parties entered into a Nanyozai Charterparty, clause 30 of which provided that disputes arising under the Charterparty shall be referred to arbitration in Hong Kong with English Law to apply. The clause further provided that each party would nominate an arbitrator.

4. A claim for demurrage arose under which the plaintiffs claimed the modest sum of US$35,000.

5. By letter dated 30th April 1993, the representative of the plaintiffs wrote to the defendants informing them that they had appointed Mr. Y.K. Chan as their arbitrator and invited the defendants to appoint their own arbitrator. The defendants have not had the courtesy to reply to that letter nor have they appointed an arbitrator.

6. The plaintiffs were therefore forced to issue an originating summons and, because the defendants resided abroad, they had to apply to me for leave to serve out of the jurisdiction. That leave was granted and in due course the process was served in the Philippines but the defendants have not returned the acknowledgment of service, nor have they contacted the court, nor the plaintiffs' solicitors and have thus taken no part whatsoever in these proceedings.

7. If this matter had fallen to be dealt with under the English and Hong Kong domestic provisions (section 7 and 9 respectively) the matter would have been simply resolved. S.9 of the Arbitration Ordinance, Cap. 341 provides as follow;

> "9. Power of parties in certain cases to supply vacancy
>
> Where an arbitration agreement provides that the reference shall be to 2 arbitrators, one to be appointed by each party, then, unless a contrary intention is expressed therein -

> (a) if either of the appointed arbitrators refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place;
>
> (b) if, on such a reference, one party fails to appoint an arbitrator, either originally, or by way of substitution as aforesaid, for 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 his award shall be binding on both parties as if he had been appointed by consent:
>
> Provided that the Court or a judge thereof may set aside any appointment made in pursuance of this section."

8. This section has been considered by a number of foreign courts exercising their jurisdiction under the New York Convention. Under that Convention, it is a ground for not enforcing a foreign arbitral award that "the composition of the arbitral authority or arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place." It has been argued unsuccessfully in various jurisdictions that as the agreement contemplated that each side should appoint an arbitrator a provision which enabled one party to turn his appointee into a sole arbitrator offended Article V(1)(d) of the Convention which I have just quoted. (As an example, see the decision of the Supreme Court of Spain reported at p.493 in Vol. X (1985) of the Yearbook of Commercial Arbitration).

9. The case before me involved an international arbitration as defined in Article 1 of the Model Law. This law has been applicable in Hong Kong since 6th April 1990. Article 11 deals with the appointment of arbitrators and provides that in an arbitration with 3 arbitrators where each party is supposed to appoint an arbitrator but one does not, the one who has, after 30 days of requesting the other to do so, may apply to the High Court of Hong Kong for the appointment to be made on behalf of the defaulting party. There is no appeal from the decision entrusted to the High Court.

10. This is the point at which things become complicated. As the defaulting party is invariably a foreign entity, it is first necessary to apply to the court to serve the originating summons seeking the appointment of the arbitrator out of the jurisdiction. This is dealt with ex parte to the Arbitration Judge and usually involves little by way of costs.

11. Once the order has been obtained it has to be served in the foreign jurisdiction and where English is not the language of that jurisdiction it has to be translated.

12. Service can sometimes be effected by lawyers in the foreign jurisdiction but in some cases service has to be effected through the relevant district court.

13. Once service has been effected and once the time for acknowledging service has expired, the application to appoint the arbitrator can be fixed or restored. An affidavit of service will be required from the foreign jurisdiction.

14. As in this case, there is usually a thundering silence from the respondent and the application to appoint an arbitrator on the respondent's behalf becomes somewhat of a formality when all the above stages have been carried out.

15. Most of the cases where this problem arises are relatively small claims for demurrage or other claims arising out of Charterparties or the international sale of goods. In my experience, the claim is usually somewhere in the regin US$30,000 - 100,000.

16. In one case where this very problem arose, I was informed by experienced maritime solicitors that the total cost of carrying out all these stages was some US$12,000 which sum represented some 15% of the actual claim and the time involved in effecting all these procedures was some 9 months.

17. It is very obvious that a procedure such as this which involves delay and cost is contrary to the spirit of arbitration which seeks to resolve a dispute quickly and economically.

18. I have taken pains to explain the effect of implementing Article 11 in practice because I know that this is a matter of some concern to practitioners in the maritime field. I hope that Article 11 will be looked at again to see whether it can be made more user friendly without negativing in any way Hong Kong's otherwise wholehearted adoption of the Model Law.

19. Given the background to this case, it seems to me wholly appropriate to order the defendant to pay the plaintiffs' costs on an indemnity basis. All the time and expense have been caused by (a) the defendant's flagrant breach of its contractual obligations to arbitrate any dispute that may arise and in connection therewith to appoint an arbitrator when called upon to do so and (b) its complete defiance of these proceedings brought simply to give effect to the agreed dispute resolution mechanism.

20. It would seem to me to be quite unjust for the plaintiff to have to bear any part of the costs thrown away and caused by the defendants' recalcitrance. For all I know, the defendants may have a good defence on the merits. However, their flagrant breach of contract and refusal to react when proceedings were served upon them make it just, in my judgment, for the defendants to meet all the costs thrown away in order for this arbitration to get to the starting tapes.

21. I am bound to note that in some similar cases, the defendants have been world famous international companies who have likewise ignored all attempts to commence an arbitration. I do not for one moment suppose that the prospect of an order for indemnity costs is going to cause a sea change in the attitude of defendants but at least it will mitigate, to some extent, the hardship which this attitude causes to plaintiffs anxious to get on with their arbitration.

22. These then were the reasons why I made an order for indemnity costs in this case and are the reasons why I will probably do likewise in future cases indistinguishable from the present.

(Neil Kaplan)

Judge of the High Court

Representation:

Miss Jeanette Waite of Crump & Co. for Plaintiffs