Continental Resources Inc. v. East Asiatic Co. (Canada)

Between
Continental Resources Inc. and Arbed S.A., Plaintiffs, and
The East Asiatic Company (Canada) Inc., The East Asiatic Company (Canada) Inc. doing business as EAC Dry Cargo Chartering and the said EAC Dry Cargo Chartering, Sovereignty Carriers Inc. and the Ship "Sovereign Venture", her owners and all others interested in her, Defendants

Federal Court of Canada - Trial Division
Strayer J.
Heard: March 21, 1994
Judgment: March 22, 1994

K. Joseph Spears, for the Plaintiffs
Thomas Hawkins, for the Defendants

STRAYER J. (Reasons for Order):

I am satisfied that the arbitration agreement set out in the Charter Party is one within Article 8(1) the Commercial Arbitration Code and that I am, therefore, obliged to refer this matter to arbitration in New York as provided by the Charter Party. I have come to this conclusion because I am satisfied that the defendants, as applicants for the reference and the stay of the action, have brought their request within the time permitted by that article. They have not yet filed a statement of defence in the action and, therefore, they have not submitted their "first statement on the substance of the dispute" to the Court.

The respondent (plaintiffs) tried to demonstrate that in the time which has elapsed since the loss was incurred, an agreement had been reached among counsel in Vancouver for arbitration there. I have reviewed the correspondence and find this argument to be far-fetched. At most, there was an agreement to try to finalize an arbitration agreement providing for arbitration in Vancouver. But no final agreement was reached. The clearest evidence of this, I believe, is that there was a "draft" agreement document under discussion which was never signed and the exchange of views by discussion or correspondence was never, I am sure, regarded by either party as a substitute for the signing of an agreed text. Indeed, I imagine that the plaintiffs would have been as surprised as the defendants at such a suggestion had it not been for the defendants now invoking article 8(1) of the Code. It is true that during the time of the abortive negotiations in respect of an agreement for arbitration at Vancouver, various steps were taken or refrained from by the parties in contemplation of such an agreement. Those were only acts of good faith on both sides which were frustrated by the failure to finalize an agreement.

The plaintiffs argue that article 8(1) of the Commercial Arbitration Code cannot, in any event, preclude the continuance of this action or its reference to New York for arbitration because, quite apart from any claim under the Charter Party, the plaintiffs have an action against Sovereignty Carriers Inc., the owner of the ship "Sovereign Venture", the vessel in question. As far as I could ascertain, no authority was cited for this proposition. The defendants point out that the bill of lading, incorporating the conditions of the Charter Party, was signed by agents on behalf of the master of the vessel and that, therefore, the vessel was a party to the bill of lading. As such, it would be entitled to the protection of the term in the Charter Party, section 34 which provides that "any dispute arising under the Charter Party [is] to be settled by arbitration in New York ...". If, however, this action includes some claim in tort against the defendant vessel which is not precluded by the agreement to arbitrate, I would exercise my discretion under section 50 of the Federal Court Act to stay that claim pending termination of the arbitration. If there is some residual right to a claim in tort remaining to the plaintiffs after the arbitration is completed, they may wish to seek to have the stay lifted. But, in the meantime, they have not made a convincing case to me that either they have such a claim or that it should proceed in this Court notwithstanding the reference of the claim under the Charter Party to arbitration in New York.

As I understand article 8(1) of the Commercial Arbitration Code, the Court has no discretion as to whether it refers matters within the arbitration agreement to arbitration. The code does not, however, address the question of how the action before the Court is to be disposed of. I am, therefore, exercising my discretion under section 50 of the Federal Court Act to stay the action having regard to the fact that for all practical purposes the issues involved in the action will be dealt with in the arbitration. Relevant criteria in exercising that discretion involve the likelihood of injustice to the defendants if the action proceeds and the unlikelihood of injustice to the plaintiffs if it does not. As the Federal Court of Appeal has noted[1]:

> As a rule, it is certainly in the interests of justice that contractual undertakings be honoured. It has been noted in this case, however, that it might be open to the defendants to raise a defence of delay or prescription in arbitration proceedings in New York, given the delay there has been in taking the matter to arbitration. I will, therefore, stay the action on condition that the defendants do not rely on prescription or delay as a defence in the arbitration.

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[1]The Ship M.V. "Sea Pearl" et al. v. Seven Seas Dry Cargo Shipping Corporation [1983] 2 F.C. 161 at 176.

The defendants argue that they should have costs of this motion in any event of the cause. I agree. In reviewing the correspondence concerning the proposed alternative of arbitration in Vancouver, I am satisfied on the whole that the plaintiffs have been much more responsible for substantial and unexplained delays. I believe the responsibility was put quite clearly on the plaintiffs by a letter of January 26, 1993, from solicitors for the defendants, where the latter pointed out to the solicitors for the plaintiffs that they had failed to provide the defendants with the plaintiffs' final position respecting a certain aspect of the draft arbitration agreement. The plaintiffs were thereby warned that unless they provided a formal position by February 15, 1993, the defendants would presume that the plaintiffs were no longer interested in a Vancouver arbitration. No reply was received to this letter and this failure to reply has not been explained. It was not until October 19, 1993, that counsel for the plaintiffs advised the defendants in writing that the plaintiffs were prepared to proceed with arbitration in Vancouver, but they still wanted to negotiate procedures. By this time, the defendants had changed their minds. The fact that a reference to New York arbitration has become necessary is therefore largely attributable to delay by the plaintiffs. Further, they have raised no substantial grounds for objecting to this motion for a reference and for a stay. The reference order and the stay should have gone by consent. Therefore, the plaintiffs should pay the costs of this motion, regardless of the outcome of the action. As the action will probably never proceed, these costs should be paid forthwith.

This appears to be an ordinary cargo claim and the amount involved is only (U.S.) $53,640.10. The loss occurred almost four years ago. I trust it is more apparent to the parties and their counsel than it is to the Court why this matter has not long since either been settled or dealt with in a simple arbitration.

STRAYER J.