Federal Court  Cour fédérale

Date: 20111213

Docket: T-165-10

Citation: 2011 FC 1466

Ottawa, Ontario, December 13, 2011

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

ORIENT OVERSEAS CONTAINER LINE LIMITED AND OOCL (CANADA) INC.

Applicants

and

SOGELCO INTERNATIONAL

Respondent

REASONS FOR ORDER AND ORDER

[1] In September 2009, the applicants, hereinafter referred to as "OOCL", obtained an arbitration award from Manfred W. Arnold, a New York arbitrator, against Sogelco for unpaid freight, demurrage and related charges arising from five shipments of frozen fish from Halifax to Antwerp. Sogelco has always maintained the position that the arbitrator did not have jurisdiction as it had never agreed, be it in writing or not, to arbitrate.

[2] In February 2010, OOCL applied *ex parte* for the registration and enforcement of the award in accordance with rules 326 and following of the *Federal Courts Rules*. Sogelco was given leave to contest the application.

[3] By order dated 27 April 2010, Prothonotary Morneau dismissed Sogelco's opposition and granted the application for registration and enforcement.

[4] There are two motions before the Court. Sogelco appealed that order which, in accordance with rule 51, is to be heard by a Federal Court judge. In addition, OOCL has moved to have the appeal dismissed for want of prosecution.

DECISION

[5] Both the appeal and the motion are to be dismissed.

WANT OF PROSECUTION

[6] A leading decision is that of Mr. Justice Dubé in *Nichols v Canada* (1990), 36 FTR 77, [1990] FCJ No 567 (QL) (FC)). The issue there was whether an action should be dismissed. Mr. Justice Dubé said:

> The issue to be resolved is whether, under the circumstances, it is still possible to have a fair trial after such a long delay. The classic test to be applied in these matters is threefold: first, whether there has been an inordinate delay; secondly, is the delay inexcusable; and thirdly, whether the defendants are likely to be seriously

> prejudiced by the delay (See Salmon L.J. in Allen v. Sir Alfred McAlpine & Sons Ltd. [[1968] 2 Q.B. 229 at page 268]).

[7] In this case, there is certainly no irreparable damage and no serious prejudice. The issue is whether the arbitrator had jurisdiction. That issue is to be resolved on the material which was before the Prothonotary. There is no worry about potential witnesses dying with the passage of time. Furthermore, although the matter could, perhaps, have moved forward more quickly, the delays are not inexcusable, as there is a reason for them.

[8] Sogelco's motion in appeal included an affidavit. OOCL moved to have the affidavit struck, and succeeded in part. Then there was cross-examination, and a continuation thereof. Rightly or wrongly, undertakings were made and apparently later fulfilled. In addition, there has been some dispute concerning execution of the award, and there have been developments in a not unrelated action between the parties.

THE ARBITRATION AWARD

[9] There were two issues before the arbitrator, Mr. Arnold. The first, as aforesaid, was whether or not he had jurisdiction. Sogelco submitted he had not because there was no agreement in writing to submit disputes to arbitration in New York. The second issue was whether OOCL was entitled to the freight, demurrage and other charges it claimed.

[10] Mr. Arnold did not rule on his jurisdiction as a preliminary point. Sogelco, without prejudice to its prime position, then defended on the merits. While it always admitted owing the freight

portion of the claim, but would only pay if OOCL dropped its other claims, it asserted that those other claims were not well-founded because OOCL failed to give it notice of the ship arrivals in Antwerp, and then delivered the cargos to the consignee rather than exercise its possessory lien.

[11] In his award, Mr. Arnold found that there was a written agreement between OOCL and Sogelco which contained a New York arbitration clause. As to the merits, he awarded the undisputed ocean freight portion of the claim and awarded demurrage in a reduced amount on the grounds that subsequent correspondence by OOCL did not constitute a settlement offer but was rather a "revised" invoice which reduced the demurrage amount due. Mr. Arnold also awarded related charges and interest, but not costs, and directed that his fee be shared equally by the parties.

PROTHONOTARY MORNEAU'S ORDER

[12] Sogelco responded two ways to the arbitration award. On 29 October 2009, it filed an action, under court docket number T-1786-09, against the OOCL parties for some $300,000 in damages because of OOCL's alleged failure to give notice that demurrage was being incurred, which in turn caused it to lose business with the consignee of the cargo. It also sought an order that OOCL absorb its claim for demurrage and other charges. It is to be noted that this action was taken before OOCL's application to register the arbitration award. The second step was to unsuccessfully attempt to pay the undisputed freight claim in full and final settlement of the award.

[13] The Prothonotary had a fair amount of material before him. The application to register was accompanied by an affidavit of Y.P. Lau, OOCL's collection manager, to which was attached a

copy of the arbitration award and the underlying service contract. His affidavit was intended to satisfy rule 329 which requires that the award and copy of the arbitration agreement be brought to the Court's attention. Sogelco filed an affidavit from its president, Gabriel Elbaz. OOCL responded with an affidavit from Vincent Prager. Although Mr. Prager is a partner in the firm representing OOCL, his affidavit is as an OOCL director.

[14] The reasons given by the Prothonotary to grant the application for registration and enforcement and to dismiss Sogelco's motion are as follows:

> **CONSIDERING** that the Court fully agrees with the dynamic expressed by Mr. Prager in his affidavit dated April 9, 2010, which is expanded upon in the applicants' written representations which form part of the Applicants' Response. Considering in particular paragraphs 30 to 33 and 37 to 44 of said written representations which the Court does accept;

[15] In holding as he did, the Prothonotary:

a. accepted that there was a signed service contract agreement between the parties dated 10 April 2006, clause 12 of which provided that disputes be resolved by arbitration in New York;

b. Sogelco actively defended the claim in arbitration and even demanded costs;

c. following issuance of the award by letter dated 4 February 2010, Sogelco sent a cheque in the amount of US$54,100, covering the unpaid freight portion of the claim which had never been disputed. Both the letter and the cheque said that payment was "in full and final payment of the arbitration award rendered on the 16th of September 2009 by Mr. Manfred W. Arnold." That cheque had been returned and was replaced by another cheque and letter "without qualifications";

d. Sogelco had not appealed the arbitration award anywhere and was beyond the three-month limitation provided in the *Commercial Arbitration Code*. Furthermore, the action in T-1786-09 could not be considered an appeal as Sogelco only sought that the award be "suspended";

e. it would be inappropriate to allow Sogelco to re-open and re-argue the dispute which had been decided in an arbitration in which it had participated.

STANDARD OF REVIEW

[16] Both parties appear to have taken the position that the Prothonotary's order was discretionary in nature. On that basis, the judge sitting in appeal can only review the decision *de novo* if the questions raised were vital to the final issue in the case, or the order was clearly wrong in that the exercise of discretion was based on a wrong principle or upon a misapprehension of the facts (*Canada v Aqua-Gem Investments Ltd*, [1993] 2 FC 425, [1993] FCJ No 103 (QL) (FCA); *Z.I. Pompey Industrie v ECU-Line N.V.*, 2003 SCC 27, [2003] 1 SCR 450; *Merck & Co Inc v Apotex Inc*, 2003 FCA 488, [2004] 2 FCR 459).

[17] It seems to me, however, that the Prothonotary's decision was not discretionary in nature. He had to decide on the merits of the application and either register the arbitration award or not. This was not a situation in which, for instance, the Prothonotary ruled on objections arising from an examination for discovery.

[18] Since the decision was not discretionary, the reviewing judge is not to interfere with findings of fact unless they were made in perverse or capricious manner or were the result of a palpable and overriding error. Findings of law, however, are reviewed on a correctness standard: see *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235; *Scott Steel Ltd v Alarissa (The)* (1997), 125 FTR 284, [1997] FCJ No 139 (QL) (FC); *Jazz Air LP v Toronto Port Authority*, 2007 FC 624, [2007] FCJ No 841.

ANALYSIS

[19] I agree with the Prothonotary that the motion to register the arbitration award with this Court should have been granted, and therefore Sogelco's appeal is to be dismissed. The basis of my decision in that Mr. Arnold acted reasonably in determining that there had been a signed agreement to arbitrate and that the Prothonotary acted reasonably in not disturbing that decision. However, I cannot agree that Sogelco's, without prejudice, participation in the arbitration constituted an acquiescence in the arbitrator's jurisdiction or that its resistance to the registration and enforcement of the award in Canada was time barred.

[20] The arbitration took place in New York. Although Sogelco participated, it did so under protest as it has always maintained the position that it was not party to any written agreement to arbitrate. OOCL only seeks to register the award with the Federal Court because it wishes to execute thereon in Canada. It was not preordained that it would come to Canada. Indeed, if OOCL were aware that Sogelco had assets in New York it would have been simpler to enforce the award there.

[21] OOCL's motion is founded on rule 326 of the *Federal Courts Rules* which defines a "foreign judgment" as including an arbitral award that may be registered here in accordance with articles 35 and 36 of the *Commercial Arbitration Code*, set out in the Schedule to the *Commercial Arbitration Act.* It is important to note that rule 326 refers only to articles 35 and 36 of the Code, rather than the entire code. The Code is based on, but is not identical, to the Model Law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law in 1985. More particularly, article 1(2) explicitly states: "The provisions of this Code, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in *Canada*." This point seems to have been lost. Furthermore, the Code only applies if one of the parties is Her Majesty, or if in relation to maritime or admiralty matters. This is unquestionably a maritime matter. The Court has to ensure that the claim is maritime in nature (*Compania Maritima Villa Nova S.A. v Northern Sales Co*, [1992] 1 FC 550, 137 NR 20).

[22] It was article 34 of the Code which was relied upon by OOCL to assert that it was too late for Sogelco to have any recourse against the award since article 34(3) provides for a three-month time-bar. However article 34 is not applicable as the arbitration took place outside Canada.

[23] Article 35 sets out what OOCL must do to have the award recognized here as binding and subject to enforcement. It was required to provide copy of the award, which it did, and the original or a certified copy of the "arbitration agreement referred to in article 7…" Article 7 provides that the arbitration agreement shall be in writing. The agreement need not be signed, as a writing would include an exchange of letters, telex, telegrams or other means of telecommunication which record the agreement.

[24] Article 36 deals with public policy grounds for refusing recognition or enforcement, none of which apply here. The whole case turns on whether or not there was a written agreement to arbitrate.

[25] The undisputed evidence before the arbitrator, and before the Prothonotary, is that on 10 April 2006 an OOCL Services Contract was signed by Mr. Elbaz, the president of Sogelco, and by the pricing director of OOCL. It is Mr. Elbaz' uncontradicted evidence that he only signed and received the one page. That one page, however, states that it is page one of eight. There is no evidence that Mr. Elbaz ever asked for the other seven pages. Clause 12 on page four of eight provides that the contract is governed by the law of the United States and "any dispute in connection with the Contract shall be resolved by arbitration in New York, NY, or as may be mutually agreed…" The parties did not agree to resolve their dispute in any other way.

[26] United States law prevailing in the State of New York has not been alleged, and so is assumed as a matter of fact to be the same as our law. Article 16 of the Code authorizes the arbitrator to determine whether or not there was an agreement to arbitrate. This is a matter falling within his own specialized expertise, and he is entitled to deference (*Voice Construction Ltd v Construction & General Workers' Union, Local 92*, 2004 SCC 23, 318 NR 332; *Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] SCJ No 59 (QL)).

[27] However it is not necessary to decide whether the reasonableness standard of review applies. Even on a correctness standard, it is crystal clear that the parties signed a contract which included a New York arbitration clause. This is not a case in which the arbitration clause is to be found in a document incorporated into the contract by reference, or even in a "ticket" case.

[28] As Mr. Justice Robertson, speaking for the Court of Appeal, stated in *Thyssen Canada Ltd v Mariana Maritime S.A.*, [2000] 3 FC 398, 254 NR 346 at paragraph 19:

> … But it is also true that we are dealing with sophisticated parties familiar with the exigencies of this particular market-place; parties who are well aware that commercial efficacy demands the use of contracts which cannot reasonably be expected to be read until such time as a loss arises. In the end, the appellant cannot argue that there was no "agreement to arbitrate" when, in reality, it simply failed to inform itself of the terms pursuant to which it agreed to have its goods shipped. This is not a case where the appellant may invoke legal principles designed to protect the weak from the strong.

[29] As the arbitrator pointed out, the carriage was performed and charges calculated in accordance with the service contract.

[30] Apart from erroneously determining that there was an agreement to arbitrate, Sogelco also submits that the decision is wrong on the merits. It should not have been charged demurrage and other items because it was never put on notice, and because the carrier failed to exercise its possessory lien before delivering the cargo to the consignee. Even if that be so, there is no recourse. If one agrees to arbitrate, one accepts the possibility that the arbitrator may get it wrong. This is not a jurisdiction in which one may go to court on a point of law, but only on whether there was an agreement to arbitrate and what I would broadly call principles of natural justice (*Navigation*

Sonamar Inc c Algoma Steamships Ltd, J.E. 87-642, [1987] RJQ 1346 (Qc Sup Ct); *Desputeaux v Éditions Chouette (1987) inc*, 2003 SCC 17, [2003] 1 SCR 178; *GPEC International Ltd v Canadian Commercial Corp*, 2008 FC 414, 71 CLR (3d) 234; *Canada (Attorney General) v S.D. Myers Inc (FC)*, 2004 FC 38, [2004] 3 FCR 368).

[31] Sogelco may or may not have a cause of action under T-1786-09 for damages arising from the alleged failure on OOCL's part to give Notices of Arrival and exercise a lien. However, it is inappropriate for it to use that case to dispute the award of demurrage and other costs, and for OOCL to counterclaim for that part of the demurrage Mr. Arnold did not award.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. The motion by Orient Overseas Container Line Limited and OOCL (Canada) Inc., to have Sogelco International's appeal from the order of Prothonotary Morneau dismissed for delay, is dismissed with costs.
2. Sogelco International's motion in appeal from the order of Prothonotary Morneau is dismissed with costs.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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