In The Supreme Court of Bermuda

CIVIL JURISDICTION

2013 No: 85

IN THE MATTER OF THE BERMUDA INTERNATIONAL CONCILIATION AND ARBITRATION ACT 1993

(1) CARNIVAL CORPORATION

(2) CARNIVAL PLC

(3) FLEET MARITIME SERVICES INTERNATIONAL LTD

Applicants

-v-

ALEXIO ESTIBEIRO

Respondent

EX TEMPORE RULING

(In Chambers)

Date of hearing: March 26, 2013

Mr. Rod Attride-Stirling and Mr Shannon Dyer, Attride-Stirling & Woloniecki, for the Applicants

Decision

1. In this matter the Applicants seek an Order under article 11(3)(a) of the UNCITRAL Model law which is incorporated into Bermuda law by the Bermuda International Conciliation and Arbitration Act 1993 for the appointment of a third arbitrator in relation to a dispute between the Applicants and the Respondents. In addition, the Applicants seek an injunction restraining the Respondent from bringing or pursuing

any proceedings other than in the Bermuda proceedings the claims which form the subject of the present dispute.

2. I am minded to grant an Order in the terms sought by the Applicants, with one modification. The Applicants have left it to the Court to signify who the third arbitrator should be. They have proposed both before me and in the arbitration appointment process various members of the Bermuda Bar. In my judgment, having regard to the disputed nature of this appointment process, the appropriate person to appoint is Mr. Geoffrey Bell QC who was a judge of this Court between 2005 and 2010. He is clearly of a higher order of seniority altogether than the party-appointed arbitrator chosen by the Applicants[1] and in my judgment that appointment should go some way to allay the concerns expressed by the Respondents in correspondence with this Court.

Background to the dispute

3. The background to this matter can be summarised as follows. It appears to be common ground between the parties that the present dispute is governed by Article 14 in the Contract, that the dispute is subject to the substantive and procedural law of Bermuda and that the Contract provides in unequivocal terms that arbitration is the dispute resolution mechanism to the exclusion of all other *fora*.

4. The present dispute is a negligence dispute arising out of the Respondent's employment with the 3rd Applicant. The nationality of the Applicants can be summarised as follows. The 1st Applicant is a Panamanian corporation, the 2nd Applicant is a British corporation and the 3rd Respondent is a Bermudian company. The Respondent is Indian and the business activities in which the Respondent is employed have strong connections with the United States but are largely international in nature involving the Respondent's work on cruise ships.

5. The present dispute arose in this way. The Respondent in or about the summer of 2012 commenced proceedings in the Circuit Court for the Judicial District of Miami Dade County in Florida in respect of the negligence complained of. The Applicants in the present proceedings responded with a Notice to Compel Arbitration filed on July 31, 2012 and that application was granted by the United States District Court for the Southern District of Florida by Her Honor Judge Patricia Seitz dated October 2, 2012.

6. The parties then proceeded to commence arbitration. The Respondent served a Notice of arbitration on or about January 30, 2013 and appointed a retired (US) judge as his

[1] In the course of the hearing I noted that the candidates proposed as third arbitrator by the Applicants were either junior to or of a similar seniority at the Bar to their party-appointed arbitrator. Although the Respondent had not complained of this specific fact, the appearance of a greater degree of collegiality between two arbitrators who were currently fellow members of the same Bar of ought to be taken into account.

party-appointed arbitrator. On or about February 20, 2013 the Applicants appointed their arbitrator Mr. Delroy Duncan, who is currently the outgoing President of the Bermuda Bar Association. Thereafter it was incumbent on the two arbitrators to appoint the third arbitrator. But that process was not given long to run when, on or about February 26, 2013, the Respondent applied to the Southern District of Florida Miami Division court again, this time seeking expedited relief and trial. The nub of that application was that the life expectancy of the Respondent was so short that it was essential that a third arbitrator be appointed as soon as possible. Complaint was made that the contractual procedure had, in effect, broken down.

7. That application was unsurprisingly opposed by the Applicants. Her Honor Patricia Seitz again on March 20, 2013 refused the Respondent's Emergency Motion for Expedited Equitable Relief and Trial. That was in paragraph 1 of her Order. Paragraph 2 of her Order is what has prompted the present application to this Court. It reads as follows:

> "*(2) If the parties have not selected a three-member panel of arbitrators by 10.00am on March 28, 2013, the parties are directed to appear before the Court.*"

The appointment of the third arbitrator

8. The Applicants contend that it is essential to protect the integrity of the arbitral process that the parties have contractually agreed to that this Court as the ultimate appointing authority under the governing law of the arbitration agreement should make the requisite appointment of the third arbitrator before March 28, 2013. It is contended that of the Court does not make the appointment there is a risk that the Florida Court might make the appointment by default.

9. Mr. Attride-Stirling, who presented his arguments with scrupulous care having regard to the fact that the Respondent has chosen not to appear at the present proceedings, was careful to point out that he has no firm basis for asserting that the Florida Court will make the appointment. The highest that he can put his case is that it is clear from the terms of the March 20, 2013 Order that the Florida Court has not ruled out the possibility of making the requisite appointment itself.

10. The Respondent has chosen not to appear at the present hearing but has instead made submissions which Mr. Attride-Stirling copied and placed before me. The nub of the argument appears to me not to be based on any practical considerations in terms of any of the qualifications or lack thereof possessed by any of the competing candidates for third arbitrator. Rather it appears to be based on the thesis that neutrality trumps all. The position in practical terms is that the Respondent's arbitrator has proposed various US arbitrators; the Applicants' arbitrator has proposed Bermudian arbitrators.

The Respondent's objection is primarily based on the notion that neutrality and impartiality requires an arbitrator that does not have the same nationality of one of the parties, in this instance the 3rd Applicant, a Bermudian company.

11. In rejecting the neutrality argument[2], I follow my reasoning in the *Princess Cruise Lines Ltd.-v-Amanda Matthews* [2011] SC (Bda) 51 Civ (4 November 2011)[3], in particular at paragraphs 11-12. That reasoning applies with greater force here because the Contract and the arbitration proceeding are governed by both Bermuda substantive and procedural law.

12. There is another argument which I find it easy to dismiss out of hand and that is that the arbitrators should be left to make the appointment themselves. In my judgment it is not open to the Respondent having 'flown' to the Florida Court to seek an appointment[4] by an external agency on the grounds of urgency to argue before this Court, which is the agreed appointing authority, that no case for an urgent appointment exists. That is wholly inconsistent with the position taken before the Florida Court and simply cannot be taken seriously at this stage.

13. And so, having regard to the Court's jurisdiction to which I was also taken by counsel, it is clear that the conditions precedent for this Court exercising its powers under the UNCITRAL Model Law have been satisfied. There are in fact two potential bases of jurisdiction. The primary basis relied upon is that set out in article 11(3), which provides:

> "*(3)Failing such agreement,*
>
> > *(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;*
> >
> > *(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.*" [emphasis added]

[2] By appointing a Bermudian third arbitrator.
[3] [2011] Bda LR 63; in this case, only Bermudian procedural law was engaged.
[4] Strictly speaking, the Respondent formally sought an expedited civil trial but this was on the grounds that an expedited arbitration hearing was impossible as the arbitrator appointment process was taking too long and, implicitly, no relief in this regard could be obtained from this Court.

14. It seems clear on the evidence before me that the two arbitrators were appointed on February 20, 2013 so that the 30 day period has now expired.

15. There was another alternative basis for this Court to make the appointment which was referred to in the course of argument. Article 11 (4) provides:

> "*(4) Where, under an appointment procedure agreed upon by the parties,*
>
> *(a) a party fails to act as required under such procedure, or*
>
> *(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or*
>
> *(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,*
>
> *any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.*" [emphasis added]

16. This was relevant for this reason. Mr. Attride-Stirling conceded that the applicable procedure under the UNCITRAL Arbitration Rules had not yet been exhausted. This procedure was set out in Articles 8-9 which envisaged an exchange of lists. This procedure was arguably expected to be resorted to by the two party-appointed arbitrators if they were unable to agree on a third arbitrator. In my judgment it cannot be seriously argued that this procedure should be allowed to run its course because the Respondent himself has broken the contractually agreed procedure in the most serious way by going to a court which is not supervising the arbitration and inviting that court to make the appointment[5]. And so an alternative basis for making the appointment which I have made arises under Article 11(4)(a).

The anti-suit injunction

17. Finally I should explain briefly why I decided to grant the injunction sought. It is really trite law that where a party has contracted to have their disputes resolved in a particular forum or by a particular means such as arbitration, it is regarded as unconscionable for a party to seek relief which falls within the arbitration clause or exclusive jurisdiction clause otherwise than from the contractually agreed tribunal.

[5] In fact the application explicitly sought to bypass the supervisory jurisdiction of this Court and the arbitration agreement altogether by requesting a civil trial and only implicitly invited the Florida Court (which had previously referred the dispute to arbitration) in the alternative to break the deadlock in the appointment of the third arbitrator process. The Respondent not only failed to invite the party-appointed arbitrators to deploy the list exchanging mechanism to resolve the only six-day long 'deadlock'; he failed to resort to the contractually agreed supervisory jurisdiction of this Court to resolve his alleged concerns of delay.

18. In this case the mischief is quite remarkable because there is no rational explanation for an application being made to 'enforce' a Bermuda arbitration clause before a Florida court. This is not the more common situation where a party contends that they are not bound by an arbitration agreement and so are entitled to seek relief from another court. In this case the Respondent has already been told by the Florida Court that the dispute is subject to arbitration and the Respondent has already actually commenced the arbitration process. And so it really is quite mind-boggling to see the Respondent seeking the appointment of an arbitrator by a court which has no jurisdiction over the arbitration[6].

19. Be that as it may, the case for the injunctive relief sought was in my judgment unanswerable and (although it seems to me that the Respondent was given notice of the present application for injunctive relief[7]) I saw nothing in the Respondent's correspondence with this Court or indeed in his document '*Response to Originating Notice of Motion*' which would support or credibly support an argument against the grant of injunctive relief.

Conclusion

20. And so for those reasons I grant the Applicants the relief that they seek in their Notice of Motion which very generously merely seeks to defer the costs of the present application to the arbitration.

Dated this 26th day of March, 2013 _____

IAN RC KAWALEY CJ

[6] The second Florida action primarily purported to seek an expedited civil trial in lieu of arbitration because no mechanism existed under Bermuda law to obtain an expedited appointment of an arbitral tribunal. The Florida Court correctly construed the application as seeking to enforce what the Court had previously determined was a binding arbitration agreement.

[7] I.e. the Respondent failed to formally appear in opposition so the application was, strictly speaking, unopposed.