[2011] SC (Bda) 51 Civ (4 November 2011)

In The Supreme Court of Bermuda

CIVIL JURISDICTION
(COMMERCIAL COURT)
2011 No. 252

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

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

PRINCESS CRUISE LINES, LTD.

Plaintiff

-v-

AMANDA MATTHEWS

Defendant

REASONS FOR DECISION
(In Court)

Date of Hearing: October 26, 2011
Date of Reasons: November 4, 2011

Mr. Attride-Stirling and Mr. Shannon Dyer, Attride-Stirling & Woloniecki, for the Plaintiff
The Defendant did not appear

Introductory

1. By an Originating Summons dated August 16, 2011, the Plaintiff sought an Order "*appointing the third arbitrator in the arbitration between the Plaintiff and Defendant", pursuant to Order 73 rule 2(1)(f) of the Rules of the Supreme Court and Article 11(4) of the UNCITRAL Model Law on Commercial Arbitration*". On August 11, 2011, the Chief

Justice granted the Plaintiff leave to serve the Defendant abroad; on October 14, 2011, the Defendant entered an appearance in person. The Plaintiff is a Bermudian company and the Defendant is a Canadian national.

2. While she did not choose to appear at the hearing of the Originating Summons, she did file evidence in opposition to the application in the form of the First Affidavit of Michael Winkleman, her Floridian attorney. It was not disputed that this Court should appoint the third arbitrator in relation to the arbitration of the Defendant's personal injury claim against her employer. The Defendant has appointed Michael Guilford, a United States attorney; the Plaintiff has appointed Mr. Delroy Duncan, a senior member of the Bermuda Bar. Rather, (a) the Plaintiff contends that the third arbitrator should be a Bermudian attorney (because familiarity with Bermudian procedural law is important), while (b) the Defendant contends that the third arbitrator should be a US attorney (because familiarity with governing US substantive law is important).

3. In a hearing which lasted over two hours, Mr. Attride-Stirling took the Court carefully through both the Plaintiff's case and the absent Defendant's documentary case. I appointed former Bermuda Supreme Court Judge Mr. Geoffrey Bell Q.C. as the third arbitrator and awarded the costs of the action to the Plaintiff. In light of the fullness of the argument and the fact that the Order was made in the Defendant's absence in circumstances where there is no right of appeal, I indicated that I would furnish reasons for my decision.

Factual findings (uncontroversial background issues)

4. On or about April 27, 2010, the Defendant filed a Complaint against the Plaintiff in the Circuit Court for Broward County, Florida in Case No. 10018403 ("the Florida Court"/ "the Florida Proceedings"). Count I in the Complaint alleged Jones Act negligence in relation to injuries suffered by the Plaintiff when she slipped and fell on the Defendant's vessel, the Caribbean Princess, on which she was employed. Count II alleged unseaworthiness, and Count III failure to provide maintenance and cure under the "*General Maritime Law*". The accident was alleged to have occurred while the vessel was docked at Port Everglades in Florida.

5. On July 7, 2010, US District Judge Alan Gold of the Florida Court made an order, *inter alia*, compelling arbitration on the application of the Plaintiff in the present proceedings. The Florida Court, noting that the Plaintiff stipulated to the fact that US law should be the proper law of the contract, held (at page 11) that:

> "*…the choice-of-law provision at issue should be severed from the Principal Terms pursuant to the severability provisions in the Principal terms. However, the arbitration provision remains enforceable pursuant to the Convention and the implementing legislation.*"

6. The operative provisions of the arbitration clause contained in Article 14 of the relevant Terms and Conditions of Employment provide as follows:

"*IN THE ABSENCE OF A CBA OR GOVERNMENT-MANDATED CONTRACT SPECIFICATION , THE COMPANY AND CREW MEMBER AGREE THAT ANY AND ALL DISPUTES, CLAIMS, OR CONTROVERSIES WHATSOEVER…INCLUDING BUT NOT LIMITED TO …PERSONAL INJURY…SHALL BE REFERRED TO AND RESOLVED EXCLUSIVELY BY BINDING ARBITRATION PURSUANT TO THE UNITED NATIONS CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS …IN HAMILTON BERMUDA, TO THE EXCLUSION OF ANY OTHER FORA, IN ACCORDANCE WITH THE BERMUDA INTERNATIONAL CONCILIATION AND ARBITRATION ACT 1993 AND THE UNCITRAL ARBITRATION RULES AS AT PRESENT IN FORCE, ALL OF WHICH ARE DEEMED TO BE INCORPORATED HEREIN BY REFERENCE TO THIS PROVISION*."

7. The Plaintiff appointed Delroy Duncan of the Bermuda Bar, who (according to the evidence) was first called to the English Bar in 1984, as its party appointed arbitrator. I took judicial notice of the fact that Mr. Duncan is currently President of the Bermuda Bar Association. The Defendant appointed Michael Guilford, a Florida attorney specializing in Admiralty and Maritime law, as her party-appointed arbitrator. On May 10, 2011, the Plaintiff's attorneys requested the two party-appointed arbitrators to appoint the third arbitrator. They failed to agree.

8. The Plaintiff's nominees were Timothy Marshall, first admitted in Alberta, Canada in 1986 and Justin Williams, both of the Bermuda Bar. I took judicial notice of the fact that Mr. Williams is currently Vice-President of the Bermuda Bar Association and was also junior to Mr. Duncan in terms of date of call. In the alternative, the Plaintiff proposed a British Barrister. The Defendant's attorney insisted that a US lawyer alone would be appropriate because the governing law of the dispute was US law.

Legal findings: principles governing the Court's jurisdiction to appoint a third arbitrator

9. Article 11of the UNCITRAL Model Law as incorporated into Bermuda domestic law by the Bermuda International Conciliation and Arbitration Act 1993 ("the Act") provides as follows:

> "*Article 11. Appointment of arbitrators*
>
> *(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.*
> *(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.*
> *(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.

(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.

(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties." [emphasis added]

10. Article 11(5) of the Model Law requires this Court in appointing a third arbitrator to "*have due regard to*":

(a) any requisite qualifications provided for in the arbitration agreement;

(b) securing "*the appointment of an independent and impartial arbitrator*"; and

(c) take into account the advisability of appointing an arbitrator of a nationality other than those of the parties".

11. Mr. Attride-Stirling for the Plaintiff very properly drew the Court's attention to the following text authority which suggested both that (a) the parties could not waive the requirement of an independent and impartial tribunal, and (b) the appointment of an arbitrator with a neutral nationality was a positive requirement, albeit that "*the parties may free the court from observation of this criterion*": Aron Broches, '*Commentary on the UNCITRAL Model Law on International Commercial Arbitration*'[1] The only authority cited for proposition (b) was a legislative provision enacted in British Columbia which expressly provided that a third arbitrator must be from a neutral country unless the parties agree. Prior to this legislative change, in *Nippon Steel Corporation, et al-v-Quintette Coal Ltd.*, the British Columbia Supreme Court (a) declined the petitioning Japanese companies' application for the appointment of an arbitrator who was not Canadian, and (b) declined to appoint the British Columbian nominees of the Respondent Canadian company:

> "*However, the court felt that given the anticipated length and nature of the arbitration it would be inconvenient and unfair to the parties and the arbitrator to appoint an arbitrator who would be away from his home and other interests. As a result, given his availability, experience and independence, the court proceeded to appoint the retiring Chief Justice* [of the B.C. Court of Appeal] *subject to his acceptance.*"

12. I found that there was no proper basis for concluding that Article 11(5) of the Model Law binds the Court to appoint a third arbitrator from a neutral country unless the parties agree. The natural and ordinary meaning of the words of Article 11(5) suggest that the Court has a duty to consider the issue of national neutrality; not that the Court has a duty to appoint a third (or sole) arbitrator with a neutral nationality unless the parties waive this requirement. There would be some cases where the nationality of the third arbitrator would have a bearing on actual or perceived neutrality; there would be others where nationality was irrelevant. I considered it obvious that the independence and impartiality of the tribunal was a mandatory requirement, because the right to have one's civil rights and obligations determined by such a tribunal is a fundamental right recognised by domestic Bermudian and public international law: Bermuda Constitution, section 6(8); American Convention on Human Rights, Article 8(1); European Convention on Human Rights and Fundamental Freedoms, Article 6; International Covenant on Civil and Political Rights, Article 14(1). This requirement I considered to be the dominant principle of Article 11(5).

13. Article 11(5) provides no guidance as to how the Court should resolve a dispute in circumstances where the parties have not agreed specific qualifications. It was common ground that the Court was entitled to consider the nature of the dispute the tribunal was required to resolve and to select appropriately qualified arbitrators. A similar approach was taken by this Court, albeit in a different statutory context in *Manley Management, Inc.-v- Everest Capital* [1999] Bda LR 22 (Mitchell, J.). I accepted in general terms the submission made by the Plaintiff's counsel in partial reliance upon the latter case, that in

[1] (Kluwer Law and Taxation Publishers: Deventer/Boston, 1990) at page 58.

an arbitration governed by Bermuda procedural law, it was "*important that the arbitrator be familiar with Bermudian procedure.*" This was a relevant finding, because it is settled Bermudian/English law that, absent any contrary indication in an arbitration agreement, "*the parties' agreement on Bermuda as the place of the arbitration implicitly indicates their agreement that the procedural law of Bermuda should apply to the arbitration*": per Bell J, at paragraph 22 of *Starr Excess Liability Insurance Company, Ltd.-v- General Reinsurance Corp.* [2007] Bda L.R. 34.

14. It did not appear to me to be necessary to cite authority in support of what I understood to be a trite rule of private international law applicable not just to Bermuda, but possibly to most of the common law and civil law world as well. Nevertheless, I accepted Mr. Attride-Stirling's submission that the principles applicable to assessing damages was a remedial rather than substantive question which fell to be governed by the procedural law of the arbitration, not the governing substantive law of the contract: *Chaplin-v-Boys* [1971] A.C. 356.

15. For the avoidance of doubt, the above findings in relation to the procedural law applicable to the arbitration were made only to provide a foundation for the determination of the present application. They should not be regarded as an attempt by this Court to usurp the competence of the arbitral tribunal itself to determine the scope of its own jurisdiction and procedure pursuant to, inter alia, Article 16 of the Model Law ('*Competence of tribunal to rule on its own jurisdiction*') and Article 19 of the Model Law ('*Determination of rules of procedure*').

Findings: the appointment of the third arbitrator

Qualifications

16. It was contended in First Winkleman that "*the arbitral tribunal in this matter will need to be familiar and experienced with the Jones Act….and the General Maritime Law of the United States to properly evaluate Defendant's causes of action….the Jones Act allows seaman who have been injured by the negligence of their employers or co-workers to bring a claim against their employers for lost wages, medical bills, pain and suffering, etc. The seaman may also receive compensation if the injuries resulted from a dangerous condition precedent in the ship*…" (paragraphs 15,17).

17. The Plaintiff's counsel submitted that, having regard to this evidence, the Complaint filed in the Florida Proceedings and the terms of the Jones Act itself, there was no basis for concluding that there was any material distinction between the common law tort of negligence and a Jones Act claim. I agreed. The Defendant's evidence (and the Florida Complaint) makes a bare assertion of liability under the General Maritime Law without asserting what principles are relied upon to found liability distinguishable from the primary negligence claim. The Florida Complaint articulated a Jones Act claim in terms which are indistinguishable from a common law negligence claim. So while it was clearly correct that experience with personal injury claims governed by US law in relation to

accidents occurring on board a ship would be useful for the third arbitrator to have, I rejected the Defendant's submission that such a qualification was essential.

18. On the other hand, the Plaintiff argued that the key issue was likely to be quantum of damages, which was governed by Bermuda law as the procedural law of the arbitration. The First Affidavit of Dana Lauren Berger sworn in support of the present application however advanced this point in a somewhat muted way: "*It is important to PCL that the third arbitrator…be…appropriately qualified, which includes experience in dealing with legal issues under Bermudian procedural law including quantum of damages*" (paragraph 25). The Plaintiff's evidence went on to stress the importance of saving costs by appointing a locally resident arbitrator.

19. Mr. Attride-Stirling elaborated upon these twin points in the course of his oral argument, explaining that the quantum of the claim applying Bermudian law principles was possibly as small as $20,000. It was therefore unlikely to be cost-effective for the Plaintiff to incur disproportionate costs contesting liability, although he had no formal instructions to concede liability at this stage. The direct evidence in support of the contention that the Defendant's arbitration claim was a small one and that quantum of damage was accordingly likely to be the key issue was very thin indeed-in fact non-existent. However, I was willing to accept this submission as to the nature of the real dispute (i.e. quantum rather than liability in relation to a small claim) as a matter of inference from the following uncontroversial facts:

    (a) The Defendant's lawyer is a US lawyer able to act on a contingency fee basis. While it is understandable that she herself would lack the resources to fund the costs of the arbitrators, I take judicial notice of the notorious fact that such a plaintiff's attorney would likely be willing to incur the 'up-front costs' if she had a substantial claim. In the instant case, (1) the Plaintiff with a view to progressing the matter has agreed to pay the costs of retaining all three arbitrators without prejudice to the tribunal deciding on the allocation of costs, having failed to persuade the Defendant's attorney to agree to a sole arbitrator at the Plaintiff's sole expense, and (2) the Defendant did not instruct counsel to oppose the present application;

    (b) The Florida Complaint describes the injuries sustained by the Defendant in generic terms without identifying any specific serious injuries;

    (c) The Defendant in the Florida Proceedings sought to invalidate the arbitration clause on the grounds that she could not afford the costs of arbitrating in Bermuda.

20. Accordingly, I found that:

    (1) experience of US law was not an essential requirement for the third arbitrator;

(2) experience of Bermuda law was likely to be a more relevant requirement as the assessment of damages under Bermuda law was likely to be more important than determination of liability under US law; and

(3) The case was cost-sensitive to both parties; it was therefore desirable to appoint an arbitrator who was resident in Bermuda.

Nationality/neutrality

21. The Defendant's arbitration claim is asserted by an employee who happens to be Canadian against a company which happens to be Bermudian. The Plaintiff's counsel made the interesting point that if the Plaintiff has assigned her claim to her US attorney under a typical contingency fee arrangement, then her claim and the nationality of her attorney have become merged. I did not consider there was sufficient factual or legal basis for me to accept this contention. The Defendant's complaint that a Bermudian third arbitrator would not be neutral fell to be rejected, if at all, on other grounds.

22. Based on the view I took of the terms and effect of Article 11(5) of the Model Law, I found that the crucial factor to be considered was the "*advisability*" of appointing an arbitrator whose nationality was neutral having regard to the overriding duty to appoint an independent and impartial tribunal. It was deposed in First Winkleman as follows:

> "21. *Plaintiff's vessels are registered under the laws of Bermuda, and Plaintiff has already appointed an arbitrator from Bermuda (Delroy Duncan). The neutrality of the arbitral tribunal would therefore best be served with the appointment of a U.S. arbitrator as the third.*"

23. There was no suggestion on the Defendant's part that a Bermudian third arbitrator would be apparently biased on nationality grounds. There were no diplomatic or trade wars between Bermuda and Canada; the dispute was not said to raise any sensitive issues of Bermuda public policy creating an appearance that a Bermudian third arbitrator would be partial to the Bermudian arbitration defendant. The Plaintiff is incorporated in Bermuda, but is obviously part of an international group which does business primarily outside of Bermuda; it is not, for instance, an insurance company with a large presence (and commensurate presumed local influence) here. Indeed, the Defendant herself asserted in the Florida Complaint that the Plaintiff did substantial business in the US and was connected to Bermuda only by virtue of the vessel's registration in a "*flag of convenience*" country. I found that there was no substance to the assertion that the requirements of neutrality would not be met if a Bermudian arbitrator were to be appointed as third arbitrator.

24. On the other hand, I was concerned about accepting the nominees proposed by the Plaintiff, in the context of an ex parte hearing which the Defendant had not elected to attend, very likely to avoid the expense. I felt that although the proposed candidates were unimpeachable (one, Mr. Marshall had previously been selected as the party arbitrator for another employee asserting a claim against the Plaintiff), the Court should avoid a

scenario where the Plaintiff had been able to effectively nominate its own party-appointed arbitrator and the third arbitrator. Such a result would not in Bermudian terms strictly conflict with the constitution of an independent and impartial tribunal as a party-appointed arbitrator is also required to be independent and impartial, unlike the position in the United States[2]. However, it would in my judgment probably leave an unpleasant taste in the Defendant's mouth (and certainly that of Mr. Winkleman) to be required to face an arbitral tribunal of three members two of whom have effectively been nominated by the opposing party. Even viewed from a more objective distance, the appearance of neutrality would have been diluted to an unacceptable extent.

25. In addition to my reluctance to appoint one of the Plaintiff's own nominees, I was also concerned about the implications for perceived impartiality of appointing another member of the Bermuda Bar who was junior to the Plaintiff's party-appointed arbitrator Mr. Delroy Duncan, President of the Bermuda Bar Association[3]. When I raised this concern, counsel proposed a more senior candidate. This would still not meet the concern, that having regard to the small size of the Bermuda litigation Bar, the perception might arise that the Plaintiff's practising Bermudian lawyer arbitrator would have greater collegial influence over a fellow practising Bermudian lawyer appointed as a third arbitrator[4].

Decision

26. Accordingly, I appointed Mr. Geoffrey Bell Q.C., a Judge of this Court between 2005 and 2010, as the third arbitrator. In my judgment a retired judge who has not practised at the Bar for some years and who was far more senior than the party-appointed Bermudian lawyer could not reasonably be perceived as lacking independence and impartiality. I considered that this decision would accommodate the Plaintiff's case that there was a need to appoint a third arbitrator familiar with Bermuda law as the procedural law of the arbitration, and to avoid the costs of flying in an arbitrator from abroad. I also considered that this would accommodate the Defendant's legitimate concerns about neutrality, albeit that the nationality concerns which were positively raised were found to lack substance.

27. These are the reasons why I granted the Plaintiff's application to appoint a third arbitrator who was experienced in Bermuda law. As the Plaintiff's application in substance succeeded, I saw no reason why costs should not follow the event according the usual rule.

Dated this 4th day of November, 2011 _____

KAWALEY J

[2] The Plaintiff proposes to challenge the Defendant's arbitrator on the grounds that he has acted against it in similar claims on numerous occasions. I assumed in making my decision that the Defendant's arbitrator was duly appointed.
[3] The President of the Association is also head of the profession's governing body, the Bermuda Bar Council.
[4] Appointed, it must be recalled, by a Bermudian Court in the context of what was effectively an ex parte hearing.