258. UNITED KINGDOM: QUEEN'S BENCH DIVISION, COMMERCIAL COURT – 20 November 1986 – *Comdel Commodities Ltd. v. Siporex Trade S.A.* *

Stay of judicial proceedings pending arbitration – Scope of the arbitration agreement – Existence of a dispute

(See Part I. A.3 and B.1,4)

Mr. Justice STEYN: In this case the plaintiffs and the defendants concluded two contracts for the purchase by the plaintiffs from the defendants respectively of 11,000 tonnes of cotton-seed oil and 21,000 tonnes of tallow, subject to FOSFA rules. These contracts were concluded during October, 1984. Both contracts provided for the opening by the plaintiffs of a letter of credit by the latest on Dec. 7, 1984. Both contracts also made provisions for the establishment of an irrevocable performance bond equal to 10 per cent. of the c. & f. value of the contracts in the defendants' favour.

Both contracts contained arbitration clauses in the following terms:

> Any dispute arising out of this contract, including any question of law arising in connection therewith, shall be referred to arbitration in London (or elsewhere if so agreed) in accordance with the Rules of Arbitration and Appeal of the Federation of Oils Seeds and Fats Associations Limited, in force at the date of this contract and of which both parties hereto shall be deemed to be cognisant.

Then the clause continues to make provision in what is usually described as the *Scott v. Avery* form, but it is not necessary for the purposes of any judgment to quote that part of the arbitration clause.

It is therefore necessary to turn to the Rules of Arbitration and Appeal of FOSFA and the particular rules that I shall be referring to are those revised and made effective from Apr. 1, 1983. The opening words of the rules are as follows:

> Any dispute arising out of a contract subject to these Rules, including any questions of law arising in connection therewith, shall be referred to arbitration in London (or elsewhere if so agreed) which shall be carried out in accordance with the Arbitration Acts 1950, 1975 and 1979 or any statutory modification or re-enactment thereof for the time being in force.
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> Each party engaging in an arbitration for an appeal pursuant to these Rules, whether or not a Member of the Federation, is deemed thereby to abide by these Rules . . .

Paragraph 1 provides for the appointment of arbitrators or an arbitrator and it sets out a regulatory framework. Paragraph 2 deals with procedure for claiming arbitration and time limits. It distinguishes between claims in regard to quality or condition in respect of which cer-

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* The text is reproduced from Lloyd's Law Reports, 1, p. 326 ff. (1987)

tain relatively short time limits are provided for and claims other than claims in respect of quality and of condition. It is common ground that the claims involved in the present case do not fall within the first category. I therefore go straight to par. 2(b) which reads as follows:

> Claims other than on quality and/or condition shall be notified by the claimant with the name of an arbitrator to the other party within the time limits stipulated in this Rule:
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> (i) For goods sold (1) on CIF terms: not later than 120 consecutive days after the expiry of the contract period of shipment or of the date of completion of final discharge of the goods whichever period shall last expire (2) on FOB terms: not later than 120 consecutive days after the expiry of the contract period of shipment (3) on any other terms: not later than 120 consecutive days after the last day of the contractual delivery period.
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> (ii) In respect of any moneys due by one party to the other, not later than 60 consecutive days after the dispute has arisen.
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> The other party shall nominate an arbitrator within 30 consecutive days from the receipt of such notice . . . [There I omit sub-par. (c) but I quote sub-par. (d): —] In the event of non-compliance with any of the preceding provisions of this Rule, claims shall be deemed to be waived and absolutely barred unless the arbitrators, umpire or Board of Appeal referred to in these Rules shall, at their absolute discretion, otherwise determine.

Now reverting to the sequence of events, the position is that performance bonds to a total value of US$1,887,200 were duly established. By December, 1984, the defendants had made a call on the performance bonds. However, the banks did not make an immediate payment. The defendants then commenced actions in the Commercial Court against the bank. In January, 1985, the plaintiffs commenced arbitrations against the defendants pursuant to the FOSFA Rules on the issue whether or not the letters of credit were opened in time. By the end of January, 1985, awards had been made against the plaintiffs in that arbitration, which has been referred to in the papers as the 1985 arbitration. In January, 1985, the defendants obtained judgment against the banks in the two High Court actions. In February, 1986, the plaintiffs purported to commence what has been called the second part of 1985 arbitrations. But Mr. Justice Bingham subsequently held that it was not competent to do so.

On May 13, 1986, the bank paid to the defendants the sum under the performance bonds and the plaintiffs then commenced the 1986 arbitration for recovery of the balance in the defendants' hands after retention by them of all sums necessary to compensate the defendants for the plaintiffs' failure to open the letters of credit as required. In respect of that matter the plaintiffs obtained a Mareva injunction. An unsuccessful application was made to discharge it and there the matter rested. The plaintiffs in May appointed Mr. Scott as arbitrator. They then wrote to the defendants and asked them whether they intended to take a time bar defence. In June the defendants replied to the effect that they intended to rely on the time bar defence.

What happened thereafter was that the plaintiffs issued a summons for relief under s. 27 of the Arbitration Act, 1950, i.e. for an extension of time within which to appoint their arbitrator. The plaintiffs also issued an originating summons for a declaration that their claims in the arbitration against the defendants started on May 13, 1986, are not time barred. The riposte of the defendants was a summons applying for a stay of the plaintiffs' originating summons under s. 1 of the Arbitration Act, 1975. These three applications came before me yesterday.

The first question to be determined is whether a stay ought to be granted or not. That resolves itself into two issues, and only two matters arise, because the plaintiffs accept that the arbitration agreement, which I have already cited, is a non-domestic arbitration agreement as defined in s. 1 of the Arbitration Act, 1975. They seek to escape the conclusion that all issues are to be determined by the arbitrators in two ways. First of all, they say that there is an issue as to whether the time limits involved apply. They assert that it is a question of construction which goes to the *jurisdiction* of the arbitrators and is therefore not a matter which the arbitrators can finally determine. The second way they put the matter is that there is no genuine dispute at all.

I deal first with the jurisdiction point. There is undoubtedly an issue between the parties as to whether the time limits under the FOSFA Rules apply at all. The defendants rely both on cl. 2(b)(i)(3) and on cl. 2(b)(ii). The plaintiffs deny that either of these provisions are applicable. This is a question of law, which depends on the proper construction of the relevant rules. But the plaintiffs allege that it goes directly to the arbitrators' jurisdiction and that the arbitrators cannot determine it. Ultimately the matter, they say, rests with the Court and it is

therefore appropriate for this Court to decide the question. The arbitration clause is in the widest terms and comprehends—

> Any dispute arising out of this contract, including any question of law arising in connection therewith.

Moreover, it is common ground that the rules which contain the time limits are incorporated by reference into the two contracts. For present purposes the rules can be read as if incorporated in extenso. The defendants are therefore seeking to rely on a contractual time bar defence. It is of course a question of law whether the defendants' construction is right, but it is a question of law "arising in connection therewith" under the contracts.

With characteristic skill, Mr. Aikens has attempted to dress it up as a point of jurisdiction (if I may use that expression in an inoffensive sense), but I am constrained to say that the argument cannot survive analysis. It is a matter squarely within the reference. It relates to a defence that the defendants wish to put forward which arises directly from the express terms of the contract. It is no more a jurisdictional point than the question of the applicability of an exception clause under a contract containing an arbitration clause would be a jurisdictional point.

A number of decisions were mentioned in argument, only one of which I find of assistance. If support for my conclusion is needed, I consider that some is afforded by the decision in *Cope v. Cope*, (1885) 52 L.T. 607. The headnote conveniently states the facts and the issue before the Court:

> A partnership was continued after the expiration of the term specified in the articles of partnership. The articles contained an arbitration clause, providing, in effect, that all disputes or questions respecting the partnership affairs, or the construction of the articles, should be referred to arbitration. There were also clauses providing for the purchasing by the continuing partners of the share of a deceased partner.
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> An action was brought by the executors of a deceased partner against the surviving partner for the winding-up of the partnership.
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> The defendant moved for a stay of proceedings and a reference of the matters in difference between the parties to arbitration.
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> One of the questions was, whether it was for the court or for the arbitrators to determine which of the clauses in the articles, and in particular whether the purchasing clauses, applied to the partnership so carried on after the expiration of the term.

Mr. Justice Kay held:

> . . . that it was for the arbitrators, and not for the court, to determine which of the articles applied; and that a stay of proceedings must be directed, and a reference of all matters in difference to arbitration.

The following passage in Mr. Justice Kay's judgment is of some interest (p. 609, left-hand column):

> But the first question which I have to consider is, whether these are not matters to be determined by the arbitrators. It is urged they are not because the arbitrators are not at liberty to decide the extent of their jurisdiction, and it is said that the ground ought to be prepared for them by the court declaring what part of the articles, if any, applied to the partnership at the death of Thomas. To some extent this argument is acceded to, for it is admitted that the court ought to decide whether the arbitration clause applies or not. But while fully appreciating the ingenuity of the argument, it seems to me that the distinction is this: that if the arbitration clause does not apply, the arbitrators would have no jurisdiction at all, and therefore to refer that question to them would be to ask them to decide whether they have any jurisdiction. But the other matter in difference — namely, whether the purchasing clauses are applicable — is not really a question as to the jurisdiction or extent of the jurisdiction of the arbitrators, but is one of those questions, either of construction of the articles, or of the extent to which they should be applied in winding-up the partnership, which the parties to these articles intended to withdraw from the jurisdiction of the ordinary tribunals, and to submit to arbitration instead. The arbitration clause is in terms unusually comprehensive. It applies after the expiration or determination of the partnership, in case of any dispute, doubt, or question between the partners, their respective heirs, executors, or administrators, either on the construction of the deed "or respecting the accounts, transactions, profits, and losses of the business of the partnership, or the dissolution of the partnership, or any other dispute whatsoever touching the partnership affairs". Larger words could hardly have been employed. These gentlemen seem to have provided with anxious care that such questions as those which have now arisen should not be made the subject of litigation. The duty of the court

is to carry out their deliberately expressed intention.

I need only add that there is in the present case of course no issue as to the construction of the arbitration clause at all. The issue relates to the applicability or otherwise of time limits set out in the rules.

It follows that I have come to the conclusion that the plaintiffs' case on this aspect must fail. I only add that on broader grounds I take the view that the view put forward by the plaintiffs, if acceded to, would introduce a most undesirable opportunity for judicial intrusion in the arbitral process during the course of the reference with an attendant risk of great delay and substantial increase of costs. It would be contrary in my view to the philosophy underlying the Arbitration Act, 1979, and the philosophy repeatedly enunciated in judgments of the Court of Appeal and the House of Lords since 1979. I conclude that the plaintiffs must fail on this point.

That brings me to the second way in which it is argued that the application for a stay ought not to succeed. The reason here advanced is as follows. On behalf of the plaintiffs it is submitted that although a stay is mandatory if s. 1 of the Arbitration Act, 1975, applies, one of the gateways from the operation of that section is if the court is satisfied that there is not in fact any dispute between the parties with regard to the matter agreed to be referred.

The way in which the Court, faced with issues in relation to competing O. 14 and stay applications, ought to approach the matter was set out by Lord Justice Kerr in *Serhia Ltd. v. State Trading Corporation*, [1986] 1 Lloyd's Rep. 31. At p. 33 Lord Justice Kerr puts the matter as follows:

> If a point of law is raised on behalf of the defendants, which the Court feels able to consider without reference to contested facts simply on the submissions of the parties, then it is now settled that in applications for summary judgment under Order 14 the Court will do so in order to see whether there is any substance in the proposed defence. If it concludes that, although arguable, the point is bad, then it will give judgment for the plaintiffs . . . . If the contract between the parties contains an arbitration clause to which section 1 of the 1975 Act applies, then the Court is not thereby precluded from considering whether there is any arguable defence to the plaintiffs' claim. If the Court concludes that the plaintiff is clearly right in law then it will still give judgment for the plaintiffs . . . But if the Court concludes that the plaintiffs are not clearly entitled to judgment because the case raises problems which should be argued and considered fully, then it will give leave to defend, and it is therefore then bound to refer the matter to arbitration under section 1 of the 1975 Act.

The present case is, of course, different inasmuch as the position is that I have an originating summons asking for a declaration before me and an application for a stay, but I take the view that I ought to adopt the same approach as Lord Justice Kerr adopted in the case of *Serhia*, and I should add with the concurrence of the other members of the Court of Appeal. But in my judgment there is a bona fide question of law here. In particular I consider that the words "for goods sold", which appear in cl. 2(b) of the FOSFA rules, are capable of being construed in the manner put forward by the defendants, and in particular I take the view that it is a possible construction of the rules that those words should be read as being shorthand for "contracts for goods sold". If that is correct the time limit provided under 2(b)(i)(3) would be applicable in this case. It is also arguable that the scheme of cl. 2 provides support for this construction in the sense that the general wording of the heading together with the layout of time limits in respect of claims relating to quality and condition, and other claims, are intended to create a comprehensive code. If that is so, that would be a factor supporting the defendants' construction. Let me make absolutely clear however that I express no concluded or tentative view as to how this matter should be resolved. That is a matter for the arbitrators. But in my judgment the point is eminently arguable. I am fortified in this view by the fact that it appears to have been the view that appealed to Mr. Justice Bingham (now Lord Justice Bingham) during the course of earlier proceedings. I furthermore take the view that this is a case where commercial arbitrators who are familiar with a whole spectrum of FOSFA disputes and arbitrations, may conceivably be in a better position than the Commercial Court to decide on the construction of these particular rules. I do not however rest my judgment on that consideration. It is sufficient to say that I am satisfied that there is a genuine and real dispute.

Both planks of Mr. Aikens' argument that the action should not be stayed have been rejected. It follows this that the application for a stay of the originating motion should be granted.

That leaves one last matter for me to deal with in this judgment and that is the application for a stay under s. 27 of the Arbitration Act 1950. Here I have listened to an interesting argument by Mr. Aikens in relation to a number of problems that arise. The position of the plaintiffs yesterday was that I ought to decide that matter, in the alternative I ought to adjourn it, but that I ought not dismiss the application. I was informed this morning that the plaintiffs' position is that I am invited to adjourn that particular application. The defendants yesterday invited me to adjourn that application but reserved their position if the matter was argued out. The present position as I understand it is that the defendants would prefer me to dismiss the application but, as Mr. Pickering put it, he is content if it is adjourned. Both parties accept that it is within my jurisdiction and within my discretion to adjourn it if I regard that as the appropriate course to take. It is of course quite possible that the arbitrators may find that the time limits are not applicable. If that is so, this application is of academic importance only. It is further possible that they may take the view that the time limits are applicable but that in the exercise of their absolute discretion an extension should be granted. In that case once again this application is academic. I should also add — and I emphasize that I have not heard Mr. Pickering on it — that I do not regard this application as a simple one at all. I regard it as involving a number of complicated questions.

In all the circumstances I have come to the conclusion that I ought simply to adjourn that application at this stage, granting at the same time liberty to both parties to apply.

I believe that I have dealt with all the issues that arise.