UK no. 29 - YB XVI

High Court

sent by
Mr. Justice Steyn

ROSSEEL N.V

and

ORIENTAL COMMERCIAL SHIPPING (UK) LIMITED.

AND OTHERS.

JUDGMENT.

The central question in this case is whether an arbitration award dated 20 June 1990, published under the rules of the American Arbitration Association, ought to be enforced in England as a New York Convention Award under the Arbitration Act, 1975.

In 1984 the Plaintiffs (a Belgian company) bought from the First Defendants (an English company) 226,000 barrels of fuel oil at U.S. $126.50 per metric ton, F.O.B. The contract was expressed to be subject to New York law, and contained a New York City arbitration clause. The contract was not performed. In 1985 the Plaintiffs commenced arbitration proceedings in New York against the First Defendants. Litigation commenced in New York as to the parties to the principal contract and the arbitration agreement. The United

States Court found, as a matter of fact, that the Second Defendant (Mr. A.H. Bokhari, a Saudi Arabian citizen) and the Third Defendants (a Saudi Arabian corporation) were parties to the principal contract and to the arbitration agreement.

The arbitration hearings took place on 26 January 1990 and 7 and 8 May 1990. The issue was whether the plaintiffs were entitled to recover damages for breach of contract and, if so, how much. The Arbitrators found in favour of the Plaintiffs on liability, and made an award in the sum of US $4,266,556.28 in favour of the Plaintiffs. The award is dated 20th June, 1990. By an amended award dated 16th August 1990 the Arbitrators corrected clerical errors in their award.

There were four applications when the hearing before me commenced. It was agreed that arguments should, in the first place, concentrate on the first two applications. The first was the Plaintiffs Originating Summons for leave pursuant to Section 3 of the Arbitration Act, 1975 to enforce against the Second and Third Defendants the New York arbitration award of 20 June 1990. The second was the Defendants Originating Summons for an order setting aside service out of the jurisdiction of the Plaintiffs Originating Summons on the ground that the Plaintiffs are not entitled to enforce the award, or, alternatively, that as a matter of discretion, leave ought not to have been granted.

Two issues arise. The first relates to the impact on the enforceability of the award of two Joint Stipulations, respectively dated 15 May 1989 and 13 February 1990, entered into by the parties in United States legal proceedings and by consent made orders of court. These Joint Stipulations predate the publication of the award. The first Joint Stipulation is dated 15th May 1989. It is signed by counsel for the parties and by court officials. It reads as follows:

> "The undersigned hereby stipulate that the above captioned appeal is hereby withdrawn without costs and without attorneys fees pursuant to Rule 41 (b) of the Federal Rules of Appellate Procedure. The parties agree that any proceedings to confirm or vacate the arbitration award will be bought in the USDC, SDNY. In any appeal therefrom the issues sought to be raise herein can be raised at that time."

The second Joint Stipulation is dated 14 February, 1990, and is in similar terms. The question is whether the parties have by agreement varied the ordinary rule that an arbitration award is "binding" immediately upon publication and

continues to bind the parties unless it is set aside or suspended by a competent judicial authority. The Defendants assert that there was such an agreement; the Plaintiffs deny it. This issue is common to both applications. The second issue arises on the Defendants ' Summons. The Defendants contend that, even if the award is binding and enforceable, leave to serve on the Third Defendant ought not as a matter of discretion to have been granted because there is no evidence that the Third Defendants have any assets within the jurisdiction. I will call this "the discretion point".

IS THE AWARD BINDING?

It is common ground that the award is a "convention award" within the meaning of the Arbitration Act, 1975, which enacted the New York Arbitration Convention of 1958 in the United Kingdom. It is further acknowledged that complied with the evidential requirements of Section 4 of the 1975 Act. The relevant subsections of Section 5 reads as follows:

> "(2) Enforcement of a Convention award may be refused if the person against whom it is invoked proved-
> (a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity; or
> (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made; or
> (c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
> (d) (subject to subsection (4) of this section) that the award deals with a difference not contemplated by or not falling within the terms of the submission

> to arbitration or contains decisions on matters beyond the scope of the submission to arbitration; or
> (e) that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country where the arbitration took place; or
> (f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.
>
> (3) Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award."

It is common ground that, although there are proceedings pending between the parties in New York, there is no application pending in the United States courts to set aside or suspend the award. The Defendants resist enforcement on two grounds, viz Section 5 (2) (f) and in particular the provision that "the award has not yet become binding on the parties" and Section 5 (3) which provides that enforcement may be refused "if it would be contrary to public policy to enforce the award".

Three features of the scheme of the New York Convention must be noted. First, the New York Convention eliminated the "double exequatur" requirement of the earlier Geneva Convention. Under the Geneva Convention a party who sought to enforce an award, had to prove an exequatur (leave to enforce) issued in the country in which the award was made as well as leave to enforce in the country in which he sought enforcement. The New York Convention abolished the need to

obtain leave to enforce in the country where the award was made. See Dr. Albert Jan van den Berg, The New York Arbitration Convention 1958, 1981, at pages 266 - 267. Secondly, the grounds of refusal set out in Section 5 are exhaustive. If none of the grounds for refusal are present, the award "shall" be enforced. Thirdly, as is apparent from Section 5 (2), the burden rests squarely on a respondent, who resists enforcement, to prove the existence of one of the grounds of refusal set out in Section 5 (2). That burden must be discharged on a balance of probabilities. The defendants, who invoke Section 5 (2)(f), must therefore prove the existence of an agreement which deprived the award of its prima facie binding character. The defendants do, however, also assert that it would be contrary to the public policy of England to enforce the award, having regard to the fact (which they assert) that the parties agreed that the award would not be binding until a United States Court had pronounced on the award. The issue of public policy is one which the Court may raise of its own motion. On the other hand, in this particular case the issue only arises if the Defendants have established an agreement containing the terms they put forward. Whichever way the case is approached the burden of proving the alleged agreement therefore rests on the Defendants.

It is now necessary to examine the validity of the Defendants' assertions. It relates to an agreement made in New York, and the law of New York is applicable. No evidence has

been adduced about the relevant principles of New York law. I am therefore bound to approach the matter in the way dictated by the principles of English contract law.

What the Defendants seek to prove is an agreement that the Plaintiffs, if they obtained an award in their favour, would not be entitled to seek enforcement against the foreign defendants abroad without first obtaining a pronouncement of the District Court of New York City. The Joint Stipulations do provide that proceedings to confirm the award must be brought in the District Court of New York. There is, however, a difference in United States law between proceedings for confirmation of an award, and proceedings for enforcement of an award. One can take proceedings in the country in which an award is made (although it is not required under the New York Convention) to confirm the award, being declaratory relief, without seeking enforcement of the award. The Joint Stipulations relate to confirmation proceedings. They do not expressly touch the subject of enforcement of the award.

It was submitted that a term must be implied that enforcement proceeding may not be taken abroad by the Plantiffs until the United States Court had confirmed the award. Such a stipulation would be an extraordinary one. It involves the Plaintiffs giving up valuable rights under an otherwise binding award for no consideration of substance. From the Plaintiffs point of view there was no commercial justification for such a

stipulation. In any event, it is impossible to imply into a provision dealing with proceedings to confirm an award, a provision restricting enforcement abroad. The suggested implication falls makedly short of satisfying the well known requirement for the implication of terms

The defendants had a further string to their bow. They sought to rely on the oral discussions which preceded the execution of the Joint Stipulations. Those discussions are unhelpful, and inadmissable, as an aid to construction of the agreement for the reasons stated by Lord Wilberforce in Penn v Simmonds(1971) 1 WLR 1381. If it is assumed that the discussions took place on a wider basis than was reflected in the Joint Stipulations, then that would not help the Defendants to establish a collateral oral pact. I say that not because of any technical application of the parol evidence rule. It is well known that the exceptions to that rule have just about swallowed up the rule. The point is one of substance: on the evidence I am satisfied that the Joint Stipulations are intergrated written agreements which were intended to supersede whatever was said in oral discussions. I do not believe there is anything to the contrary in the evidence of Mr. Harrison, the lawyer who represented the Defendants in the New York proceedings. But if there is I am bound to say that I would reject it as unreliable.

There is a further reason why the Defendants reliance on the affidavit evidence of Mr. Harrison must fail. Mr. Harrison has sworn a number of affidavits. His earlier affidavits did not assert an express oral agreement that the Plaintiffs would not seek enforcement abroad until after confirmation of the award by the United States Court. In argument this weakness in the Defendants' case was pointed out. Thereafter, Mr. Harrison swore a further affidavit. This eleventh hour evidence was to the following effect:

> "....I discussed with Mr. Hanessian and he understood and agreed that prior to steps being taken anywhere to collect on any award Rosseel as a first step would apply for confirmation in the Southern District.

This account is challenged by the Plaintiffs. I also regard Mr. Harrison's account as inherently improbable. The Defendants were asked whether they wanted an issue tried: they unambiguously told me that they did not wish oral evidence to be led. The Defendants asked me to do the best I can in the light of the disputed affidavit evidence. I will do so. My conclusion is that it is more probable than not that the Defendants account is wrong. I particularly reject as unreliable Mr. Harrison's account of the discussions in his last affidavit.

For all these reasons I find that the Defendants have not proved the agreement on which they rely. It follows the the Defendants have not established any of the recognised grounds of refusal under Section 5.

THE DISCRETION POINT.

Under this heading the leave to effect service out of jurisdiction under Order 73, rule 7 is challenged. The challenge is directed only at the leave granted against the Third Defendants. There is no evidence that the Third Defendants (a company trading in Saudi Arabia) have any assets within the jurisdiction. It was submitted that there is no sufficient jurisdictional connection; and that it was therefore not a proper case for granting leave to serve out of the jurisdiction against the Third Defendants. I disagree. The English Court is bound by a statute, arising from treaty obligations, to enforce the award. The presence of assets in the jurisdiction is not a precondition under the statute to the enforcement of the award.It ought not to be regarded in the exercise of the Courts discretion as a prerequisite to the granting of leave to serve out of the jurisdiction. A contrary view would in effect introduce into the statute, which carefully reflects our treaty obligations, a pre-condition which is not to be found in the 1958 New York Convention. That Convention has now entered onto force in the laws of some 80 countries. It is the great success story of international

commercial arbitration. This court ought to be astute to avoid making an order which will derogate from the efficacy of the New York Convention system and our treaty obligations as enshrined in the 1975 Act.

Conclusion.

Leave to enforce the award is granted.