GATOIL INTERNATIONAL INC. v. NATIONAL IRANIAN OIL CO.

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

Royal Courts of Justice

21 December 1988

Before:

MR JUSTICE GATEHOUSE

GATOIL INTERNATIONAL INC v NATIONAL IRANIAN OIL COMPANY

MR K.S. ROKISON, QC and MR A. SMITH (Instructed by Habaree Nathanson, 50 Stratton Street, London W1X 6NR) appeared on behalf of the PLAINTIFF

MR A.G. POLLOCK and MR R. JACOBS (Instructed by Freve Cholmeley, 28 Lincoln's Inn Fields, London WC2A 3HH) appeared on behalf of the DEFENDANT

JUDGMENT

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JUDGMENT

MR JUSTICE GATEHOUSE: This is an application by the defendant under s.1(1) of the Arbitration Act 1975 for a mandatory stay in an action brought against it by the plaintiff; alternatively for an order that the action be dismissed or stayed pursuant to the inherent jurisdiction of the Court on the ground of forum non conveniens. The relief sought in paragraph 1 of the summons is not pursued.

The plaintiff is registered in Panama. The defendant is incorporated under the laws of the Islamic Republic of Iran. On 17 April 1982 the parties entered into a written contract for the purchase by the plaintiff and the sale by the defendant of a substantial quantity of Iranian light and heavy crude oil during the period between 1 April and 31 December 1982. The contract was upon a standard form used by the defendant and incorporated the defendant's general terms and conditions, Section 8 of which provides for arbitration in the following terms:

> "Any dispute between the parties arising out of this Contract shall be settled by arbitration in accordance with the laws of Iran. The party who wants to submit such a dispute to arbitration shall advise the other party in writing, stating therein its claim and nominating its arbitror. The other party shall nominate a second arbitror within 30 days after receiving the said advice.
>
> The two arbitrors thus appointed shall appoint a third arbitror who shall be the president of the board of arbitration. Should the other party fail to appoint and nominate the second arbitror or should the two arbitrors fail to agree on the appointment of the third arbitror within 30 days, the interested party may request the President of the Appeal Court of Tehran, Iran, to appoint the second arbitror or the third arbitror as the case may be.
>
> The arbitrors appointed as per above provisions shall have broad experience with respect to the petroleum industry practices and oil marketing and be reasonably fluent in written and spoken English.
>
> The arbitration award may be issued by majority and shall be binding on both parties.
>
> The seat of arbitration shall be in Tehran, unless otherwise agreed by the parties."

Section 10 provides:

> "The Contract shall be governed by and construed according to the laws of Iran."

It is alleged by the plaintiff that the defendant failed and refused

to deliver the agreed quantity of oil, and, despite the arbitration clause, on 17 March 1987 the plaintiff served a writ upon the defendant at what was said to be its head office in London. The points of claim alleged a short delivery of over 44 million barrels and claimed damages for loss of profit in the sum of US $107,633,000-odd, together with a comparatively small sum for demurrage expenses and extra war risk insurance, together with interest.

The plaintiff does not seek to avoid arbitration. It merely does not wish to arbitrate the dispute in Tehran, as required by the arbitration clause. The defendant is not willing to have the dispute litigated and is not prepared to arbitrate except in Tehran. The clause in question is, of course, a non-domestic arbitration clause and the defendant is entitled, as of right, to a stay of the action under s.1(1) of the 1975 Act, unless the Court is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.

Consideration of the words "null and void" does not arise. The argument centred around the words following, i.e. "inoperative" and "incapable of being performed". The parties agreed that I should consider this question first and that, if necessary, the alternative issue of forum non conveniens should be postponed for later argument and possibly cross-examination of witnesses upon their affidavits.

The first argument relied upon by the plaintiff was directed to the description of the default appointer in the arbitration clause, namely the President of the Appeal Court of Tehran. No such person has existed since the revolution. By the post-revolutionary law, which abolished the Appeal Court, that Court's functions were transferred to the Municipal Court of Tehran, and the function of appointing an arbitrator where the parties are unable to agree is now exercisable by a Judge of that Municipal Court. The experts are also now agreed that if such an appointment had to be made, Article 644 (2) of the Civil Code of Procedure provides that it would have to be from amongst those residing or domiciled within the jurisdiction of that Court, a restriction which would not have applied if the President of the Court of Appeal had been the default appointer.

Mr Sabi, the Iranian lawyer engaged by the plaintiff, in his first affidavit pointed to Article 232 of the Iranian Civil Code, which provides that in regard to contracts:

> "the following conditions are of no effect, though they do not nullify the contract itself:-
> I. Conditions which are impossible to fulfil."

Mr Sabi also relies upon Article 190 of the Iranian Civil Code, which provides:

> "For validity of a contract, the following conditions are essential:
> I. The intention and mutual consent of both parties."

Mr Sabi says that Article 8, the arbitration clause, is a condition of the contract and that it lacks two vital elements necessary if it is to be capable of being performed, namely: (a) it is impossible to enforce the provisions relating to the appointment of the second and third arbitrators; and (b) the parties did not intend to constitute the Municipal Court, or a Judge thereof, as the default appointer.

I prefer the opinions expressed by Dr Movahed and Professor Safai to the effect that Article 8 is not a condition of the contract but a collateral contract consisting of a number of different conditions or terms. If, as contended by the plaintiff, the condition relating to the default appointer is void, that does not nullify the rest of Article 8. The parties entered into this contract some two and a half years after the enactment of the Iranian law abolishing the pre-revolutionary Appeal Court and replacing it and its functions with the Municipal Court of Tehran. But as Article 8 itself is not nullified, and as the parties' mutual intention is to arbitrate further

disputes, should they arise, in Tehran, according to the substantive and curial laws of Tehran, it seems to me that they must both be bound by the provisions of law as to the substitute default appointer.

The practical aspect of the matter is this. The plaintiff has not appointed its own arbitrator as required by the opening paragraphs of Article 6, because it is obviously the claimant in the dispute. I deal later in this judgment with the reason why it has not done so. The defendant is therefore not yet in a position when it is called upon to appoint its own arbitrator. If and when that arises, it seems obvious that it will do so because failure to co-operate would present the plaintiff with a virtually irrefutable argument that Article 6 is incapable of being performed. It would then fall to the two appointed arbitrators to agree upon the appointment of the third. Only if they failed to agree upon the third appointment would a Judge of the Municipal Court be called upon to exercise his default function. I do not think that I should assume at this stage that the two appointees will not be able to agree upon the third arbitrator.

The plaintiff suggests that the defendant's appointee will be likely to be obstructive in the knowledge that this must result in the Municipal Court being called upon to exercise its default function, and thus appoint a third arbitrator from within the restricted class, because this would be the defendant's wish, and the defendant is likely to be consulted by, and would be able to dictate the actions of, its own arbitrator. I am not prepared to assume in advance that the defendant's arbitrator will so abnegate his duty to act independently in agreeing an acceptable third arbitrator.

Even if, in the event, agreement as to the third arbitrator proves impossible and a Municipal Court Judge is called upon to exercise the default function, it is not inevitable that such appointee will have some connection with the defendant, as suggested in paragraph 4(b) of Mr Sabi's first affidavit, though the field of potential candidates will no doubt be more limited than the field which would theoretically have been available to the President of the Court of Appeal. I am not, therefore, prepared to hold that the arbitration clause is inoperative or incapable of being performed on this ground.

The plaintiff's next argument is founded upon Article 139 of the Iranian Constitution, which provides:

> "The settlement of disputes concerning public or government property or its [sic] referral to arbitration shall in each case be contingent upon the approval by the Council of Ministers and must be notified to the Assembly. Cases in which the party to the dispute is an alien must also be approved by the Assembly."

It is not easy to determine precisely what this Article means on the basis of the translation provided. I accept without hesitation that the Article is directed at the referral stage, when a dispute has arisen, and not to the incorporation of an arbitration clause in the contract (See Professor Safai's evidence.) On the other hand there seems to be no warrant for his conclusion that the Article applies only when an Iranian governmental entity intends to institute a claim against a foreign national by arbitration, and not when a foreign national is claimant. Nor do I think that Article 35(e) of the defendant's Statute, which I assume is the equivalent of an English company's Articles of Association, has anything to do with this matter, as asserted by Dr Movahed. That Article merely gives the defendant's board of directors power to delegate its powers of appointing arbitrators, and it seems fanciful to me to suggest that because the Statute, which dates from nationalisation in 1952, has had post-revolutionary approval, the requirements of Article 139 are thereby dispensed with.

Dr Movahed exhibits a letter from some officer in the Prime Minister's office to the Minister of Petroleum which says that approval under Article 139 of the Constitution was not required where the present defendant was a proposed claimant in an arbitration in Paris against the present plaintiff in another

oil contract dispute. It appears to be based upon an opinion of the Council of Guardians, whose job it is to interpret the Constitution and who are a different body from the Council of Ministers, in a yet further proposed arbitration against the French Atomic Energy Authority.

For a number of reasons it is not a very satisfactory answer to the plaintiff's reliance on Article 139, but it seems to me that the most cogent answer to the plaintiff is this. If the procedures required by Article 139 do apply in a case where a foreign corporation proposes to bring arbitration proceedings against NIOC, it is incumbent on the proposed claimant to obtain the necessary approvals. Alternatively, it is incumbent upon NIOC to obtain approval to defend the proceedings when brought. It may be that both parties need approval. But no such proceedings have yet been brought or are yet contemplated, and it is not until approval has been sought and refused that the plaintiff is able to rely upon Article 139.

The third alternative ground relied upon by the plaintiff is that, practically speaking, it is impossible for them to find a qualified arbitrator who is willing to go to Tehran. There are exhibited to Mr Corban's affidavit four replies from potential arbitrators who were approached in late 1986 and the early months of 1987. Each refused, and there is an unparticularised allegation that a number of other candidates have been approached and have refused. I am asked to infer that the result will be the same, whomsoever is approached and that the arbitration clause is incapable of being performed for that reason.

Of the four replies in evidence it would seem that two were not in any case properly qualified candidates. What can be said by the plaintiff is that despite the ceasefire in the Iran/Iraq war, the evidence of Mr Sabi shows that Tehran remains an uncomfortable venue and that there are many reasons, good or supposed, which will deter many potential arbitrators from accepting appointment as the plaintiff's nominee. Mr Pollock, for NIOC, accepted that the plaintiff is in some difficulty in persuading an arbitrator of its choice to accept the appointment, but he contended that difficulty is not enough; the plaintiff has to show that no one suitable from the available field is prepared to accept the appointment. I do not accept that the plaintiff is required to go that far. It would be totally unrealistic to expect any plaintiff to show that it had exhausted the possible field. There must come a point far short of this where the Court can be satisfied on balance of probabilities that a corporation such as the plaintiff is unable, as a practical reality, to find an appointee of its choice who is willing to sit as an arbitrator in Tehran. But I am not satisfied that that point has been reached on the evidence before me.

The required qualifications of the arbitrators are that they should have broad experience of petroleum industry practice and be reasonably fluent in spoken and written English. There is no requirement that they should be legally qualified, though no doubt that would be desirable. Since English is, broadly speaking, the lingua franca of the oil industry worldwide, the potential field is enormous. I think that I am entitled to take judicial notice of the fact that there are likely to be English-speaking people, lawyers and/or oil company executives, all over the world, including of course the important areas of the Third World, who would be acceptable to the plaintiff as arbitrator, and who would not necessarily be deterred from sitting in Tehran.

In his affidavit Mr Sabi has made a formidable prima facie case for the argument that Tehran is not the forum conveniens for arbitration between these parties, but that does not fall to be explored further because the plaintiff has not satisfied me that Section 8 of this contract is null and void, or inoperative, or incapable of being performed.

The defendant is therefore entitled to the stay it seeks.