QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

Jan. 20, 1997

CHINA AGRIBUSINESS DEVELOPMENT CORPORATION
v.
BALLI TRADING

Before Mr. Justice LONGMORE

Arbitration — Award — Enforcement — Arbitration rules — Construction — Dispute under contract referred to arbitration — Current arbitration rules applied — Award in favour of plaintiffs — Whether parties agreed that rules applicable would be rules current at time arbitration begun — Whether award should be enforced.

On June 15, 1994 the plaintiffs as buyers contracted with the defendants as sellers for the purchase and sale of hot rolled steel coils. The contract contained an arbitration clause in the following terms:

> . . . If no settlement can be reached the dispute shall then be submitted for arbitration to the Foreign Trade Arbitration Commission of the China Council for the promotion of International Trade in accordance with the Provisional Rules of Procedure of the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade. . . .

Disputes arose and in October, 1994 the plaintiffs sought to refer those disputes to arbitration in accordance with the clause. It then came to be appreciated that the Foreign Trade Arbitration Commission (FETAC) had changed its name to China International Economic and Trade Arbitration Commission (CIETAC), but CIETAC was still the appropriate arbitral tribunal.

The rules under which CIETAC operated were not however the provisional rules of FETAC which had ceased to have effect on July 1, 1989 well before the contract was made nor even the rules that then came into operation but a yet subsequent set of rules which had come into force on June 1, 1994.

CIETAC accepted the plaintiffs' reference to arbitration and sent a copy of the current rules to the defendants on Nov. 7, 1994. No response was received.

On May 5, 1995 CIETAC made an award in favour of the plaintiffs. The defendants have not honoured the award and the plaintiffs applied to enforce the award as a judgment of the Court.

On June 24, 1996 Master Trench gave ex parte leave and on Nov. 6, 1996 refused to set aside that leave.

It was accepted that the award was one to which the New York Convention applied and therefore enforcement must take place as of right unless the defendants could show that one of the grounds set out in the Arbitration Act, 1975, s. 5(2) existed.

The defendants argued that they agreed to arbitrate under the provisional rules of FETAC. They accepted that FETAC and CIETAC were the same entity but they argued that they expressly agreed to arbitration under the old provisional rules and not to arbitration under the current rules.

Since it was common ground that CIETAC made their award pursuant to the rules current at the time when the dispute arose and when arbitration was invoked the defendants argued that they had proved within the terms of s. 5(2)(e) of the 1975 Act that "the arbitral procedure was not in accordance with the agreement of the parties".

Held, by Q.B. (Com. Ct.) (LONGMORE, J.), that (1) the correct construction of the contract was that the parties agreed that the rules of FETAC or any successor body should apply and that the rules would be the rules current at the time the arbitration was begun; FETAC never had any rules other than the provisional rules and the word "provisional" was no more than a word of identification, not a word of differentiation intended to indicate an earlier version of rules by which and by which alone, the parties were to be bound (*see* p. 78, col. 2);

(2) CIETAC would not have accepted the reference to arbitration if the parties had asked them to conduct the arbitration under the old provisional rules; if the agreement were to be construed as an agreement to arbitrate only under the provisional rules, the parties would have agreed to do something impossible; and the Court would try to avoid imputing to the parties an intention to do something which could not be done (*see* p. 79, col. 1);

(3) the parties intended to and did agree that there was to be arbitration in China under the appropriate rules of the relevant arbitral institution (*see* p. 79, col. 1);

(4) the parties agreed that there would be arbitration if required in China and that such arbitration would be held under the rules of the relevant institution at the time when arbitration was invoked (*see* p. 79, col. 2);

(5) it was clear from the terms of the statute that refusal to enforce a Convention award was a matter for the discretion of the Court; in that context it must be relevant to assess the degree of prejudice to the defendants by the arbitration being conducted under the current rather than the provisional rules (*see* p. 79, col. 2);

(6) the change in fee structure was so insubstantial that there was not sufficient prejudice to justify refusal to enforce a Convention award; and if there was jurisdiction to refuse to enforce the award in the sense that this was a case coming within s. 5(2)(e) of the 1975 Act, such jurisdiction would not have been exercised (*see* p. 80, col. 1);

(7) the argument that the arbitration could only proceed under the provisional rules had been raised at a very late stage; the plaintiffs were never given any opportunity to consider what action might be appropriate in the light of an argument that any arbitration had to take place under the old FETAC provisional rules and in no other way; a party who, only at the door of the enforcing Court dreamed up a reason for suggesting that a Convention award should not be enforced was unlikely to have the Court's sympathy exercised in

his favour; and on the facts of this case enforcement of the award would not be refused; the award remained enforceable and the appeal from the order of Master Trench would be dismissed (*see* p. 80, cols. 1 and 2).

The following cases were referred to in the judgment:

Bunge S.A. v. Kruse, [1979] 1 Lloyd's Rep. 279;

Chen Jen Nan Dar Industrial and Trade United Co. Ltd. v. F.M. International Ltd., [1992] 1 H.K. Cases 328;

Mertens & Co. P.V.B.A. v. Veevoeder Import Export Vimex B.V., [1979] 2 Lloyd's Rep. 372;

Offshore International S.A. v. Banco Central S.A., [1976] 2 Lloyd's Rep. 402.

This was an appeal by the defendants Balli Trading from the order of Master Trench refusing to set aside the ex parte leave granted to the plaintiffs China Agribusiness Development Corporation to enforce the arbitration award made in their favour in the arbitration between the plaintiffs and the defendants in the dispute arising under the contract of sale between the parties.

Mr. T. Landau (instructed by Messrs. Simmons & Simmons) for the plaintiffs; Mr. C. Freedman (instructed by Messrs. Palmer Cowan) for the defendants.

The further facts are stated in the judgment of Mr. Justice Longmore.

Judgment was delivered in open Court.

JUDGMENT

Mr. Justice LONGMORE: On June 15, 1994 the plaintiffs as buyers made a contract with the defendants, a company registered in England as sellers, for the purchase and sale of hot rolled steel coils. That contract contained an arbitration clause in the following terms.

"Arbitration. All disputes in connection with this contract or the execution thereof shall be settled by friendly negotiation. If no settlement can be reached, the case in dispute shall then be submitted for arbitration to the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade in accordance with the Provisional Rules of Procedure of the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade. The decision made by the Commission shall be accepted as final and binding upon both parties. The fees for arbitration shall be borne by the losing party unless otherwise awarded by the Commission.

Disputes arose and in October, 1994 the plaintiffs sought to refer those disputes to arbitration in accordance with the clause. It then came to be appreciated that the Foreign Trade Arbitration Commission ("FETAC") had changed its name to China International Economic and Trade Arbitration Commission ("CIETAC"). But CIETAC, as the arbitration commission was now known, was still the appropriate arbitral institution.

The rules under which CIETAC operated were not, however, the provisional rules of FETAC which had ceased to have effect on July 1, 1989, well before the contract was made, nor even the rules that then came into operation but a yet subsequent set of rules which had come into force on June 1, 1994. CIETAC accepted the plaintiffs' reference to arbitration and sent a copy of the current rules to the defendant sellers ("Balli") on Nov. 7, 1994. No response was received.

CIETAC proceeded to decide the matters in issue substantially in the plaintiffs' favour and on May 5, 1995 made an award in the separate sums of U.S. $51,678.67 and RMB 385,372.54 together with RMB 35,350 for costs. Balli have not honoured that award. The plaintiffs have therefore applied to enforce the award as a judgment of the Court. Master Trench gave ex parte leave on June 24, 1996, and on Nov. 6, 1996 refused to set that ex parte leave aside. I now have to determine an appeal against that refusal.

Although various points were argued before Master Trench it is now accepted that the award is one to which the New York Convention applies, and that therefore enforcement must take place as of right unless the defendant can show that one of the grounds set out in s. 5(2) of the Arbitration Act, 1975 exists. What is said by Balli is that they agreed to arbitrate under the provisional rules of FETAC. They accept that FETAC and CIETAC are the same entity, but they submit that they expressly agreed to arbitration under the old provisional rules and not to arbitration under the current rules.

Since it is common ground that CIETAC made their award pursuant to rules current at the time when the dispute arose and arbitration was invoked, Balli submit that they have proved within the terms of s. 5(2)(e) of the 1975 Arbitration Act that "the arbitral procedure was not in accordance with the agreement of the parties". The arbitration agreement is no doubt governed by Chinese law, but I have no evidence that for this purpose it is any different from English law. As a matter of English law it is clear that if an arbitration agreement requires an arbitration to be held according to the rules of a particular institution that agreement prima

facie refers to the rules current at the time when the arbitration is begun. (See *Offshore International S.A. v. Banco Central S.A.*, [1976] 2 Lloyd's Rep. 402, *Bunge S.A. v. Kruse*, [1979] 1 Lloyd's Rep. 279 and *Mertens & Co. P.V.B.A. v. Veevoeder Import Export Vimex B.V.*, [1979] 2 Lloyd's Rep. 372.)

That, however, is only the prima facie position and as Mustill & Boyd, Commercial Arbitration, 2nd ed., p. 282 puts it:

> The particular context or words may, of course, yield a different interpretation.

For Balli, Mr. Freedman submits:

1. That the express words of the contract must here yield a different interpretation because it was expressly agreed that the arbitration was to be held under the provisional rules.

2. That it made no difference if, which is here disputed on the evidence, the arbitral body would refuse to apply the provisional rules. The agreement for arbitration was, says Mr. Freedman, conditional on that arbitration being held under the provisional rules. If that agreement could not be performed there was no arbitration agreement and it followed that if the plaintiffs wished to assert their legal rights they had to sue Balli in Court, presumably in England. He relied on a passage in *Offshore International v. Banco* where Mr. Justice Ackner said at p. 408:

> If the parties had wanted to provide for the 1955 rules to be the rules that were applicable to any arbitration that took place between them, they could have so provided. There can be no doubt that as from June 1, 1975, the 1975 rules were the only rules of the ICC then in force under which arbitrations could be held.

3. That Balli's stance was entirely rational and comprehensible since the provisional rules allowed the arbitrators to charge a maximum fee of 1 per cent. of the amount at stake, whereas the current rules permitted charging according to a sliding scale which resulted in this case in a charge being levied of 2.7 per cent. of the amount at stake.

Mr. Landau, for the plaintiffs, submits:

1. That the arbitration clause is or was a standard FETAC arbitration clause which merely identified the relevant rules; agreement on that clause did not amount to an express agreement for an earlier version of the rules as in the example given by Mr. Justice Ackner.

2. That the evidence was clear that CIETAC would refuse to arbitrate under an old, let alone a doubly old, set of rules. There was thus a stark choice between arbitration under the current rules and no arbitration at all. The clause should be construed in such a way as to permit arbitration as the agreed manner of resolving the dispute, even if that was to vary the agreement of the parties that arbitration should be conducted pursuant to the earlier provisional rules.

3. The relevantly full wording of s. 5(2)(e) of the Act is: "Enforcement of a Convention award *may* be refused . . . " I emphasize the word "may";

> . . . if the person against whom it is invoked proves: (e) that the composition of the arbitral authority or arbitral procedure was not in accordance with the agreement of the parties.

Mr. Landau emphasizes the word "may" and submits that the Court has a discretion, not an obligation, to refuse to enforce an award made pursuant to an arbitral procedure which did not accord with the agreement of the parties. That discretion should not be exercised, he submitted, in a case where (a) the current rules had been sent to Balli who had expressed no objection at the time but had merely taken no part in the arbitration and (b) the differences in fee charging, being the main respect in which Balli allege prejudice, amounted to no more than £1500.

I will deal with these arguments under the headings of construction and discretion.

Construction

I agree with Mr. Landau that the correct construction of this contract is that the parties agreed that the rules of FETAC, or any successor body, should apply and that the rules would be the rules current at the time the arbitration was begun. He referred me to a standard Chinese text book called "China Trade Documents" published in 1985 in which a clause in almost identical words is set out at p. 97 by way of a sample arbitration clause. I understand that FETAC never had any rules other than the provisional rules and I conclude that the word "provisional" is no more than a word of identification, not a word of differentiation intended to indicate an earlier version of rules by which, and by which alone, the parties were to be bound.

In this context it is relevant to consider whether CIETAC, as FETAC became, would have been prepared to accept the reference to arbitration under the old provisional rules. Although Balli have obtained evidence from a Chinese lawyer (Mr. Peter Jiang), that they would, that lawyer does not address himself to the critical clauses of the current rules or the question of charging. The plaintiff's Chinese lawyers, the Jung Hee Law Office, have asked the staff of CIETAC themselves who have said that the latest rules always applied to any dispute. The lawyers conclude that it was impossible for CIETAC to apply the provisional rules. Mr. Landau can also claim support from arts. 7 and 80 of the current rules and from the only literary

work which has considered the question. (See Kaplan Spruce and Moser, Hong Kong and China Arbitration Cases and Materials, p. 322.)

In the result I prefer the evidence of the Jung Hee Law Office to that of Mr. Peter Jiang, and conclude that CIETAC would not have accepted the reference to arbitration if the parties had asked them to conduct the arbitration under the old provisional rules. It seems therefore that if the agreement were to be construed as an agreement to arbitrate only under the provisional rules, the parties would have agreed to do something impossible. Of course, parties to a contract are free to agree something which is in the event impossible and the Courts will have to determine the legal consequence, but a Court will try to avoid imputing to the parties an intention to do something which cannot be done.

The question here is whether the parties have agreed that there shall be arbitration and that it shall take place in China, or whether they have gone further and agreed that if any arbitration is to take place it will only take place in China under provisional and out of date rules, and if that cannot be done there is to be no arbitration at all. I have no hesitation in rejecting the latter construction and saying that the parties intended to and did agree that there was to be arbitration in China under the appropriate rules of the relevant arbitral institution.

In addition to relying on the extra judicial writings of Mr. Justice Kaplan in his authorial capacity, Mr. Landau also relies on a decision of Mr. Justice Kaplan in his judicial capacity. A similar point to the present case arose in *Chen Jen Nan Dar Industrial and Trade United Co. Ltd. v. F. M. International Ltd.*, [1992] 1 H.K. Cases 328. The argument run in that case does not seem to be precisely the same argument as that addressed to me by Mr. Freedman, viz. that the parties had agreed the provisional rules and no other. The argument was rather that if one compared the two versions of the rules the new rules were not merely in different terms but in terms more prejudicial to the respondents.

Mr. Justice Kaplan held that the new rules were more "liberal" than those they replaced and then said in relation to the argument addressed to him at p. 335:

> In my judgment there is nothing in this point. The fact that the arbitral institution chosen by the parties has improved its rules between contract and arbitration is not sufficient to justify refusing enforcement. Such a complaint does not come within the grounds set out in figure [5] (2) E.

I substitute the figure 5 for the relevant section of the Hong Kong Ordinance.

Mr. Freedman criticized this passage since he submitted that the new rules, at any rate as to charging, were not an "improvement" if one looked at the matter from the point of view of the ultimately paying party. He also submitted that the critical question for the purpose of s. 5(2)(e) of the 1975 Act was "what arbitral procedure had the parties agreed". The question whether the arbitration had been conducted under "better" or "worse" or more or less "liberal" rules was beside the point. There is, as it seems to me, some limited force in Mr. Freedman's submissions. It must, however, be remembered that Mr. Justice Kaplan was dealing with the argument put to him which asserted that prejudice had been caused to the respondents in the arbitration by the use of the new rules.

For my own part, as a matter of construction I conclude that the parties in the present case agreed that there would be arbitration if required in China, and that such arbitration would be held under the rules of the relevant institution at the time when arbitration was invoked. In other words the parties have not used clear enough words to contract out of the prima facie construction of such clauses as laid down by the English cases to which I have referred.

Discretion

Mr. Freedman acknowledged the presence of the word "may" in s. 5(2)(e) of the 1975 Act. He submitted, however, that the statute in this respect was merely following the terms of the New York Convention which was concerned to make clear that a Contracting State which permitted enforcement to be refused in certain limited circumstances was not in breach of the Convention. No doubt that is the sense of the Convention. But the terms in which the English legislature has in fact enacted the power to refuse enforcement must remain relevant for an English Judge. It is clear from the terms of the statute that refusal to enforce a Convention award is a matter for the discretion of the Court. In that context it must be relevant to assess the degree of prejudice to Balli by the arbitration being conducted under the current, rather than the provisional, rules. Mr. Justice Kaplan so decided in the *Chen Jen* case and I gratefully follow his lead. (See [1992] 1 H.K. Cases 328 at p. 336.)

In order to show prejudice Mr. Freedman relied mainly on the enhanced power to assess the fees of the arbitration contained in the new rules. He also sought to submit that a record of the arbitration proceedings was not available to Balli as of right under the current rules while it would have been under the provisional rules. I am not satisfied that it was in fact so available under the provisional rules

and I pay no further attention to that consideration.

Mr. Landau submitted that the change in fee structure was so insubstantial (the extra bill was no more than £1500 overall) that there was not sufficient prejudice to justify refusal to enforce what is a Convention award. I agree with that contention, and if I had jurisdiction to refuse to enforce this award, in the sense that I was satisfied that this was a case coming within the s. 5(2)(e) of the 1975 Act, I would not be prepared to exercise that jurisdiction in this case.

It is also relevant to observe that the argument that the arbitration could only proceed under the provisional rules has been raised at a very late stage. When the plaintiffs invoked arbitration the new CIETAC rules were sent to Balli. Balli did not at that stage say that they had only agreed arbitration under the FETAC provisional rules. They never gave any reason for refusing to participate in the arbitration. They waited until the award had been made and proceedings were brought to enforce that award. The plaintiffs were never given any opportunity to consider what action, e.g. an ad hoc arbitration or litigation in England, might be appropriate in the light of an argument that any arbitration had to take place under the old FETAC provisional rules and in no other way.

It is a matter of record that Balli and their lawyers appear to have been unaware of the content of the provisional rules when they first applied to set aside the order of Master Trench. (See par. 20, Mr. Alaghband's affidavit.) The provisional rules first surfaced in an affidavit of Mr. Evans on Oct. 2, 1996. A party who, only at the door of the enforcing Court, dreams up a reason for suggesting that a convention award should not be enforced is unlikely to have the Court's sympathy exercised in his favour, and for this reason also I would not on the facts of this case be prepared to refuse the enforcement of the award.

I add that Mr. Landau also sought to rely on the affidavit evidence of Miss Pan Fei to the effect: (1) That no discussion about the nature of the rules took place between the parties at the time of contracting. (2) That all that was agreed was arbitration in China. (3) That when she came to draw up the formal written contract she simply inserted what she thought wrongly was the then standard Chinese arbitration clause. Mr. Freedman objected to this evidence being read since it was, he said, both inadmissible and produced too late for him to take instructions as to its correctness. Any such evidence is, of course, inadmissible on the question of construction. It seemed to me potentially admissible on the question of discretion, and I allowed it to be read for that reason because it seemed to me that three clear days was sufficient time for Balli to be able to take instructions upon it. In the event I do not base any part of my judgment on that evidence. For the reasons I have given the award must remain enforceable and the appeal from the order of Master Trench will be dismissed.