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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Arbitration between
ASSOCIATED BULK CARRIERS OF BERMUDA,

Petitioner,

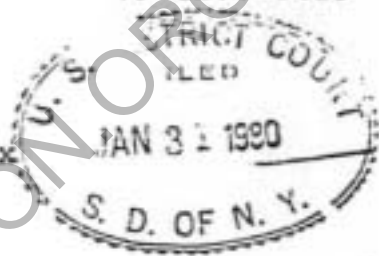
-against-

MINERAL IMPORT EXPORT OF BUCHAREST,

Respondent.

MEMORANDUM OPINION
and ORDER

49647
79 Civ. 5439



APPEARANCES (See Last Page)

MARY JOHNSON LOWE, D.J.

Petitioner seeks confirmation of an arbitration award pursuant to the Convention and Enforcement of Foreign Arbitral Awards [1970] 3 U.S.T. 2517, T.I.A.S. No. 6997, and Chapter 2 of the United States Arbitration Act, 9 U.S.C. §201 et seq.

On December 23, 1977, petitioner and respondent entered into a contract of charter in New York City whereby petitioner agreed to transport aboard the "M.S. HEYTHROP" 45-55 long tons of coal from 1 or 2 safe berths Curtis Bay and/or 1 or 2 safe berths Hampton Roads in Baltimore, Maryland to 1 or 2 safe berths Constanza, Rumania. A dispute arose between the parties under the charter party and petitioner claimed \$28,183.28 plus interest and costs from respondent for (a) a shortfall in the final accounting position of the voyage (i.e. \$15,067.64), and (b) the difference in favor of petitioner between the demurrage earned by the vessel at the loading port and the despatch

earned by the respondent at the discharge point (i.e. \$13,115.64).

The respondent failed to pay the sum claimed by petitioner. Therefore, in accordance with the arbitration clause of the charter party,^{1/} petitioner appointed a London arbitrator. On October 10, 1978, respondent was advised by petitioner of the appointment of its arbitrator and was invited to appoint an arbitrator of its own within ten days of that date. On October 20, 1978, petitioner reiterated its invitation that respondent appoint an arbitrator. After respondent failed to reply, the London arbitrator appointed by petitioner accepted the appointment as sole arbitrator.

On January 29, 1979, petitioner forwarded respondent copies of the submission of claim prepared by the petitioner. On February 19, 1979, the arbitrator wrote the respondent requesting that it submit its defense within twenty-one days, or notify the arbitrator of its intention to present a defense. Respondent failed to reply to the arbitrator's request and on March 23, 1979, the arbitrator issued a preemptory order requiring that the submission of any defense by respondent be presented within twenty-one days of that date; and further, that respondent attend or be represented at the arbitration hearing which was scheduled

1/ The December, 1977, charter party arbitration clause provides,

(d) "If any dispute or difference should arise under this Charter, same to be referred to three parties in the City of London, one to be appointed by each of the parties hereto, the third by the two so chosen, and their decision, or that of any two of them, shall be final and binding, and this agreement may, for enforcing the same, be made a rule of Court. Said three parties to be commercial men." (lines 41-43).

to be held in London, England at the Baltic Mercantile and Shipping Exchange. The arbitrator further ordered that if respondent failed to appear, he would reach a decision based on the documents before him at the time of the hearing. On April 19, 1979, the hearing took place; petitioner appeared but respondent failed to attend or submit evidence. Consequently, the arbitrator, based on the evidence before him, entered an award, dated at London on May 10, 1979, directing respondent to pay petitioner \$30,020.53. The award also taxed respondent with the arbitrator's fee of £ 275., and directed respondent to reimburse the petitioner for the arbitrator's fee if petitioner paid the fee, which it did.

To date, the award has not been satisfied and remains due and owing by the respondent. On November 11, 1979, the petitioner filed an action in this Court seeking confirmation of the arbitration award and a judgment in the amount of the award. In accordance with the instructions from this Court, on December 18, 1979, petitioner telexed the respondent to further inform them of the pending petition in this Court. The telex stated that a default judgment would be rendered if the respondent

did not respond immediately.^{2/} The respondent has to date failed to reply.

1. Title 9, U.S.C., §201 provides for the enforcement in the United States of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"), [1970] 3 U.S.T. 2517, T.I.A.S. No. 6997. Article III of the Convention states, in part, that each "contracting State" shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the Convention's articles. The United States, United Kingdom and Rumania are all parties

2/ Petitioner's telex to respondent stated the following,

"Please be advised that Judge Lowe of the United States District Court for the Southern District of New York has ordered that you reply by telex immediately and state whether you intend to appear by counsel or otherwise submit evidence in opposition to the confirmation of the arbitration award rendered in London on May 10, 1979. As you have previously been notified on several occasions [sic] by mail the arbitration award involves disputes arising out of the above captioned charter party was rendered despite your failure to appear. The award was in favor of Associated Bulk Carriers of Bermuda in the sum of U.S. Dollars 27,667.64 together with interest thereon at the rate of 8 percent per annum for April 17, 1978.

Please be further advised that if we do not receive your immediate reply by telex a default judgment will be rendered against you by the Court."

(i.e. "contracting states") to the Convention, and therefore bound by its terms. Accordingly, petitioner's arbitration award is governed by the Convention and enforceable in this country, provided that the award was rendered in accordance with the Convention's articles. ^{-3/} (1)

2. The only apparent objection which the respondent could raise against enforcement of the arbitration award is that the London arbitrator did not have jurisdiction to enter an arbitration award on behalf of petitioner because the arbitration procedure used appeared to have been in contravention of both the charter party agreement between the parties and Article V, clause 1. (d) of the Convention. This Court finds, however, as a matter of law, that the arbitration

3/ 9 U.S.C. §207 provides,

"Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention."

procedure did not violate the Convention or charter party;

4/ Article V, clause 1.(d) of the Convention states that recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof 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, was not in accordance with the law of the country where the arbitration took place. The arbitration clause of the charter party agreement between the parties provides for the appointment of a three man arbitration panel; each party to the charter party to appoint one arbitrator, and the two arbitrators chosen to appoint the third arbitrator. Also, the three are to be commercial men, and their decision is final and binding on the parties.

In the instant action, the petitioner chose the sole London arbitrator who rendered the award. This procedure appears to violate the charter party and Convention, but, in fact, does not. Since the award was rendered in London, the law of the United Kingdom is controlling by the terms of Article V, clause 1.(d) of the Convention and 9 U.S.C. §207. Under English Law, the charter party arbitration clause is governed by the English Arbitration Act 1950. See, 2 Halsbury's Laws of England [4th ed.] ¶533 at 272; The Damianos [1971] 2 QB 586, [1971] 2 All ER 1301 CA. Section 9(1) of the Arbitration Act 1950 states, "Where an arbitration agreement provides that the reference shall be to three arbitrators, one to be appointed by each party and the third to be appointed by the two appointed by the parties, the agreement shall have effect as if it provided for the appointment of an umpire, and not for the appointment of a third arbitrator, by the two arbitrators appointed by the parties." Section 8(1) of the Arbitration Act 1950 states, "Unless a contrary intention is expressed therein, every arbitration agreement shall, where the reference is to two arbitrators, be deemed to include a provision that the two arbitrators shall appoint an umpire immediately after they themselves are appointed." Section 7(b) of the Arbitration Act 1950 states, "Where an arbitration agreement provides that the reference shall be to two arbitrators, one to be appointed by each party, then, unless a contrary intention is expressed therein--if, on such a reference, one party fails to appoint an arbitrator, either originally, or by way of substitution as aforesaid, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference and his award shall be binding on both parties as if he had been appointed by consent." See, Arbitration Act 1950, 14 Geo. 6c. s. 7, 8, and 9.
(footnote continued on next page)

(footnote 4 continued)

The effect of the Arbitration Act 1950 sections 8 and 9 is that the charter party arbitration clause provided for the appointment of two arbitrators and an umpire chosen by the arbitrators. On October 10, 1978, petitioner chose its arbitrator, notified respondent of the appointment, and invited respondent to appoint an arbitrator on its behalf. Respondent failed to do this, and on October 20, 1978, petitioner again invited respondent to appoint its arbitrator. Respondent again failed to respond to petitioner's invitation, and, pursuant to section 7 of the Arbitration Act 1950, petitioner appointed its arbitrator as the sole arbitrator in the action.

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For the above-mentioned reasons and pursuant to the Convention, [1970] 3 U.S.T. 2517, T.I.A.S. No. 6997, and Chapter 2 of the United States Arbitration Act, 9 U.S.C. §201 et seq., petitioner's application is hereby granted. The award rendered in this matter on May 10, 1979, in London, England is confirmed and entered as a judgment of this Court. Petitioner is directed to submit an appropriate judgment in accordance herewith.

It is So Ordered.


UNITED STATES DISTRICT JUDGE

Dated: January 31, 1980
New York, New York

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