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Minmetals Germany GmbH v Ferco Steel Ltd

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

[1999] 1 All ER (Comm) 315, (Transcript)

HEARING-DATES: 23 OCTOBER 1998, 20 JANUARY 1999

20 JANUARY 1999

COUNSEL:
Michael Swainston for the defendant; Duncan Matthews for the plaintiff.

PANEL: COLMAN J

JUDGMENTBY-1: COLMAN J

JUDGMENT-1:
COLMAN J.This application to set aside leave to enforce two Chinese arbitration awards raises matters of considerable importance with regard to the approach of the English courts to the enforcement of foreign awards generally and New York Convention awards in particular (see the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958; UN TS 330 (1959); Cmnd 6419)).

On 12 January 1998 Cresswell J made an order under s 101 of the Arbitration Act 1996 giving leave to Minmetals Germany GmbH (Minmetals) to enforce an award dated 29 September 1995 in the initial arbitration and an award dated 20 March 1997 in the resumed arbitration conducted under the auspices of the China International Economic and Trade Arbitration Commission of Beijing (CIETAC). The total amount of the awards was $ US1,692,95378, including damages, the successful party's costs and expenses and the costs of the arbitration. Payment was to be made within 45 days, failing which interest was to accrue at the rate of 85% pa.

Before explaining the issues now before the court it is necessary to set out the history of the Chinese proceedings.

The dispute which gave rise to the arbitration awards arose out of a contract dated 3 March 1993 under which Ferco Steel Ltd (Ferco), an English company, agreed to sell to Minmetals of Dusseldorf a total of 10,000 metric tons of steel channels of various dimensions at a price of $ US340 per metric ton CFFO CQD Shanghai. The contract, although made in Germany between an English seller and a German buyer was on a form written in Chinese and English which included a term (cl 13) giving the buyers the right to apply to the China Commodity Inspection Bureau for inspection after discharge of the goods. If on such inspection it were found that the quality or quantity did not conform to the contract or invoice, the buyers were to be entitled to lodge claims with the sellers on the basis of the bureau's survey report within 90 days after discharge of the goods, except claims for which the shipping company or the marine insurers were liable. There was also an arbitration clause in the following form:

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.'

On 4 March 1993 Minmetals entered into a sub-sale contract under which they agreed to sell to China Resources Metals and Minerals Co (China Resources) steel of the same quantity, quality and description at a price of $ 348 per metric ton.

Minmetals referred their claim against Ferco to arbitration by CIETAC on 27 December 1993. It appears from the initial arbitration award that an inspection certificate issued by the inspection bureau at Shanghai stated that there was a 100% divergence between the actual dimensions of the steel channels and the dimensions specified in the contract. Further, some of the channels were not marked with a quality number at all or bore marks inconsistent with those quality marks specified in the contract. In the course of that arbitration submissions were made by the buyers, Minmetals, that the actual loss which they had suffered by reason of the sellers' breaches of contract included loss of profit and the amount of compensation payable to sub-buyers, China Resources, for breach of the sub-sale contract. It appears that Minmetals were seeking to recover damages on the basis that by reason of the non-conformity of the goods with the contractual quality and marks requirements the actual value of the steel could only be scrap value. They thus put forward a claim for damages amounting to $ US25m against a total contract value of $ US34m.

In so doing, they were apparently passing on as against the sellers the sub-buyer's submission that, because the goods had not been marked with a heat number, a quality inspection could not be carried out and therefore the quality could not be determined at all. The arbitrators held that, although the steel ought to have had heat numbers in accordance with the contract and although the steel channels delivered did not comply with the contract for that reason and because of their dimensions, they were still usable as such and were not steel scrap. Since the sellers had refused to accept the buyers' rejection of the goods, they ought to pay to the buyers 'adequate compensation' for their breaches of contract. The arbitrators concluded:

according to the arbitration award registered under (95) Mao Zhongcai Zi No. 0114 regarding the dispute over the quality of steel channels between the plaintiff and its customer "China Resources", the plaintiff's actual loss consists of the compensation to the plaintiff's customer for the price difference caused by the divergent quality amounting to USD 1,223,50536 and the refunding of the customer's costs and interest expenses amounting to USD 441,43142 in total USD 1,664,93678.'

The reference to arbitration award '(95) Mao Zhongcai No. 0114' was to an award made in the sub-sale arbitration between Minmetals as sellers and China Resources as buyers. That award had clearly been made on 28 September 1995, the day before that of 29 September 1995 between Minmetals and Ferco and it had therefore at no stage been referred or put in evidence in the course of that arbitration. The members of the arbitral tribunals were the same. I shall refer to it as 'the sub-sale award'.

Following publication of the initial award Ferco applied on 24 January 1996 to the Beijing Intermediate People's Court for revocation of that award. The main basis for this application was that Ferco had at no stage had the opportunity to consider the sub-sale award and to make submissions on it. Ferco further submitted that the sub-sale contract and their own contract were not back-to-back because the former did, but the latter did not, contain a provision that the goods ought to be marked. They further argued that, although the case advanced by the buyers and sub-buyers was that the goods had been disposed of as scrap by melting them down and that compensation should be calculated on that basis, there had been no evidence in either arbitration that the goods had been melted down and treated as scrap. Nevertheless, the calculation of compensation was still based on this assumption. It was therefore submitted that the award had been made in breach of art 53 of the arbitration rules of CIETAC, which provides:

The arbitration tribunal shall independently and impartially make its arbitral award in accordance with the facts of the case, the law and the terms of the contracts, international practices and the principle of fairness and reasonableness.'

On 8 October 1996 the Beijing court issued its judgment by which it directed that the case should be remitted to CIETAC 'for a resumed arbitration' and that the proceedings to revoke the award should be 'suspended'. The basis for this order was that 'for reasons for which it was not responsible' the respondent was not able to state its views.

On 10 October 1996 the arbitral tribunal issued to the parties a notice giving directions as to the resumed arbitration and requiring Ferco to provide no later than 20 October a copy of its application to the Beijing court with supporting reasons for revocation of the award. However, Ferco's Beijing attorney, Mr Peter Jiang, by a letter to CIETAC dated 18 October 1996 declined to do so because: (i) the Beijing court's decision not at once to revoke the award was wrong and Ferco was going to challenge it; (ii) the CIETAC rules made no provision for a resumed arbitration and CIETAC had no jurisdiction to revoke the first award, (iii) the court's ruling was that the case should be re-arbitrated and not that the existing arbitration should be resumed; and (iv) any re-arbitration should be the subject of a fresh agreement to arbitrate between Ferco and Minmetals. In its reply of 26 December 1996 CIETAC explained that its decision to re-arbitrate the case did not involve revocation of the first award as that was a decision which only the court could make. It was instead a procedure during the period of suspension of the application to the court for revocation. There would be an oral hearing on 30 January 1997 before which the parties (especially Ferco) were to submit written 'supplementary opinions'.

By a written submission of 2 January 1997 by Mr Jiang on behalf of Ferco two points were taken. It was submitted that 'the key question in this case is whether or not the relevant steel channels have in fact been melted down'. Minmetals had first alleged that they had been treated as scrap and later in the initial arbitration Minmetals had alleged that the goods had been resold and 'the way in which the steel had been handled directly affected the amount and reasonableness of the loss'. Therefore Ferco requested the arbitrators to go with the parties to Shanghai 'to investigate and obtain evidence'. No hearing should take place and no award should be made until such time as these facts had been 'clarified'.

The second point taken on behalf of Ferco was that the contracts were not back-to-back in relation to transportation marks, there having been an agreement between Minmetals and Ferco to dispense with such marks whereas no such agreement had been made under the sub-sale contract. Therefore Ferco could not be liable for damages due to absence of marks.

I observe that in relation to the first point the arbitrators had concluded that the steel was usable as steel channels and that therefore the damages ought not to be calculated on the basis of goods only having a scrap value. The award obviously refers to the quantum of loss under both the sale and sub-sale arbitrations. In relation to the second point the arbitrators had by their initial award already held that the steel was not marked in accordance with the contract to which Ferco was a party and that Ferco was in breach of that contract for that amongst other reasons.

It is further to be noted that these submissions contain no specific mention of the arbitrators' having relied upon the sub-sale award in order to quantify the loss sustained by Minmetals when this award had never been shown to Ferco. Nor do they contain any explanation of the basis on which Ferco applied to the Beijing court for revocation of that award. Nor do they invite the arbitrators to disclose that award.

The arbitrators declined Ferco's invitation to visit Shanghai for this purpose.

According to the second award, at some stage after 10 December 1996 and before the hearing, Mr Jiang further made the point that evidence as to the loss caused by the breach, in particular how the steel had been dealt with after delivery, must be collected by means of investigation in the course of the arbitration and, if the tribunal had decided to avert or refuse to carry out the proceedings to obtain and examine evidence, that meant that there had been 'an infringement of the arbitration process'. This is apparently in substance a submission that, unless the tribunal carried out an investigation of the facts as to the dealing with the steel after delivery, it would not be complying with proper procedure.

In his skeleton argument for the resumed hearing dated 27 January 1997 Mr Jiang took the following points. (i) Whether the steel delivered was scrap was not important; what was important was to ascertain whether the steel had been dealt with in such a way as to increase the loss to the buyer. (ii) It was for Minmetals to prove what loss had been caused by the breach of contract by Ferco as distinct from the 'inappropriate dealing' with the steel. (iii) Steel prices had fallen dramatically in the second half of 1993 due to 'macro economic measures announced by the Chinese government' and loss thereby suffered by the Chinese sub-purchaser could not be passed on to Minmetals. The award against Minmetals in favour of the sub-buyer was the result of Minmetals having failed sufficiently to take that point in its defence to the sub-sale arbitration. (iv) Loss recoverable in respect of a breach of contract under the Chinese Foreign Economic Contract Law could not exceed that which was foreseeable when the contract was entered into. In the present case the loss claimed arose from unforeseeable causes, namely the manner of dealing with the steel after delivery and the Chinese governmental measures. (v) The innocent party was not entitled to recover any increase in the loss due its failure to mitigate.

I observe that their skeleton argument made no mention of the arbitrators' reliance on the evidence of their own award in the sub-sale arbitration or to the fact that such award had never been provided to Ferco. So here, by pointing to the burden of proof of loss caused by Ferco's breach of contract resting on Minmetals, to the need to ascertain whether subsequent dealing in the steel had involved a failure to mitigate Minmetal's loss, to its being impermissible to rely on loss caused by a fall in market prices of steel and to Minmetals having failed to take that point against its sub-buyer. Ferco was apparently attempting to persuade the arbitrators that Minmetals had failed to prove that they had suffered recoverable loss, but without any specific complaint about the arbitrators' reliance on their sub-sale award as evidence of the amount of that loss. They did not submit in terms that the arbitrators should not have relied on it without prior disclosure of its contents to Ferco.

I conclude, on the basis of the material to which I have referred, that the case presented by Ferco to the tribunal at the resumed hearing was in substance that there was a serious deficiency in the evidence as to what loss, if any, had been caused to Minmetals by Ferco' s breaches of contract and that it was up to Minmetals or the tribunal to establish what loss was recoverable on the basis of causation and the relevant principles of remoteness and with regard to the duty to mitigate. I further conclude that at no stage, either before or orally during the hearing, was the tribunal informed of the grounds on which Ferco had applied for revocation of the first award or of Ferco's submission that there was a serious procedural defect in the conduct of the first arbitration inasmuch as the tribunal had reached a conclusion on the basis of evidence to which Ferco had never been given access.

On 20 March 1997 the arbitrators issued their award in the resumed arbitration.

The award stated that the most important of Ferco's submissions was that the arbitrators should go to Shanghai to investigate whether the steel had been disposed of as scrap, a request which had first been made and refused before the first arbitration award was made. The arbitrators had already concluded in their first award that the steel delivered was not scrap and that the amount of damages should not be fixed on the assumption that it was. Ferco could have carried out its own investigation of evidence to make good its main claim, but had not adduced any such evidence or new reasons to show why the arbitrators should carry out further evidential investigation of the facts. The award of 29 September 1995 should therefore be maintained.

Again, there is no consideration of the propriety of their reliance on the sub-sale award or of whether, without it, the buyers had proved their loss. According to the affidavit evidence of Mr Shepherd, of Ince & Co, the solicitors for Ferco, Mr Jiang explained to him that it was not incumbent upon him to refer to or request a copy of the sub-sale award at the resumed hearing because, the issue of quantum having been remitted to the arbitrators, damages were entirely at large and since Minmetals did not rely on that award at the rehearing, there was no reason for him to do so. It was for Minmetals to prove its case on quantum.

It is the uncontradicted evidence of Minmetals that the second award was final and enforceable under Chinese law.

Following the second award on 4 April 1997 Ferco made a further application to the Beijing court to revoke that award. The grounds relied upon were that the arbitrators had wrongly continued to rely on the sub-sale award although it had never been disclosed to Ferco and Ferco had never been permitted to make submissions about it. Minmetals had never relied on that award as evidence and it was therefore not open to the arbitrators to do so without first giving both the parties an opportunity to make submissions on it.

I observe that as these were the grounds on which Ferco applied to the court not only to have the first award revoked but also the resumed arbitration award, Mr Jiang' s omission to use this argument at the resumed arbitration is quite incomprehensible and his explanation as conveyed to Mr Shepherd is entirely unconvincing. Observed through the eyes of any English commercial lawyer it appears quite bizarre that, having persuaded the court to order a remission of the first award on the main ground of the arbitrators' defective reliance on the sub-sale award as evidence, Mr Jiang should make no reference whatever to this defect before the arbitrators and should then proceed to attempt to set aside the second award in reliance on precisely the same defect.

The Beijing court rejected Ferco's application. In its judgment on 20 February 1998 the court observed that at the resumed arbitration hearing the tribunal asked Ferco to comment 'but Ferco did not make a statement'. The judgment continues:

This court holds that by not giving Ferco the opportunity to comment on the 0114 arbitration award, such award being evidence for the purpose of the arbitration award in this case, CIETAC infringed the procedural rules of arbitration. For this reason, this court suspended the revocation proceedings and asked CIETAC to resume arbitration. In the course of the hearing of the resumed arbitration CIETAC asked Ferco to state its views thereby complying with the prescribed procedural rules of arbitration. However, Ferco did not do so. Now Ferco asks that the (95) Mao Zhong Zi 0437 award and the R94070 resumed arbitration award be revoked on the grounds that in contravention of the procedural rules of arbitration by CIETAC, it did not receive the 0114 award and the related evidence. This argument does not constitute sufficient ground and the court rejects it. In accordance with the provisions of art 61 of the Arbitration Law of the People's Republic of China, it is ordered that: Ferco's application for the revocation of the (95) Mao Zhong Zi 0437 award and of the R94070 arbitration award be refused.'

Thus, quite clearly, the Beijing court left the awards undisturbed because Ferco, having been given the opportunity by means of the resumed arbitration to challenge the arbitrators' reliance on the sub-sale award in the absence of its disclosure, had failed to do so. The way in which this judgment is framed leaves no doubt that the court took the view that the arbitrators had in the course of the first arbitration infringed the CIETAC procedural rules of arbitration but that, by giving Ferco the opportunity to comment on the sub-sale award in the course of the resumed arbitration, the arbitrators had cured the original defect.

In his third affidavit Mr Shepherd stated that Mr Jiang had ascertained from the chief judge of the court that the court had based its judgment on a 'minute' of the arbitration hearing which stated that Ferco had failed to make statements to CIETAC, but had not been provided with tape recordings of the hearing at which Mr Jiang had made submissions challenging quantum. Mr Shepherd suggests

that the plain implication is that the judgment is confused and based on a mistaken assumption because the court did not appreciate that at the resumed hearing Mr Jiang did challenge quantum.

On 31 March 1998 Ferco issued an application for a retrial in the Beijing court. The only ground relied on was that the court had wrongly proceeded on the basis that Mr Jiang had not made any comment on the sub-sale award at the resumed arbitration, without ascertaining that the award had never been provided to Ferco and that, accordingly, it was impossible for Mr Jiang to comment on it in his submissions to the arbitrators. By a further submission of 2 June 1998, Mr Jiang submitted as further grounds for a retrial that the court was not in possession of the record of the arbitration and did not know that Mr Jiang had fully addressed the arbitrators on damages. This application has yet to be heard.

The proceedings in this court

On 26 June 1998 I heard argument on the alternative application by Ferco that their application to set aside the CIETAC awards should be adjourned pursuant to the court's powers under s 103(5) of the Arbitration Act 1996 pending determination of the application to the Beijing court for a retrial and, if that application were successful, pending determination of the renewed application for revocation of the award. In view of the fact that Mr Michael Swainston, on behalf of Ferco, confined his argument on that occasion to adjournment of the application, as distinct from setting aside the order of Cresswell J giving leave to enforce the awards, the submissions by Mr Duncan Matthews, on behalf of Minmetals, were confined to that issue alone and did not extend in any depth to setting aside the order. In the event, I concluded that the application should be adjourned but on terms that Ferco provided security in the sum of $ US18m in respect of the amount of the award by no later than 24 July 1998. This sum represented just over 80% of the claim, together with accrued interest and costs. That order reflected my initial impression that the chances of persuading the Beijing court to allow a retrial and to revoke the awards were slender and that, if that application failed, the prospects of Ferco persuading me to set aside the awards after full argument were equally slender. Further, the sub-sale award had been satisfied by Minmetals and the Companies Act returns of Ferco since 1987 had described it as a dormant company. That was surprising in view of its having entered into the sale contract in 1993 and disturbing in the face of an outstanding award in the order of $ US2m.

In the event, Ferco failed to comply with the condition as to security and the matter returned to court on 3 August 1998. It was stated on behalf of Ferco that it was unable to comply with the order. It was then necessary to consider whether to maintain the adjournment or to set aside the order of Cresswell J. I directed that the setting aside application should be further argued. In view of the lack of time necessary for that purpose the hearing had to be adjourned until after the long vacation. Mr Matthews has now addressed me fully in reply to Mr Swainston's complete submissions in support of the application and I have been referred to a number of further authorities.

In view of the circuit commitments, judgment had to be reserved until I was again sitting in the Commercial Court.

The submissions advanced on behalf of Ferco in favour of setting aside the order giving leave to enforce can be summarised as follows.

(1) The first award was defective, because as recognised by the Beijing court in the second award, the arbitrators failed to give Ferco the opportunity to make submissions on the sub-sale award.

(2) The resumed arbitration hearing was for the purpose of reopening the issue of what loss had been caused to Minmetals by Ferco's breaches of contracts and at that hearing it was up to Minmetals to adduce evidence that loss was so caused. It was not for Ferco to disprove causation of loss by adducing evidence and it was therefore entitled to ignore the fact that the sub-sale award had been the basis of the tribunal's first award, and had still not been disclosed to it if, as was the case, Minmetals did not rely on it.

(3) The arbitrators' conclusion in their second award that there was no need for them to carry out any further investigation of the evidence of loss, in view of the fact that the tribunal had already 'passed the [first] award' and because Ferco had failed to provide any evidence for its claim and had advanced no new reasons for further investigation of the evidence, had the effect of reversing the burden of proof against Ferco and simply left it in the same position as it had previously been by confirming the first award on the basis of evidence never provided to Ferco.

(4) Consequently, there had been as much a breach of natural justice in relation to the second award as to the first.

(5) The judgment of the Beijing court rejecting the application of Ferco to revoke the second award was based on the false assumption that no submissions had been made on behalf of Ferco at the resumed arbitration, due to the fact that the court had no record or transcript of the hearing and simply relied on an inaccurate minute in stating that Ferco made no statement at the resumed hearing when the tribunal asked it to comment.

(6) In the result the Beijing court hearing had not cured the defect in either award.

(7) The English courts should therefore decline to enforce the awards because: (i) there was in relation to quantum no opportunity for Ferco to know or to meet the claim against it within s 103(2)(c) of the Arbitration Act 1996; (ii) the arbitrators acted inconsistently with the CIETAC arbitration rules in not disclosing their sub-sale award and there was therefore a want of jurisdiction within s 103(2)(d) or the procedure was not in accordance with the agreement of the parties within s 103(2)(c); and (iii) in all the circumstances, including the second decision of the Beijing court, enforcement of the award would be contrary to public policy within s 103(2)(f), having regard to the English courts' approach to enforcement of foreign judgments exemplified in Pemberton v Hughes [1899] 1 Ch 781 and Adams v Cape Industries plc [1991] 1 All ER 929, [1990] Ch 433.

The case for enforcement

It is submitted by Mr Duncan Matthews in favour of enforcement that: (i) Chinese arbitral procedure permitted the arbitrators on their own initiative to investigate the evidence for themselves, as well as to receive evidence from the parties; (ii) in arriving at the amount of loss for which it held Minmetals to be liable under the sub-sale award, the tribunal appears to have assessed, partly on the basis of its own investigations, a reasonable value for the

goods as delivered; (iii) the basis upon which the Beijing court by its first order directed a 'resumed' arbitration was, as stated in its own order and as reflected in its subsequent order, that 'for reasons for which [Ferco] was not responsible it was not able to state its view', thereby enabling Ferco to make submissions to the tribunal with regard to the sub-sale award and the tribunal's reliance on it as the basis for the quantification of damages; (iv) having been given that opportunity, Ferco then made general and specific submissions as to the lack of evidence of loss to Minmetals, but neither applied for sight of the sub-sale award nor expressly complained about reliance upon it, nor even informed the tribunal of the precise reasons for which it had applied to the court for revocation of the initial award; (v) the tribunal was therefore left to make its second award on the basis of Ferco's additional submissions on causation of loss, remoteness and failure to mitigate damages, but without any express criticism of its reliance on the sub-sale award and without submissions as to the contents of that award and their relevance to the issues of loss in the instant arbitration; (vi) Ferco had therefore been given the opportunity of presenting its case for the purposes of s 103(2)(c) of the Arbitration Act 1996, but had not fully taken it; (vii) the second award involved no departure from the CIETAC rules current at the time of the making of the contract (3 March 1993) or at the time of the second hearing (30 January 1997) and was therefore neither made without jurisdiction for the purposes of s 103(2)(d) of the 1996 Act nor was the result of procedure not in accordance with the agreement of the parties for the purposes of s 103(2)(e) of the 1996 Act; (viii) the second decision of the Beijing court rejecting the application to revoke the two awards was not mistaken or confused, but was based upon the omission of Ferco to challenge the arbitrators' reliance on the sub-sale award or to adduce evidence which contradicted such reliance; and (ix) there was accordingly no basis for suggesting that enforcement of the award would be contrary to public policy in the sense of offending against English views of substantial justice (see Pemberton v Hughes and Adams v Cape Industries plc).

The issues

[1] It is common ground that the awards were New York Convention awards. Nor is it disputed by Ferco that unless it can persuade the Beijing court to order a retrial of the application to revoke and, as a result of that retrial, the Beijing court orders revocation, the awards are, as they stand, final and enforceable under Chinese law. Section 103(1) and (2) of the 1996 Act expressly provides that such awards must be enforced unless the party against whom enforcement is sought proves that the case falls within one of the exceptions in sub-s (2). With regard to the court's power under s 103(3) to decline to enforce or recognise an award on grounds of inarbitrability of the subject matter or of enforcement being contrary to public policy, whereas it is always open to the court to take an illegality point of its own volition, if a respondent to enforcement wishes to rely on matters within this subsection, the burden of making good the objection to enforcement, in my judgment, clearly rests on that party.

[2] Before dealing with the issues of real substance on this application, one of the matters raised on behalf of Ferco can be dealt with quite briefly. That is the submission that the awards contain decisions on matters beyond the scope of the submission to arbitration within s 103(2)(d). The function of this exception is to exclude from enforcement awards made on issues falling outside those which were referred for decision to the arbitrators. The vice of the awards upon which Ferco rely is the arbitrators' reliance on evidence derived

from their own investigations and not previously provided to Ferco. That evidence, however, went to a central issue within the overall dispute referred to arbitration, namely what loss had been caused to Minmetals by Ferco's breaches of contract. Whether in relying upon that evidence or in omitting to disclose it to Ferco the tribunal acted in accordance with the CIETAC rules or with any other procedural requirements of Chinese law is entirely irrelevant to the question whether the tribunal's decision was inside or outside 'the scope of the submission'. That scope falls to be defined by reference to the issues to be resolved by the arbitrators and not by reference to the procedure to be adopted for that purpose. This is clear beyond doubt from the wording of s 103(2)(c) which expressly covers deviation of the actual procedure from the agreed procedure.

This head of objection to enforcement must therefore be rejected. I now turn to the three remaining issues to which I refer as: the inability to present a case issue; the s 103(2)(e) issue; and the public policy issue.

The inability to present a case issue

Although many of those states who are parties to the New York Convention are civil law jurisdictions or are those which like China derive the whole or part of their procedural rules from the civil law and therefore have essentially an inquisitorial system, art V of the convention protects the requirements of natural justice reflected in the audi alterem partem rule. Therefore, where the tribunal is procedurally entitled to conduct its own investigations into the facts, the effect of this provision will be to avoid enforcement of an award based on findings of fact derived from such investigations if the enforcee has not been given any reasonable opportunity to present its case in relation to the results of such investigations. Article 26 of the CIETAC rules by reference to which the parties had agreed to arbitrate provided:

'The parties shall give evidence for the facts on which their claim or defence is based. The arbitration tribunal may, if it deems it necessary, make investigations and collect evidence on its own initiative.'

That, however, was not treated by the Beijing court as permitting the tribunal to reach its conclusions and make an award without first disclosing to both parties the materials which it had derived from its own investigations. That quite distinctly appears from the grounds of the court's decision--that Ferco was, for reasons for which it was not responsible, unable 'to state its view'. Those reasons could only have been its lack of prior access to the sub-sale award and the evidence which underlay it. I conclude that it was to give Ferco's lawyer an opportunity to refute this material that the Beijing court ordered a 'resumed' arbitration.

It is to be observed that when CIETAC issued a new set of rules effective from 1 October 1995 it expanded art 26, renumbered as art 38, to introduce a provision requiring that where the tribunal carried out its own investigations and collected evidence on its own initiative it should 'timely inform the parties to be present at the place where the arbitration deems it necessary'. By art 40, where the tribunal consults an expert or appraiser, his report is to be copied to the parties 'so that they may have the opportunity to give their opinions thereon'.

[7] The concept of a resumed hearing in Chinese law is said by Minmetals' solicitor, Yvonne Percival, on the information and advice of its Chinese lawyer and of the vice-chairman of CIETAC, to have been introduced as part of a concerted effort to modernise Chinese arbitration law and is specifically based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law, of which art 34(4) provides:

'The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.'

This is clearly an extremely useful and flexible procedural device which may avoid the wholesale setting aside of an award following a procedural defect in the conduct of an arbitration.

[8] The position, therefore, following the court's order for a resumed arbitration, was therefore that it was open to Ferco's counsel to ask to see the sub-sale award and the evidence on which it was based and then to make further submissions and indeed, if so advised, to adduce further evidence to persuade the tribunal that it should not base the recoverable loss on the liability of Minmetals to China Resources. If Ferco had any case to present, that was it.

[9] However, Mr Jiang, Ferco's counsel, apart from raising a number of procedural and jurisdictional issues relating to the resumed arbitration apparently proceeded on the assumption that, by reason of the court's order, he could ignore the arbitrator's reliance on the sub-sale award and evidence and make submissions as if such reliance was no longer open to the arbitrators. That, however, was neither the effect nor purpose of the order for a resumed hearing.

[10] In the event, when the arbitrators came to prepare their second award, they had before them the further submissions by Mr Jiang which did not specifically address or challenge the underlying evidence upon which their first award was based. In confirming their first award they took the view that nothing that Mr Jiang had submitted displaced their earlier factual conclusion.

In these circumstances, I have no doubt whatever that Ferco had not been unable to present its case. On the contrary, it had been given every opportunity to do so. What had gone wrong was that its counsel had simply failed to take that opportunity.

[11] Mr Swainston, on behalf of Ferco, submitted that there was in effect a continuing inability to present its case because the arbitrators continued to fail to disclose the sub-sale award and the underlying evidence prior to making their second award. That submission has to be considered against the facts that Ferco's counsel not only refused to inform the tribunal of why the application had been made to the court to revoke their first award but failed to ask them for a copy of the sub-sale award so that he could advance a case as to why it should be the factual foundation for the arbitrator's quantification of Minmetals' loss.

[12] In my judgment, the inability to present a case to arbitrators within s 103(2)(c) contemplates at least that the enforcee has been prevented from presenting his case by matters outside his control. This will normally cover

the case where the procedure adopted has been operated in a manner contrary to the rules of natural justice. Where, however, the enforcee has, due to matters within his control, not provided himself with the means of taking advantage of an opportunity given to him to present his case, he does not in my judgment bring himself within that exception to enforcement under the convention. In the present case that is what has happened.

I therefore reject the submissions of Ferco that it was unable to present its case.

The s 103(2)(e) issue

It is submitted that the awards were arrived at by an arbitral procedure not in accordance with the agreement of the parties. By the arbitration clause the parties agreed to the CIETAC rules. In addition to art 53, which I have already set out, those rules provided:

Article 14 The Claimant shall satisfy the following requirements when submitting his Application for Arbitration: (i) an Application for Arbitration in writing shall be submitted and the following shall be specified in the Application for Arbitration (d) the Claimant's claim and the facts and evidence on which his claim is based

Article 20 When submitting the Application for Arbitration relevant documentary evidence and other documents, apart from supplying a copy of the secretariat of the Arbitration Commission, the party/parties shall provide duplicate copies in the same number as the number of other party/parties and the arbitrators composing the arbitration tribunal.'

It is argued that the tribunal acted in breach of these rules, as well as of art 53.

There is, in my judgment, no basis for that submission with regard to arts 14 and 20 in relation to either arbitration award. Both articles are concerned with the procedure to be adopted by the parties as distinct from that to be adopted by the tribunal.

Article 53, however, is clearly and expressly applicable to the conduct of the arbitrators in making their award. I am in no doubt that, as regards the first award, they did not act in accordance with 'international practices and the principle of fairness and reasonableness'. Their omission to give Ferco a prior opportunity to deal with the sub-sale award was not in compliance with these requirements.

However, the position following the Beijing court's order for a resumed hearing was that the evidence relied on by the arbitrators was open to challenge by means of a request for sight of the award and of the evidence on which it was based. As I have held, no such challenge was advanced.

Article 45 of the CIETAC rules provides as follows:

A party knows or should have known that any provision or requirement of these Rules has not been complied with and yet proceeds with the arbitration proceedings without explicitly raising in writing his objection to non-compliance in a timely manner shall be deemed to have waived his right to

object.'

There can be no doubt that Ferco' s representatives were fully aware of the arbitrators' failure to act in accordance with the rules when they embarked upon their application to the court to revoke the award and when they participated in the resumed hearing. However, they proceeded without explicitly raising with the arbitrators their objection as to such non-compliance. By art 45 they therefore waived their right to object to the continuing omission of the arbitrators to disclose the award. Indeed, it is difficult to envisage a more glaringly obvious waiver of procedural irregularity than that found in this case. I therefore accept the submission on behalf of Minmetals that it is no longer open to Ferco to rely on non-compliance with the rules for the purposes of resisting enforcement of the award.

I would only add that the concept of express or implied waiver of procedural objection is well established in the context of international arbitration law. It is now reflected in s 73 of the 1996 Act.

The public policy issue

It is accepted that, if Ferco is to rely on this exception, it must establish that the awards now sought to be enforced were arrived at by means which were contrary to the requirements of substantial justice contained in English law as explained in Adams v Cape Industries plc [1991] 1 All ER 929, [1990] Ch 433.

Mr Swainston relied on that decision as exemplifying English public policy as to the enforcement of foreign judgments. He referred in particular to the statement of principle:

The notion of substantial justice must be governed in a particular case by the nature of the proceedings under consideration. The purpose of an in personam monetary judgment is that the power of the state through the process of execution will take the defendant's assets in payment of the judgment. In cases of debt and in many cases of contract the amount due will have been fixed by the acts of the parties and in such cases a default judgment will not be defective for want of judicial assessment. When the claim is for unliquidated damages for a tortious wrong, such as personal injury, both our system and the federal system of the United States require, if there is no agreement between the parties judicial assessment. That means that the extent of the defendant's obligation is to be assessed objectively by the independent judge upon proof by the plaintiff of the relevant facts. Our notions of substantial justice include, in our judgment, the requirement that in such a case the amount of compensation should not be fixed subjectively by or on behalf of the plaintiff.' (See [1991] 1 All ER 929 at 1049-1050, [1990] Ch 433 at 566-567.)

It was then argued that a similar approach should apply in this case where there had been a continuing failure to provide Ferco with the evidence on which the arbitrators relied. That, it was submitted, was a continuing breach of natural justice and therefore the awards were made in circumstances contrary to the requirements of substantial justice in English law. Mr Swainston emphasised that in Adams v Cape Industries plc [1991] 1 All ER 929 at 1053, [1990] Ch 433 at 570-571, as is clear from the judgment, the defendants could have attended the plaintiff's default judgment application and thereby informed themselves of the usual means of quantification of damages which was adopted by the American judge, and could have taken steps to challenge such damages by applying to set

aside the judgment, but failed to do so, yet the English court still held enforcement of the default judgment to be contrary to public policy.

Adams v Cape Industries plc involved quite exceptional facts. It is clear that the Court of Appeal regarded it as relevant to the public policy issue to consider both the availability of remedial steps in the local jurisdiction and the reasonableness of the defendant's conduct in omitting to take them. This is clear from the following passage:

'Since the ultimate question is whether there has been proof of substantial injustice caused by the proceedings, it would, in our opinion, be unrealistic in fact and incorrect in principle to ignore entirely the possibility of the correction of error within the procedure of a foreign court which itself provides fair procedural rules and a fair opportunity for remedy. The court must, in our judgment, have regard to the availability of a remedy in deciding whether in the circumstances of any particular case substantial injustice has been proved. However, the relevance of the existence of the remedy and the weight to be attached to it must depend upon factors which include the nature of the procedural defect itself, the point in the proceedings at which it occurred and the knowledge and means of knowledge of the defendants of the defect and the reasonableness in the circumstances of requiring or expecting that they made use of the remedy in all the particular circumstances.' (See [1991] 1 All ER 929 at 1052-1053, [1990] Ch 433 at 570.)

Amongst the considerations which, as appears from the passages of the judgment, weighed in favour of the court's conclusion that there had been substantial injustice was the lack of knowledge by the defendants of facts which could have led them to anticipate injustice or which might suggest to them that injustice had occurred in the course of the default hearing (see [1991] 1 All ER 929 at 1053-1054, [1990] Ch 433 at 571). That lack of knowledge made their omission to avail themselves of local remedies not unreasonable.

Although that case was concerned with public policy in relation to the enforcement of foreign judgments and not of foreign arbitration awards, it illustrates the principle that, in the sphere of enforcement, considerations of public policy involve investigation not only of the core procedural defect relied upon by way of objection to enforcement but of all those other surrounding circumstances which are material to the English court's decision whether, as a matter of policy, enforcement should be refused. Such circumstances may give rise to policy considerations which so strongly favour enforcement as to outweigh policy considerations to the contrary. An example in the rather different environment of the public policy against enforcement of arbitration awards in respect of contracts contra bonos mores is to be found in the recent decision of this court in Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd [1998] 4 All ER 570, [1998] 3 WLR 770. In that case the issue was whether the enforcement of a New York Convention award should be refused on the grounds of public policy in a case where it was alleged that the commission contract containing the arbitration agreement envisaged the corrupt purchase of personal influence from Kuwait government officials but where the issue had already been raised in an International Chamber of Commerce arbitration and it had been determined that the contract was not illegal under its proper law. In concluding that the award should be enforced in the face of the allegation of illegality it was necessary to have regard not only to the public policy of discouraging international commercial corruption, but to the countervailing policy of giving effect as far as possible to the finality of international

arbitration awards and to discouraging the relitigation of issues already determined by the arbitrators by adducing evidence not shown to have been unavailable before the arbitrators.

[30] In the present case, the public policy issue arises in the context of a New York Convention award made pursuant to a Chinese arbitration clause by the agreed Chinese arbitral authority. In international commerce a party who contracts into an agreement to arbitrate in a foreign jurisdiction is bound not only by the local arbitration procedure but also by the supervisory jurisdiction of the courts of the seat of the arbitration. If the award is defective or the arbitration is defectively conducted the party who complains of the defect must in the first instance pursue such remedies as exist under that supervisory jurisdiction. That is because by his agreement to the place in question as the seat of the arbitration he has agreed not only to refer all disputes to arbitration but that the conduct of the arbitration should be subject to that particular supervisory jurisdiction. Adherence to that part of the agreement must, in my judgment, be a cardinal policy consideration by an English court considering enforcement of a foreign award.

[31] In a case where a remedy for an alleged defect is applied for from the supervisory court, but is refused, leaving a final award undisturbed, it will therefore normally be a very strong policy consideration before the English courts that it has been conclusively determined by the courts of the agreed supervisory jurisdiction that the award should stand. Just as great weight must be attached to the policy of sustaining the finality of international awards, so also must great weight be attached to the policy of sustaining the finality of the determination of properly referred procedural issues by the courts of the supervisory jurisdiction. I use the word 'normally' because there may be exceptional cases where the powers of the supervisory court are so limited that they cannot intervene even where there has been an obvious and serious disregard for basic principles of justice by the arbitrators or where for unjust reasons, such as corruption, they decline to do so. However, outside such exceptional cases, any suggestion that under the guise of allegations of substantial injustice procedural defects in the conduct of an arbitration which have already been considered by the supervisory court should be reinvestigated by the English courts on an enforcement application is to be most strongly deprecated.

[32] In summary, therefore, in a case where an enforcee alleges that a New York Convention award should not be enforced on the grounds that such enforcement would lead to substantial injustice and therefore be contrary to English public policy the following must normally be included amongst the relevant considerations: (i) the nature of the procedural injustice; (ii) whether the enforcee has invoked the supervisory jurisdiction of the seat of the arbitration; (iii) whether a remedy was available under that jurisdiction; (iv) whether the courts of that jurisdiction have conclusively determined the enforcee's complaint in favour of upholding the award; and (v) if the enforcee has failed to invoke that remedial jurisdiction, for what reason, and in particular whether he was acting unreasonably in failing to do so.

[33] In the present case, following the initial award and the first order of the Beijing court, Ferco's counsel did not in the course of the resumed hearing take the opportunity to inform the tribunal of the reasons for the hearing or to obtain the sub-sale award or, having done so, to challenge its evidential basis or the arbitrators' reliance on it. He appears to have regarded the order for a resumed arbitration as made without jurisdiction and have failed to understand

its purpose. I am not persuaded that in so doing he was acting reasonably. That the sub-sale award remained undisclosed was due to his failure to take advantage of the remedy provided by the supervisory court. Further, as I have held, under art 45 of the CIETAC rules there was a contractual waiver of the right to object to the defects. In these circumstances the application to the Beijing court to revoke the second award appears to have been bound to fail. It may be that the court was left by the CIETAC minute of the resumed hearing with the impression that Mr Jiang had made little in the way of submission, but it is clear beyond doubt that it must have been aware from the contents of the second award that he had never sought to obtain the sub-sale award or to raise with the arbitrators the one objection to the first award on the basis of which the court had ordered the resumed hearing.

In these circumstances, does the enforcement of these awards lead to substantial injustice? In my view, it does not. The unreasonable conduct of Ferco in the manner of its subsequent conduct of the arbitration which has, in effect, deprived it of its local remedies has left it in exactly the same position in substance as if it had wholly ignored the availability of such remedies. Moreover, although the arbitrators acted wrongly in failing to disclose the sub-sale award, they had heard and investigated the evidence in the sub-sale arbitration and had reached their conclusions on the issue of loss to the sub-purchasers of the steel. They then transposed their conclusions on that evidence to the issue of Minmetal's recoverable losses in the main arbitration. Because of the way in which Ferco has conducted itself in relation to that arbitration it is not in the position to invite the inference that even if the award had been disclosed to it the arbitrators would probably have been persuaded to arrive at a conclusion of fact more favourable to Ferco. The highest it can be put is that they might have done so.

In the circumstances, even if one takes account of a continuing feature of injustice in the failure to disclose the sub-sale award prior to the second award and of the possibility that the arbitrators would have arrived at a conclusion more favourable to Ferco if disclosure had been made, the countervailing policy considerations in favour of enforcement of the awards are, in my judgment, so strong that they displace the policy consideration of non-enforcement in the face of procedural defects going to a breach of natural justice.

In the course of argument Mr Swainston referred me to a decision of the Hong Kong Court of Appeal in Apex Tech Investment Ltd v Chuang's Development (China) Ltd [1996] 2 HKC 293, where, following the hearing, CIETAC arbitrators had investigated the facts and produced an award based on their findings without first informing the parties of the results of their investigation. The hearing before the Court of Appeal proceeded on the basis that the facts were within the New York Convention exception of inability to present the enforcee's case and the only question was whether the judge had properly exercised his discretion in ordering enforcement on the basis that disclosure of the investigation would not have affected the ultimate result. The judgment was reversed on the ground that on the facts the result might have been affected. That authority is, however, of no direct assistance on the issues which I have had to consider. I have not decided to uphold enforcement on the basis of a residual discretion but on the basis that Ferco have failed to bring themselves within any of the s 103 exceptions to enforcement. Had I concluded that Ferco had brought themselves within any of the exceptions to enforcement upon which they relied I would not

have thought it appropriate in this case to exercise my discretion in favour of enforcement.

Conclusion

In the event the order of Cresswell J giving leave to enforce the awards as a judgment will be upheld.

There is, however, an outstanding point on which the parties may wish to address further argument. Ferco has applied to the Beijing court for a retrial of its application for revocation of the second award. That application has yet to be heard. Although the prospects of success appear to be distinctly slender it is not impossible that such application will succeed and that, if it does, that the second award will be revoked. If that were to happen and the award had already been satisfied by Ferco, Minmetals would be under a duty to reimburse the amount paid. In these circumstances, in view of the fact that the application for retrial does not fall within s 103(5) of the Act, the question arises whether there should be a stay of execution pending the decision on the retrial application. This matter should be dealt with when this judgment is formally pronounced.

DISPOSITION:
Application dismissed.

SOLICITORS:
Ince & Co; Sinclair Roche & Temperley

Minmetals Germany GmbH v Ferco Steel Ltd

The Times, March 1, 1999, Colman, J., QBD (Comm Ct).

Following a dispute arising out of a contract containing an agreement to arbitrate in China, two arbitration awards were made under the auspices of the China International Economic and Trade Arbitration Commission (CIETAC). F applied to set aside the leave granted to M under the Arbitration Act 1996 s. 101 to enforce the awards and the court had to decide, inter alia, whether F had been denied an opportunity to present its case; whether the procedure for arriving at the awards had been in accordance with the parties' agreement, thus complying with the CIETAC rules, and whether F had shown that the means of arriving at the awards was contrary to the concept of substantial justice so that it would go against English public policy to enforce them.

HELD, dismissing the application, that it followed from the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 Art. 5, which applied to the awards, that an enforcee had to be given a reasonable opportunity to present its case in relation to the findings of fact resulting from the investigations undertaken by the arbitrators. A court deliberating whether to set aside leave to enforce a foreign award had to examine the alleged injustice of the arbitral procedure, consider whether the enforcee had called upon the courts of the country concerned to exercise their supervisory jurisdiction and whether, it had failed to take advantage of any remedy available under the jurisdiction, such failure had been reasonable. In the instant case, it was clear that F had failed to avail itself of the opportunity given to it to present its case. The arbitrators had not acted in accordance with Art. 53 of the CIETAC rules on fairness and reasonableness in making the first award, but the Beijing court had ordered a resumed hearing and F had not taken this opportunity to challenge the evidence relied upon by the arbitrators at the first hearing. It had to be concluded that it had thereby waived its right to object and that no substantial injustice would result from enforcement of the awards.