IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Folio No.1143 of 2000

Royal Courts of Justice
Friday, 19th January 2001

Before:

MR. JUSTICE MOORE-BICK

B E T W E E N :

TONGYUAN (USA) INTERNATIONAL TRADING GROUP — Claimant

- and -

UNI-CLAN LIMITED — Defendant

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MR. T. FYPE (Solicitor of Messrs. Baker & McKenzie) appeared on behalf of the Claimant.

MR. C. AYLWIN (instructed by Messrs. Staynors) appeared on behalf of the Defendant.

J U D G M E N T

(As approved by the Judge)

MR. JUSTICE MOORE-BICK: This is an application to set aside an order made by Master Miller on 16th October last year giving leave to the claimants in an arbitration to enforce an award in their favour as a judgment.

The application is made on three grounds. It is said, first of all, that the award is a nullity; alternatively, that it is not expressed in a form which is capable of being enforced as a judgment; and thirdly, that in any event the court ought not to order that the award be enforced summarily but should leave the claimant to an action to enforce the award in order to enable a cross-claim to be taken into account.

The contract in this case was made in December 1995 and was for the sale of two sachet-filling machines: one relating to dry products and one for liquid products. Both machines were sold cif Chengdu, in the People's Republic of China.

Under the contract the sellers, Uni-Clan Limited, were to sell the machines and to instal and test them to the satisfaction of the buyers. The contract contained an arbitration clause in the following terms:

> "All disputes in connection with this contract or the execution thereof shall be settled through friendly negotiation. In case no settlement can be reached, the case may then be submitted to China International Economic and Trade Arbitration Committee of CCPIT in

accordance with its Arbitration Rules. The arbitration shall take place at the Shenzhen or the Shanghai office of CCPIT nominated by the party who applies for arbitration. The arbitral decision shall be final and binding upon both parties."

The contract contained no express choice of proper law, but the arbitrators have found that it was governed by the law of the People's Republic of China.

The goods were delivered to the buyers' premises in Chengdu in August 1996. Various disputes subsequently arose between the parties in relation to the machine for filling sachets with liquids. In particular, the buyers alleged that the machine was seriously defective and could not be made to work properly.

In April 1998 they referred the matter to arbitration. The sellers took no part in the proceedings, although they did at one stage seek to make contact with one of the members of the tribunal who had been appointed by the Director of the Arbitration Committee in default of an appointment on their part. The tribunal, which consisted of three arbitrators, held a hearing in Beijing. The defendant was kept informed not only of the commencement of the arbitral proceedings, but of their progress, and was invited to attend and put its case, but it chose to ignore the proceedings, except in the very modest respect to which I have referred.

On 6th April 1999, the tribunal published its award. It held, in summary, that the contract was governed by Chinese

law, that the machine for filling sachets with liquids was seriously defective and that the buyers were entitled to reject it. It held that the defendant seller was to take the goods back (in other words, as one can see from the award, to collect them) but that the claimant buyers were to clean and pack the machine and provide a limited amount of administrative support. The defendants were ordered to return the price which they had received for the goods, together with interest at 7% per annum to the date of payment. They were ordered to return the money within two months, after which the tribunal directed that interest should run at 10% per annum.

The award runs to several pages in which the tribunal describes in some detail the nature of the contract, the circumstances which gave rise to the dispute, the submissions of the parties. It concludes with the speaking part of their award and the orders which they make.

The first ground upon which it is submitted that the order of Master Miller should be set aside is that the award is a nullity. This award, having been made and published in China, falls within the scope of the New York Convention, and my attention has therefore been directed to ss.100-103 of the Arbitration Act 1996. Mr. Aylwin, who appeared on behalf of the sellers, the respondents in the arbitration, relied in particular on s.103(2)(e), which provides that the court may refuse to enforce or recognise an award falling within the scope of the Convention if the procedure adopted in the

arbitration was not in accordance with the agreement of the parties. He has relied on the fact that, as appears from the award itself, the hearing took place in Beijing, whereas the parties had agreed that it should take place in Shenzhen or Shanghai, at the option of the party claiming arbitration. He readily accepted, however, that in view of the fact that the sellers chose to take no part in the proceedings, it is impossible for him to submit that any failure to comply with the agreement of the parties as to venue had any prejudicial effect as far as his clients are concerned. He was therefore constrained to accept that, if the matter were to be determined as a matter of discretion, there would be no grounds upon which the court could properly decline to enforce the award. In those circumstances, he submitted that the failure of the tribunal to conduct the hearings at one of the two places identified in the arbitration award is a matter of such significance that it renders the whole proceedings a nullity. If he were right about that, of course, he would be right in his submission that the court ought not to order enforcement of the award.

It is fair to say that the learned editors of **Mustill & Boyd on Arbitration**, 2nd edn., lend a certain amount of support to Mr. Aylwin's submissions. In particular, at p.344, they say this:

> "If the arbitration agreement stipulates that the hearing must be held in a particular place, the arbitrator has no power to sit elsewhere without the

consent of the parties."

and in footnote 7, they say:

"Failure to sit at the agreed venue probably deprives the arbitrator of jurisdiction. At any rate the arbitrator should assume that this may be the case and act accordingly."

It is Mr. Aylwin's submission that the agreement as to the place of the hearing is of such fundamental importance in this case that it is a condition of a valid arbitration, as suggested by the learned editors of **Mustill & Boyd**. Alternatively he submitted that it is at least an intermediate term, and that the gravity of the breach in the present case was so great as to render the award a nullity.

In my judgment, the importance of a term of this kind can only be assessed by reference to the true construction of the contract. It may be that, in many cases, the parties will be sufficiently concerned about the place at which the arbitration is to be conducted as to make it clear by their agreement that it is a matter of fundamental importance. In other cases, a different picture may emerge.

The contract in the present case does not, in my judgment, point to the conclusion that to hold the proceedings in Shenzhen or Shanghai was necessarily critical in all cases. One can understand that those locations may well have been chosen for the convenience of the two parties. Other locations within China might have proved very difficult for

one or other, or both, parties. The extent to which the failure to hold the proceedings at one of the chosen locations could have a very great, or an entirely insignificant, effect on the parties and their ability to deal with the proceedings, depending on the particular circumstances of the case. It hardly needs to be said that to conduct the proceedings in a country outside that stipulated by the parties could have the most serious effects because it might well result in subjecting the proceedings to an entirely different curial law. In the absence of any language which makes it clear that these parties regarded the venue for the arbitration as a matter of critical importance in all cases, I think the right construction of this arbitration clause is that it was an intermediate term, and that the effect of a failure to comply with it must be viewed in the light of the nature and gravity of the particular breach.

In this case, the sellers made it clear, at a very early stage, that they had no interest in taking part in these proceedings. They were invited to a appoint an arbitrator, but failed to do so. They were invited to take part in the proceedings and failed to do so. Mr. Aylwin has very frankly conceded that in those circumstances, holding the arbitration in Beijing had not the slightest effect on the fairness of the proceedings and caused no prejudice to his clients.

It seems to me that one cannot assess the gravity of a breach of this kind simply in geographical terms; it is

necessary to assess the extent to which it had some impact on the conduct of the proceedings. Removing the proceedings from Shenzhen or Shanghai to Beijing had no effect on the curial law, and in all the circumstances I am quite unpersuaded that this award can be regarded as a nullity simply on the grounds that the proceedings were conducted in Beijing rather than in one or other of the two chosen localities.

The second ground upon which the sellers rely is that it is said that the form in which the award is expressed is one which is incapable of being enforced as a judgment. Mr. Aylwin has helpfully drawn my attention to the well-known case of Margulies Brothers Ltd. v. Dafnis Thomaides & Co. (U.K.) Ltd. [1958] 1 Ll.Rep., 205. That was a case in which a trade tribunal directed that certain contracts should be set off against other contracts and the resultant differences paid by one party to the other. The Court of Appeal concluded that the award was not an award for a sum certain, nor was it an award which could be enforced as a judgment, because it did not make its effect sufficiently clear. It was impossible to ascertain what had to be paid without indulging in a certain amount of arithmetic.

The Master of the Rolls, Lord Evershed, giving the leading judgment in that case, said this:

> "... when you look at the award and the varying document of 24 Jan. 24, you have not got a subject-matter capable of enforcement under s.26, and it seems to me, I confess, that there is no answer to

that point. You cannot enforce a document which merely says by way of declaration (in effect) that certain contracts with three numbers should be set against certain other contracts with three other numbers, and that Dafnis Thomaides & Co. (U.K.), Ltd., ought to pay the differences between them."

That case is authority for the proposition that an award which is effectively couched in purely declaratory terms cannot be enforced as a judgment, and for the wider proposition that, in order to be enforceable as a judgment under s.66 of the Arbitration Act 1996 (as it now is), the award must be framed in terms which would make sense if those were translated straight into the body of a judgment. It highlights the fact that, on an application of this kind, the court is concerned in this respect with the form of the award, not with its substance.

In the present case, the principal paragraph of the award is expressed in the following way:

"The NVLG-10 Liquid Bagging Machine and spare parts purchased by the plaintiff from the defendant shall be returned. The defendant shall return to the plaintiff 85% of the money for goods which has been paid through negotiation with the use of the letter of credit, totalling US$131,750. The defendant shall pay the plaintiff the interest calculated at 7% of the annual interest rate for the above-mentioned money for goods from the day of negotiation from the bank to the date of actually returning the money to the plaintiff. The plaintiff does not need to pay US$7,750, the remaining sum for the NVLG-10 Liquid Bagging Machine which has

not been paid, because the equipment is to be returned."

Mr. Aylwin accepted that the second part of that paragraph, directing his clients to pay specific sums of money, with interest at certain rates, is in sufficiently clear terms to be capable of enforcement as a judgment. He submitted, however, that the paragraph must be read as a whole, and that the language of the first sentence is insufficiently clear and, indeed, is incapable of forming an enforceable judgment. He submitted that it is unclear in that it does not say in terms who is to deliver the machine or to whom, nor does it use language which the English courts would recognise as language requiring one party to deliver up goods to another. He also submitted that the relationship between the obligation to deliver the goods and the obligation to return the price is not sufficiently clear. It is, he submitted, not clear whether the one is contingent on the other, or whether they are independently enforceable.

This award, of course, was made in China, and made in the Chinese language. The document from which all those in court have worked is a certified translation. But even when a foreign award is made in the English language, it must be rare that it will use terms precisely mirroring those which an English court would use for the purpose of drafting a judgment. The question, in my judgment, is whether the award as it stands (in this case the award in translation) is

sufficiently certain to be capable of enforcement as it stands. No judgment is read in a vacuum, and in my judgment there is no doubt here about who is to deliver what to whom, or what is meant by the expression "shall be returned". There can be no doubt that what the arbitrators are directing is that the machine shall be returned, that is, delivered up, by the buyer to the seller, and that the seller shall return, that is, pay back, the price it has received for the goods.

I have no difficulty in accepting that the language of para.1 of this part of the award is sufficiently clear to be capable of enforcement as it stands. I see no reason to construe this paragraph as requiring any necessary relationship between its two parts. The court should not, in my view, be astute to find difficulties of construction of awards or, for that matter, judgments, where none really exist. I am unpersuaded that there are such uncertainties about the drafting of this paragraph as to make it incapable of enforcement as a judgment. It is unnecessary, in those circumstances, for me to decide whether this is a ground upon which the court can properly decline to enforce an award under s.101 of the Arbitration Act 1996.

The third ground advanced in support of this application is that it would be unfair and improper to allow this award to be enforced as a judgment in circumstances where the sellers have a good arguable cross-claim against the buyers relating to the subject matter of the award itself.

This argument depends on evidence adduced by the sellers which tends to suggest that during the period while it has been in the custody of the buyers, the machine has deteriorated to a significant degree and substantial numbers of parts have been removed. There is evidence in the form of an affidavit sworn by Mr. David Portlock, the Senior Overseas Manager for Uni-Clan, concerning an inspection of the machine which he conducted in December of last year. He has annexed to that statement a report of an inspection carried out at that time in which the condition of the machine is described as being extensively corroded, with a number of parts missing. Other parts which were not with the machine were said to be available, although they were not produced. Mr. Aylwin submitted that there is evidence here that, while the machine has been in the custody of the buyers since the date of the award it has been allowed to deteriorate seriously and, indeed, in his words, that it has been "cannibalised". He submitted that it would be quite wrong for the court to permit the award to be enforced in those circumstances because the award itself contemplates not simply that the sellers will return such parts as they may choose, but that they will return the machine as a whole.

My attention has been drawn again to s.103 of the Arbitration Act 1996, which sets out the grounds upon which the court is entitled to refuse to enforce an award falling within the New York Convention. Section 103 sub-section 3

states that recognition or enforcement of the award may be refused if it would be contrary to public policy to recognise or enforce it. Mr. Aylwin submitted, as I think he had to, that it would be contrary to public policy in this case for the court to allow the award to be enforced in a manner which did not enable the sellers to have their cross-claim taken into account.

The essential nature of the complaint, as I have already indicated, is that, at least since the date of the award, the buyers have been, in effect, involuntary bailees of this machine and owed a duty to the sellers to take reasonable care of it until it was collected. It is an argument which, to some extent, is difficult for the sellers to advance given the fact that, as far as one can see, they have made no attempt whatsoever to remove the machine in the period of almost two years since the award was published. There is little in the evidence to indicate with any certainty to what extent any deterioration or loss of parts has occurred during that period.

My attention has been drawn to the case of Min Metals (Germany) GMBH v. Perco Steel Limited, [1999], CLC, 647, in which Colman J. considered certain factors which the court might wish to take into account when deciding whether enforcement of an award should be refused on public policy grounds. In that case it was alleged that the procedure leading to the award had been seriously flawed. In my

judgment, an important distinction is to be drawn between the situation in which the manner in which the award has been obtained can be criticised in some manner, and circumstances which may have arisen since the publication of the award which are said to render its enforcement unfair. In the former case, it is the validity of the award itself which is impeached; in the latter case, the award is not impeached, it is simply said that it would be unfair to enforce it. I am not aware of any case in which the courts have accepted that it would be inappropriate to allow a Convention award which is otherwise valid and enforceable to be enforced as a judgment on the grounds that the judgment debtor has an arguable cross-claim against the holder of the award. In my judgment, there is a very strong public policy consideration in favour of enforcing awards, whether awards published in this country or published abroad, and it would require a very strong and unusual case to render the enforcement of an award in circumstances of this kind contrary to public policy. I have seen nothing in the evidence in this case which would lead me to that conclusion, and therefore I reject this ground as well. In those circumstances, this application must fail.
