CREMER

1984 No 696sp

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THE HIGH COURT

IN THE MATTER OF:-

THE ARBITRATION ACTS, 1954-1980

PETER CREMER Gmbh AND COMPANY

APPLICANTS

and

CO-OPERATIVE MOLASSES TRADERS LIMITED

RESPONDENTS

Judgment of Mr. Justice Costello delivered the 25th day of February, 1985.

Mary P. Donoghue
Registrar

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The applicants are a German company with offices in Hamburg. They claim that on the 21st October, 1983 an agreement was made between them and the respondents that they would sell to the respondents 10,000 metric tons of cane molasses at a price of 96.60 dollars per metric ton C.I.F. Dublin; that it was an express term of the agreement that it would incorporate the Arbitration Rules of the Grain and Feed Trade Association Ltd., effective from 1st June, 1983; and that when disputes arose arbitrators were appointed under the Rules of the Association. It is claimed that an arbitration was held in London and that by an award of the 22nd June, 1984 the respondents were directed to pay 165,000 dollars with interest as appears in the award. These proceedings have been brought under Part III of the Arbitration Act, 1980 for the enforcement of the award under its provisions.

The 1980 Act defines arbitration agreements to which the Act applies as meaning "agreements in writing" and makes provision for the enforcements of "awards", that is, awards made in pursuance of an arbitration agreement in the territory of a state, other than the State, which is a party to the New York Convention (which is set out in the Schedule to the Act). The United Kingdom is a party to the New York Convention; Part III of the Act was brought into operation on the 10th August, 1981 (see S.I. No. 195 of 1981); and so the applicants can avail of its provisions. The question is whether those provisions allow the enforcement of this particular award.

Section 7 provides that the award is enforceable in the same manner as an arbitration award under section 41 of the Arbitration Act, 1954 and by virtue of section 9 (1) enforcemer

can only be refused under the provisions set out in that section. The respondents say that they can bring themselves within the provisions of subsection (2) of section 9 and that enforcement should therefore be refused. Their case is that (a) there was no concluded agreement of sale or alternatively no concluded written agreement of sale in this case; or, in the further alternative, (b), that if there was a written agreement for sale and if it contained an arbitration clause arbitration should have taken place in Hamburg, and not London, under its terms. In these circumstances they rely, in particular, on section 9(2)(e) of the Act which provides that enforcement of an award may be refused if it is proved that -

> "(e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which, or under the law of which, the award was made".

For reasons which I will give later, I think this court in the light of this defence, has jurisdiction under the 1980 Act to consider the facts which have given rise to the present claim. I propose to do so now and indicate my conclusions on them as I go along.

The First Contract:

There was produced in evidence documents relating to an agreement made at the end of August, 1983 and the beginning of September, 1983 between the parties to the present dispute. I will refer to this as "the first contract". The first document produced is a long letter dated the 30th August, 1983 which is headed

"Contract No. V 24 309 dated 23.8.83"

which begins by stating

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"We herewith confirm having sold to you" a quantity of molasses as therein specified. But although the letter is confirmatory of an earlier agreement it proceeds to set out a number of detailed terms, relating to such matters as the quality of the goods, delivery periods, price, sampling, discharge, payment and title. Its last clause reads:

"Arbitration: If any, amicably in Hamburg."

The letter ends with a request that the respondents should return the duly signed duplicate of this contract. So, although the letter purported to confirm an agreement for sale which has already been concluded the letter is in effect a request that the respondents would agree that the sale would be subject to the terms and conditions set out in it.

The respondents did not accept all the suggested terms and a number of telex messages passed between the parties about them. The first point of significance for this case is to note that each of the telex messages is headed "Contract No. V. 309 dated 23.8.1983", so that even though the final terms were not agreed until towards the middle of September, the parties regarded the contract was one dated the date which I have just quoted. And the second point of importance is that in the course of the negotiations the applicants' proposals for arbitration were amended. The respondents firstly suggested that the arbitration clause should read "If any, amicably in London", but they later agreed to the applicants' suggestion that it should read "If any, gafta, London". It is conceded that the reference to "gafta, London" was understood by the parties as meaning that arbitration (if any) would take place in London under the rules of the

"Grain and Feed Trade Association".

The Second Contract

I come now to consider the dealings between the parties which have given rise to these proceedings. They began with a telephone conversation on the 21st October between the parties representatives. This was followed by two telexes sent by the applicants on the same day. The first began as follows:

> "We hereby confirm our today's sale to you - 10,000 tons cane molasses of any origin".

It went on to describe the quality of the goods to be supplied, and that the price would be 96.50 per 1000 Kg. C.I.F. Dublin. It gave the arrival date as between "15th Feb/15th March, 1984" and it ended with the following words which are crucial in this case:

> "all other conditions as per our contract dated 23rd Aug. 1983".

Now, as I have pointed out, the parties had reached an agreement for the sale of molasses on the 23rd August, 1983. Later they had negotiated further terms, but they continued to refer to their contract as being dated the 23rd August. I have no doubt therefore that the "conditions" referred to in this telex are those contained in the letter of the 30th August, as amended by subsequent telexes. This first telex of the 21st October, 1983 was therefore confirming that the sale agreed on the telephone would be subject to the arbitration clause, previously agreed, namely that it would be held in London under the rules of the Grain and Feed Trade Association. Later that day a second telex was sent by the applicants. This purported to "confirm" two additional terms, one of which being

a price escalation clause.

The respondents replied to neither of these telexes. Neither did they reply immediately to a letter of the 26th October, 1983 which the applicants sent to the respondents. This was in a form similar to their earlier letter of the 30th August, and was headed

"Contract No. V 25289 dated 21.10.1983"

so obviously it was referring to the agreement reached on that date. As in the previous letter, it set out a number of terms and conditions. It commenced by stating "We hereby confirm having sold to you" the quantity of molasses referred to in the earlier telex. Amongst the conditions contained in the letter was one called a "special condition" namely the price escalation clause which had been set out in the second telex. It provided opposite the words "Delivery Period" that delivery would take place as follows; "arrival 2nd half of February/ 1st half of March, 1984". As before, the last condition in the letter referred to arbitration and it read as follows:

"Arbitration: If any, amicably in Hamburg",

and the letter ended with a request that the respondents return a signed duplicate "of this contract". So, one of the problems which has arisen in this case becomes immediately obvious The applicants' telex of the 21st October, by suggesting that the sale be subject to the conditions of the contract of the 23rd August had proposed that any arbitration should take place in London under the G.A.F.T.A. rules, but this letter had proposed arbitration in Hamburg.

The respondents did not return the duplicate of the letter of 26th October nor did they communicate any further with the applicants until a telephone call took place on the 15th

November. Its terms were confirmed by a telex from the applicants of that date. This was headed "Contract No. V 25289 dated 21.10.83 10,000 tons cane molasses, CIF Dublin" and read

> "We herewith confirm as per your request having changed the originally stipulated arrival period from 2nd half February/1st half March into arrival March/April".

The conclusions which are suggested to me by the documentary evidence in the case are as follows. Firstly, the two telexes of the 21st October are stated to be "confirmatory", and it would appear that they represent the terms of a verbal agreement which the parties had reached over the telephone on that day. If this is so then it would follow that the parties had expressly agreed that the terms and conditions would be those under which the previous consignment had taken place, but with the exception of a price variation clause, whose existence had been omitted in the first telex, an omission rectified very shortly afterwards. Had these telexes misstated what had been verbally agreed, it is to be expected that a reply denying their accuracy would have been sent. But this did not happen. The letter of the 26th October accurately sets out the terms and conditions of the parties' verbal agreement, with the exception of the arbitration clause. Once the terms actually agreed have been established I do not think that an error in the preparation of a formal contract effects the legal consequence. The applicants must of course show that a written agreement to arbitrate exists, but they can, in my opinion, rely (a) on the two telexes of the 21st October, and the earlier telexes and the letter of the 30th August to which I have referred and (b) the respondents' verbal confirmation on the 15th November of the existence of the contract and its terms.

It is clear from section 9 of the 1980 Act that on an application for enforcement of an award under Part III the onus of showing that the award should not be enforced is on the respondent to the proceedings, who relies on subsection (2) of that section for this subsection requires that the person against whom the award is invoked must prove the matters set out in sub-paragraphs (a) to (f). The respondent in this case has failed to displace the inferences which, as I have just indicated, the documentary evidence suggests. The affidavit grounding this application swears that it was an express term of the agreement made on the 21st October, 1983 tha the agreement would incorporate the arbitration rules of the Grain and Feed Trade Association. In reply the respondents' affidavit states: "If there was an agreement between the parties (which is denied) it was not an express or any term of the alleged agreement that same would incorporate the arbitration rules of the Grain and Feed Trade Association..." To overcome the very strong evidence of the telexes it would, in my view, have been necessary for them to have produced very persuasive detailed affidavit evidence to contradict it. This has not been done.

Section 9 (2) (e) of the Arbitration Act, 1980

The respondents did not attend the arbitration in London, but their solicitor wrote on the 12th March, claiming that the respondents had never contracted to be bound by an arbitration under the rules of the Grain and Feed Trade Association, and challenged the arbitrators' jurisdiction. The arbitrators gave careful consideration to the telexes to which I have referred and concluded that the parties had conferred jurisdiction on them. The enforcement of an award to which

Part III of the 1980 Act applies can only be refused by the court in very limited circumstances. If however the person against whom the award is invoked proves that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, then enforcement may be refused (see section 9 (2) (e) of the Act - a subsectio to give effect in our domestic law to the corresponding part of Article V of the New York Convention). It is clear therefore that once the point is raised by a respondent this Court is not bound by an arbitrator's conclusion that it has been composed in accordance with the parties' agreement, but must itself adjudicate on the jurisdiction point. This I have done.

For the reasons which I have given I am satisfied that the parties had agreed to arbitrate their disputes in London under the G.A.F.T.A. rules as pleaded and in these proceedings, the respondent have failed to prove that either the composition of the arbitra authority or the arbitral procedure was not in accordance with their agreement. Nor have they proved any other of the matters referred to in sub-paragraphs (a) to (f) of subsection (2) of section 9. Accordingly, the applicants are entitled to have the award enforced.

Approved
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