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LLOYD'S LAW REPORTS

Editor: Miss M. M. D'SOUZA, LL.B., Barrister

COURT OF APPEAL

Feb. 25, 1991

HISCOX
v.
OUTHWAITE

Before Lord DONALDSON of LYMINGTON, M.R.,
Lord Justice McCOWAN
and Lord Justice LEGGATT

Arbitration — Award — Convention award — Dispute under reinsurance contract — Final award signed in France — Plaintiffs initiated proceedings against award — Whether a Convention award — Whether proceedings could be entertained by High Court — Whether defendant estopped from asserting award not subject to Arbitration Acts 1950 and 1979 — Arbitration Act 1950, s. 22, Arbitration Act 1979, s. 1, Arbitration Act 1975, ss. 3, 5.

A dispute arose under a reinsurance contract between the plaintiff and defendant representative Lloyd's underwriters and was referred to the sole arbitrament of Mr. R. A. MacCrindle, Q.C. The arbitration agreement provided that arbitration was to take place in London and both the agreement and the reinsurance contract were governed by English law.

The arbitration took place in stages and in due course Mr. MacCrindle signed a final interim award. This was dated Nov. 20, 1990 and concluded in the same way as the previous awards save that the address was "12 Rue d'Astorg, 75008 Paris, France".

On Dec. 10, 1990 the plaintiffs initiated the following proceedings: (1) an originating summons for leave to appeal to the High Court under s. 1(3)(b) of the Arbitration Act, 1979; (2) an originating summons for an order directing Mr. MacCrindle to state further reasons for his award pursuant to s. 1(5) of the Arbitration Act, 1979 and (3) an originating motion seeking remission of the award pursuant to s. 22 of the Arbitration Act, 1950.

The defendant contended that as this was a Convention award, under the terms of the Arbitration Act, 1975 the High Court was disabled from adjudicating upon those proceedings.

The issues for decision were (1) where was an arbitration award "made" for the purposes of s. 7(1) of the Arbitration Act, 1975 which defined a Convention award as meaning —

> . . . an award made in pursuance of an arbitration agreement in the territory of a state, other than the United Kingdom, which is a party to the New York Convention.

(2) to what extent if at all did the Arbitration Acts 1950 and 1979 apply to a Convention award where the procedural law of the arbitration was English? and (3) whether the defendant was estopped from asserting award not subject to the Arbitration Acts, 1950 and 1979.

———*Held*, by Q.B. (Com. Ct.) (HIRST, J.), that (1) this was not a Convention award because although dated in Paris it was "made" in London for the purposes of the 1975 Act;

(2) even if this was a Convention award the High Court had the necessary jurisdiction to adjudicate on the proceedings initiated by the plaintiff;

(3) if it had been necessary to decide, the defendant was estopped from asserting that the award was not subject to the Arbitration Acts, 1950 and 1979.

The defendant appealed.

———*Held*, by C.A. (Lord DONALDSON, M.R., McCOWAN and LEGGATT, L.JJ.), that (A) an award was not "made" at the seat or central point of the arbitration; where the Court was concerned with a statute avowedly designed to give effect to an international convention, in the event of ambiguity it was permissible to have regard to the travaux preparatoires; from these it was plain that a great deal of thought and debate was devoted to this issue and a conscious and deliberate decision was reached in favour of defining a "Convention award" in terms of where the award was made as opposed to anywhere else, including where the arbitration took place; where an award states that it was dated or signed in a particular place that was the place where it was made; the award was signed in Paris and was therefore a Convention award (*see* p. 12, col. 2; p. 14, col. 1; p. 17, col. 2; p. 18, col. 1; p. 19, col. 2; p. 20, col. 1);

———*Brooke v. Mitchell*, (1840) 6 M. & W. 473, considered.

(B) as to whether the Convention award was amenable to remedies in the 1950 and 1979 Acts (per Lord DONALDSON, M.R.; MCCOWAN, L.J. dissenting) that (1) the submission by the defendant that the Courts could only adjourn the 1950/1979 proceedings would be rejected; the answer lay in treating the Court which was both the competent authority and an enforcing Court as two separate Courts; the Convention then worked as it was intended to; although this might give the 1975 Act a purposive construction this was permissible and indeed necessary when construing a statute giving effect to an international Convention intended to be applied consistently in different jurisdictions (*see* p. 15, col. 2; p. 16, col. 1);

(2) (per LEGGATT, L.J.) the 1975 Act could not be construed so as to preserve a locus for the English Courts when acting in its supervisory capacity; the Act did not envisage that the award would be subject to the supervisory jurisdiction of the English Courts; an adjournment of enforcement proceedings would be of no avail because no application to the English Court for the setting aside of a Convention award would be successful in face of s. 3(2); for the purposive argument to succeed the words "any legal proceedings" in s. 3(2) had to be construed as meaning "any proceedings for the enforcement of a Convention award"; the Convention award could be relied on outside the realm of enforcement to meet all proceedings including proceedings to set aside and suspend the award (*see* p. 21, col. 2);

(C) as to the estoppel issue (LEGGATT, L.J. dissenting), that the exchange of letters between the solicitors on Aug. 3 and 6 in relation to the draft award showed quite clearly that both parties assumed the fact that an award dated at Paris was no obstacle to the exercise by the English Courts of their supervisory jurisdiction under the Arbitration Acts, 1950 and 1979; that assumption was never questioned and on its basis the plaintiff incurred costs in preparing for the hearing of his applications under the 1950 and 1979 Acts before he learned that his right to make this was being challenged; it would be unconscionable now to allow the defendant to renege from the common assumption which extended not only to the facts that application under the 1950 and 1979 Acts could be made within a specified time but by necessary implication that in respect of an award which stated on its face that it was dated at Paris such applications could and would be heard and determined on their merits; the appeal would be dismissed (*see* p. 16, col. 2; p. 17, cols. 1 and 2; p. 19, col. 1).

The following cases were referred to in the judgments:

Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd., (C.A.) [1982] 1 Q.B. 84;

Brooke v. Mitchell, (1840) 6 M. & W. 473;

Hamel-Smith v. Pycroft Jetsave Ltd., Feb. 5, 1987 (Unreported).

Vistafjord, The (C.A.) [1988] 2 Lloyd's Rep. 343;

Wilkinson v. Barking Corporation, (C.A.) [1948] 1 Q.B. 721.

This was an appeal by the defendant Mr. Richard Henry Moffit Outhwaite, a representative Lloyd's underwriter and all other members of Syndicate 661 at Lloyd's who were party to the contract of reinsurance from the judgment of Mr. Justice Hirst given in favour of the plaintiff Mr. Robert Ralph Scrymgeour Hiscox a representative Lloyd's underwriter suing on his behalf and on behalf of the members of Syndicate 33 at Lloyd's, and holding in effect that the arbitration award made in the dispute between the plaintiff and defendant was not a Convention award; that the Court had the necessary jurisdiction to adjudicate on the plaintiff's application and that the defendant was estopped from asserting that the award was not subject to the Arbitration Acts 1950 and 1979.

Mr. Justice HIRST delivered the following judgment on Feb. 19, 1991:

Introduction

There were before the Court last Friday, Feb. 15, 1991, three applications by the applicants in relation to a final interim arbitration award dated Nov. 20, 1990 made by Mr. Robert Alexander MacCrindle, Q.C. as sole arbitrator viz: (a) A summons for leave to appeal under s. 1(3)(b) of the Arbitration Act, 1979. (b) An originating summons for an order directing the arbitrator to state further reasons pursuant to s. 1(5) of the Arbitration Act, 1979. (c) A notice of originating motion seeking the remission of the award to the arbitrator under s. 22 of the Arbitration Act, 1950.

Both parties are Lloyd's underwriters, Mr. Hiscox suing on his own behalf and on behalf of the members of Syndicate 33 at Lloyd's, and Mr. Outhwaite being sued on his own behalf and on behalf of all other members of Syndicate 661 at Lloyd's who are parties to the contract of reinsurance which is the subject of the proceedings.

The arbitration was heard in England, and conducted under English procedural rules. However the award was signed by Mr. MacCrindle in Paris, and as a result Mr. Rokison on behalf of the respondents has raised a preliminary issue, namely that the Court cannot entertain these applications, on the footing that this

is a Convention award to which the Arbitration Act, 1975 applies, and that the 1975 Act on its proper construction precludes the granting by the Court of any of the three orders sought by the applicants.

The crux of his submission is stated clearly and succinctly in Mr. Rokison's skeleton argument, and I cannot do better than quote it:

The Court cannot Entertain these Applications

1. The Award to which the Applications relate is an Award made in Paris, France. It specifically states (see Applicant's Bundle A pp. 22, 25):

> NOW I, the said ROBERT ALEXANDER MACCRINDLE . . . .do hereby make and publish this my INTERIM AWARD (p. 22).
>
> . . . .
>
> DATED at Paris, France, this 20th day of November, 1990.
>
> (Signature)
>
> ROBERT ALEXANDER MACCRINDLE
>
> 12, Rue d'Astorg,
>
> 75008, Paris, France. (p. 25)

2. The Award is therefore a "Convention Award" within the meaning of the Arbitration Act 1975. Section 7(1) of that Act provides:

> Convention Award means an award made in pursuance of an arbitration agreement in the territory of a State, other than the United Kingdom, which is a party to the New York Convention . . .

France is a party to the New York Convention. (See for example, Mustill and Boyd on Commercial Arbitration (Second Ed.) at p. 707).

3. Accordingly, the Award is enforceable in accordance with Section 3(1) of the Act, and by Section 3(2)

> Any Convention Award which would be enforceable under this Act shall be treated as binding for all purposes on the persons as between whom it was made . . .

It is accordingly binding as between the Applicant and the Respondent. No question can be raised as to its correctness under the Arbitration Act 1979, and clearly it cannot be remitted to the Arbitrator pursuant to Section 22 of the Arbitration Act 1950 with a view to its being reconsidered. Such a jurisdiction would be inconsistent with the Court's obligation to enforce the Award.

4. Furthermore, it is implicit in both the Arbitration Act 1950 and the Arbitration Act 1979 that those Acts (insofar as they apply to Awards) only apply to Awards made within the jurisdiction. (See Cmnd. Paper 1515 — copy will be supplied.)

5. Only if the above contention is rejected does the Court have to consider the applications.

Mr. Colman on behalf of the applicants puts forward three answers to Mr. Rokison's submission viz: (1) That this is not a Convention award since the award was not made in France. (2) If it is a Convention award, on the proper construction of the 1975 Act the Court is entitled to grant the orders sought. (3) In any event the respondents are estopped from taking the point at issue.

Although the application was in Chambers, I am giving this judgment in open Court at the request of both parties. Since the history of the arbitration and its aftermath is relevant both to the first and third of Mr. Colman's points, it is convenient, before dealing with the issues in more detail, to summarise the relevant facts.

The arbitration

The dispute arises under an Aggregate Excess of Loss Reinsurance Agreement dated Mar. 30, 1982, which contained as art. 11 the following arbitration clause:

> If any dispute shall arise between the Reassured and the Reinsurers with reference to the interpretation of this Agreement or the rights with respect to any transaction involved, the dispute shall be referred to two Arbitrators, one to be chosen by each party and such Arbitrators shall first choose an Umpire. If they are unable to agree upon an Umpire, they shall appeal to the Chairman of the Committee of Lloyd's for the time being to nominate him and in the event of the said Arbitrators not agreeing, the decision of the said Umpire shall be final and binding upon all parties. The Arbitrators and Umpire shall interpret this Agreement as an honourable engagement and they shall make their award with a view to effecting the general purpose of this Agreement in a reasonable manner, rather than in accordance with the literal interpretation of the language.
>
> Said Arbitration shall take place in London and the Arbitrators and Umpire shall be executive officials of Insurance or Reinsurance Companies or Lloyd's Underwriters. The cost of Arbitration shall be borne by the parties hereto as the Arbitrators and/or Umpire may direct.

This was varied by an agreement dated Oct. 24, 1989 contained in a letter signed by the solicitors for both parties addressed to Mr. MacCrindle as follows:

> This letter is to confirm that the parties have now agreed, subject to your acceptance, to appoint you as sole Arbitrator to determine all disputes and differences arising between them in relation to the quantification of the liability of the reinsurers (Syndicate 661) under the aggregate excess of loss reinsurance agreement number 82050036, the validity of which has already been determined by your recent Award.
>
> It is further agreed between the parties that the hearing in this matter should commence on 25th April 1990, estimated duration 10 days, assuming that date to be convenient to yourself. Your appointment is deemed to be upon the terms of Article 11 of the reinsurance agreement, amended so as to provide for you to act as sole Arbitrator.
>
> It is anticipated that there will need to be an interlocutory hearing for directions, and we would ask you please to confirm which of the two days in November (13th or 14th) which have been indicated by your Clerk would be convenient for such an appointment. The directions to be sought by each party will be notified in due course.

It is plain from the last sentence of the second paragraph that, save for the substitution of a single arbitrator for the previous regime, art. 11, including London as the venue for the arbitration still stood.

There was an agreed order for directions dated Nov. 13 1989, containing several directions completely in line with ordinary English arbitration practice (ie., points of claim, points of defence, discovery, exchange of statements of witnesses of fact, and limitations on the number of expert witnesses); it was also provided that Commercial Court guidelines should apply generally, subject to any specific directions.

The hearings took place in London in April and May, 1990, and after final speeches in July it was agreed that Mr. MacCrindle should produce a set of reasons together with draft declarations on the issues of principle, with the parties having the opportunity if so desired to make representations in relation to the form of the declarations to be embodied in the award. The draft interim award signed in Paris on Aug. 6, 1990, and made on the above basis, was headed (as had been all the pleadings, and as was the final interim award) with the words:

> In the matter of the Arbitration Acts 1950 to 1979, and In the matter of an Arbitration.

Three days beforehand, the applicants' solicitors addressed to the respondents' solicitors the following letter:

> We take the view, and we would be obliged if you would confirm that you agree, that if either party is contemplating making an application for leave to appeal to the Court on any aspect of the Award, time does not run until at the earliest six weeks from 6th August 1990.

On Aug. 6 the respondents' solicitors, having meantime received a copy of the draft interim award, replied as follow:

> It is our understanding of Point 8 of the Arbitrator's Award that if either party within six weeks of 6th August 1990 notifies the Arbitrator in writing that it desires to make representations as to the form of the Arbitrator's Award, then this Award dated 6th August 1990 shall be treated as a draft only and the final form will be determined following the further hearing and that the time for appeal will commence running from the date of this final form. If however, neither party notifies the Arbitrator in writing within six weeks of 6th August 1990 that it desires to make representations, then the Award dated 6th August 1990 will be treated as the Arbitrator's Interim Award and that the time for appeal will commence running at six weeks from 6th August 1990, as you have stated in the second paragraph of your letter of 3rd August 1990.
>
> Would you please confirm that you are in agreement with our understanding of Point 8 of Mr. MacCrindle's Award.

On Nov. 6 there was a further hearing before Mr. MacCrindle to discuss the form in which the declarations should appear in the final interim award. As already noted, this was signed by Mr. MacCrindle in Paris on Nov. 20, bearing the same heading as the draft interim award.

On the same day the applicants' solicitors received from the clerk at 4 Essex Court, Temple, where Mr. MacCrindle is a door tenant, a fax to inform them that the award could now be taken up from those Chambers on payment of the balance of charges due. Shortly after receiving this letter, the applicants' solicitors collected the award from the Chambers against a cheque for the amount stated in the letter.

The present applications were issued and served on Dec. 10, 1990.

On Jan. 28, 1991 the applicants applied to me

for an order that all three applications should be heard together; this was not opposed by the respondents, subject to the proviso that the Court should not read any of the documents pertaining to the third application until the first two had been disposed of; this procedure was approved by the Court.

On Feb. 8, the applicants' solicitors forwarded provisional paginated bundles to the respondents; also on the same day they furnished a further affidavit, and there was controversy as to whether that affidavit was admissible. On Feb. 12, the respondents' solicitors forwarded three affidavits to the applicants' solicitors, under cover of a letter which for the first time foreshadowed (though without any detail or explanation) the preliminary point now under consideration.

The Arbitration Act, 1975

This Act, which was of course passed to give effect to the New York Convention, provides so far as relevant as follows:

> 3 Effect of Convention awards (1) A Convention award shall, subject to the following provisions of this Act, be enforceable —
>
> (a) in England and Wales, either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section 26 of the Arbitration Act 1950 . . .
>
> (2) Any Convention award which would be enforceable under this Act shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in the United Kingdom; and any reference in this Act to enforcing a Convention award shall be construed as including references to relying on such an award . . .
>
> 5. Refusal of enforcement (1) Enforcement of a Convention award shall not be refused except in the cases mentioned in this section . . .
>
> (f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.
>
> 7 Interpretation (1) In this Act —
>
> "arbitration agreement" means an agreement in writing (including an agreement contained in an exchange of letters or telegrams) to submit to arbitration present or future differences capable of settlement by arbitration;
>
> "Convention award" means an award made in pursuance of an arbitration agreement in the territory of a State, other than the United Kingdom, which is a party to the New York Convention.

Where was the award made?

Mr. Rokison relies on the actual words used by Mr. MacCrindle above his signature, and submits that they in themselves self-evidently demonstrate beyond doubt that it was made in Paris.

The only sensible construction of the interpretation clause in the 1975 Act was that an award was made where it was signed, and there was no warrant in the wording of the Act to support any looser test.

Mr. Rokison relied in support of his argument on the 5th Report of the Private International Law Committee dated October, 1961 (CMD 1515) in which the Convention was considered. This was a most distinguished committee with Mr. Justice Cross as chairman and Mr. Justice Wilberforce and Mr. Justice Megaw among its members (each as he then was). Paragraph 1 of the Convention is as follows:

> 1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

The Committee's commentary on this article stated inter alia as follows:

> The second sentence of this paragraph introduces a new factor. A number of Continental countries distinguish between "foreign" and "domestic" awards. Country A will not regard an award made in Country B as "foreign", if the parties are nationals of Country A: Country X will not regard an award made in Country Y as "foreign" if it is made in accordance with the procedural rules of Country X. Similarly Country X will not regard an award made *in its own territory* as "domestic" if it is made in accordance with the procedural rules of Country Y. The effect of the second sentence in this paragraph seems to be that Country X in the last example is bound to enforce "foreign" awards made in its own territory. This obligation appears to be imposed only on coun-