LLOYD'S LAW REPORTS

Editor:
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CASES JUDICIALLY CONSIDERED

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COURT OF APPEAL

June 14, 15, 1973

JUGOSLAVENSKA OCEANSKA PLOVIDBA v. CASTLE INVESTMENT CO. INC.

Before Lord DENNING, M.R.,
Lord Justice CAIRNS and
Lord Justice ROSKILL

Arbitration — Award — Enforcement — English award expressed in foreign currency — Whether enforceable in the same manner as judgment — Arbitration Act, 1950, sects. 26, 36 (1).

An English arbitration award cannot be enforced under the Arbitration Act, 1950, *sect.* 26 *if it is expressed in a foreign currency and not in sterling.*

The plaintiffs, a company incorporated in Yugoslavia, chartered the vessel *Kozara* to the defendants, a company incorporated in Panama, under a time charter-party on the form of the New York Produce Exchange. The hire was payable in New York in United States currency semi-monthly in advance. The United States Harter Act, 1893, and the Canadian Water Carriage of Goods Act, 1936, were incorporated. The charter-party had no connection with England except for an arbitration clause which stated that any dispute under it was to be referred to arbitration in London. A dispute arose and the arbitrators awarded U.S. $62,245.75. The defendants did not comply with the award and the plaintiffs applied to the Court by summons under the Arbitration Act, 1950, sect. 26 for leave to enforce the award in the same manner as a judgment.

———*Held,* by Master ELTON that leave would not be given.

On appeal by the plaintiffs:

———*Held,* by KERR, J., that

(1) the arbitrators had not misconducted themselves by expressing the award in U.S. dollars for that was the currency with which the charter-party had the closest connection (*see* p. 3, col. 1; p. 4, col. 2; p. 7, col. 2);

(2) however, an award made in England and expressed in a foreign currency was not enforceable in the same manner as a judgment even when that currency was the money of account or even where it was the one with which the transaction had its closest connection (*see* p. 3, col. 2; p. 5, col. 1);

(3) nor could such an award be enforced upon conversion of the amount awarded into sterling (*see* p. 5, col. 2; p. 7, col. 2).

Appeal dismissed.

On appeal by the plaintiffs:

———*Held,* by C.A. (Lord DENNING, M.R., CAIRNS and ROSKILL, L.JJ.), that (1) (i) the arbitrators did have jurisdiction to make an award in a foreign currency whenever that was the proper currency of the contract i.e., the currency with which the payment under contract had the closest and most real connection; (ii) accordingly, in this case, the arbitrators were entitled to make their award in United States dollars and their award was valid (*see* p. 10, col. 1; p. 14, col. 1);

———*Margulies Bros. Ltd. v. Dafnis Thomaides & Co. (U.K.) Ltd.*, [1958] 1 Lloyd's Rep. 250; [1958] 1 W.L.R. 398; *The Teh Hu,* [1970] P. 106; [1969] 2 Lloyd's Rep. 365, considered.

(2) that leave should be given under the Arbitration Act, 1950, sect. 26 to enforce the award in the same manner as a judgment provided that the award was first converted into sterling (*see* p. 11, col. 1; p. 15, col. 1).

Appeal allowed.

The following cases were referred to in the judgment:

Bankruptcy Notice, *In re*, [1907] 1 K.B. 478;

Beswick v. Beswick, (H.L.) [1968] A.C. 58;

London & Overseas Freighters Ltd. v. Timber Shipping Ltd., (H.L. [1972] A.C. 1; [1971] 1 Lloyd's Rep. 523;

Margulies Bros. Ltd. v. Dafnis Thomaides & Co. (U.K.) Ltd., [1958] 1 Lloyd's Rep. 250; [1958] 1 W.L.R. 398;

Teh Hu, (C.A.) [1970] P. 106; [1969] 2 Lloyd's Rep. 365;

United Railways of Havana and Regla Warehouses Ltd., *In re*, (H.L.) [1961] A.C. 1007;

Woodhouse A.C. Israel Cocoa v. Nigerian Produce Marketing Co., (C.A.) [1971] 2 Q.B. 23; [1971] 1 Lloyd's Rep. 25.

This was an appeal by the plaintiffs, Jugoslavenska Oceanska Plovidba, owners of the motor vessel *Kozara*, against the refusal by Mr. Justice Kerr, on appeal from a decision of Master Elton, to give them leave under sect. 26 of the Arbitration Act, 1950, to enforce an arbitration awarding U.S. $62,245.75 against the defendant charterers, Castle Investment Co. Inc. The charterers had not honoured the award.

The further facts and arguments are stated in the judgment of Mr. Justice Kerr.

Mr. K. S. Rokison, (instructed by Messrs. Ince & Co.) for the appellant plaintiffs; the respondent defendant was not represented and did not appear.

Mr. Justice Kerr's judgment, given on Jan. 29, 1973, was as follows:

JUDGMENT

Mr. Justice KERR: This is an appeal from Master Elton which raises an important question about the validity and effect of an arbitration award made in England which awards the payment of a sum of money expressed in foreign currency.

The claimants in the arbitration and plaintiffs in this Court are a company incorporated in Yugoslavia where they have their principal office and place of business. They were at all material times the owners of a vessel called *Kozara* which was under construction and subsequently delivered by a shipyard in Japan. The respondents and defendants in this Court are a company incorporated in Panama. There is no other evidence as to where they carry on business but it appears that this included the chartering of ships in the international freight market. Neither party has any connection with this country. By a time charter-party on the form of the New York Produce Exchange made in Freeport, Grand Bahamas, on Aug. 2, 1965, the plaintiffs chartered the *Kozara* to the defendants for the period of one year, 30 days more or less, from date of delivery at the shipyard in Japan. The defendants were entitled to trade the vessel on a world wide basis within Institute Warranty Limits with certain exclusions and the vessel was ultimately to be redelivered at the defendants' option in the United States, United Kingdom, Continent, Mediterranean or Japan. The rate of hire payable by the defendants was U.S. $2.465 per ton on the vessel's total deadweight carrying capacity with an increase (also expressed in dollars) in the event of the vessel being used continuously in a certain trade. The hire was payable in "New York in cash in United States currency" semi-monthly in advance. Together with the hire a monthly lump sum payment of $700 in United States currency was also to be paid on account of overtime for the officers and crew and the cleaning of holds. The charter included other provisions for the payment of victualling charges for passengers, pilots and other persons, all equally expressed in United States dollars. The printed form of charter-party contained a provision for arbitration in New York, but this was crossed out and London substituted. Claims for general average was to be adjusted in London or New York at owners' option. The United States Harter Act, 1893, and the Canadian Water Carriage of Goods Act, 1936, were incorporated. It will therefore be seen that, leaving aside the various options as to redelivery and adjustment of general average, the charter-party had no connection with this country apart from the London arbitration clause, and that both the money of account and the money of payment were exclusively expressed in United States dollars.

On redelivery of the vessel a dispute arose between the parties. The plaintiffs contended that the vessel had been redelivered to them too early, that some of the hire remained unpaid, and that the hire which had been paid had been calculated on the wrong deadweight capacity. They accordingly claimed a total sum of U.S. $110,737.26 together with interest. The defendants disputed these claims. The matter was referred to arbitration in London, the owners appointing Mr. John Chesterman and the charterers Mr. Cedric Barclay as their respective arbitrators. These gentlemen are well-known arbitrators and members of the London Maritime Arbitrators Association. On May 14, 1969, the arbitrators made a joint award of which the material parts for present purposes are as follows:

> We hold that the proper amount due to the owners is U.S. $53,910.75. . . .
> WE AWARD AND ADJUDGE:
> That the Charterers shall forthwith pay to the Owners the sum of U.S. $53,910.75, together with interest up to the date of this Award, which we fix at U.S. $8,335.00 making a total amount of U.S. $62,245.75. . . .

The arbitrators further awarded the costs of the arbitration to the owners and the fees and costs of their award in the sum of £420 sterling.

The defendants did not comply with the award and in November, 1971, the plaintiffs issued and obtained leave to serve on the defendants in Panama the summons which is now before me. This asks for an order that the plaintiffs be at liberty to enforce the award

> . . . in the same manner as a judgment or order to the same effect pursuant to Section 26 of the Arbitration Act 1950 . . .

The defendants did not appear to this summons. It was heard and dismissed by Master Elton on June 16, 1972. The plaintiffs are now appealing against this decision, the matter having been transferred to the Commercial Court. The notice of appeal was duly served on the defendants in Panama but they have again not appeared and have taken no part in the proceedings. I have therefore only heard argument on the part of the plaintiffs, but their Counsel, Mr. Rokison, has endeavoured fully and fairly to place before me the whole of the relevant material.

The issue directly raised by this appeal is whether or not this award may be enforced in the same manner as a judgment under sect. 26 of the Arbitration Act, notwithstanding the fact that it is expressed in United States dollars. But the first issue is logically whether, quite apart from any questions of enforcement, the arbitrators had power to make an award in this form. I do not think it matters for present purposes whether, if the arbitrators had no such power, the correct analysis is that the award is invalid because it contains an error of law on its face, or because the arbitrators exceeded their jurisdiction, or because they technically misconducted themselves by not expressing the award in sterling. In all such cases the Court has power, if it thinks fit, to remit the award to the arbitrators with a direction to express it in sterling. Thus, in *Margulies Brothers Ltd. v. Dafnis Thomaides & Co. (UK) Ltd.*, [1958] 1 Lloyd's Rep. 250; [1958] 1 W.L.R. 398, Mr. Justice Diplock (as he then was) had before him an award which purported to award the payment of a sterling sum of money but which was so expressed that it was impossible to ascertain on the face of the award what that sum was, though the parties were in fact agreed upon the proper method of calculation and on the result. Mr. Justice Diplock remitted the award to the arbitrators with a direction to amend it so as to award a specific sum and refused an order for leave to enforce the award in the same manner as a judgment. He made the order for remission on two grounds. First, he held that he had power to do so because the award was uncertain without recourse to extrinsic evidence and therefore bad on its face. Secondly, he held that he also had power to do so because it is an implied term of an arbitration agreement that an award for the payment of a sum of money should be in a form capable of being enforced in the same manner as a judgment, that this award could not be so enforced, and that the arbitration tribunal was therefore guilty of technical misconduct in failing to comply with this term. This decision was followed by Mr. Justice Donaldson in this Court in *Cremer v. Samanta and Samanta*, [1968] 1 Lloyd's Rep. 156, in similar circumstances.

Neither case raised any question about the currency in which an award had to be expressed, and the transactions in question were only concerned with sterling. These cases may therefore not be directly relevant to the present problem, but I respectfully agree with the principles applied in them and follow them in so far as they may be material for present purposes. However, no question of remission is asked for. The period of six weeks from the making and publication of an award, which is prescribed by R.S.C., Order 73, r. 5 (1) for an application for remission, has long since expired, and the plaintiffs have not applied for any extension of time under R.S.C., Order 73, r. 5. They are treating the present summons as a test case for determining the effect and enforceability of an award expressed in foreign currency, at any rate where that currency is that of the money of account and of the money of payment of the contract under which the dispute arises and where the claim is also made in that currency. For this reason they are also not bringing an action on the award, which would no doubt be a sterile exercise in the circumstances. They have indicated that in the event of their being unsuccessful on this appeal their intention is to take the matter further. The issue is one of considerable importance in relation to the numerous international arbitrations held in the City of London in the ordinary course of its business.

In the 18th edition of Russell on Arbitration (1970), the following appears at p. 281:

Award must be within arbitrator's power. In the absence of agreement as to payment in foreign currency or in accordance with a gold clause, an arbitrator has no power to make an award for payment of money in any currency but £ sterling.

The only authority cited for this proposition is the decision of the majority of the Court of Appeal in *Teh Hu* (*Owners*) *v. Nippon Salvage Co. Ltd.* (*The Teh Hu*, [1970] P. 106; [1969] 2 Lloyd's Rep. 365. There had been no discussion of this question in any previous edition of Russell nor is there any reference to this point in the title on arbitration in Halsbury's Laws, including the supplements. Neither Counsel nor I have been able to find any authority bearing on this question other than *The Teh Hu*.

Since this matter only arose indirectly in *The Teh Hu* I propose to defer a detailed discussion of this case until later and first to consider the question in principle.

It is the settled law of this country that our Courts can only give judgments for sums of money expressed in sterling. This is not so in all other countries: see per Lord Denning, M.R., in *The Teh Hu* at pp. 124, 125 and pp. 369, 370, and the reference to Dr. F. A. Mann's work on The Legal Aspect of Money (see p. 351 of the 3rd edition). The principle does not rest on any statutory provision but on an established rule which was last authoritatively restated by the House of Lords in *Re United Railways of Havana v. Regla Warehouses Ltd.*, [1961] A.C. 1007, at pp. 1043, 1052 and 1069. But this rule does not appear to me to be directly relevant to arbitration awards except in so far as it may be relevant when one comes to consider the enforceability of an award in the same manner as a judgment. For instance, although such an agreement could not validly be made in relation to a judgment, I can see no reason whatever why parties to an English arbitration should not be at liberty to agree that the award should be expressed in a foreign currency, and it is common knowledge among lawyers and businessmen concerned with international arbitrations in this country that arbitrators are frequently asked to do so by both parties and comply with such requests. As has often been pointed out, much of our law dealing with currency problems and the predominant position of sterling in our law stems from times when sterling was universally respected as one of the most stable of all currencies. Unfortunately this is no longer so, at any rate at present. Businessmen are nowadays very often at pains to avoid having their obligations measured in terms of sterling. This was recognized in *The Teh Hu* both by Lord Denning, M.R., and Lord Justice Salmon (as he then was) although they otherwise differed in their views. It would be a considerable benefit to this country as a centre for international arbitrations if in such cases arbitrators were able, without question, to make their awards in the currency with which the transaction has its closest connection. If this is not permitted by our law, then it is likely to prove an increasing detriment in the future. An award expressed in the relevant currency would then be enforceable abroad without having to go through sterling. Admittedly, parties can, and sometimes do, avoid this difficulty by special agreement. But once a dispute has arisen and been referred to arbitration it is often difficult to achieve agreement about anything. Further, one of the parties may often wish to leave it open to him to enforce the award in this country. But in the present uncertain state of the law he would in that event not be advised to agree to the award being expressed in the relevant currency, which he would otherwise be likely to prefer, for fear of being compelled to bring an action on the award as a means of enforcing it here.

I think that logically the first question is whether the arbitrators can be said to have misconducted themselves by expressing the award in United States dollars, and as to the applicability or otherwise of the principles stated in the *Margulies* and *Cremer* cases to which I have referred.

Looking at the question of misconduct generally without reference to question of enforcement, it is in my view impossible to suggest that any question of misconduct arises. It would undoubtedly be misconduct for an arbitrator to make an award in a foreign currency with which the transaction and the parties have no sufficient connection. But this does not arise here. If in August, 1965, when the charter-party was concluded, the parties had been asked in what currency they would expect and desire an award to be expressed if an arbitration under the charter should ensue, then I have no doubt that they would both have said something to the effect that they expected and hoped that any award would be expressed in dollars unless there should unfortunately be some legal reason rendering this impossible. Sterling had then already been once devalued since the war and it is common knowledge that dollars were regarded as a much more stable and desirable currency in international trade. This is no doubt why the parties expressed their bargain throughout in terms of United States dollars