Neutral Citation Number: [2021] EWHC 3474 (Comm)

Case No: CL-2020-000842

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

IN THE MATTER OF THE ARBITRATION ACT 1996
IN THE MATTER OF A GAFTA ARBITRATION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2021

Before :

Sir William Blair
Sitting As A Judge Of The High Court

- -

Between :

LLC AGRONEFTEPRODUKT	**Claimant (Respondent sellers in the arbitration)**
- and -	
AMEROPA AG	**Defendant (Claimant buyers in the arbitration)**

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- -

Lydia Myers (instructed by **Jackson Parton)**) for the **Claimant**
Chris Smith QC (instructed by **AACNI (UK) LTD**) for the **Defendant**

Hearing dates: 8 and 9 December 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR WILLIAM BLAIR SITTING AS A JUDGE OF THE HIGH COURT

"Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 21 December 2021 at 10:30."

Sir William Blair :

1. This is a challenge by the Claimant on grounds of lack of jurisdiction to an Award made by a GAFTA Board of Appeal on 23 November 2020. The Claimant is LLC Agronefteprodukt ("Sellers"), a Russian company which was the seller of the goods concerned and the respondent in the arbitration. The Defendant, Ameropa AG ("Buyers"), is a Swiss company which was the buyer of the goods and the claimant in the arbitration. The challenge extends on the same jurisdictional grounds to the Award of the GAFTA First Tier Tribunal made on 13 March 2020. It is brought under s. 67 Arbitration Act 1996. The goods in question were Russian Milling Wheat.

2. The basis of the challenge is that the Notice of Arbitration purported to commence a single arbitration whereas there were two contracts and a Notice of Arbitration was required to be given under each of them. It is pleaded as follows: "Neither the First Tier Tribunal, nor the Board of Appeal, had jurisdiction because the Defendant failed to commence the … arbitration in a valid and effective manner, instead illegitimately purporting to commence a single arbitration in respect of 2 claims under 2 separate and independent contracts, each containing a separate arbitration agreement."

3. The Respondent's case is that the Notice of Arbitration was on its face intended to commence two separate arbitrations under each contract, and hence was valid.

4. The evidence at the hearing consisted of agreed documents and witness statements from both sides. The witness statements were not agreed, but sensibly the parties agreed to dispense with cross-examination. It is not in dispute that challenges under s. 67 Arbitration Act 1996 take the form of a rehearing and not a review, and that the parties are permitted to adduce arguments which were not advanced before the arbitrators (*GPF GP S.à.r.l. v Republic of Poland* [2018] Bus L.R. 1203 at [70], Bryan J). In this case both the First Tier Tribunal and the Board of Appeal decided that they did have jurisdiction.

5. The Sellers seek an order that both the Award and the determination by the Board of Appeal are of no effect because neither the First Tier Tribunal nor the Board of Appeal had substantive jurisdiction.

The facts

6. As the Awards show, there was a considerable factual dispute before the arbitrators as to liability and damages, but this challenge relates solely to the facts of the jurisdictional issue where the factual disputes are within a much narrower compass.

7. By a contract of sale dated 21 June 2018, the Sellers agreed to sell, and the Buyers agreed to buy, 40,000MT of Russian Milling Wheat on FOB Novorossiysk terms. By a separate contract of sale dated 10 July 2018, the Sellers agreed to sell, and the Buyers agreed to buy, a further 25,000MT of Russian Milling Wheat on the same terms.

8. The contracts each contained an arbitration clause referring any dispute arising out of or under the contract to arbitration in London in accordance with the GAFTA Rules No.125:

> "Arbitration Clause

> Any dispute arising out or under this contract shall be settled by arbitration in accordance with the Arbitration Rules no.125 of the Grain and Feed Trade Association, in the edition current at the date of this contract, such rules forming part of this contract and of which both parties hereto shall be deemed to be cognizant. Arbitration to take place in London/England."

9. Disputes arose between the parties under each of the contracts and the Buyers sent a Notice of Arbitration to the Sellers on 30 August 2018 which stated as follows:

> "Dear Sirs,
>
> Subject: Contract 180833 dated 21st June 2018 and Contract 181013 dated 10th July 2018.
>
> We have been appointed by Ameropa AG through its branch office Ameropa SA in Lausanne.
>
> Pursuant to the terms of the "Arbitration Clause" of the above-referenced contracts, we hereby declare arbitration in London in accordance with Gafta Arbitration Rules No. 125.
>
> We appoint Mr Ben Leach (copied) as our client's arbitrator for the disputes related to the two Contracts.
>
> Not later than the 9th consecutive day after today, you shall appoint a second arbitrator and serve a notice of the name of the arbitrator so appointed.
>
> On a separate note, we wonder if, for efficiency and economy, you would accept the two contracts/disputes be adjudicated under a single arbitration and by the same Tribunal."

10. The Sellers did not respond to the Notice of Arbitration. On 11 September 2018, the Buyers applied to GAFTA for the appointment of an arbitrator on behalf of the Sellers, which GAFTA did on 14 September 2018.

11. On 21 September 2018, the Sellers emailed the Buyers referring to the dispute between the parties and saying that "*we are open for discussion about variants of settlements to avoid arbitrations*". The parties thereupon entered into negotiations, and on 16 November 2018 concluded a "*Washout Agreement*" which like the contracts of sale was subject to English law and GAFTA arbitration. This referred to the contracts and stated that:

> "WHEREAS:
>
> A. Sellers and Buyers concluded two contracts, one no. VCH-180833 dated 21 June 2018 for 40,000mt of Russian Milling Wheat to be delivered FOB Novorossiysk at USD 198 per mt between 25th and 31st August 2018 and the other no. VCH-181013 dated 10 July 2018 for 25,000mt of Russian Milling

> Wheat to be delivered FOB Novorossiysk at USD 213 per mt between 1st and 15th October 2018 ("the Contracts").
>
> B. Sellers now desire to settle the Claim in the following terms.
>
> IT IS HEREBY AGREED AS FOLLOWS:
>
> 1. Buyers hereby agree to reduce the amount of the Claim to USD 1,100,000 ("the Settlement Sum") for the sake of this Agreement and on the condition that this sum is strictly and punctually paid as agreed below.
>
> *[dates of payments]*
>
> 3. Upon Receipt of the Settlement Sum within the periods stated above, Buyers will discontinue and withdraw the Claim, with no costs for the Sellers.
>
> 4. In the event that the Settlement Sum is not fully paid within the agreed periods, Buyers will be entitled to terminate this Agreement and to continue the Claim in arbitration for the full value of their loss…"

12. The Sellers did not make payment under the Washout Agreement, and on 20 February 2019 the Buyers' lawyer wrote to the Sellers stating that the Buyers had terminated the Washout Agreement and would "*continue the arbitration to the full value of our client's loss*".

13. On 24 May 2019, the Sellers wrote to GAFTA objecting that the Tribunal had no jurisdiction over the claim on the grounds that the Buyers had failed to commence arbitration under each contract properly, instead wrongfully purporting to commence a single consolidated arbitration in respect of the disputes under the two separate contracts without the Sellers' consent to such consolidation. By s. 31(1) Arbitration Act 1996, an "*objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction*". It is not in dispute that the Sellers' objection to jurisdiction was raised before it contested the merits.

14. The First Tier GAFTA Tribunal rejected the Sellers' objection on the grounds that the right to object had been waived by their silence as regards the Buyers' suggestion that the two contracts/disputes be adjudicated under a single arbitration and by the same Tribunal. The Board of Appeal upheld the decision based on the terms of the Washout Agreement, further holding that by the time of the objection the Buyers appointed arbitrators and GAFTA had relied on the Sellers' acceptance in the Washout Agreement that there was a single arbitration and the Sellers had waived the right to object.

The parties' contentions

15. In short, the Sellers maintain that the Notice of Arbitration is ineffective. The reason for this contention is that the Notice illegitimately purported to commence a single

arbitration in respect of two claims. Consolidation was of course possible, and indeed likely since the contracts were for the same product on the same terms and close together in time. It is not suggested that there is anything inherent in the facts that made consolidation unsuitable, but it is common ground that it required the consent of both parties (s1.1 and s7.1 GAFTA Arbitration Rules No.125). Such consent has never been given (though the Sellers did fully participate in the proceedings). It is not suggested that there is any substantive defect in the Notice. Issues of rectification and estoppel also arise between the parties, each maintaining that the other is estopped from contesting the others' case. The parties' contentions and the court's conclusions are set out below.

Interpretation of the Notice of Arbitration

16. The starting point is s. 14(4) Arbitration Act 1996 which provides as follows:

> "Where the arbitrator or arbitrators are to be appointed by the parties, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties notice in writing requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of that matter."

17. As can be seen, other than writing, there are no statutory prescribed formalities in respect of a notice, and the courts have taken a commercial approach to their interpretation. This is shown in a number of authorities including *Seabridge Shipping AB v A. C. Orssleff's Efef's A/S* [1999] 2 Lloyd's Rep 685 p.690, Thomas J, and *Atlanska Plovidba v Consignaciones Asturianas SA* [2004] 2 Lloyd's Rep 109 at [17], Moore-Bick J. Applying these authorities, in *The Biz* [2011] 1 Lloyd's Rep. 688 at [11], Hamblen J set out the principles as follows:

> "(1) When asking whether the requirements of section 14 have been complied with, one should interpret section 14 'broadly and flexibly' avoiding a strict or technical approach, especially when the notice has been drafted by non-lawyers.
>
> (2) The requirements of section 14 will generally be satisfied if the notice sufficiently identifies the dispute to which it relates and makes clear that the person giving notice is intending to refer the dispute to arbitration; and
>
> (3) In considering whether these requirements are met, one should concentrate on the substance rather than the form of the notice and consider how a reasonable person in the position of the recipient would have understood the notice given its terms and the context in which it was written."

In *A v B* [2018] Bus L.R. 778 at [22], Phillips J adopted this approach in full.

18. In support of their case that objectively interpreted the Buyers' Notice of 30 August 2018 evidenced an intention to commence a single arbitration, the Sellers rely on the fact that:

i) It makes no reference to the commencement of more than one arbitration;

ii) It refers to 'the arbitration clause' rather than 'the arbitration clauses';

iii) It refers to 'an arbitrator' rather than 'the arbitrators';

iv) It refers to 'arbitration in London' rather than 'arbitrations in London';

v) It makes continuous references to a single arbitration being commenced by the Buyers and only the final paragraph makes any reference to consolidation.

19. However, in my view, these fair linguistic points, which are in effect fastening on the fact that the singular is used rather than the plural, are all relatively minor. Concentrating on the substance rather than the form of the Notice, the more important point comes from the final paragraph – and it supports the Buyers not the Sellers. This paragraph makes a request of the Sellers: whether "*for efficiency and economy, [Sellers] would accept the two contracts/disputes be adjudicated together under a single arbitration and by the same Tribunal*". As was submitted by the Buyers, this request makes no sense unless the Notice is commencing two arbitrations, and indeed is the premise on which the request is made.

20. The Sellers seek to rely on the reasoning in *A v B*, which concerned an arbitration under the LCIA Rules – these rules, it was pointed out, treat a request as giving rise to a single arbitration, including in relation to the payment of fees [19(i)]. It is correct, as was said on behalf of the Sellers, that there is a similarity with the present case in that the GAFTA Rules also provide for fees in relation to each arbitration commenced. Following the Notice, only one fee was paid by the Buyers. But whether or not the arbitration was subsequently treated as a single arbitration does not affect the jurisdiction question which depends on the interpretation of the Notice. There is also (as was pointed out on behalf of the Buyers) a difference between the applicable arbitral rules, since the GAFTA Rules reflect the language of s. 14(4) of the 1996 Act, while the LCIA Rules contain further provision in this regard.

21. However, the most important difference between *A v B* and the present case lies in the difference in the terms of the Notice. In *A v B*, there was no equivalent of the final paragraph. The terms are described at [22] and made it "*clear that the intention was to commence a single arbitration and no reasonable reader would conclude otherwise*". In my view, the converse is true in the present case. As noted, *A v B* emphasises that the applicable approach is as set out in *The Biz*, and applying that approach, I find that the Notice of 30 August 2018 validly commenced separate arbitration proceedings. My reasoning is slightly different from that of the First Tier GAFTA Tribunal and the Board of Appeal, but the conclusion is the same.

Rectification

22. The Sellers' alternative case is that if the objective interpretation of the Notice is such that it commenced two arbitrations, which I have held it is, the Buyers' subjective intention in writing the Notice was clear from the correspondence and pleadings exchanged in the course of the arbitral proceedings, their position being that there was a single dispute and they intended to commence a single arbitration by way of a single Notice. In these circumstances, it is submitted that the Notice should be rectified to

reflect that intention. Rectification by the court is available, it is submitted, where any written instrument does not correctly record the true intentions of the person or persons making it and it is not confined to contracts. Reference is made to *Lee v Lee* [2018] EWHC 149 (Ch) at [38].

23. It is accepted on behalf of the Buyers that their case on this challenge is different from the case advanced in the GAFTA proceedings, and reliance is placed on *GPF GP S.à.r.l. v The Republic of Poland* (see above) to show that this is permissible. They submit however that references in some of their submissions to GAFTA as to there being only "*one dispute*" between the parties was on the basis that the contracts had effectively been merged as a result of the Washout Agreement.

24. There is a prior question, in that the Buyers submit that the doctrine of rectification does not apply to a notice of arbitration. They submit that the authorities show that a document must be transactional in nature to qualify for rectification by the court, whereas a notice of arbitration is not transactional in this sense. No case was cited in which a notice of arbitration has been rectified. It is not however necessary to decide whether such a document can in principle be subject to rectification because in my view the requisites for rectification do not exist in the present case.

25. In English law, a court may rectify a document broadly on two grounds, (i) common mistake, and (ii) unilateral mistake. It was made clear in argument on behalf of the Sellers that it is not suggested in the present case that rectification is available on the basis of common mistake. The reason is that the Sellers' case is that the Notice of Arbitration was and was intended to be in respect of a single arbitration, whereas the Buyers' case is that it was and was intended to be in respect of an arbitration under each contract. There was no mistake that can be said to be common between the parties.

26. The Sellers rely on what they say was a unilateral mistake by the Buyers in the drafting, so that the final paragraph of the Notice should be rectified by the court so as (in effect) to reverse the reference to two disputes and substitute a reference to one dispute. This is a paradoxical and, in my view, incorrect approach. In the case of unilateral mistake, rectification is permissible where one party makes a mistake in a document, and the other party knows of the mistake but allows it to stand in circumstances that make it inequitable for it to rely on the document as mistakenly drawn. In these circumstances, the court has power to rectify the document so as to put right the mistake. These are not the circumstances of the present case. The party that gave the Notice denies that there was any mistake. Further, it would seem unlikely that a court would rectify a notice of arbitration (assuming that there is power to do so) on the application of the other party to the arbitration agreement if the effect was to decide that an arbitral tribunal lacked jurisdiction following the giving of an award. There is another reason why rectification is not available in this case. Rectification is an equitable remedy, and it would plainly be inequitable to rectify this Notice and decide that the tribunal had no jurisdiction when, subsequent to the Notice, the parties signed the Washout Agreement by which the Sellers agreed that the Buyers were to be entitled to continue with the arbitration should the settlement sum not be paid.

Whether the Buyers are estopped

27. In the further alternative, the Sellers submit that the Buyers are estopped from contending that the Notice commenced two arbitrations because the Sellers made various representations giving rise to a common assumption during the arbitral proceedings that the Notice purported to commence a single arbitration. Both estoppel by representation, and estoppel by convention are relied on. I deal with estoppel by convention below.

28. The Sellers submit that the Buyers had ample opportunity to accept that the Notice was invalid and issue another notice. It would be unconscionable, some two and a half years later and after the expiration of the time bar applicable to the Buyers' claims, to allow the Buyers to resile from the position taken during the arbitral proceedings.

29. In substance, the Sellers' case in this respect is based on the assertion that the Buyers' presented one argument in the GAFTA proceedings and are presenting a different argument in these proceedings challenging jurisdiction. There certainly are differences, but not perhaps to the extent contended for by the Sellers. The ultimate contention has always been the same, namely that the GAFTA tribunals had jurisdiction.

30. There is however a legal objection to the Sellers' contentions. In *GPF GP S.à.r.l. v The Republic of Poland* (see above) at [72], it was stated that, " *... it is difficult to see how a waiver could arise in circumstances where it is well established that there can be a re-hearing under section 67, a fact parties are taken to know), and in the context of no restriction being set out in section 67 itself restricting what arguments may be re-run, no question of any loss of a right to advance particular arguments on a re-hearing under section 67 can arise.*" Although that passage refers to waiver, the same considerations apply in my view to estoppel.

31. Further, the Sellers have not made out a case that they relied on such representations to their detriment by incurring wasted costs. This is not a realistic contention in circumstances in which the parties agreed in the Washout Agreement that in the event that the settlement sum was not paid, which it was not, the Buyers would be entitled to terminate the Agreement and to continue the claim in arbitration for the full value of their loss. It is obvious that the Buyers would rely on this agreement, and contest any supposed lack of jurisdiction, whatever the precise arguments deployed. There have been no wasted costs.

Whether the Sellers are estopped

32. Estoppel also arises in the context of an alternative contention by the Buyers, who rely on the Washout Agreement to found an estoppel by convention. The applicable principles were recently confirmed by the Supreme Court in *Tinkler v Commissioners for Her Majesty's Revenue and Custom* [2021] UKSC 39. There must be a common assumption expressly shared by the parties, and something must be shown to have crossed the line sufficient to manifest an assent to the assumption. The party alleging the estoppel must show that it has relied on the assumption to its detriment in connection with some subsequent mutual dealing between the parties.

33. The Buyers' case is that at the time of the Washout Agreement, the Sellers had not suggested that the Notice of Arbitration was invalid, and the parties proceeded on the basis that if the settlement sum was not paid, the arbitration which by then had been

started could be resumed. That was the parties' common understanding, on which the Buyers relied by entering into the agreement.

34. The Sellers' response is that they did not accept, ratify or validate the commencement of a single arbitration under the two contracts by way of the Washout Agreement. That Agreement merely suspended the invalidly commenced arbitration and was unrelated to the effectiveness of the Notice. The Sellers were not obliged to respond to the Notice of Arbitration within a certain time limit, their sole obligation in relation to challenging the jurisdiction of the First Tier Tribunal being to raise the objection before taking their first step to contest the merits of the Buyers' claim, which they did.

35. Again, the Sellers' position is unrealistic. The GAFTA tribunals, composed of individuals with market expertise, place considerable weight on the Washout Agreement for perfectly understandable reasons. The intention of the Washout Agreement was clearly to enable the Buyers to continue with the arbitration if the Sellers failed to pay the agreed settlement sums. It was not suggested by the Sellers at the time that the arbitration had not been validly commenced. On the contrary, the premise of the Agreement was that there were valid arbitration proceedings on foot that the Buyers were entitled to continue to pursue in the event of non-payment.

36. I agree with the Buyers that in these circumstances there was an implicit common understanding between the parties at the time the Washout Agreement was concluded that the Notice was valid and/or that the arbitration had been properly commenced upon which the Buyers relied by entering into the Washout Agreement. As was pointed out on behalf of the Buyers, had the Sellers suggested otherwise at the time, the Buyers would never have agreed. Having entered into the Washout Agreement without reservation, the Sellers cannot now resile from that common understanding. I would also find for the Buyers on this ground. So far as the Sellers raised estoppel by convention in support of their own case, I reject it.

Conclusion

37. For the above reasons, the Sellers' jurisdiction challenge under s. 67 Arbitration Act 1996 fails. The parties should draw up the order that follows from this judgment. Any consequential matters that the parties wish to raise can be dealt with in writing after this judgment has been handed down. The court is grateful to both parties for their valuable assistance in formulating the issues for decision.