

CREMER (Peter) & M B H

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Finlay C.J.
Henchy J.
Griffin J.

THE SUPREME COURT
(89/95)

IN THE MATTER OF THE ARBITRATION
ACTS 1954 TO 1980

BETWEEN

PETER CREMER GMBH AND COMPANY

Applicants/Respondents

and

CO-OPERATIVE MOLASSES TRADERS LIMITED

Respondents/Appellants

JUDGMENT delivered on the 11th day of July 1985 by
FINLAY C.J. *Non Liss.*

This is an appeal brought by the Respondents in the High Court against an Order made by Costello J. on the 25th February 1985 declaring that an award dated the 22nd June 1984 made by an arbitral tribunal in London set up in accordance with the rules of the Grain and Feed Trade Association (GAFTA) ought to be enforced and ordering that the Applicant in pursuance of that award do recover from the Respondent the sum of 165,000 US dollars for principal; 4,690 US dollars for interest to the date of the award; and £785 Sterling for fees and expenses of the arbitration and

£50 Sterling for arbitrator's fee, together with interest of 11 per centum per annum on the principal sum of 165,000 US dollars from the 23rd June 1984 to the date of payment thereof.

Facts

Peter Cremer GMBH and Company (Cremer) is a Company incorporated in accordance with the laws of the Federal Republic of Germany having its registered offices in Hamburg. Co-Operative Molasses Traders Limited (Co-Operative Molasses) is a co-operative with limited liability under the Industrial and Provident Societies Act of 1893 having its registered offices in Dublin.

In August 1983 Co-Operative Molasses ordered from Cremer a quantity of molasses consisting of about 6,000 to 7,000 metric tons to be shipped to Dublin. The contract for the supply of this material was arrived at by a series of telexes, letters and telephone conversations. The goods ordered were duly delivered and paid for and the contract completely performed.

It is not disputed that in the negotiations for that contract Cremer originally suggested as one of the terms of the contract that arbitration should take place "if any, amicably in Hamburg". Co-Operative Molasses sought an amendment of that term, seeking arbitration "if any, amicably in London". This was accepted by Cremer who finally provided that arbitration should be "if any, GAFTA London". It was agreed this meant in accordance with the rules and regulations of GAFTA in London. Cremer was a member of GAFTA; Co-Operative Molasses was not, but had previously, on the evidence, agreed to that clause in transactions with a member of GAFTA.

On the 21st October 1983 negotiations commenced between the parties for a further delivery of molasses. These again were conducted by telex, correspondence and telephone conversation. The amount of the delivery was to be 10,000 tonnes; the date of delivery February/March 1984 and special arrangements with regard to price and delivery were agreed. In the first telex dealing with this transaction,

dated 21st October 1983, sent by Cremer to Co-Operative Molasses, a sale is confirmed of 10,000 tonnes of a specified quality, at a specified price, c.i.f. Dublin, with an arrival date and with the clause "All other conditions as per our Contract dated 23rd August 1983". In a subsequent letter written by Cremer to Co-Operative Molasses, dated the 26th October 1983, the Contract is set out in detail and contains the clause "Arbitration, if any, amicably in Hamburg." A request was made that the duplicate of that Contract should be signed and returned but this was not complied with. On the 15th November 1983 Co-Operative Molasses requested an alteration of the original stipulated arrival period from the second half of February/first half of March to arrival in March/April. This was agreed to by Cremer. In January 1984 Co-Operative Molasses sought to vary the amount of the delivery and also the price. This was replied to by a telex from Cremer to Molasses, pointing out that they had a valid contract for 10,000 tonnes for delivery in March/April and calling upon Co-Operative

Molasses to honour that contract. A further exchange of telexes then took place with Co-Operative Molasses finally, on the 24th January 1984 repudiating the existence of a contract.

Cremer then submitted the dispute which had thus arisen to the arbitration of GAFTA in London. Co-Operative Molasses refused to recognise the authority of that arbitration and did not appear at it or make representations to it.

On the 22nd June 1984 the arbitrators appointed by GAFTA issued an award making the following findings:

1. That a contract existed between the parties.
2. That the contract included a clause providing for arbitration by GAFTA in London.
3. That Co-Operative Molasses were in breach of the contract.
4. That the sums directed to be paid by Co-Operative Molasses to Cremer by the Order of the High Court already referred to were due as damages for breach of contract.

Grounds of the Appeal

It was submitted on behalf of the Appellants that in law it was not open to the arbitral authority to reach a decision that a contract existed between the parties and as a result thereof to assume jurisdiction and that by reason of that fact the Appellants were entitled to resist enforcement of the award either under Section 9(2)(d) or under Section 9(2)(f) of the Arbitration Act 1980. In the alternative, it was contended that if, contrary to the submission that no contract existed between the parties a contract did exist it provided for arbitration amicably in Hamburg and the Appellants were accordingly entitled to resist enforcement of this award pursuant to the provisions of 9(2)(e) of the Act of 1980.

The relevant statutory Provisions

Part III of the Act of 1980 deals with the enforcement of New York Convention awards. The New York Convention is the convention on the recognition and enforcement of foreign arbitral awards done at New York on the 10th June 1958 and is set out in the First Schedule to the Act. Both

the State and the United Kingdom is a party to the New York Convention.

By virtue of Section 6(1) of the Act of 1980 "award" means an award 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. By Section 2 of the Act of 1980 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.

By Section 7(1) of the Act an award shall, subject to the subsequent provisions of the Act, be enforceable either by action or in the same manner as the award of an arbitrator is enforceable by virtue of Section 41 of the Arbitration Act 1954.

Section 9(1) of the Act provides as follows:

"Enforcement of an award shall not be refused otherwise than pursuant to the subsequent provisions of this Section."

Subsection (2) reads:

"Enforcement of an award may be refused if the person

against whom it is invoked proves that:

(d) subject to subsection (4) of this Section the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration, or

(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 where the arbitration took place, or

(f) 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 the award was made."

Section 9(4) provides that an award which contains decisions on matters not submitted to arbitration may be enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from any decisions on matters not so submitted. "

Section 9(5) provides

"In any case where an application for the setting aside or suspension of an award has been made to such a competent authority as is mentioned in subsection (2)(f) of this Section, a court before which enforcement of the award is sought may, if it

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thinks fit, adjourn the proceedings and may, on the application of the party seeking to enforce the award order the other party to give such security as the court may think fit."

The Law

The first submission made on behalf of the Appellants is that there was no binding contract between the parties and that, therefore, there could not be a binding agreement to submit disputes to arbitration and that, accordingly, the assumption of jurisdiction by the arbitrators of GAFTA in London was invalid.

I am not satisfied that this issue can properly be made the subject matter of a defence pursuant to either Section 9(2)(d) or Section 9(2)(f) of the Act of 1980. Section 9(2)(d) clearly, in my view, refers to a situation where there is an undoubted submission to arbitration and where it can be established by the terms of such submission that the award deals with a difference not contemplated by or falling within them or that it contains decisions on

matters beyond the scope of that submission. If, as is contended by the Appellants in this case, there was no binding agreement containing an arbitration clause then, by definition, there could be no submission to arbitration and in the absence of a submission to arbitration there could be no issue as to whether an award dealt with differences not contemplated or falling within the terms of a submission or went beyond the scope of the submission.

The terms of Section 9(2)(f) are, in my view, also wholly inappropriate to the issue raised by the Appellants. The reference at the commencement of that subclause to an award having not yet become binding is quite inappropriate to describe a situation in which an award is a nullity and can never become binding.

The Appellants did not seek to set aside or suspend in England the award which was made by GAFTA in London. Having regard to the terms of Section 9(5) of the Act of 190 it is quite clear that subclause 9(2)(f) could not be

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interpreted as including a situation in which the party against whom an award is sought to be enforced raised grounds on which he could challenge the validity of the award in the country in which it was made but had not sought to do so.

The issue raised by the Appellants in this case as to whether a binding contract existed between the parties and, therefore, there was an existing agreement to arbitration, is an issue which falls to be determined in an application under Part III of the Act of 1980 to enforce an award. It falls to be determined, however, in my view, quite clearly by reason of the definition of "award" contained in Section 6(1) of that Act, coupled with the definition of an arbitration agreement contained in Section 2. If a court before whom an application is made to enforce an award pursuant to Part III of the Act of 1980 is to enter upon consideration of that application it must first be satisfied that the document or decision sought to be enforced is, within the meaning of that Act, an award made in pursuance

of an arbitration agreement within the meaning of that Act.

In determining that issue the Court can not rely, of course, on any decision reached by the arbitral authority that an arbitration agreement had been reached, nor is it, however, in my view, in any way debarred from reaching a decision on that issue by reason of the existence in the award of a decision by the arbitral authority that an arbitration agreement exists.

Having regard to this view, the first issue which falls to be determined on this appeal is as to whether the finding made by the learned trial Judge that a binding contract did exist between the parties in October of 1983, which included an agreement for arbitration, is supported by the evidence. In my view, it is. In his judgment Costello J. carefully and accurately sets out the documents consisting of correspondence and telex messages which led to what he accepts to be the conclusion of the Contract in October of 1983, incorporating and referring as it did, to the conditions of the Contract of August 1983 which was also reached as a result of correspondence and telex messages.

I would accept and endorse his reasoning that with the exception of an ambiguity concerning the place of arbitration with which I am dealing later in this judgment, that all the terms and conditions of the Contract were accurately and fully set out as agreed between the parties in the letter of the 26th October 1983 to which I have referred and the absence of any dispute on the part of Co-Operative Molasses as to the accuracy of those terms and indeed their conduct on or about the 15th November 1983 in seeking the alteration of one single term therein contained, namely, the date of delivery, must be taken as clear evidence that these written documents constitute the true terms of the agreements between the parties.

The second issue which then arises is as to whether, upon those documents the agreement between the parties which clearly included an agreement for arbitration, was an agreement for arbitration by GAFTA in London or, as the Appellants contend, amicably in Hamburg. Quite clearly, in my view, the first telex of this new transaction, dated the 21st October 1983, which stated that all other conditions,

other than those mentioned in the telex which dealt with quantity, quality and price and date of delivery, were as of the previous Contract, must be taken as the learned trial Judge did take it, to mean that what was there recorded was a Contract with a provision for arbitration by GAFTA in London. I would accept the view expressed in the Court below that the patent error of including in the letter of the 26th October reference to arbitration amicably in Hamburg which had been the original proposal contained in the August transaction does not affect the correctness of the general provision that all other conditions should be as of the August Contract. This is particularly true, since the alteration from the original proposal of arbitration in Hamburg at the commencement of the negotiations in August to an arbitration in London and, subsequently, to a GAFTA arbitration in London was at the specific instance of Co-Operative Molasses. The reality of the contention now made on behalf of Co-Operative Molasses that the Contract reached, if a Contract was reached in October 1983, was for arbitration amicably in Hamburg, can, I think, be best

tested by considering what the situation would be and what the decision of a court should be on this documentation if Cremer had sought to enforce an arbitration in Hamburg with regard to the dispute arising from the October transaction and Co-Operative Molasses had sought to resist it. If the issue were in that form I have no doubt that a court would be forced to the conclusion that the real contract between the parties was as finally agreed in the August transaction, namely, for arbitration by GAFTA in London.

In these circumstances, whether one views the question of the venue of the arbitration and the organisation to carry it out, on the basis of an issue as to whether the award was made in pursuance of the arbitration agreement or whether one views it as the raising of a specific defence under Section 9(2)(e) of the Act of 1980, I am satisfied that the learned trial Judge reached the correct conclusion in holding that the agreement between the parties was for arbitration by GAFTA in London.

In these circumstances I would dismiss the appeal of

the Appellants in this case and confirm the Order of the
High Court.

approved
J. a. Finley
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