Judgment : Mr Justice Langley: Commercial Court. 6th April 2000

INTRODUCTION

1. The applicant Company (which was the Respondent in the arbitration and to which I will refer as Marc Rich) appeals, by permission of this court, against an Award by the Gafta Appeal Board in which the Board decided that the respondent company's arbitration notice by which the Gafta arbitration was commenced was served in accordance with Clause 2.2 of Gafta 125 and so the claim was not time barred. Clause 2.2 provides (subject to discretion) that an arbitration notice must be served *"in respect of disputes relating to monies due not later than the 90th consecutive day after the dispute has arisen"*.

2. The Board also upheld the first tier award in favour of the respondent (Agrimex) in the sum of US $79, 762.50 for carrying charges under the terms of a contract of sale made in December 1997 and January 1998. There is no appeal against that part of the Award.

THE SALE CONTRACT

3. Agrimex were the sellers and Marc Rich the buyers of 25,000 mts of Ukrainian feed wheat on fob terms Ukraine. The contract provided for carrying charges to commence on expiry of the shipment period and incorporated Gafta 49 and 125. Payment was to be made *"Net cash within 24 hours of presentation"* of specified documents at the counters of Agrimex's bank in Geneva. Mr Morpuss submitted that this payment provision applied to claims for carrying charges as well as the payment of the price of the wheat. Mr Baker said (rightly) that such a submission had not been made to the Board. He also submitted that it was wrong and in any event too late for Marc Rich to raise the matter now as Agrimex was entitled to have it decided by Gafta if it had any relevance. In my judgment Mr Morpuss is wrong. The documents specified in the provision, including the invoice referred to in it, refer only to the sale price of the wheat.

THE AGRIMEX CLAIM

4. The vessel's holds were not initially accepted for loading and loading only began on February 24, 1998. The contract shipment period was January 20 to February 10. Hence the claim for carrying charges or, as Mr Baker put it, reverse demurrage, because the ship's delay delayed the cargo.

5. On March 16 Agrimex sent Marc Rich an invoice for extension and carrying charges in the sum of $79,762.50. In the event, as the Board held, the claim for extension was wrong and the claim for carrying charges increased as a result. There was no response to the invoice. A reminder was sent on May 4. Agrimex' solicitors wrote on July 7 demanding payment by July 15. Again there were no responses. Agrimex gave notice of arbitration on July 21. Subject to discretion, for that notice to comply with the 90 day provision in Clause 2.2 *"disputes relating to"* the March 16 invoice must not have arisen before April 21, that is 5 weeks after the date of the March 16 invoice.

6. The Gafta first tier award was issued on April 9, and the Board of Appeal award on August 26, 1999. The Board found that the dispute arose on July 15 when Marc Rich failed to respond to what the Board described (para 5.3 of the Appeal Award) as *"the latest ultimatum"*.

THE ISSUES

7. The issues which arise on the present appeal are:

   (1) Whether the Board of Appeal erred in law in holding that the dispute arose on July 15, 1998 and that the claim was in time.

   (2) Whether as a principle of law, as Mr Morpuss submits, a *"dispute"* arises when an invoice is sent or at least when it is received; and if not, when on the particular facts of this case a dispute arose between Agrimex and Marc Rich.

   (3) If Marc Rich is right in its submission that Agrimex's claim was time-barred, what is the appropriate form of relief. Clause 22 of Gafta 125 provides that:

   If any time limit or provisions imposed by these Rules are not complied with then, subject only to the discretion of the tribunal or board of appeal conferred by this Rule, the claimant's claim and/or appellant's appeal as the case may be, shall be deemed to be waived and absolutely barred....

TIME-BAR

8. Mr Morpuss submits, relying principally on the decision of Colman J in ***Acada Chemicals v Empresa Nacional*** [1994] 1 LL Rep 428, that a dispute arose at the time Marc Rich received the March 16 invoice. Alternatively Mr Morpuss submits that a dispute had arisen before April 21 in any event.

9. Mr Baker submits that the Board of Appeal was entitled to reach "the sensible conclusion" of fact which they did that after merely sending an invoice and 5 weeks silence there was no dispute. He also submits that there was no error of law and no principle of law that silence on receipt of an invoice creates a dispute at the time of its receipt.

THE AUTHORITIES

10. The starting point is the decision of Kerr J in ***The M Eregli*** [1981] 2 LL Rep 169. In that case a charterparty contained an "*all disputes"* arbitration clause and a requirement that any claim had to be made in writing and the claimant's arbitrator appointed "*within nine months of final discharge*". Thus the criterion for limitation was discharge not the existence of a dispute but only disputes could be referred to arbitration. Discharge was completed on November 3, 1975. In May, June and July 1976 the charterers sent invoices to the owners for dispatch money due. No arbitrator was appointed by August 3, 1976, 9 months after discharge. In the summer of

1977 more letters were written, again without reply, and the charterers eventually appointed an arbitrator in August 1977.

11. Kerr J (see page 173 of the report) held that the time limit could only be ignored on the ground that there was no dispute between the parties and that would only be so if the claim had been admitted: "*But if, as here, a claim is made and is neither admitted nor disputed but simply ignored, then I think the time limit clearly applies and that the claimant is obliged ... to appoint an arbitrator within the limited time.*"

12. The question was therefore a negative one: was there no dispute between the parties before the elapse of the 9 months? In this case the questions are whether there was a dispute and when it arose. If the answer to those questions depends on a claim being ignored then the question becomes when is it to be concluded that the claim has been ignored.

13. In ***Ellerine Brothers Ltd v Klinger*** [1982] 1 WLR 1375 the Court of Appeal considered a film distribution agreement with an "*all disputes*" arbitration clause. The claimant, between September 1980 and February 1981, sought statements of account for the receipts of the film with no or evasive responses. A writ was issued in April claiming an account and the sums found to be due on taking it. The defendant sought and obtained a stay pursuant to Section 1(1) of the 1975 Arbitration Act on the basis that there was a dispute which had to be referred to arbitration.

14. In the course of his judgment, at page 1381, Templeman LJ said: "*Again by the light of nature it seems to me that section 1(1) is not limited either in content or in subject matter; that if letters are written by the plaintiff making some request or some demand and the defendant does not reply, then there is a dispute. It is not necessary for a dispute to arise that the defendant should write back and say "I don't agree". If, on analysis, what a plaintiff is asking or demanding involves a matter on which agreement has not been reached and which falls fairly and squarely within the terms of the arbitration agreement, then the applicant is entitled to insist on arbitration instead of litigation.*"

15. The issue in the case was whether or not a dispute existed at the time the writ was issued. That was some 7 months after the first request for an account had been made. As is clear from pages 1382 and 1383 of the report (where The M. Eregli is cited) in that context the fact that the defendant does nothing after a number of requests but continues "a policy of masterly inactivity" does not mean that there is no dispute.

16. In my judgment Mr Baker was right in submitting that both these decisions are authority only that it is not necessary for a dispute to exist for the recipient of a claim or demand to say "No". Beyond that, however, the approach of the court has been, as one would expect, to put the question in context and answer it on the facts of the particular case. As it was put by Bingham J in ***The Messiniaki Bergen*** [1983] 1 LL Rep 424 at 429 (a case involving an "any disputes" arbitration clause in a charterparty): "*I am reluctant to attempt any legal definition of a term so well understood by owners and charterers as "dispute". It plainly indicates that a controversy or contention has arisen between the parties. It takes two to quarrel. The making of a claim or demand ... does not of itself give rise to a dispute, because the other party may accept it. Even the rejection of such claim or demand by such party need not give rise to a dispute, because the rejection may be expressly or impliedly accepted or may be put on grounds affording no arguable basis for rejection. Everything, I think, depends on the facts of the particular case and I do not think it is possible or desirable to generalise.*"

17. In ***Acada***, Colman J had to consider the same provision of clause 2.2 of Gafta 125 as is in issue in this case. He also considered a provision of the sale contract which stated that: "*Final invoices may be prepared by either party and shall be settled without delay, and if not so settled a dispute shall be deemed to have arisen which may be referred to arbitration.* I shall refer to this as the "*final invoices clause*".

18. The sellers claimed discharge port demurrage and sent a debit note dated May 17, 1989 for the amount claimed and several reminders which the buyers simply ignored. They commenced arbitration in May 1991 claiming demurrage and the buyers contended that the claim was time barred. The issue therefore was whether a dispute had arisen more than 90 days before May 1991, the first demand for payment having been made 2 years earlier. Colman J cited both ***The M. Eregli*** and ***Ellerine*** and continued (at page 431 of the report): "*Applying this approach, the failure of the plaintiff buyers to agree to accept the claim for demurrage in the face of the debit note of May 17, 1989 gave rise to a dispute in respect of the demurrage claimed in that debit note and that dispute arose at the time of receipt of the debit note by the plaintiff buyers.*"

19. In the context of clause 2.2., I do not think either ***The M. Eregli*** or ***Ellerine*** dictate an absolute conclusion that a failure to agree to accept an invoice results in a dispute arising at the time the invoice is received, and I am not at all sure that, despite Mr Morpuss' submissions, that was what Colman J was saying in this passage. Plainly Colman J was referring to the particular case before him and the practical question remains as to when "*a failure to agree to accept*" a claim is sensibly to be inferred. Clause 2.2 does not say 90 days after an invoice is received, but 90 days after the dispute has arisen. That could I think, apply as readily before an invoice is ever sent as well as some time after it is sent depending on the particular circumstances.

20. In considering what I have called the final invoices clause, at page 432, Colman J said "... *I would have held that* (the clause) *had the effect of giving rise to an obligation that the debit note be paid by the buyers without delay. Even assuming that this imparts a 6 weeks period of grace, a dispute would have arisen at about the end of June 1989 and this would have been far more than 90 consecutive days prior to the commencement of arbitration.*"

21. Mr Baker was tempted to rely on this passage to submit that it was at least a good illustration of the sort of time lapse which was required after a demand before it could be said a dispute had arisen even where there was express provision for it. Again, I do not think it is right to adapt other decisions on other provisions to the circumstances of this case.

22. I readily acknowledge Mr Morpuss' submission that certainty in time bar provisions is commercially a most desirable end. But the date of an invoice is certain when it is known but quite uncertain before the invoice is issued. In any event certainty is best achieved by express words in the arbitration clause itself.

23. In my judgment what these authorities decide is unsurprising. It is that each case must turn on its own wording and circumstances. In this case the question is did the dispute in respect of the monies claimed by the March 16 invoice arise on or before April 21 1998. If it did the claim was (subject to discretion) time barred; if it did not it was not time barred. That question is primarily one of fact save that it is clear law that a demand or invoice followed by silence is capable of giving rise to a dispute.

THE APPEAL AWARD

24. Before the Board Marc Rich's case was, as before me, that a dispute arose when the March 16 invoice was received. In response to Agrimex' alternative case that if the claim was time barred time should be extended in Agrimex' favour it was submitted that Marc Rich was under no duty to respond to the invoice and Agrimex should not be relieved from the consequence of its own forgetfulness or mistake.

25. Agrimex' case was that clause 2.2 did not impose a time limit of 90 days from receipt of the invoice and that it was only on 13th August that Marc Rich had said there was no justification for the carrying charges which *"on any commonsense view"* was when the dispute first arose. The latter submission was misconceived as the arbitration notice itself was issued before August 13.

26. It is perhaps not surprising that faced with these submissions the Board in fact decided upon a middle course. Their reasoning appears in paragraphs 5.4 and 5.5. The emphases are mine.

> *5.4 The question of when a dispute arises is one that often engenders considerable differences of opinion in contractual disputes and in many cases it is a matter of commonsense rather than writ in stone. In this case, from the evidence before the Board, it is clear that whatever else may have gone before, Sellers solicitors sent a message to Buyers on 7th July in which, inter alia, they stated -"if they* (Buyers) *do not receive full payment on or before ... 15th July 1998 we reserve the right to begin arbitration proceedings against you to recover the outstanding sum."*
>
> *5.5 It could well be argued that had Buyers responded by 15th July then there had never been a dispute. We FIND THAT Sellers' solicitors message of 7th July was a new finality and constituted a new arrangement and that therefore the date upon which the dispute arose was when Buyers refused to respond to this last ultimatum.*

27. However understandable in the light of the submissions made, I find this reasoning flawed. It appears to be saying that provided a dispute arises within the time limit it does not matter (or at least it is not necessary to consider) whether one may have arisen earlier. Moreover I think, as expressed, the Board has asked itself the wrong question. I have sought to state what I think is the right question in the paragraph immediately preceding this section of my judgment. I cannot therefore accept Mr Baker's submission that the Board's decision as expressed is simply one of fact involving no more than an exercise of commercial commonsense.

THE CONSEQUENCES

28. It follows that the Appeal Award so far as it relates to time-bar must be set aside. Both counsel, on reflection, considered that (in the event I concluded as I have) the proper consequence was that the matter should be remitted to the Board for it to decide the question anew. I agree. It will moreover be a matter for the Board whether it wishes to receive any further information or submissions from the parties to assist it in reaching a decision.

29. There remains also the question whether, should it arise, the Board would also be entitled to consider the exercise of the power to extend time which it has under Clause 22. Again the parties are agreed that the discretion is the discretion of the Board and not this court and if it does arise and is to be exercised then it should be the Board which exercises it.

30. Mr Morpuss submits, however, that it would not be appropriate (see section 69(7) of the Arbitration Act 1996 to remit the question to the Board because Agrimex could have protected its position by asking the Board to indicate how it would have exercised its discretion if it had needed to consider the issue. He points to the relatively small amount in issue. However Agrimex did advance a case on discretion before the Board and Marc Rich a case against it. The Board, having concluded that the claim was not out of time, understandably did not address discretion. I do not think the mere fact that no request was made for a ruling on a contingent basis makes it inappropriate for the matter to be remitted should it now arise when the Board reconsiders whether the claim itself was brought in time. In a real sense Marc Rich also could have asked the Board to cover the position at the time of the appeal hearing but, be that as it may, in the context of this judgment I think it is both just and reasonable that Agrimex should retain the chance of an exercise of discretion in its favour should it require it and that the Board should also be able to address the question of discretion when the matter is remitted to them.

31. I, too, am concerned that these proceedings have escalated to the point where the costs and delays are out of proportion to the sums and issues involved. Remitting the claim to the Board will inevitably aggravate the position. That, however, is the parties' choice in the event that I reached the conclusions I have.

32. I will therefore allow the appeal and order that the matter be remitted to the Board for it to reconsider the question of time limit in the light of this determination and to consider the issue of discretion, in each case as it may consider appropriate as regards whether it requires or wishes to have any further submissions or information from the parties to enable it to do so.

Mr G. Morpuss ...instructed by Messrs Sinclair Roche & Temperley for the Applicant)
Mr A. Baker ...instructed by Messrs Holmes Hardingham Walser Johnston Winter for the Respondent)