Case No: 2014 FOLIO 804

Neutral Citation Number: [2014] EWHC 3649 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/11/2014

Before :

MR JUSTICE COOKE

- -

Between:

Toyota Tsusho Sugar Trading Ltd	**Claimant**
- and -	
Prolat S.R.L	**Defendant**

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- -

Mr Brian Dye (instructed by Hill Dickinson LLP) for the Claimant
The defendant was neither present nor represented

Hearing date: 3rd November 2014

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Judgment

Mr Justice Cooke:

The application

1. This is an application made by the claimant (Toyota) under section 32 of the Arbitration Act 1996 seeking the court's determination of questions relating to the substantive jurisdiction of an Arbitration Tribunal appointed by the Refined Sugar Association. The application is made with the permission of the Tribunal, Messrs Van Grutten, Grimsey and Koch on the basis that the determination of these questions by the court is likely to produce substantial savings in costs, that the application was made without delay and there is good reason for these matters to be determined by the court, as opposed to the Tribunal.

2. I find that the requirements of section 32(2)(b) and section 32(3) of the 1996 Act are met because, as the Arbitration Tribunal itself said in a ruling of 2nd May 2014 at paragraphs 3-14 (the ruling in which it gave permission to apply to the court) there are factual issues to be resolved in determining the jurisdiction dispute and an appeal might well follow a Tribunal decision on the matter. The determination of the court is therefore likely to produce substantial savings in costs. The application has been made without delay and the involvement of the court in Naples presents an additional good reason why this court should decide the issues.

3. The matter came before the court in circumstances where, I am satisfied, the defendants had received full notice of the proceedings but chose not to participate. A Memorandum of Exchanges between Toyota's solicitors and the defendant (Prolat) and its Italian lawyers reflects the care taken by Toyota to ensure that Prolat has been served with all the applications and relevant material documents in this action. The matter therefore proceeded before me in the absence of Prolat or any legal representatives appearing for it.

4. The evidence before me consisted of witness statements from Mr Rubino, Mr Adamovic, Mr Dërmaku and two witness statements from Mr Vincenzini, who also appeared in court to give oral evidence to confirm correct and add to what he had said in those statements and to answer any questions which might arise.

5. There were two bundles of documents in evidence before the court in addition, which showed the chronological sequence of exchanges between the parties at the time when the alleged contract and addenda were being negotiated.

6. I have also considered with care Prolat's claim form (Writ of Summons) dated 13th January 2013 in the Italian court in Naples in which Prolat maintained that Mr Enrico Dibranco was not their representative or agent but the appointed broker for Toyota. It is said that Mr Dibranco had offered to assist Prolat in importing sugar to be bought from Toyota and that he identified onward purchasers for the resale by Prolat. Prolat maintained that Mr Dibranco had reached an understanding with Toyota for the import of 8000 MT of sugar initially, had applied for an import licence and a bank guarantee on behalf of Prolat and had charged commission, as had two other individuals for the procuring of that guarantee which was purportedly issued by Banca Nazionale del Lavoro SpA (BNL).

7. The quantity of sugar was increased to 10,000 MT approximately with a reduction in the unit price. Prolat's case is that it left the organisation of the shipping import and other documentation to Mr Dibranco and that it did not receive contractual documentation from Toyota or Mr Dibranco until 22nd October 2013, after importation had taken place. As will appear, that contention is unsustainable in the light of the evidence put before this court.

8. Prolat in its claim form in Naples referred to the onward sale of part of the imported sugar to various buyers, including quantities of about 344 metric tonnes to companies associated with Mr Dibranco or his family. Prolat then referred in its claim form to Toyota's discovery that the BNL guarantee was forged and maintained that Mr Dibranco was Toyota's agent and not Prolat's. It admitted that it had only paid €100,000 to Toyota but stated that Toyota had successfully regained possession of the imported sugar which had not been sold by that stage as the result of an agreement on 15th November 2013. According to Prolat, 54% of the sugar cargoes remained at the import terminal and had been repossessed but only a further €319,500 was owing to Toyota in respect of the sugar which had been on sold, a figure which was paid on 29th or 30th November 2013.

9. Claims are made by Prolat in paragraph 39 of its claim form in Naples for damages for various alleged wrongdoing by the claimants, whether for breach of contract or tort. At paragraph 40 Prolat sets out its contentions as to the jurisdiction of the Italian courts to determine the dispute as to monies owing and its case as to the application of Italian law.

10. What is clear from the claim form in its totality and from paragraph 40(4) in particular is that Prolat recognises the existence of a contract for the sale of sugar between itself and Toyota which has now come to an end. In summary, Prolat claimed that Toyota was liable in contract and in tort for:

    i) Inducing Prolat to make an arrangement for a sugar trade that was outside its ordinary course of business;

    ii) Taking advantage of Prolat in applying erroneous US$/€ exchange rates;

    iii) Shipping the sugar prematurely;

    iv) Relying on terms of a contract that had not been negotiated nor signed;

    v) Diverting a huge quantity of sugar;

    vi) Taking advantage of an agreement signed on 15th November 2013 between the parties' respective lawyers for the freezing of a quantity of sugar (the unsold portion);

    vii) Exposing Prolat to the claim of Enrico Dibranco for his fees;

    viii) Claiming €100,000 in costs and fees;

    ix) Ruining Prolat's reputation with BNL.

11. Toyota has objected to the jurisdiction of the Italian court on the basis of the arbitration clause upon which it relies in the contract and addenda which, in its contention, govern the position between the parties. The Italian court has not yet determined this issue.

12. Prolat has objected to the jurisdiction of the Tribunal in submissions sent by its Italian lawyers, Studio Legale de Marco Della Rocca dated 11th March 2014. In those submissions Prolat contend that:

    i) No sale and purchase agreement was ever signed by Prolat;

    ii) No arbitration agreement was ever signed by Prolat;

    iii) There is no evidence of the conclusion of any agreement to arbitrate;

    iv) There is no evidence that Mr Dibranco acted for Prolat;

    v) Mr Dibranco acted as proxy for Toyota;

    vi) Toyota, having obtained, by agreement, a form of saisie conservatoire relief against Prolat in Naples, is obliged to pursue substantive proceedings there.

13. Toyota's case in arbitration is set out in the written Amended Statement of Case submitted to the Tribunal, which appears at bundle A1/82-89. In essence Toyota seeks payment of the purchase price for 4,867.794 MT of sugar delivered to Prolat and on sold by it, plus damages in respect of 5,134.206 MT "returned" by Prolat, constituted by the difference between the contract price and the prices obtainable on resale by Toyota, plus additional expenses incurred as a consequence of Prolat's repudiation of the contract.

14. It appears therefore to be common ground between Toyota and Prolat that there was a contract for the sale and purchase of approximately 10,000 MT of sugar. The issue is whether or not there was a concluded agreement to arbitrate. In order to determine that the court must first determine what the terms were of any contract that was made and the proper law of that contract.

The jurisdiction of the Court

15. The subject matter of the application to this Court is the existence or otherwise of an agreement to arbitrate. In consequence, although Prolat has commenced proceedings in Italy in which it contends that it is not party to any arbitration agreement, Regulation 44/2001 does not apply to prevent this Court considering the issue because of the paragraph 7 of the preamble and Regulation 1(2)(d) in the light of existing authority. I was referred to the decisions of the European Court in case 190/89 – *Marc Rich & Co AG v Società Italiana Impianti PA* [1991] ECR 1-03855 and case 185/07 – *Allianz SpA v West Tankers Inc* [2009] ECR 1-00663 and the opinion of the Advocate General in that case. I was also referred to the decision of Mr Justice Flaux in *West Tankers v Allianz (No. 3)* [2012] EWHC 854. This Court is not being asked to interfere with the functions of the Italian court as no form of anti-suit injunction is being sought against Prolat. This Court is being asked to determine whether or not

there is an arbitration agreement and to make a declaration in the light of its conclusion.

16. Although Regulation 121/2012 is not yet in force and does not come into force until 10th January 2015, its effect would be no different from Regulation 44/2011. Article 1(2)(d) remains unchanged from the earlier Regulation but is more fully explained in paragraph 12 of the Preamble. I was also referred to Article 73 which states that the Regulation will not affect the application of the New York Convention. Although it is not yet in force, it was suggested that some might regard the new Regulation as declaratory of the existing state of the law.

17. The position is therefore, whether regard is had to the earlier Regulation or the new Regulation, that neither applies to arbitration and this Court and the Arbitration Tribunal are free to consider matters relating to arbitration even though the Italian court is also seised with a dispute of identical, similar or related nature.

The applicable law

18. Article 10.1 of the Rome 1 Regulation 583 of 2008 provides that the existence and validity of a contract is to be determined by the law that would govern the contract if the contract were valid. In my judgment, any contract for the sale of sugar between Toyota and Prolat in the circumstances to which the evidence refers, could only be governed English law.

    i) The Contract and Addenda 1 and 2, upon which Toyota rely, each contain a clause that provides that they shall be governed by and construed in accordance with the provisions of English law. In the Contract of 22nd July 2013, clause 23 expressly so provides and clause 24 incorporates the rules of the Refined Sugar Association of London. Clauses 23 and 24 of Addendum 1 dated 16th August 2013 follow the same form, as do clauses 24 and 25 of Addendum 2 dated 31st August 2013. Addendum 3 leaves all other terms and conditions of the Contract and previous amendments in full force and effect, save as specifically changed by it.

    ii) There was therefore an express choice of law in the putative contract alleged by Toyota within the meaning of Article 3(1) of the Rome 1 Regulations.

    iii) Article 4(1)(a) provides that, to the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract for the sale of goods shall be governed by the law of the country where the seller has his habitual place of residence.

    iv) Article 4.3 provides that where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, however, the law of that other country is to apply. There is no such manifestly closer connection with another country in the present case. Whilst Prolat is resident in Italy and the shipments came into Italy, Toyota is an English company and the shipments came from the USA, Algeria and Montenegro. Toyota, as sellers, operated from England and sent out emails and documents from there including contract documentation in the English language and, as hereafter appears, repeatedly referred to English law and arbitration.

v) Furthermore, although Article 10.2 allows for the possibility of applying a different law in circumstances where a party contends he did not consent to the contract, that only applies where it would not be reasonable to determine the effect of that party's conduct in accordance with the law which otherwise governs. For reasons which will appear hereafter, that is not the position here.

The terms of the Agreement between the parties

19. Mr Vincenzini was the trader who negotiated and concluded the sale contract with Prolat on Toyota's behalf. In his evidence he explained that the contract arose out of extraordinary measures that the EU Authorities had put in place in 2013 to increase by 1.2 million MT the supply of sugar in the EU internal market. 50% of that was to be achieved by imports of raw and white sugar at reduced import duties. The additional imports were effected by a series of four tenders held in January, February, May and June 2013 whereby bidders indicated the reduced level of import duty that they were prepared to pay and the EU Authorities then allocated the quotas accordingly. Prolat succeeded in obtaining a quota of 10,000 MT of white sugar in the June tender at an import duty level of €165 per MT, for which it was obliged to provide security to the Authorities.

20. Mr Rubino's evidence was that he was contacted by Mr Dibranco towards the end of May 2013 who said he had an import licence and wished to purchase sugar. Mr Rubino arranged a meeting and introduced him to Mr Vincenzini at his offices in Triggiano, near Bari, at a meeting on 5th June 2013. Mr Rubino recalled that Mr Vincenzini explained to Mr Dibranco how the sugar market worked, how a quotation for the sale of sugar is created, about quality, transportation and the like and also talked through the various contractual clauses and arbitration clauses which would appear in a standard agreement. In particular, Mr Rubino recalled that Mr Vincenzini said that any agreement that Toyota concluded with Prolat would be made under the Rules of the RSA but that if there was any dispute, arbitration would be conducted under those Rules. Mr Rubino had a clear recollection of Mr Vincenzini illustrating the above clauses and rules of arbitration of the RSA.

21. At the meeting Mr Dibranco said on several occasions that he was working with a company called Prolat in purchasing sugar and at the end of meeting said that he would be in touch when he was in a position to buy.

22. Mr Vincenzini's evidence was that at the end of May 2013 he received a telephone call from Toyota's agent in Italy, Mr Rubino, who was a very experienced broker in the sugar trade. He told him that he had been contacted by Mr Dibranco who had political connections in Italy and acted as a broker or fixer in the Italian sugar market. Mr Dibranco was apparently looking for white sugar to import. A meeting then took place at Mr Rubino's offices between Mr Vincenzini, Mr Dibranco and Mr Rubino. Mr Dibranco said that he was acting on behalf of Prolat and there were discussions about a potential deal.

23. In oral evidence Mr Vincenzini, whose memory had been refreshed by reading Mr Rubino's witness statement himself said that he recalled specifically stating that any agreement between sugar traders and Prolat would be subject to the Rules of the RSA and any dispute would be resolved by arbitration conducted under such Rules.

24. This led to an offer being made by Toyota to Prolat on 11th June in respect of 5,000 MT of sugar which included, in the terms of the offer, an arbitration clause requiring arbitration in accordance with the rules of the Refined Sugar Association of London and for the governing law to be English law. Negotiations continued by telephone resulting in a further offer to Prolat of 4th July. Each of these offers, though addressed to Prolat, was sent to Mr Dibranco. Mr Dibranco told Mr Vincenzini that he was talking to Prolat and receiving their instructions. Discussions proceeded as to the origin of the cargo and a reference was made to the possibility of shipment of the cargo from Montenegro. Mr Dibranco asked for a meeting to take place in Bar in Montenegro so that Mr Angelino Pedata of Prolat could inspect sugar that was stored there in a warehouse belonging to Pacorini Montenegro D.a.o. as a result of a sale by Toyota to Beta LLC.

25. On 11th July, Mr Vincenzini met with Mr Dibranco, Mr Pedata, Mr Adamovic of Pacorini and Mr Dërmaku of Beta. On 12th July a further breakfast meeting took place between the same persons, save that Mr Adamovic was not then present. Both Mr Adamovic and Mr Dërmaku confirm Mr Vincenzini's account of meetings at which they were individually present. The idea under discussion was that Beta would either sell the sugar directly to Prolat at Toyota's request or would sell it to Toyota to on sell it to Prolat. Discussions took place in relation to the exchanges which Mr Vincenzini had already had with Mr Dibranco, including the written offers of 11th June and 4th July.

26. Mr Pedata confirmed that he had received these offers and was being kept abreast of discussions that were going on with Mr Dibranco. Mr Vincenzini specifically asked Mr Pedata on 12th July with whom Toyota should continue to communicate in connection with the proposed sugar sales to Prolat and Mr Pedata made it clear that he should continue to discuss and negotiate directly with Mr Dibranco and conclude any contract with him, because the latter was representing Prolat in relation to the sugar business.

27. Mr Adamovic's evidence was that, at the first meeting on 11th July, Mr Vincenzini introduced Mr Dibranco and Mr Angelino Pedata to him as representatives of Prolat. He had spoken Italian in doing so and Mr Pedata in no way demurred. Mr Dibranco was the person speaking on behalf of Prolat in discussing the potential terms or mechanics of the contract. Mr Vincenzini in oral evidence confirmed this.

28. Mr Dërmaku's evidence was that Mr Pedata was introduced to him as a member of Prolat with Mr Dibranco being introduced as Prolat's representative. Mr Vincenzini told him that Mr Dibranco was in charge, on behalf of Prolat, of the intended business between Toyota and Prolat. Mr Dibranco led the discussions on behalf of Prolat in which Mr Pedata would occasionally contribute. Mr Dërmaku recalled that, at the breakfast meeting on 12th July, Mr Pedata informed Mr Vincenzini that he should continue to negotiate with Mr Dibranco.

29. It was on 8th July that Mr Dibranco sent an email setting out draft wording for a bank guarantee, even though Toyota's previous offers had made no reference to the need for such a guarantee and simply provided for payment to be made by a 10% cash deposit and letter of credit in respect of the balance. Telephone discussions followed as to the terms of the wording of the guarantee.

30. On 19th July 2013 Mr Vincenzini sent a further firm offer to Mr Dibranco, addressed to Prolat in respect of 8,000 MT of white sugar. Clause 22 provided for arbitration in accordance with the RSA rules, clause 23 provided that the governing law should be English law and clause 24 provided for the contract to be subject to the rules of the RSA.

31. Further telephone conversations followed in relation to packing, mode of delivery and the form of the bank guarantee with Mr Dibranco until agreement was reached between them and Mr Vincenzini sent him a sale contract dated 22nd July 2013 with Toyota as seller and Prolat as buyer. The contract (No. 500079) was for 8,000 MT CFFO Naples with shipment in August 2013 from Algeria, USA or Brazil. Payment was to be made within 30 days of the Bill of Lading date against presentation of Toyota's commercial invoice and copies of shipping documents. Additionally, by clause 13, Prolat was to provide Toyota with a bank guarantee issued by BNL for €3.8 million by 24th July 2013. The contract contained identical clauses 22, 23 and 24 to that of the 19th July offer.

32. According to Mr Vincenzini, at some point on 23rd or 24th July Mr Dibranco called him and told him that the contract (which had been signed on behalf of Toyota) accurately reflected what had been agreed but said that Prolat would need more time to pay for the sugar, requesting 60 days for payment from the Bill of Lading date rather than the 30 which had been agreed. Mr Vincenzini agreed to the request in consideration of a further payment of US$2 per MT to reflect the additional financing cost. A revised contract was then sent on 24th July 2013 to Mr Dibranco reflecting the change. On the same day, having requested copies of Prolat's financial statements from Mr Dibranco, Mr Vincenzini received, direct from Prolat, financial statements for 2012 and the drafts for 2013.

33. It was not until 6th August that, following further discussion as to its terms, the bank guarantee was forthcoming with a validity date at the end of November. The original arrived by courier on 13th August and Mr Vincenzini acknowledged receipt both to Mr Dibranco and to Prolat. He also sent a copy of it to Prolat for their records by email. The first paragraph of it referred expressly to the contract between Toyota and Prolat numbered 500079.

34. Shipments then began under the contract whilst discussions continued in relation to an additional quantity of approximately 2,000 MT which Prolat was seeking in order to fulfil its tender. The sugar under discussion was that which had been inspected in Bar in the second week of July by Mr Pedata which Beta had since agreed to sell to Toyota for supply to Prolat.

35. On 15th August after consultation with Mr Dibranco, the final pricing (contractually agreed as LIFFE October 2013 contract number 5 plus a premium of US$ 142 per MT (including the additional $2) was discussed and agreed with details of the price conversion to Euros). On the following day Mr Vincenzini sent Prolat and Mr Dibranco Addendum 1 which set out not just the increased price but all the contract terms including clauses 22-24 in identical terms to the unamended Contract. This Addendum had also been signed on behalf of Toyota. Mr Vincenzini requested execution of the contract on behalf of Prolat following Mr Pedata's return from holiday. Copies of the shipping information and pricing details were sent to Prolat as well as Mr Dibranco. There were three shipments from the USA and two from

Algeria. In due course the original shipping documents and invoices were couriered to Prolat so that it could take delivery of the sugar. The exact quantity (7,992 MT) was agreed with Mr Dibranco as was the detailed pricing and the form of shipping documentation.

36. During the course of his own holiday, Mr Vincenzini agreed with Mr Dibranco on the sale and purchase of a further 2,008 MT of sugar on the same terms as the 7,992 MT, with logical amendments. Because it was being shipped from Bar to Bari, a fixed price of €485 per MT CFFO Bari was agreed with shipments between 14th and 15th September. Payment of 100% of the purchase price was to be made 30 days from the Bill of Lading date. The terms agreed were recorded in Addendum 2, dated 31st August 2013, which similarly repeated all the terms of the contract with the new amendments agreed by Mr Dibranco. Under the pricing provision, the wording recorded that the bank guarantee of €3.8 million which had been provided did not cover the additional tonnage and that there was agreement that the additional 2010 MT (as the 2008 MT became on shipment in bags) would be held in Santamato Port warehouse in Bari and would only be released to Prolat on written instructions of Toyota on receipt of payment for that quantity or payments made in respect of the earlier shipments which reduced the outstanding balance on all shipments to a figure below the guaranteed amount of €3.8 million. Mr Vincenzini's evidence was that he did not think that Addendum 2 was sent to Prolat at that stage.

37. On 9th September, Mr Vincenzini received an email from Prolat asking for confirmation of the invoice price for the shipment of Algerian sugar and because he did not know whether Prolat was referring to the earlier shipment or to the cargo to be shipped from Bar, he gave details of both the price on the earlier shipment CFFO Naples and the Addendum 2 additional cargo CFFO Bari. At that point he also sent a copy of Addendum 1 by email to Prolat and asked it to sign it and return it for Toyota's records.

38. On 16th September, Mr Vincenzini flew with a colleague to Bari to meet Mr Pedata there because a concern had been expressed by Prolat about the integrity of the slings around the bags of sugar which had been used for original shipment from Algeria to Bar and were to be used again for onward shipment to Bari under Addendum 2. A meeting took place with Mr Pedata and Mr Dibranco on 17th September 2013 at the Santamato Port warehouse in Bari. At that meeting, Mr Vincenzini handed over further copies of the Contract and the two Addenda to Mr Pedata asking for them to be executed and returned. Mr Pedata said that there was no issue with any of the contract terms and he would have the documents signed and stamped when he got back to Naples and then return them to Toyota. The version of Addendum 2 that was handed to Mr Pedata had however a typographical error in clause 3 because it referred to a total tonnage of 10,010 instead of 10,002 for the tonnage under the contract and the two Addenda. Mr Vincenzini made a handwritten amendment which he initialled before handing over the copy. This is the document which Prolat has produced to the Italian court, showing that it was in its possession. Prolat could not have obtained the manuscript amended version by any other route than at this meeting.

39. During that meeting Mr Pedata sought a further extension of time for payment to the end of November 2013 (as opposed to 30 days after Bill of Lading date). He said that Prolat was prepared to pay an extra €1 per MT for this on all the sugar (both the original contract quantity and the additional 2,010 MT) and they would be prepared to

amend the BNL guarantee to cover the position. Mr Vincenzini said he would need to consult his colleagues in London before agreeing and, having done so, on 19th September sent an email to Prolat setting this out and asking for confirmation in writing that the bank guarantee would be increased to cover the full value of the sugar shipped at the higher price. The bank guarantee would have to be increased to €4,838,114.88 with a maturity date of 31st December. On the very next day, Prolat replied by email accepting the offer and stating that a bank guarantee in the higher amount would be sent as soon as possible. It was 14th October before an amended guarantee was provided in the higher amount which Mr Vincenzini sent in a copy to Prolat and on that day Mr Vincenzini sent an email to Santamato, copied to Prolat, confirming that the 2,010 MT in the warehouse could be released because the bank guarantee had been increased. Mr Dibranco was also copied in and Mr Vincenzini sought execution of Addendum 3 which was to be sent the next day and was indeed then sent to both Prolat and Mr Dibranco. In fact all three Addenda were then sent on 22nd October under separate emails with a view to execution in accordance with the assurances given by Mr Pedata at the meeting in Bari. Addendum 2 was a typed up version of the document handed over at that meeting with the manuscript amendment.

40. Addendum 3 specifically referred to the original contract No 500079 and the Amendments dated 18th August and 31st August 2013. It set out the price for the 7,992 MT and the 2,010 MT parcels with the €1 increase in respect of each. It recorded the changed payment terms in respect of the 7,992 MT CIFFO Naples and the 2010 MT CIFFO Bari with 100% of the final price to be paid by 30th November 2013 with the security of a bank guarantee for €4,838,115. By the last paragraph of the Addendum, "all other terms and conditions of the Contract and previous amendments remain unchanged and in full force and effect, including without limitation the Arbitration Clause".

41. On 6th November, on checking with BNL, it emerged that the bank guarantee and amended guarantee were unauthorised forgeries. The following day Mr Vincenzini flew to Naples with a colleague and met Mr Dibranco who insisted that the problem was one of miscommunication with the bank. When the Toyota representatives met Mr Pedata's son he was shocked at what they told him and said he did not believe it. In an email of 11th November, Prolat said hat it had always operated in accordance with the agreements made and the problems which had arisen were not its fault.

Analysis of the effect of the evidence

42. On the unchallenged evidence of Mr Vincenzini, reinforced by that of Mr Adamovic and Mr Dërmaku, it is clear that Mr Dibranco was authorised by Mr Pedata to act as agent for Prolat in the negotiation and agreement of the Contract and Addenda 1-3.

    i) At the meetings in Bar on 11th and 12th July, Mr Pedata specifically told Toyota, in the person of Mr Vincenzini that they should negotiate and reach agreement with Mr Dibranco because he was representing Prolat.

    ii) The original contract was made over the telephone between Friday 19th July and Tuesday 23rd July and was recorded in the contract documents sent on 23rd July 2013 and revised documents sent on 24th July 2013.

iii) On 24th July, Prolat sent details of their financial statements to Toyota in the context of the authority given by it to Mr Dibranco.

iv) A copy of the guarantee procured by Mr Dibranco was sent by Toyota to Prolat on 13th August, with its express reference to the sales contract number 500079.

v) Shipment of sugar took place from the United States and Algeria with shipping details being supplied to Prolat.

vi) On 14th August the pricing details were once again sent to Prolat in respect of the US shipped cargo and the likely price to be finalised for the Algerian shipment. Price estimates were given for the 2,008 MT to be shipped from Bar.

vii) On 15th August, pricing of the Algerian shipment was finalised with details sent to Prolat as well as Mr Dibranco.

viii) On 16th August Addendum 1 was sent to Prolat for execution, already signed on behalf of Toyota.

ix) On 9th September confirmation of pricing was again sent to Prolat, as was a copy of Addendum 1, with a request for signature of the document which had already been executed by Toyota.

x) At a meeting on 17th September, Mr Vincenzini handed to Mr Pedata further copies of the Contract and Addenda 1 and 2 with a manuscript amendment. Mr Pedata said that the terms were agreed.

xi) On 19th September a further amendment was agreed in an exchange of emails with Prolat, extending the payment date for an additional €1 per MT and increase in the guaranteed sum. That €1 per MT applied to all the contracted cargo under the Contract, Addendum 1 and Addendum 2.

xii) On 14th October the amended form of guarantee was sent by Mr Vincenzini to Prolat, with its express reference to the contract 500079.

xiii) On 21st October a reminder was sent to Prolat and Mr Dibranco about execution of the amended sale Contract and the Addenda.

xiv) On 22nd October all three Addenda were sent to Prolat for execution setting out all the terms agreed including the amendments.

43. In these circumstances not only did Mr Pedata of Prolat hold out Mr Dibranco to Toyota as having authority to act on behalf of Prolat in negotiating and agreeing the Contract and Addenda at the meeting in July 2013, prior to the conclusion of any contract, but, as Mr Dibranco was at the self-same meeting, he was given specific authority to do so in the presence of the Toyota representative. Mr Dibranco thus not only had ostensible authority to act for Prolat but actual authority.

44. Since the evidence shows that Mr Dibranco agreed the terms of the Contract, Addendum 1, Addendum 2 and Addendum 3, each of those documents, though not signed on behalf of Prolat, binds Prolat.

45. Furthermore, it is clear from all the documents to which I have referred in this judgment (and others also) that Prolat was well aware of the agreements which had been made on its behalf by Mr Dibranco and received copies of them all shortly after they were agreed and during the course of shipment. On 17th September Mr Pedata expressly agreed that the terms of the Contract, Addendum 1 and Addendum 2, which were handed to him there, reflected the agreement made. Pricing and shipping details had been sent by Toyota to Prolat for its agreement and no objection was made. In due course original shipping documents were sent to Prolat so it could take delivery of the sugar. Prolat then took delivery of the cargoes of sugar in full knowledge of the terms of the contracts and on sold 46% approximately and must be taken thereby to have ratified the contracts by Mr Dibranco on their behalf. By its own conduct Prolat must be taken also to have agreed the terms of the Contracts regardless of Mr Dibranco's status.

46. The Contract itself, Addendum 1 and Addendum 2 specifically referred to the governing law as English law, to the RSA arbitration clause and to the RSA rules as part of the terms and conditions of the Contract. Addendum 3 reinforced these terms, including its specific reference to the arbitration clause.

The arbitration clause

47. The Contract and Addenda 1 and 2 contain an arbitration provision in these terms:

> "Any dispute arising out of or in connection with this Contract shall be referred to arbitration before The Refined Sugar Association of London for settlement in accordance with the rules relating to arbitration. Such arbitration shall be in accordance with English law."

48. I have already referred to the final paragraph of Addendum 3.

49. Section 5 of the Arbitration Act 1996 provides that Part I of the Act applies only where the arbitration agreement is in writing. Section 5(2) provides that there is such an agreement in writing "if the agreement is made in writing, (whether or not it is signed by the parties), if the agreement is made by an exchange of communications in writing or if the agreement is evidenced in writing." Section 5(3) provides that where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing whilst section 5(4) provides that an agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.

50. It is clear in my judgment that these requirements are satisfied in the present case. As already set out, on 9th September 2013 Prolat asked Toyota for confirmation of the invoice price of 7,992 MT provided under the Contract under Addendum 1 and Mr Vincenzini confirmed the price. The cargo was shipped and documents relating to it couriered to Prolat who accepted them. The terms of the Contract and Addendum 1

was specifically agreed by Mr Dibranco and evidenced in writing by the Contract and Addendum 1. Mr Dibranco agreed (otherwise than in writing) by reference to terms which were in writing. The terms were recorded by Toyota, one of the parties to the Contract and Addendum.

51. Similarly, with regard to the terms set out in Addendum 2, Prolat enquired as to the price and Mr Vincenzini set out the price for this on 9th September 2013. Prolat also received a copy of Addendum 2 and shipment took place under its terms. Once again the terms of this were expressly agreed orally by Mr Dibranco, by reference to Addendum 2 and were recorded by Toyota in Addendum 2.

52. On 17th September 2013 copies of the Contract, Addenda 1 and 2 were given by Mr Vincenzini to Mr Pedata who expressly agreed to their terms in stating that they would be executed when he got back to Naples. There was therefore agreement by Mr Pedata directly for Prolat, the agreement was evidenced in writing, the agreement was made by reference to terms in writing and the terms were recorded by Toyota in those documents.

53. Moreover, Mr Pedata wished to put back the date for payment until the end of November and agreed to a price rise of €1 per MT on all the sugar and to increase the bank guarantee amount to reflect it. The emailed offer of this amendment from Mr Vincenzini was accepted by Prolat's email of 20th September. This was recorded in Addendum 3 which again was emailed to Prolat on 22nd October with further copies of the Contract and the earlier Addenda with the manuscript amendment now in typed form in Addendum 2.

54. Again it is clear that there was an agreement with Prolat on the terms of Addendum 3 which is in writing which evidences the agreement made and was recorded by Toyota as one of the parties to the agreement.

55. At all times Prolat, by its conduct, accepted the terms of the contractual documents supplied and imported the sugar through customs, took possession of it and sold substantial quantities to its customers. As the documents clearly record the arbitration agreement, there was an agreement by Prolat, both through the agency of Mr Dibranco and on its own behalf to arbitrate in accordance with the terms of the arbitration clause in the Contract and Addenda.

56. The arbitration clause is wide in its ambit providing that any dispute "arising out of or in connection with this contract" should be referred to arbitration. There is no doubt that both the claims made by Toyota and the claims made by Prolat fall within the scope of the arbitration clause. The parties are therefore bound to refer such disputes to arbitration in accordance with its terms.

Conclusion

57. In these circumstances Toyota is entitled to the declaration which it seeks in the following terms:

> "IT IS ORDERED that the preliminary question of substantive jurisdiction namely whether the parties' arbitration tribunal ("the Tribunal"), presently comprised of P.J Van Grutten, J

> Grimsey and H Koch, appointed by the Refined Sugar Association ("the RSA"), has substantive jurisdiction over any dispute between the Claimant and the Defendant arising out of or in connection with the parties' contract contained in and/or evidenced by Sale Contract No 500079 dated 22 July 2013 and three amending Addenda thereto, respectively dated 16 August 2013, 31 August 2013 and 21 October 2013; and without limitation to the ambit of the foregoing, whether, in particular, the Tribunal has substantive arbitral jurisdiction over the claims submitted by the Claimant to the Tribunal in the Claimant's claim submissions dated 7th February 2014, as amended pursuant to permission given by the Tribunal on 22nd and 24th July 2014, should be, and is, answered "Yes"."

58. Furthermore, costs must follow the event and Prolat should therefore pay the claimant's costs of and occasioned by this arbitration claim, to be the subject of a detailed assessment if not agreed. I would be prepared to order a payment on account of such costs on receipt of satisfactory evidence of costs incurred.