Case No: CL-2014-000446

Neutral Citation Number: [2016] EWHC 2022 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/08/2016

Before :

MR JUSTICE KNOWLES CBE

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Between :

Xstrata Coal Queensland Pty Ltd **Sumisho Coal Australia Pty Ltd** **Itochu Coal Resources Australia Pty Ltd** **ICRA OC Pty Ltd**	**Claimants**
- and -	
Benxi Iron & Steel (Group) International Economic & Trading Co Ltd	**Defendant**

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Mr David Lewis QC and Mr NG Casey (instructed by **Clyde and Co LLP**) for the **Claimants**
Mr Alexander Gunning QC (instructed by **Gateley LLP**) for the **Defendant**

Hearing dates: 27 and 28 April 2016

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Judgment

Mr Justice Knowles :

Introduction

1. The Defendant ("the Buyer") agreed to buy a substantial quantity of coking coal. There were four sellers ("the Sellers"): the first three Claimants, together with one other. That other was either the fourth Claimant or another company.

2. The agreement between the Buyer and the Sellers was known as "the Oaky Contract" and was in writing. The Buyer and the Sellers also agreed, by the Oaky Contract, to arbitration under LCIA Rules in the event of a dispute, and with the seat or legal place of the arbitration to be London.

3. A dispute arose and was referred to arbitration in London. The Claimants and the Buyer took a full part in the arbitration. On 23 August 2010 the arbitral tribunal issued an award ("the Award") requiring the Buyer to pay to the Claimants US$27,846,000 together with interest and costs.

4. The Buyer did not pay and the Claimants applied on 16 August 2011 for recognition and enforcement of the Award in the People's Republic of China under the 1958 New York Convention. The Buyer is incorporated in China and conducts business in China.

5. The Claimants' application was to the Shenyang Intermediate People's Court. The Buyer argued successfully that the application for recognition and enforcement of the Award should be refused. The Buyer's argument was that ICRA OC Pty Limited ("ICRA OC"), the fourth Claimant in the arbitration (and in these proceedings before the Commercial Court), was not a party to the Oaky Contract, including the agreement to arbitration.

The Oaky Contract

6. The Oaky Contract is signed "for and on behalf of the Seller" by Xstrata Coal Queensland Pty Limited ("XCQ", the first-named Claimant in these proceedings before the Commercial Court).

7. The Oaky Contract uses these words to describe "the Seller":

> "SELLER: Xstrata Coal Queensland Pty Limited (ABN 69098156702) as agent for the Oaky Creek Joint Venturers (being Sumisho Coal Australia Pty Limited, Xstrata Coal Queensland Pty Ltd, Itochu Coal Resources Australia Pty Limited and ICRA NCA Pty Limited) and [sic] Level 38, Gateway, 1 Macquarie Place, Sydney, N.S.W. 2000, Australia (as the Seller)".

8. It is therefore the fact that the words used in the Oaky Contract are "ICRA NCA Pty Limited" and not "ICRA OC Pty Limited". There is evidence that there do exist two companies, one by each name.

9. However the description of the Seller in the Oaky Contract also refers to "the Oaky Creek Joint Venturers". By a separate agreement dated 31 December 1997 and restated as at 1 March 2005, and named the Oaky Creek Joint Venture Agreement, four companies agreed and confirmed that they had by that agreement "associat[ed] themselves in an unincorporated joint venture, known as the "Oaky Creek Joint Venture", for the purpose of conducting" defined operations for the exploration and prospecting for, and mining and loading of, coal.

10. The fourth of the four companies so agreeing by the Oaky Creek Joint Venture Agreement was ICRA OC Pty Limited, not ICRA NCA Pty Limited (the company named as an Oaky Creek Joint Venturer under the Oaky Contract).

The Arbitration and the Award

11. Thus the four parties who were Claimants in the LCIA arbitration were the four companies who had agreed to associate themselves in a joint venture by the Oaky Creek Joint Venture Agreement, ie including ICRA OC Pty Limited.

12. These four companies were described as the Claimants in the Award, at paragraph 1. (The Award also made clear in the same paragraph that "Level 38" was the registered address of XCQ and not the name of a fifth company.)

13. At paragraph 7 of the Award the arbitral tribunal stated:

> "The dispute arises under the "Contract for Sale and Purchase of Coking Coal", numbered OCP/BEN/HCC-08/01/01, which is dated 15 August 2008 and was executed by Ben Steel [the Defendant] and XCQ on 4 September 2008 ("Oaky Contract"). XCQ signed as Seller as agent for the Oaky Creek Joint Venturers (being itself, Itochu, ICRA and Sumisho)."

14. At paragraph 109 of the Award the arbitral tribunal stated:

> "The Oaky Contract defines the "Seller" XCQ "as agent for the Oaky Creek Joint Venturers", which jointly comprise all four individual Claimants. The Tribunal determines, in accordance with the Oaky Contract, that Claimants seek an award in favour of all the Claimants jointly."

15. The Award was in these terms (leaving aside costs):

> "(i) Within thirty (30) days of the date of this Award, Respondent Benxi Iron & Steel (Group) International Economic and Trading Co. Ltd, shall pay to Claimants Xstrata Coal Queensland Pty Ltd., Itochu Coal Resources Australia Pty Limited, ICRA OC Pty Limited and Sumisho Coal Australia Pty Limited, jointly, the amount of United States Dollars Twenty Seven Million Eight Hundred Forty-Six Thousand (US$27,846,000), with simple interest thereon at the rate of one and one-half percent (1.5%) from 1 January 2009 until date of payment.
>
> …
>
> (iv) All other claims and counterclaims of the parties are dismissed."

16. From these paragraphs of the Award it is clear that the arbitral tribunal treated ICRA OC Pty Limited and not ICRA NCA Pty Limited (a) as a party to the Oaky Contract (including the agreement to arbitration), (b) as one of the Oaky Creek Joint Venturers, (c) as a party to the claim before the arbitral tribunal and (d) as a beneficiary of the Award.

17. However the arbitral tribunal did not explain how it dealt with the fact that the Oaky Contract used the words "ICRA NCA Pty Limited" and not "ICRA OC Pty Limited".

Recognition and Enforcement

18. As indicated above, before the Shenyang Intermediate People's Court, in resisting recognition and enforcement of the Award the Buyer focussed on the point that the Oaky Contract used the words "ICRA NCA Pty Limited".

19. In the course of what has been described as an "informal hearing" before the Shenyang Intermediate People's Court on 18 July 2013 the Defendant [the Buyer] observed "There is no explanation about the change of the company in the Award; therefore we believe that there was a critical flaw in the arbitral process".

20. The Shenyang Intermediate People's Court issued a decision on 25 April 2014. It found and concluded as follows:

> "Shenyang Court found that there is no contractual relationship between ICRA OC and the Respondent [the Buyer], therefore, the arbitration agreement (ie the arbitration clause in the Oaky Contract for Sale and Purchase of Coking Coal) does not exist. Therefore, ICRA OC shall not be deemed as one of the claimants under the arbitration request submitted to LCIA, and the arbitration award [the Award] which requires the Respondent [the Buyer] to make payment to the four Claimants, including ICRA OC, is without merit because of a lack of supporting legal argument or factual bases."

21. These findings and conclusions are of course contrary to those of the arbitral tribunal. The Claimants, including ICRA OC, wish to attempt to address the situation by requesting the arbitral tribunal to use its authority under Article 27 of the applicable LCIA Rules. The Claimants wish to use Article 27.3 to request the arbitral tribunal to make an additional award. Alternatively they wish to use Article 27.1 to request the arbitral tribunal to make corrections to the Award.

22. Under Article 27 of the LCIA Rules any application for a correction of the Award or an additional award has to be made within 30 days of the publication of the Award. The Claimants approached the arbitral tribunal on 30 May 2014, but on 11 June 2014 the LCIA confirmed that "while sympathetic to the Claimants' position, … absent agreement of the parties or an order from a competent court extending time for the application" the arbitral tribunal was "functus officio".

23. The Claimants therefore ask the Commercial Court to extend the deadline, using its powers under section 79 of the Arbitration Act 1996. Section 79(1) provides so far as material:

> "[U]nless the parties otherwise agree, the court may by order extend any time limit agreed by them in relation to any matter relating to the arbitral proceedings ....".

In the present case the parties did not "otherwise agree".

24. It is relevant to observe that, realistically, the time limit under Article 27 of the LCIA Rules would almost always expire before the outcome was known of a contested attempt under the New York Convention to obtain recognition and enforcement of an award in another country.

Using Article 27 of the LCIA Rules 1998

25. The parties are agreed that the applicable LCIA Rules in the present case are the LCIA Rules 1998. Article 27 is in these terms:

> "Correction of Awards and Additional Awards
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> 27.1 Within 30 days of receipt of any award, or such lesser period as may be agreed in writing by the parties, a party may by written notice to the Registrar (copied to all other parties) request the Arbitral Tribunal to correct in the award any errors in computation, clerical or typographical errors or any errors of a similar nature. If the Arbitral Tribunal considers the request to be justified, it shall make the corrections within 30 days of the receipt of the request. Any correction shall take the form of a separate memorandum dated and signed by the Arbitral Tribunal or (if three arbitrators) those of its members assenting to it; and such memorandum shall become part of the award for all purposes.
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> 27.2 The Arbitral Tribunal may likewise correct any error of the nature described in Article 27.1 on its own initiative within 30 days of the date of the award, to the same effect.
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> 27.3 Within 30 days of receipt of the final award, a party may by written notice to the Registrar (copied to all other parties), request the Arbitral Tribunal to make an additional award as to claims or counterclaims presented in the arbitration but not determined in any award. If the Arbitral Tribunal considers the request to be justified, it shall make the additional award within 60 days of receipt of the request. The provisions of Article 26 shall apply to any additional award."

26. In Torch Offshore LLC v Cable Shipping Inc [2004] EWHC 787 (Comm); [2004] 2 Lloyd's Rep 446 Cooke J considered the power of an arbitral tribunal under section 57(3)(b) of the Arbitration Act 1996 to "make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the Tribunal but which was not dealt with in the award …". At paragraph [27] in his judgment Cooke J said:

> "In my judgment s.57(3)(b), which uses the word "claim", only applies to a claim which has been presented to a Tribunal but has not been dealt with, as opposed to an issue which remains undetermined, as part of a claim. It is noteworthy that the

terms of s.57(3)(b) differ from the terms of s.68(2)(d) in the language used. I consider that the terms of s.57(3)(b) are apt to refer to a head of claim for damages or some other remedy (including specifically claims for interest or costs) but not to an issue which is part of the process by which a decision is arrived at on one of those claims."

27. Cooke J also considered section 57(3)(a) of the Arbitration Act 1996. That subsection permits an arbitral tribunal to "correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award". At paragraph 28 in his judgment Cooke J said:

> "If however Torch had reverted to [the arbitrator], applying for clarification as to whether he had decided against it on [a particular issue], it would have been clear in this court whether or not he had determined the issue. It seems to me that s.57(3)(a) can be used to request further reasons from the arbitrator or reasons where none exist. The policy which underlies the Act is one of enabling the arbitral process to correct itself where possible, without the intervention of the Court. Torch contended that it was clear that the arbitrator had not decided the issue and that therefore: there was no ambiguity in the award which required clarification, but the very existence of a genuine dispute on this question militates against that argument. If there was unarguably a clear failure to deal with an issue, it could be said that there was no ambiguity in the award, but as set out in *Al Hadha* at par.70 an award which contains inadequate rationale or incomplete reasons for a decision is likely to be ambiguous or need clarification. There was therefore room for an application by Torch under s.57 …"

28. The language of Article 27.3 of the LCIA Rules 1998 and of s.57(3)(b) of the Arbitration Act 1996 is not identical, but I do not consider the differences material for present purposes.

29. The language of Article 27.1 of the LCIA Rules 1998 and of s. 57(3)(a) of the Arbitration Act 1996 is also not identical. Article 27.1 refers to "correct[ing] in the award any errors in computation, clerical or typographical errors or any errors of a similar nature". S.57(3)(a) refers to "correct[ing] an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award".

30. It was the words "clarify or remove any ambiguity" that were the focus of Cooke J's observations cited above. Mr Alexander Gunning QC, for the Defendant, submitted that the omission in the LCIA Rules 1998 of reference to a power to clarify or remove ambiguity was deliberate, referring to the article by Mr Martin Hunter and Mr Jan Paulsson entitled "A Commentary on the 1985 Rules of the London Court of International Arbitration" (1985) 10 YCA 167, at 172. Mr Gunning QC drew attention to the fact that in the LCIA Rules 2014 Article 27.1 does now contain reference to "ambiguity". He uses that point to reinforce his submission that there is significance in those words being absent in the LCIA Rules 1998.

31. I do not see, with respect, that the article relied on bears out the submission. Indeed in my view it tends against the submission. The article references a choice by the LCIA to take a different course from the UNCITRAL draft Model Law, by omitting provision for the parties to request "interpretations" of awards. That is one thing.

However the article says something quite different of the authority that is given by Article 17 in the LCIA Rules 1985 (the forerunner of Article 27 in the LCIA Rules 1998): "If such an authority did not exist, there might be a problem if arbitrators having rendered an award were considered functus officio and therefore without jurisdiction to correct the clerical mistakes and omissions which occasionally may be made". And more generally the article describes the "guiding principles" for the LCIA Rules 1981 and 1985 as "party autonomy, on the one hand, and giving the tribunal maximum discretion and powers, on the other hand".

32. In my judgment clarifying or removing ambiguity would fall within the words "any errors of a similar nature" in Article 27.1 of the LCIA Rules 1998. I regard the amendment to the LCIA Rules 2014 as stating expressly what was previously implicit.

33. In a memorandum of 30 September 2010 the arbitral tribunal expressed the view when denying a (separate) request by the Buyer for clarifications of the Award that under Article 27 "the grounds for granting corrections are narrow in scope … [t]here are no provisions in LCIA Article 27 for "clarification" or insertion of additional language". I express no view either way on his decision to deny that particular request by the Buyer, but respectfully consider that Article 27 does allow clarification through the use of a memorandum which then becomes part of the Award.

34. The present case is not a case of "interpretation". Following Cooke J, it is not a case of a claim that has been presented to the arbitral tribunal but has not been dealt with. But it does involve an "omission which may occasionally be made", to use the language of Hunter and Paulsson. In these circumstances I am satisfied that, if time were extended by this Court, the Claimants would be entitled to request the arbitral tribunal to make corrections to the Award that would clarify a matter that omission had left unclear or ambiguous.

35. Mr Gunning QC says that the Claimants contemplate a full blown jurisdiction hearing before the arbitral tribunal. Mr David Lewis QC and Mr Noel Casey, for the Claimants, say that is not what is sought. I do not, with respect, see that anything like that is what would be involved or permitted. If the arbitral tribunal acceded to the Claimants' request under Rule 27.1 it can be relied upon to control the process and correct the award through a memorandum (that would become part of the award) that simply explained how it dealt with the fact that the Oaky Contract used the words "ICRA NCA Pty Limited" and not "ICRA OC Pty Limited".

Extending the time limit

36. Section 79(3) provides:

> "The Court shall not exercise its power to extend a time limit unless it is satisfied –
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> (a) that any available recourse to the tribunal, or to any arbitral or other institution or person vested by the parties with power in that regard, has first been exhausted, and

(b) that a substantial injustice would otherwise be done."

37. It is clear that, as things stand, (a) is satisfied in the present case.

38. As to (b), in my judgment the present case is a clear case where substantial injustice would be done if I do not extend time.

39. I take into account everything I have summarised above. Neither the parties to the arbitration nor the Shenyang Intermediate People's Court have the benefit of an explanation from the arbitral tribunal of how it dealt with the fact that the Oaky Contract used the words "ICRA NCA Pty Limited" and not "ICRA OC Pty Limited".

40. The absence of an explanation from the arbitral tribunal thus leaves uncertainty about the Award, and that impedes the arbitral process. Justice requires that that uncertainty be resolved one way or another, and that the Claimants have the opportunity to seek that resolution. The Claimants wish to attempt that resolution by enabling the arbitral tribunal to add the explanation that is presently missing.

41. Enabling the arbitral tribunal to add an explanation that is present missing, so as to provide clarity or remove ambiguity, is in my judgment (as I have sought to explain above) a permissible approach under the applicable rules. It is also a just and reasonable approach. In the context of this case it is an approach that is designed to serve the objectives of holding parties to their agreement if they have agreed to arbitrate, and then of assisting the process of arbitration.

42. The arbitral tribunal will carefully control the process of receiving, considering and responding to the request. If the arbitral tribunal accedes to the request then the explanation will be available to the Courts of the People's Republic of China and it may be of assistance.

43. The question of recognition and enforcement in China remains a matter for the Courts of China. In the present case the jurisdiction of the arbitral tribunal has already been questioned before the Courts of China, albeit by a person who did (rather than did not) participate, at least to some degree, in what the Claimants would contend is the arbitral process: cf. Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan [2009] EWCA Civ 755; [2010] UKSC 46; [2011] AC 763). It will of course be a matter for the Courts of China whether any explanation now added by the arbitral tribunal allows, merits or requires reconsideration of the existing conclusions of the Shenyang Intermediate People's Court.

44. Expert opinions on the law of the People's Republic of China have been provided to the Commercial Court by all parties. These address in particular the question whether that law would allow the existing conclusion of the Shenyang Intermediate People's Court to be reconsidered, and if so how. The expert opinions differ, and it is not for me to reach a final view on how. Among the expert materials is a translation of a valuable speech by the Presiding Judge of the First Circuit Court of the Supreme People's Court entitled "The Latest Development of the Judicial Examination of International Commercial Arbitration in China". This indicates that in cases of what is termed a "judicial examination of arbitration" if the procedure of appeal and retrial is not correct then the procedure of an application for review may be available where a

party is not satisfied with the outcome of a jurisdictional challenge in enforcement proceedings.

45. For present purposes it is sufficient that I indicate I find the opinion of Mr Gao Yifeng gives persuasive reasons why some form of reconsideration could well be allowed. Mr Gao is a partner, and former managing partner, of Beijing Global Law Office and an arbitrator with various well known arbitral associations including CIETAC and BAC.

46. But even if the question of recognition and enforcement in China is concluded by the decisions already reached by the Shenyang Intermediate People's Court and cannot be reopened, the opportunity for correction by the arbitral tribunal still has value. Mr Gunning QC submitted for the Defendant that there would be limited consequences for the Claimants if the extension of the time limit were refused because the Award would remain in place and "[t]here is no actual evidence that the Claimants have been deprived of the benefit of the Award simply because it cannot be enforced in the PRC". However, without correction, it is reasonable to assume that attempts to seek recognition and enforcement of the Award will be met by the same type of challenge elsewhere in the world as the Buyer has mounted in China.

47. This reinforces the point that continuing uncertainty over the Award serves no worthwhile end, and more generally undermines the arbitral process. It reinforces the point that it would be unjust not to allow the available opportunity in the present case to allow the arbitral tribunal to consider whether the uncertainty can be removed. The result may be one that assists the Claimants or the Buyer.

48. As to the question whether the Commercial Court should exercise the power to extend time in circumstances where the Commercial Court is entitled to exercise the power, I am quite sure that the power should be exercised. I have had regard to the guidance in Gold Coast Ltd v Naval Gijon SA [2006] EWHC 1044 (Comm); [2006] Lloyd's Rep 400 (Gloster J). The matters to which I have referred in this judgment militate strongly in favour of the exercise of the power.

49. I do not find powerful countervailing factors. I have considered all matters referred to in evidence and submissions. Undue delay in particular has been alleged, but I find that in the present case it was reasonable for the Claimants to await the existing conclusion of the Shenyang Intermediate People's Court before approaching the arbitral tribunal and the LCIA. Once the existing conclusion of the Shenyang Intermediate People's Court was known I find, having reviewed the particular chronology and circumstances of this matter, that the Claimants took steps without undue delay, both in making this application to this Court and in prosecuting it.

Conclusion

50. In the circumstances the Court will exercise its power under section 79 of the Arbitration Act 1996 to extend the time limit under Rule 27.1 of the LCIA Rules 1998. The precise form of order will be discussed with Counsel.