Case No: 1998 Folio No 1123

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 November 1998

Before:

THE HON MR JUSTICE LANGLEY

BETWEEN:

FTC "UZDON" — **Applicant**

- v -

ROMAK S.A. — **Respondent**

TIMOTHY YOUNG QC
STEPHEN KENNY
(instructed by RICHARDS BUTLER for the APPLICANT)

MARK HAVELOCK-ALLAN QC

(instructed by MIDDLETON-POTTS for the RESPONDENT)

With reference to R.S.C. Order 68 Rule 1 and the Practice direction of The Master of The Rolls dated 9th July 1990([1990] 1 W.L.R. 1126)

I certify that the attached text records my judgment and direct that no further note or transcript need be made.

The Hon. Mr Justice Langley
6th November 1998

JUDGMENT

THE APPLICATION

The Applicant, "UZDON", applies under section 68 of the Arbitration Act 1996 to challenge the Award of the first tier GAFTA arbitral tribunal which was appointed to determine a claim against UZDON by the Respondent to the application, "ROMAK." UZDON claims that there was serious irregularity affecting the tribunal, the proceedings or the award of the kind specified in Section 68 (2) (a) of the Act namely *failure by the tribunal to comply with section 33* of the Act in a manner which UZDON submits the court should consider *has caused or will cause substantial injustice to* UZDON.

Section 33 of the Act provides for the general duty of the arbitral tribunal to :

> *(1)(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and*
>
> *(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.*

THE FACTS AND CHRONOLOGY

In July 1996 the parties entered into a written contract ("the Contract") for the sale by ROMAK to UZDON of up to 50,000 metric tons of Kazak milling wheat. The contract expressly provided for UZDON to open a letter of guarantee or an equivalent letter of credit by October 10 1996 at the latest. The delivery period was until December 31. The contract was to be in force

from *the moment of signing*. It was issued in both Russian and English versions. ROMAK is a Swiss Company. UZDON is a Foreign Trade Company based in the Republic of Uzbekistan.

Clause 11.1 of the contract provided that *The parties will endeavour to settle any dispute in a friendly way but in case it should be impossible to reach a mutually acceptable solution of any such disputes the case to be submitted for Arbitration to G.A.F.T.A. London for final and binding Arbitration as per Rules of GAFTA No 125.*

At about the same time that UZDON signed the contract (by Mr Kadyrov, their "General Director") UZDON, ROMAK and organisations to which I shall refer as GAK and ODIL also entered into what has been referred to as the "quadripartite agreement". The effect of that agreement was one of the matters which came to be in issue in the arbitration.

There is no dispute that ROMAK delivered wheat into Uzbekistan of the right quantity and quality by December 31 1996. Indeed the substantial delivery was complete and invoiced by September 9 1996. On October 24 1996 Mr Kadyrov signed a letter addressed to ROMAK which expressed UZDON's regret that the letter of guarantee/credit required by the contract had not been provided and promised to correct the situation in the near future. In a recent affidavit sworn on information provided to him by Mr Kadyrov, Mr Emmott of UZDON's solicitors, deposes that this letter was drafted by Mr Pletscher of ROMAK and signed "naively" by Mr Kadyrov *without appreciating the significance of what he was doing*. I find that both unconvincing and improbable for reasons which will become apparent. The significance of the

letter is that it plainly recognises the validity of the contract and UZDON's payment liability under it at the time when the delivery was virtually complete and yet, if UZDON were right in its subsequent contentions, the whole contract remained ineffective and the deliveries unlawful by the law of Uzbekistan because there was no "quota" allocated to ROMAK for the delivery.

A reading of the subsequent first tier Award shows (Paragraph 1.8 to 1.10) that UZDON also wrote in February 1997 referring in terms to the contract on the basis it was binding and effective.

On April 2 1997 ROMAK gave notice to UZDON of arbitration and of their appointment of Mr Short as arbitrator by fax. The fax stated :

> *please let us know within 9 days if you accept Mr Short as sole arbitrator or appoint your own arbitrator by the same deadline. Should you fail to do so by the above deadline, we shall apply to GAFTA for an official appointment of Arbitrator on your behalf in accordance with our arbitration agreement.*

The reference to 9 days was in accordance with Rule 3.1 of the Arbitration Rules No. 125.

On April 14 ROMAK gave notice to UZDON of their failure to appoint an arbitrator and that it was applying to GAFTA to do so.

On April 21 GAFTA notified UZDON of the appointment of Mr Allen *as your arbitrator* adding :

> *You are at liberty to appear before the Arbitrators either in person or by representative or to state your case in writing. Written statements and/or other documentary evidence which you may*

wish to submit must be done in accordance with Rule 4 of the GAFTA Arbitration Rules Form 125.

There followed the appointment of the third arbitrator and directions for service of submissions, all of which were duly notified to UZDON and referred in terms to the Rules. UZDON were allowed 21 days for their submissions expiring on May 28. Time was extended to June 9. UZDON complied with that time limit and delivered their submissions prepared by their "Chief Legal Adviser" a Mr Tulaganov. UZDON provided a translation of their submission but the tribunal (rightly) preferred to obtain their own, did so, and notified UZDON supplying copies (fax June 20). ROMAK were given 14 days to reply from June 20.

Also on June 9 UZDON wrote to Mr Allen in terms which stated that UZDON *would like to put you in the way of argument in order you could objectively represent our interests in the arbitration of GAFTA.*

On July 11 ROMAK supplied their reply submissions to both GAFTA and UZDON. UZDON wrote on August 5 to GAFTA stating its response to ROMAK's reply.

These were the submissions which were before the first tier tribunal when it considered and reached its Award dated August 22 1997. The Award summarises UZDON's submissions in paragraph 4. On my reading of the documents submitted to the Tribunal, the summary was a fair one, and Mr Timothy Young, QC, who appeared for UZDON did not seek to criticise it. The decision to reject the submissions was also, in my judgment, both well reasoned and right. In effect the tribunal decided that arguments based on a

lack of quota were both inconsistent with the contract and correspondence, and arguments based on the quadripartite agreement were inconsistent with the terms of that agreement in particular the terms (Clause 6) which provided (in effect) that UZDON was to be responsible to ROMAK for any failures on the part of ODIL in relation to the delivery of or payment for the wheat.

The Award awarded that UZDON pay ROMAK US $10,510,629.12 plus interest. The final paragraph of the Award referred to the *'Appeal fee' 'in the event of an Appeal being lodged.'* The letter from GAFTA to UZDON of August 22 enclosing a copy of the Award also referred expressly to the right of appeal and to notification of appeal having to reach GAFTA under the Rules by *no later than 12 noon on the 30th consecutive day after the date of the Arbitration Award.* ROMAK delivered a copy of the Award (translated into Russian) to UZDON at a meeting in Tashkent on September 2 1997. There is evidence that at the meeting not only were ROMAK told that UZDON had already arranged to have the Award translated but that there was discussion about both ROMAK and UZDON appealing the Award (ROMAK because it was felt that the tribunal had wrongly rejected the claim for certain penalties provided for in the contract) but both agreed that they would not do so.

On September 30 ROMAK wrote to UZDON stating (rightly) that the Award was *now final* and saying in effect that further steps would be taken unless serious proposals for a commercial settlement were made. There was no response.

On October 9 GAFTA wrote to UZDON stating that it had been reported that UZDON had not complied with the Award and asking when UZDON proposed to do so. There was no response.

On November 3 GAFTA wrote again warning that it would consider "posting" UZDON unless advised in writing by December 3 that UZDON had complied with the Award. Again there was no response and GAFTA wrote on December 19 stating that it had decided to "post" UZDON unless UZDON complied with the Award by January 19, 1998. Again there was no response and UZDON was "posted" on January 26.

On February 9 UZDON (by Mr Tulaganov) wrote to ROMAK and Mr Allen stating that it *could not agree with the decision of GAFTA arbiters because it does not have juridical base.* Mr Kadyrov visited GAFTA on February 26. It seems clear from GAFTA's letter to UZDON following this meeting that a question was raised by UZDON as to whether the Award was in error in naming UZDON as buyers, as distinct from ODIL.

On March 13 Mr Tulaganov wrote to GAFTA, making the point that the Award should have been against ODIL not UZDON and asking that the award be reconsidered. On March 16 UZDON instructed their present solicitors. Notice of intention to appeal the Award was given on March 27. An application to be permitted to appeal out of time was made and fully argued on paper and at an oral hearing before the GAFTA Board of Appeal. It was rejected by an Appeal Award dated July 31 1998. The Award sets out fully the submissions of the parties and (without expressly giving reasons) refuses to exercise the absolute discretion to extend time. In the context of the chronology I have stated and

bearing in mind the form of the Award it is reasonable to suppose that the tribunal in effect accepted the submissions of ROMAK.

On August 28 UZDON made the present application. It was supported by an affidavit from Diane Galloway of UZDON's solicitors based on the documents and information supplied by Mr Kadyrov (not Mr Tulaganov). In Paragraph 30 of that Affidavit it was deposed that:

> [UZDON] *does not believe itself to have been under any liability to ROMAK. I do not set out in this affidavit UZDON's full case on the merits of its dispute with ROMAK. These are being investigated with UZDON as a matter of urgency, and I will seek the leave of the court to put a further affidavit before it, setting out in detail why the Award is considered to be erroneous. In outline, however, the position (as we presently understand it) is set out in paragraph 7 of UZDON's submissions.....*

Diane Galloway was right in deposing that leave would be required if further evidence was sought to be relied upon: R.S.C. Order 73 rule 22(1). The documents said to contain UZDON's then case on the merits in summary raised *the quota point* in a number of legal guises, referred to the *railing advices* and *railway bills* asserting that they referred to contracts other than the Contract, and asserted that UZDON never received delivery.

ROMAK's evidence (Affidavit of Mr Pletscher) was served on September 30.

On October 22 Mr Emmott's affidavit was sworn. It has 32 paragraphs and two Exhibits. The Exhibits cover some 200 pages, albeit some of the material was already available elsewhere in evidence. Understandably, in the

circumstances I have summarised, Mr Havelock-Allan QC took objection to the Court giving leave for the Affidavit to be used in evidence.

I have read the material contained in it. In the light of the view I have formed, which takes account of Mr Emmott's affidavit, I do not think it necessary to rule formally on whether leave to permit it to be adduced in evidence should be given. What should however be said is that the major purpose of the Rules as to time limits for applications of the present type is that challenges should be made promptly and fully and not be a means to delaying the day when Awards become fully enforceable. In the context of this application, if I had felt that ROMAK were prejudiced by the late service of the affidavit (which in terms of an evidential response to it I think ROMAK has established) I would have refused leave.

I have set out the history of this matter at length because in my judgment it is the basis on which the issues which UZDON seek to raise must be addressed and can be determined.

THE ISSUES

It is UZDON's submission that

(1) the first tribunal failed to adopt procedures *to ensure that UZDON were fairly treated and have failed to give the appearance of fair treatment,* and

(2) the consequence has been that UZDON has been caused *substantial injustice*. UZDON submit that *substantial injustice* is to be construed as meaning that if proper procedures had been adopted the tribunal *might well* have come to an Award more favourable to UZDON.

ISSUE (1) FAIR TREATMENT

UZDON make a number of points. They, and my assessment of them, follow.

(1) UZDON were *innocents abroad* and they misunderstood the role of their arbitrator expecting him to represent their interests.

I find this wholly uncompelling. UZDON unquestionably entered into a contract (in both Russian and English) involving substantial obligations with a GAFTA arbitration clause in it. If, as is said, UZDON did not even have a copy of the GAFTA Arbitration Rules that, in my judgment, is entirely UZDON's own fault. The Rules were frequently referred to in the correspondence as well as in the Contract. What they required UZDON to do was also spelt out in correspondence. As to the role of Mr Allen, it is to my mind compelling that this complaint surfaced only once UZDON's solicitors were instructed. In none of the correspondence or meetings was any complaint made. The period of silence in the face of the correspondence I have summarised between the Award and the end of January 1998 (5 months) speaks loudly that the fact that an Award was made (on documents and without oral submissions) came as no surprise to UZDON and that no basis was seen of this kind to challenge it. It would have been natural for UZDON, if this was truly their belief, to have written at once to Mr Allen on receipt of the Award. I would add that it also concerns me that the lawyer at UZDON (Mr Tulaganov) who dealt with the arbitration and correspondence has not deposed to his understanding of the position either directly or otherwise.

(2) The time limits imposed by the tribunal on UZDON were unreasonably stringent whereas ROMAK were treated more favourably.

I see no basis for this submission in fact. In any event UZDON were able to and did put submissions before the tribunal until the "reply to the reply" sent on August 5. For an arbitration commenced on April 2 of this type I can see nothing unfair or prejudicial to UZDON in that. I would also repeat that on receipt of the Award and for months thereafter UZDON did not suggest that they had been intending to put forward any further or different submissions or evidence to the tribunal or Mr Allen.

(3) UZDON did not even receive ROMAK's original claim submission.

Assuming this to be the case, again I can see no prejudice to UZDON at all. UZDON knew well ROMAK's case. ROMAK wanted to be paid for the wheat. The issues emerged fully and fairly in the documents which were exchanged, as is also apparent from the Award itself.

(4) UZDON were not given time to reply to ROMAK's reply.

In the event, they were and did so. See above.

(5) UZDON were not informed that there would be no oral hearing, despite the terms of the letter of April 21, 1997.

The letter itself offered alternatives: oral or writing. Diane Galloway deposed (presumably on information provided by Mr Kadyrov) in paragraph 16 of her Affidavit that after their reply to reply submissions :

> [UZDON] *believed that there would be some sort of meeting in London at which the dispute would be discussed and at which oral evidence could be led. Instead they received a copy of the tribunal's Award ....*

If this were truly the case, I cannot understand how it was that the point was not made until their Affidavit was sworn. Not only was there the period of silence to which I have referred but when the silence was broken (on UZDON being "posted") the complaint was that the Award was wrong not that it had been arrived at without a hearing.

(6) The tribunal should itself have decided that an award on documents was inappropriate where the issues were ones involving whether there were binding agreements between the parties and the sum involved was substantial.

I do not agree. The issues were reasonably well defined and not unusual. The documents themselves were not difficult to construe or understand. UZDON's own contemporaneous correspondence plainly acknowledged there was a contract between the parties.

CONCLUSION ON ISSUE (1)

In my judgment no case has been made that the tribunal acted in breach of section 33 of the Act. The parties had a reasonable opportunity to put their case and to deal with their opponent's case. The tribunal did act fairly and impartially and did adopt appropriate procedures. Moreover insofar as UZDON complains about the procedure it was either the author of its own problems or chose not to seek to remedy them by deciding not to pursue an appeal. The right to appeal was clearly documented and indeed discussed and I regret to say that I cannot accept UZDON's evidence that it was unaware of the right until it instructed solicitors.

That is sufficient to dispose of their application but I will also deal briefly with Issue (2).

ISSUE (2) SUBSTANTIAL INJUSTICE

I do not find it helpful, at least in this case, to seek to express the words of the Act in different language. The question is : *has there been serious irregularity which the court considers has caused UZDON substantial injustice.*

So far as the merits of UZDON's defence to the claim are concerned they have now been set out by leading counsel in his skeleton argument. In short, in my judgment, and despite the clarity of the manner in which they are now stated, they in fact amount to no more than the arguments which were advanced to and dealt with by the first tier tribunal and are, however expressed, at heart no more than an attempt either to avoid the provisions of the Quadripartite Agreement and in particular Clause 6 of it, or to advance the quota argument under various further legal guises which have no greater merit than those which the tribunal rejected.

It follows that I can also see nothing in the evidence or submissions to suggest that UZDON has suffered any let alone any substantial injustice in not advancing those arguments (so far as it did not in fact do so) before the first tier tribunal. I repeat that UZDON had, but chose not to exercise, its right to advance them on appeal.

In my judgment the reality of this dispute is that the arguments advanced by UZDON both before the tribunal and before me are inconsistent with the agreements they entered into and the correspondence they wrote and received. The Award recognised that and nothing put before me now on this application ,

made over 14 months after the Award was published, affects the position. It would indeed be a substantial injustice to ROMAK if the Award were not allowed to stand.

As I indicated at the end of the hearing the application by UZDON is therefore refused.

COSTS

Mr Havelock-Allan submits that this is an appropriate case for an order that ROMAK be awarded the costs of this application to be taxed on an indemnity basis rather than the standard basis. He does so on the basis that the application was hopeless and ill-founded, being based on a case which was inconsistent with UZDON's own documents, which were dealt with by UZDON in an unsatisfactory manner in the affidavit evidence filed on UZDON's behalf. Mr Young, for UZDON, accepts of course that costs must be awarded against UZDON but submits that there is nothing exceptional in the circumstances to justify an award on an indemnity basis.

I have formed the view that UZDON's conduct of the matter has been such as Mr Havelock-Allan characterises it. Whilst it is of course understandable that a party such as UZDON may not be wholly familiar with the procedures of arbitration, in particular where English is the language of the arbitration, I do not think those disadvantages, if such they were, begin to explain or justify the nature of the arguments advanced and the delays in advancing them by UZDON.

I do therefore think it appropriate to award ROMAK the costs of this application to be taxed on an indemnity basis.