

No extension of time for buyers to commence FOSFA arbitration under section 12 Arbitration Act 1996

(1) SOS Corporacion Alimentaria SA (2) Mataluni Spa v Inerco Trade SA [2010] EWHC 162 (Comm)

Background to dispute

This dispute arose out of the industry wide contamination of Ukrainian sunflower oil with mineral oil in 2008. Following an urgent alert by the European Commission on 30 April 2008, the European authorities recommended the withdrawal of contaminated goods to safeguard consumer health.

In the present case, the buyers of certain cargoes of Ukrainian sunflower seed oil commenced FOSFA arbitration proceedings against the sellers for contamination of the cargoes. The sale contracts incorporated the standard form FOSFA 54, Rule 2 of which specifies certain time limits for commencing FOSFA arbitration including a time limit of 21 days from discharge for quality/condition claims. Rule 2(d) provides that where the claimant does not comply with these time limits and the respondents raise the non-compliance as a defence, then claims are deemed to be waived and absolutely time-barred unless the FOSFA arbitrators, umpire or Board of Appeal determine otherwise in their absolute discretion.

The cargoes in question were loaded prior to the EU alert and the testing at loadport did not include analysis for mineral oil. When the buyers became aware of the industry wide contamination, they focussed on recalling all products as had been recommended and testing all stocks to determine which had been affected. By the time that they commenced FOSFA arbitration to recover their financial losses in respect of the oil that was found to be contaminated, the time limits specified under Rule 2 of FOSFA 54 had been missed. Nonetheless, the FOSFA arbitrators exercised their discretion under Rule 2(d) to allow the claims to proceed.

The sellers appealed to the FOSFA Board of Appeal which reversed the decision of the First Tier Tribunal and held that the buyers' claims were time barred.

The buyers made two applications to the court. Firstly, they applied under section 12 of the Arbitration Act 1996 (the "Act") for an extension of time to commence arbitration. Secondly, they applied for permission to appeal against the FOSFA arbitration awards pursuant to section 69 of the Act, which relates to appeals from arbitration awards on a point of law.

Commercial court decision

Mr Justice Hamblen dealt first with the application for permission to appeal under section 69 of the Act because if that application was dismissed, it would follow that the FOSFA Appeal Board's exercise of its discretion to hold that the claims were time-barred was lawful and not open to challenge and that might be relevant to the exercise of the court's discretion under section 12 of the Act. Alternatively, if the court were to allow the appeal, then it might decide to remit the issue of a time extension to the FOSFA Appeal Board, in which case the section 12 application would have to be postponed pending the outcome of the arbitral process.

The judge stated that the circumstances in which the court will find that the arbitrators have exercised their discretion unlawfully are likely to be rare. The FOSFA Board of Appeal had exercised its discretion not to grant the buyers a time extension to commence arbitration. The Board was unimpressed with the buyers' explanation for their delay. In the present case, the Judge concluded that the buyers had not demonstrated that the FOSFA Appeal Board's decisions were open to serious doubt or that they revealed any error of law. The section 69 application was, therefore, dismissed.

Turning to the section 12 application, the buyers had argued that the risk of sunflower oil contamination by mineral oil was not a recognised risk in the industry prior to the Ukrainian sunflower oil scandal in mid 2008 and was not generally tested for by sunflower oil traders. They alleged that

there was no industry standard method of testing for this type of mineral oil at the time that the contamination was discovered and it was only in direct response to the problem which was discovered in 2008 that the relevant authorities introduced a standard method of testing with effect from August 2008. Consequently, the buyers maintained that at the time of contracting, the parties would not reasonably have contemplated that the sunflower oil might be contaminated by a substance which was not recognised as a usual or likely potential contaminant and which had likely been deliberately and fraudulently added (although not by the sellers).

Mr Justice Hamblen highlighted the fact that the test for making a successful application for a time extension under section 12 was more stringent than that under its predecessor, section 27 of the Arbitration Act 1950. Under section 27, the court had been permitted to grant an extension of time if failure to do so would have resulted in undue hardship. Under section 12 of the Arbitration Act 1996, undue hardship would not be sufficient and time would be extended in exceptional circumstances only. Section 12(3) provides that the court should only make an order to extend time for commencing arbitration if (a) the circumstances were outside the reasonable contemplation of the parties when they agreed the time limit in question and it would be just to extend the time or (b) the conduct of one party makes it unjust to hold the other party to the strict terms of the time limit.

The judge said that the relevant factors that he needed to take into consideration in deciding whether to exercise his discretion under section 12 were: the length of the delay; whether it was due to the claimants' fault; if so, the degree of fault and whether either party would suffer prejudice if the discretion were not exercised. However, any prejudice suffered by the buyers as a result of the time bar was of no great weight because this was matched by the prejudice to the sellers in losing a good defence to a substantial claim.

The judge accepted the buyers' evidence that the mineral oil contamination had not been a recognised risk within the industry at the relevant time and that the parties could not reasonably have contemplated such contamination. However, in respect of one of the claims, the contamination had been established 8 days prior to the expiry of the time limit, yet the buyers had not taken the relevant steps to protect their position in due time. In respect of the other claims, the buyers had delayed in commencing arbitration even after they had become aware of the contamination and were in a position to put in a claim notice. In the judge's view, the buyers' failure to commence arbitration as soon as they became aware of the contamination involved a high degree of fault. In his opinion, they were also guilty of culpable delay even after being put on notice that the sellers were relying on the time bar.

The judge rejected the buyers' argument that they had not known of the relevant time limits for claiming FOSFA arbitration until they had been made aware of these by another company in the same group for whom the oil had originally been purchased. He stated that the buyers should have been familiar with the terms of the contracts they had made and the time bars they contained. The buyers were a well established international producer and distributor of vegoils and had a legal department which was actively involved in dealing with the contamination issue. They should therefore have been well aware of the rather fundamental practice of contractual time limits for bringing claims relating to goods in international contracts for the sale of goods governed by Trade Association terms, including FOSFA. In the circumstances, the judge did not consider that the buyers' failure to comply with the FOSFA time limit could be said to involve circumstances beyond their reasonable contemplation.

The judge therefore dismissed the section 12 application.

Comment

Section 12 of the Arbitration Act 1996 contemplates that an extension of time for commencing arbitration can be obtained from the court in cases where there is already an arbitral process for seeking such an extension, so long as any available arbitral process for obtaining a time extension has been exhausted. However, as Mr Justice Hamblen stated in this case, such cases "*are likely to be rare*". The applicant would have to show that it was not an "*ordinary case*" and that there was a good reason why it would be just to extend time notwithstanding the contrary decision of the chosen arbitration tribunal.

daniel.jones@incelaw.com
reema.shour@incelaw.com

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T:+971 4 3598982	T:+49 40 38 0860	T:+852 2877 3221	T:+33 2 35 22 18 88	T:+44 20 7481 0010	T:+33 1 53 76 91 00	T:+30 210 4292543	T:+86 21 6157 1212	T:+65 6538 6660
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E: firstname.lastname@incelaw.com

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