

Final Port of Discharge: actual or contractual?

AWB (International) Ltd v Tradesmen International (PVT) Ltd [2006] VSCA 210

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Facts

AWB (International) Ltd (the Appellant) contracted in writing to sell Tradesmen International (PVT) Ltd (the Respondent) 150 000 tonnes $\pm$ 5% of bulk Australian Standard White Wheat (the Wheat) on cost and freight terms (CFR) (the Agreement). Under the Agreement, dated 14 January 2004, the appellant was to pay for and charter a vessel that would deliver the Wheat to Port Qasim or Karachi Port, Pakistan.

An arbitration clause contained in the Agreement stated, in summary:¹

1. Any dispute should be referred to and finally resolved by Arbitration under the UNCITRAL Rules.
2. Any notice alleging a dispute (including arbitration) must be made in writing and the claimant's arbitrator appointed within six months of the vessel arriving at the final port of discharge. If this procedure is not followed the claimant waives their rights and no arbitration or litigation can proceed.

The Wheat was shipped in four ships, the first, second and fourth of which were rejected by Pakistan Quarantine Authority (Quarantine); the last, on 2 March 2004. Following the rejection of the Wheat by Quarantine the Respondent wrote to the Appellant on a number of occasions:²

1. 26 February 2004 (First Notice) – this letter advised the Appellant of the first two rejections and stated that while the Respondent would challenge the rejection, they would reserve the right to recover damages from the Appellant in the case that the Wheat supplied deviated from the specifications mentioned in the certificate provided by the Appellant.
2. 10 March 2004 – this letter asked for the Appellant's assistance to re-sell the Wheat. Assistance was provided and the Wheat was finally discharged on 7 April 2004 in Jakarta, Indonesia.
3. 2 September 2004 – this facsimile stated that further to the letter dated 26 February 2004 that the Respondent hereby gave notice of arbitration under the terms of the Agreement and that Mr Bruce Harris had been appointed as Arbitrator.
4. 13 September 2004 – this letter claimed to be a continuation of the letter dated 28 February 2004 and the notice of arbitration and specified 'such details as are required as the next step'.³

The Appellant responded to communication no. '3' by asking the Respondent to 'clarify' whether or not arbitration was being commenced and asked them to clarify the 'basis of [the] claim as [the] message [was] unclear'.⁴

Both parties and the trial judge accepted that had the Respondent issued the last notice within the allocated six month period, it would have been sufficient to avoid the time bar.

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¹ *AWB (International) Ltd v Tradesmen International (Pvt) Ltd* [2006] VSCA 210, [4].

² *Ibid* [5].

³ *Ibid*.

⁴ *Ibid*.

Issues

Before the arbitrator the following issues were in dispute:

1. whether there existed any valid or subsisting agreement to arbitrate between the parties;
2. whether, if there was a subsisting agreement to arbitrate, the Respondents purported notice of arbitration was time barred; and
3. did 'final port of discharge' refer to the contractual port or the actual port?

Arbitration

The arbitrator held that:⁵

1. there was a valid and subsisting agreement to arbitrate between the parties;
2. 'final port of discharge' referred to the actual port of discharge. In this case, that was Jakarta, Indonesia;
3. the six month time period began on 7 April 2004 when the Wheat was discharged in Jakarta;
4. any notice of arbitration had to comply with Article 3.3 of the UNCITRAL Arbitration Rules (the Arbitration Rules);
5. the notice dated 2 September did not comply with the Arbitration Rules; and
6. the notice dated 13 September did comply with the Arbitration Rules and was issued within the allocated time period.

Byrne J's Decision in the Victorian Supreme Court

The Appellant appealed the arbitrator's decision to the Victorian Supreme Court alleging that that the arbitrator erred in his decision. The Appellant submitted that Byrne J should hold that:⁶

1. the 'final port of discharge' was Port Qasim and not Jakarta;
2. a valid notice of arbitration had to comply with Art 3.3 of the Arbitration Rules;
3. the letter dated 02 September did not comply with such rules; and
4. the first notice was not a valid notice.

The judge refused the Appellant's appeal in this instance as they did not meet the requirements of the *Commercial Arbitration Act 1984* (Vic) (CAA) s38(5)(b)(i) and because the appeal would not substantially add to the certainty of the commercial law under CAA s35(5)(b)(ii).⁷

The Respondent also filed an originating motion, cross claiming that even if the final port of discharge under cl 15(ii) was Port Qasim and time commenced on 2 March 2004, the arbitrators erred in determining that a valid notice of arbitration had to comply with Art 3.3, and the first notice did not comply with this requirement.

The judge held that the arbitrator was 'not manifestly wrong'⁸ in determining that the contractual port was the final port of discharge and that a valid notice did have to comply with Art 3.3. He further held that the first notice did not comply with the requirements of Art 3.3 and as such was not a valid notice of arbitration. However, the judge found that the combined effect of the first notice and the letter dated 26 February 2004 sufficiently foreshadowed the Respondent's claim and ruled that since an arbitrator had been appointed, the time bar did not apply.

⁵ Above n 1, [6].

⁶ Ibid [8].

⁷ Ibid [12].

⁸ Ibid [9].

Appeal to the Victorian Supreme Court of Appeal

The Appellant then appealed Byrne J's decision to the Victorian Supreme Court of Appeal. The Appellant's 'principal contention' was that the 'words final port of discharge in cl 15(ii) refer[red] to the actual, and not the contractual, final port of discharge and that his Honour erred in concluding that the arbitrator's decision to the contrary was not a manifest error of law'.⁹ Chernov JA delivered the lead judgment in this case with Bell JA and Neave AJA both concurring.

Final Port of Discharge

The Respondent argued that the time bar in cl 15(ii) ran from the time when the discharge actually occurred and that such time bar operated 'perfectly well' if such ordinary meaning was given to the term 'final port of discharge'.¹⁰ The Respondent agreed that the purpose of notice under cl 15(ii) was to allow the Appellant to 'gather and preserve evidence', but contended that its preferred result still 'accommodate[d] the parties' clear intention to place the obligation on [the Respondent] to give [the Appellant] notice of any claim it wishe[d] to make...shortly after the actual discharge'.¹¹

The Appellant argued that cl 15(ii) was only concerned with the contractual destination of the wheat, Port Qasim, because other destinations fell outside the scope of the contract and that all subsequent obligations under the agreement were referable to Port Qasim. It was further argued that the term 'final' referred to the choice given to the Respondent to nominate a port for discharge between Karachi Port and Port Qasim and did not reflect an intention to recognise an actual port of discharge that differed from those stipulated.¹²

This view was shared by Chernov JA who stated that it would be 'plainly wrong' to conclude cl 15(ii) referred to the actual port of discharge if it were a place other than the contractual destination.¹³ In explaining his decision, Chernov JA noted that the court seeks to 'ascertain what reasonable business people in the position of the parties, had they applied their minds at the time of contracting, would have regarded the clause to mean',¹⁴ and referred to the case of *Schenker & Co (Aust) Pty Ltd v Maplas Equipment and Services Pty Ltd* where McGarvie J¹⁵ stated that 'the nature of [a] document and contract in which words appear is always a relevant consideration in their construction'.¹⁶ He also referred to *Antaios Compania Naviera SA. V Salen Rederierna A.B.* where Lord Diplock¹⁷ stated that if a 'detailed, semantic and syntactical analysis of the words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense'.¹⁸ Chernov JA additionally referred to *Darlington Futures Ltd v Delco Australia Pty Ltd*¹⁹ where it was stated that interpretation should follow the 'natural and ordinary meaning [of the clause], read in the light of the contract as a whole...giving due weight to the context in which the clause appears including the nature and object of the contract'.²⁰

In this case the Court considered that it would flout business commonsense and contradict the nature of the contract if cl 15(ii) was interpreted as referring to a port that was not within the scope of the contract. It was noted that all other rights and liabilities under the contract, including discharge of goods, quarantine standards, timely delivery, milling and sale of the wheat, were made with reference to Pakistan.²¹

⁹ Ibid [11].

¹⁰ Ibid [13].

¹¹ Ibid.

¹² Ibid.

¹³ Ibid [14].

¹⁴ Ibid [15].

¹⁵ *Schenker & Co (Aust) Pty Ltd v Maplas Equipment and Services Pty Ltd* [1990] VR 834, 837.

¹⁶ Above n 14.

¹⁷ *Antaios Compania Naviera SA. V Salen Rederierna A.B.* [1985] AC 191.

¹⁸ Above n 14.

¹⁹ (1986) 161 CLR 500.

²⁰ Above n 1, [16].

²¹ Ibid [17].

Chernov JA held that it would defy commercial commonsense to have the time period begin to run after actual discharge of the wheat in Jakarta when the Respondent's claim is referable to 'alleged failure by [the Appellant] to provide wheat acceptable to the Pakistan authorities'.²²

It was further held that any provisions in the contract detailing the Appellant's obligations regarding shipping merely identified the terms on which a charterparty was to be employed and did not influence cl 15(ii). It was held that the Appellant's obligations under the contract were essentially completed after the charterparty had been employed and the wheat loaded onto the vessel, although they could still be held liable for default by the charterparty. However, the performance 'guaranteed' by the Appellant taking responsibility for default merely related to Pakistan as that is where the charterparty was contracted to deliver the goods.

Valid Notice of Arbitration

Chernov JA held that the stipulation in cl 15(i) stating all disputes shall 'be referred to and finally resolved by arbitration under the...Arbitration Rules',²³ meant that the first notice was not a valid notice of arbitration. It did not comply with the requirements of Art 3.3.

Notice of Claim

The Court addressed the issue of whether a valid notice of arbitration complying with Art 3.3 was required to halt the time bar or if the reference to any 'other [written] claim alleging a dispute' in cl 15(ii) lessened the strict requirements of a notice of arbitration.²⁴ Due to the terms 'or' and 'other' in this clause, Chernov JA held that a written notice of claim (as opposed to a notice of arbitration) was sufficient to fulfill the cl 15(ii) requirement of a 'claim'.²⁵ It was held that cl 15(ii) primarily existed to ensure the Respondent informed the Appellant of the substance of any claim at an early stage, allowing the Appellant to '[gather] and [preserve] evidence, and the like' and that both a notice of claim and a notice of arbitration fulfilled this objective.²⁶ In coming to this decision his Honour likened the situation to that of statutory interpretation²⁷ and referred to *Smith v Lucas*²⁸ where it was held that 'one must consider the meaning of words used, not what one may guess to be the intention of the parties'.²⁹

Chernov JA came to a decision, which he believed 'construed and [gave] effect',³⁰ to the wording of the agreement, despite the Appellant's argument that such an interpretation 'contradict[ed] [the] underlying purpose',³¹ of the agreement (that is, that a strict requirement of notice of arbitration be given within a strict time period) and that the words 'or other claim alleging a dispute',³² were general in nature and could therefore not 'derogate from the specific requirements of the claim',³³.

Agreeing with the trial judge, Chernov JA held that the first notice combined with the letter dated 26 February 2004 gave 'sufficient notice to [the Appellant] of the claim that was being made against it and...satisfied the relevant requirement of cl 15(ii)'.³⁴

²² Ibid [20].

²³ Ibid [26].

²⁴ Ibid [27].

²⁵ Ibid.

²⁶ Ibid [32].

²⁷ Ibid [31].

²⁸ (1881) 15 Ch D 531, 542.

²⁹ Above n 27.

³⁰ Ibid.

³¹ Above n 1, [28].

³² Ibid [29].

³³ Ibid.

³⁴ Ibid [27].

Summary

The court concluded that the 'final port of discharge' as referred to in cl 15(ii) was in fact the contractual port. This ruling was made for reasons of commercial commonsense, as the contract in question merely encompassed the Pakistan ports and it would have been 'plainly wrong' to have the time period commence by reference to a non contractual destination, especially when all other obligations of the parties were contractual. The court also concluded that it could only interpret the words used in the contract and rule on their meaning, not guess what the parties may have actually meant. For this reason, it was held that the use of the words 'or other written agreement' diminished the strict requirements of Art 3.3 and cumulatively, the first notice and letter dated 26 February 2004 were sufficient to halt the time bar.