The Netherlands

Transport and Maritime Arbitration Rotterdam-Amsterdam ("Tamara") Arbitration

Anonymous, Procedural Order of a Tamara arbitration tribunal, 10 December 2012

ARBITRATION UNDER TAMARA RULES: WHAT THE LANGUAGE OF THE ARBITRATION SHOULD BE FAILING A CHOICE PREVIOUSLY MADE BY THE PARTIES

Summary

This note concerns an arbitration under Dutch law between seventeen cargo claimants domiciled outside the Netherlands and two ship owners, one of whom was domiciled in the Netherlands. Failing a choice of language for the arbitration proceedings, a dispute arose between the contesting parties regarding the language of the arbitration. The claimants argued that the language should be Dutch because, amongst other things, the proceedings were in the Netherlands, the applicable law was Dutch law and the arbitrators and the lawyers representing the contesting parties were Dutch. The ship owners argued that English law applied because, amongst other things, the arbitration was an international arbitration between parties most of whom were not domiciled in the Netherlands, the contract under which the dispute arose was in English and the language of correspondence between the parties was English. Furthermore, as the ship owners' main expert could only speak English, an arbitration in Dutch would represent inequality of arms. The tribunal held that, because the case had no real links with the Dutch language, the language of the arbitration should be English.

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Facts

On 24 May 2012 the claimants sent a notice of arbitration to the respondents. On 10 October 2012 the arbitration tribunal was appointed.

On 23 October 2012 the tribunal notified the parties of the order of the proceedings and asked the parties whether it was agreed that the language of the arbitration was to be English. The respondents' lawyer answered that English had indeed been agreed as the language of the arbitration proceedings. Initially the claimant's lawyer agreed that English had been agreed upon but later he denied that such an agreement existed and argued that the proceedings should be conducted in the Dutch language. The tribunal invited the parties to submit their arguments regarding the language of the arbitration so that it could answer this procedural question.

On 7 November 2012 the claimants submitted their statement arguing that the language of the

arbitration should be Dutch because:

- the contract of affreightment under which the dispute had arisen contained a choice of Dutch law and Tamara arbitration in Rotterdam, the Netherlands;

- the proceedings were under Tamara rules, which are of Dutch origin;

- the lawyers acting for the parties were qualified under Dutch law;

- the three arbitrators were Dutch;

- the principle of equality of arms led to the application of Dutch law because the respondents' lawyer was bilingual (English and Dutch) whereas the claimants' lawyer was not. This gave the respondents an unfair advantage.

On 27 November 2012 the respondents argued that English law should apply because:

- there was an implicit agreement between the parties regarding the choice of English law;

- as the Tamara Rules contain no provisions regarding the language of the arbitration, international doctrine and other arbitration rules should be used as guidelines in order to establish the language of the arbitration. In that respect article 20 of the ICC rules is relevant. It provides: "*In the absence of an agreement by the parties, the arbitral tribunal shall determine the language or languages of the arbitration, due regard being given to all relevant circumstances, including the language of the contract.*" The fact that the contract of affreightment was in English supported the argument that English should be the language of the arbitration;

- the principle of equality of arms indicates that the language of the arbitration should be English because the respondents' principal expert only spoke English. If Dutch were to be the language of the arbitration, this would give the claimants an unfair advantage, especially during the hearing when relevant points could be lost in translation during the hearing;

- English was the language in which the parties conducted their business and correspondence amongst themselves;

- The seventeen claimants were domiciled outside the Netherlands as well as one of the two respondents. It was practically unheard of to conduct such an international arbitration in Dutch. Such international proceedings are invariably conducted in English. There was no valid reason to break with that custom;

The procedural order

The dispute between the parties was subject to clause 44 of the contract of affreightment

dated 7 January 2010. That clause provided that:

"*..., any dispute ... shall be referred to Arbitration in Rotterdam in accordance with the TAMARA Arbitration Rules, ...*"

Furthermore the clause provided that "*The contract shall be governed by and construed with Dutch law.*"

Neither clause 44 of the contract of affreightment nor the TAMARA Arbitration Rules regulated the language of the proceedings. Therefore, pursuant to Dutch law, the tribunal was entitled to establish the language of the arbitration. The tribunal took the following facts and circumstances into account:

a) the language of the contract and its addendum was English;

b) all of the claimants were domiciled outside the Netherlands;

c) one of the two respondents was domiciled outside the Netherlands;

d) the contract of affreightment was between parties domiciled outside the Netherlands and related to the carriage of goods by sea between ports which were outside the Netherlands;

e) the most common language in the practice of the international carriage of goods by sea is English;

f) the TAMARA Arbitration Rules deliberately offer the flexibility to conduct the arbitration proceedings in any other language than Dutch;

g) all three arbitrators as well as the lawyers representing the parties were involved in the practice of international transport and shipping and were adequately experienced in using the English language.

The claimants' argument that the choice of Dutch law implied the use of the Dutch language did have some validity, in particular in respect to domestic disputes. However, the Tribunal was of the opinion that this argument was less valid when it related to a contract that had almost no real links with the use of the Dutch language.

The claimants' argument relating to Rotterdam as the place of arbitration did not carry much importance as Rotterdam was known as an international centre of trade and transport where the use of English prevailed.

The claimants' final argument relating to equality of arms was in itself a valid argument to the extent that language problems may have a negative influence on one or other of the parties when pleading their case. However, the Tribunal was not convinced that this problem would occur in this matter as it found that both the parties and the lawyers had adequate knowledge

of the English language to be able to conduct the proceedings in English. Furthermore, the tribunal intended to pay special attention to any language problems, if and when these might occur in the course of the proceedings and, if so, the tribunal would intervene and, if necessary, would allow any party or its lawyer to make use of interpreters or written translations.

The tribunal concluded by holding as follows under paragraph 3.7 of its procedural order:

"*In view of these considerations the tribunal finds it reasonable that the prevailing language to be used in the arbitration proceedings shall be English.*"

Comments

Although the tribunal did not state it in so many words, it seems that the facts and circumstances listed under a) to g) above led the tribunal to hold that the language of the arbitration was to be English, because the contract of affreightment under which the dispute arose had no real links to the Dutch language.