



Chartered
Institute of
Arbitrators

CIArb

***Scott v Avery* Clauses: O'er
Judges' Fingers, Who Straight
Dream on Fees**

by

Andrew Tweeddale and Keren Tweeddale

Reprinted from

(2011) 77 *Arbitration* 423-427

Sweet & Maxwell

100 Avenue Road

Swiss Cottage

London

NW3 3PF

(Law Publishers)

SWEET & MAXWELL

Scott v Avery Clauses: O'er Judges' Fingers, Who Straight Dream on Fees

Andrew Tweeddale

Keren Tweeddale

1. Introduction

Anyone who has studied arbitration law will have heard of a *Scott v Avery* clause; however, few people will have seen such a clause in practice and fewer still will have understood its purpose. A *Scott v Avery* clause does two things. First, it creates an obligation to arbitrate and secondly, it creates a condition precedent to a claimant's right of action that it must have previously arbitrated the dispute. There are still a few forms of contract which insist on including a *Scott v Avery* clause. These are mainly commodity contracts; for example, the Grain and Feed Trade Association (GAFTA) and the Federation of Oilseeds and Fats Associations (FOSFA). The FOSFA arbitration clause states¹:

“29. ARBITRATION: Any dispute arising out of this contract, including any question of law arising in connection therewith, shall be referred to arbitration in London (or elsewhere if so agreed) in accordance with the Rules of Arbitration and Appeal of the Federation of Oils, Seeds and Fats Associations Limited ...

Neither party hereto, nor any persons claiming under either of them, shall bring any action or other legal proceedings against the other of them in respect of any such dispute until such dispute shall first have been heard and determined by the arbitrators, umpire or Board of Appeal (as the case may be) in accordance with the Rules of Arbitration and Appeal of the Federation, and it is hereby expressly agreed and declared that the obtaining of an Award from the arbitrators, umpire or Board of Appeal (as the case may be), shall be a condition precedent to the right of either party hereto or of any person claiming under either of them to bring any action or other legal proceedings against the other of them in respect of any such dispute.”

An obligation to arbitrate is, however, created by a valid arbitration clause, and all modern arbitration laws set out provisions to enforce that obligation.² The distinguishing feature of a *Scott v Avery* clause, therefore, is that it contains a condition precedent. It makes arbitration a condition precedent to any court action. In this article we consider how a condition precedent works and how it can affect the interlocutory remedies a party can claim in an arbitration.

2. The History of the *Scott v Avery* Clause

One rarely reads a judgment in which a judge will criticise another. Lord Campbell in *Scott v Avery*,³ however, decided to criticise the attitude of the whole of the judiciary to arbitration. In the middle of the 19th century a stay of litigation to arbitration would only take place where a judge considered it an equitable course; there was no mandatory requirement to order a stay. As a result, many claimants ignored the arbitration clause within their contracts

¹ See also, for example, cl.26 of the GAFTA No.100.

² See, for example, Arbitration Act 1996 s.9 and UNCITRAL Model Arbitration Law art.8.

³ *Scott v Avery* [1843–1860] All E.R. Rep. 1 HL.

and, when disputes arose, commenced court proceedings. The judiciary then often failed to stay the litigation to arbitration, and the courts relied upon the principle that a party cannot by contract oust the jurisdiction of the courts.⁴ However, Lord Campbell explained in *Scott v Avery* the real reason for the court's dislike of arbitration clauses, in a passage in his judgment that was later omitted from some published reports,⁵ because it caused embarrassment to the judiciary. In his opinion the courts' hostility to arbitration clauses derived from the fact that judges had previously been paid on the basis of the amount of work that was brought into the courts. Arbitrations therefore robbed the judiciary of their income. Lord Campbell acknowledged⁶:

“[T]hat as formerly the emoluments of the judges depended mainly or almost entirely upon fees and they had no fixed salary, there was great competition to get as much as possible of litigation into Westminster Hall, and a great scramble in Westminster Hall for the division of the spoil ... They had great jealousy of arbitrations, whereby Westminster Hall was robbed of those cases which came neither into the Queen's Bench, nor the Common Pleas, nor the Exchequer. Therefore, they said that the courts ought not to be ousted of their jurisdiction, and that it was contrary to the policy of the law.”

The case of *Scott v Avery* involved a clause which was drafted to overcome the objection to ousting the court's jurisdiction. However, in order to be effective, it was not sufficient simply to create a contractual obligation to arbitrate, the clause needed to postpone a cause of action arising until after the arbitrator's award was made, so that the court's jurisdiction was not ousted. Lord Cranworth in the leading judgment held that it was valid. His Lordship distinguished a clause in a contract that ousts the jurisdiction of the court where a cause of action has already arisen, from the *Scott v Avery* clause where the jurisdiction of the court is not ousted because the cause of action is yet to arise. In considering the purpose of the condition precedent he concluded⁷ that there was:

“no principle or policy of the law which prevents parties from entering into such a contract as no breach shall occur until after a reference has been made to arbitration.”

His Lordship reasoned that in an arbitration no cause of action accrues until the award has been made⁸ because the right of a party to an action is a claim for the sum specified by the arbitral tribunal.⁹

3. Does a *Scott v Avery* Clause Affect Interlocutory Remedies?

The court has moved a long way from its initial hostility to arbitration. The Arbitration Act 1996 requires the court to act in a supporting role and to give effect to the principle of party autonomy.¹⁰ For example the Arbitration Act 1996 s.1(c) sets out as a fundamental principle of arbitration proceedings that the court “should not intervene” with the proceedings except as provided by the Arbitration Act 1996 Pt 1, and in s.44 sets out the powers of the court in support of arbitration proceedings, which will form part of the proceedings “unless otherwise agreed by the parties”. Subject to such an agreement, the courts have the same power to grant ancillary relief as they have in relation to legal proceedings.¹¹ It is therefore

⁴ See, for example, *Thompson v Charnock* (1799) 8 Term Rep. 139; 101 E.R. 1310, where it was held that an arbitration agreement did not bar an action in court. The court held that the right of action had accrued, and the fact that the parties had agreed to arbitration did not oust the jurisdiction of the courts.

⁵ For example: *Scott v Avery* 10 E.R. 1121; (1856) 5 H.L. Cas. 811.

⁶ *Scott v Avery* [1843–1860] All E.R. Rep. 1 at 7.

⁷ *Scott v Avery* [1843–1860] All E.R. Rep. 1 at 4.

⁸ *Scott v Avery* [1843–1860] All E.R. Rep. 1 at 6.

⁹ *Scott v Avery* [1843–1860] All E.R. Rep. 1 at 5.

¹⁰ See Arbitration Act 1996 s.1(b).

¹¹ *Q's Estate, Re* [1999] 1 All E.R. (Comm) 499 QBD (Comm).

somewhat ironic that a *Scott v Avery* clause, which was initially drafted so as not to oust the court's jurisdiction, appears now to have that effect when a party is seeking an interlocutory remedy.

The issue came before Flaux J. in the Commercial Court in the case of *B v S*.¹² There was a FOSFA form on contract with an unamended arbitration clause (see above). The claim was for nearly US \$3 million and B sought from the court a worldwide freezing order over the assets of S. The application for the freezing order was made under the Arbitration Act 1996 s.44, which states:

“Court powers exercisable in support of arbitral proceedings.

- (1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.
- (2) Those matters are—
 - ...
 - (e) the granting of an interim injunction or the appointment of a receiver.”

S applied to set aside the injunction on the basis that the freezing injunction was obtained in breach of the *Scott v Avery* clause. S argued that a *Scott v Avery* clause prohibits the taking of legal action or legal proceedings and therefore the Arbitration Act 1996 s.44 does not apply as the parties have “agreed otherwise”.

At the outset of his judgment Flaux J. stated that as a matter of construction cl.29 of the FOSFA form was wide enough to exclude all proceedings anywhere, whether substantive or ancillary. His Lordship then went on to consider whether the clause should be interpreted as excluding only substantive proceedings, as was the case under the Arbitration Act 1950. Flaux J. made a distinction between the ethos of the Arbitration Act 1950 and the Arbitration Act 1996. Prior to the Arbitration Act 1996 it was accepted that the courts would have had the power to issue this type of injunction. The Arbitration Act 1950 s.12(6) set out mandatory powers that a court possessed in relation to the reference to arbitration, which the parties could not exclude. However, Flaux J. stressed¹³ that the Arbitration Act 1996 is fundamentally different from the Arbitration Act 1950, particularly s.12(6), and that cl.29 of the FOSFA form on contract has to be read against the “permissive or non-mandatory regime of s.44 of the 1996 Act together with the whole philosophy underlying the Act of party autonomy”.

Flaux J. reviewed the authorities in detail. He considered the case of *Mantovani v Carapelli*,¹⁴ which had a near-identical *Scott v Avery* clause under the GAFTA rules. In that case the judge held that the *Scott v Avery* clause prohibited *all* legal proceedings and did not distinguish between proceedings commenced in Italy or those commenced in England. However, the judge then stated that this did not prevent an English court from ordering security because of the mandatory powers given to the court under the Arbitration Act 1950 s.12(6). Flaux J. distinguished *Mantovani* on the basis that the judge's reasoning was that the effect of the Arbitration Act 1950 s.12(6) permitted the court to order security notwithstanding the wide words of the *Scott v Avery* clause. He stressed again that this was not the case under the Arbitration Act 1996 s.44.

Flaux J. also had to consider whether it would be a breach of the *Scott v Avery* clause for the court to deal with an interlocutory matter rather than with an issue that went to the substance of the dispute. He put the question in the following terms: whether “any action or other legal proceedings” excluded “all proceedings, whether substantive or procedural”.

¹² *B v S* [2011] EWHC 691 (Comm); [2011] 2 Lloyd's Rep. 18.

¹³ *B v S* [2011] EWHC 691 (Comm) at [9].

¹⁴ *Mantovani v Carapelli SpA* [1978] 2 Lloyd's Rep. 63 QBD (Comm).

In order to answer this question Flaux J. considered the case of *Toepfer International v Societe Cargill France*,¹⁵ which was decided by Colman J. just before the Arbitration Act 1996 came into force.

In *Toepfer* a party to a GAFTA contract, which contained a *Scott v Avery*-type arbitration clause, commenced court proceedings in France. The other party then commenced proceedings in London to restrain the buyer from continuing with the French court proceedings. The buyer in the proceedings argued before Colman J. in the London court that the *Scott v Avery* clause prevented this application being made. Phillips L.J.¹⁶ in the Court of Appeal later described this submission as “not lacking in effrontery, having regard to their own conduct in bringing proceedings in France. Mr Justice Colman gave it short shrift”. Colman J. had stated¹⁷ that the *Scott v Avery* clause, which referred to “any dispute arising out of or under the contract”, was not intended to cover a dispute as to whether an anti-suit injunction should be granted. Colman J. concluded that¹⁸ “An award is therefore not a condition precedent to the claim for an injunction”. The Court of Appeal, when considering Colman J.’s analysis, agreed with it and stated,¹⁹ “we are satisfied that, as a matter of construction, a *Scott v Avery* clause cannot apply to injunctive proceedings brought for the purpose of enforcing the clause itself”. However, the Court of Appeal accepted, because of a raft of previous authority, that the *Scott v Avery* clause would apply to other supportive or procedural applications. Flaux J. interpreted this decision as relevant only to the construction of a *Scott v Avery* clause under the regime of the Arbitration Act 1950.

Flaux J. also considered Rix J.’s judgment in *Q’s Estate, Re*,²⁰ which was the only case so far to deal with injunctions under the Arbitration Act 1996 s.44. Although in this case the arbitration clause was not a *Scott v Avery*-type clause, Flaux J. found support in Rix J.’s obiter statements which he took as saying that if it had been such a clause it would have precluded the court from exercising its jurisdiction under the Arbitration Act 1996 s.44.

Flaux J. therefore concluded that because the Arbitration Act 1996 contained no similar provision to the Arbitration Act 1950 s.12(6), the effect of the *Scott v Avery* clause was now more far reaching. The *Scott v Avery* clause required him to discharge the freezing order because the wording of the clause had to be construed as meaning that the parties had agreed otherwise and, therefore, there was no power to make an order under s.44. It would also have a similar effect to any application made by a party under the Arbitration Act 1996 s.42.²¹ The result is that many of the powers that the courts would normally possess to assist the arbitral tribunal in the conduct of the arbitration are removed.

It is evident from the history of *Scott v Avery*-type clauses that when they were originally drafted there was no consideration of the removal of the court’s ancillary powers. *S v B* illustrates that applications to the court under ss.42 and 44 will be prevented where there is a *Scott v Avery*-type clause. These are provisions which were included in the Arbitration Act 1996 to support the arbitral process. Equally, applications under ss.45, 50 and 77²² will be prevented as these are clauses where the court cannot act if the parties “otherwise agree”.

In contrast, the mandatory powers given to the courts under the Arbitration Act 1996 will not be affected by the *S v B* ruling. For example, *Scott v Avery* clauses will not affect the court’s power to extend time for commencing an arbitration under s.12, or for staying litigation under s.9, or for securing the attendance of witnesses under s.43.

¹⁵ *Alfred C Toepfer International GmbH v Societe Cargill France* [1997] 2 Lloyd’s Rep. 98 QBD (Comm).

¹⁶ *Alfred C Toepfer International GmbH v Societe Cargill France* [1998] C.L.C. 198 CA at 204.

¹⁷ *Toepfer International v Societe Cargill France* [1997] 2 Lloyd’s Rep. 98 at 107.

¹⁸ *Toepfer International v Societe Cargill France* [1997] 2 Lloyd’s Rep. 98 at 107.

¹⁹ *Mantovani v Carapelli SpA* [1980] 1 Lloyd’s Rep. 375 CA at 381.

²⁰ *Q’s Estate, Re* [1999] 1 All E.R. (Comm) 499.

²¹ “Enforcement of preemptory order”—see also Rix J.’s analysis of this in *Q’s Estate, Re* [1999] 1 Lloyd’s Rep. 931.

²² “Determination of preliminary point of law”, “Extension of time for making award” and “Powers of the court in relation to service of documents”, respectively.

Having regard to the pro-arbitration attitude of the courts, there appears to be no benefit to a party in including a *Scott v Avery*-type clause in its contract. Given that these clauses now strip away the court's powers to support the arbitral process it can be fairly said that they actually achieve the opposite of what was originally intended. They make arbitration more difficult for those parties that choose arbitration.