THE HIGH COURT

DUBLIN

[2004] IEHC 198

2003 44 SP

BROSTROM TANKERS AB

PLAINTIFF

And

FACTORIAS VULCANO SA

RESPONDENT

APPROVED JUDGMENT BY MR. JUSTICE KELLY

ON WEDNESDAY, 19 MAY 2004

I hereby certify the following to be a true and accurate transcript of my shorthand notes of the evidence in the above-name matter.
Laura Polly

APPEARANCES

For the Plaintiff:	**Mr. J. Breslin BL**
Instructed by:	**Feídhlímíon Wrafter** **A & L Goodbody,** **North Wall Quay,** **IFSC,** **Dublin 1.**
For the Respondent:	**Ms. N. Hyland BL**
Instructed by:	**Helen Collins** **McCann Fitzgerald,** **2 Harbourmaster Place,** **IFSC,** **Dublin 1.**

JUDGMENT WAS GIVEN BY MR. JUSTICE KELLY ON 19 MAY 2004, AS FOLLOWS:

MR. JUSTICE KELLY:

The plaintiff is a Swedish company and carries on the business of ship-owner. The defendant is a Spanish company. On 23 December 1996, a contract was entered into between the plaintiff and the defendant whereby the defendant agreed to construct a chemical tanker on behalf of the plaintiff. The name of that vessel was New Building 476.

The contract was governed by Norwegian law. It contained an arbitration clause whereby all disputes were to be resolved by arbitration in Oslo in accordance with the law of Norway.

A dispute arose -- about which I will have to say more in a moment -- and was submitted to arbitration. A panel of three arbitrators chaired by a High Court Judge heard and determined the claim. By a majority, they found in favour of the plaintiff and made an award of 13,666,606 Swedish kroner being approximately €1.5 million. That award was made on foot of a breach of the shipbuilding contract, and the award was dated 27 November 2001.

This application seeks to enforce the award in this State pursuant to Section 7 of the Arbitration Act 1980.

One may wonder why a Swedish company is seeking to enforce an award governed by Norwegian law against a Spanish company in Ireland. The reason arises from the plaintiff's belief that there is an intercompany debt owed to the defendant by an Irish company called Rucile International Limited which may, if the application to enforce the award is successful, be garnished.

The defendant opposes the making of an enforcement order. It does so by reference to one, and only one, of the statutory grounds of defence available under the Act. It is the ground which is contained in Section 9 Subsection 3 of the Act.

Section 9 is contained in Part 3 of the Arbitration Act of 1980. That part of the Act deals with New York Convention Awards. The award in suit is such an award. Section 9 Subsection 1 provides, and I quote:

"Enforcement of an award shall not be refused otherwise than pursuant to the subsequent provisions of this section."

Subsection 2 provides six circumstances in which the court may refuse enforcement if the party against whom the award is sought to be enforced can prove the existence of any one of them. Subsection 2 provides, and I quote:

"Enforcement of an award may be refused if the person against whom it is invoked proves that:
(a) a party to the arbitration agreement was (under the law applicable to him) under some incapacity; or

(b) the arbitration agreement was not valid under the law of the country to which the parties subjected it, or failing any indication thereon, under the law of the country where the award was made;

(c) he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present his case;

(d) subject to Subsection (4) of this Section the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration; or

(e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country where the arbitration took place; or

(f) the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which or under the law of which, the award was made."

None of these provisions have any application to the present case.

Subsection 3 provides, and I quote:

"Enforcement of an award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration under the law of the State or if it would be contrary to public policy to enforce the award."

It is this latter proviso that the defendant relies upon asserting that it would be contrary to public policy to enforce the award in Ireland. In order to understand how this assertion arises, it is necessary to refer to certain background material.

The vessel was to be completed by 18 April 2000. On 6 December 1999, the defendant informed the plaintiff that it would not be able to complete by then. Correspondence was

exchanged between the parties in the month of March 2000, and in particular between the 2nd and the 14th of March, concerning inter alia the possibility of substituting another ship in lieu of Number 476.

On 17 March 2000, the defendant obtained a form of court protection in Spain pursuant to an Act called the Suspension of Payments Act of 1922.

On 31 March 2000 the defendant wrote to the plaintiff, and here I quote from the award which has been made in favour of the plaintiff:

"In a letter of 31 March 2000 to Brostrom, Factorias writes that the yard's offer to deliver the sister, Vessel 475, has been rejected several times, that it is absolutely impossible for the yard to deliver 476 before 18 October 2000, and that the owners have stated several times that they do not want to take delivery of the ship after that date. Referring to this, the yard writes:

'We had to consider your attitude as a repudiation of the contract and, in accordance with the terms of our letter dated March 10, 2000 we had cancelled the contract from March 15, 2000.'

In the letter the yard repeats that, 'We are at your disposal to return to you the amounts paid, and to agree a reasonable claim for expenses incurred.'

Brostrom replies on 3 April 2000, 'We are of the opinion that the contract is still in force. Your unilateral decision of nullifying the contract is legally without foundation.'

In the course of the spring and summer 2000 negotiations were held for an out of court settlement which, however, did not succeed. On the 7th of September 2000, Brostrom cancelled the contract. Brostrom's request to have the advance instalments repaid was thereafter affected by Factorias' bank without Factorias intervening."

That is a quotation from the arbitrator's award.

The receivership or protection afforded to the defendant by the Spanish courts came to an end on 10

October 2001. On that date, an agreement between the defendant and its creditors became binding upon them pursuant to an order of the Spanish Court. By that procedure the defendant is liable to pay its creditors just 10% of the debts due to them, such payment to be made by instalments over a period of 18 months.

The defendant contends that because the arbitration award allegedly deals with a liability which accrued prior to 17 March 2000, the claim covered by the award is captured by the Spanish court order and so as a matter of Spanish law may be recovered by the plaintiff only to the extent 10% of the full sum due. Thus it is argued this Court as a matter of public policy ought not to make an enforcement order since to do so would enable the plaintiff to recover, insofar as there are assets belonging to the defendants in this jurisdiction without imposition of the 10% limitation. Such a result ought not to be permitted, it is said, under the "Contrary to Public Policy" provision of Section 9(3) of the Act.

I must record that there has been an extensive exchange of affidavits, and there is enormous conflict between both Spanish and Norwegian lawyers as to the correctness of the views propounded by each side both in respect of Spanish and Norwegian law.

Amongst the issues in dispute are the following:

(a) whether the liability under the award falls within the scope of the Spanish receivership order. If the award arises in respect of a liability which antedated the order of the Spanish Court of 17 March 2000, it is said to be captured. But it is argued that the liability postdated that date because the contract was cancelled on 7 September 2000. But that assertion is itself disputed by the Norwegian lawyers who have expressed opinions on Norwegian law which was, of course, the governing law of the contract.

(b) the Spanish lawyers also dispute the issue as to whether the debt is captured in any event by reference to the law of the kingdom of Spain.

(c) the Spanish lawyers also argue as to whether the statutory provisions of the Spanish Suspension of Payments Act would justify a Spanish Court in refusing to enforce an award in that country on the basis of Spanish public policy. It is argued that principles of bankruptcy law and suspension of payments are outside the scope of Spanish public policy as a basis for refusing enforcement of a foreign arbitration award.

(d) there is also a dispute between the Spanish lawyers as to the territorial implications of the Spanish Court's order.

Having exchanged extensive affidavits of foreign law, each side then, as was their entitlement, served notices to cross-examine the lawyers who swore affidavits in respect of the foreign law. If that cross-examination proceeded, I would have to decide on these difficult questions of foreign law as a matter of fact. Daunting as that task might be, I am prepared to undertake it if it is necessary to do so.

However, I suggested to counsel that having regard to the provisions of Section 9(3) of the Act they should make their arguments relevant to that provision on the assumption that the defendant is correct in the arguments which it makes to the effect that the debt in question is captured by the arrangements sanctioned by the Spanish Court pursuant to the original order of 17 March 2000. They agreed to adopt this course.

Without, therefore, deciding any of these vexed questions of foreign law, I am now going to decide whether, even if they were all decided in favour of the defendant, it would provide a basis for refusing enforcement of the award.

If I decide that it would, I will then have to hear the cross-examination of the foreign lawyers and decide whether as a matter of fact the plaintiff or the defendant's experts are correct in their opinions as to the relevant legal questions.

If I decide to the contrary, then the matter is at an end. That is so because, even with all of the foreign legal questions decided in favour of the defendant, it would not provide a basis for refusing enforcement under Section 9(3) of the Act.

I am satisfied that there are strong public policy considerations in favour of enforcing awards. That is no less so in the case of New York convention awards.
Indeed, in Redfern and Hunters “Law and Practice of International Commercial Arbitration” (Third Edition) the authors speak of most countries faithfully observing what is described as the pro-enforcement bias of the New York convention. Such a leaning in favour of enforcement must not, of course, stand in the way of refusal if such is required as a matter of public policy.

I am satisfied that the public policy referred to in Section 9(3) of the Act is the public policy of this State. That is clear, in my view, from the wording of Article 5(2) (b) of the New York Convention which is scheduled to the Act of 1980. Article 5(2) reads as follows, and I quote:

"Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
(a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
(b) the recognition or enforcement of the award would be contrary to the public policy of that country."

Reference there to "that country" means in this case Ireland, this State.

Counsel for the defendant was unable to produce a single authority from here or anywhere else in the common law world supportive of her contention that public policy requires that I refuse enforcement in this country because to order enforcement would confer a commercial advantage on the plaintiff which it might not get under Spanish law, or that the commity of courts would be imperilled by an enforcement order being made.

I am quite satisfied that a refusal of an enforcement order on grounds of public policy would not be justified in this case. To do so would extend to a very considerable extent the notion of public policy as it has come to be recognised in the context of the enforcement of an arbitral award. The case law and the textbook writers make it clear that the public policy defence to an enforcement application is one which is of a narrow scope. It extends only to a breach of the most basic notions of morality and justice. In this regard, I derive considerable assistance from the decision in Parsons and Whitmore Overseas Company -v- Société General de l'Industrie du Papier, a decision of Circuit Judge Joseph Smith. This is reported at 508 F. 2d 969, a decision of the second circuit of 1974. In the course of his judgment, Judge Smith says this, and I quote:

"Perhaps more probative, however, are the inferences to be drawn from the history of the convention as a whole. The general pro-enforcement bias informing the convention and explaining its supersession of the Geneva Convention points towards a narrow reading of the public policy defence.
An expansive construction of this defence would vitiate the Convention's basic efforts to remove preexisting obstacles to enforcement.

Additionally, considerations of reciprocity - considerations given express recognition in the Convention itself - counsel courts to invoke the
public policy defence with caution lest foreign courts frequently accept it as a defence to enforcement of arbitral awards rendered in the United States.

We conclude, therefore, that the Convention's public policy defence should be construed narrowly.

Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice."

He quotes authorities in support of that proposition.

I am satisfied that a broad interpretation such as is contended for by the defendant would defeat the Convention's purpose of permitting parties to international transactions to promote neutral dispute resolution. The issue is dealt with in this fashion in Redfern and Hunter under the heading "Public Policy". This is at Paragraph 10(46), and I quote:

"Recognition and enforcement of an arbitral award may also be refused if it is contrary to the public policy of the enforcement state. It is understandable that a state may wish to have the right to refuse to recognise and enforce an arbitration award that in some way offends the state's own notions of public policy. Yet, when reference is made to public policy, it is difficult not to recall the skeptical comment of the English judge who said more than a century ago:
'It is never argued at all but where other points fail.' Certainly, the national Courts in England are reluctant to excuse an award from enforcement on grounds of public policy. Indeed, according to one learned commentator:
There is no case in which this exception has been applied by an English Court.

Indeed, in most countries this pro-enforcement bias of the New York Convention has been faithfully observed". I am of opinion that I would only be justified in refusing enforcement if there was, (as is stated Cheshire and North's Private International Law in the 13th Edition):

"Some element of illegality, or that the enforcement of the award would be clearly injurious to the public good, or possibly that enforcement would be wholly offensive to the ordinary responsible and fully informed memberof the public."

This case comes nowhere near that position. There is no illegality or even suggestion of illegality, nor are any of the other elements even remotely demonstrated. I am satisfied that there is no aspect of Irish public policy which could justify a refusal of an enforcement order even assuming that all of the foreign legal questions are decided in favour of the defendant.

That being so, I am satisfied that this is an award which should be enforced, and that the attempt to resist its enforcement on the basis of it being contrary to Irish public policy fails.

THE JUDGMENT THEN CONCLUDED