1.3.89. Set off & counter claim Arbitration Reported

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

BEFORE THE HON. THE CHIEF JUSTICE

ON THE 13TH, 14TH & 15TH FEBRUARY 1989

CAUSE NO. 137 OF 1988

In the matter of
THE FOREIGN ARBITRAL AWARDS
ENFORCEMENT LAW 1975

and

In the matter of
An Arbitration between
SWISS OIL CORPORATION as
claimant and THE REPUBLIC
OF GABON and LA SOCIETE
NATIONALE PETROLIERE GABONAISE
PETROGAB S.A. as
counterclaiming defendants

BETWEEN: (1) IMBAR MARITIMA S.A.
(2) IMRO MARITIMA S.A.
(3) LENI TRANSPORT S.A.
(4) LOVELACE S.A.
(5) HARVIST CORPORATION
(6) INTER MARITIME MANAGEMENT S.A. PLAINTIFFS

AND: THE REPUBLIC OF GABON DEFENDANT

Mr. Robin Potts Q.C. instructed by Mr. C. Quin of Bruce Campbell & Co. for the Plaitniffs

Mr. Andrew Jones of Maples & Calder for the Defendant

COLLETT C.J.

RULING AND JUDGEMENT

By their originating summons dated 27th May, 1988 the Plaintiffs are seeking leave pursuant to the Foreign Arbitral Awards Enforcement Law 1975 to enforce an arbitral award made by the International Chamber of Commerce Court of Arbitration in Paris on 3rd April 1987. They specifically ask leave to enforce that part of the award which orders the Defendant to pay Swiss Oil Corporation the amount of 6 million U.S. dollars with interest at 9.5% per annum from 1st July, 1983.

The background to this litigation is succinctly stated in the words of Harre J. taken from his Ruling on an earlier application herein, as follows -

> "Certain claims of the first five plaintiffs ("the shipowners") for damages against the defendant, the Republic of Gabon ("the Republic") were assigned to the sixth plaintiff ("IMM") by an agreement made on the 8th February 1986. The agreement provided that it was to be governed and construed according to the Laws of Switzerland and that the assignment was made on a fiduciary basis whereby IMM was under an obligation to account to the Shipowners for any amounts recovered in respect of the claims assigned to it. IMM in turn assigned the claims of the Shipowners and its own claims against the Republic to Swiss Oil Corporation ("SOC") by an assignment made on the same day. The assignment to SOC was also made on a fiduciary basis and provided that SOC was under an obligation to account to IMM for any amounts recovered in respect of the claims assigned to it.
>
> SOC filed a request for arbitration with the Court of Arbitration of the International Chamber of Commerce in Paris, purporting to act in its own name and as assignee. The terms of reference for the arbitration refer to an arbitration clause contained in a contract for sale of crude oil concluded between SOC and the Republic. That arbitration clause was the basis of the request for arbitration, and the Republic argued before the Arbitral Tribunal that the tribunal did not have jurisdiction to adjudicate upon the Shipowners' claims. That argument was rejected. Tribunal consequently entertained jurisdiction and concluded that it was not necessary for the claims to be assigned to SOC in order for the Tribunal to obtain jurisdiction over them within the scope of the arbitration clause. It found the Republic liable for damages on the claims and awarded

the sum of U.S.$6,000,000.00 and interest as compensation. It also, however, awarded the Republic compensation which was far in excess of this sum in respect of its counterclaim against SOC.

After the award, SOC executed an assignment in favour of the present plaintiffs in this suit of that part of the award which it acknowledged that it had obtained on a fiduciary basis on their behalf.

Although the terms of reference conferred on the tribunal power to "decide whether any amounts awarded to each of the parties should be set off", no such decision was made by it. However, in seeking to enforce the award against SOC before the Grand Court, the Republic has in effect, sought to liquidate the sum awarded by the Arbitral Tribunal against it in respect of the Shipowners' claims by setting them of against the greater amount awarded to it in respect of its claim against SOC, the fiduciary assignee of the claims.".

The main contention advanced by the Republic as to why this Court should refuse its leave to enforce the award is that French law or Gabonese law which is identical, is the governing law and that by operation of the doctrine of 'compensation' in French Law the respective obligations of Swiss Oil Corporation and the Republic became mutually extinguished pro tanto at the moment when the respective awards declaring them were rendered; there was,thereafter, nothing left which could be effectively assigned by Swiss Oil Corporation to the shipowner Plaintiffs or enforced in this jurisdiction. There is a pending issue between the parties as to the application of French law and of Swiss law, which governed the original assignments in 1966, and as to whether or not the effect, in accordance with those legal systems, is such as contended for by the Republic. Expert evidence of the foreign laws in question is needed to resolve those questions but before I am asked to consider them at all the

further question arises whether or not this Court, even if it were to answer them in favour of the Republic, would be entitled to refuse the leave now sought in these proceedings to enforce the award in this jurisdiction.

On the face of it the award or that part of it on which the Plaintiffs rely is good. The evidence of it required by section 6 of the 1975 Law to be produced is now before the Court. The written assignments of it in 1988 by Swiss Oil Corporation to Imbar Maritima and by Imbar Maritima to the other Plaintiffs have also been produced. In those circumstances counsel for the Plaintiffs relies upon section 7 of the Law, which is in the following terms:-

"7. (1) Enforcement of a Convention award shall not be refused except in the cases mentioned in this section.

(2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves -

(a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity; or

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

(c) that 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: or

(d) (subject to subsection (4)) that 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) that 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) that 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, it was made.

(3) Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award.

(4) A Convention award which contains decisions on matters not submitted to arbitration may be enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from

those on matters not so submitted.

> (5) Where an application for setting aside or suspension of a Convention award has been made to such a competent authority as is mentioned in paragraph (f) of subsection (2) the court before which enforcement of the award is sought may, if it thinks fit, adjourn the proceedings and may, on the application of the party seeking to enforce the award, order the other party to give security.".

It is plain upon the wording of subsection (1) that enforcement of a Convention Award duly evidenced is mandatory upon this Court except in one or other of the circumstances detailed in paragraphs (a) to (f) inclusive of subsection (2) or in subsection (3). The circumstance that the award relied on has been subsumed (if this be the case) by operation of the law of the country where the arbitration took place or by operation of the law governing the reference to arbitration is not mentioned among them. No doubt as counsel for the Defendant contends, a convention award which had been recognised by this Court, as the award in favour of the Republic against S.O.C. has been, could be relied upon in accordance with section 5 of the Law "by way of defence, set off or otherwise in proceedings in the Islands". But that section does not provide that it may be so relied on as a ground for the refusal of recognition or enforcement of another Convention award which it is sought to enforce against the party, such as the Republic, which has had the award in is favour already recognised by the Court.

Viewed in context section 7 of the Law must be regarded as a comprehensive provision detailing exhaustively the only circumstances under which this Court is entitled to refuse to enforce a Convention Award which is regular on its face. The provisions of that section are in no way governed by section 5 which, as counsel for the Plaintiff contends, is irrelevant in this respect. That view is confirmed by an examination of the English text of the New York Convention of 1958 which it is the express purpose of the 1975 Law to implement. Article V of the Convention provides that recognition and enforcement of an award may only be refused at the request of the party against whom it is invoked on specified grounds which very closely parallel the terminology of subsections (2) and (3) of section 7 of the Law.

No mention of set-off or compensation appears and no part of that Article or indeed of the Convention as a whole affords any support to the argument advanced on behalf of the Defendant. It is, of course, trite law that the Court should, if possible construe a local statute such as the 1975 Law in such a way as to give effect to the Convention which it seeks to implement.

That being so, I am compelled to conclude that, whatever the merits may be of the Defendant's present contentions founded upon the doctrines of French, Swiss or combined French and Swiss law, they are not contentions which can properly be advanced or be given effect to in these proceedings. There is, moreover, another ground on which the Plaintiffs assert that irrespective of the merits of these contentions the Republic is not entitled to rely upon them in this Court. That is the doctrine of res judicata. Counsel for the Plaintiffs put his submissions on this issue in two different ways. That first was to suggest that the failure of the arbitrators to rule upon the question of set-off, although empowered and indeed directed by the agreed terms of reference of the arbitration to do so, coupled with their decision to make cross awards of gross amounts in favour of the Republic and of SOC respectively, gives rise to an inference that they considered and rejected the application of the doctrine of compensation in French Law.

That argument was effectively countered by counsel for the Republic who pointed to the absence of any issue as to that legal doctrine from the pleadings exchanged between the parties and of any legal argument upon it. That being so, the arbitrators may well have made their award in the way which they did per incuriam as to the applicability of the doctrine of compensation. Alternatively, since that doctrine is said to operate automatically and without any judicial pronouncement, they may well have decided that no action on their part was called for to render the award of a nett amount. In my judgement no clear inference can be drawn and the Plaintiffs have not made out their case for res judicata on the basis of that suggestion.

Alternatively, however, Plaintiffs' counsel points to a wider aspect of the doctrine of res judicata exemplified by the decision of the Judicial Committee of the Privy Council in Yat Tung Co. v Dao Heng Bank (1975) A.C. 581. At p 590 Lord Kilbrandon, delivering the Judgement of the Committee cited with approval the words of Wigram V-C.in Henderson v Henderson (1843) 3 Hare 100 at p. 115 where he said :-

> "....where a given matter becomes the subject of litigation in and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.".

Lord Kilbrandon observed that the shutting out of a subject of litigation is a power which no court should exercise except after a scrupulous examination of all the circumstances and that it is limited to cases where reasonable diligence would have caused the matter to be raised earlier. The Judicial Committee went on however to hold that the Hong Kong Courts had been right to strike out as an abuse of process a statement of claim which could and should have been pleaded in an earlier litigation in those Courts between the parties.

What are the circumstances here?

The relevant part of the Terms of Reference to arbitration agreed between the Republic and S.O.C. are contained in Article 6.7 thereof which states - "The Arbitral Tribunal shall resolve all disputed issues within the scope of the parties' claims and defences and in particular.....decide whether any amounts awarded to each of the parties should be set off". Clearly the arbitrtors then had jurisdiction to adjudicate upon

that issue. It is common ground that they were not asked by the Republic in its pleading to set off any amount which might be awarded against it in respect of the claims forming the basis of the award in question here against any amount which might be awarded in favour of the Republic against S.O.C. arising out of other claims within the scope of the reference. The award is silent but the inference must be that if asked to so by the Republic the arbitrators would either have rendered a nett award or would have declined to do so on the basis that compensation was not applicable as between the respective claims advanced. Either way, there would then have been a decision of a competent tribunal which could, if desired, have been tested on appeal.

Since it seems clear that the matter could have been put forward for decision in this way can it also be said that it would have been so raised if reasonable diligence had been employed by those advising the Republic? One finds it difficult to avoid the conclusion that it would. Compensation is apparently a well known doctrine of French law deriving from Article 1290 of the Code Civil. Both parties were represented before the arbitrators by experienced French advocates. I readily appreciate that the benefit of the award of $6 million plus interest was not assigned by S.O.C. to the Plaintiffs until well after that award was rendered: nevertheless, it was common knowledge between the parties before the arbitral hearing that the claims which have resulted in this award had been assigned by the shipowners to S.O.C. by a fiduciary assignment.

It seems to me in light of this analysis that I have no option but to hold the doctrine of res judicata in its wider sense to be applicable to the circumstances here. The result is that having failed to raise the issue of a compensation before the Arbitral Tribunal, the Republic is not entitled to raise that issue now before this Court.

The conclusions and rulings at which I have arrived on those two submissions have the effect of disposing of the issues in this Originating Summons and in the result the Plaintiffs are

entitled to the relief they seek. It becomes unnecessary for me to enter into a consideration of the interesting arguments advanced to me by Counsel as to the proper characterisation of the issue of compensation for the purpose of deciding whether it is procedural or substantive in character. Any remarks of mine as to that issue would in the circumstances be purely obiter and I refrain from entering upon it.

For the reasons given, therefore, I give judgement in favour of the Plaintiffs for leave to enforce in response to paragraph 1 of their Originating Summons.

Dated / March, 1989

CHIEF JUSTICE.