THE HIGH COURT

[2015 No. 291 MCA]

IN THE MATTER OF THE ARBITRATION ACT 2010
AND IN THE MATTER OF ORDER 56 OF THE RULES OF THE SUPERIOR COURTS
AND IN THE MATTER OF AN ARBITRATION

BETWEEN

F.B.D. INSURANCE PUBLIC LIMITED COMPANY

APPLICANT

AND

SAMWARI LIMITED TRADING AS MUNSTER AIR COMPRESSORS

RESPONDENT

AND

SIMON MURPHY

NOTICE PARTY

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 20th day of January, 2016

1. In this application, the applicant seeks an order pursuant to Article 34 of the UNCITRAL Model Law setting aside what is referred to as an interim arbitral award by the notice party (arbitrator) dated 21st September, 2015, entitled *"Interim Determination on Status of Claimant Company,"* on the grounds specified in Article 34(2)(b)(ii) of the Model Law in that the award is in conflict with the public policy of the State as reflected in the Companies Act 2014. The applicant also seeks other ancillary relief set out in the notice of motion dated 28th September, 2015.

2. The respondent held an insurance policy with the applicant in respect of premises at Kilbarry Industrial Estate, Dublin Hill, Cork. These premises were damaged by a fire that occurred on 17th December, 2014, which also destroyed the

stock therein. The fire is the subject matter of a garda investigation which has yet to be completed.

3. In an affidavit grounding this application, Mr. Gerard Gannon, Solicitor, states that he is advised that the notice party (arbitrator) has erred in law and misdirected himself in determining that the respondent company may continue to prosecute an arbitration when the company has, at a General Meeting, passed a resolution that it be wound up as a creditor's voluntary winding up and caused a creditor's meeting to be summoned for the day following the General Meeting. In those circumstances, the applicant maintains that the respondent has no insurable interest which may be the subject matter of a claim in the arbitration and that the decision as to whether or not to arbitrate is one for the liquidator to take.

4. In *Snoddy v. Mavroudis* [2013] IEHC 485, Laffoy J. emphasised the limits of the jurisdiction of the court to set aside an award under Article 34 of the Model Law. Article 34 does not provide for any review of an award on the grounds that the arbitrator made an error of law or fact.

5. In *Broström Tankers AB v. Factorias Vulcano S.A.* [2004] 2 I.R. 191 Kelly J. considered the concept of public policy under the Arbitration Act 1980 which was in similar terms to the Model Law. At p. 197, para 28, he stated:-

> "*The caselaw 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 & Whitmore Overseas Co. Inc. v. Société Général de l'Industrie du Papier 508 F. 2d 969 (2nd Cir, 1974)[a decision of Circuit Judge Joseph Smith]. 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 pre-existing obstacles to enforcement...

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."

Issues

6. In this application, the following issues arise:-

(i) was the decision *"an award"*?;

(ii) was the company in liquidation at the time when the arbitrator made an *"Interim Determination on Status of Claimant Company"* and determined that it was not in liquidation?; and

(iii) is the affidavit evidence of Mr. Derek Ryan, Chartered Accountant, admissible having regard to the fact that no such evidence was given before the notice party (arbitrator)?

7. In the course of the hearing, counsel for the applicant accepted that if the determination by the notice party of the status of the claimant was not an *"award"*, Article 34 does not apply. In that context, I think it is useful to look at the *"order for directions"* made by the notice party on 15th July, 2015, following a preliminary

meeting held at the notice party's offices on 13th July, 2015 (stated in error to be *"13th day of July, 2014"*). The following relevant extracts are taken from the directions:

> *"**4. Identification of Parties in dispute***
>
> *The status of the Claimant Company to be set out to the satisfaction of the Arbitrator and the Respondent's solicitor, given the recent Notice of Creditors Meeting which was issued but, as submitted by counsel for the claimant, has now been withdrawn.*
>
> ...
>
> ***8. Any Preliminary Issues to be Determined***
>
> *None*
>
> ...
>
> ***14. Awards***
>
> ***(i) Need for any interim award** – None envisaged at present..."*

8. The court was referred to the UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration. This publication offers some assistance to the court as to what might constitute *"an award"* within the meaning of the Model Law. Whether Article 34 proceedings are admissible against a decision or ruling that merely determines preliminary questions of the claim is a controversial issue. There is no uniform terminology for such decisions or rulings and they can, in practice, be referred to as *"interim awards"* or *"partial awards"*. If a trend is to be discerned in the digest of case law it seems to suggest that Article 34 proceedings are only applicaple where the arbitrator's decision was on the merits of the case but have no application in the case of procedural orders. The respondent argues that in this arbitration the central issue or substance of the dispute was whether the claimant was

entitled to be indemnified on foot of the policy of insurance which it held with the applicant.

9. Although *"arbitral award"* is not defined in the Model Law, Chapter VI entitled "*Making of Award and Termination of Proceedings*" sets out the formal procedures for making an award and Article 31 prescribes the form and contents of an award. In one case, in the Oberlandesgericht in Hamburg, Germany, 14 Sch 01/98, it was found that a decision of an arbitral tribunal constituted an arbitral award if it entailed a decision on the merits of the case. In another case in the Oberlandesgericht in Cologne, Germany, 9 Sch 06/00, the court held that a decision of an arbitral tribunal could be considered as an arbitral award if it met the formal requirements of Article 31 of the Model Law.

10. Just as *"arbitral award"* is not defined in the Model Law, the only reference to it in the definition section of the Arbitration Act 2010, is to be found in s. 2(1) which states, *inter alia*: *"'award' includes a partial award..."*.

11. As I believe this is the first time that the courts in this jurisdiction have been asked to consider what is meant by an *"arbitral award"* for the purposes of proceedings under Article 34, I now set out the position, as I understand it, from considering the text of the Model Law, the Act of 2010 and the UNCITRAL Digest of Case Law. For the court to have jurisdiction under Article 34 to set aside a decision of an arbitral tribunal, the decision must be one which has been made on the merits of the case and meet the formal requirements of Article 31. It seems to me that this must include a partial award if it meets those criteria. Procedural orders or rulings made in the course of an arbitration are not amenable to challenge under Article 34.

12. The directions given by the arbitrator in the order for directions dated 15th July, 2015, were made on consent of the parties to the arbitration. It is of importance

to note that the arbitrator stated that there were no preliminary issues to be determined and no interim award was envisaged at that time. The interim determination on the status of the claimant company did not constitute either an interim or final award. It was a ruling by the arbitrator on a procedural issue as to whether or not the claimant could continue to maintain the proceedings in its own name or whether they would have to be prosecuted by a liquidator. If the applicant was of the view that the determination as to the status of the claimant company was to be an award (either interim or final), it is difficult to understand how it agreed to the directions which were made by the arbitrator. I am satisfied that the determination by the notice party of the status of the claimant was not an award and is not amenable to challenge under Article 34. The fact that Mr. Gerard Gannon in para. 4 of his affidavit grounding this application refers to a determination as being an *"interim arbitral award"* does not make it so. In para. 5 of his affidavit sworn on 25th September, 2015, in support of this application, he says:-

> *"I am advised that the notice party has erred in law and misdirected himself in determining that the respondent company may continue to prosecute an arbitration when the company has at a General Meeting passed a resolution that it be wound up as a creditor's voluntary winding up and has further caused a Creditor's Meeting to be summoned for a stated day thereafter..."*

13. Even if Mr. Gannon is correct in asserting that the notice party has erred in law that is not a ground for setting aside his decision under Article 34 (see *Snoddy v. Mavroudis* [2013] IEHC 285, (Laffoy J.) and *Patrick O'Leary t/a O'Leary Lissarda v. John Ryan* [2015] IEHC 820 (McGovern J.). If that is the position regarding errors made in law in an arbitral award then *a fortiori*, Article 34 can have no application where the errors in law sought to be impugned are not part of an *"arbitral award"*.

14. Since I have determined that the decision/ruling of the notice party was not an *"arbitral award"*, it follows that the application cannot succeed. It is not, therefore, necessary for me to consider whether or not the arbitrator was correct in his determination as to the status of the claimant. But for the sake of completeness, I would state that the evidence has not established that the company was in liquidation. The applicant raised that issue before the notice party in the course of a preliminary hearing and the burden of proving that was on the applicant. No liquidator was ever appointed. If there were irregularities or deficiencies in the minutes, books or records of the respondent or the cancellation of the creditor's meeting after it had been called, these may be matters for the Director of Corporate Enforcement or for another court but are not relevant to the issue which I have to decide and I make no finding on these matters.

15. While this motion was decided by my finding that the ruling/decision sought to be impugned was not an *"award"*, I wish to state that had it been either permissible or necessary to adjudicate on the status of the respondent, the evidence of Mr. Derek Ryan would not have been admissible as it was not raised before the notice party (arbitrator) and there seems to be no good reason why such evidence could not have been canvassed before him at the preliminary hearing.

16. The applicant has failed to establish that the decision/ruling of the notice party was an *"award"* and it follows that it does not come within the scope of Article 34 and this application must fail. I refuse the relief sought.

Approved 20-01-16
D. J. Mc G.