THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVIHCV (COM) 2012/0052

BETWEEN:

VENDORT TRADERS INC.

Applicant

And

EVROSTROY GRUPP LLC

Respondent

Appearances: Mr Marcus Staff, Mr. Adam Cloherty and Mr Jeremy Child for the Applicant, Vendort Traders Inc
Ms Tamara Cameron for the Respondent, Evrostroy Grupp LLC

JUDGMENT

[2012: 8, 22 November]

(Statutory demand – demand based upon LCIA arbitration award – whether award creating an enforceable debt – whether underlying debt disputed – section 10 Insolvency Act 2003 considered – whether demand to be set aside)

[1] **Bannister J [Ag]:** This is an application by a BVI registered company, Vendort Inc ("Vendort") to set aside a statutory demand served upon it on 24 May 2010 by Evrostroy Grupp LLC ('Evrostroy').

[2] The demand is for RUR38 million (together with GBP36 thousand and US$3,474 by way of interest and costs of the arbitration in which liability of Vendort to pay those sums has been established). The particulars of debt set out in the demand state that Vendort is indebted to Evrostroy pursuant to a final award made on 1 November 2011 in an LCIA arbitration and the principal sum is stated to be the balance due under a written share sale and purchase agreement entered into between the parties on 15 May 2006 and which is expressed to be subject to English law ('the SPA'). It appears from the evidence of Mr Jacques L Jones ('Mr Jones'), filed on behalf of Vendort, and from the material which he exhibits to his affidavit that the shares were shares of a company called JSC ISKOG, which were transferred to Vendort on 24 July 2006. Vendort had paid some RUR15 million of

the purchase price of RUR44.7 million on 17 July 2006 but has not paid the balance of RUR25.4 million, which forms the basis of the demand.

[3] Evrostroy filed its request for arbitration on 17 December 2009 and the arbitrator was appointed on 29 January 2010. By his final award made on 1 November 2011 the arbitrator held Vendort in breach of its obligations under the SPA and ordered it to pay the sums which form the basis of the statutory demand. None of that money has been paid. No steps have been taken by Evrostroy to enforce the award here under the Arbitration Ordinance ('the Ordinance'). It cannot do so under section 34 of the Ordinance because the award is not a Convention Award as defined therein, but it could, at the discretion of the Court, be made enforceable as a judgment pursuant to section 28. No application has been made for that purpose. Neither has Vendort made any attempt to have the award set aside.

[4] Mr Staff, who appears together with Mr. Adam Cloherty and Mr. Jeremy Child for Vendort, says that the fact that the Court has not made an order under section 28 of the Ordinance for the award to be enforceable as a judgment means that it is unenforceable. Evrostroy cannot, therefore, serve a statutory demand because no statutory demand can be validly made unless the underlying debt is both due and payable.[1] Mr Staff relies upon section 10(3) of the Insolvency Act, 2003 ('IA, 2003'), the effect of which is to exclude from the definition of 'liability' an illegal or unenforceable liability and thus, indirectly, to provide that an unenforceable liability cannot be a debt for the purposes of a statutory demand or claimed in the liquidation of a company.

[5] I have no hesitation in rejecting this submission. The effect of an order under section 28 of the Ordinance is to make the award enforceable as a judgment. The word 'enforceable', where it occurs in conjunction with the word 'illegal' in section 10(3) of IA, 2003, does not mean 'enforceable as a judgment.' Otherwise, only judgment creditors could serve statutory demands or claim in liquidations. 'Unenforceable' in section 10(3) means not actionable – for example, because the contracting party was a minor, or because the claim is statute barred, or unsupported by valuable consideration or affected by one or other of the many defects which may prevent a claim from being capable of being collected in proceedings brought for the purpose. Evrostroy has a debt enforceable against Vendort, because Vendort has been ordered in an arbitration in which Vendort appeared and took part to pay the money to Evrostroy.

[6] The question for the purposes of this application, therefore, is whether that debt should be treated as the subject of a dispute of substance, in which case the statutory demand must be set aside[2], or whether, as a matter of discretion, the demand should be set aside on the grounds that to let it stand would result in substantial injustice.[3]

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[1] Insolvency Act, 2003, s 155(2)(a)
[2] section 157(1(a)(i), IA, 2003
[3] section 157(2)(b), IA, 2003

[7] It follows that the question on the present application is not whether the award should be enforced in this jurisdiction. The Court is not, therefore, concerned, even indirectly, with section 25 of the Ordinance, which in my judgment has application only to domestic awards, but it seems to me that it would be wrong in principle to treat a debt established by a foreign award as disputed unless it can be argued on substantial grounds that the arbitral process was not properly followed or was inherently flawed ('misconducted' to use the traditional language of section 25), or unless some evidence has subsequently emerged which shows that there is a substantial argument that the arbitration proceeded on a fundamentally mistaken basis of fact, as where, for example, there is compelling evidence that the contract on which the arbitration pronounced was a forgery (as in **HJ Heinz Co Ltd v EFL Inc**[4]**),** or unless it would otherwise be contrary to the public policy of the jurisdiction in which the award was being relied upon for the Courts of that jurisdiction to recognize it as founding an exercise of the jurisdiction of those Courts. The case law shows that this latter question is not necessarily the same question as whether a claim brought in the domestic Courts upon the cause of action which succeeded in the foreign arbitration would have failed on public policy grounds.[5] These principles seem to me to stand good whether or not the presumption in favour of enforcement found in Part IX of the Ordinance applies to the award.

[8] In the present case, Vendort does not deny that it entered into the SPA or suggest that it is not bound by the arbitration agreement which it contained. It took part in the arbitration and did not then and does not now make any challenge to the process or to the rendering of the award itself. Mr Staff accepts, very properly, that the rendering of the award created an estoppel between his client and Evrostroy.

[9] The objection to this Court recognizing the award is based, first, on the fact that a witness who gave evidence in the arbitration, Mamporia, told the arbitrator that he had bought Evrostroy, after the SPA had been entered into, from one Koltsov, (who had signed the SPA on Evrostroy's behalf), for RUR20,000 and subsequently sold it on to a lady called Mde Smirnova, who was supposedly the mover behind Evrostroy's claim in the arbitration, for RUR10,000. Mamporia explained the low purchase price by saying that although he believed that Vendort owed Evrostroy RUR29.4 million, he, Mamporia, did not have the means to collect the debt. This, of course, does not make any sense, since in those circumstances it would be the beliefs of Koltsov which would be principally material to the price. In criminal proceedings against one Koslov, alleged to have stood behind Vendort in the matter of the SPA, he told the Russian Courts that when he purchased Evrostry from Koltsov he thought it was an empty shell without assets or liabilities. So, says Mr Staff, it is shown that Mamporia lied to the arbitrator.

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[4] [2010]

[5] **Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd** [2000] 1 QB 288

[10] I do not know how Mr Staff can be sure that Mamporia lied to the arbitrator rather than to the Russian criminal Court, but even assuming that he did, I cannot see how that would mean that the award was arguably tainted by procedural irregularity or based upon a fundamental mistake of the sort which was exposed in **Heinz**, nor why that means that it would be contrary to the public policy of the Virgin Islands to recognize the award. A foreign arbitral award is recognized (or enforced) not because the domestic Court believes it to have been correctly decided, but because it represents the bargain between the parties. They agreed to be bound by the decision of the arbitrator. They did not agree to be bound by process out with that bargain, which is why challenges to arbitral awards are (I speak in very broad terms) challenges to the process rather than challenges on the merits but, as I have already said, no complaint is made by Mr Staff about the process itself. This element of his complaint is that if the case was reargued, the result might be different. That is not, as I understand it, a ground why this Court should not recognize the award.

[11] Mr Staff further complains that Mme Smirnova's evidence was incredible or, perhaps more accurately, that she herself struck an incredible figure. He also says that in the Russian criminal proceedings it appears to have been established that Koltsov does not exist – in the sense that the person who used that identity in transacting the SPA had in fact purchased that identity from someone else. I do not see how that affects the matter. Vendort accepts that it is bound by the SPA. Vendort received the shares and makes clear that it has no intention of handing back those which it retains (having earlier disposed of certain of them). The fact, if true, that the person acting as Evrostroy's agent in the transaction may have been masquerading as somebody else does not seem to me to be a reason why the award should not be recognized. In my judgment neither of these complaints gets anywhere near to establishing that the award is procedurally unsafe or that public policy requires that it should not be recognized.

[12] This material is said to establish that the award was obtained by fraud. The evidence does not begin to establish that. Then it is said that the attempt to enforce the award is part of a fraudulent scheme (the details of which are not particularized and which in any event is not said to have originated until 2007, after the SPA had been entered into and partially performed) designed to achieve the divestment from Vendort of the remaining ISKOG shares and that to recognize or enforce the award would be contrary to public policy. I cannot see how obtaining the appointment of a Court appointed liquidator over a debtor company can be part of a fraudulent scheme. A liquidator, if appointed, will have the power to go behind the award, so that Vendort's position and that of any other creditors which it may have would be fully protected if a liquidator were to be appointed.

[12] Mr Staff relies upon sections 25 and 26 of the Ordinance. In my judgment, these sections (which I do not need to set out *in extenso*) apply for the most part (if not entirely, which is something which I do not have to decide on this application) only to domestic awards. I have no power under section 25(1) to remove an LCIA arbitrator on the grounds that he has misconducted himself or under section 25(2)

to set aside his award (although the Court would no doubt decline to enforce it or to permit it to be relied upon in support of a statutory demand if it were alleged on substantial grounds that that the arbitration was not conducted in accordance with ordinarily accepted standards of due process). No suggestion is made here that the arbitrator misconducted himself or the proceedings or that the award was improperly procured. Section 26(2) has no application to the LCIA award in this case (a) because it is a final award in a foreign arbitration and (b) because no question arose in the arbitration whether one or other party to it was guilty of fraud.

[13] It seems to me, therefore, that Mr Staff is unable to point to any substantial dispute as to the validity of the debt due by Vendort to Evrostroy under the SPA.

[14] For these reasons Vendort cannot claim that there is a substantial dispute affecting its debt to Evrostroy, nor can it show, for the purposes of section 157(2)(b), that substantial injustice will be caused if the demand is allowed to stand.

[15] For these reasons this application must be dismissed. I will make an order pursuant to section 157(5) IA, 2003 authorising Evrostroy to make application for the appointment of a liquidator.

Commercial Court Judge
22 November 2012