

**THE HIGH COURT
ADMIRALTY
THE M.V. "SONATA"**

[2007 No. 614P]

BETWEEN

**COMMON MARKET FERTILIZER S.A.
AND GRASSLAND FERTILIZERS (KILKENNY) LIMITED**

PLAINTIFFS

AND

THE OWNERS AND ALL PERSONS CLAIMING AN INTEREST IN THE M.V. "SONATA"

DEFENDANT

Judgment of Mr. Justice Paul Butler delivered the 7th. day of March, 2007

1. By Plenary Summons dated herein on the 29th January, 2007 the plaintiffs commenced proceedings claiming damages for breach of contract of carriage and for breach of duty including negligence arising out of damage to a cargo of 7,279.5 metric tonnes of compound fertilizer carried on board the merchant vessel "Sonata" from St. Petersburg, Russia to Waterford in Ireland under a Bill of Lading dated the 12th January, 2007. The plaintiffs further claimed interest pursuant to contract and pursuant to statute.

2. By Order of this Court made on the 29th January, 2007 the M.V. Sonata was arrested.

3. By Notice of Motion dated the 12th February, 2007 the defendant seeks:-

1. An order pursuant to s. 5 of the Arbitration Act, 1980 or otherwise staying the plaintiffs' claim herein;
2. A consequential or other order setting aside the arrest and releasing the defendant's vessel from the arrest and custody of the Admiralty Marshal;
3. Alternatively, if for any reason the Court determines that it ought not to set aside the arrest or release the ship without security an order pursuant to O. 64, r. 17 of the Rules of the Superior Courts or otherwise fixing the security herein;
4. An order providing for the defendant's costs of this application and the defendant's costs of the proceedings.

4. Section 5 of the Arbitration Act, 1980 provides:-

"5.—(1) If any party to an arbitration agreement, or any person claiming through or under him, commences any proceedings in any court against any other party to such agreement, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the proceedings may at any time after an appearance has been entered, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.

(2) Nothing in this section shall be construed as limiting or otherwise affecting the power conferred on the High Court pursuant to section 39 (3) of the Principal Act to refuse to stay any action brought in breach of an arbitration agreement."

5. "Arbitration Agreement" is defined by s. 2 of that Act as:-

"An agreement in writing (including an agreement contained in an exchange of letters or telegrams) to submit to arbitration present and future differences capable of settlement by arbitration".

6. The defendant claims that there is an arbitration agreement between the parties on the basis that there is an Arbitration Clause in the Charterparty.

7. *Sweeney v. Mulcahy* [1993] I.L.R.M. 289 is cited by the defendant as an authority for the proposition that an offer in writing of a contract that includes an Arbitration Clause, though not replied to in writing by the other party, is sufficient to constitute an Arbitration Agreement if the contract offered is subsequently acted upon by the parties.

8. While the plaintiffs were not parties to the Charterparty, it is submitted that as the Bill of Lading refers to the Arbitration Clause therein the plaintiff's are bound by it in that the Charterparty is incorporated in the Bill of Lading.

9. While the law is correctly stated on behalf of the defendant, I am satisfied that in this case the facts are fundamentally different in that the Charterparty was generated subsequent to the Bill of Lading and could not, therefore, form part of it.

10. I, therefore, refuse the relief sought at paragraph 1 of the notice of motion herein.

11. As I have refused the relief sought at paragraph 1 of the Notice of Motion the "consequential" order sought at paragraph 2 does not arise. In the submissions it has been attempted to expand the reliefs sought in the Notice of Motion to a challenge of the jurisdiction of this court to arrest the vessel at all on the basis that the M.V. Sonata wears the flag of the Commonwealth of Dominica, a non-contracting party to the 1952 Arrest Convention (incorporated into Ireland by the Jurisdiction of the Courts (Maritime Conventions) Act, 1989). In the *M.V. "Kapitan Labunets"* [1995] 1 I.L.R.M. 430 the Supreme Court found that Article 8, paragraph (2) of the Convention plainly conferred jurisdiction to arrest a ship flying the flag of a non- contracting State.

12. Article 8.2 of the Convention provides:-

"(2) A ship flying the flag of a non-contracting State maybe arrested in a jurisdiction of any contracting State in respect of any of the Maritime claims enumerated in Article 1 or of any other claim for which the law of the contracting States permits arrest."

13. I am satisfied that the court had jurisdiction to order the arrest in this case.

14. The other question remaining is that of security. It is clear that quantum will be hotly contested in this case and I can go so far as to observe that the defendant has indeed suggested an arguable case to the effect that the plaintiffs may well not be able to recover much of the sum now claimed. It is, however, accepted that the security should be fixed on the basis of the plaintiffs' "reasonably arguable best case". While the plaintiffs may not succeed to the full they have particularised and reasonably argued their best case in the amount of U.S. dollars \$950,000.00 inclusive of interest in costs and I deem the same to an appropriate sum.

15. I shall hear the parties on the form of Order to be made on the basis of the foregoing findings.