UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Arbitration Between
NAR S.P.A. - INDUSTRIA NASTRI ADESIVI,

Petitioner,

- against -

I.R. INDUSTRIES, INC.,

Defendant.

98 CIVIL 1057 (BDP)

JUDGMENT

Whereas the above entitled action having been assigned to the Honorable Barrington D. Parker, Jr., U.S.D.J., and the Court thereafter on May 20, 1998 having handed down its MEMORANDUM DECISION AND ORDER granting petitioner's motion to confirm the arbitral award, it is,

ORDERED, ADJUDGED AND DECREED: That the petitioner's motion to confirm the arbitral award is granted, with statutory costs for petitioner.

Dated: White Plains, New York
May 21, 1998

James M. Parkinson
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Arbitration Between

NAR S.P.A. - INDUSTRIA NASTRI ADESIVI,

Petitioner,

-against-

I.R. INDUSTRIES,

Respondent.

98 Civ. 1057 (BDP)

MEMORANDUM DECISION AND ORDER

BARRINGTON D. PARKER, JR., U.S.D.J.

Petitioner NAR S.p.A. - Industria Nastri Adesivi ("NAR"), an Italian corporation, moves pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"), 9 U.S.C. § 201 et seq., to confirm a foreign arbitral award rendered in Italy in its favor on March 8, 1996. Respondent I.R. Industries, a New York corporation, has not opposed this motion.

Pursuant to an arbitration clause in an April 14, 1988 agreement between NAR and I.R. Industries, NAR commenced an arbitration proceeding against I.R. Industries in Milan, Italy. In accordance with the Rules of Arbitration of the International Chamber of Commerce, NAR sought to recover from I.R. Industries the balance owed for five shipments of goods that NAR made to I.R. Industries after terminating a business relationship between the parties. After hearing evidence, the Arbitrator on March 8, 1996 entered an award in writing. The Arbitrator found no modification of the April 14, 1988 agreement that would have relieved I.R. Industries of its contractual obligation to pay the full amount of NAR's invoices and issued a judgment against I.R. Industries. In January 1997, the award was certified by a Magistrate in Milan, Italy. NAR now seeks confirmation of that award. For the following reasons, NAR's motion to confirm the award is granted.

DISCUSSION

Congress has provided federal district courts with the authority to confirm foreign arbitral awards. 9 U.S.C. § 207; see also Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 19 (2d Cir. 1997). To obtain enforcement of the arbitral award, a party may apply to federal district court, attaching copies of the arbitral award and the agreement to arbitrate. See Convention, Article IV (reprinted following 9 U.S.C. § 201). NAR has complied with these requirements. Once the requirements are complied with, the district court's role in reviewing a foreign arbitral award is limited: "The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition specified in the said Convention." 9 U.S.C. § 207. These grounds for refusal must be invoked and proved by the party opposing confirmation of the award, and are

Copies Mailed to Counsel of Record.

not applicable here where the motion is unopposed. See Convention, Article V.

CONCLUSION

Petitioner's motion to confirm the arbitral award is granted. The Clerk of the Court is directed to enter judgment, with statutory costs, for petitioner.

SO ORDERED:

BARRINGTON D. PARKER, JR.
U.S.D.J.

Dated: White Plains, NY
May 20 1998

INTERNATIONAL COURT OF ARBITRATION

CASE No. 7535/FHS/AC

NAR S.p.A. - Industria Nastri Adesivi (Italy)

vs

I.R. Industries, Inc. (U.S.A.)

* * *

INTERNATIONAL CHAMBER OF COMMERCE

INTERNATIONAL COURT OF ARBITRATION

Case no. 7535/FHS/AC

AWARD

In accordance with the rules of arbitration of the ICC in arbitral proceedings no. 7535/FHS/AC

Opposing

NAR S.p.A. - Industrie Nastri Adesivi

Via Leonardo da Vinci 8, 35020 Legnaro (PD), Italy (represented by Alberto Miele and Diego Rigatti, Via Borgogna 8, Milan)

Plaintiff

Against

I.R. Industries, Inc.

200 Clearbrook Road, Elmsford, NY 10523, United States of America (represented by Giampiero Rinaldi, Galleria del Toro 3, Bologna)

Defendant

* - * - *

Considering in fact and law:

1. The parties to this proceeding were already in business relations when in September 1992 the United States authorities in charge of verifying the practice of dumping, namely the United States Customs Service, an agency of the United States Department of Commerce, ascertained that the price quoted on imports by the Defendant violated federal rules on commercial practices (Antitrust Laws). The above mentioned agency consequently gave advance warning that it would place a fine on the Defendant's imports. The uncertainty as to the financial burden charged to the Defendant originating from this offence risked being a factor that could place doubt on the entire business relationship with the Plaintiff.
2. The Defendant consequently reported this fact to its opposite party and requested a contractual solution to take account of the altered circumstances. An exchange of correspondence between the parties followed, between 18th and 19th October 1992, who tried to come to an agreement on the implications of the probable charge debited to the Defendant by the American authorities. The parties differ as to the result of that attempt.
3. It is nevertheless undisputed, independently of the substance of a contractual agreement concluded in 1992,

that the parties concluded a contract dated 22nd January 1988 countersigned 14th April 1988. The purpose of this contract was to regulate the manner of payment of the invoices issued by the Plaintiff and on the other side to insure the Defendant that any sums that it was called upon to pay as fines to the American authorities would be reimbursed by the Plaintiff. Such assurance should have been provided through the issue of a bank guarantee.

In July 1990 the Plaintiff decided to terminate the business relationship existing between the parties due to the difficulties it had in maintaining the product's competitivity on the United States market, following the devaluation of the dollar and the age-old uncertainty about the anti-dumping fines. This decision was communicated to the Defendant in the letter of 6th August 1990. Deliveries, however, ceased at the end of September 1990. After the last consignments, the Defendant informed the Plaintiff that, according to its calculations, the total fines for the period from 1981 to 1987 came to US$ 176,019.00 without counting interest compounded on the single fines. In this proceeding a sum of US$ 904,383.72 potentially at risk was advanced. Making reference to a letter of 13th January 1989 from the Plaintiff, the Defendant refused payment of the

invoices issued by the Plaintiff for the last 5 deliveries, that is the invoices issued between 6th June and 25th September 1990 for a total of US$ 353,712.00, taking advantage of an alleged right to the deduction. There is no divergence between the parties on this sum, so the arbitrator can dispense with verifying whether or not it is exact.

The Plaintiff on his part disputes the Defendant's right to practise the set-off.

The Plaintiff formulates multiple claims both principal and subordinate, modified several times during the proceedings, without examining individually the legal premises to each of the claims one risks reaching contradictory conclusions. The arbitrator is, however, bound solely by the requests indicated in the deed of mission of 19/24/27.1.1994 as they correspond to those conventionally submitted to the arbitrator. As no request to modify the deed of mission has been made, the arbitrator considers this document binding.

It is noted nevertheless:

1. that the Plaintiff at the hearing of 8th September 1994 waived asking for a partial award as the probatory stage was already concluded at that date;
2. the arbitrator has been instructed by the International Court of Arbitration to pronounce

himself solely on the claims formulated by the Plaintiff, as the Defendant has not paid the requested advance for the costs of the proceeding.

6. The first claim of the Plaintiff refers to the sentencing of the Defendant to pay US$ 353,712.00 plus interest at the rate fixed by the official table of interest rates. The Defendant for his part has never expressed any reservation about the accuracy of the sum due on the basis of the five invoices issued between 6th June 1990 and 25th September 1990. While it does dispute the collectibility of the sum considering it his right to deduct the sums due in guarantee of the payments of any future anti-dumping fines. On the basis of an alleged tacit agreement subsequent to the contract of 22/23.1./18.4.88 and confirmed by a letter from the Plaintiff to the Defendant dated 13th January 1989 (unsigned) in which, among other things, the Plaintiff reassured the Defendant of the existence of a right to compensation in the following manner:

"anyway I would like you to remind that as guarantee for IR there is always its debit towards Nar and it can in case be used as compensation".

7. The Defendant in this affirmation saw a change in the contractual terms contained in the agreement dated 22-23.1./14.4.88. In support of his theory the

Defendant avails himself of the testimony of Mrs Patricia Mitchell, Briarcliff, New York, employee of the Defendant from 1977 to the present day, who confirms the existence of verbal agreements about the Defendant's right to "compensation" (term incorrectly used to express the Italian concept of compensation that is translated by "set-off" in English). The Plaintiff disputes the admissibility of the testimony given by Mrs Mitchell, considering that she is a manager employed by the Defendant and, in any case, openly interested in the outcome of the case. The arbitrator, in order to evaluate the evidence, takes account not only of the declarations made by the witness about her personal connection to the Defendant, but also the effective interest that she might have in the outcome of the case. These concepts are not necessarily covered by the intention of the witness and Italian procedural regulations. It appears from her statement that the witness does not hold a position in the Defendant's company such as to give her any direct financial interest in the outcome of the case: she does not share in the profits, nor does she own stock or shares. On the other hand, the Defendant has admitted that if sentenced to pay the sum requested by the Plaintiff the company could be brought to a state of bankruptcy.

6.

The witness is certainly acquainted with this so it should be considered that she does have an interest, at least indirect, in the outcome of the case. Consequently her testimony must be considered unreliable. Her testimony is also inadmissible as to the facts demonstrated by the documentary evidence prior to the verbal evidence that it was intended to demonstrate by her testimony (art. 2723, Italian Civil Code).

Furthermore, and for other reasons, the arbitrator does not consider proven the existence of an agreement subsequent to that of 22-23.1./14.4.88. In fact, the agreement itself was meant to substitute the deduction and set-off practised up to that moment, with the reimbursement of the customs penalties by the Defendant at the first request and countercheck of pre-payment. On this point the agreement is very clear, in that it specifies at point D):

"until the date of this contract the Distributor (...) has deducted the same sum at the time of payment of the invoices in favour of Nar, off-setting its credit towards Nar in this way".

Because of the notorious difficulties that only partial payment of invoices issued by an Italian company caused it at the Central Italian Bank, the Plaintiff had obtained this modification of the commercial

7.

relationship meaning that from then on

"(...) Nar agrees to reimburse the Distributor (...)" (art. 1)

and

"(...) the Distributor undertakes for the time being to pay Nar the whole amounts of the Nar invoices" (art. 2)

The arbitrator shall subsequently pronounce judgment on the validity of this agreement, but for the time being he considers it manifest proof of the fact that the parties wished to preclude the deduction or the set-off exercised by the Defendant. Subsequently, even the Plaintiff's manifest failure to fulfil one of its contractual obligations (that of having a guarantee given by the Banca Popolare Veneta) did not revive the right to the deduction.

The same letter of 13th January 1989, on which the Defendant bases his right to the set-off, is also clear in requesting payment of the invoices issued within the terms of the contract. The alleged right to the set-off may be interpreted simply as an actual right of the person in possession of a sum of money, but there is no indication that there was any contractual desire to create such a right. On the contrary, the Plaintiff's representative writes

8.

"(...) in the spirit of collaboration that should animate us, we will consider a proposal that can be fair and satisfying the both of us; (...)".

We are therefore in the presence of pre-contractual negotiations and it cannot be concluded in any case that - the parties not having demonstrated the contrary - a modification of the contract was finalized.

The conclusion thus follows that the sum of US$353,712.- is due in its entirety by the Defendant without the right to set-off.

Although upholding the existence of a contractual agreement, while contesting a later verbal modification, the Plaintiff objects the ineffectualness of such agreement, and likewise in general of any and every agreement the purpose of which is the contribution or total assumption of the burden of the anti-dumping fine imposed by the United States Department of Commerce on the importation of the Plaintiff's products. This position is not confirmed, however, either by USA legislation or by the principles of good faith regulating international commerce.

The thesis proposed by the Plaintiff to support the invalidity of the contractual agreements is that of public order protected by the United States anti-dumping legislation. What needs to be safeguarded is the

9.

competitivity of the domestic United States commerce, which must be protected against the unfair measures of foreign competitors who adopt a price policy unjustified by the company's economy. According to United States legislation ascertainment of violation of the anti-trust law leads to penalties aimed at restoring competitive balance between the imported product and domestic production.

The thesis adopted by the Plaintiff is not however supported by the law or by legal opinions expressed by10. jurists eminent in the matter. On the contrary the relevant legislation provides specific laws the aim of which is to avoid the parties adopting measures to evade the condition of the "balanced" price determined by the United States authorities. In fact, article 353 (19 Code of Federal Regulations 353) of the law provides11. that if the importer and the foreign producer agree to have the foreign producer bear any anti-dumping penalties, the authority should impose double the fine, making access to the American market even more difficult. It is thus the same United States law that demonstrates a certain realism foreseeing that agreements, either express or implicit, relating to the anti-dumping charge will always exist in international commerce. The same law, although it does not tolerate

10.

this transfer of the anti-dumping charge does take account of it, increasing the fine. It must be concluded that the violation of the law does not represent violation of public order. It follows that the contracts stipulated between the parties to regulate the transfer of the fine to the Plaintiff are not void even if the consequences they have are different from those wished for by the parties, who, if they had been aware of this, would have certainly made other provisions.

After having ascertained the validity of the contract it is now necessary to verify the consequences on the contractual responsibilities assumed by the parties. In particular, it is necessary to establish which contractual provisions have been violated and consequently what sentences should be ordered.

The contents of the agreements as well as all the negotiations supported by the documentary evidence exchanged by the parties indicate that it was their intention to maintain the commercial relationship despite the fine imposed by the United States customs authorities. The facts inferred by the parties in respect of the agreements also prove the real intention that was the basis of the contracts. The 1982 agreement provided a 4% deduction on invoices to be charged to the Plaintiff. As for the problems the

11.

Plaintiff had with the Banca Nazionale regarding the inconsistency between the sums invoiced and those actually received, the parties decided to substitute the deduction with a bank guarantee, thus permitting the Plaintiff to collect the entire amount of the sums invoiced.

The Plaintiff, as the Defendant notes, later failed to to arrange the bank guarantee, as per his contractual obligations. Within this proceeding, however, the Defendant has renounced asking for a sentence to be issued with reference to this breach, so the arbitrator is not required to study this matter any further.

Having ascertained the legality of the agreements, the arbitrator must still pronounce judgment on the question of the Defendant's breach of obligation to contribute to the escrow account, provided for in the agreement of 20th October 1988. If it were ascertained that there was a breach, the Defendant would be sentenced to refund the 3% discount exercised during the period 1982-1986.

The Plaintiff asks both that it be ascertained that the opposite party is in breach of contract as far as the creation of an escrow account is concerned, and consequently for the reimbursement of a discount that the Defendant considers a commercial discount, whilst the Plaintiff alleges that it is the contribution due by

the Defendant to the escrow account.

Also in this ambit the arbitrator notes that the parties have acted and respectively tolerated actions that differ from what was foreseen in the contract for the period prior to the agreement of 14th April 1988.

From the results of the proceedings it appears that a proper escrow account was never formally opened, in that the deduction practised by the Defendant seemed to satisfy the requirements of the parties to face any possible requests put forward by the American customs authorities.

There is no fact on record that indicates that the Plaintiff requested, before this proceeding, information on the existence of an escrow account, or details as to the paying in of contributions by the Defendant.

On the other hand, the undertaking made by the Defendant regarding the 4% contribution to the escrow account is formulated in such a general way that it is not possible to determine when precisely this contribution should have been paid in.

It may be affirmed that the obligation to pay the deductions practised on the imports paid to the Plaintiff and its own contribution existed and still exist today only as the Defendant's debt. It is in any case my duty to observe that the parties never formally

legalized an Escrow Agreement foreseeing all the conditions relating to the respective contributions as well as access to the account and use of the funds. Until such legalization and the opening of the account took place the Defendant only had a fiduciary duty towards the Plaintiff to manage the funds diligently in the interest of the parties. It may be added that the opening of the escrow account was principally in the interest of the Defendant. In fact, the funds thus collected should have been used to face any possible requests put forward by the American customs authorities.

In the agreement of 14th April 1988 no more reference was made to the mysterious escrow account, so it must be presumed that it never existed. On the contrary the manner in which the deduction took place is clearly indicated at point D) of the premises, including the sum paid to the United States government agency. Consequently it must be concluded that in the absence of a formal escrow agreement there was no contractual obligation to pay the deductions into a separate account, while it remained the obligation of the Defendant to answer directly for the use of the funds according to the contractual agreements governing the deduction. Since the Plaintiff has not been able to

prove that the funds were used contrary to their purpose, the arbitrator cannot sentence the Defendant to return the sum of US$ 50,194.89.

13. As for the starting date and amount of the interests, the arbitrator bases himself on the information provided him by the Plaintiff, since it is not contested by the Defendant. The interest is that foreseen by the official table supplied by the Department of Treasury for default interests applied to sums accrued but that are outstanding, from the 91st day from the date of issue of the invoice. Procedural expenses and compensation of the opposite party are payable by the losing party. Thus the Defendant will reimburse the Plaintiff most of the costs and will pay the Plaintiff compensation taking account that the sentence refers solely to the sum already recognized by the Defendant from the beginning and that the further claims made by the Plaintiff are entirely rejected. The note of fees indicated by the Plaintiff amounts to Lit.85,500,000 (doc. 15) and will be acknowledged to it in the same proportion as the costs of this arbitration.

In respect of the rules of arbitration contained in the arbitral regulations of the International Chamber of Commerce of 1st January 1988 the arbitrator decides:

1) The Defendant is sentenced to pay the Plaintiff the sum of US$353,712. Any further claim put forward by the Plaintiff is rejected. On the main sum interests are due at the following rates:

11% at 91 days from the date of issue of the invoice until 31.3.91

10% from 1.4.91 to 31.12.91

9% from 1.1.92 to 31.3.92

8% from 1.4.92 to 30.9.92

7% from 1.10.92 to the date of actual payment

2. The costs of the arbitration, paid in advance by the Plaintiff, are at the rate of 85% to be charged to the Defendant who will reimburse the Plaintiff. The other 15% remains charged to the Plaintiff. The Court has set the costs of the arbitration at US$29,000.

3. Compensation of Lit. 72,900,000.- is assigned to the Plaintiff.

Lugano, 8th March 1996

The Sole Arbitrator

(Signature)

Michael Becker

PRETURA DE MILAN

RECORD OF FILING OF AWARD

Today, 12th April 1996, before the undersigned Clerk of the Pretura of Milan, appeared

Mr. Diego Rigatti,

born in Dolo (Venice) on 7th December 1965, with offices in Milan, Via Durini no. 15, identified by his membership card no. 6159 of the Bar Association of Milan, issued on 14th June 1994, who, in his capacity of defender of the claimant,

NAR S.p.A. - INDUSTRIA NASTRI ADESIVI,

with head offices in Legnaro (PD), via Leonardo da Vinci 8, represented legally by the Managing Director, Mr. Carlo Ocegli

FILES

the original award issued on 8th March 1996 by the Arbitrator Prof. Michael Becker from the law firm Bolla, Bonzanigo ed Associati, via Canonica 8, 6901 Lugano, Switzerland together with the following documents:

- doc. no. 1: copy of contract 14th April 1988;
- doc. no. 2: copy of request for arbitration;
- doc. no. 3: original deed of mission of 27.1.1994;

Milan, 12th April 1996

Read, confirmed and undersigned.

The Depositor

(Signature)

The Clerk

(Signature)

Stamp: Dr. Annamaria RESTELLI

Clerk's Office

The Pretore (Magistrate) of Milan

Having read the award mentioned in the record above relating to the this arbitration the seat of which has been conventionally established by the parties in Milan;

considered the formal regularity of the same;

seen the arbitration clause;

seen paragraphs 823-825 of the code of civil procedure

DECLARES

the enforceability of the award pronounced between:

NAR S.p.A. INDUSTRIA NASTRI ADESIVI

...R. Industries Inc.

Milan,

(handwritten) Over the year 1996, on 10th October, Mr. ARHELLINI LUCA, identified by his Identity Card no. AA9561306 issued by Padua municipality on 31.7.1996, appears before the signatory Clerk of the Non-Contentious Business Office and, by proxy issued by Mr. Rigatti Diego on 9.10.1997, withdraws the award issued by Mr. BECKER MICHAEL on 8.3.1996 during the arbitral proceedings promoted by NAR S.p.A. - Industria

Nastri Adesivi vs. I.R. Industries Inc.

Luca Arnellini

Stamp: Dr. Annamaria RESTELLI

(Signature)

Clerk's Office (Initialled)

Then, over the year 1996, on 20th November, Mr. ARHELLINI LUCA, identified by his Identity Card no. AA9561306 issued by Padua municipality on 31.7.1996, appears before the signatory Clerk of the Non-Contentious Business Office and, by proxy issued by Mr. Rigatti Diego on 20.11.1995, gives back the award issued by Mr. BECKER MICHAEL on 8.3.1996 during the arbitral proceedings promoted by NAR S.p.A. - Industria Nastri Adesivi vs. I.R. Industries Inc.. He gives also a copy of a letter dated 15.11.1996 sent by Mr. Becker.

Stamp: Dr. Annamaria RESTELLI

Clerk's Office (Initialled)

The Pretore (Magistrate) of Milan

Having read the award mentioned in the record above relating to the this arbitration the seat of which has been conventionally established by the parties in Milan;

considered the formal regularity of the same;

seen the arbitration clause;

seen paragraphs 823-825 of the code of civil procedure

DECLARES

the enforceability of the award pronounced between:

NAR S.p.A. INDUSTRIA NASTRI ADESIVI

and

I.R. Industries Inc.

Milan, 7th January 1997

Stamp: Dott. Giacomo Daodato

PRETORE (MAGISTRATE)

(Signature)

Stamp: Local Pretura, Milan

Stamp: Dr. Annamaria RESTELLI

Clerk's Office (Initialled)

Stamp: Registration No.

08.01.97 000317

Stamp/hand written sum of fees:

4561 IB Lit. 80.000

Fixed charge Lit. 250.000

TOTAL Lit. 330.000

Number Stamp: 03625

Receipt Stamp: Registry of Deeds, Judgments, and fines, Milan

Registered on 30.01.97

No. 005815 Series: 4A

Taxes Lire: 330.000

Three hundred and thirty thousand

A18 No. 3825

Cashier: F. Biasi (Initialled)

Date stamp: 30.01.97

Illegible ... (Initialled)