

**THE HIGH COURT**

[2021] IEHC 277  
**366/2020 COS**

**IN THE MATTER OF ARCTIC AVIATION ASSETS DESIGNATED ACTIVITY COMPANY**

**AND**

**IN THE MATTER OF NORWEGIAN AIR INTERNATIONAL LIMITED**

**AND**

**IN THE MATTER OF DRAMMENSFJORDEN LEASING LIMITED**

**AND**

**IN THE MATTER OF TORSKEFJORDEN LEASING LIMITED**

**AND**

**IN THE MATTER OF LYSAKERFJORDEN LEASING LIMITED**

**AND**

**IN THE MATTER OF PART 10 OF THE COMPANIES ACT, 2014**

**AND**

**IN THE MATTER OF NORWEGIAN AIR SHUTTLE ASA, AS A RELATED COMPANY WITHIN  
THE MEANING OF SECTION 517 AND SECTION 2 (10) OF THE COMPANIES ACT, 2014**

**Judgment of Mr. Justice Quinn delivered on the 26th day of April, 2021  
(Section 537 - unopposed)**

1. This judgment relates to an application by three companies in the Norwegian Group for approval pursuant to s. 537 of the Companies Act 2014 (“the Act”), of repudiation of contracts with nine counterparties who did not oppose the application. The three applicants are Arctic Aviation Assets DAC (“AAA”), Norwegian Air International Limited (“NAI”) and Norwegian Air Shuttle ASA (“NAS”), which is the parent company of the Group.
2. The background to the examinership of the companies and to this application has been described in detail in two previous judgments of this court. The First Judgment, [2020] IEHC 664, relates to the appointment of the examiner. The Second Judgment, [2021] IEHC 268, relates to applications pursuant to s. 537 for leave to repudiate 425 executory contracts with 68 counterparties. Many of those applications were opposed by the counterparties to the contracts. On 5 March, 2021, and on other dates, I made orders approving the repudiation of a number of those contracts and directed that a hearing be held pursuant to s. 537 (3) of the Act to determine the quantum of the losses incurred by the counterparties which had opposed the application.
3. In the Second Judgment, I considered and determined questions raised by the opposing counterparties regarding such matters as the test to be applied on an application under s. 537, the extraterritorial effect of these proceedings and of s. 537, the jurisdiction of this court where contracts are expressed to be subject to the laws of other states, issues regarding the Cape Town Convention on International Interests in Moveable Equipment and the Protocol thereto and the mode of determination of the quantum of the losses of counterparties. It is not necessary or appropriate to repeat here the consideration of those issues.
4. Section 537(1) of the Act provides as follows: -

*"(1) Where proposals for a compromise or scheme of arrangement are to be formulated in relation to a company, the company may, subject to the approval of the court, affirm or repudiate any contract under which some element of performance other than payment remains to be rendered both by the company and the other contracting party or parties".*

5. This application is grounded on an affidavit sworn by Mr. Tore Jenssen, a director of the relevant companies, on 22 January, 2021.
6. The application is supported by the examiner who swore an affidavit on 28 January, 2021.
7. A central feature of the evidence presented to the court in the petition, and in the report of the independent expert accompanying the petition made in accordance with s. 511 of the Act was that the business plan which would underpin the restructuring envisaged a "*slimmed down*" version of the Norwegian Group such that it would henceforth service a regional market and ultimately dispense with the long haul business which had been a feature of its success in previous years.
8. On 14 January, 2021, NAS made a public announcement in relation to its business plan, which included confirmation of the intention to cease long haul operations.
9. As a consequence of this decision, the companies say that a number of the contracts relating to the group's long haul business would be surplus to requirements. This applies to the contracts the subject of this application.
10. One of the petitioners, Torskefjorden Leasing Limited ("TLL"), was a company which had focussed exclusively on servicing the Group's long haul requirements. Therefore, TLL no longer formed part of the group's business plan. On 15 January, 2021, the examiner reported on this fact to the court and an order was made lifting the protection of the court with regard to TLL, discharging the examiner of TLL, and appointing joint liquidators of it.
11. Following the appointment of liquidators to TLL, the examiner remained of the view, based on the Group's business plan, that it is possible for him to formulate proposals for a scheme of arrangement in respect of the remaining companies. The evidence before the court on this application is that the examiner and the companies have determined that a number of agreements to which the companies are a party are required to be terminated in order to enable the examiner to finalise proposals for a scheme of arrangement. To this end they believe that it is necessary to repudiate certain contracts and to address the liabilities arising from such repudiation in schemes of arrangement to be formulated by the examiner.
12. NAS and NAI are both aircraft operating companies. For the most part, the contracts to which this application relates concern ground handling and/or fuel line services provided to NAS and/or NAI at a number of US international airports. It is said that consequent on the decision to dispense with long haul operations, such US-based services are no longer

required by the Group and it is for that reason that the relevant companies are seeking leave of this Court to repudiate the relevant contracts.

13. The power of the court to grant approval for the repudiation of a contract is discretionary. Before the court considers the exercise of its discretion, it is necessary to examine firstly that the court has jurisdiction to make an order. Two conditions are necessary to establish jurisdiction, namely the following: -

- (i) That this is a case in which "*proposals for a compromise of a scheme of arrangement are to be formulated in relation to the company*".
- (ii) That the relevant contract is a contract "*under which some element of performance other than payment remains to be rendered both by the company and the other contracting party or parties*". Such a contract is frequently referred to as an "*executory contract*".

**Are proposals "to be formulated"?**

14. In his affidavit sworn on 28 January, 2021, the examiner refers to the company's business plan. He states that under the proposed business plan the group would: -

- (i) Focus on core businesses in the Nordic countries.
- (ii) Cease to operate long haul routes.
- (iii) Initially hold up to 50 Boeing 737 aircraft, primarily operating within Norway and other Nordic countries and between those countries and the rest of Europe.
- (iv) That a significant reduction in the number of aircraft assets held by the group and of certain other services used by the group, will be required.

15. The examiner states that he and his team have been assisting the companies in assessing the fleet and services which on the basis of the business plan will be required after the restructuring of the companies. He continues: -

*"My team and I have and are continuing to carefully consider the company's proposal as a basis for proposals for a scheme of arrangement for the company. Whilst the evaluation is ongoing I am of the view that I will be in a position to formulate schemes of arrangement that would facilitate the survival of the companies and the preservation of employment on the basis of the business plan proposed by the company"*.

16. The examiner also states that in his view the termination of the contracts the subject of this application would facilitate the formulation of proposals for schemes of arrangement in respect of the companies. He states that the approval of the repudiation of those contracts would significantly enhance the prospect of the companies attracting the substantial investment that will be necessary to fund a scheme of arrangement to ensure the future survival of the companies and to finance the companies' future working capital requirements.

17. Finally, the examiner states that he believes that the approval of the repudiation of the contracts would ensure that the companies are not burdened by ongoing obligations under contracts which relate to services which are surplus to the companies' future requirements. He cites by way of example ground handling and fuel line contracts at airports located in the United States.
18. It was clear from this uncontradicted evidence that it is intended that proposals would be formulated in relation to the companies and accordingly this condition is fulfilled.

**Do the parties to the contracts have remaining non-monetary obligations?**

19. To establish whether this condition is fulfilled it is necessary to consider each of the contracts which the companies seek leave to repudiate. Most of the relevant contracts are stated to be subject to the laws of jurisdictions other than the State, and contain clauses submitting the resolution of any disputes to the court of those other jurisdictions. The companies exhibited evidence of the relevant foreign law with a view to assisting the court in establishing that the contracts in each case contain clauses constituting obligations in respect of which some element of performance other than the payment of money remains to be rendered having regard to the governing law of the contracts.
20. In respect of the laws of a number of states within the USA, this evidence is contained in a Report dated 29 January, 2021, by the companies' counsel, Hogan Lovells US LLP, of New York. In this Report, Hogan Lovells consider the relevant contracts and confirm that they contain obligations to perform obligations other than the payment of money.
21. Many of the agreements on which Hogan Lovells gave their opinions were governed by the laws of states other than New York, notably Massachusetts, California, Delaware, Colorado, Connecticut and Washington. In their report for the purpose of this application, they state that their advice relating to the agreements is advice based on New York state law, and that they have not considered the statutes, rules, regulations or case law of any other state. They state as follows: -

*"We note that some of the agreements are governed by the laws of states other than the covered law (the law of New York) as identified under the relevant headings in Appendix B and, for the purposes of our review and with your consent, have assumed without further investigation that the laws of such other states are the same as the covered law. We have not considered any laws other than the covered law, or as to the effect that such law may have on the confirmations provided herein. Moreover we draw to your attention that, for the purposes of this report, we have instead interpreted the provisions of such agreements in accordance with the apparent meaning, application and effect that lawyers generally understand terms to have under internal New York contract law as currently in effect, even though New York courts would more likely seek to interpret apply and give effect to such agreements under the laws of the relevant state, which could lead to different results. We have not considered any interpretation, application or effect of such provisions or any divergence from such New York law interpretation application or*

*effect thereof that may arise by reasoning of the application of the laws of any other states or any other law”.*

22. Hogan Lovells point out that separate opinions have not been obtained from lawyers in states other than New York.
23. It was submitted to me that in the context of the limited factual exercise facing this Court on this question, namely, to determine whether the contracts contain non-monetary obligations on the part of each party, that the US legal report based on New York law opinion should provide sufficient guidance to the court. It is also submitted that the default position is that this Court may approach the examination of those contracts on the basis of Irish law, being the *lex fori* of this application. There is cited to me a passage from *Dicey, Morris & Collins on the Conflict of Laws* (15th edn, Sweet & Maxwell) in the following terms: -

*“The burden of proving foreign law lies on the party who bases his claim or defence on it. If that party adduces no evidence, or insufficient evidence, of the foreign law, the court applies English law”.*

24. I accept the submission that in the case of the contracts the subject of this application, where no contrary evidence has been adduced and no controversy has been raised as to the provisions of these contracts, it is appropriate for this court to satisfy itself on a reading of the relevant contracts, assisted by the opinion of Hogan Lovells even in the cases of contracts with counterparties in states other than New York, for the purpose of establishing the limited fact that the relevant contracts contain outstanding mutual non-monetary obligations.
25. I now turn to the individual contracts the subject of the applications.

**Massachusetts Port Authority – NAS – 15 April 2017**

26. This agreement relates to the lease of a property at Terminal E, Boston Logan International Airport to NAS.
27. The agreement provides for the payment of rent, fees and other charges.
28. NAS is required to pay a deposit or alternatively provide a letter of credit.
29. The non-monetary obligations under this agreement on the part of NAS include the following.
30. Article 8 imposes obligations on NAS relating to the conduct of its operations at Boston Logan International Airport including compliance with laws, rules and regulations, obligations concerning employees, the taking of security precautions and the provision of personnel and equipment necessary to comply with applicable laws and regulations, and provisions concerning the removal of rubbish and refuse from the premises and the provision of cleaning services.

31. Article 9 imposes obligations relating to the alteration, maintenance and repair of the premises.
32. Article 11 imposes obligations relating to environmental matters.
33. Article 12 imposes obligations relating to indemnification and insurance.
34. In addition to the fundamental obligation to make the leased premises available to NAS, the non-monetary obligations which remain to be rendered by the Authority include the following: -
  - (1) Provision for the removal of snow and ice from the entry and sidewalks to the terminal and other access matters;
  - (2) The obligation to repair and maintain the structural portions of the terminal and common use facilities; and
  - (3) The obligation to perform structural maintenance and structural repairs to the ramp area.
35. I am satisfied based on reading the terms of the contract and the opinion of Hogan Lovells US that the contract with the Massachusetts Port Authority is an executory contract for the purpose of s. 537.

**Laxfuel Corporation – NAS – 1 September 1985**

36. This is an agreement between a number of airlines which have operations in and out of Los Angeles International Airport and Laxfuel Corporation. The original agreement was made on 1 September, 1985, and has been amended from time to time thereafter. The purpose of the agreement is to enable those contracting parties through Laxfuel to collectively purchase, lease or otherwise acquire, develop and operate fuel delivery systems and fuel storage facilities at Los Angeles International Airport.
37. NAS is one of the many airlines which is a contracting party to this agreement.
38. The four facilities provided under the agreement by Laxfuel are as follows: -
  - (1) The receipt, storage and transfer of aviation fuel from ocean tankers and trucks;
  - (2) The receipt and storage of aviation fuel through underground pipelines from area refineries;
  - (3) The delivery of aviation fuel into hydrant systems at satellite locations throughout Los Angeles International Airport; and
  - (4) The delivery of aviation fuel to refueller vehicles for delivery to aircraft which do not have access to the hydrant system.
39. The agreement is stated to be governed by the laws of the state of California.

40. The monetary obligations under the contract are that NAS, and other airlines which use the Laxfuel arrangement pay amounts which are determined by the proportion their gallonage bears to the total gallonage of all contracting airlines in each month.
41. The non-monetary obligations which remain to be performed by NAS include the following: -
- (1) NAS is precluded from assigning, selling, transferring or pledging its membership in Laxfuel without the written consent of the fuel committee.
  - (2) NAS is required to permit non-contracting users of the airport to use the facilities on a non-discriminatory basis subject to such parties executing a non-contracting user agreement.
  - (3) NAS is required to permit properly trained and qualified operators to access the facilities.
42. The non-monetary obligations to be performed by Laxfuel include the core obligation of managing and providing the fuel services under the agreement and the provision of assistance to members.
43. I am satisfied having regard to the plain meaning of the contract terms, and the opinion of Hogan Lovells US that this is an executory contract to which s. 537 applies.

**Tom Bradley International Terminal Equipment Company Inc. – NAS – 1 July 2013**

44. This again is what is referred to as a "*member agreement*" between Tom Bradley International Terminal Equipment Company Inc. and its members, which include NAS. This agreement relates to the use, operation and maintenance of aeronautical equipment at the Tom Bradley International Terminal at Los Angeles International Airport.
45. The governing law is the law of the state of California.
46. The non-monetary obligations which remain to be rendered by NAS include the following: -
- (1) Article 8.1 – Each member has obligations relating to management including an obligation to appoint member representatives and give notice of meetings.
  - (2) Article 9.1 – An obligation to prepare and maintain books of account associated with the company.
47. The non-monetary obligations of the counterparty include the following: -
- (1) Article 9 – to maintain books and records.
  - (2) Article 9B – to prepare and file federal and state tax returns.
  - (3) Article 10.7 – to provide a training and certification programme for the maintenance of passenger loading bridges.

- (4) Article 11.1 – to procure the appointment of a consortium manager.
  - (5) Article 14.1 – to use and maintain all relevant equipment in accordance with the provisions of relevant governing agreements.
48. Having regard to the plain meaning of the terms of this contract and the opinion of Hogan Lovells US LLP, I am satisfied that this is an executory contract to which the provisions of s. 537 apply.

**Bosfuel Corporation – NAS – 23 October 2017**

49. This agreement relates to the provision and maintenance of fuel distribution and fuel storage facilities at Boston Logan Airport.
50. The agreement is stated to be governed by the laws of the Commonwealth of Massachusetts, USA.
51. The non-monetary obligations remaining to be rendered by NAS include the following:-
- (1) Clause 4.02 – If NAS is subject to an inspection it must deliver relevant equipment at the time and location designated by an operator.
  - (2) The agreement contains continuing restrictions on selling, assigning, transferring or pledging or otherwise disposing of the company’s interest or membership in Bosfuel without the written consent of the fuel committee.
  - (3) Article 17 – places continuing disclosure obligations on the contracting airline members including NAS.
52. The non-monetary obligations remaining to be rendered by Bosfuel include the provision of fuel distribution and storage facilities, the use and operation and improvement of the facilities, allocation of costs and revenues in connection with the facilities, and the administration of the facilities.
53. Having regard to the terms of the agreement itself and the report of Hogan Lovells US LLP, I am satisfied that this is a contract which contains continuing performance obligations otherwise than the payment of money, and is a contract to which s. 537 applies.

**SFO Fuel Company LLC (“SFO”)**

54. This agreement relates to the provision and maintenance of fuel distribution and fuel storage facilities at San Francisco International Airport.
55. NAS is a contracting party to this agreement. The contracting parties agreed to form the company to purchase, lease, construct or otherwise acquire and operate and maintain facilities for storage and delivery of jet fuel by underground pipelines or refueller vehicles to all parts of San Francisco International Airport.
56. The agreement was stated to have commenced on 1 September 1997.



57. The contracting airlines and the company entered into the agreement to provide for their respective rights and duties related to the use, operation and improvement of the fuel system at the airport and the allocation of costs and revenues.
58. The non-monetary obligations which remain to be rendered by NAS include the following: -
- (1) To deliver any connection equipment designated by the fuel system operator for inspection.
  - (2) To provide finance and legal information as required.
59. The non-monetary obligations which remain to be rendered by SFO include: -
- (1) The obligation to oversee the supply and maintenance of fuel services and an obligation to allow any person who is not a party to the agreement to use the fuel system under certain conditions.
  - (2) To select a fuel system operator to maintain and operate certain elements of the fuel system.
  - (3) To cause the fuel system to be acquired, constructed, modified, leased purchased and financed in accordance with the provisions of a fuel system lease.
60. The contract is stated to be governed by the laws of the State of California, USA.
61. Having considered the terms of the contract itself and the report of Hogan Lovells US LLP, I am satisfied that it contains outstanding obligations other than the payment of money and accordingly is a contract to which s. 537 applies.

**AUS Fuel Company LLC – NAS – 1 October 2019**

62. This is an agreement similar to the SFO Fuel Company agreement and it relates to the provision and maintenance of fuel distribution and fuel storage facilities at Austin Bergstrom International Airport located in the city of Austin, State of Texas, USA.
63. The agreement is in terms broadly similar to the SFO Fuel Company agreement. This agreement was governed by the laws of the State of Delaware.
64. I am satisfied having read the obligations stipulated in the contract, and having regard to the opinion of Hogan Lovells US LLP that this is a contract with outstanding performance obligations other than the payment of money and is an agreement to which the provisions of s. 537 apply.

**Gate Gourmet Switzerland GMBH – NAS and NAI – 1 January 2018**

65. There are two agreements between NAS and NAI on the one hand and Gate Gourmet Switzerland GMBH on the other hand. Each is dated 1 January, 2018. The first agreement is described as a "*retail service agreement*" and the second is described as a "*catering service agreement*".

66. Under the retail service agreement, Gate Gourmet supplies services in relation to on board and pre-order retail services including the offering and sale of food and beverages on board flights, together with additional products and duty free products for sale.
67. Under the terms of the agreement, the parties share the profits and losses of those sales and certain commission arrangements apply in relation to the sale of duty free.
68. The non-monetary obligations remaining to be rendered by NAS and NAI include the provision of trollies, boxes and other heavy equipment required for the distribution of the products, the distribution of product catalogues and marketing materials, and the protection of intellectual property and insurance matters.
69. The non-monetary obligations which remain to be rendered by Gate Gourmet include ensuring that all products are free from defects and conform to applicable standards, the requirement to obtain approval in writing before using the Norwegian brand name, and provisions concerning insurance.
70. The catering service agreement relates to the provision of prepaid meals, crew meals, beverages and other services to flights of NAS and NAI. Similarly to the retail services agreement, the catering agreement contains obligations on the part of NAS and NAI to provide adequate equipment to enable Gate Gourmet to carry out its services, and the provision of insurance and such matters.
71. The non-monetary obligations to be rendered by Gate Gourmet include commitments to ensure that they have taken out appropriate insurance and commitments regarding confidentiality.
72. These agreements are stated to be governed by the laws of Norway and the parties accept the jurisdiction of the Norwegian courts.
73. There has been provided a letter of advice dated 3 February, 2021, from Messrs BAHR, the companies' legal advisors in Oslo containing a confirmation that the clauses referred to in the contract and which constitute continuing obligations on the part of the parties to the contract, contain obligations to do things other than the payment of money.
74. Based on a reading of these contracts and of the letter of Messrs BAHR, I am satisfied that these are contracts in respect of which there are outstanding obligations other than the payment of money and to which s. 537 applies.

**AerData BV – Arctic Aviation Assets Limited – 9 May 2016**

75. This contract is for the provision of lease contract management services and related products. The details of the services to be provided are contained both in the agreement itself dated 9 May, 2016, and a document described as an "*Order for additional AerData services*".
76. The non-monetary obligations which remain to be rendered by AAA include the following:  
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- (1) Certain non-disclosure obligations.
  - (2) Obligations regarding the maintenance of confidential information.
  - (3) The obligation within ten days of termination of the contract to return all software and associated documentation and to delete previously loaded copies of software.
  - (4) Obligations regarding taxes, intellectual property, confidentiality and disclosure.
77. The non-monetary obligations remaining to be rendered by AerData are stated to include non-disclosure obligations, retention of confidential information and return of same for archival purposes, and continuing obligations with regard to taxes, intellectual property and confidentiality.
78. The contract is stated to be governed by the laws of England.
79. There has been put into evidence a report by Messrs Hogan Lovells International LLP, London. They confirm as a matter of English law that the clauses referred to in the contracts constitute obligations in respect of which some element of performance other than payment remains to be rendered.
80. Having considered the terms of the contract put into evidence and the opinion of Hogan Lovells International LLP, I am satisfied that this is a contract pursuant to which obligations other than the payment of money remain to be performed. I am satisfied that it is a contract to which the provisions of s. 537 of the Act apply.

**Discretionary considerations**

81. In the Second Judgment, I examined the extensive evidence of the companies and of the examiner as to the basis on which the companies had identified the contracts the repudiation of which it said were necessary to facilitate the formulation and implementation of a scheme of arrangement and were necessary for the survival of the companies and parts of their undertaking as a going concern. Comprehensive evidence was tendered as to the restructuring and the necessity to terminate, either by agreement or repudiation, relevant contracts. I also considered the case law informing the court in the exercise of its discretion. Having done so, I was satisfied as to the necessity for repudiations in the context of the examiner's intentions and made the orders sought by the companies under s. 517 (1). Again, it is not necessary to repeat that analysis in this judgment, save to say that my conclusions on the applications the subject of this judgment are informed by that analysis.
82. The evidence of the companies on these applications is uncontradicted. I have found that the contracts referred to in this judgment are of such a nature that repudiation thereof will facilitate the formulation of proposals for a scheme of arrangement and is necessary for the survival of the companies as a going concern. I am also satisfied that the decision to select these contracts for repudiation is consistent with the objectives of Part 10 of the Act and the purpose for which the examiner was appointed.

83. Accordingly, I was satisfied to make the approval order pursuant to the provisions of s. 537 (1).

**Quantification of losses**

84. Section 537 (2) provides that any person who suffers loss or damage as a result of a repudiation of a contract approved under the section shall stand as a unsecured creditor for the amount of such loss or damage.
85. Section 537 (3) provides that in order to facilitate the formulation, consideration or confirmation of a scheme of arrangement the court may hold a hearing and make an order determining the amount of any such loss or damage.
86. On this application, I have not been asked to hold a hearing under s. 537 (3). Instead, the examiner in his affidavit states that it is his intention that the proposed scheme of arrangement would prescribe a mechanism for the quantification of the amount of the loss or damage suffered by the counter parties to the contracts as a consequence of repudiations. This is a reference by the examiner to the formula which is common to schemes of arrangement under Part 10 of the Act whereby the quantum of unagreed claims is determined by an independent expert, appointed pursuant to the terms of the scheme.
87. The jurisdiction to hold a hearing as to quantum pursuant to subsection (3) is discretionary. In the Second Judgment I considered the submissions of the opposing parties that the court should in the particular circumstances of their cases hold such a hearing. For the reasons detailed in that judgment I determined that such a hearing should be held in those cases. In relation to the repudiation of the contracts the subject of this judgment no party has sought a hearing as to quantum. I therefore made the order pursuant to s. 537 (1) approving the repudiation and made no order for a quantum hearing pursuant to subs. (3).