Neutral Citation Number: [2020] EWHC 2904 (Comm)

Case No: CL-2020-000656

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, Fetter Lane, London EC4A 1NL

Date: 2 November 2020

Before :

MR JUSTICE ANDREW BAKER

- -

Between :

SRS MIDDLE EAST FZE	**Claimant**
- and -	
CHEMIE TECH DMCC	**Defendant**

- -
- -

James Leabeater QC (instructed by **Morgan, Lewis & Bockius LLP**) for the **Claimant**
Riaz Hussain QC (instructed by **Taylor Wessing LLP**) for the **Defendant**

Hearing date: 28 October 2020

- -

Covid-19 Protocol:
This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 3.00 pm on 2 November 2020.

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker :

Introduction

1. By Claim Form dated 7 October 2020, the claimant seeks "*interim and/or final anti-suit injunctions*" to restrain the defendant from pursuing proceedings in the Emirate of Sharjah, UAE, in contravention, the claimant says, of a binding arbitration agreement between the parties. The particular target of the Claim is an action commenced by the defendant on or about 15 September 2020 in the Sharjah Federal Court of First Instance ("the Sharjah Court"), Case No. SHCFICOM 2020/0005047 ("the Sharjah Claim").

2. I heard the parties on 15 and 19 October 2020, for urgent case management, because a hearing in the Sharjah Claim was scheduled for 20 October 2020. The defendant undertook to appear in the Sharjah Court only to seek an adjournment, and I gave directions for service of these proceedings, an exchange of evidence, and a hearing on 28 October 2020 that, in the event, came on again before me. One direction as to evidence, under CPR 35.5(1), permitted the parties to adduce expert opinion evidence as to UAE law within any witness statements that were served rather than by way of expert report requiring permission under CPR 35.4(1) and other Part 35 formalities.

3. On 20 October, the defendant appeared in the Sharjah Court to seek an adjournment, as promised, and that hearing in the Sharjah Claim is now scheduled for 4 November.

4. Pursuant to my case management directions, the defendant acknowledged service on 21 October without stating any intention to contest jurisdiction but stating an intention to defend on the merits.

5. The claimant has not issued a separate Application Notice for interim relief, but Mr Hussain QC for the defendant confirmed that no procedural point was taken and that the defendant was content for me to treat the hearing as a full *inter partes* hearing of the application for interim relief notified by the Claim Form itself. I am grateful for that constructive procedural approach adopted by the defendant, taking its stand, as it has, on the merits of its position in respect of the arbitration agreement and the Sharjah Claim rather than taking up time over how precisely the issue has come before the court for those merits to be examined.

6. This is an unusual anti-suit injunction case raising a point on the propriety, as judged by reference to the orthodox *Angelic Grace* test, of steps taken by the defendant to obtain interim relief from a court to whose jurisdiction the claimant is subject but which is not the court of the seat of the arbitration, in support of substantive claims that the defendant has itself referred to arbitration in London, accepting its obligation to do so.

7. This is my judgment on the hearing referred to in paragraph 2 above, prepared under some pressure of time so that the parties know where they stand before the hearing in Sharjah the day after tomorrow.

Facts

8. In June 2018, the claimant engaged the defendant by a contract expressly governed by English law to engineer and construct a new tank storage terminal and connect it to existing infrastructure in the Al Hamriyah Free Zone in Sharjah. The dispute resolution provision of the contract related to any "*dispute (of any kind whatsoever) … between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Employer*". It provided for reference of any such dispute to the Employer's Representative (as defined in the contract) in the first instance (clause 20.4), and to arbitration if either party was dissatisfied with the result or if the Employer's Representative failed to give a decision (*ibid*). Where notice of intention to commence arbitration was given, clause 20.5 required certain structured efforts at amicable settlement to be made. Then, by clause 20.6, the contract gave this detail to the agreement to arbitrate:

> "*In the event the Parties are unable to reach an amicable settlement in accordance with sub-clause 20.5 above, then:*
>
> *(a) the dispute shall be finally settled by arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce ['ICC Rules'];*
>
> *(b) the dispute shall be settled by three arbitrators appointed in accordance with these Rules;*
>
> *(c) the arbitration shall be conducted in the English language, and*
>
> *(d) the place in which the arbitration shall take place shall be London.*"

9. Pursuant to the contract, a performance guarantee dated 26 February 2020, replacing an earlier guarantee dated 1 October 2018, was issued to the claimant by Orient UNB Takaful PJSC ('Orient') for US$4,075,000, which was 10% of the contract price. The performance guarantee is expressly governed by UAE law and the ICC458 Uniform Rules for Demand Guarantees.

10. On or about 16 April 2020, the claimant purported to terminate the contract for cause (essentially or primarily heavily delayed performance). By letter dated 16 April 2020, the claimant made demand upon Orient for payment under the performance guarantee, delivering up the original as required by its terms. The defendant does not accept that the claimant was entitled to terminate the contract, and says it is entitled to payments thereunder, including for alleged variations, and to extensions of time to complete the work.

11. The defendant commenced arbitration under clause 20.6 by a Request for Arbitration dated 4 June 2020. The arbitration has ICC Reference No. 25361/AYZ. The claimant filed an Answer to the Request dated 5 August 2020, which included counterclaims as well as defences. A tribunal of three arbitrators is now constituted and a first case management conference has been held, although that was not the case when any of the court proceedings to which I refer below were commenced.

12. Article 28 of the ICC Rules deals with "*Conservatory and Interim Measures*". Article 28(1) provides that, unless the parties have agreed otherwise, "*as soon as the file has been transmitted to it, the arbitral tribunal may … order any interim or conservatory measure it deems appropriate*", such measure to "*take the form of an order, giving reasons, or of an award as the tribunal considers appropriate.*"

13. Article 28(2) provides as follows:

> "*Before the file is transmitted to the arbitral tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an arbitral tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal.*
>
> *Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the arbitral tribunal thereof.*"

14. The following court proceedings have been commenced:

    (1) Proceedings in Sharjah brought by the defendant against the claimant and Orient for interim relief in support of the defendant's substantive claims against the claimant ('the Interim Relief Claim'). The defendant's application was initially refused and an appeal against that refusal failed, but a further appeal by the defendant was allowed and a yet further (and final) appeal by the claimant has recently been rejected. The Interim Relief Claim was commenced on 17 May 2020 by an application made to the Court of Summary Matters at the Sharjah Court ('the Summary Court').

    (2) A claim in the Dubai Court of First Instance, Case No. 669/2020, commenced on 24 June 2020, brought by the claimant against Orient on the performance guarantee ('the Orient Claim'). There is no question but that the claimant was entitled to sue Orient in Dubai if it wished to pursue its claim for payment under the performance guarantee. The claimant's commencement and pursuit of the Orient Claim could not possibly justify the defendant in breaching the arbitration agreement, as regards the pursuit of its claims against the claimant under the contract. Nor does it arguably amount to good reason why the defendant should not be restrained by injunction from breaching that agreement if it is doing so or threatening to do so. That is the position notwithstanding that, according to the defendant, Orient applied to bring the defendant into the Orient Claim as a third party, on the basis that if Orient was obliged to pay out under the performance guarantee it would say the defendant was obliged to indemnify it.

    (3) The Sharjah Claim, commenced as I have said in mid-September 2020, which the defendant says it commenced because it was advised that a procedural rule required it to file an action for the establishment of its substantive rights, else the provisional measures granted in the Interim Relief Claim would become deemed void *ab initio*.

(4) This Claim, issued on 7 October 2020, for anti-suit injunctions (a) restraining the defendant from pursuing the Sharjah Claim, or any other substantive claim arising out of or in connection with the contract other than a claim in the ICC arbitration, and (b) requiring the defendant to discontinue the Sharjah Claim, and for declaratory relief as to the defendant's obligation to arbitrate.

15. The Interim Relief Claim succeeded, on the defendant's second appeal before the Sharjah Federal Court of Appeal, on 9 September 2020. The main correspondence that followed, spawning this Claim, may be summarised as follows:

(1) By email dated 15 September 2020, Morgan Lewis for the claimant notified the ICC Secretariat of the Interim Relief Claim and its outcome in the Federal Court of Appeal and continued that:

> "*Under the laws of the United Arab Emirates, we understand the provisional attachment orders made by the Federal Court of Appeal will lapse unless the [defendant] files suit in the UAE Courts for the Courts to decide the substantive disputes arising between the parties – which would be a breach of the arbitration agreement between the parties. In the premises, the [claimant] may need to apply to the Tribunal (which is the ultimate arbiter of these proceedings) pursuant to Article 28 of the ICC Rules for urgent interim relief.*"

On that basis, Morgan Lewis asked that the ICC expedite the completion of the tribunal.

(2) Also on 15 September 2020 by email, Morgan Lewis wrote to Taylor Wessing for the defendant, referring to the Federal Court of Appeal decision and saying that Morgan Lewis understood that that decision and the provisional measures granted to the defendant "*are not aimed at resolving, and do not resolve, the substantive matters in dispute between our clients; and that the substantive issues will be resolved in [the ICC arbitration]*". They asked, for the avoidance of doubt, for confirmation that the defendant "*accepts that the substantive disputes between our clients will only be resolved by the Tribunal in [the ICC arbitration]*" and that the defendant "*will not make any claims for substantive relief in relation to any matters in dispute between our clients in any court in the United Arab Emirates (including but not limited to Sharjah)*".

(3) In reply on 17 September 2020, Taylor Wessing confirmed Morgan Lewis' understanding that the Sharjah Federal Court of Appeal was not aimed at resolving, and did not resolve, any substantive dispute, adding that "*The Judgment of the Sharjah Court of Appeal does no more than preserve the status quo. It does not resolve any substantive disputes.*" Taylor Wessing did not, however, give either of the confirmations requested concerning where substantive disputes were now to be resolved.

(4) A further exchange (Morgan Lewis on 18 September; Taylor Wessing in reply on 20 September) took matters no further.

(5) The claimant then moved promptly to prepare and issue the Claim Form herein on 7 October 2020 and arranged for its urgent consideration by the court.

16. With hindsight, it is unfortunate that Taylor Wessing did not inform Morgan Lewis, in reply to their initial request for confirmations, that the Sharjah Claim was being or was about to be filed, but on the basis of advice that such a filing was required to prevent the provisional measures obtained by the defendant from becoming deemed void, and that the defendant *did* accept that the only proper venue for a determination of its substantive claims on their merits was the ICC arbitration.

17. It appears that the procedure before the Sharjah Court follows a pattern of successive court appointments, at which submissions are put before the court (and it may be, I envisage at later stages, evidence is filed or taken). The first appointment before the Sharjah Court in the Sharjah Claim was on 27 September 2020, at which the claimant submitted a memorandum in response, applying for the Sharjah Court to stop the Sharjah Claim in view of the arbitration agreement between the parties. That is an application under Article 8 of Federal Law No. (6) of 2018 on Arbitration ('the Arbitration Law'; 'the Article 8 Application').

18. I have two slightly different renderings of Article 8 into English, although they are to the same material effect, reflecting the New York Convention. In the translation exhibited by Ms Kelly of Morgan Lewis of the memorandum of response to which I have just referred, Article 8 is translated, so far as material, as:

> "*1. The court to which a dispute in connection of which there is an arbitration agreement is referred shall order not to accept the case if the defendant so pleads prior to making any request or pleading with regard to the merits of the case.*"

That came with Ms Kelly's third statement, filed after the hearing (at my request and without objection by the defendant) because I was concerned that although Ms Kelly had stated in previous evidence that the Article 8 Application had been made, I had not seen it and its precise terms might be relevant to the terms in which any interim anti-suit injunction should be articulated, if I decided that an injunction should be granted. With her second statement (the claimant's reply evidence for this hearing), Ms Kelly exhibited a copy from Westlaw of an English-language version of the UAE Official Gazette setting out the Arbitration Law. It was not in evidence whether that is only Westlaw's translation or whether, rather, it has some official source or status in the UAE. However that may be, the version on Westlaw has the following for the relevant provision of Article 8:

> "*1. The court, before which an action was instituted regarding a dispute in respect of which an Arbitration Agreement exists, shall dismiss the action, if the Respondent moves to dismiss on this ground before making any other motions or plea on the subject matter of the action, unless the court finds that the Arbitration Agreement is void, or unenforceable.*"

Nothing turns on the omission in the memorandum of response of the closing wording, excepting cases where the court finds the arbitration agreement to be void or unenforceable.

19. The foregoing is sufficient to explain the short point that now arises. Before this court, whether or not this was as clear as it could have been in pre-action correspondence, the defendant has been explicit and clear in accepting its obligation, under the arbitration agreement, to ensure that the arbitrators in the ICC arbitration alone, and

not the Sharjah Court, determine its claims the subject matter of the Sharjah Claim. It claims, however, that it ought not to be restrained by injunction from pursuing the Sharjah Claim if restraining it would mean that it lost the protection of the provisional measures granted in the Interim Relief Claim.

20. The claimant says that, taken at face value, the Sharjah Claim seeks to put before the Sharjah Court for determination on the merits, contrary to the arbitration agreement, the defendant's substantive claims, so there is (at the very least) a presently threatened breach, and it will be for the defendant to show good reason why it should not be restrained. The provisional measures granted in the Interim Relief Claim cannot provide good reason, the claimant submits, in that:

    (1) there is no evidence that those provisional measures will be lost if the Sharjah Claim is now stopped;

    (2) if the provisional measures would be lost, so be it, because:

        (a) that would mean, *ex hypothesi*, that they were provisional measures the availability of which required the defendant to bring its substantive claims and pursue them to judgment before the Sharjah Court, in breach of the arbitration agreement, and it would be contrary to the essence of that agreement to treat the availability of provisional measures contingent upon dishonouring it as good reason to dishonour it;

        and if necessary

        (b) the defendant had ample means by which to obtain provisional measures of the kind obtained in Sharjah, if merited, without having to breach the arbitration agreement, in that

            (i) the interim relief in question was available in Sharjah under Article 22 of the Federal Law No. (11) of 1992 ('the Civil Procedure Law'), without the need to commence a substantive claim like the Sharjah Claim to obtain or preserve it,

            (ii) an application could have been made to this court pursuant to s.44 of the Arbitration Act 1996,

            (iii) an application could have been made in the ICC arbitration (under Article 29 of the ICC Rules, the Emergency Arbitrator procedure, if made before the tribunal was fully constituted), or

            (iv) an application could have been made in the DIFC Court under Article 24(3) of DIFC Arbitration Law No.1 of 2008, an order of which court could be enforced in Dubai, thence in Sharjah.

21. It will be appreciated, if other points are left to one side and just paragraphs 19, 20(1) and 20(2)(b)(i) above are compared, that upon analysis there is only a narrow point between the parties. The defendant has obtained interim relief the substance of which the claimant concedes could have been obtained without breach or threatened breach

of the arbitration agreement. Thus *on the claimant's case* the defendant's wrong or threatened wrong, if there is one, is in filing further proceedings it did not need to file and the cessation of which, *it is the claimant's case*, has not been shown to put the interim relief at risk. Moreover, as I explain below, *the basis upon which the defendant sought interim relief* was that it was available to it (if merited, on the approach taken to such matters in Sharjah) under Article 22 of the Civil Procedure Law, in support of the substantive claim it would be obliged to, and intended to, refer to arbitration.

The Interim Relief Claim

22. By its originating application document submitted on 17 May 2020, Case No. 2179 of 2020, the defendant applied to the Summary Court for provisional measures, naming both the claimant and Orient as respondents. I do not have evidence of the Sharjah court structure and hierarchy, but considering some of the submissions made in Sharjah, in particular those of the claimant as to the appropriateness of the Summary Court taking the case, and since it is clear that an appeal lay to the Sharjah Court, my impression is that this was akin to making an application here in the High Court before a Master, from whose decision an appeal would lie to a High Court Judge. Be that as it may, the Summary Court refused the application, and there was indeed an appeal to the Sharjah Court.

23. The application sought, in substance, an interim injunction restraining payment out by Orient under the performance guarantee, and an interim freezing injunction against the claimant in respect of assets up to the asserted amount of the defendant's claims, a little under US$13 million (the precise figure does not matter). In the application, the defendant was open and explicit that its substantive claims were subject to the arbitration agreement, and that it would be referring them to arbitration.

24. The application was founded upon Article 22 of the Civil Procedure Law, the defendant's submission to the Summary Court being that:

> "*It is legally established, in accordance with Article 22 …, that the Courts of the State have jurisdiction to order summary and precautionary provisions which shall be executed in the State even if they were not related to the principal action. … Therefore, the Court has jurisdiction to issue the current order even if the [defendant] is going to file an arbitration claim in London of its objective requirements against the [claimant] as far as executing the Contract is within the jurisdiction of Sharjah and as far as the Courts of the State have the jurisdiction to order summary and precautionary provisions even if the Contract contains an arbitration provision and as far as such precautionary provisions are not relating to the arbitral jurisdiction.*"

25. There was a collateral submission that the arbitration agreement did not confer jurisdiction on the arbitrators to order interim precautionary measures. That was a bad submission, but as I have noted already the claimant agrees with the defendant's main submission, which was sufficient, namely that Article 22 conferred jurisdiction to order provisional measures of the kind sought by the defendant in support of its then intended arbitration claims. Pursuant to the direction allowing expert opinion evidence to be included within the witness statements exchanged for this hearing, without the need for full Part 35 formalities, the claimant's relevant evidence is from

Ms Kelly herself, who is an Australian solicitor, a Registered Foreign Lawyer with the Law Society in this jurisdiction, and qualified and licensed as a legal consultant in Dubai (meaning she is qualified to practise there but without rights of audience before the UAE Courts). She is a partner in Morgan Lewis based in Dubai and has practised in the UAE for 15 years. I have no doubt that she is properly qualified to opine on the relevant content of UAE law and do not detect any evident sign that the fact she is the claimant's solicitor in this matter has tainted her evidence, albeit of course for a final trial herein, if there is one, it may be preferable for any expert evidence as to UAE law to be given by an independent expert witness. It is right to note, in particular, that when one of Mr Leabeater QC's submissions seemed to me to strain Ms Kelly's evidence on Article 22 so as to render it less favourable to the defendant than it had struck me on reading it, and I rose to allow instructions to be taken, the submission in question was withdrawn and, on Ms Kelly's instructions, Mr Leabeater QC confirmed that her evidence was intended to mean what it appeared to mean, namely that in her view Article 22 indeed gave the Sharjah Court power to order the provisional measures sought by the defendant, in support of its intended arbitration claims and "*without then asking the Sharjah Courts to determine the substantive issues*".

26. I find it unsurprising that it was the defendant's submission, and that it is Ms Kelly's opinion, that Article 22 has that effect. In translation, it reads as follows (with my emphasis, the emphasised language rather speaking for itself, one might think):

> "*The courts shall have jurisdiction to determine preliminary issues and interlocutory applications in the original action within their jurisdiction and shall also have jurisdiction to determine any application connected with such action which the proper course of justice requires that it be heard with it, and they shall likewise have jurisdiction to make orders for expedited and preservatory procedures to be carried out in the State notwithstanding that they do not have jurisdiction in the original action.*"

27. The defendant's originating application also made reference to Articles 111 and 113(1) of Cabinet Decision No. 57 of 2018, which I understand from Ms Kelly's evidence to have amended or replaced certain provisions of the Civil Procedure Law. Articles 111 and 113(1) appear in a Section 2 entitled, in translation, "*Provisional Seizure*". On their face, read in translation, they seem to provide that "*the provisional seizure of the property and the assets of [a creditor's] opponent*" and the "*provisional seizure*" of movable property in which the applicant claims some proprietary interest are among the remedies by way of interim relief available to the Sharjah Court, with a statement of the grounds on which they may be ordered.

28. Read sensibly, as it presently seems to me, the Interim Relief Claim was thus a claim for protective provisional measures in support of the defendant's intended claims in what is now the ICC arbitration commenced a few weeks later, founded upon Article 22, but by reference to Articles 111 and 113(1) to justify the availability, under Article 22, of the particular type of interim relief sought.

29. Article 114(2) of Cabinet Decision No. 57 of 2018 provides as follows:

> "*The judgment creditor shall, within eight days at most from the date of issuance of the seizure order, file before the competent Court the action for the*

establishment of the right, in cases where the seizure is ordered by the magistrate of summary justice, otherwise, the seizure shall be deemed void ab initio."

30. In her first witness statement, being the claimant's primary evidence in support of its anti-suit injunction claim, Ms Kelly referred to Article 261(2) of the Civil Procedure Law, which was to similar effect. In her second witness statement, she corrected herself, saying that Article 261(2) has been superseded by, and she should have referred to, Article 114(2) of the Cabinet Decision. Correcting for that error, Ms Kelly's evidence was and is that the claimant's request (paragraph 15(2) above) that the defendant confirm that only the ICC arbitrators would be asked to deal with the substantive merits was made because of a concern on the claimant's part that by reason of Article 114(2), the defendant might commence substantive proceedings in the Sharjah Court.

31. The defendant's evidence before me is from Balasubramanian Sanjeevi, a director of the defendant. His evidence is that the Sharjah Claim was filed by the defendant on an understanding that filing such a claim was necessary, because of advice from the Sharjah lawyers acting for the defendant in the Interim Relief Claim, Al Fajer Advocates and Legal Consultants ('Al Fajer'), that Article 114(2) applies in the circumstances of this case. Mr Sanjeevi says that:

    (1) Al Fajer's advice was that "*even though the Arbitration had already been commenced as of 4 June 2020 [i.e. before interim relief was granted on appeal], this would not be sufficient to constitute a 'claim for confirmation of the right in the circumstances in which the attachment was undertaken by the order of the judge of the summary matters', and therefore a failure to file a confirmation claim in the Sharjah Courts would have resulted in the Attachment Proceedings and the Attachment Order being declared null and void*".

    (2) The defendant therefore filed the Sharjah Claim "*which was required to preserve the Attachment Order … and nothing more*".

32. Mr Sanjeevi does not say when that advice was given, or why it was sought. As I have said, the Interim Relief Claim as filed sought relief under Article 22 of the Civil Procedure Law. It did not suggest that substantive proceedings would be filed in the Sharjah Court or were thought to be necessary. To the contrary, the position taken was that its substantive claims had to be, and would be, referred to arbitration. The suggestion of a possible procedural requirement to file a substantive claim to preserve the interim relief was first raised between the parties *by the claimant* (see paragraph 15(1) above). At this stage, I have no evidence that it was a possibility considered by the defendant before that. Equally, though, if the defendant was only prompted to consider filing the Sharjah Claim by the claimant's message raising the procedural point, one might have thought Mr Sanjeevi would have said so. That will have to be investigated further at trial, if it is thought it might then matter.

33. The Interim Relief Claim was dismissed by the Summary Court on 15 June 2020. The defendant appealed to the Sharjah Court, under Case No. 2278/2020, but that appeal was dismissed on 11 August 2020. The defendant's further appeal, to the Sharjah Federal Court of Appeal, under Case No. 1015/2020, succeeded on 9 September 2020, and on that date the interim relief sought by the defendant was granted. An attempt by

the claimant to appeal that decision to the UAE Supreme Court in Abu Dhabi was rejected by that Court on 20 October 2020.

34. In upholding the Interim Relief Claim, the Sharjah Federal Court of Appeal referred to Article 111 of Cabinet Decision No. 57 of 2018 and not to Article 22 of the Civil Procedure Law. As it seems to me, Article 22 may well be the source nonetheless of the power that has been exercised in the defendant's favour, bearing in mind what I have said about how the defendant put its claim (paragraph 28 above). That too may need to be investigated at trial.

Anti-Suit Injunctions and Interim Protective Measures

35. In the context of ship arrests or the threat thereof, if lawfully available for the purpose of obtaining security for a claim that must be referred to arbitration for determination on the merits, Jonathan Hirst QC, sitting as a High Court judge in *The Kallang (No.2)* [2008] EWHC 2761 (Comm), [2009] 1 Lloyd's Rep 124, stated a general principle in these terms at [78]:

> "*the English court will not restrain a party … where the sole purpose of the arrest is to obtain reasonable security for the claim to be arbitrated … in England. Section 11 of the Arbitration Act 1996 also assumes that a claimant can properly arrest a vessel in order to obtain security for an arbitration claim. The precise basis on which the court acts – construction of the arbitration clause or discretion – is not authoritatively established but the general approach is clear enough. Where, however, the claimants' [i.e. the anti-suit injunction defendants'] actions go beyond simply seeking reasonable security for the arbitration proceedings, there is a breach of the arbitration agreement which the English court will restrain*"

36. HHJ Waksman QC, as he was then, sitting as a High Court judge, applied that principle in *The Sam Purpose* [2017] EWHC 719 (Comm), [2017] 2 Lloyd's Rep 50. Many other cases could be mentioned, and I shall not lengthen this short judgment by any fuller review. I regard the principle as formulated in *The Kallang (No 2)* as well-established good law. It is regularly given practical effect by insisting that an anti-suit injunction compelling the defendant to procure the release of a ship from an apparently lawful arrest will not be granted without an undertaking to provide satisfactory alternative security for the substantive claim in arbitration (say, a P&I Club letter of undertaking or a bank guarantee), a fairly recent example before me being *The Joker* [2019] EWHC 3541 (Comm).

37. Mr Leabeater QC submitted that a different approach should be taken, less accommodating of an arbitration claimant's wish to obtain interim relief in a foreign jurisdiction in support of his claim brought or to be brought in arbitration, outside the particular case of ship arrest. As he rightly submits, ship arrest is inherently tied to the whereabouts of the ship from time to time, rather than to the seat of the arbitration, has particular public interest considerations at its foundation, is governed by international convention, and is an interim remedy as of right, policed by the tort of wrongful arrest that outlaws claims brought *mala fides* or with *crassa neglentia* rather than being a remedy granted or not as a matter of discretion. I do not agree that those features of the ship arrest jurisdiction render it different in principle, for present

purposes, from the sort of interim relief sought by the defendant here, at least where, which is sufficient for this case:

(1) the interim relief is sought before the arbitration tribunal is constituted; and

(2) the seeking of interim relief from any competent court is expressly permitted by the arbitration agreement (here, that is under Article 28(2) of the ICC Rules).

Taking the stance that an anti-suit injunction will generally not be granted in respect of court proceedings the sole purpose of which is to seek interim protective measures in support of the interim relief applicant's substantive claim brought or to be brought in arbitration in any event seems to me right in principle, and is consistent with the approach taken to the availability of freezing orders in support of arbitration, as discussed by Rix J, as he was then, in *In Re Q's Estate* [1999] 1 Lloyd's Rep 931.

38. Complex and interesting questions would arise if, on the basis of Article 28(2) of the ICC Rules, an arbitration claimant sought and obtained protective measures from a court and, either upon its equivalent application to the arbitrators, if made, for such measures (if they are within their powers, as for example under Article 28(1) of the ICC Rules), or upon some application by the arbitration respondent to the arbitrators complaining about what had happened, the arbitrators decided that the protective measures granted ought not to obtain in the case. But those are not questions that arise in this Claim, at all events at this stage; and in my judgment, it is not for this court, at least (again) at this stage, in the exercise of its jurisdiction to enforce the arbitration agreement by injunction, to second guess the Sharjah Federal Court of Appeal's conclusion as to the appropriateness on the facts of this case of the provisional measures it has ordered. There could be a case in which the nature of the provisional measures sought, or the venue in which they are sought, provides grounds for an argument that the foreign proceedings are in any event vexatious and oppressive; and in such a case if this court has jurisdiction *in personam* over the arbitration claimant in respect of that vexatious conduct, an injunction could be justified on that basis. But that is not the basis on which an anti-suit injunction has been sought in this case. The claimant takes its stand simply, and squarely, on the orthodox *Angelic Grace* test, asserting that (a) the commencement and/or pursuit of the Sharjah Claim was and will be a breach of the arbitration agreement and (b) no good reason has been shown why that should be tolerated to continue.

39. One specific question arises, because of a submission by Mr Leabeater QC, on the ambit or limits of the proposition that, generally speaking, foreign proceedings the sole purpose of which is to obtain security or protective interim measures in support of a substantive claim brought or to be brought in arbitration will not be restrained.

40. In *The Sam Purpose, supra*, HHJ Waksman QC referred at [9]-[12] to how matters had appeared when he initially granted an interim injunction *ex parte* on notice. The case concerned proceedings in Nigeria and a ship arrest there. At the *ex parte* hearing, it was the claimant's position, seemingly agreed by the defendant (which did not appear, but did put in a written submission), that if the Nigerian proceedings had to be terminated because of the arbitration agreement, the Nigerian court could not maintain the arrest or require security *in lieu*, in support of the intended arbitration claim. At the return date, the judgment on which is the reported judgment (although I was also

shown a transcript of the *ex parte* judgment), matters had moved on. It had become common ground that under s.10 of the Nigerian Admiralty Jurisdiction Act 1991, the Nigerian court had power to make the stay or dismissal of proceedings in favour of arbitration conditional upon the maintenance of the arrest or provision of other security, in support of the claim in arbitration.

41. Of the position as it had been presented to the court *ex parte*, HHJ Waksman QC said at [11] that:

    (1) "*On the face of it, there was jurisdiction to issue an anti-suit injunction in respect of the Nigerian proceedings on the usual basis that their inception had violated the various arbitration agreements subsisting between the parties*" (my emphasis); and

    (2) "*if, by a final injunction, [the defendants] were ordered to cease those proceedings, if the effect of that was that the arrest would be discharged as well, then so be it.*"

42. As a primary submission, Mr Leabeater QC argued that filing the Sharjah Claim was a breach of the arbitration agreement that could and should be restrained by injunction even if, under the *lex fori* there, it had to be filed to avoid the protective measures granted in the Interim Relief Claim becoming deemed void *ab initio* under Article 114(2) of Cabinet Decision No. 57 of 2018. Citing the *dictum* quoted in paragraph 41(1) above, the argument was that so long as the Sharjah Claim, on its face, sought to put the defendant's substantive claims before the Sharjah Court, it was a breach that fell to be restrained, and the desire to preserve the protective measures could not be good reason to avoid an injunction.

43. In my judgment, that submission went too far. Taking again the paradigm in this area, the case of ship arrests, it is common that the arbitration claimant may have to initiate proceedings in the form in which he would if wishing to pursue his substantive claim in the court ordering the arrest, in order to invoke that arrest jurisdiction. HHJ Waksman QC was of the view, as am I, that an anti-suit injunction would not issue to restrain the initiation of proceedings, if required in order to invoke the arrest jurisdiction, *so long as those proceedings were being initiated only for that purpose and did not need to be pursued on the merits to obtain or retain the benefit of the arrest*. At [32], HHJ Waksman QC recorded a submission made to him much like Mr Leabeater QC's made to me, to the effect that "*if the foreign claimant had to launch substantive proceedings to obtain an arrest but could then stay the proceedings immediately so that all that was left was the arrest*", then an injunction should be granted. HHJ Waksman QC said he found that "*a difficult conclusion because functionally and as a matter of substance rather than form, it would be equivalent to obtaining an arrest without substantive proceedings. Having regard to … The Kallang (No 2) I would find it surprising if, in those circumstances, there was even a breach at all.*"; and on any view, the circumstances posited would not be sufficient to found an anti-suit injunction, or the outcome and the reasoning for it in *The Sam Purpose* itself would have been different.

44. Thus, the *dictum* quoted in paragraph 41(1) above must be understood in the context of the case it was describing, namely a case in which it was only possible to obtain, or at least maintain, security or other interim protective measures by pursuing a claim on

the merits in the court that granted those measures. In those circumstances, logically it could not be the case that the commencement of the court proceedings had the sole purpose of obtaining the security (or other measures) in support of the arbitration. *Ex hypothesi*, such interim relief would be unavailable from the court in question and the commencement of the court proceedings could only be explained by an intention to have the substantive merits judged there, contrary to the arbitration agreement. I agree with Mr Leabeater QC that it would then be to allow the tail to wag the dog to say that because of Article 28(2) of the ICC Rules, that would be permissible. Whilst Article 28(2) contains wide and general wording as to the type of interim relief it can be permissible to go to court to seek, it cannot sensibly be read as permitting relief to be sought that requires the final determination of the substantive merits to occur otherwise than in arbitration. That is the import of the *dictum* quoted in paragraph 41(2) above; and it was because at the *ex parte* hearing that was thought to be the position on the facts, namely that staying or dismissing the Nigerian proceedings would have to involve the loss of the arrest, that the *dictum* quoted in paragraph 41(1) above then applied.

45. *The Sam Purpose* is thus an important judgment with which I agree, and a precedent for the present case that I think it right to follow. By the time of the return date hearing, whatever the prior history had been, the defendant "*[was] not taking any step other than to stay the [Nigerian] proceedings and leave the arrest in place*", and therefore, even though there had originally been a breach of the arbitration agreement in that case (for other reasons specific to the facts that do not matter for my purposes), there was "*a separate question as to whether injunctive relief is … required*" (*per* HHJ Waksman QC at [32]), and the furthest the court would go was "*the continuation of some form of negative [injunctive] relief to stop any further action other than to stay the current [Nigerian] proceedings*" (*ibid* at [38]).

Discussion & Conclusions

46. This is not the trial of this Claim, it is only an urgently arranged interim consideration of the Claim, albeit that under my directions and thanks to the constructive approach taken by the defendant, it has been an interim consideration after an exchange of evidence and a full day *inter partes* argument. The question is what, if any, interim anti-suit relief should be granted.

Basic Merits

47. On the approach identified above, the first merits question is whether the Sharjah Claim goes beyond, or threatens to go beyond, the seeking of the protective measures that were sought by and obtained in the Interim Relief Claim.

48. The defendant's submissions and evidence did not always keep distinct the question whether the Sharjah Claim had to be filed at all (the Article 114(2) point) and the question whether trying to hold onto the provisional measures granted in the Interim Relief Claim could be 'good reason' so that the defendant should not be restrained from pursuing the Sharjah Claim further. In part, that is because Mr Sanjeevi's evidence on 'good reason' was long on suggested prejudice to the defendant if the provisional measures were lost but short to the point of non-existent on why staying the Sharjah Claim in favour of the ICC arbitration, pursuant to Article 8 of the Arbitration Law, would or might mean that the provisional measures would be lost.

49. Mr Sanjeevi's claim that the defendant would suffer severe prejudice without the provisional measures was in any event incoherent. On his evidence, what has had and may continue to be having damaging commercial consequences, the source of the alleged prejudice, is the fact that the claimant demanded payment under the performance guarantee, asserting that the defendant did not perform properly under the contract, and pursued that demand by the Orient Claim, leading Orient to require the defendant to deposit cash collateral to cover Orient's liability if the claim succeeded, and having other adverse commercial effects. (According to Mr Sanjeevi, the Orient Claim has in fact now failed at first instance, although he says there could be an appeal, but that does not affect the point I make here.)

50. Mr Hussain QC fairly accepted that, though it would be the defendant's burden to show 'good reason' and though my case management directions had facilitated the easy provision of expert opinion evidence on the point sufficient for this stage of the proceedings, the defendant had in fact adduced no evidence at all as to what happens next in the Sharjah Claim. At it most basic, that means there is no evidence for the proposition that although Article 114(2), if it applies at all, speaks only of the timely *filing* of a claim in the Sharjah Court to preserve provisional measures granted by the Summary Court from becoming deemed void, those measures might be lost in this case despite the fact that the Sharjah Claim was timely filed. More specifically, and most pertinently, there is no evidence for the proposition that if the Sharjah Claim is now stayed in favour of arbitration pursuant to the Article 8 Application, the provisional measures will be lost.

51. Mr Hussain QC submitted, echoing the approach his client adopted in the most recent solicitors' correspondence, that no injunction should be granted unless there are undertakings from the claimant that, in substance, would ensure that the provisional measures would remain: "*The proceedings are not a breach of the arbitration agreement (alternatively they should not be injuncted absent a replacement security and undertaking) as they are bona fide proceedings to preserve the conservatory measures and security ordered on 9 September 2020*".

52. But that brings me back to my agreement with HHJ Waksman QC's view quoted in paragraph 41(2) above. If under UAE law the Sharjah Claim can be stopped, pursuant to Article 8 of the Arbitration Law, but with the provisional measures granted in the Interim Relief Claim left in place pending arbitration, then the defendant has no need of any such undertakings, and it should be consenting to the Article 8 Application. There is no question of this court, at all events at this stage (*cf* paragraph 38 above), requiring the defendant to give up the provisional measures if under UAE law they can be left in place in support of the ICC arbitration. At that point, the analysis does differ from the typical ship arrest case like *The Joker*, in which the court is asked by the shipowner for an injunction requiring the release of an arrest that under the law of the jurisdiction of arrest could be maintained pending the arbitration and the court will typically require that adequate replacement security answering to a future arbitration award is either in place or offered.

53. If however the provisional measures cannot be left in place in support of arbitration, in other words if maintaining those provisional measures requires the Sharjah Claim not to be stayed in favour of arbitration but to be pursued for merits adjudication, then they are not provisional measures the defendant should have sought, the defendant is in fact, though it professes otherwise, intent on breaching the arbitration agreement,

and there is no reason why it should not be restrained from doing so. To echo HHJ Waksman QC, if the effect of requiring the defendant to honour the arbitration agreement is that the provisional measures have to be discharged, so be it.

54. I am therefore left with the following situation:

(1) The defendant has commenced the Sharjah Claim in circumstances where it is doubtful whether it had any need to do so and at a time when in the solicitors' correspondence it was being coy as to whether it had in mind to try to have the merits of its substantive claims determined by the Sharjah Court.

(2) When confronted with this application, the defendant has sought to extract terms from the claimant that it needs, and can rationally demand, only if it is unable to preserve the provisional measures it has obtained in the Interim Relief Claim except by breaching the arbitration agreement.

(3) The putative argument of 'good reason' why the defendant should not be restrained, as presented by reference to the Interim Relief Claim, fails as to both premise and conclusion. The premise is that if the Sharjah Claim is now stopped in its tracks pursuant to Article 8 of the Arbitration Law, i.e. stayed or dismissed in favour of arbitration, the provisional measures granted in the Interim Relief Claim will be lost. But the defendant has offered no evidence to show that any such case arguably arises. The conclusion is that avoiding the loss of the provisional measures would be 'good reason'. But to the contrary, if staying the Sharjah Claim in favour of arbitration would mean that the provisional measures would be lost, then so be it, because *ex hypothesi* they would then have been provisional measures only available to a party pursuing its claim on the merits before the Sharjah Court, and the promise to arbitrate must be taken to extend to a promise not to seek such provisional measures notwithstanding Article 28(2) of the ICC Rules.

(4) To do other than give unconditional consent to the Article 8 Application would be to breach the arbitration agreement; and though the defendant has commenced and is duly prosecuting the ICC arbitration, and though it professes not to wish the merits to be determined otherwise than in that arbitration, unconditional consent has not been given or offered.

55. In those circumstances, in my judgment there is a *prima facie* case that a breach of the arbitration agreement is threatened, and there is no serious question, unless it comes from the other points to which I turn next, why good reason might be found for not restraining that breach by injunction.

Alleged Delay / Participation

56. Mr Hussain QC argued that good reason not to restrain a breach or threatened breach might be found in this case additionally or alternatively because the claimant fully participated in the Interim Relief Claim, and because Orient is involved in the UAE, as co-respondent in the Interim Relief Claim in Sharjah and as defendant in the Orient Claim in Dubai. However, in my judgment:

(1) There is nothing for the defendant in the claimant's participation in the Interim Relief Claim. There is no basis for a finding that the claimant participated with an appreciation that the Sharjah Claim would need to be filed *and pursued on the merits rather than stayed under Article 8 of the Arbitration Law*. I think it reads too much into the claimant's message to the ICC Secretariat (paragraph 15(1) above) to suggest that the claimant resisted the grant of provisional measures knowing that if they were granted the substantive merits would then fall to be litigated through to judgment in Sharjah rather than be subject to arbitration, or in any way encouraged the defendant to think that might be acceptable.

(2) There is therefore also nothing in any related point on delay. The relevant chronology is that of paragraph 15 above. In short, there has been no delay at all – the Interim Relief Claim has been steered by the parties from (the equivalent of) the QB Master's corridor to the Supreme Court in just 5 months – and the claimant moved very promptly, after the filing of the Sharjah Claim, when the defendant did not respond unequivocally to confirm that it was not now seeking to undermine the arbitration agreement.

(3) I said when identifying it, and maintain, that the Orient Claim is no reason whatever not to enforce the arbitration agreement between the claimant and the defendant. The claimant cannot bring its claim on the performance guarantee in the ICC arbitration. Given the very nature of such guarantees, it is entirely natural for the claimant to seek to pursue the Orient Claim even whilst arbitrating the disputes over primary liabilities. Whether the Orient Claim succeeded or failed, its commencement and pursuit by the claimant does not arguably provide good reason why the defendant should not be held to its obligation to arbitrate the substantive merits.

(4) In particular, though there was an assertion that Orient would somehow be prejudiced if an anti-suit injunction were granted, what prejudice it might suffer was not identified and so far as I can see there could be none. The unavailability of the ICC arbitration to Orient is the inevitable consequence (absent a later tri-partite deal supplementing the arbitration agreement) of the way these commercial arrangements were put in place: a bilateral primary contract with ICC arbitration agreement; a performance guarantee separate to that contract and outside that arbitration agreement.

Balance of Justice

57. Subject to three points, two of them taken by Mr Hussain QC and one concerning the form of relief sought, a conventional analysis would apply here. Damages are not an adequate remedy for the claimant being required to defend itself on the merits in the Sharjah Court, or risk default judgments against it if it does not do so, when the merits should be determined in the ICC arbitration. The *status quo* to be preserved is that the Sharjah Claim has been filed but has made no progress beyond that.

58. Mr Hussain QC submits, however, that there should not be any interim injunction because, firstly, damages would not be an adequate remedy for the defendant if the grant of an interim anti-suit injunction here caused the loss of the provisional measures. But that submission depended on two false premises:

(1) that preventing the Sharjah Claim from proceeding further would result in the loss of the provisional measures, when there is no evidence to that effect;

(2) that the loss of the provisional measures would cause significant harm to the defendant, when that is not arguably supported by Mr Sanjeevi's evidence.

Furthermore, it is a submission that could not avail the defendant anyway. I repeat that, on the point of principle raised by a case like this, in my judgment the correct approach is that if under UAE law the provisional measures cannot be maintained without litigating the substantive merits, contrary to the arbitration agreement, such that the grant of an anti-suit injunction will mean the loss of the provisional measures, then so be it. That is not good reason against the grant of an anti-suit injunction, it is the reason why an anti-suit injunction should be granted despite the protestations of the defendant that it only intended the Sharjah Claim to be a means of securing the provisional measures and had thought that what it was doing was within the spirit and letter of Article 28(2) of the ICC Rules.

59. Secondly, Mr Hussain QC submitted that the undertaking as to damages offered in the normal way by the claimant as *quid pro quo* for any interim injunction granted at this stage was insufficient protection for the defendant unless fortified, because of concerns the defendant says it has as to the claimant's means. But other than the false point on the consequences of granting an interim injunction dealt with in the previous paragraph, there is no evidence that, at all events in the short term, such an injunction will cause the defendant any material harm at all. There is time to get to the bottom of that, including (it may be) time to explore the availability and adequacy of comfort, more or less formal, from the claimant's parent or of independent security to fortify the undertaking if there is a serious case for requiring it. There is no such time to sort out whether the defendant should be ensuring that the Sharjah Claim does not proceed any further. There can be liberty to the defendant to apply, if so advised, for the undertaking to be fortified. The possibility that further consideration may need to be given to that is not a reason against granting urgent injunctive relief now.

60. Thirdly, a point arises because the claimant does not seek only an interim injunction articulated in negative terms – that the defendant not take steps to further the Sharjah Claim pending trial – but an injunction requiring that the Sharjah Claim be now discontinued. I am reluctant to order, as proposed by the claimant, that the defendant immediately discontinue the Sharjah Claim, without evidence, and there is none from either side, of how exactly, under the applicable procedural law in Sharjah, proceedings once filed can be brought to an end, with what knock-on consequences.

61. To use English legal language, which is all I can do without such evidence, the *status quo ante* would be most precisely preserved if the Sharjah Claim were stayed pending trial herein or further order. But it seems to me that it is fair and appropriate to go further than that on the particular facts of this case, since the primary proper means by which to ensure that the Sharjah Claim goes no further is the Article 8 Application already pending before the Sharjah Court. Since I am against Mr Hussain QC on his submissions concerning delay, participation and the position of Orient, the only basis put forward for not conceding the Article 8 Application was, again, the defendant's demand that there be terms that would in substance preserve the provisional measures granted in the Interim Relief Claim if those measures would otherwise be lost to the defendant if the Sharjah Claim is stopped under Article 8. That brings the argument

back to where I started, namely that this is an unusual anti-suit injunction case, since the anti-suit injunction defendant openly accepts its obligation to arbitrate the claims in question and indeed has commenced and is pursuing the necessary arbitration, raising a short point on what to do about interim protective measures sought and obtained by that party in the court in which it has commenced the proceedings to which the anti-suit injunction claimant seeks to object. My view on that point, in line with the view taken *obiter* in *The Sam Purpose*, is that the defendant has no business demanding from the claimant or the court the terms it has demanded. They are either unnecessary, because the provisional measures will not be lost by the stopping of the Sharjah Claim pursuant to Article 8 (and if I had to judge the point finally on the evidence as it stands, that would be the conclusion), or they are inappropriate, because if the provisional measures cannot be maintained under UAE law without prosecuting the Sharjah Claim through to judgment on the substantive merits, then they should not have been sought in the first place.

Conclusion

62. For those reasons, I have come to the conclusion that, subject to a liberty to apply, if so advised, as to fortifying the undertaking as to damages, this is an appropriate case for the grant of an interim anti-suit injunction on terms designed to ensure that the defendant (a) does not take the Sharjah Claim forward, and indeed (b) now concedes the Article 8 Application without qualification.

63. It has not been necessary, therefore, to deal with the claimant's further submission that if the court might contemplate the preservation of the provisional measures, were they threatened by the Article 8 Application, being 'good reason' for not enforcing the arbitration agreement by injunction, nonetheless not so here because of the sufficient availability of interim protective relief from the arbitrators, this court or the DIFC. I shall not lengthen this judgment by dealing with the points taken as to that on either side. Suffice to say there were submissions for the defendant that would have needed serious consideration to the effect that interim relief from none of those (in the case of the DIFC, if possible at all in support of an arbitration seated in London, which was itself contentious) was a satisfactory alternative to the remedy available from and obtained in the Interim Relief Claim.

64. There is one final matter to address. At paragraph 38 above, I referred in passing to the possibility that arbitrators might be asked to consider, and might then decide, that interim relief obtained from or being sought in a court was inappropriate. How fully we are to treat arbitrators as having control over how arbitrable disputes are to be dealt with might have to be considered if that situation arose; but on any view, it is an important notion that arbitrators with powers such as those of ICC arbitrators under Article 28(1) of the ICC Rules are entitled to have a primary say. Although *prima facie* an interim anti-suit injunction granted now, in support of the ICC arbitration in this case, would restrain the defendant until trial herein or further order of this court from taking any step to pursue the Sharjah Claim, as it seems to me it would be wrong in principle to require the defendant to come back to court for clearance to take a step authorised or permitted by the arbitrators, on an application made by the defendant pursuant to Article 28(1).

Outcome

65. The result on this hearing, for the reasons given above, is that there should and will be an interim anti-suit injunction restraining the defendant from pursuing the Sharjah Claim further and requiring it to consent to the Article 8 Application, with a view to ensuring that the Sharjah Claim is stayed in favour of the ICC arbitration, all pending trial herein or further order of this court. The parties must liaise in the immediate future over further directions for bringing this Claim to trial.

66. I envisage that the precise form of words for the injunction granted at this stage might be along these lines, but there will be a brief opportunity for counsel to agree or improve upon the drafting as part of submitting any editorial suggestions to finalise this judgment:

> "*1. Until trial herein or further order of the Court, the Defendant shall take no further step to pursue against the Claimant its proceedings in the Emirate of Sharjah, UAE, before the Sharjah Federal Court of First Instance ("Sharjah Court"), Case No. SHCFICOM 2020/0005047 ("Sharjah Claim"), except:*
>
> *1.1 any step that may be necessary to comply with paragraph 2 below; or*
>
> *1.2 any step that may be directed or permitted by order of the arbitrators upon an application by the Defendant pursuant to Article 28(1) of the Rules of Arbitration of the International Chamber of Commerce 2017 ("ICC Rules") in ICC arbitration number 253612/AYZ.*
>
> *2. The Defendant shall consent to the Claimant's application submitted in the Sharjah Claim on 27 September 2020 for the Sharjah Court to decline to accept the Sharjah Claim for determination on the merits, pursuant to Article 8 of UAE Federal Law No. (6) of 2018 on Arbitration, and by its legal representatives in the Sharjah Claim the Defendant shall communicate that consent to the Sharjah Court at the hearing in the Sharjah Claim scheduled for 4 November 2020.*"

67. There will be liberty to either party to apply further if the Sharjah Court does not grant the Article 8 Application; and liberty to the defendant to apply for fortification of the claimant's undertaking as to damages.

68. As regards costs, provisionally it seems to me that the claimant will be able to say that it has achieved a significant proportion of the substance of what it set out to achieve at this stage. In particular, it can say that I have been persuaded that the defendant must be directed to be unconditional in its support for the staying of the Sharjah Claim in favour of arbitration, pending final consideration of the question of an injunction in this Claim.

69. On the other hand, I have some sympathy with the view that the claimant was not as clear as it could have been, until the matter could be explored in front of the court, that it was not seeking to take away from the defendant the fruits of the Interim Relief Claim, if they could be maintained without the defendant pursuing the Sharjah Claim, as filed, for determination of the substantive claims on the merits in the Sharjah Court.

My decision against the claimant on its primary submission that the mere filing of the Sharjah Claim should be treated as a breach of the arbitration agreement that would have been restrained by anti-suit injunction, even if filing it was necessary to preserve the provisional measures and did not have to mean that the defendant now proceeded on the merits in the Sharjah Court, seems to me to be of importance to the defendant.

70. In the circumstances, whilst I retain an open mind as regards any contrary submission that might be advanced, I would think it likely to be fair to order that costs to date be in the case. The order on this judgment will therefore provide for that absent any application for a different order, which (if made) I shall consider on the basis of written submissions.

Claim No. CL-2020-000656

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Before Mr Justice Andrew Baker (sitting in private)
2 November 2020

In an Arbitration Claim

B E T W E E N:-

SRS MIDDLE EAST FZE

Claimant

- and -

CHEMIE TECH DMCC

Defendant

ORDER

PENAL NOTICE

IF YOU, CHEMIE TECH DMCC, DISOBEY THIS ORDER YOU MAY BE HELD TO BE IN CONTEMPT OF COURT AND YOU MAY BE FINED OR HAVE YOUR ASSETS SEIZED.

IF CHEMIE TECH DMCC DISOBEYS THIS ORDER, THE DIRECTORS OF CHEMIE TECH DMCC MAY BE HELD TO BE IN CONTEMPT OF COURT AND MAY BE IMPRISONED, FINED OR HAVE THEIR ASSETS SEIZED.

ANY OTHER PERSON WHO KNOWS OF THIS ORDER AND DOES ANTHING WHICH HELPS OR PERMITS CHEMIE TECH DMCC TO BREACH THE TERMS OF THIS ORDER MAY ALSO BE HELD TO BE IN CONTEMPT OF COURT AND MAY BE IMPRISONED, FINED OR HAVE THEIR ASSETS SEIZED.

UPON HEARING Leading Counsel for the Claimant and Leading Counsel for the Defendant at a hearing held remotely via MS Teams on 28 October 2020

UPON READING three Witness Statements from Ms Rebecca Kelly and three Witness Statements from Mr Balasubramanian Sanjeevi

AND UPON THE CLAIMANT UNDERTAKING to pay to the Defendant any damages which the Defendant may sustain as a result of this Order and which the Court considers the Claimant should pay

IT IS ORDERED THAT:

Injunctions

1. Until trial herein or further order of the Court, the Defendant shall take no further step to pursue against the Claimant its proceedings in the Emirate of Sharjah, UAE, before the Sharjah Federal Court of First Instance ("Sharjah Court"), Case No. SHCFICOM 2020/0005047 ("Sharjah Claim"), except:

    1.1. any step that may be necessary to comply with paragraph 2 below; or

    1.2. any step that may be directed or permitted by order of the arbitrators upon an application by the Defendant pursuant to Article 28(1) of the Rules of Arbitration of the International Chamber of Commerce 2017 ("ICC Rules") in ICC arbitration number 253612/AYZ.

2. The Defendant shall consent to the Claimant's application submitted in the Sharjah Claim on 27 September 2020 for the Sharjah Court to decline to accept the Sharjah Claim for determination on the merits, pursuant to Article 8 of UAE Federal Law No. (6) of 2018 on Arbitration ("Article 8 Application"), and by its legal representatives in the Sharjah Claim the Defendant shall communicate that consent to the Sharjah Court at the hearing in the Sharjah Claim scheduled for 4 November 2020.

Costs

3. Costs incurred to date shall be costs in the case, unless either party applies for a different order in respect of some or all of those costs, any such application to be made by solicitors' letter submitted by email to the Clerk to Mr Justice Andrew Baker (no Application Notice or fee required) by 5 pm on Monday 9 November 2020 and to be determined by the judge on paper.

Directions

4. By 5 pm on Monday 16 November 2020, the parties shall agree so far as possible directions for the final trial of this Claim and submit the same by email to the Clerk to Mr Justice Andrew Baker, for approval by the judge (to the extent agreed) or determination by the judge (to the extent in dispute).

5. Liberty to either party to apply, if so advised, for further or varied relief if the Sharjah Court does not grant the Article 8 Application.

6. Liberty to the defendant to apply, if so advised, for a direction for security or other fortification in respect of the claimant's undertaking as to damages set out in the recitals to this Order.