Neutral Citation Number: [2020] EWHC 3343 (Comm)

Case No: CL-2020-000603

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

IN AN ARBITRATION CLAIM
AND IN THE MATTER OF AN ARBITRATION

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

Date: 4 December 2020

Before :

THE HONOURABLE MR JUSTICE BRYAN

- -

Between :

GRACE OCEAN PRIVATE LIMITED

Claimant

-and-

COFCO GLOBAL HARVEST (ZHANGJIAGANG) TRADING CO., LTD.

Defendant

MV "BULK POLAND"

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Neil Henderson (instructed by **Penningtons Manches Cooper LLP**) for the **Claimant**
The Respondent was not represented and did not appear.

Hearing date: 4 December 2020

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APPROVED JUDGMENT

MR JUSTICE BRYAN:

A. Introduction

1. This is the return date in relation to an interim anti-suit injunction granted on 12 October 2020 by Cockerill J (the "ASI Order") , following a hearing on 9 October held ex parte but after informal notice had been given to the Defendant, on the application of Grace Ocean Private Limited ("Owners"), whereby the Defendant COFCO Global Harvest (the "Defendant") was restrained from pursuing the claim for damage to a cargo of Brazilian soyabeans proceedings commenced by it before the Qingdao Maritime Court on 6 August 2020 ("the Chinese Proceedings") on the basis that the same was in breach of London arbitration agreements contained in the contracts of carriage, the cargo had been carried on board Owners' vessel, the BULK POLAND ("the Vessel"). Those Chinese Proceedings had been commenced in breach of London arbitration agreements.

2. According to the evidence of Mr Sachs in his third statement, which I accept, the ASI Order was served on the Defendant by email the same day, and on the Defendant's Chinese lawyers on 13 October. There has been no response from the Defendant, and it has not acknowledged service (which should have been done by 9 November). The Defendant was notified of this return date hearing on 26 October 2020 and again on 23 November and has been provided with a copy of the hearing bundle (on 2 December), as well as a copy of the Owners' Skeleton Argument, bundle of authorities and details of the hearing time and how to attend the hearing.

3. The Defendant did not attend the hearing, and I was satisfied that it was aware of the hearing, had been given proper notice of the hearing, and chose not to attend. In such circumstances I allowed the return date hearing to proceed in the absence of the Defendant.

B. Background to the application and the underlying dispute

4. The dispute arises out of the carriage of some 69,699.714 mt of 2019 crop Brazilian soybeans in bulk ("the Cargo") on board the Vessel from the port of Barcarena, Brazil, to the People's Republic of China. The contracts of carriage were contained in or

evidenced by four bills of lading dated 1 July 2019 ("the Bills of Lading"/the Bills). There were four shippers of the Cargo., and the Bills of Lading were consigned "TO ORDER". The Defendant's name and address were stated in the "Notify address" section of each Bill. The original Bills of Lading were presented at Longkou by the Defendant, which took delivery of the Cargo.

5. The Claimants, a company incorporated in Singapore, are the owners of the Vessel and the contractual carrier of the Cargo. The Defendant is the receiver of the Cargo and is a company incorporated in the People's Republic of China. The Cargo was insured by China Pacific Insurance Co., Ltd ("CPIC").

6. The reverse of each of the Bills of Lading set out the Conditions of Carriage. Clause 1 of the Conditions of Carriage states that:

"(1) All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated."

7. The front page of each of the Bills of Lading referred to a charter party dated 17 May 2019 as follows:

"Freight payable as per charter party dated 17 May 2019."

8. The Vessel was subject to three charterparties.

(i) The Claimant, by way of a time charter dated 7 November 2011, chartered the Vessel to DryLog Bulk Carriers Ltd (the "Head Time Charter").

(ii) (DryLog Bulk Carriers Ltd as disponent owners sub-chartered the Vessel to Star Logistics LLC ("Star") by way of a sub-time charter (the "Time Charter").

(iii) By a fixture recap dated 17 May 2019 incorporating an amended CONVOY Charterparty (Adapted 2004) with rider clauses, Star sub-chartered the Vessel to Gavilon Grain LLC ("the Voyage Charter")

9. I am satisfied, based on the express wording in Clause 1 of the Conditions of Carriage of the Bills of Lading, that the reference is to the Voyage Charter.

10. Clause 14 of the amended CONVOY Charterparty (Adapted 2004) incorporated in the Voyage Charter provides:

> *"**Bill of Lading***
>
> ***14**. It is also mutually agreed that this contract shall be completed and superseded by the signing of Bills of Lading. Any Bill of Lading issued under this Charter Party are [sic] considered to incorporate all terms/conditions including arbitration to this Charter Party."*

11. Clause 56 of the amended CONVOY Charterparty (Adapted 2004) further provides:

> *"**Arbitration:***
>
> ***56**. [New York provisions deleted]*
>
> ***Arbitration London – English Law to apply***
>
> **…**
>
> *Any dispute arising hereunder shall be governed by English law.*
>
> *…*
>
> *Any claim must be made in writing and Claimants' arbitrator appointed or proposed within twelve months of final discharge and where this provision is not complied with, the claim shall be deemed to be waived and absolutely barred."*

12. On established principles I am satisfied that, as a matter of English law, the effect of the first line of the terms and conditions of the Bills of Lading is to incorporate the terms of the Voyage Charterparty, including the choice of

English law and London arbitration, into the contracts of carriage contained in or evidenced by the Bills of Lading.

13. The result of the contractual terms agreed between the parties to the contracts of carriage as contained in or evidenced by the Bills of Lading is that any substantive claim by cargo interests under the Bills of Lading is subject to English law and must be brought by way of London arbitration only.

14. The Vessel arrived at Longkou anchorage on 14 August 2019 and tendered Notice of Readiness on the same day. The Vessel berthed on 18 August 2019 and commenced discharge of the Cargo.

15. A "Notice of Claim" dated 19 August 2019 was then served by the Defendant asserting that they were the final holders of the bills of lading and alleging heat damage to the Cargo during the carriage onboard the Vessel, indicating a claim and threatening the arrest of the Vessel.

16. The Defendant demanded security for their claim in the amount of US$4.5 million. In order to prevent arrest of the Vessel, Wang Jing, on behalf of Owners, negotiated security provided by Gard, the Claimant's protection and indemnity insurers, as counter-securer to China Reinsurance (Group) Corporation. The latter then issued a Letter of Undertaking ("LOU") directly to the Defendant. This approach was taken because Chinese parties and Chinese courts do not generally accept security directly from international P&I clubs.

17. The LOU was in Chinese, and in the English free translation, provided amongst other matters, as follows:-

"we, China Reinsurance (Group) Corporation…hereby undertake to pay to you on demand such sum or sums, as may either be agreed in writing between the parties, or as may be adjudged by an effective judgment or mediation award of the competent Court or awarded by a final award or a mediation award by the competent Tribunal…"

18. The Vessel completed discharge of the Cargo on 24 August 2019 and sailed from Longkou on the same day.

19. On 6 August 2020 the Defendant filed a Statement of Claim against Owners before the Qingdao Maritime Court seeking compensation for alleged damage to the Cargo during the carriage from Brazil to the People's Republic of China. The sum claimed by the Defendant is RMB12,098,315.70 plus interest, which sum amounts to circa US$1,790,660 (the "Chinese Proceedings").

20. On 19 August 2020, the claim documents together with the Court's writ of summons were served on Wang Jing, who are based in Qingdao. The writ of summons set a first hearing date for the case of 22 October 2020 from which it was clear that the Defendant was intent on prosecuting a claim in the People's Republic of China in breach of the agreement to submit disputes to London arbitration.

21. The Owners issued a challenge to the jurisdiction of the Qingdao Maritime Court. This was rejected on 24 September 2020. The Owners appealed that decision to the Shandong Higher People's Court on 20 October, and is awaiting its decision.

22. On 8 September Owners English solicitors wrote to the Defendant informing it that the Chinese Proceedings were in breach of the London arbitration agreements, requiring it to confirm that it would withdraw the Chinese Proceedings by 15 September and warning it that failure to do so would mean it would face an application to the English court for an anti-suit injunction.

23. The Defendant did not respond to that letter, or any of the subsequent correspondence relating to the present claim and application before the English court.

24. Owners therefore issued the arbitration claim form on 16 September and sought the interim antisuit injunction, as it had threatened to do. As already noted the ASI Order was made on 12 October, following the hearing on 9 October.

25. On 12 October the ASI Order was served on the Defendant by email in accordance with para.5 of the ASI Order. The following day the Defendant's Chinese solicitor instructed in the Chinese Proceedings was served by email, also in accordance with para.5 of the ASI Order. The covering letter of Penningtons drew attention to the penal notice and consequences of not complying with the ASI Order. In a subsequent letter of 13 October, Penningtons enquired whether the Defendant intended to proceed with London arbitration in circumstances in which the Owners had undertaken to this Court that they would not take a point in relation to the apparent 12 month time bar so long as the Chinese Proceedings were withdrawn and London arbitration commenced within 60 days of the ASI Order.

26. The Defendant did not respond to any of the correspondence. On 14 October the Owners' Chinese solicitors, Wang Jing, spoke to the Defendant's Chinese solicitors and were informed that they were not authorised to handle these proceedings and that they did not know how the Defendant intended to proceed.

27. The arbitration claim form and supporting documents were then served on the Defendant and its Chinese solicitors by email on 15 October, and on the Defendant in hard copy by courier on 17 October.

28. On 26 October the Defendant was copied into the email correspondence with the Listing Office, by which the return date hearing was fixed. On 23 November Penningtons wrote asking the Defendant to respond to its letter of 13 October and reminding it that the return date had been fixed for 4 December. As already noted, there has been no response from the Defendant.

C. Applicable Legal Principles

29. On an interlocutory application, the applicant must show "*to a high degree of probability that its case is right*". That is because if there is not confidence that such an enforceable promise presently exists the principles of comity and restraint in interfering with foreign proceedings would weigh heavily against the granting of relief: see Raphael, *The Anti-Suit Injunction*, paras.13.51-13.56; and Gee, *Commercial Injunctions*, 6th edn. para.14-027 citing *Midgulf International v Groupe Chimiche Tunisien* [2009] 2 Lloyd's Rep. 411 at [36]-[39].

30. If that hurdle is met, it will ordinarily be for the respondent to prove that there are strong reasons not to grant the injunction: *Ecom Agroindustrial v Mosharaf Composite Textile Mill* [2013] 2 Lloyd's Rep. 196 at [19].

31. On an interim basis, if the force of the arbitration clause is established to the necessary standard, then the Court is simply engaged in determining whether 'strong reasons' exist, and whether the injunction should be granted in the court's discretion on the material before it at the hearing: see *Raphael*, para.13.54.

32. The governing law of the Bills will be determined in accordance with the provisions of the Rome I Regulation (Regulation (EC) No 593/2008). That provides in arts. 3(1), 3(5), and 10 that:

> "3(1) A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or part only of the contract.
>
> …
>
> 3(5) The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 10, 11 and 13.
>
> …
>
> 10(1) The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.
>
> 10(2) Nevertheless, a party, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1."

33. It follows that the question of whether the Bills incorporate an express choice of English law is governed by English law by art.10(1), unless art.10(2) applies.

34. Applying English law, if the governing law clause of a charterparty is incorporated into a bill of lading, this will amount to an express choice of applicable law for the purposes of art.3(1): see *The Channel Ranger* [2014] 1 Lloyd's Rep. 337, at [30]-[37].

35. If the express choice of English law in the Voyage Charter is incorporated into the Bills, then the question whether the arbitration clause in the Voyage Charter is incorporated into the Bills is governed by English law by virtue of the putative proper law rule of the common law: see *Seniority Shipping Corporation SA v City Seed Crushing Industries Ltd.* [2019] EWHC 3541 (Comm) per Andrew Baker J at [12].

36. As already noted, the reverse of the Bills contain the following wording:

> "(1) All terms and conditions liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated."

37. The face of the Bills reference a charterparty dated 17 May 2019, which is the Voyage Charter and which includes as already noted an English law and London arbitration clause providing for "Arbitration London – English Law to apply" and "Any dispute arising hereunder shall be governed by English law".

38. It is well established that the express incorporation by the words in the clause on the face of the Bills is effective to incorporate the terms of the Voyage Charter, including the choice of London arbitration, into the contracts of carriage contained in or evidenced by the Bills: see *The Delos* [2001] 1 Lloyd's Rep. 703 at [12] page 705; and Aikens on *Bills of Lading*, paras.7.85-7.109.

39. I am also satisfied that such analysis is not affected by art.10(2), which does not apply as it is reasonable and in accordance with the ordinary expectations of international trade to judge the effectiveness of the incorporation into a bill of lading of the choice of governing law specified by the charterparty by reference to the law specified in the charterparty: see *Seniority Shipping Corporation*, supra, at [12]-[18].

40. The result of the contractual terms agreed between the parties is that any substantive claim by cargo interests under the Bills is subject to English law and must be brought by way of London arbitration only. As already noted, the Defendant is a party to the contracts of carriage as the receiver and lawful holder of the bills: the original Bills endorsed in blank by the respective shippers were

presented by the Defendant at the discharge port, and the Bills are relied upon by the Defendant for its claim in the Chinese Proceedings.

41. It is against that backdrop that Owners seek the continuation of the interim anti-suit order restraining the Defendant from pursuing the Chinese Proceedings in the terms of the draft Order that accompanies the return date application, such Order being sought under section 37(1) of the Senior Courts Act 1981 which provides the only available basis for ordering an anti-suit injunction in the circumstances of a London arbitration clause: see *AES Ust-Kamenogorsk Hydropower Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSCC* [2013] 1 WLR 1889.

42. Where a contract contains an English law and arbitration clause, the Court will ordinarily exercise its jurisdiction to restrain a party prosecuting foreign proceedings in breach of the arbitration agreement unless there are good or strong reasons to the contrary. However, the grant of such an order remains discretionary and may be lost in the event that the application is not made promptly or before the foreign proceedings are too far advanced: see *The Angelic Grace* [1995] 1 Lloyd's Rep. 87, at page 96.

43. A voluntary submission to the jurisdiction of the foreign court may amount to a strong reason why a contractual injunction should not be granted: see Raphael, *The Anti-Suit Injunction*, paras.8.22-8.23; and *Pan Ocean Co. Ltd. v China-Base Group Co., Ltd. and another* [2019] EWHC 982 (Comm) at [39]-[54] ("*Pan Ocean*"). The question of whether a litigant has submitted to the jurisdiction of a foreign court is a matter of English law: see *Pan Ocean* at [39].

44. When considering whether there has been a voluntary submission to the jurisdiction of the foreign court as a matter of English law, the provisions of the Civil Jurisdiction and Judgments Act 1982 ("the CJJA 1982") are relevant: see *Seniority Shipping Corporation* at [37]. An appearance for the purposes of challenging the jurisdiction of the foreign court will not be a voluntary submission.

45. The English Courts have taken the approach that comity is not a material factor and the English Court will readily grant the injunction unless there are strong reasons not to do so. This is justified on the basis of the overarching nature of the parties'

freedom of contract which is seen as a system-transcendent value, see: *The Yusuf Cepnioglu* [2016] 1 Lloyd's Rep 641 (CA) at [34]-[37]; and *The Anti-Suit Injunction*, paras. 8.31-8.44. On established principles, this is not a case where there should be any concern about the conflict of conflicts and the orthodox approach of Longmore LJ in *The Yusuf Cepnioglu* and stated by the Supreme Court in *Enka Insaat ve Sanayi AS v OOO Insurance Chubb* [2020] 1 WLR 4117 at para.[184], is to be taken.

D. Application of the Principles to the Facts

46. As identified above, I am satisfied that the Bills incorporated English law and London arbitration agreements. The Defendant is bound by those agreements to arbitrate any claim arising out of the carriage of the Cargo as the lawful holder of the Bills and receiver of the Cargo. In such circumstances I am satisfied that there has been a clear breach of the arbitration agreements, and the present situation is one where damages are not an adequate remedy for the Owners.

47. Nor are there any good or strong reasons why the orders sought should not be granted. The LOU given to release the Vessel responds to London arbitration and the Defendant will not lose its security if it withdraws the Chinese Proceedings. Equally whilst it appears that any cargo claim is time barred (on the basis that discharge completed on 24 August 2019 and so the Defendant's claim became time-barred on or about 25 August 2020), at the previous hearing, Owners gave an undertaking to the Court that it would not rely upon the timebar if the Defendant withdrew the Chinese Proceedings and commenced London arbitration within 60 days of the date of the ASI Order. That 60-day period will expire on 11 December. The Defendant has not complied with the ASI Order, nor commenced London arbitration. Nevertheless it is proposed that the Order now sought should again contain a similar undertaking, but not extend the date for compliance beyond 11 December i.e. that provided the Chinese Proceedings are promptly withdrawn and a London arbitration commenced, the Defendant's claim will be able to proceed without the Owners being able to assert that it is time barred.

48. I am also satisfied that the Chinese Proceedings are not too far advanced. As already noted, the claim was served on Owners' Chinese solicitors on 19 August. Owners challenged the jurisdiction of the Qingdao Maritime Court at the first opportunity. That challenge was rejected on 24 September. The Owners appealed that decision on 20 October to the Shandong Higher People's Court and the decision of that court is awaited.

49. On the basis of the Chinese law evidence before me (from Owners' Chinese lawyer Wang Jing) I am satisfied that there has been no submission to the jurisdiction of the Qingdao Maritime Court as a matter of Chinese law, nor has there been a voluntary submission as a matter of English law. The Owners' appearance before the Qingdao Maritime Court to challenge jurisdiction was not a voluntary submission see section 33(1)(a) of the CJJA 1982. I also note that the Statement of Appeal to the Shandong Higher People's Court includes an express reservation as to jurisdiction.

50. Equally I am satisfied that there has been no delay on the part of Owners in bringing the application - the claim in the Chinese Proceedings was served on Owners' Chinese solicitors on 19 August 2020 and the arbitration claim was issued on 16 September 2020.

51. I am satisfied that in the circumstances of the present case that there are no good or strong reasons why the order sought should not be granted and that it is appropriate to exercise my discretion in favour of the continuance of the anti-suit injunction, which I so order. I will now finalise the terms of the Order with Owners' counsel. The order should continue to contain the customary cross-undertaking in damages and be fortified with a Club LOU from Gard P&I (Bermuda) Ltd. in the sum of £50,000.