Neutral Citation Number: [2022] EWHC 892 (Comm)

Case No: CL-2022-000174

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/04/2022

Before :

MR JUSTICE FOXTON

- -

Between :

AQUAVITA INTERNATIONAL SA **Claimant**

- and -

INDAGRO SA **Defendant**

- -
- -

Thomas Steward (instructed by **MFB Solicitors**) for the **Claimant**
Yash Kulkarni QC (instructed by **Watson Farley & Williams**) for the **Defendant**

Hearing date: 11 April 2022
Draft to parties: parties: 11 April 2022

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE FOXTON

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII and The National Archives. The date and time for hand-down is deemed to be Tuesday 12 April 2022 at 11:30am.

Mr Justice Foxton :

1. This is the return date of an anti-suit injunction granted by Mr Justice Fraser on 4 April 2022 restraining the Respondent ("Indagro") from commencing and pursuing court proceedings in Brazil.

2. The Applicant – who I shall refer to as the Owner - also sought an order for mandatory injunctive relief requiring Indagro to provide bail or other security pursuant to certain Letters of Indemnity which it has provided to the Owner in relation the delivery of cargo without production of bills of lading. However, Mr Steward accepted that such an application was premature in circumstances in which no threat of arrest or quantified claim for security had yet been formulated.

The background

3. The Owner's vessel AQUAVITA ETERNITY was chartered by Indagro under the terms of a charterparty dated 25 November 2021 ("the Charterparty") to carry a cargo of 61,500/63,500 mt of ammonium sulphate from Qinhuangdao, China to "1 safe berth / safe anchorage Paranagua plus 1 safe berth / safe anchorage Sao Francisco Do Sul". There appears to have been a later agreement to add a third discharge port.

4. Of the cargo loaded, some 42,750mt was shipped under Bills of Lading Nos 1B, 2B and 3B, issued to Yantai Jiahe Agriculture Means of Production Co ("Yantai") as shipper, who was itself the seller of the 42,750mt to Indagro as buyer. I will refer to the 42,750mt of cargo as "the Cargo" and Bills of Lading Nos 1 B, 2B and 3B as "the Bills of Lading".

5. In late January 2022, the Owner received notice from Yantai claiming that Indagro had not made the payment due under the sale contract, with the result that the Bills of Lading had not been released to Indagro. Yantai instructed the Owner not to discharge the Cargo except against presentation of the original Bills of Lading.

6. The first 12,400 mt of the Cargo sold to Indagro formed part of 17,400 mt to be discharged at Sao Francisco do Sul. On 28 March 2022, Indagro obtained an order from the 2nd Civil Court of the City of Sao Francisco do Sul requiring the Owner to discharge 17,400 mt of cargo or face a daily fine of about $100,000 as well as possible criminal sanctions ("the 2nd Civil Court Order").

7. Clause 33 of the Charterparty provides for the application of English law and that:

> "any and all disputes of whatsoever nature arising out of or relating to this Charter, or to the making, performance or termination hereof, or to any Bill of Lading issued hereunder, shall be referred to the arbitration of three persons in London".

8. The Owner contended that the application by Indagro to the 2nd Civil Court constituted a breach of the arbitration agreement and applied without effective notice to Mr Justice Fraser for an anti-suit injunction requiring Indagro to withdraw the proceedings before the 2nd Civil Court, set aside the 2nd Civil Court Order and to refrain from commencing any further proceedings to similar effect in relation to the remainder of the Cargo.

9. Mr Justice Fraser refused to make any order in respect of the existing Sao Francisco proceedings because, on the evidence before him, discharge of the 17,400 mt of cargo (including 12,400 mt of the Cargo) which was the subject of the 2nd Civil Court Order was almost complete. However, he was persuaded to grant an anti-suit injunction in relation to the balance of the Cargo, which was due to be discharged at Rio Grande.

10. There is no dispute between the parties as to the principles to be applied in determining whether to grant an anti-suit injunction. In brief terms:

    i) The Court has power to grant such an injunction to restrain proceedings brought in breach of an arbitration agreement under s.37 of the Senior Courts Act 1981, even if no arbitral proceedings are on foot or in prospect: Ust-Kamenogorsk Hydropower Plant JSC v AES Hydropower Plant LLP [2013] UKSC 35, [25].

    ii) The applicant must show a "high probability of success" that the pursuit of the foreign proceedings involves a breach of the arbitration agreement (The Angelic Grace [1995] 1 Lloyd's Rep 87 and Dell Emerging Markets (EMEA) Ltd v IB Maroc.com SA [2017] EWHC 2397).

    iii) If the applicant makes out such a case, it is for the respondent to show a "strong reason" why relief should not be granted (The Epsilon Rosa [2003] 2 Lloyd's Rep 50, 518).

    iv) Finally, it must be just and convenient for an anti-suit injunction to be granted.

11. In this case the principal issue between the parties is that at ii): has the Owner established a "high probability of success" that further proceedings in Brazil for the purpose of ordering the Owner to discharge the balance of the Cargo would constitute a breach of clause 33? Indagro says that the Owner has not, because the proceedings before the 2nd Civil Court, and any similar proceedings in relation to the balance of the Cargo, are interim in nature and for that reason do not involve a breach of the arbitration agreement. The same argument is raised at the "strong reason" stage.

12. Before considering this issue further, it is necessary to consider the nature and effect of the proceedings before the 2nd Civil Court.

The proceedings before the 2nd Civil Court

13. Indagro sought a "preliminary injunction" requiring the Owner to discharge the 17,400 mt because its refusal to do so was "illegal" and in breach of provisions of the Brazilian Civil and Commercial Code.

14. The order was made by the 2nd Civil Court by way of urgent relief under Article 300 of the Civil Procedure Code. Applications under Article 300 involve a two-stage test:

    i) the court being satisfied that the claim brought is plausible or arguable; and, if so

    ii) an assessment of the likely harm the applicant will suffer if no order is made.

Article 300(3) provides that emergency relief will not be granted in the event that there is a danger of "irreversibility of the decision". While this last provision is mentioned in the 2nd Civil Court judgment, it is not directly addressed.

15. On the first issue, the 2nd Civil Court held that the retention of cargo was justified under the terms of Article 7 of (Brazilian) Decree Law No 116/67 and Article 40 of the REB Normative Instruction No 800/27 only in the event of non-payment of freight or when there had been a declaration of general average. The 2nd Civil Court also construed clause 31 of the Charterparty, which provided for discharge against letters of indemnity where the original bills of lading had not arrived at the port of discharge in time, as supporting the view that there was no right to withhold discharge on the facts of the case. On the second issue, the 2nd Civil Court referred to the demurrage which Indagro would be required to pay while the vessel awaited discharge, and the fact that letters of indemnity would be provided in respect of discharge. The 2nd Civil Court Order required delivery to the alleged receivers, rather than discharge into a warehouse ashore under the Owner's control.

16. I was referred by Mr Kulkarni QC to the following passage from the judgment:

> "In accordance with art. 300 of the Civil Procedure code, urgent relief, with regard to the anticipation of the final provision, depends on: a) the probability of confirmation of the right and; b) from the danger of harm. The first requirement consists of the plausibility of the party's allegations, examined in accordance with the legal system and the prevailing jurisprudential understanding, while the second requires an analysis of the degree of possible damage, whether difficult or uncertain to repair, and its imminence. …"

17. On the evidence before the court, from Ms Heloisa Slav of Slav Advogados (Indagro's Brazilian lawyers), the 2nd Civil Court made an interim rather than final determination, pending a future and autonomous claim which could be brought in whatever forum the parties had agreed to be competent. Under paragraph 20 of Brazilian Law No 9.307/1996, where there is a binding arbitration agreement, the substantive claim must be brought in arbitration within 30 days of the precautionary measure being granted, failing which the precautionary measure ceases to have effect.

The legal principles

18. It has long been established that proceedings which are brought elsewhere than the agreed forum (a "non-contractual forum") for the purposes of security for a claim to be advanced in the agreed forum will not generally be made the subject of anti-suit injunctive relief by the English Court: Thomas Raphael QC *The Anti-Suit Injunction* (2008), [7.43].

19. Many of the authorities establishing this principle involved proceedings commenced in a non-contractual forum to obtain security by arresting a ship. In Kallang Shipping SA Panama v AXA Assurances Senegal (The Kallang) No 2) [2009] 1 Lloyd's Rep 124, [78] Jonathan Hirst QC observed that the court:

> "will not restrain a party to an English arbitration clause from arresting a vessel in another jurisdiction where the sole purpose of the arrest is to obtain reasonable security for the claim to be arbitrated or litigated 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' actions go beyond simply seeking reasonable security for the arbitration proceedings, there is a breach of the arbitration clause which the English court will restrain".

20. The principle has been applied to proceedings commenced in a non-contractual forum to obtain security for a claim in some other form, including freezing order or similar relief: In re Q's Estate [1999] 1 Lloyd's Rep 931, 938. The court's approach might be said to reflect the reality that the courts of a country where assets are located are generally better placed to make effective orders preserving those assets and/or preventing their dissipation (Credit Suisse Trust v Cuoghi [1998] QB 818, 827).

21. There are three features of proceedings brought in a non-contractual forum to obtain security which merit mention:

    i) The non-contractual court is not generally concerned with reaching a final decision on the merits of the claim, merely an interim decision that the merits are sufficiently arguable. If the security obtained can only be maintained if the proceedings are prosecuted to a judgment on the merits, it is clear that the proceedings will involve a breach of the arbitration or jurisdiction clause: SRS Middle East FZE v Chemie Tech DMCC [2020] EWHC 2904 (Comm) and The Sam Purpose [2017] EWHC 719 (Comm).

    ii) The relief sought does not involve (even on an interim basis) the granting of the relief which would follow from the final enforcement of the parties' substantive rights and obligations: for example the payment of a debt to the putative creditor or the provision of disputed contractual performance.

    iii) The relief can be said to be in aid of the substantive proceedings in the agreed forum, with limited value if no such proceedings are prosecuted to settlement, judgment or award. Security for a claim or the freezing of assets is dependent, in the final analysis, on there being a successful prosecution of the claim and a judgment or award which needs to be enforced.

22. On the evidence before me, the application before 2nd Civil Court, and any similar applications in respect of the balance of the Cargo, have the first of these features, but not the second or third. Mr Kulkarni QC for Indagro argues that the presence of the first feature is sufficient of itself to prevent the proceedings from constituting a breach of the arbitration agreement. Mr Steward for the Owner argues as his primary ground that proceedings in a non-contractual forum which do not share the first and second features will constitute a breach of the forum selection agreement. In the alternative, he submits that proceedings which lack both the second and third features will do so, even where the first is present.

23. The parties were not able to refer me to a case which had considered whether an application for interim relief in a non-contractual forum had breached a forum selection agreement other than cases concerned with obtaining security. However, it is possible to find statements in the authorities which lay particular emphasis on the interim nature

of applications for security in foreign proceedings when explaining why they are not appropriate subjects for anti-suit relief (for example, SRS Middle East FZE v Chemie Tech DMCC, [23], which also emphasises the third feature, and U and M Mining Zambia Ltd v Konkola Copper Mines plc [2013] EWHC 260, [63]).

24. It is also possible to find statements in the authorities emphasising that the court will consider the substantive effect, rather than simply the form, of the proceedings in the non-contractual forum, and that such proceedings will constitute a breach of the choice-of-forum provision if they amount to an attempt to "outflank the arbitration agreement" (Orient Express Lines (Singapore) v Peninsular Shipping Services [2013] EWHC 3855, [26]) or are "directly or indirectly directed to rendering the … arbitration clause ineffective" (Kallang Shipping v Axa [2007] 1 Lloyd's Rep 160, [39]).

Analysis and conclusion

25. I am going to assume in Mr Kulkarni QC's favour that the mere fact that relief is sought in the form of interim performance of a substantive obligation is not itself sufficient to render proceedings in a non-contractual forum a breach of the forum selection clause. While proceedings of that kind necessarily trespass rather more closely on the domain of the parties' chosen tribunal, it is arguable that applications which, in such a context, seek to "hold the ring" pending a determination by the agreed tribunal, and which are brought before a court better able to grant effective holding relief, do not breach the forum selection agreement, or at least engage the generally strong presumption that parties should be held to their agreed forum, including by anti-suit injunction if necessary. Drawing the line at that point might also require a differential treatment of pure freezing injunctions, and proprietary injunctions seeking to preserve assets which are subject to proprietary claims in the chosen forum.

26. In this case, however, both the second and third features are missing, and the absence of the latter is particularly noticeable. The 2nd Civil Court Order involved, in practical terms, the final determination of Indagro's contention that the Owner was obliged to discharge the relevant portion of the Cargo, and the same would be true of any similar orders made hereafter. When I asked Mr Kulkarni QC what issue remained to be determined in the arbitration, his response was that *the Owner* might want to "fashion some sort of breach" claim, alleging that Indagro had breached an implied term of the Charterparty by requiring discharge. He did not suggest that Indagro itself had any relief to seek in the arbitration ("in support of which" it might be said that the 2nd Civil Court Order had been made). In circumstances in which the only relief which might be sought in the arbitration is a complaint by the respondent to the 2nd Civil Court Order that the order should not have been made, I do not believe that the order can be said to have been made in support of the arbitration. Instead, I am satisfied both that it was an attempt to outflank the arbitration agreement, and, as a matter of substance, to obtain relief which would be final in effect from the 2nd Civil Court rather than the arbitration tribunal.

27. In these circumstances I am satisfied that the Owner has shown a high probability of success on its claim that the proceedings before the 2nd Civil Court and any similar proceedings commenced in Brazil involve a breach of the arbitration agreement.

28. I am not persuaded that there is any "strong reason" not to grant such relief. In particular, I see no reason why Indagro could not seek relief from the arbitral tribunal

or the English (supervisory) court under s.44 of the Arbitration Act 1996, applying the parties' chosen law of English law. This is the natural forum in which to seek such relief (Econet Wireless Ltd v Vee Networks Ltd [2006] EWHC 1568 (Comm), [19]). An interim injunction could have been sought under s.44(2)(e) with the consent of the tribunal which has now been appointed. If such an order could not have been obtained from the court under s.44(3) (about which I make no findings) this would be because it would involve the English court usurping the jurisdiction of the arbitrators (Cetelem SA v Roust Holdings Ltd [2005] 2 Lloyd's Rep 494; EurOil Ltd v Cameroon Offshore Petroleum SARL [2014] EWHC 52 (Comm)), which can scarcely be a good reason for allowing proceedings in breach of the arbitration agreement to continue elsewhere. If the public policy of minimal curial intervention reflected in s.1(c) of the 1996 Act has the effect that the English supervisory court will not or cannot act in matters which trespass too closely onto the arbitral tribunal's jurisdiction, that same public policy strongly supports holding the parties to the arbitration agreement, and restraining proceedings before a foreign court which would not be similarly inhibited.

29. For these reasons I am also persuaded that it would be just and convenient to grant the anti-suit injunction sought, and to continue the order made by Mr Justice Fraser.