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ENGLISH COURT SUPPORT FOR ARBITRATION – DEVELOPMENTS

Commercial Court upholds supremacy of arbitration and overturns section 44(3) of the Arbitration Act 1996 injunction – not deemed "necessary" and "appropriate"

Daelim Corp v Bonita Company Ltd & Ors [2020] EWHC 697 (Comm)

HFW acted for the 2nd and 3rd Defendants

“Daelim was concerned that if EMIC paid Bonita, the funds would disappear before final determination of which party owed the Disputed Sum.”

The Commercial Court was asked to grant an *ex parte* (without notice) injunction to preserve assets in support of arbitration proceedings under s. 44(3) of the Arbitration Act 1996 (the 1996 Act), in circumstances where the Claimant, Daelim Corporation (Daelim), and the Defendant, Bonita Company Limited (Bonita) each asserted the right to be paid a debt as against a third party debtor/the 2nd and 3rd Defendants, Eastern Media International Corporation and Far Eastern Silo & Shipping (Panama) S.A. (together known as EMIC). The third party debtor was willing to pay to whomever it was obliged to pay. Bonita refused to agree to the debt being paid into a joint account on appropriate terms. Daelim obtained an *ex parte* injunction from the Court restraining Bonita from taking steps to recover the debt from the third party. In deciding that the injunction should be discharged, the Court showed its reluctance to interfere in the arbitral process.

What was the background?

Daelim bareboat chartered to Bonita the Panamax bulker “DL CARNATION” (the Vessel), which was in turn sub chartered by Bonita to EMIC. The bareboat charters contained provisions for the resolution of disputes by London arbitration under LMAA Terms.

In June 2019, the parties subsequently entered into a Termination and Settlement Agreement (the TSA) by which they agreed terms for the early termination of the bareboat charters. Daelim was owed c.US$1m by Bonita in bareboat charter hire for April and May 2019 at the time. The TSA provided for payments to be made by EMIC of c.US$6m directly to Daelim and c.US$500,000 to Bonita. Under the TSA, disputes and claims were to be resolved by arbitration in Hong Kong under the HKIAC rules and governed by English law.

Disputes subsequently arose in relation to the payment to be made by EMIC to Bonita under the TSA (known as the Disputed Sum), which EMIC was ready, willing, and able to pay to whomever it was obliged to pay. Daelim and Bonita each asserted an entitlement to be paid the Disputed Sum, with Daelim arguing that the right arose from an assignment to it, under or pursuant to the terms of the head charter, of Bonita’s rights, of which EMIC had notice. Daelim pursued the right as assignee as Bonita had not paid the May and June 2019 hire originally due under the head charter.

The Court considered that:

1. a claim by Daelim against Bonita for the unpaid April and May hire was a claim to be brought in London arbitration under the head charter; and
2. a claim by either Daelim or Bonita against EMIC for the Disputed Sum was a claim to be brought in Hong Kong arbitration under the TSA, Daelim being bound as assignee (as it asserted) to pursue EMIC, if at all, only in accordance with the arbitration clause that bound Bonita and also being bound by that arbitration clause directly as a party to the TSA.

Daelim was concerned that if EMIC paid Bonita, the funds would disappear before final determination of which party owed the Disputed Sum. EMIC was willing to pay to a joint account if appropriate terms could be agreed, leaving Daelim and Bonita to argue who had the right to be paid; whilst Daelim supported the idea, Bonita did not.

In June 2019 Daelim therefore sought and obtained from the Court an *ex parte* injunction (the June Order) in respect of the Disputed Sum, which:

1. restrained EMIC from paying the Disputed Sum to Bonita, pending further order of the Court (paragraph 5.1 of the June Order);
2. required EMIC to pay the Disputed Sum into an agreed account, failing which into court (paragraph 5.2 of the June Order); and
3. restrained Bonita from pursuing EMIC under the TSA: “[*Bonita*] *shall not, until further Order*

of the Court, demand and/or take any steps to demand or to recover the Disputed Sum from [EMIC]" (paragraph 5.3 of the June Order).

A return date hearing was held in late June 2019, by which point EMIC had complied with the first two requirements, and by an order dated 17 July 2019 (the July Order), the Court discharged the relief granted under those points. The relief under point 3 remained, and Bonita was required to issue an application if it wished to challenge it.

Bonita applied to discharge paragraph 5.3 of the June Order on the basis that it was: (1) not necessary; (2) not appropriate; and (3) obtained upon a presentation of the case to the Court *ex parte* so as to be misleading and unfair.

In response, Daelim argued that the relief granted by paragraph 5.3 was: (1) a necessary and appropriate *quid pro quo* for requiring EMIC to pay into court, absent an agreed joint account arrangement; and (2) necessary and appropriate. On point (3), Daelim asserted that there was no unfairness of the *ex parte* presentation of the case.

What are the Court's powers?

It is well established that parties may in limited circumstances apply to the Court for orders in support of arbitration proceedings under s. 44 of the 1996 Act.

Whilst the Court is guided by the principle of non-intervention under s. 1(c) of the 1996 Act, there are limited circumstances in which the Court will exercise supportive powers under s. 44.

In the present case, the Claimant applied under s. 44(3) of the 1996 Act, which provides:

> "*If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.*"

For more information on the Court›s powers, see the briefing at: https://www.hfw.com/English-Court-Support-for-Arbitration-Recent-Developments-February-2018

What did the Court decide?

The Commercial Court upheld Bonita›s application to discharge the injunctive relief, finding that:

- it was not *"necessary"* to order the preservation of the assets, a test required under s. 44(3) of the 1996 Act; and
- it was not the necessary *quid pro quo* for EMIC paying the *Disputed Sum* into Court.

In doing so, the Court noted that *"no proper asset-preservation analysis"* had been attempted for the purpose of identifying the "asset" to be preserved under s. 44(3) of the 1996 Act.

The Judge considered that the relevant asset could only have been the debt (if it existed) owed by EMIC to Bonita under the TSA as that was "*the only asset the continued existence of which was threatened in any way by EMIC›s intention to pay Bonita*." However, the Judge noted the following oddities in this analysis:

1. if the injunction (under paragraph 5.3) were perceived to be in support of Daelim›s intended London arbitration (under the head charter), it was an injunction granted to preserve an asset by a party wishing to pursue a claim to prove that the asset did not exist (and an injunction sought and granted against a party not privy to the relevant arbitration agreement);
2. if the injunction (under paragraph 5.3) were perceived to be in support of an intended Hong Kong arbitration (under the TSA) concerning the asset, then it in fact prohibited Bonita from bringing exactly that claim (being the claim the injunction was supposed to support).

The Court viewed the prohibition on Bonita by paragraph 5.3 as, in substance, an anti-arbitration provision preventing Bonita from pursuing EMIC under the TSA arbitration agreement, whilst leaving Daelim free to pursue EMIC under the TSA.

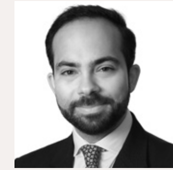
The Court observed "*it was the wrong application by the wrong applicant in the wrong forum, possibly generally, but on any view as regards paragraph 5.3 of the June Order.*" In so saying, the court was referencing the difficulties caused by inconsistent law and jurisdiction clauses in the bareboat charters (providing for London arbitration under LMAA Rules) and the TSA providing for Hong Kong arbitration under the HKIAC Rules.

Having discharged the injunction, the Court did not need to consider Bonita›s submission that there had been unfairness in the *ex parte* presentation of the case to Court, but commented that there had not been a breach of the obligation to give full and frank disclosure, and so if required to determine this issue, would have found that there was no unfairness.

What are the practical implications of this case?

1. The decision is a useful reminder of the Court›s general reluctance to interfere in, but rather to support, the arbitral process, and the limited jurisdiction to grant relief under s. 44 of the 1996 Act for both domestic and foreign seated arbitrations. The scope of s. 44(3) is particularly narrow: as seen here, relief will only be granted where it is *necessary* and *appropriate*.
2. Parties should always consider harmonising arbitration agreements in the relevant contracts to avoid the possibility of parallel proceedings leading to inconsistent outcomes, and ensure, as far as possible, that any subsequent related settlement agreements adopt similar law and jurisdiction clauses.
3. Where there are competing arbitration provisions in the underlying contracts, the parties should consider the most appropriate jurisdiction in which to seek relief, and may need to act to prevent parallel proceedings in the other jurisdiction.
4. When making an *ex parte* application, the parties and their representatives should remember their ongoing duty of full and frank disclosure in relation to the evidence presented to the Court. A breach of this duty is likely to see any relief over-turned, with potentially significant costs consequences, as well as consequences for the preservation of any assets.

For further information, please contact the author of the briefing:



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