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

18 June 2020

THE LONDON STEAM-SHIP OWNERS' MUTUAL INSURANCE ASSOCIATION LTD v THE KINGDOM OF SPAIN, THE M/T "PRESTIGE"

[2020] EWHC 1582 (Comm)

BEFORE: MR JUSTICE HENSHAW

CASE SUMMARY

Background

In 2002, the MT "Prestige" ("**the Vessel**") sank off the coast of Northern Spain causing a large oil spill and significant damage to the coastline of Spain and France. The incident led to the institution of criminal proceedings in Spain and civil claims were subsequently brought within these. The Claimant ("**the Club**") was sued as liability insurer of the owners of the Vessel but did not participate in the proceedings. The Club commenced arbitrations against Spain and France but Spain and France did not participate. The arbitrator issued an award in 2013 which included a number of declarations. These included declarations that Spain and France were bound by an arbitration clause in the insurance contract between the owners of the Vessel and the Club.

The Club sought to enforce those awards as judgments pursuant to s. 66 of the Arbitration Act 1996 ("**AA**"). Spain and France defended that claim and issued their own proceedings under ss. 67 and 72 of the AA for a declaration that the arbitrator had had no jurisdiction to render the awards. These applications were the subject of proceedings before Hamblen J in *The "Prestige" (No. 2)* [2013] EWHC 3188 (Comm). The applications were rejected, the awards were entered as judgments and orders were made in their terms. Hamblen J further held that Spain and France were not entitled to invoke state immunity in respect of the Club's claims. The decision of Hamblen J was upheld on appeal by the Court of Appeal ([2015] EWCA Civ 333).

Proceedings came before the Spanish Supreme Court which held that the Club was directly liable to the Spanish claimants, including Spain and France. Questions of quantum were remitted to a Provincial Court and the Club participated in those proceedings. The Provincial Court rendered a judgment on quantum and issued an execution order. Spain brought proceedings in England to enforce the execution order. The Club served on the States a number of notices of arbitration purporting to commence fresh arbitration proceedings against them, seeking declarations that the States were in breach of their obligations not to pursue the direct civil claims other than by arbitration in London, as well as injunctive relief. The Club also sought equitable compensation for breach of an equitable obligation to arbitrate the claims, contractual damages and an order that Spain withdraw the claims brought in the Spanish proceedings.

Spain brought an application under CPR Part 11 to set aside the order of Robin Knowles J, dated 8 April 2019, granting the Club permission to serve an arbitration claim form out of the jurisdiction. That claim form sought the appointment of an arbitrator pursuant to s. 18 of the AA. Spain brought the application on two grounds: (a) that it was immune from all suits brought by the Club pursuant to s. 1 of the State Immunity Act 1978 ("**SIA**") and alternatively, that (b), the Court had no jurisdiction to hear the claims set out in the arbitration claim form pursuant to s. 18.

ISSUE 1: State Immunity

Spain contended that it was immune from the Club's arbitration claim seeking an appointment of an arbitrator pursuant to s. 1 SIA. The Club submitted that it was not immune by reason of one or more of the exceptions set out in ss. 9, 3(1)(a), 3(1)(b) and 2 SIA. The issue fell to be decided on the balance of probabilities as a preliminary issue (at [30]).

Henshaw J held (at [47]) that the words "*the arbitration*" in the phrase "*proceedings ... which relate to the arbitration*" referred to the particular dispute which the State had agreed in writing to submit and that therefore, for the purposes of s.9 SIA, the Club had to establish that Spain should be treated as having agreed to submit to arbitration the claims which the Club sought to pursue. This required the Court to consider the caselaw on the "conditional benefit" principle (at [49]-[71]). The Court considered, *inter alia*, the judgments in *Schiffahrtsgesellschaft Detlev von Appen GmbH v Voest Alpine Intertrading GmbH (The "Jay Bola*") [1997] Lloyd's Rep 279; *Charterers' Mutual Assurance Association v British and Foreign* [1997] ILPr 838; *Through Transport Assurance Association v New India Assurance (The "Hari Bhum")* [2004] EWCA Civ 1598, [2005] 1 Lloyds Rep 67; *The Wadi Sudr* [2009] 2 CLC 1004; *Through Transport (The "Hari Bhum") (No. 2)* [2005] EWHC 455 (Comm), [2005] 1 CLC 367; *Shipowners' Mutual Protection and Indemnity Association (Luxembourg Containerships Denizcilik Nakliyat ve Ticaret AS (The "Yusuf Cepnioglu")* [2016] EWCA Civ 386; *The "Prestige" (No. 2)* [2013] EWHC 3188 (Comm), [2015] EWCA Civ 333; and *Aspen Underwriting Ltd and Ors v Credit Europe Bank NV* [2020] UKSC 11.

The Court held (at [76]) that once a claimant in proceedings brought in disregard of an arbitration clause has asserted a claim under the contract containing an arbitration clause and a dispute has arisen, then either party can refer that dispute to arbitration. The question for the Court was what is comprised in that dispute. Upon consideration of the arbitration clause, the Court held (at [82]) that the arbitration clause applied to Spain's claim by obliging those bound by it to arbitrate not only the substantive claim itself but also any dispute about a party's compliance with the obligation to arbitrate. It would be "*highly artificial*" to conclude that the clause only applied in respect of the substantive claim and not to disputes arising from failure to observe the clause. The equitable obligation imposed on Spain to recognise the Club's right to arbitration included the total impact of the arbitration clause on Spain's claim. The Court distinguished the Supreme Court's decision in *Aspen Underwriting Ltd*, holding that that decision concerned the nature of the third party action necessary to engage the conditional benefit principle in the first place, rather than its precise scope once engaged. The Court concluded (at [87]) that Spain had agreed in writing to submit the arbitration for the purposes of s. 9 SIA and therefore had no immunity in relation to the claims now brought by the Club. The only exception was that Henshaw J held (at [92]) that Spain did not lack immunity under s.9 SIA as regards the Club's claim for breach of contract based on Spain's participation in the s. 66 AA proceedings for enforcement of the 2013 arbitration award. There was no reason to infer that by taking steps in those proceedings Spain was making a

contractual offer to abide by the result.

The Court also considered (at [93]-[119]) the application of s. 3(1)(a) of the SIA. It held (at [97]) that the words "*(whether of a commercial, industrial, financial, professional or other similar character)"* in s. 3 (3) (c) should not be regarded as exhaustive. This view accorded with the restrictive version of state immunity (viz. immunity only for sovereign acts) and the need for the SIA to be read consistently with Article 6 of the ECHR (as held in *Benkharbouche* [2014] 1 CMLR 40). Henshaw J held (at [99]) that Spain's pursuit of a claim was an activity of a commercial, financial or other similar nature since it was an invocation and attempted enforcement of a contract of insurance relating to the liabilities of a business. The Court distinguished the decisions in *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2)* [2005] EWHC 2437 (Comm) and NML v Republic of Argentina [2011] UKSC 31, holding that the Club's proposed arbitration reference, in support of which it sought the Court's assistance, related directly to the relevant activity (Spain's pursuit of its claims abroad). The s. 18 AA application itself also related to that activity in the same way as the proposed arbitration did (at [106]). The narrow construction of s.3(1)(a) was held (at [108]) to run counter to the restrictive theory of sovereign immunity favoured in *Benkharbouche*. Accordingly, Spain was held (at [115]) to lack immunity by reason of s. 3(1) (a) of the SIA.

The Court considered (at [120]-[134]) the application of s. 3(1)(b) of the SIA. The Club contended that the relevant contractual obligation was Spain's obligation to arbitrate in London and that this "*fell to be performed wholly or partly in the United Kingdom*". Henshaw J considered (at [128]-[129]) that the arbitration agreement contained both negative and positive aspects; each one being the corollary of the other. A claim to enforce the negative covenant was held to be equivalent to a claim to enforce the positive covenant, which was an obligation to be performed within the jurisdiction.

Finally, the Court considered (at [135]-[139]) the application of s. 2 of the SIA, *viz.* whether Spain had submitted to the jurisdiction. The Club submitted that by filing a Part 11 challenge on the basis that immunity only arose in the case where it failed on its jurisdiction challenge, Spain had invited the court to determine the jurisdiction first and that Spain, by inviting the Court to set aside service based on the merits of the Club's claim, had taken steps in proceedings other than for the purpose "*only*" of claiming immunity. Spain argued that in the proceedings before the Court it had challenged immunity and jurisdiction in the same application. The Court considered *Kuwait Airways Corp v Iraqi Airways Co* [1995] 1 Lloyd's Rep. 25 and held (at [149]) that Spain had not taken a step in the proceedings for the purposes of s. 2 of the SIA nor had it submitted to the jurisdiction of the English court.

ISSUE 2: Section 18 AA

The Club was required to show a good arguable case that the arbitration had commenced, and the tribunal had jurisdiction to determine the claims (at [30], [153]). Spain argued that the Court lacked jurisdiction to appoint an arbitrator since: (a) the Club's proposed arbitration claims were not arbitrable and therefore did not fall within the terms of the arbitration agreement; (b) the causes of action relied upon by the Club were merged into the 2013 arbitral award and the s. 66 judgments and therefore did not fall within the terms of an arbitration agreement; and (c) there was no jurisdiction to grant an injunction, damages in lieu of an injunction, or equitable compensation against Spain.

Henshaw J held (at [163]) that the arguments raised by Spain on the remedies available to the

Club raised several questions relating to novel and/or developing areas of law and ought not to be resolved on a s. 18 AA application and were to be left to the arbitrator in the first instance. In light of the Court's conclusion in the context of s. 9 of the SIA that Spain had agreed to submit to arbitration all of the Club's proposed claims, the Club had, *a fortiori* a good arguable case that Spain had submitted to the jurisdiction of the arbitrator. The Court held that there had been no merger (at [177]). Henshaw J held (at [170]) that Spain's continued pursuit of claims in disregard of the arbitration agreement had involved, and continued to involve, successive breaches of its obligations in equity and had created new causes of action; that the notion that the Club could have or did refer to the original arbitration these further causes of action, which at that time lay in the future and were not necessarily to be anticipated was contrived and wrong.

Spain submitted that the arbitrator would have no power to grant any injunction sought by the Club. The Court considered whether the Club's arguments were so obviously wrong such as to make it pointless to appoint an arbitrator and/or whether the Club had a good arguable case on these arguments. Spain contended that s. 13 of the SIA read with s. 48 of the AA precluded an arbitrator from granting an injunction against a state. The Court held (at [188]- [189]) that s. 13 of the SIA governs the exercise but not the existence of a court's power to grant an injunction, and that s. 48 of the AA permits an arbitrator to grant an injunction against a state. Henshaw J held that there was a cogent policy argument in support of the position that an injunction granted by a court was liable to impinge on the *par in parem* principle, whereas this consideration applied with less force to arbitration, as a creature of consent.

The Court also considered that it was arguable that s. 13 of the SIA ought not to be construed as prohibiting the grant by a court of an injunction in respect of a non-sovereign act or activity in light of the restrictive doctrine of sovereign immunity and considerations under the ECHR. Henshaw J therefore held (at [192]) that the Club had an arguable case on the availability of the injunction it sought in arbitration. He further held (at [200] – [201]) that there was a good arguable case that an arbitrator would have the power to award damages against a state in lieu of or in addition to an injunction, notwithstanding the possibility that s. 13 of the SIA might prevent an injunction from being granted. Finally, Henshaw J held (at [212]) that the question as to whether or not the Club was entitled to claim equitable compensation on some basis outside of that provided in s.50 of the Senior Courts Act 1981 raised complex and novel points of law which were to be resolved by the arbitrator, at least in the first instance, with the benefit of full argument.

CONCLUSION

The Court refused Spain's CPR Part 11 application and held that the Court would appoint an arbitrator pursuant to s. 18 of the AA (at [215]).
