

Court Grants Rare Extension of Time for Commencing Arbitration Proceedings

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Introduction

The arbitration process, being a matter of consent between the parties, is fairly strict when it comes to compliance with procedure, such as timelines. Limitation periods are a fortiori treated with grave stringency. While courts may be able to grant extensions of time, there are limited grounds on which they can do so, and commercial judges are generally very circumspect about interfering with the arbitration process or otherwise to be perceived as depriving a party of an accrued time bar defence.

As such, a court order granting an extension of time for commencing arbitration proceedings is less than common. In *Times Trading Corporation v National Bank of Fujairah (Dubai Branch)* [2020] EWHC 1983 (Comm), the English High Court had to consider an application for such an extension. The Court's decision was in the ultimate analysis driven largely on whether the conduct of the respondent made it unjust to hold the applicant to the relevant time bar.

The Court found that the applicant in this case had been misled by conduct attributable to the respondent into pursuing proceedings against the wrong party, and thus should not be held to any resultant failure to meet the time bar for initiating a claim in arbitration against the respondent. Relying on section 12 of the UK

Arbitration Act 1996 ("**AA 1996**"), the Court granted the applicant an extension of time to commence arbitration proceedings against the respondent.

Kendall Tan and Max Lim of Rajah & Tann Singapore LLP acted for the applicant bank in related Singapore proceedings, as well as in the conduct of the English court proceedings in conjunction with Messrs Campbell Johnston Clark and instructed Counsel.

Brief Facts

Singapore proceedings

The claim involved a vessel ("**Vessel**") owned by Rosalind Maritime LLC ("**Rosalind**"), which allegedly was chartered to Times Trading Corp ("**Times**") pursuant to a bareboat charter ("**Bareboat Charter**"). The applicant, the National Bank of Fujairah ("**NBF**"), was the lawful holder of a series of Bills of Lading issued over a cargo of coal on board the Vessel.

Through its Singapore solicitors Rajah & Tann, NBF asserted a claim for misdelivery against the carrier, which was addressed to Rosalind as the Vessel's registered owner on the basis that the cargo had been misdelivered or wrongfully converted. In its letter, NBF had specified that "*[NBF] also invite you to state in writing with full supporting documents why you should not be liable to our clients for misdelivery and/or conversion of the Cargo.*" At this time, NBF was not aware of the existence of the alleged Bareboat Charter, nor of Times' involvement.

The solicitors appointed by the Vessel's interests, including (unknown then to NBF) Times and Rosalind, replied to state that they acted for the Owners, and took no issue with the addressing of the claim, leading NBF to believe that Rosalind was the carrier. The solicitors withheld the fact that they were acting concurrently for Times.

Shortly thereafter, on 2 January 2019, NBF issued an *in rem* Writ of Summons in the High Court of Singapore ("**Singapore Proceedings**"), addressed as against "Owners and/or Demise Charterers and/or other persons interested in ..." the Vessel.

The Bills of Lading contained an arbitration clause requiring disputes to be submitted to London arbitration. They also contained an alleged 12-month time bar for bringing cargo claims (though the applicability of this to NBF's claims was in controversy and not admitted to). Days after Times' emergence onto the scene through its English lawyers, as hitherto NBF was not aware of the alleged Bareboat Charter, Times cited the alleged time bar on which it attempted to stand to defeat NBF's misdelivery claim.

UK proceedings

In the meantime, in circumstances that were only revealed to NBF nearly a year later, Rosalind and Times had entered into a cooperation agreement with Trafigura whereby Trafigura would be responsible for handling the misdelivery claims. On 4 June 2019, before the 12-month mark from the time the claims arose, NBF commenced London arbitration proceedings against the carrier for misdelivery by a notice addressed to Rosalind. Trafigura's then English solicitors replied to inform NBF that they acted for Trafigura, which had conduct of the defence of NBF's claims. However, they too did not identify exactly for whom Trafigura acted, nor did they mention the Bareboat Charter in correspondence to NBF's lawyers.

On 18 July 2019, after the 12-month mark, another set of English solicitors appointed for Trafigura and Times sent a letter stating to NBF's lawyers for the first time that the Vessel was under bareboat charter to Times when the Bills of Lading were issued. As such, they claimed that the Bills of Lading were issued by Times and not Rosalind; that the arbitration had thus allegedly been commenced against the wrong party; and that NBF's claim had become time-barred.

NBF, through Rajah & Tann, on that same day, asked for a copy of the alleged Bareboat Charterparty which Times and Trafigura were now claiming existed. The English solicitors stridently refused to provide a copy. That refusal continued even after Rajah & Tann had stated that if the alleged Bareboat Charterparty was not produced, they would treat the alleged Bareboat Charter as "baseless and a contrivance". NBF made clear that position several times over, and in the course of appearances by its Singapore counsel before the Singapore High Court in the *in rem* action it had commenced here.

A copy of the alleged Bareboat Charter was ultimately only disclosed much later on 9 March 2020 when Times commenced an application before the English High Court, seeking to enjoin NBF from pursuing the Singapore Proceedings. Times was substantially unsuccessful, in that the English High Court granted an anti-suit injunction against the Singapore Proceedings in favour of London arbitration, but only on condition that Times would give an undertaking not to rely on any time bar argument in the arbitration. However, Times refused to comply with this condition.

Times sought to appeal against the condition imposed on the injunction, but was denied permission by the English Court of Appeal to further pursue the argument. Having failed in its attempt to challenge the condition imposed, Times did not seek to maintain the injunction. NBF responded with its application under section 12 of the AA 1996 for a statutory extension of time to commence arbitration proceedings against Times.

Holding of the English High Court

The High Court of Justice granted NBF's application for an extension of time, despite Times' vehement resistance by its legal team.

Extensions of time

Under section 12 of the AA 1996, the English courts may extend the time for beginning arbitral proceedings where:

- 12(3)(a): the circumstances are such as were outside the reasonable contemplation of the parties when they agreed to the provision in question, and it would be just to extend the time, or
- 12(3)(b): the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question.

Regarding section 12(3)(b), the following principles apply:

- A claimant must show some positive conduct on the part of a respondent that renders reliance on the time limit unjust.
- The respondent's behaviour does not have to be the sole or even the predominant cause of the failure to meet the deadline, but a causal nexus must exist.

- The respondent's conduct does not need to be wrongful or blameworthy. Unintentional conduct on the part of the respondent may suffice.

Application

In determining whether the conduct of Times made it unjust to hold NBF to the alleged 12-month time bar, the Court found that the relevant correspondence from the various firms of English solicitors who were adverse to NBF, which sought to avoid disclosure to Rajah & Tann of the Bareboat Charter and of Times' involvement, were attributable to Times.

On the facts, Foxton J was satisfied that the impression given on Times' behalf was that Rosalind was the carrier under the Bills of Lading and not Times. This and the conduct of those representing Times were significant factors in NBF not meeting the time bar (assuming the time bar was applicable), thus establishing the requisite causative nexus which made it unjust to hold NBF to the strict terms of the time bar.

Having fulfilled this threshold requirement, the Court went on to consider whether to exercise its discretion to grant the extension of time. Here, the Court found that Times contributed to NBF's delay by refusing to produce the Bareboat Charter when requested. The Court also found it relevant that Times was aware of the claim and arbitration, and the solicitors who were acting for Times were acting for Rosalind in the arbitration which NBF had commenced to enforce the same claim NBF now sought an extension of time to bring against Times.

Taking all of these matters into consideration, the Court concluded that it was appropriate to grant NBF the extension it sought.

After Foxton J's decision was handed down, Times sought permission to appeal to the English Court of Appeal, but this was refused.

Observation from the Singapore perspective

In Singapore, the cases of *The Duden* [2008] 4 SLR(R) 984 and *The Xanadu* [1997] 3 SLR(R) 360 establish that the Singapore Court has the power to order a stay of an action before it on condition that a party waives any defence of time bar in prospective arbitration proceedings, *where the justice of the case demands it*. The approach of the English High Court above, in considering whether the conduct of the other party was unjust, coheres with the approach in these Singapore cases. The Singapore authorities were cited to the English High Court in the proceedings on the anti-suit injunction and the section 12 AA 1996 application.

Concluding Remarks

It is notoriously difficult for a party to obtain a statutory extension of time for initiating arbitration proceedings under sections 12 of the AA 1996. This decision is a rare instance of how the English courts will approach such an application, and the factors which are relevant to, and ultimately will be weighed in the interests of justice to favour the grant of an extension of time.

The decision also demonstrates that the courts will not assist a defendant that seeks to sit on a time bar defence or other procedural provisions where its conduct was instrumental in bringing about the other party's inability to comply.

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