

Imposing Conditional Terms on an Anti-Suit Injunction – The English Court's Exercise of Discretion to Achieve a Just Outcome

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Introduction

The law of anti-suit injunctions has been the subject of much discussion before the courts, particularly in the context of arbitration agreements. As a discretionary form of relief, the courts may take into account the relevant factors in deciding whether to grant an anti-suit injunction.

In *Times Trading Corporation v National Bank of Fujairah (Dubai Branch)* [2020] EWHC 1078 (Comms), the English High Court demonstrated the scope of exercise of its discretion, declining to grant an anti-suit injunction as applied for, but imposing conditional terms on the injunction instead.

The case involved a bank which had brought court proceedings in Singapore against the owners and/or demise charterers of the vessel "Archangelos Gabriel" ("**Vessel**"). Before the English court, the demise charterers ("**applicant**") applied for an anti-suit injunction of the Singapore proceedings in favour of arbitration. It was alleged that the applicant (and not the owners) were liable to the bank on their claims, and that the time limit for commencing arbitration proceedings against the applicant had passed. The English court, taking into account all the circumstances, including the actions of the applicant in causing the deadline to be missed and the lack of unreasonableness on the part of the bank, granted an injunction on the condition that the applicant would not rely on the time bar argument in the arbitration.

The decision marks a rare instance where the English courts have imposed such a condition in the grant of an anti-suit injunction. It also provides some insight of how the court will exercise its discretion to achieve a fair and just outcome.

Kendall Tan and Max Lim of Rajah & Tann Singapore LLP acted for the 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

The claim involved a series of Bills of Lading issued in respect of a cargo of coal onboard the Vessel. The Vessel was owned by Rosalind Maritime LLC ("**Rosalind**"). The National Bank of Fujairah ("**NBF**") claimed to be the lawful holder of the Bills of Lading, and that the cargo had been misdelivered.

Importantly, the Bills of Lading contained:

- (a) A 12-month time bar for bringing claims, including NBF's misdelivery claim; and
- (b) An arbitration clause requiring disputes to be submitted to London arbitration.

NBF, through Rajah & Tann, asserted a claim for misdelivery against the carrier, which was addressed to the Vessel's Owners, Rosalind. In the letter, it was stated that "*our clients 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.*" Rosalind's then solicitors 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 liable to them on their claims. Subsequently, on 2 January 2019, NBF issued an *in rem* Writ of Summons in the High Court of Singapore ("**Singapore Proceedings**"), addressed in standard form to "Owners and/or Demise Charterers and/or other persons interested in ..." the Vessel.

On 4 June 2019, and thus within the 12-month time limit, NBF commenced London arbitration proceedings against the carrier for misdelivery by a notice addressed to Rosalind. The Owners' then solicitors replied without specifying exactly who they acted for, proposing to appoint an arbitrator; they did not mention any bareboat charter.

On 10 July 2019, after the 12-month time limit had expired, solicitors Reed Smith, stating that they acted for "Owners", appointed an arbitrator for the carrier. On 19 July 2019, Reed Smith sent a letter stating to NBF for the first time that the Vessel was under bareboat charter to Times Trading Ltd ("**Times**") when the Bills of Lading were issued. As such, Reed Smith claimed that the Bills of Lading were issued by Times and not Rosalind, and the arbitration had thus been commenced against the wrong party. However, as the 12-month time limit had expired, NBF could not commence arbitration against Times.

The parties began negotiating the stay of the Singapore Proceedings. NBF offered to stay the Singapore Proceedings in favour of London arbitration on condition of a waiver by Times of any time bar defence, but this was rejected.

Times commenced an application before the English courts on 9 March 2020 to enjoin NBF from pursuing the Singapore Proceedings.

Holding of the High Court

The English High Court granted an anti-suit injunction against the Singapore Proceedings in favour of London arbitration, but imposed the condition that Times would give an undertaking not to rely on any time bar argument in the arbitration. This was essentially the position proposed by NBF in the course of negotiation.

Applicable principles

The Court set out the relevant principles in determining whether to grant an anti-suit injunction:

- (a) The Court has the power to grant an injunction in all cases in which it appears to be just and convenient to do so.
- (b) The Court has jurisdiction to restrain foreign proceedings which are in breach of a binding agreement to refer disputes to arbitration.
- (c) The Court will ordinarily exercise its discretion to restrain such proceedings unless there are strong reasons to refuse the relief.

However, the Court also highlighted that the grant of injunctive relief is discretionary, and that it would continue to consider all relevant discretionary factors, even if such factors do not meet the hurdle of "strong reasons".

Application to facts

On the facts, the Court was the view that the jurisdictional basis for an injunction had been made out. However, the Court found that there were discretionary factors which militated against the grant of an injunction on the terms sought.

- (a) Times had not sought or agreed to a stay in Singapore because such a stay would be on terms that no time bar issue was taken (whether pursuant to NBF's offer or pursuant to an order of the Singapore court). This demonstrated an intention to have its cake and eat it too.
- (b) Times had delayed the application for an injunction – NBF served on the Vessel the *in rem* Writ of Summons in the Singapore Proceedings on 9 November 2019, but Times only applied for the injunction on 9 March 2020. While this was not a case of egregious delay that warranted the refusal of the injunction, it amounted to a discretionary factor which would feed into the consideration.
- (c) There was also the element of "unclean hands". Considering the history of the proceedings, the Court found that NBF had not acted unreasonably in having been led to miss the 12-month time limit for initiating arbitration against Times. Conversely, Times and Rosalind seemed likely to have been aware at all times of NBF's understanding that Rosalind was the carrier and thus the correct counterparty in an arbitration, and consciously did not correct this understanding until after the 12-month time limit had passed.

Based on the nature of those factors, the Court concluded that the grant of an injunction would only be just and convenient if it were on conditional terms. The Court thus imposed the condition that Times would give an undertaking not to rely on any time bar argument in the London arbitration.

Subsequent Proceedings

After this decision was handed down, Times sought permission from the first-instance judge to appeal but this was refused. Times' subsequent application to the English Court of Appeal for permission to appeal has also been dismissed. The English Court of Appeal upheld the judge's exercise of her discretion in determining on the facts that it was only just and convenient to grant an injunction on condition.

Concluding Words

This decision highlights that an anti-suit injunction is a matter of the court's discretion. The court is entitled to take into account all relevant factors, and to grant an order which it finds just and convenient. This might include – as in the present decision – imposing conditional terms on the grant of the injunction.

Such discretion may be used to avoid any unfairness in outcome of an application for injunction. Injunction orders may be tailored to prevent a disputant from benefiting from any sharp practice on its part, or to alleviate the effects of tactical litigation.

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