THE ARREST news

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IN THIS QUARTERLY ISSUE

Time to Arrest!

Several recent arrest cases in Spain have questioned the time limits where a ship arrest order might be obtained from the Spanish Commercial Courts.

The initial time limit to arrest a ship is clear; from the moment one party holds a maritime claim. Furthermore, Art. 1.2 of the 1999 Arrest Convention states that an arrest under the Convention means "any detention or restriction on removal of a ship by order of a Court to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment or other enforceable instrument."

A recent judgment issued by the Pontevedra Commercial Court would appear to cast some doubt where an action on the merits –in that case London arbitration - had been started at the time the arrest was applied for. Thus, the Magistrate of the Pontevedra Commercial Court refused to issue a ship arrest order on the basis that arbitration in London had been started on the merits at the time the arrest had been applied for. The question one needs to pose is; should a party be in a worse position holding a claim and having started arbitration proceedings than holding a claim only? Our strong view is that it should be not. The excessive workload at many of the Spanish Commercial Courts, provoked by their exclusive competence to deal with bankruptcy matters, may explain this kind of ruling which appear to address very lightly the commercial and legal boundaries when an arrest application is presented to the Court.

The other side of the coin is an arrest order recently issued by the Commercial Court of Las Palmas (Canary Islands). In this case, prior to the arrest application the arresting party had obtained an European judgment which it sought to enforce it in Spain. However, obtaining the relief under enforcement proceedings is not as fast and flexible as a ship arrest application. Different documents and forms under the 44/2001 EU Regulation are required and this type of proceedings is not considered urgent by the Commercial Courts. Therefore to avoid the ship escaping from the Spanish jurisdiction the claimant applied for the ship arrest under the 1999 Arrest Convention and under general principles of Spanish procedural law. He argued that they could not be in a worse position with a judgment in his hands than when holding a maritime claim. It was further argued that the arresting party should be entitled to a precautionary measure under the 1999 Arrest Convention or general principles of Spanish and EU laws, this had to be so until such a time as the enforcement of the judgment took place. The precautionary ship arrest was granted by the Commercial Court.

The action in Las Palmas was not to satisfy a judgment but to ensure the ship did not leave the port before an enforcement order could be obtained on the basis of the

judgment. We are living difficult financial times and it is submitted that Courts must be ready to consider an arrest application with a certain degree of flexibility, entitling creditors to obtain sufficient security for their credits whether these are embodied in a maritime claim, a judgment, or arbitration award.

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Felipe Arizon holds a Ph.D in English Law from Newcastle and a LL.M. from Southampton; he has been a "Visiting Scholar" at the University of Tulane-New Orleans.
Dr. Arizon acts before many international and domestic arbitration forums including ICC, Gafta, Fosfa, CAP and RSA. He is a well-known barrister before Spanish Courts, including High Courts, Appeal Courts and Supreme Courts. According to The Legal 500 Felipe "is well liked and supported by the main players of the Spanish market".
He is regular contributor to international and Spanish publications in commercial law, carriage of goods, insurance and arrest of ships and is the Founder of www.shiparrested.com . Felipe is lecturer at the Spanish State Institute for International Trade and has lectured widely in Spain and abroad: England (Newcastle University; Lloyd's Maritime Academy), Russia, Ukraine, Netherlands, France, and Turkey. He has been engaged on seminars at the Nautical Institute (England). Felipe is supporting member of the LMAA.

An Anti - Anti - Anti Suit injunction, Ecom Agroindustrial Corp Ltd. v Mosharef Composite Textile Mill Ltd [2013] EWHC 1276 (Comm)

Members DAVIES BATTERSBY of London were instructed on behalf of Ecom in this interesting case in English High Court proceedings which again demonstrates the refusal of the English courts to allow parties to avoid contractually agreed arbitration by hiding behind their home courts. Mr Justice Hamblen granted Ecom an anti-anti-suit injunction in respect of an arbitration clause.

The Contract (Material Terms)

Ecomassold about 1,500MT of Brazilian raw cotton to Mosharef withequal shipments within a shipment period of July, August and September 2011.

Rules
The contract incorporated the Rules and By-laws of the International Cotton Association ("ICA") in force at the time the contract was entered into. All disputes will be settled amicably or will be referred to arbitration in accordance n with the rules and by-laws of the ICA and shall be resolved by the application of English Law".

Arbitration
ICA arbitration for any technical and quality disputes.

Reimbursement
By irrevocable and confirmed Letter of Credit (L/C) available by sight payment, opened by an A-1 bank approved by sellers before opening, in favour of a negotiating bank nominated by sellers.

Failure to open L/C.

Mosharaf was meant to open a L/C for the first shipment by the 20 June 2011 but failed to do so and in fact failed to open a letter of credit at all. The reason given for failing to open the L/C by Mosharaf was said to be a requirement of Bangladeshi law that prevented the their bank from opening a L/C in favour of Ecom because of provisions to restrict the import of cotton into Bangladesh for a price higher than the prevailing market price.

Arbitration

Attempted at an amicable settlement failed and Ecom declared arbitration on the 22nd November 2011 and on the 28 November the ICA arbitration was commenced. Mosharafrefused to take part in the ICA proceedings and instead,without notice to Ecom, commenced proceedings in Dhaka, Bangladesh.
The Bangladeshi proceedings were founded on the alleged provisions of Bangladeshi law, which, as said above, precluded the opening of a L/C where the contract price was higher than the prevailing market price. Mosharaf also argued that the damages sought by Ecom in their ICA arbitration claim was a payment without consideration and against public policy in Bangladesh by virtue of s.23 of the Contract Act. It was further argued that such a damages payment would result in the liquidation of Mosharaf causing injustice and was (they asserted) illegal.
Mosharaf also obtained an interim anti-suit injunction to restrain Ecom from pursuing any claim in relation to the Contract.
Mosharaf, argued that the dispute between the parties does not fall within the arbitration clause of the contract on the ground that it was not a "technical or quality dispute". Mosharafargued that the Bangladesh was the correct forum for the dispute as the cause of action arose at Mosharaf's Bangladeshi offices.
Ecom filed an appeal against the interim injunction in Dhaka on the basis that it should not have been granted because of the existence of the arbitration agreement. There has been no progress with proceedings in Bangladesh. Ecomalso issued proceedings in the UK seeking an injunction

to prohibit Mosharaf from taking any further steps in the Bangladeshi proceedings, or from commencing any further proceedings in relation to the contract and to order the Defendant to take immediate steps to discontinue the Bangladeshi proceedings.

HELD:

Pursuant to Bylaw 300 of the ICA when the parties agreed to refer "any technical or quality dispute" to arbitration, this was simply another way of saying that "all disputes" would be referred to arbitration. Mosharaf claimed that the arbitration clause did not apply because the contract has been frustrated or is otherwise invalid. As a matter of English Law, this contention is wrong. The existence and validity of an arbitration clause is treated as being entirely separate from the underlying contract pursuant to s.7 of the Arbitration Act 1996. Accordingly the dispute is subject to the arbitration agreement in the contract and the commencement of the Bangladeshi proceedings amounted to a breach of the contract.

The anti anti suit injunction was therefore granted. Mr Justice Hamblen also acceded to our request to grant Ecom declarations that Mosharaf is:

- obliged to arbitrate all disputes relating to the contract
- to bring any jurisdiction challenge to the Tribunal or before this Court;
- in breach of contract by commencing the Bangladeshi proceedings

The court held that it had the jurisdiction to grant the declarations at its discretion because they will assist Ecom and possibly the Bangladeshi court in the event that the court granted the injunction and Mosharafdid not obey it.

Comment

The High Court has therefore, once again, confirmed that will stand behind arbitration clauses and will not allow parties to undermine them by originating proceedings in their home courts.

The High Court did not require evidence that Mosharraf's contention were correct or otherwise in Bangladeshi law and was unconcerned with this. It simply held Mosharraf to the terms of the arbitration clause. It also confirmed that the ICA arbitration clause is sufficiently widely drawn to cover all disputes, which will bring comfort to those using its standard form contracts.

Finally, the High Court again reminded parties that challenges to the validity of arbitration clauses are separate to challenges to the validity of the contract as a whole and should be raised before the arbitral tribunal as opposed to being ignored by the launch of independent proceedings.

Davies Battersbyinvite fellow members to comment on the case and will be happy to advise on similar cases.

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Richard set up CHARTER WISE LTD. as a Shipping & Trade Consultancy in 1995 after returning from Switzerland. He is member of the Insurance and Litigation department, ANDRÉ & CIE Lausanne (Switzerland) 1981-1995 (Troubleshooting and particularly maritime/trade disputes and arbitrations). Richard is an Ex - seagoing deck officer (Over 10 years experience from Deckboy to Mate; OLAU LINE, ATHEL LINE, SILVER LINE.) He has experience of Lloyd's and Companies Insurance market as a claims broker as well as experience of P&I placing and claims for a major East European fleet.

Richard is fellowmember of : The Chartered Institute of Arbitrators (Chartered Arbitrator), The Institute of Export; The British Maritime Law Association; and council Member of International Commodity & Shipping Arbitration Service and Panel Arbitrator (Trade and Maritime).