Case Note
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MAERSK A/S v MERCURIA ENERGY TRADING SA

[2021] EWHC 2856 (Comm), [2022] 2 Lloyd's Rep 95

HHJ Pelling QC sitting as Judge of the High Court

11 October 2021

Abstract

A cargo claimant brought court proceedings in Turkey against the carrier within the one-year time limit stipulated in the bills of lading but in breach of an exclusive English jurisdiction clause therein. The carrier applied to English court for a final anti-suit injunctioni. The court granted the anti-suit injunction despite the claims being, by then, time barred and not able to be brought again in the English courts. The court refused to impose a condition that the carrier would not raise time bar defence in any subsequent English court proceedings; or to require the cross-undertaking in damages that the cargo claimant asked for, the injunction being final, rather than interlocutory.

The court refused to summarily assess costs in favour of the carrier due insufficient details in the schedule of costs, but ordered interim payment on account thereof.

Facts

A Turkish seller sold, in June 2020, to Mercuria (a global commodity trading company) 4,000 mt of copper blister ingots for USD45 million CIF China. The seller contracted with Maersk and MSC, in Turkey, for carriage of the cargo from Turkey to China. Maersk issued five negotiable bills of lading for the cargo that it carried, of which Mercuria became the lawful holder.

All the bills of lading had an one-year time limit clause (whereby the carrier would be discharged from all liability unless a claim was brought within one year after the date when the relevant goods had been delivered) and an exclusive English jurisdiction (and choice of law) clause.

Upon delivery in China, the cargo delivered was found to be not copper but cobblestones. Mercuria alleged that the copper originally stuffed into the containers had been fraudulently switched for cobblestones. However, it was not Mercuria's case the Maersk was a party to the fraud.

Pursuant to the time limit clause, the time bar took effect between 27 August and 24 September 2021 in respect of four of the five bills issued by Maersk. For the fifth bill, it took effect between 3 and 5 October 2021.

Mercuria applied for Turkish court mediation in August 2021 (the filed evidence indicated that a pre-action mediation was mandatory in Turkey before court proceedings could be commenced). The mediation took place by two short phone calls respectively on 3 August and 10 August 2021, by the end of which it was clear that no resolution would be found by the mediation.

On 13 August 2021, Mercuria commenced court proceedings in Turkey against Maersk, MSC, the terminal operator at the loadport, and the inspection company it had engaged there. It served the statement of claim on Maersk on 25 August 2021. The time limit for Maersk to file its defence expired on 8 September 2021. Maersk applied for and obtained an extension of time until 8 October 2021 and accordingly filed a defence. There was no indication that Maersk intended to challenge the jurisdiction of the Turkish court when it applied for the extension of time nor when it earlier participated in the mandatory pre-action mediation in Turkey.

In the meantime, two important events took place. First, on 6 September 2021, MSC wrote to Mercuria to say that the Turkish proceedings were commenced in breach of the exclusive jurisdiction cause, and called upon Mercuria to discontinue the same and to recommence proceedings before English court by 6 March 2022, subject to which MSC agreed not to rely on the one-year time limit clause; MSC therein also

stated that its contractual position was materially identical to that of Maersk. This letter was copied to Maersk, which did not make any such offer, but it was clear that Maersk made no such concession. Second, Maersk instructed its English solicitors on 7 September 2021, who instructed counsel on 13 September 2021; and this application for an anti-suit injunction was made on behalf of Maersk to the Commercial Court on 20 September 2021.

Issues

Mercuria opposed the anti-suit injunction. Mercuria also argued that, if the court was minded to grant the anti-suit injunction, it should be on condition that Maersk would not rely on the one-year time limit in defence to any action subsequently commenced by Mercuria in the English court. In addition to these two primary issues for determination, three ancillary issues that arose for determination were: (i) whether a cross-undertaking in damages ought to be required from Maersk upon granting the injunction; (ii) whether there ought to be a summary assessment of costs; and (iii) whether and if so in what sum there should be an interim payment on account of costs. HHJ Pelling QC dealt with each of the five issues in turn.

First issue: Should an anti-suit injunction be granted?

Mercuria argued that the injunction should not be granted because there was a delay in Maersk making the application and Mercuria would be prejudiced by the injunction as it was already out of time to commence an action in English court. Mercuria also argued that there were good reasons to bring the action in Turkey (broadly, forum conveniens arguments), including that the four defendants that Mercuria had sued in Turkey could only be sued together before a Turkish court. Mercuria further submitted that, as a matter of Turkish law, the Turkish court had exclusive jurisdiction, because the contract of carriage was made in Turkey.

HJJ Pelling QC rejected the arguments of Mercuria and granted a final anti-suit injunction. The Judge reiterated the general principle that an anti-suit injunction would ordinarily be granted to enforce an exclusive jurisdiction agreement (the existence of which, if disputed, must be proved to a high degree of probability), provided that it is applied for promptly, unless there are strong reasons for not doing

so.ii The Judge expressed that the court's "primary concern [was] to uphold the parties' bargain, absent strong reasons to the contrary".iii

The Judge did not accept that there was a delay in Maersk making the application (which was made within a month after Maersk was served with the Turkish statement of claim). The Judge noted that although Maersk could have applied for a quia timet injunction when Turkish proceedings had not been issued but were anticipated by the mandatory pre-action mediation process in Turkey, but it was not obliged to do so. The Judge observed that "great care must be taken before concluding the contractual rights have been lost by mere silence and inaction". In any event, the Judge held that the promptness (and conversely delay) in applying is measured in relation to the stage that the foreign proceedings have been advanced. In this case, the Turkish proceedings, in less than two months as it stood then, had it not advanced too far. The Judge explained the rationale for this principle thus: "the question of delay and comity are linked, and the concern in relation to delay is, or it is primarily with, the degree to which delay has materially increased the perceived interference with the process of a foreign court, or which has led to a waste of its time and resources".iv

The Judge did not agree that Turkish court was the forum conveniens, and in any event ruled that forum conveniens had "little or no significant role to play" on an anti-suit injunction application to enforce an exclusive jurisdiction agreement. The Judge emphasised that it was for the respondent (Mercuria) "to prove that it was not unreasonable for it not to file a protective claim form in [the agreed jurisdiction]". The Judge further emphasised that even if Turkish court were to be the forum conveniens, that was not "a good reason for not issuing a [protective] claim in [the agreed jurisdiction]". The Judge pointed out that this "[was] a particular application of the strong reasons requirement and recognises the importance that English law places on compliance with contractual obligations." The Judge made it clear that the issue was not where the forum conveniens was, but why no protective claim was not issued in the agreed jurisdiction.v

As to Mercuria's argument that Turkish courts had exclusive jurisdiction over the matter, the Judge said "Turkish law became material only because the claim was issued in Turkey by Mercuria in breach of its contractual obligation to bring claims against Maersk in the High Court in London."vi

Second issue: Should a condition be imposed to prevent Maersk from relying on the time bar clause in any subsequent English proceedings?

The Judge found, (contrary to Maersk's counsel's suggestion) that he had a discretion to impose conditions when granting an injunction pursuant to s 37(2) Senior Courts Act 1981.

However, the Judge did not find any reason in this case to exercise the discretion to impose the condition that Mercuria asked for, Mercuria having failed in its "prejudice" and "delay" arguments.

The Judge distinguished Times Trading Corporation v National Bank of Fujairah (Dubai Branch) (The Archagelos Gabriel) [2020] 2 Lloyd's Rep 317 and noted that The Archagelos Gabriel was a "very fact-specific" case. In that case, the Cockerill J granted an anti-suit injunction to restrain proceedings by a cargo claimant against the bareboat charterer, on condition that bareboat charterer would not rely on time bar defence in London arbitration. In that case, there were active discussions between the parties concerning a possible consensual stay, combined with the waste of time and costs; and "raising of false expectation" was identified to be a relevant factor.

Third issue: Should Maersk be required to give an undertaking in damages?

The Judge refused to require an undertaking in damages from Maersk. This was generally required only in cases of interlocutory injunctions, and the injunction the Judge granted in this case was a final one.

The judge did not accept the argument of Mercuria that an undertaking should be required because the time limited for acknowledging the service had not expired yet and that Mercuria could still challenge the jurisdiction of this court when acknowledging the service. In rejecting this argument, the Judge noted that an application to challenge the jurisdiction of this court would be one without any realistic prospect of success.

Fourth issue: Should costs be summarily assessed?

It was, naturally, not in issue that Mercuria must be ordered to pay costs to Maersk. However, Mercuria asked that the costs should not be summarily assessed for two reasons. First, the costs claimed by Maersk was more than £100,000. Second, the schedule of costs tendered by Maersk was not in the right form. The Judge refused the first reason, but agreed with the second reason because the grades of the fee earners were not identified and there was not sufficient break down of the work done save for alleged work done between two specific dates under broad headings.

Fifth issue: Should an order for interim payment on account of costs be made?

As the Judge's refusal to assess the costs summarily, Maersk asked for an order of interim payment on account of costs. Maersk's counsel suggested that the court should arrive at a figure (between £120,000 and £125,000) that would have been the outcome of a summary assessment. To the contrary, Mercuria's counsel suggested that the court should look at the figure asked in the losing party's schedule of costs (which was about £108,000) and allow a discount from that to arrive at the interim payment to be allowed in favour of the successful party.

The Judge noted that both these submissions missed the principle and held that the interim payment ordered must reflect "the likely minimum reasonable figure that the receiving party will receive following a detailed assessment." The judge ordered £85,000 to be paid within 14 days. In arriving at this figure, the Judge applied London 2 band rates while the rates claimed by Maersk was more than this. The Judge commented that "this is a relatively straightforward application in a well-travelled area of the law" and that "[whilst] there may have been a need to prepare significant

amounts of evidence, there is no justification for saying ... this is so exceptionally heavy".

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4 February 2023

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i It is understood that the application, which was issued on 20 September 2021 was initially for an interim injunction, was listed at short notice on 23 September, and on that date was adjourned for directions (without grant of an interim injunction) for it to be heard as an application for a final, rather than an interim, injunction: see also [17], [37] and [42].

ii See Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace) [1995] 1 Lloyd's Rep 87, per Millett LJ at page 96 col 2; Donohue v Armco Inc [2002] 1 Lloyd's Rep 425, per Lord Bingham at para 24, Lord Hobhouse at para 45 and Lord Scott at para 53.

iii See Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb" [2020] 2 Lloyd's Rep 449; [2020] 1 WLR 4117, at paras 179, 184 and 293.

iv See Qingdao Huiquan Shipping Co v Shanghai Dong He Xin Industry Group Co Ltd [2019] 1 Lloyd's Rep 520.

v See Essar Shipping Ltd v Bank of China Ltd (The Kishore) [2016] 1 Lloyd's Rep 427, per Walker J at para 68.

vi See Aline Tramp SA v Jordan International Insurance Co (The Flag Evi) [2017] 1 Lloyd's Rep 467 at para 52.