Chapter 60

EFFECT OF ARBITRATION CLAUSE ON ARREST

The Supreme Court of India in SLP (Civil) no.17183/ 1999, the Owners & Parties Interested in m.v B.C & Anr -vs- State Trading Corporation of India Ltd & Anr has held that on a careful consideration of the entire matter we are of the view that there is no good ground or acceptable reason why the intention of the parties to incorporate the arbitration clause in the Charter Party Agreement in the Bill of Lading should not be given effect to. The High Court was not right in rejecting the prayer of the appellants for stay of the suit.

A claim which is brought in the Admiralty Court by an action in rem is subject to an arbitration agreement so that if an action were commenced the court would stay the proceedings to arbitration upon the application of the defendant.

Under the provision of English Law, under section 26 of The Civil Jurisdiction and Judgments Act, 1982, which is in force since November 1, 1984 provides that where the court stays or dismisses Admiralty proceedings on the ground that the dispute in question should be submitted to arbitration the court may order that any property arrested or security given to prevent arrest or to obtain release from arrest shall be retained as security for satisfaction of the arbitration award or order that the stay be conditional upon the provision of equivalent security for the satisfaction of the arbitration award.

The Court of Appeal has held in The Bazias 3 & 4 [1993] 1 Lloyds Rep. 101, that the effect of section 26 is to assimilate arbitration claims with in rem proceedings in the Admiralty Court. Thus there is no longer a wider discretion when the claim is subject to an arbitration clause, and the ship

arrested will ordinarily be released only if security is provided sufficient to cover the amount of the claim, together with interest and costs, on the basis of the plaintiffs reasonably arguable best case.

Position in UK

Domestic and non-domestic arbitration agreements

The rules of English law relating to domestic and non-domestic arbitration is set out in: (i) the Arbitration Act 1950; and (ii) the Arbitration Act 1975 and 1996.

A domestic arbitration agreement is one that provides for arbitration in the UK, where both parties are UK residents or bodies incorporated or managed in the UK. In the case of a domestic arbitration clause the court has the discretion to stay the proceedings. Section 4(1) of the English Arbitration Act 1950 provides that a court may stay the proceedings if satisfied that there is no sufficient reason why the matter should not be referred to arbitration. Since the power of the court is discretionary, it may impose such terms as it thinks fit as a condition for agreeing to grant a stay of proceedings. In particular, it can require the owner of the vessel to provide alternative security for the arbitration.

Most shipping contracts contain non-domestic arbitration clauses. The position of non-domestic clauses are contained in s 1 of the UK Arbitration Act 1975, which imposes a mandatory duty on the courts to stay proceedings when a contract incorporates a non- domestic clause. The Arbitration Act 1975 was passed in the English Parliament to give effect to the ratification of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, otherwise known as ˜The New York Convention.

Section 1(1) states: ˜If any party to an arbitration agreement to which this section applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to that proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter referred, shall make an order staying the proceedings.

However, s 9 of the Arbitration Act 1996 re-enacts s 1(1) of the Arbitration Act

1975 and now states that a court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed. The remaining words in s l of the Arbitration Act 1975 are omitted.

The effect of this change was seen in the case of The Halki. 1 The plaintiff was a shipowner that chartered the vessel to the defendant for carriage of goods from Far East to Europe. The charterparty contained an arbitration clause, which stated that disputes are to be determined in London in accordance with English law. The plaintiffs claimed damages under the charterparty and made an O 14 application stating that the defendants had no arguable defence. The defendants did not admit liability and sought to stay the proceedings on grounds that there was a ˜dispute within the meaning of s 9(4) of the Arbitration Act 1996 and the matter should be referred to arbitration.

The Court of Appeal held that s 9 introduced a significant restriction on the previous power of the court by omitting the words in s l of the Arbitration Act 1975 whereby the court could order a stay ˜unless satisfied ¦ there is not in fact any dispute between the parties with regard to the matter agreed to be referred. Accordingly, once the court was satisfied that there was a dispute under an arbitration agreement which governed the contract between the parties, it was not open to the plaintiff to bring proceedings to enforce a claim which the defendant had no arguable defence, and the court had to grant a stay unless it found the arbitration to be null and void. In the instant case, there was a dispute which arose once the plaintiff claimed damages for breach of the charterparty and, therefore, until the defendant admitted that the sum was due and payable, the matter had to be referred to arbitration for determination.

Arrest of ships as security for arbitration in the UK

Prior to the English Civil Jurisdiction and Judgments Act 1982, the law was not very clear on the arrest of ships as security for arbitration. Generally, there were two issues that faced a court when deciding whether to allow an arrest of a vessel as security for arbitration claims. The first involves the issue as to whether the court has the jurisdiction to arrest a vessel for a claim in arbitration. The second issue is whether in its discretion, it is prepared to do so. It has been submitted that the motive for effecting an arrest is irrelevant to the question of jurisdiction. If a vessel is within the jurisdiction of the court and the claim falls within the categories of maritime claims provided for in the Supreme Court Act 1981, the courts power of arrest can be invoked even if the plaintiffs motive in applying for arrest is to obtain security for an arbitration claim. 2 The motive for the arrest is, however, relevant when deciding whether the court should exercise its discretion to order an arrest. In The Cap Bon, 3 Brandon J said that the purpose of an action in rem was solely to obtain security in respect of a judgment in court or sum due under settlement of action and that security was not available for ensuring payment

of the judgment of some other court or an award of an arbitration tribunal. 4 Thus, if the purpose of arrest was solely to obtain security for an arbitration award, the court would decline to exercise its discretion in the plaintiffs favour. Further, any security or bail actually provided would only be available to satisfy an Admiralty Court judgment; it could not be used to satisfy an award since it would not, in terms, be expressed to cover this. Usually, when an action in rem is commenced and there is a non-domestic clause, the shipowner would apply to stay the proceedings under s 1(1) of the Arbitration Act 1975. The court is then faced with how to deal with the arrest of the vessel or the substitute security tendered in its place. The natural thing to do would be to disallow the execution of the arrest or to release the ship from arrest if arbitration proceedings have already commenced. 5 However, Brandon J in The Rena K 6 was of the view that whilst the Arbitration Act 1975 makes it mandatory for the court to stay the admiralty proceedings and precludes him from imposing a condition as to alternate security in favour of arbitration, it does not oblige the court to release the vessel as security or retain security already given to secure its release if the arrest has already been made. The court still had the discretion, when granting the mandatory stay of proceedings, to continue any arrest already obtained if it was shown by the plaintiff that any arbitration award in his favour was unlikely to be satisfied by the defendant. 7 This reasoning was applied in The Tuyuti 8 where the Court of Appeal reversed the High Courts stay on the execution of the warrant of arrest. Robert Goff LJ said that in arresting or continuing the arrest of a ship as security, the security was being administered not in relation to the arbitration proceedings but in relation to a possible judgment in the action in rem. The above exception is popularly known as the principle in The Rena K and it should be emphasized that the burden is on the plaintiff to produce evidence in court that the defendant would not be able to satisfy an award that may be made against him. Failing to do so would compel the court to stay the proceedings and release the vessel in the usual manner.

Whilst on one hand, the English cases do not allow for the arrest of ships as security for arbitration claims because of jurisdictional issues, the judges have made exceptions in cases where the defendant is unable to satisfy an award that may be made against him. This uncertainty in the law is one of the reasons that eventually led to the Civil Jurisdiction and Judgments Act 1982.

The English Civil Jurisdiction and Judgments Act (˜CJJA) 1982 only came into force in November 1984, some two years later. It provides:

26 (1) Where in England and Wales or Northern Ireland a court stays or dismisses Admiralty proceedings on the ground that the dispute in question should be submitted to arbitration or to the determination of the courts of another part of the United Kingdom or of an overseas country, the court may, if in those proceedings property has been arrested or bail or other security has been given to prevent or obtain release from arrest"

(a) order that the property arrested be retained as security for the satisfaction of any award or judgment which"

(i) is given in respect of the dispute in the arbitration or legal proceedings in favour of which those proceedings are stayed or dismissed; and

(ii) is enforceable in England and Wales or, as the case may be, in Northern Ireland; or

(b) order that the stay or dismissal of those proceedings be conditional on the provision of equivalent security for the satisfaction of any such award or judgment.

(2) Where a court makes an order under sub-s (1), it may attach such conditions to the order as it thinks fit, in particular conditions with respect to the institution or prosecution of the relevant arbitration or legal proceedings.

Section 26 at least clarifies the position with the pre-CJJA case law and now makes clear that where admiralty proceedings are stayed on the basis of an agreement to arbitrate, the court either orders the retention of the arrested property to stand as security for the satisfaction of any arbitration award, or it may order that alternative security be provided. It is noteworthy that s 26 does not say in clear precise terms that it is possible to arrest as security for arbitration; instead, all it actually does is prescribe a form of procedure where the court can order the retention of security if those procedural requirements are met. This makes little practical difference since a plaintiff may bring an action in rem against the defendants vessel in the UK despite his motive to solely obtain security for arbitration and even if the court stays the in rem proceedings it may order that the vessel be retained as security (or alternative security is provided) which is all the plaintiff wants after all.

An example is seen in The World Star 10 where charterers arrested the ship solely to obtain security for arbitration proceedings. This was the sort of application that the English courts had held to be impermissible prior to the advent of s 26. 11 The defendant shipowners applied for a stay and for an order that the vessel be released from arrest. Sheen J concluded that since, as a matter of procedure, the case fell squarely within s 26, the court could order the retention of the vessel as security for the satisfaction of the arbitration award. 12 In another case, The Bazias 3 and Bazias 4; 13 the plaintiffs issued in rem proceedings against the vessel, having given due warning that they intended to arrest the vessel in order to obtain security amounting to $10.7 m. The defendants applied for a stay under s 1 of the English Arbitration Act 1975. On appeal, they argued that the pre-existing practice was preserved by s 26 so that in respect of a claim that was subject to an arbitration clause, the court had a discretion to release the vessel without requiring equivalent security depending on whether the defendant was likely to be able to meet any arbitration award in the plaintiffs favor. In other words, s 26 does not bind the court to make an order under sub-s (a) and sub-s (b). It may take a third route, that is, to make an order releasing the vessel without equivalent

security. The plaintiffs, on the other hand, argued that the effect of s 26 was to assimilate claims in arbitration with in rem proceedings in the Admiralty Court so that the discretion would be the same in both classes of case.

In reply to the defendants argument, the court stated that the wider discretion in arbitration cases was an inevitable consequence of the security afforded by in rem proceedings not being able to enforce an award and only being available in respect of in rem proceedings. Lloyd LJ agreed with the plaintiffs that the purpose of s 26 was to assimilate the three classes of claim in all respects and there is nothing in the language of s 26 nor in the cases decided immediately before the CJJA 1982, which is inconsistent with that argument. Having said that, the usual practice has always been that the vessel will only be released on the provision of sufficient security to cover the amount of the claim, plus interest and costs on the basis of the plaintiffs reasonably best arguable case.

14 Counsel for the defendants also wanted the courts to exercise their powers under s 26(2)of the CJJA 1982 to order the plaintiffs to give a cross-undertaking in damages in case the arrest turns out to be unjustified by which they mean the plaintiffs claim in arbitration fails in toto. But the courts stated that it is not usual admiralty practice and they do not regard this case as being one in which they could introduce so far reaching a change in the practice for the first time. But there is nothing to stop the defendants from requesting the plaintiffs to deposit security for the losses they are likely to suffer whilst the vessel remains under arrest.