

May 2024

Commodities in Focus Weekly – issue 76

Euronav Shipping NV v Black Swan Petroleum DMCC¹ - Commercial Court declines to grant anti-anti-arbitration injunction on discretionary grounds

Despite meeting the legal test, the Commercial Court refused to grant the applicant's anti-anti-arbitration injunction ("**AAAI**") for reasons including comity and delay.

Background

Black Swan Petroleum DMCC ("**BSP**") had stored a cargo of crude oil onboard a vessel owned by Euronav Shipping NV ("**Euronav**") and anchored in a Malaysian port. Euronav subsequently surrendered possession of the cargo to the US Department of Justice on the basis that it was sanctioned under US law.

BSP commenced a claim against Euronav before the High Court of Malaysia, its position being that the relationship of bailment between it and Euronav was for reward rather than on terms.

Euronav commenced arbitration proceedings in London under London Maritime Arbitrators Association ("**LMAA**") Terms on the basis that the sub-bailment was on the terms of a storage contract with a third party, Silk Straits, which incorporated, in an addendum, an arbitration agreement.

Euronav subsequently applied to the High Court of Malaysia for an order staying or striking out the claim or, alternatively, for a stay under the Malaysian Arbitration Act for the dispute to be resolved in the London arbitration. That application was dismissed, and the Malaysian Court held that by taking this step, Euronav had submitted to the jurisdiction of the High Court of Malaysia and was precluded from seeking a stay in favour of arbitration under the Malaysian Arbitration Act. That decision is binding unless and until overturned by the Malaysian Court of Appeal. That appeal is pending.

When Euronav pressed ahead with the London arbitration and objected to BSP's application for a stay, BSP applied to the High Court of Malaysia for an anti-arbitration injunction. The Court determined that Euronav be restrained from continuing with the London arbitration until the conclusion of the Malaysian appeal proceedings (the "**AAI Order**").

Euronav then sought an AAAI from the English High Court requiring BSP to take steps to set aside the AAI Order and, in the meantime, to not enforce it. BSP opposed this application on the grounds that there was no arbitration agreement it could have breached, but even if it was in breach, the Court should refuse the application for the discretionary reasons of comity, voluntary submission and delay.



Decision

The Court confirmed that the test for a contractual interim anti-suit injunction is whether there was a "*high degree of probability*" of both the existence and the breach of an arbitration agreement between the parties.² The Judge held that there was a high degree of

¹ [2024] EWHC 896 (Comm) (26 April 2024)

² Paragraphs 25-30

probability that at a notional trial Euronav would be able to prove on the balance of probabilities:

1. The existence of an arbitration agreement between the parties because: (a) the conduct of Euronav and Silk Straits, namely starting to perform their agreement without any reservations of rights pending completion of negotiations, was such that the relevant addendum became binding;³ and (b) BSP consented to Euronav holding the cargo on the terms of Euronav's agreement with Silk Straits by agreeing to transfer possession to Euronav without first enquiring as to Euronav's relationship with Silk Straits.⁴
2. The breach of that arbitration agreement because: the AAI Order prevents Euronav from complying with directions given in the London arbitration.⁵

However, the Court ultimately exercised its discretion to decline to grant the AAAI, providing five key reasons for such judgment:

1. Granting an AAAI would impact on the **comity** between the English and Malaysian Courts in a manner that is inappropriate (paragraph 56).
2. Making the order sought would result in **duplicative proceedings** "*with all the problems and expense that follows*" (paragraph 57).
3. Euronav **voluntarily submitted to the jurisdiction** of the High Court of Malaysia (paragraph 58).
4. Given Euronav's voluntary submission, BSP is **entitled to invoke the jurisdiction** of the Malaysian Court to protect the jurisdiction of that Court (paragraph 59).
5. Euronav **delayed** in issuing the application and as such "*has been the architect of its own position in the Malaysian proceedings*" (paragraph 60).

The Judge accepted that the discretionary consideration would be weighed differently if the Court of Appeal of Malaysia overturns the decision that Euronav voluntarily submitted to that jurisdiction, so found that the most appropriate outcome was to adjourn Euronav's application with liberty to restore following the final determination of Euronav's appeal before the Malaysian Court of Appeal.

Comment

This case provides useful guidance on anti-suit injunctions and dealing with cross-jurisdictional conflicts between arbitration and litigation.

It demonstrates the ways in which party conduct can impact on an application for a discretionary remedy. In particular in the context of anti-suit injections, it is a reminder of the importance of not (inadvertently) taking steps that could amount to voluntary submission before an unintended court as well as not delaying in bringing an application before the English Court.

Please click [here](#) for a copy of the full judgment.

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³ Paragraphs 33-41

⁴ Paragraphs 42-48

⁵ Paragraphs 49-53