Equitable compensation for failure to comply with arbitration clause (Argos Pereira España v Athenian Marine Ltd, M/V ‘Frio Dolphin’)

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Arbitration analysis: It is not unusual for claims in respect of or arising out of contracts to be pursued by a party which was not in fact a party to the contract in question, but rather has rights derived from that contract. A common situation is where an insurer has indemnified its assured and then seeks by way of assignment to pursue its assured’s claim against its counterparty under the contract. It is well-established law that an insurer in such a situation must advance the claim in accordance with whatever forum clause is contained within the contract. In this case, the commercial court was asked on an appeal against an arbitrator’s award under section 69 of the Arbitration Act 1996 (AA 1996) to determine whether a failure by a party deriving rights from the contract to comply with the applicable forum clause gave rise to a liability for equitable compensation. That question had not previously been determined by the courts. The judge held that such a failure did give rise to a liability for equitable compensation. Written by Paul Toms, barrister at Quadrant Chambers.

Argos Pereira España SL and another v Athenian Marine Ltd [2021] EWHC 554 (Comm)

What are the practical implications of this case?

For contracting parties whose contracts provide either for the jurisdiction of the courts of England and Wales or arbitration in London, the significant implication of this case is that they now have the valuable remedy of equitable compensation where a party deriving rights from the contract wrongly pursues foreign proceedings (whether in court or arbitration).

That remedy is particularly valuable since it is likely to be treated as permitting a party to obtain compensation for all the foreseeable financial consequences caused by the failure to comply with the forum clause just as much as if there had been a failure by the original party to the contract to comply with the forum clause. It is also valuable because other remedies which were already available, such as an injunction or declaration, may not always be available or appropriate and, even if they are, they may not be complied with by the other party.

What was the background?

The owners issued bills of lading for the carriage of frozen fish and squid (‘the goods’) onboard the vessel Frio Dolphin. The bills of lading contained a clause providing that disputes arising under the bills of lading were to be determined in arbitration in London.

The goods were defective on arrival at the discharge port. The consignee of the goods was indemnified by its insurer. While it is not clear from the judgment, it seems that the consignee assigned its rights of suit under the bills of lading to the insurer; alternatively, the insurer was able to bring proceedings in Spain in its own name pursuant to rights of subrogation.

The insurer brought proceedings against Lavinia, the owners' manager and the charterer of the vessel, in Spain. It did so in the mistaken belief that Lavinia was the contracting carrier under the bills of lading and, therefore, the party allegedly liable for the damage to the goods.

Lavinia successfully challenged the jurisdiction of the Spanish courts, but was awarded only part of its costs.

The owners, therefore, pursued in arbitration in London a claim to recover the costs paid by Lavinia but not recovered in the Spanish proceedings.

That claim was advanced on the basis that although the insurer was not a party to the bills of lading and, therefore, could not be liable for damages for breach of contract, it had an equitable obligation to pursue its claim in accordance with the arbitration clause in the bills of lading and that equitable compensation was available for the breach of such an obligation.

The owners further argued that while the loss had been suffered by Lavinia and not the owners, the owners could still recover equitable compensation under the so-called 'transferred loss' principle most recently considered by the Supreme Court in *Lowick Rose LLP (in liquidation) v Swynson Ltd* [2017] UKSC 32.

What did the court decide?

As set out above, it is well-established that where a claimant is not a party to a contract but derives its right of suit from a contract, whether by virtue of an assignment or some statutory provision or otherwise, then the claimant must bring its claim in accordance with the forum clause in the contract.

It is further well-established that if such a claimant does not bring its claim in accordance with the forum clause in the contract, then an injunction can be obtained to prevent the claimant from pursuing proceedings in breach of the forum clause.

However, what had not been determined until this case is whether a party in the owners' position could also bring a claim for equitable compensation. An ordinary claim for damages for breach of contract is not available in such a situation since the claimant is not a party to the contract.

The judge held that there was nothing in the authorities which prevented such a claim from succeeding, and considered that the submissions made on behalf of the owners were powerful and logical.

In particular, it was accepted that if there was no entitlement to claim equitable compensation, then a party to a contract could assign its rights to a related company so that the assignee could sue in the non-contractual forum without risk of compensation and that the absence of such an entitlement would encourage forum-shopping. The court also accepted that an injunction may not be available or of any effect or recognised and, indeed, that commercial or time pressure may not permit an injunction to be obtained.

Finally, the court held that the principle of transferred loss applied. The arbitrator had held that, on its proper construction, the arbitration clause extended to claims brought not only against the

owners but also against Lavinia. The insurer was refused permission to appeal against that finding under AA 1996, s 69. In the light of that finding, the court held that the 'known object' of the arbitration clause was to benefit Lavinia and that the anticipated effect of a breach of equitable duty was to cause loss to Lavinia. The court further held that—but for a claim by the owners—there would be a 'black hole' since Lavinia had no entitlement itself to claim the costs that were not recovered in the Spanish proceedings. As to that final point, the court did, however, leave open the possibility that a party in Lavinia's position might be able to recover damages in lieu of an injunction under section 50 of the Senior Courts Act 1981 in the event that an injunction was an available remedy and had been sought.

As a result, the owners were held entitled to claim all of Lavinia's irrecoverable costs of the Spanish proceedings.

Case details:

- Court: Commercial Court (Queen's Bench Division), Business and Property Courts of England and Wales, High Court of Justice
- Judge: Sir Michael Burton GBE (sitting as a judge of the High Court)
- Date of judgment: 10 March 2021

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