PRESTIGE OIL SPILL AFTERMATH CONTINUES TO LINGER

26 OCTOBER 2023 • ARTICLE

Over 20 years after the MT Prestige (the "Prestige") split in half and sank, releasing 77,000 MTs of heavy crude oil onto the Spanish and French coasts, the aftermath continues to preoccupy the courts.

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The recent judgments in *London Steamship Owners' Mutual Insurance Association (The "Club") v The Kingdom of Spain (2023)* EWHC 2473 and *The French State v London Steamship Owners' Mutual Insurance Association Ltd (2023)* EWHC 2474 relate to challenges arising from the quantum judgment of the La Coruña Provincial Courts of ordering the Club to pay France up to €117m and Spain up to €2.355bn subject to an overall limit of US$1bn to which the Club was entitled to limit non-CLC claims.

BACKGROUND

The Club was the Prestige's P&I insurer and had been sued in Spain (together with the Master and owners) by both Spain and France directly under Article 117 of the Spanish Civil Code as the owners' liability insurers. In 2013, the Club commenced arbitrations in London against France and Spain, relying on the arbitration agreement in its rules whilst the Spanish proceedings were still ongoing.

Two separate arbitration awards were issued in 2013 making negative declarations in favour of the Club against France and Spain that each was bound by the arbitration clause in the Club's Rules. Further pursuant to the "pay to be paid" rule in the rules, the owner had to pay France and Spain in full before a claim for indemnity could be brought against the Club, whose liability was further subject to a global limit of US$1bn.

The Club applied to register both awards as judgments under s.66 Arbitration Act ("AA") 1996. Enforcement was resisted by France and Spain, with both challenges failing in the High Court (*Prestige (No. 2) (2014) 1LLR 309*) and on appeal (*Prestige (No. 2) (2015) 2 LLR 33*).

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Following the Spanish Supreme Court's decision in 2016 that the Master, owners and Club were liable up to US$1bn , the Club issued further arbitration proceedings in 2019 against France and Spain separately, seeking a declaration that both were in breach of their obligation to arbitrate claims against the Club, making claims for equitable compensation and contractual damages, and seeking an injunction to restrain them from breaching the obligation to arbitrate with damages in lieu.

Meanwhile, Spain sought to register the Spanish quantum judgment in England under Article 34 of Regulation No 44/2001 (the Brussels Regulation). Once the Spanish judgment was registered, the Club appealed against the registration order which was heard together with applications from the states to set aside the two new 2023 arbitration awards.

In both of these arbitrations, the respective arbitrators issued two partial awards in 2023. Regarding Spain, the award (in simple terms) declared it to be in breach of its obligation to pursue its claim by arbitration in London in seeking to enforce Spanish judgments and that if Spain, through enforcement outside Spain, obtained a monetary judgment from the Club, it should indemnify the Club in the same amount. Regarding France, the award was in broadly similar terms.

The two aforementioned judgments were handed down on 6 October 2023. The French judgment (EWHC 2424) is a s.69 AA 1996 appeal against the partial awards issued in 2023 which also sought an extension of time to appeal. The Spanish judgment determines the Club's appeal against Spain's s.66 AA 1996 judgment and various challenges under ss 67, 68 and 69 AA 1996 against the partial awards.

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FRENCH JUDGMENT

France argued that the first partial award was not an "award" as it was not a complete decision given it lacked finality since the arbitrator only indicated the relief that she was minded to grant (and did in the second partial award). The Court, however, held that the first partial award *was* an award as it was called such, it decided the substantive rights and liabilities of the parties and matters on a concluded view and only left over limited issues for later determination including relief and costs. Applying well-known tests for extension of time in Kalmneft,[2] the Court refused to extend time for two of the four grounds but granted an extension of time for applications to determine whether a tribunal has power under s.48(5) AA 1996 to grant an injunction against a state and whether there was power to award equitable compensation. The delay of three months after the 28-day period granted for a s.69 appeal, was described as "substantial".

The Court held on the first ground that the tribunal lacked the power to grant an injunction against France subject to one unresolved point (on which a decision was deferred) in the absence of consent by the state; s. 13(2) State Immunity Act[3] restricted the power of the Court to grant an injunction against the state and that likewise there was no power conferred on an arbitrator under s. 48(5) AA 1996. On the second ground, relating to equitable compensation, the Court held the tribunal did have power to award compensation for breach of the equitable obligation to arbitrate (given neither states were Club members) and there was no principled distinction to be made between a party exercising rights by virtue of assignment or subrogation and one exercising rights by direct action. Both parties could be bound by an arbitration clause in the contracts.[4] The appeal under the second ground was dismissed.

SPANISH JUDGMENT

The applications brought by Spain (determined in EWHC 2473) are more numerous and complicated by the impact of a reference to the CJEU.[5] The judgment addresses both the Club's appeal against the s. 66 AA 1996 registration of the Spanish judgment and Spain's applications against the 2013 awards. In a 22 June 2022 judgment, the CJEU concluded that the English s.66 judgments enforcing the awards against Spain could not prevent the recognition in England under Article 34(3) of the Brussels Regulation of a judgment of a member state i.e., the Spanish judgments.

The issue for the English Court in respect of the Club's appeal was whether the English s. 66 judgments were irreconcilable with the Spanish judgment.

The Court held that the Club's appeal against the registration of the Spanish judgment in England succeeded on the basis of irreconcilability. It further held the two judgments were irreconcilable since the owners of the Prestige had not paid Spain, thus under the English s.66 judgments, the Club was not liable to Spain. In contrast, the Spanish judgment held the Club *was* liable to Spain. The Court found that there was an issue estoppel arising from *The Prestige (No. 2) (2014) 1LLR 309* judgment which had entered the s.66 judgment based on the 2013 award, having rejected the contrary argument that doing so contravenes the Brussels Regulation as the regulation was expressly not applicable to arbitration.

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On the premise that the English and Spanish judgments were irreconcilable, the Court then considered whether Article 34(3) of the Brussels Regulation prevented recognition of the Spanish judgment.

The Club made numerous arguments that its appeal should succeed.[6] One being that it would be against public policy to recognise and enforce the Spanish judgment as contrary to the rule on res judicata. The Court held that the Club could rely on res judicata to resist enforcement of the Spanish judgment since the former was inconsistent with the 2013 award.

In addition, Spain made applications under s. 67, 68 and 69 AA 1996 in relation to the 2023 first partial award which were dealt with in the same judgment.

The s. 67 application to set aside the award in its entirety was based on the CJEU judgment which Spain argued did preclude the arbitrator from having jurisdiction. The Court held it was satisfied the arbitrator had jurisdiction to determine the claims and Spain could not go behind the determination of the Court of Appeal in the *Prestige Nos. 3 and 4.*[7]

As for the s.69 application, Spain advanced four grounds of appeal, being that the tribunal:

- misinterpreted the CJEU judgment;
- misdirected itself in not regarding itself as bound by the CJEU's determination of EU law;
- lacked the power to grant injunction relief against Spain; and
- erred in awarding equitable compensation in circumstances where the case fell outside those established by authority under s. 50 Senior Courts Act ("SCA").

Regarding the first two grounds, the Court found that the judgment did not touch on whether Spain was bound to arbitrate and, since arbitration clauses are outside the scope of the Brussels Regulation, the tribunal's jurisdiction was unaffected.

As to the tribunal's power to award equitable compensation, the Club argued the tribunal had power to award compensation for Spain's breach of its equitable obligation to arbitrate disputes with the Club. The tribunal awarded compensation for the breach but, in its discretion, did not grant an injunction but damages in lieu under s. 50 SCA.[8] The Court held the arbitrator could award equitable compensation since, had the insured been in breach of its contractual obligation to arbitrate, damages could have been awarded meaning a monetary remedy for breach of the equitable obligation by Spain was due. This would require an incremental development in the availability of equitable compensation since it could not have remained in the same narrow form because at the time Lord Cairns' Act (repealed in 1893) came into force therefore limiting to a narrow category of breaches. This extension of a monetary remedy for breach of the obligation to arbitrate by a party exercising derived rights (and thus not in breach of contract) is both novel and welcome.

On the last ground, the Court held the tribunal lacked the power to grant an injunction under s.48(5) AA 1996 but declined to make a ruling pending the Court of Appeal's hearing in The Resolute[9] later this year.

These recent judgments may well be appealed. The availability of equitable compensation beyond established categories would benefit from the scrutiny of a higher court. Although post-Brexit, the Brussels Regulation and Brussels Recast Regulation no longer apply (save for pending cases) after 31 December 2020, the New York Convention continues to apply to permit recognition and enforcements of Convention awards inter alia between the UK and EU members. Further, following the Brexit transition period, English Courts can issue anti-suit injunctions once more to restrain breaches of an arbitration agreement.[10]

FOOTNOTES

[1] *"Fanti" and Padre Island No. 2 (1990) 2 LLR 181* where both owners had become insolvent, *Jay Bola (1997) 2 LLR 279*, *the Hari Bhum (No. 1) 1 LLR 206* and *Yusuf Ceprioglu (2016) EWCA civ 386* where the Court characterized the direct action statute in Turkey as allowing the claimant essentially to enforce the same contractual obligations as the insured could have done rather than exercising a new and independent right created by statute.

[2] *Kalmneft v Glencore International Ltd (2002) 1 LLR 128*

[3] The same point occurred in *UK P&I Club v Republica Bolivariana de Venezuela (The Resolute) (2022) 1 WLR 466* on appeal to Court of Appeal in December 2023

[4] *Jay Bola (1997) 2 LLR 279*

[5] Court of Justice of the European Union

[6] The discussion of the arguments and counter-arguments takes up 200 paragraphs of the judgment.

[7] *M/T Prestige Nos. 3 and 4 (2020) EWHC 1982 and (2020) EWHC 1920 and on appeal (2021) EWCA civ 1989*

[8] Equitable compensation should not be confused or elided with equitable damages. Equitable compensation is available for example for breach of fiduciary duty and is assessable at date of trial. Damages in lieu of an injunction under s.50 SCA are assessable at date of breach and in the same manner as common law damages.

[9] See footnote [3] above

[10] The Brussels Regulations *(West Tankers Inc v Allianz SPA (2009) 1 AC 1138)* and Brussels Recast *(Nori Holding v Public Joint Stock company Bank Otkritie Financial Corporation (2018) EWHC 1843* deemed ASJ incompatible with the Regulation and Recast

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