Neutral Citation Number: [2013] EWHC 1276 (Comm)

Case No: 2013 FOLIO 97

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**COMMERCIAL COURT**

Royal Courts of Justice
Rolls Building,Fetter Lane, London, EC4A 1NL

Date: 20/05/2013

**Before** :

**MR JUSTICE HAMBLEN**

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**Between :**

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| **ECOM AGROINDUSTRIAL CORP. LTD** | **Claimant** |
| **- and -** | |
| **MOSHARAF COMPOSITE TEXTILE MILL LTD** | **Defendant** |

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**Mr Luke Pearce** (instructed by **Davies Battersby)** for the **Claimant**
**Defendant not represented**

Hearing dates: Friday 10 May 2013

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# Approved Judgment

**Mr Justice Hamblen :**

## Introduction

1. By an arbitration claim issued by the Claimant on 22 January 2013 the Claimant claims injunctive and declaratory relief relating to proceedings which have been commenced by the Defendant in Bangladesh, on the ground that those proceedings were commenced in breach of an arbitration agreement.

2. The Defendant has not acknowledged service of the claim form, or taken any other part in these proceedings, and did not appear at the hearing.

## Background

3. The background to the claim is set out in the first witness statement of Patrick Battersby.

4. The claim arises out of a contract for the sale of Brazilian Raw Cotton dated 31 January 2011, under which the Claimant was the Seller and the Defendant was the Buyer (the "Contract").

5. The Contract contained the following material terms:

| | |
|---|---|
| "Quantity | About 1,500 metric tons |
| Quality | Brazilian Raw Cotton 2011 Crop |
| | ... |
| Shipment | July, August, September 2011 Equally |
| | ... |
| Price | 189.50 US cents / lb. |
| Reimbursement | By irrevocable and confirmed Letter of Credit (L/C) available by sight payment, opened by an A-1 bank approved by sellers before opening, in favour of a negotiating bank nominated by sellers. |
| | … |
| Rules | This contract incorporates the Rules and By-laws of the International Cotton Association in force at the time this contract was entered into. All disputes will be settled amicably or will be referred to arbitration in accordance with the Rules and by-laws of the International Cotton Association and shall be resolved by the application of English law. |
| Arbitration | ICA arbitration for any technical and quality disputes |
| | ... |
| | LC Opening: July LC by 20th June, August LC by 21st July 11, September LC by 21 August 2011 otherwise CC's to apply. |

GENERAL CONDITIONS UNLESS OTHERWISE MENTIONED OVERLEAF

> ...
> 12. GENERAL:
> This contract ... is subject to the Rules of the Cotton Association mentioned therein – any dispute shall be settled according to these Rules."

6. Pursuant to the contract the Defendant was meant to open a letter of credit for the first shipment by 20 June 2011. The Defendant failed to open a letter of credit by that date or at all. The reason given by the Defendant was that the price of cotton had fallen since the conclusion of the Contract, and it was therefore unable to fulfil its commitments.

7. On 22 November 2011, following an unsuccessful attempt to reach an amicable solution to the dispute, the Claimant wrote to the Defendant declaring that it was holding the Defendant in breach of the Contract, and intended to commence arbitration forthwith.

8. Accordingly, on 28 November 2011, the Claimant commenced arbitration against the Defendant pursuant to the rules of the International Cotton Association ("ICA") claiming damages against the Defendant for breach of contract. The quantum of the claim is stated to be US$3,475,948.72.

9. The Defendant did not take part in the arbitration. Instead, on 19 January 2012, and without warning to the Claimant, the Defendant issued proceedings against the Claimant (and certain others) before the First Court of Joint District Judge, Dhaka (the "Bangladeshi proceedings"). In the Bangladeshi proceedings, the Defendant seeks a declaration that the Contract is illegal and void, and has no binding effect on the Defendant, and/or that the Contract has been frustrated by virtue of the fact that it was impossible to set up a letter of credit, together with a permanent injunction restraining the Claimant from pursuing any claim or proceedings in respect of the Contract before the ICA or elsewhere.

10. Also on 19 January 2012, at the same time as issuing the Bangladeshi proceedings, the Defendant applied for and obtained an interim anti-suit injunction from the Bangladeshi court to restrain the Claimant from pursuing any claim in relation to the Contract.

11. The Defendant's case in the Bangladeshi proceedings is founded upon certain provisions of Bangladeshi law which are said to restrict the import of cotton into Bangladesh for a price which is higher than the then prevailing market price. In particular, it is said that Bangladeshi law precluded the Defendant's bank from opening up a letter of credit in the Defendant's favour, and that performance of the Contract was therefore impossible. In addition, the Defendant contends that the payment of US$3,475,948.72 which is claimed by the Claimant would be payment without any consideration and is against the public policy of Bangladesh by virtue of s.23 of the Contract Act; and that such payment would result in its liquidation, causing injustice and is (apparently for that reason) illegal.

12. The Defendant also contends in the Bangladeshi proceedings that the dispute between the parties does not fall within the arbitration clause in the Contract, on the ground that it is not a "technical or quality dispute". The Defendant goes on to say that the

Bangladeshi court has jurisdiction, on the basis that the cause of action arose at the offices of the Defendant in Bangladesh.

13. On 18 June 2012 the Clamant filed an appeal in the Bangladeshi court against the interim injunction. The principal ground of appeal is that the Bangladeshi court should not have granted the order because of the existence of the arbitration agreement. Despite various attempts on behalf of the Claimant to have the appeal listed, the appeal has not yet been heard and no date has been fixed for it to be heard in the near future. Indeed the evidence of Mr Battersby at paragraphs 28-9 of his first witness statement is that it may take several years before the Bangladeshi proceedings can be fully disposed of via the procedural routes available in Bangladesh. In April 2012 the Claimant filed a Written Statement setting out its objections to the jurisdiction of the Bangladeshi court as well as its defence to the claims made.

14. In the meantime, in light of the interim injunction granted by the Bangladeshi court, the Claimant has taken no further steps in the ICA arbitration, which is effectively on hold pending the disposal of those proceedings.

15. Against the above background, on 22 January 2013, the Claimant issued the present Commercial Court proceedings. In summary, the Claimant claims:

    (1) An injunction to (a) prohibit the Defendant from taking any further steps in the Bangladeshi proceedings (save to discontinue them), or from commencing any further proceedings in relation to the Contract; and (b) order the Defendant to take immediate steps to discontinue the Bangladeshi proceedings; and

    (2) Declarations that:

        (a) The Defendant is obliged to arbitrate all disputes relating to the Contract;

        (b) The Defendant is obliged to bring any challenge to the substantive jurisdiction of the Tribunal or to the validity of the arbitration agreement contained in the Contract (if and to the extent that this is still permissible) before the Tribunal or before this Court in the exercise of its supervisory jurisdiction;

        (c) The Bangladeshi Proceedings against the Claimant constitute a breach of the Contract.

16. At the time the claim was initiated the Claimant anticipated that it would apply for an interim injunction to 'hold the ring' pending the final determination of the arbitration. However, in the event, given that the Defendant has chosen not to appear it has been possible to have the claim listed for final determination at an early stage, as directed by order of Cooke J dated 25 March 2013, pursuant to which the claim has been listed for a hearing in the absence of the Defendant.

**The claim for an anti-suit injunction**

(i) The law

17. The basic principles governing the grant of an anti-suit injunction in this context are well settled.

18. The jurisdiction to grant a final injunction to prevent the breach of an arbitration clause is provided by section 37(1) of the Senior Courts Act 1981, which confers upon the Court a general power to grant injunctions "in all cases in which it appears to the court to be just and convenient to do so" - see *The Epsilon Rosa* [2003] 2 Lloyd's Rep 509 (CA), para 40; see also *AES Ust-Kamenogorsk Hydropower Plant v Ust-Kamenogorsk Hydropower Plant JSC* [2012] 1 WLR 920 (CA), paras 61-63.

19. Where foreign proceedings are brought in breach of an arbitration clause, the court will "ordinarily" grant an anti-suit injunction to restrain those proceedings unless there are "strong reasons" not to do so. The burden of proof is on the party in breach of the arbitration clause to show that there are strong reasons why an injunction should not be granted. The Court is not obliged to exercise any particular caution before granting the injunction - see *The Angelic Grace* [1995] 1 Lloyd's Rep 87, 96; *Donohue v Armco* [2002] 1 Lloyd's Rep 425 (HL) para 24 (Lord Bingham), 53 (Lord Scott); Raphael, *The Anti-Suit Injunction* (2008) para 7.09.

20. Although anti-suit injunctions are usually in prohibitive form, in appropriate cases the court will also grant a mandatory anti-suit injunction requiring the injunction defendant to discontinue foreign proceeding - see Raphael, *The Anti-Suit Injunction*, para 3.18 and the cases at footnote 55. An example of such a case is the House of Lords decision in *Turner v Grovit* [2002] 1 WLR 107.

21. Where, as in the present case, the foreign defendant is itself seeking (or has obtained) an anti-suit injunction, and thus the Court is asked to grant an anti-anti-suit injunction, caution is called for (see *Raphael*, para 5.49; see also *General Star International Indemnity v Stirling Brown* [2003] Lloyd's Rep IR 719, para 16). However, where the foreign proceedings are brought in breach of an exclusive jurisdiction or arbitration clause, anti-anti-suit injunctions are frequently granted – see, for example, *Sabah Shipyard v Government of Pakistan* [2003] 2 Lloyd's Rep 571, paras 40-42; *Goshawk v ROP* [2006] EWHC 1730 (Comm)).

(ii) Whether the Bangladeshi proceedings are a breach of the arbitration clause

22. The first question is whether the Bangladeshi proceedings are a breach of the arbitration clause.

23. The starting point is the "Rules" provision in the Contract, which provides as follows:

> "This contract incorporates the Rules and By-laws of the International Cotton Association in force at the time this contract was entered into. All disputes will be settled amicably or will be referred to arbitration in accordance with the Rules and by-laws of the International Cotton Association and shall be resolved by the application of English law." (emphasis added)

24. The parties' agreement is therefore that "all disputes" under the Contract shall (if they cannot be settled amicably) be referred to arbitration under the ICA rules. As a matter of the natural and ordinary meaning of the wide words used, the underlying dispute

between the parties in the present case clearly comes within the terms of that broadly drawn arbitration agreement.

25. That provision is further bolstered by clause 12 of the Contract, which provides that "any dispute" under the Contract shall be settled according to the Rules of the ICA. Those Rules in turn provide (by Bylaw 201) that: "All disputes relating to the contract will be resolved through arbitration in accordance with the Bylaws of the International Cotton Association Limited."

26. In the Bangladeshi proceedings the Defendant contends that the underlying dispute between the parties does not fall within the scope of the arbitration. In particular, the Defendant refers to the "Arbitration" provision which states that "ICA arbitration for any technical or quality dispute". The argument is that the dispute between the parties is not a "technical or quality dispute", and it follows that the arbitration clause does not apply to it.

27. Under the Rules and By-laws of the International Cotton Association, all disputes that may arise under a contract are categorised as either "quality" disputes or "technical" disputes. Quality disputes relate to "manual examination of the quality of cotton and/or the characteristics which can only be determined by instrument testing". Every other dispute is categorised as a "technical" dispute - see Bylaw 300. It follows that, when the parties agreed to refer "any technical or quality dispute" to arbitration, that was simply another way of saying that "all disputes" would be referred to arbitration (as stipulated by the other provisions in the Contract).

28. The Defendant also appears to contend that the arbitration clause does not apply to the dispute because the Contract has been frustrated or is otherwise invalid. As a matter of English law, that contention is wrong. Even if there were any merit in the Defendant's frustration or illegality arguments (which is denied by the Claimant), that would have no effect on the arbitration clause, the existence and validity of which is treated as being entirely separate from the underlying Contract (see s.7 of the Arbitration Act 1996).

29. As a matter of English law, being the agreed governing law, in my judgment it is clear that the underlying dispute between the parties is subject to the arbitration agreement in the Contract, and the commencement of the Bangladeshi proceedings amounted to a breach of the Contract by the Defendant.

(iii) Are there strong reasons not to grant the injunction?

30. Given that there has been a clear breach of the arbitration agreement, the only question which remains is whether there are "strong reasons" not to grant the injunction sought by the Claimant. The Claimant submitted that there are not.

31. Although the burden of showing strong reasons not to grant the injunction is on the Defendant, and the Defendant has adduced no evidence to discharge that burden, at paragraphs 52-55 of his first witness statement Mr Battersby nevertheless considers the possible arguments which might have been raised by the Defendant if it were represented, in opposition to the injunction. These are considered in turn below.

32. The first point that might have been taken by the Defendant is that the injunction should be refused on the basis that the Bangladeshi court is the more appropriate forum to hear the dispute, because of the nature of the arguments run by the Defendant in Bangladesh, which raise principles of Bangladeshi law and public policy. However, that would not be a good reason to refuse to grant the injunction in circumstances where the Defendant has agreed that all disputes under the Contract should be submitted to arbitration, under English law. Indeed the fact that the Defendant is asking the Bangladeshi court to apply Bangladeshi law to the dispute in the face of a clear agreement for English law to apply may be said to be a factor weighing in favour of the grant of an injunction - see *Shell v Coral* [1998] 1 Lloyds Rep 72, 78. In such circumstances, it would not be open to the Defendant to rely on principles of *forum conveniens* to resist the application for an injunction. If the Defendant wishes to rely on any provisions of Bangladeshi law in opposition to the Claimant's claim for damages, the place to do so is before the tribunal.

33. Second, the Defendant might have contended that the Claimant should have applied for an anti-suit injunction earlier. As outlined above, the Bangladeshi proceedings were commenced on 19 January 2012, about one year before the present claim was issued. However, as explained by Mr Battersby at paragraphs 28-29 and 53 of his first witness statement, there were good reasons for the Claimant's delay, namely that it thought it might be able to deal with the Bangladeshi proceedings more quickly and efficiently in the Bangladeshi courts themselves, by appealing the order for an interim injunction. In the event, that has not proved possible, hence the need for the present proceedings. No prejudice, however, has been caused to the Defendant by the delay in the meantime. As explained by Mr Battersby, in the year since the injunction was granted by the Bangladeshi court, nothing has happened in the Bangladeshi proceedings.

34. Third, it might be said that the Claimant has submitted to the jurisdiction in Bangladesh by filing its appeal against the interim injunction. That would not appear to be so. The basis of the appeal is that the injunction should never have been granted, and indeed the Bangladeshi proceedings should never have been commenced, since the dispute is manifestly governed by an arbitration clause. That is also the position adopted in the Written Statement. That is entirely consistent with the position taken by the Claimant in the present proceedings. The Claimant in any event, submits that even if it had (contrary to its primary case) submitted to the jurisdiction in Bangladesh by filing its appeal, that would still not amount to a strong reason against the grant of the present injunction (see e.g. *Bank of New York v GV Films* [2010] 1 Lloyd's Rep 365, paras 18-23).

35. Fourth, it might be asked whether comity requires that the English court refuse to grant the injunction in the present case, in circumstances where the Bangladeshi court has already granted an anti-suit injunction against the Claimant which arguably extends to the present proceedings. This issue was considered by the Court of Appeal in *Sabah v GOP* [2003] 2 Lloyd's Rep 571, para 40, where Waller LJ said as follows:

> "If there was an injunction in place that would clearly be a relevant matter and the English Court would clearly prefer not to be thought to be aiding a contemnor. But where the obtaining of the injunction was itself a breach of contract, and was seeking to prevent a party exercising its contractual right to

> bring proceedings in the English Court, the English Court must at least allow the proceedings to be commenced in its Courts. It does not necessarily follow that the English Court should grant an injunction to prevent proceedings in the foreign Court, but again the existence of the foreign injunction should not prevent it doing so, if the very obtaining of that injunction can be seen to have abused the rights of the litigant with the contractual right to come to England…"

36. The present case is stronger than the *Sabah* case, since it contains an exclusive forum clause, whereas the English jurisdiction clause in the *Sabah* case was a non-exclusive one. In circumstances where the Defendant is bound by an arbitration clause, it is an egregious breach of contract for the Defendant not only to commence proceedings in a non-contractual jurisdiction but to obtain an injunction from that non-contractual forum to prevent the Claimant from itself vindicating the rights granted to it under the arbitration clause. Whilst the Bangladeshi court order is a relevant factor, where, as here, "the obtaining of the injunction can be seen to have abused the contractual rights of the litigant with the contractual right to come to England" to arbitrate, it is not a factor of any great weight.

37. Finally, the Defendant might say that even if the test for an injunction is otherwise satisfied, it should only be prohibitive in its form, not mandatory. In other words, it should be limited to ordering the Defendant not to take any further steps in the arbitration, but should not go as far as to order the Defendant to discontinue those proceedings. However, while a Court should be more cautious before ordering a mandatory injunction, there is no doubt that the Court is entitled to make such an order in appropriate cases.

38. The Claimant submits that this is an appropriate case because (1) this case concerns a final order and therefore an established breach of contract; (2) it involves an exclusive forum clause; (3) the breach is particularly egregious in that it involves seeking to prevent the Claimant from exercising its contractual rights, and (4) it is necessary for such an order to made because of the interim injunction which is in place. I accept that these reasons justify the making of a mandatory order. In particular, given that the Defendant has already obtained an interim injunction from the Bangladeshi court, for the order to be practically effective it is important that the injunction granted by this Court be in mandatory form.

39. In all the circumstances, there are no strong reasons for the Court not to grant an anti-suit injunction in the present case in the terms sought by the Claimant. On the contrary, there is every reason to grant the injunction.

**The claim for declaratory relief**

40. In addition to the injunctive relief dealt with above, the Claimant claims declarations in the terms set out above.

41. In cases such as the present where foreign proceedings have been commenced in breach of an arbitration clause the Courts have on numerous occasions granted declaratory relief in similar terms to those sought in this case, whether or not injunctive relief is also granted – see, for example, *Through Transport Mutual Insurance Association v*

*New India Assurance* [2004] 2 CLC 1189; *AES Ust-Kamenogorsk Hydropower Plant v Ust-Kamenogorsk Hydropower Plant JSC* [2010] 1 CLC 519 (Burton J), para 20; and see *Raphael*, para 15.07. It is clear that the Court does have jurisdiction to grant such declarations, and the question whether they should do is a matter of the Court's discretion - see the decision of the Court of Appeal in *AES Ust-Kamenogorsk Hydropower Plant v Ust-Kamenogorsk Hydropower Plant JSC* [2012] 1 WLR 920 paras 36, 42, 64-5, 103-105.

42. As to the substance of the declarations, for reasons already given it is clear that Defendant is obliged to arbitrate all disputes under the Contract; that accordingly any challenge to the substantive jurisdiction of the tribunal must be brought before the tribunal itself (or this Court in its supervisory jurisdiction), and not before the Bangladeshi court, and that the Bangladeshi proceedings constitute a breach of the arbitration clause contained in the Contract.

43. As to discretion, the Claimant submitted that the declarations sought would be of assistance to the Claimant, and also potentially to the Bangladeshi Court in the event that the injunction were granted by this Court and the Defendant did not obey it. In addition, it is submitted that the declarations may be of assistance to the Claimant in enforcing any award which is ultimately obtained from the tribunal. I accept that these are good and sufficient reasons for exercising my discretion to make the declarations sought.

**Conclusion**

44. In all the circumstances, in the exercise of my discretion I shall grant the relief sought in the draft order before the court, along with costs.