

Construction Newsletter – How far can you go? Anti-suit injunctions, interim relief and ICC Arbitration Rules: SRS v Chemie Tech

Introduction and background

The ICC Arbitration Rules permit parties to seek interim relief before courts in support of an arbitration. But it is a breach of any exclusive arbitration clause to seek a substantive ruling from a court on issues which should be referred to an arbitration.

Where, then, is the dividing line between interim relief and substantive claims? When will English courts step in with an anti-suit injunction to restrain a claim for substantive relief? These issues were recently considered by the Commercial Court in SRS Middle East FZE -v- Chemie Tech DMCC [2020] EWHC 2904 (Comm).

A dispute between the aforementioned parties is currently subject to arbitration in London in accordance with an exclusive arbitration clause. On 2 November 2020, the Commercial Court granted an interim anti-suit injunction restraining proceedings commenced by the Defendant in the United Arab Emirates despite (at least on the Defendant's case) the fact that this may force the Defendant to relinquish interim relief obtained there (that was itself properly obtained in support of the arbitration, i.e. was not in breach of the arbitration clause).

The contract was for the construction of a tank terminal, but the decision will be of interest to all international arbitration practitioners, not just those with interest in Middle Eastern construction projects. The principles governing the circumstances in which parties to an arbitration seated in London can obtain interim relief in another jurisdiction are of broad application.

The facts

The Claimant (the “**Employer**”) employed the Defendant (the “**Contractor**”) to construct a new tank storage terminal and connect it to existing infrastructure in the Al Hamriyah Free Zone in Sharjah, United Arab Emirates. The contract provided that any “*dispute (of any kind whatsoever) ... between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Employer*” would be resolved by arbitration in London under the ICC Rules.

The Employer had the benefit of a performance guarantee (the “**Guarantee**”) issued by Orient UNB Takaful PJSC (“**Orient**”). The Guarantee was governed by UAE law and the ICC 458 Uniform Rules for Demand Guarantees.

Typical construction project disputes arose: the Contractor claimed that it was entitled to extensions of time and payments for variations, while the Employer purported to terminate the Contractor's employment for delay. The Contractor commenced arbitration in London.

Before the arbitral tribunal was constituted, three sets of proceedings (followed by the present case) were commenced in various courts. Two of them were on their face unobjectionable, but the third was *prima facie* in breach of the

arbitration clause.

1. First, the Contractor sought and obtained from courts in Sharjah interim relief in support of its claims in the arbitration in London (the “**Interim Relief Claim**”). It was entitled to do so under the ICC Rules, because the tribunal was not yet constituted. Article 28(2) of the ICC Rules provides that:

“Before the file is transmitted to the arbitral tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an arbitral tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal.”

Accordingly, the bringing or pursuit of the Interim Relief Claim was not a breach of the arbitration clause.

2. Second, the Employer commenced a claim against Orient based on the Guarantee in the Dubai Court of First Instance (the “**Orient Claim**”). Again, the Employer was plainly entitled to do so. The Orient Claim is between the Employer and a third party, so unaffected by the arbitration agreement between the Employer and the Contractor.
3. Third, (the offending claim) the Contractor commenced a claim for substantive relief in the Sharjah Federal Court of First Instance (the “**Sharjah Claim**”). One unusual aspect of the case is that the London arbitration was commenced by the same party who went on to commence the Sharjah claim, although nothing turns on this. The Contractor’s explanation for commencing the Sharjah Claim was that it had been advised that a procedural rule required it to file an action for the establishment of its substantive rights, otherwise the provisional measures granted in the Interim Relief Claim would become deemed void *ab initio*.

Following the Interim Relief Claim, the Employer required the Contractor to confirm that no substantive proceedings would follow now that there was an ongoing arbitration in London. The Contractor provided no undertaking and went on to commence the Sharjah Claim.

The Employer applied to the Sharjah Federal Court of First Instance asking it to decline jurisdiction over the Sharjah Claim pursuant to Article 8 of the UAE Federal Law on Arbitration on the grounds that there was an arbitration agreement between the parties (the “**Article 8 Application**”). It also brought a claim for a both an interim and a final anti-suit injunction in the Commercial Court in London.

Was the Sharjah Claim necessary to retain interim relief?

Before the English Commercial Court, the Employer argued that both the commencement and the pursuit of the Sharjah Claim were a breach of the arbitration agreement. The Contractor accepted that the substantive claims (and subject matter of the Sharjah Claim) could only be arbitrated in London. However, it opposed the anti-suit injunction on the grounds that if it were restrained from pursuing the Sharjah Claim, it would lose the provisional measures granted in the Interim Relief Claim. Whether this was correct as a matter of UAE law was disputed by the Employer, and in the event seriously doubted, but not decided, by Andrew Baker J.

The decision

Andrew Baker J declined to find that the commencement of the Sharjah Claim was itself a breach of the arbitration

agreement. The court explored an analogy with arrest cases. In such cases, it is well established that an anti-suit injunction compelling the release of a vessel from arrest will not be granted where the sole purpose of the arrest is to obtain reasonable security for the arbitration claim, unless the applicant for the injunction provides alternative security for the substantive claim in arbitration such as a club letter of undertaking or a bank guarantee (The Kallang (No.2) [2008] EWHC 2761 (Comm)). Accordingly, an anti-suit injunction will not be issued to restrain the initiation of proceedings required to invoke the arrest jurisdiction, provided that those proceedings were only initiated for that limited purpose and were not pursued substantively to obtain or retain the benefit of the arrest.

The court declined to accept the Employer's submission that arrest cases were in their own special category, and considered that the mere *institution* of the Sharjah Claim was not a breach of the arbitration agreement, provided that the Contractor was correct that that was necessary to maintain the interim relief obtained.

However, that argument plainly could not be made in respect of the *prosecution* of the claim. The conclusion of the analysis was that *prima facie* a breach of the arbitration agreement was threatened by the continuation of the Sharjah Claim, since "*to do other than give unconditional consent to the Article 8 Application would be to breach the arbitration agreement*" [54(4)]. A good reason would therefore be necessary to refuse the injunction.

The Contractor relied on (among other things) the need to pursue the Sharjah Claim in order to retain the interim relief but offered no expert evidence that UAE law was to that effect. On a review of potentially relevant provisions of UAE law, Andrew Baker J had very serious doubts that it was. Had it been correct, it would not have assisted the Contractor, because the court found that if the Sharjah Claim had to be actively prosecuted (in breach of the arbitration agreement) in order for the interim relief not to lapse, then neither it nor the Interim Relief Claim should have been started in the first place.

The Contractor advanced further alternative arguments based on (i) the Employer's participation in the Interim Relief Claim, and (ii) the Orient Claim. Both points were shortly rejected. There was no basis for saying that the Employer participated in the Interim Relief Claim on the basis that the Sharjah Claim would be issued and actively prosecuted. As for the Orient Claim, that was a matter between the Employer and a third party, and a natural consequence of how performance guarantees operate. Orient's application to join the Contractor to the claim as a third-party defendant to a claim by Orient for indemnity had no bearing on this.

Security

No doubt heartened by the court's rejection of the Employer's primary case, the Contractor argued that by analogy with arrest cases, the anti-suit injunction should only be granted if the Employer provided security for the Contractor's claims in the arbitration, in essence as "replacement" security for the provisional measures obtained in the Interim Relief Claim. That case however was very firmly rejected.

Aside from the fact that the Contractor had not established that it would in fact lose the interim relief it had obtained, there was a more fundamental point. As the court held at [61], "*[the Contractor] has no business demanding from [the Employer] or the court the terms it has demanded,*" for essentially the same reasons for which the argument based on necessity of prosecuting the Sharjah Claim failed. Conditions were unnecessary if the Sharjah Claim could be stayed or abandoned pursuant to the Article 8 Application without relinquishing the provisional measures granted in the Interim Relief Claim, whereas if it could not, then they were inappropriate because the provisional measures should not have been sought in the first place.

No security was ordered. The Contractor was given liberty to apply for fortification of the Employer's undertaking in damages in the usual way, but it was not entitled to "replacement" security for the interim measures it had obtained in the Interim Relief Claim.

Result

The Court granted an interim anti-suit injunction:

1. Restraining the Contractor from taking any step in the Sharjah Claim, save for consenting to the Article 8 Application, and any steps that may be permitted by the arbitral tribunal; and
2. Ordering the Contractor to consent to the Article 8 Application.

Conclusion and practical implications

This is an important case for all international arbitration practitioners. It confirms that if the practical effect of enforcing an arbitration agreement by an anti-suit injunction happens to be that the restrained party is prevented from obtaining or maintaining otherwise unobjectionable interim relief in another jurisdiction, then, as the court succinctly put it at [53], “*so be it*”. This will not provide the required good reason to refuse to uphold the jurisdiction clause in favour of arbitration in London.

The interim relief the Contractor sought and obtained in the Interim Relief Claim appears to have been an order restraining Orient from paying out on the Guarantee, and an order freezing the Employer’s assets up to some \$13 million. It is not clear why the Contractor did not seek from the English court relief of similar practical effect under section 44 of the Arbitration Act 1996. As this case shows, this might have been the preferable course of action for the Contractor in circumstances where it was advised (rightly or wrongly) that at UAE law, any such interim relief would lapse *ab initio* if a substantive claim was not pursued in the Sharjah courts – a problem it would not have faced had it sought interim relief in England.

The full judgment is [available on BAILII](#).

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