Demand Bonds and International Arbitration: The Autonomy Principle Stands Tall

1. In April of this year, the High Court gave judgment in the case of *Shapoorji Pallonji & Company Private Ltd v Yumn Ltd & Standard Chartered Bank* [2021] EWHC 862 (Comm). This was an important decision on the operation of demand bonds, in the broader context of international arbitration.
2. Simon Hale of 4 Pump Court appeared for the Employer, successfully resisting an injunction to restrain a USD 32.2m bond call pending ICC Emergency Arbitration proceedings.
3. The underlying energy project was for the construction of a USD 214m peat-fired power plant in Rwanda, East Africa. The EPC contractor was an Indian company, Shapoorji Pallonji & Company Private Ltd ("**Shapoorji**"). The Employer was Yumn Ltd ("**Yumn**").
4. The project was to be delivered pursuant to a series of contracts, all of which were governed by English law. Under clause 15 of an "Umbrella Agreement", Shapoorji was required to provide an on-demand bond in the amount of 15 per cent of the aggregate contract price: USD 32.2m ("the **Bond**"). Shapoorji procured the Bond from Standard Chartered Bank in London ("the **Bank**").
5. The project agreements between Shapoorji and Yumn all contained agreements to ICC arbitration for the resolution of disputes between them. The seat of the arbitration was Singapore. In contrast, the Bond gave exclusive jurisdiction to the English Courts.
6. The project experienced extensive delays. The cause of those delays was hotly disputed between Shapoorji and Yumn. However, as employer, Yumn levied liquidated delay damages in the sum of around USD 21.8m. It further contended that another breach of contract by Shapoorji entitled it to claim another USD 10.4m. Yumn therefore made a demand on the Bond for these amounts, totalling USD 32.2m ("the **Demand**"). Under the terms of the Bond, the Bank was required to make payment of a valid Demand within 48 hours.
7. Shapoorji's position was that the Demand should not have been made. It initially alleged the Demand was a fraud. It issued urgent injunction proceedings seeking to restrain the Bank from making payment. Yumn issued its own claim, seeking to compel the Bank to pay.
8. Those proceedings came before HHJ Pelling QC sitting in the Commercial Court. By the time of the hearing, Shapoorji no longer maintained its fraud allegations. Instead, it focussed on the legal question of how an English Court should exercise its powers to restrain a bond call, where the underlying dispute to which the bond call related was a dispute that would be resolved in international arbitration.
9. Ordinarily, an application for an injunction to restrain payment by a bank would be made under section 37 of the Supreme Court Act 1981.
10. In that context, English case-law has established that the requirements which have to be met in order for the Court to intervene were onerous. In general, for a Court to restrain a call upon an autonomous demand band, it would need to be satisfied, to an enhanced evidential standard, that:
    - 10.1 there was compelling evidence from which the only realistic inference to be drawn was that the demand was fraudulently made;[1] or
    - 10.2 there was clear evidence that in making its demand on the bond, the beneficiary was in breach of an express obligation contained in the underlying commercial agreement not to make demand other than in defined circumstances.[2]
11. HHJ Pelling QC's distillation of the four typical categories of case that arise in bond enforcement disputes is a particularly helpful summary for practitioners: see *Shapoorji* at [17]-[24].
12. Shapoorji's legal argument was that the formidable obstacles established in the aforementioned authorities relating to applications under section 37 of the 1981 Act simply did not apply to its application. This was because

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it had applied for relief under section 44 of the Arbitration Act 1996, rather than under the Supreme Court Act.

13. It argued that its application was seeking an order in support of arbitration; and in particular, that it was simply seeking to facilitate the hearing of the underlying dispute between Shapoorji and Yumn on an emergency basis, by an ICC Emergency Arbitrator. Shapoorji argued that s/he was the proper Tribunal to consider whether the Demand should be further restrained.
14. It was common ground that an ICC Emergency Arbitrator might apply a less stringent test when considering whether to grant measures in support of arbitration, than would an English Court deciding whether to injunct a bond call. Emergency Arbitrators often apply transnational concepts when considering interim measures in international arbitration, which focus on the preservation of the *status quo* between the parties, as a means of protecting the efficacy of the arbitration process as a whole.
15. Although that was an agreed matter, the central question was whether that arbitral practice made any difference to how the High Court should address the injunction application before it. HHJ Pelling QC found that it did not:
    - 15.1 First, it had been open to Shapoorji to refer the dispute underlying the Demand to an Emergency Arbitrator at any time, but it had not done so. Having failed to do so, it could not now complain that a Demand had been made and the Court had become properly seized of the attempt to enforce it. The Bond plainly gave the Court jurisdiction;
    - 15.2 Second, there was no authority for the proposition that the Court should approach the enforcement a demand bond differently where the underlying dispute was to be resolved in arbitration. On the contrary there was authority pointing the other way: namely, that an application under section 44 of the Arbitration Act 1996 engaged the very same onerous case law and tests as would any other injunction application in this context;[3]
16. The lynchpin principle in these findings is the paramount status of the autonomy principle in English law. It holds that autonomous financial instruments take effect without regard to any underlying dispute that they are connected to. On-demand bonds will be enforced save where fraud is present, or the demand is itself made in plain breach of contract. The High Court's decision makes clear that this is the practice of the English Court regardless of whether that underlying dispute will be fought out in the same Court or international arbitration.
17. The Court therefore dismissed the Shapoorji's application and found that, applying English law principles governing the enforcement of demand bonds, none of the exceptions justifying intervention had been made out. The autonomy principle stands tall.
18. A copy of the full judgment is available here.

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[1] Shapoorji, at [19], and the authorities cited there: Edward Owen Engineering Ltd v Barclays Bank International Ltd [1978] 1 QB 159, applied in United City Merchants (Investments) Ltd v Royal Bank of Canada & Ors [1982] 2 Lloyd's Rep. 1, by Lord Diplock at page 6, and Alternative Power Solution Ltd v Central Electricity Board & Anr [2014] UKPC 31; [2015] 1 WLR 697).

[2] Shapoorji, at [20], and the authorities cited there: Sirius International Insurance Company v FAI General Insurance Limited & Ors [2003] EWCA Civ 470; [2003] 1 WLR 2214 and MW High Tech Projects UK Ltd v Biffa Waste Services Ltd [2015] EWHC 949 (TCC), per Stuart-Smith J (as he then was) at paragraphs 34-37

[3] Shapoorji, at [32], and the authority cited there: Ouais Group Engineering and Contracting v Saipem SpA [2013] EWHC 990 (Comm)

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