Verity Shipping SA (Owners) v NV Norexa [2008] APP.L.R. 02/13

JUDGMENT : Mr. Justice Teare: Commercial Court. 13th February 2008

1. The Claimants have applied to continue an anti-suit injunction granted *ex parte* by Tomlinson J. on 21 December 2007 and continued on 10 January 2008 by Flaux J. The injunction prohibits the Defendants from prosecuting proceedings commenced in Antwerp on 21 January 2005. The Defendants oppose the further continuation of the injunction. Both parties are agreed that it is very desirable that my judgment be given upon the Claimants' application before 15 February 2008.

The parties

2. The Claimants are the Owners and Managers of the vessel SKIER STAR. By a voyage charterparty dated 12 December 2004 the vessel was chartered to Expofrut SA, an Argentinian company, on the 1994 Gencon form for the carriage of fresh fruit, vegetables or other compatible refrigerated cargoes from Campana to Antwerp. Bills of lading were issued in Campana dated 3 January 2005 on the Congenbill 1994 form in respect of a cargo of palletised cartons of fresh grapes and plums.

3. The Defendants claim to be the holders of the bills of lading at the discharge port and the insurers of the cargo. I shall refer to the holders of the bills as the Cargo Interests.

The contract of carriage

4. The bills of lading (headed "to be used with charterparties") stated on their face that freight was payable as per charterparty dated December 12, 2004. On their reverse they stated:
"All terms and conditions, liberties and exceptions of the Charter Party dated as overleaf, including the Law and Arbitration Clause, are hereby incorporated."

5. The voyage charterparty dated 12 December 2004 contained a Law and Arbitration clause which provided:
"This Charter Party shall be governed by and construed in accordance with English law and any dispute arising out of this Charter Party shall be referred to arbitration in London……."

6. There was no dispute that the time limit of one year provided by the Hague Rules or the Hague Visby Rules applied to the contracts of carriage contained in or evidenced by the bills of lading.

The discharge of the cargo

7. The cargo was discharged at Antwerp on 20 and 21 January 2005. The Belgian Federal Agency for Food Safety ("FAVV") condemned the cargo, alleging oil vapour contamination. The cargo is said to have been worth about Euros 2.3m.

The proceedings in Antwerp

8. On 21 January 2005 a surveyor, Captain Desmet of the Nautical Commission, was appointed by the Antwerp Court at the request of the Cargo Interests. On the same day the Antwerp Court Bailiff, Guido Dupont, at the request of the Cargo Interests, served a summons on the Owners alleging that they were liable for the loss of the cargo. Also on that day the vessel was arrested and the Owners' P&I Club secured the Cargo Interests' claim.

9. On 8 February 2005 the claim was introduced before the Antwerp Court and adjourned *sine die* which is usual, pending the production of the surveyor's report.

10. In February and/or March 2005 the Owners started proceedings in Antwerp against FAVV seeking an indemnity in respect of any liability the Owners may have to the Cargo Interests.

11. On 28 February 2005 the Owners' Belgian lawyer Mr. De Paep sent a fax to the Cargo Interests' Belgian lawyer informing him that a writ would be served on FAVV. A copy of the writ was not served on the Cargo Interests and so they were not made aware that the writ stated that Owners *"positively dispute the jurisdiction of the Antwerp Commercial Court as well as the admissibility and the basis of the aforementioned claim, nevertheless in as far as any decision against [the Owners] would be rendered, [FAVV] should indemnify [the Owners]."*

12. On 2 May 2005 the Owners' claim against FAVV was introduced before the Antwerp Court and adjourned *sine die*. At some stage this claim was consolidated with the Cargo Interests' claim against the Owners.

13. In December 2005 the insurers of the cargo were joined in the Antwerp proceedings as co-claimants.

14. The one year limitation period provided by Article III r.6 expired on 21 January 2006.

15. On 18 April 2006 the surveyor published his preliminary report. All parties were given permission to make comments and/or to raise questions in relation to the report by 13 June 2006.

16. By a written request dated 7 June 2006 the Owners sought an extension of time and the surveyor extended the deadline until 11 August 2006. Following a second request by the Owners the deadline was further extended until 14 September 2006.

17. On 31 August 2006 the Owners submitted their comments, asked questions and submitted further documents.

18. On 10 October 2006 the Owners requested a reply to their comments and on 20 October 2006 the court surveyor replied in part and said that other matters would be referred to Professor Van Peteghem of the University of Ghent.

19. On 7 November and 12 December 2006 the Owners reminded the court surveyor that they awaited a reply. On 18 December 2006 the court surveyor replied saying that the professor had indicated that his comments would be available by the end of January 2007.

20. On 7 March 2007 the surveyor disclosed the reply of the professor and closed his file. He submitted his report to the Antwerp Court on 13 March 2007. His report consists of 5 volumes. I was shown a translation of his conclusions which show that he considered such issues as the nature and degree of the contamination, the source of the HFO components which contaminated the cargo, the mechanism by which those components escaped from the bunker tank (a corrosion hole) and the Class history of the vessel including thickness measurements of the vessel's structures.

21. There followed a period of negotiation between representatives of the Owners and Cargo interests which did not result in agreement.

22. On 17 October 2007 the Cargo Interests' Belgian lawyer Mr. De Cocker requested the Court to set down a procedural calendar.

23. On 19 October 2007 the Owners' Belgian lawyer Mr. De Paep wrote to the Court referring to Mr. De Cocker's request for a time table for the submission of briefs and a date for the presentation of oral arguments to be fixed. He said that his clients did not object to "*such procedural schedule*" but asked the Court to take into account that his clients had issued a third party notice against FAVV and that the procedural time table should therefore also allow for pleadings by FAVV.

24. On 27 November 2007 Jackson Parton, the Owners' English solicitors, informed the Cargo Interests that they would seek an anti-suit injunction in England unless the Cargo Interests agreed to withdraw their claim in the Antwerp Court.

25. On 6 December 2007 the Antwerp Court fixed a time table providing for the Owners' defence to be served by 15 January 2008. Further steps in the proceedings were fixed culminating in an oral hearing on 2 December 2008.

26. On 17 December 2007 the Claimant submitted their written points of claim.

The proceedings in London

27. On 21 December 2007 the Owners sought and obtained from the Commercial Court in London an injunction restraining the Cargo Interests from taking any further steps in the Antwerp proceedings and ordering them to discontinue those proceedings on or before 15 January 2008. That date was extended until 15 February 2008 by an order dated 10 January 2008.

The basis of the claim for an anti-suit injunction

28. As a matter of English law disputes arising out of the contracts of carriage contained in or evidenced by the bills of lading in this case are required to be referred to arbitration in London.

29. At present the position in English law is that the Court has jurisdiction to grant an anti-suit injunction to enforce an arbitration clause notwithstanding that the respondent to that application has commenced proceedings in a country in the EU; see ***Through Transport v New India*** [2005] 1 Lloyds Rep. 67 and ***The Front Comor*** [2005] 2 Lloyds Rep. 257. However, the question whether such a jurisdiction is compatible with the Brussels Regulation has been referred to the European Court of Justice by the House of Lords; see ***The Front Comor*** [2007] 1 Lloyds Rep. 391.

30. The grounds on which the Court's discretion to grant an anti-suit injunction to enforce an arbitration clause are to be exercised are clear. Unless the party seeking to proceed elsewhere than in arbitration can demonstrate strong cause or good reason why it should be permitted to break its contract an injunction should issue; see ***The El Amria*** [1981] 2 Lloyds Rep. 119 and ***The Angelic Grace*** [1995] 1 Lloyds Rep. 87.

The Cargo Interests' Submissions

The risk of inconsistent decisions

31. The first *"strong cause or good reason"* suggested by counsel for the Cargo Interests is that there is a risk of inconsistent decisions between the arbitration in London and the Antwerp Court. That is because there are proceedings between the Owners and FAVV in Antwerp in which the Owners effectively seek an indemnity in respect of any liability they might have to the Cargo Interests. FAVV cannot be a party to the London arbitration.

32. The Owners' response to that argument is that if there is such a risk that is a risk that the Owners are willing to take as the price of enforcing the London arbitration clause.

33. A risk of inconsistent decisions is a factor which has generally been accorded significance in cases where exclusive jurisdiction or arbitration clauses are sought to be enforced. Thus in ***The El Amria*** [1981] 2 Lloyds Rep. 119 at p.128 Brandon LJ referred to the risk of the same issues being decided differently in two tribunals as *"a potential disaster from a legal point of view"*. That was a case in which cargo owners, seeking to sue ship owners in England in breach of an exclusive jurisdiction clause, had also commenced an action in England against the Mersey Docks and Harbour Board because the shipowners had contended that the damage to the cargo had been caused by slowness in discharge. In such a case the third party, the Mersey Docks and Harbour Board, as well as the cargo owners, were at risk of an injustice resulting from inconsistent decisions. Subsequent decisions have confirmed the significance of this factor; see ***Donohue v Armco*** [2002] 1 Lloyds Rep.425 at pp.433-5 (per Lord Bingham):

"The authorities show that the English Court may well decline to grant an injunction or a stay, as the case may be, where the interests of parties other than the parties bound by the exclusive jurisdiction clause are involved or grounds of claim not the subject of the clause are part of the relevant dispute so that there is a risk of parallel proceedings and inconsistent decisions."

34. In the present case the Cargo Interests will not suffer an injustice in the event that they succeed in the London arbitration and the Antwerp Court, in the recourse action by the Owners against FAVV, later reaches a decision inconsistent with decision in the London arbitration. By contrast, the Owners may suffer an injustice in that event, but they are willing to take that risk as the price of enforcing the London arbitration clause. However, the third party, FAVV, may suffer an injustice from inconsistent decisions if the Cargo Interests succeed in the London arbitration but FAVV are found liable to the Owners by the Antwerp Court. This is not an unrealistic consideration. The Club's summary of the surveyor's provisional findings is that the cause of the loss was the "*unreasonable rejection of the entire cargo by FAVV.*" If the London arbitration were to conclude that the loss of the cargo was caused by the Owners' breach of contract the Owners may well urge the Antwerp Court to find that the loss was caused by the unreasonable behaviour of FAVV.

35. Thus, although the Owners are prepared to take the risk of inconsistent decisions, the risk of injustice to the third party, FAVV, means that the risk of inconsistent decisions remains a reason in favour of refusing an anti-suit injunction. If the Antwerp Court tries both the Cargo Interests' claim against the Owners and the Owners' recourse claim against FAVV there will be no risk of inconsistent decisions and no risk of injustice to the third party.

Delay

36. The second "*strong cause or good reason*" suggested by counsel for the Cargo Interests is that the Owners waited until December 2007 to seek an anti-suit injunction in circumstances where they knew in January 2005 that the Cargo Interests were proceeding against them in Antwerp in breach of the London arbitration clause.

37. In ***The Angelic Grace***]1995] 1 Lloyds Rep.87 at p.96 Millet LJ said that the English Court need feel no diffidence in granting an anti-suit injunction "*provided that it is sought promptly and before the foreign proceedings are too far advanced.*" The importance of proceeding without delay was emphasised by Mance J. in ***Toepfer v Molino Boschi*** [1996] 1 Lloyds Rep.510. That was perhaps an extreme case where there had been a delay of 7 years in seeking an anti-suit injunction during which time the parties had exchanged exhaustive memoranda under Italian law and procedure regarding jurisdiction, arbitration and the merits. But Mance J.'s comments illustrate that a party who wishes to enforce a jurisdiction clause should apply promptly once he is aware of a breach of the arbitration clause:

"Faced with what they have always submitted was a clear breach of an agreement remitting any relevant disputes to English arbitration and giving exclusive jurisdiction to the English Court on matters not so remitted, it was in my view incumbent on Toepfer to investigate and raise the possibility of taking relevant steps in England to rectify the position long before September or May 1995, if they wished to take any such steps at all."

38. In the present case it was said that although the Owners were aware in January 2005 that the Cargo Interests were taking proceedings against them in Antwerp the Owners did not seek an anti-suit injunction from the English Court until December 2007. They joined FAVV in the Antwerp proceedings and participated in the court survey process. The Antwerp proceedings progressed to the point where the surveyor's final and substantial report had been published and the Antwerp Court had given directions for the Cargo Interests, Owners and FAVV to plead their cases and to prepare for an oral hearing in December 2008. It was only at this late stage, in December 2007, that the Owners sought an anti-suit injunction from the English Court.

39. The Owners said in response that in Antwerp they did not have to register their objection to the jurisdiction until after the court survey process had been completed. It could not be said in Antwerp that the Owners' participation in the proceedings had waived their objection to the jurisdiction or had amounted to a submission to the jurisdiction. The survey process was *"jurisdiction neutral*". Once the survey process had been concluded, settlement talks had failed and the Cargo Interests had requested the Court to set a procedural time table leading to trial, the Owners promptly sought an anti-suit injunction from the English Court.

40. I accept that when analysing the position in Antwerp one must do so having regard to the law and procedure in that court. Thus I accept that the Owners are free to challenge the jurisdiction of the Antwerp Court notwithstanding their participation in the Antwerp proceedings to date. However, when Owners seek an anti-suit injunction from the English Court it is necessary to have regard to the principles on which that remedy is granted by the English Court. One such principle is that the remedy should be sought promptly and before the foreign proceedings are too far advanced.

41. There is no dispute that the Owners were aware of the London arbitration clause from the beginning. Mr. Parton, the English solicitor acting on behalf of the Owners, has said: *"My clients and their advisers were fully aware of the arbitration clause throughout. ……..It was always the intention to raise it if and when the Antwerp proceedings went beyond the court surveyor stage. There was neither obligation nor purpose in raising it earlier."*

42. This approach makes sense in Antwerp where jurisdiction may be challenged when the Owners submit their pleading after the completion of the court survey process. However, it is less obvious that it makes sense in England. It is clear from the statement of principle in ***The Angelic Grace*** to which I have referred and from the application of that principle in ***Toepfer v Molino Boschi*** that once a person is aware that a claim which has been agreed to be referred to London arbitration is being pursued in a foreign court in breach of that agreement he ought, if he wishes to obtain an anti-suit injunction from the English Court, "*promptly and before the foreign proceedings are too far advanced"* to apply to the English Court.

43. Having regard to the statement of principle in ***The Angelic Grace*** it was incumbent upon the Owners to take steps to obtain an anti-suit injunction from the English Court (if that is what they wanted to do) long before December

2007. The Owners knew that proceedings were being taken in Antwerp in January/February 2005 in breach of the arbitration clause. They served recourse proceedings against FAVV on or about 17 March 2005 and informed FAVV that they "*positively disputed the jurisdiction of the Antwerp Commercial Court*". If the basis of that objection was the London arbitration clause then it seems to me that any application to the English Court for an anti-suit injunction against the Cargo Interests ought to have been made at some stage in 2005. By failing to do so the Owners failed to act promptly.

44. The Owners waited until December 2007 before applying to the English Court. I regard that as a substantial delay notwithstanding that in Antwerp the time for challenging the jurisdiction has not yet passed. Whether the proceedings in Antwerp are "*too far advanced*" depends upon an analysis of what has happened there and what is still to happen there. The facts (together with some expert opinion) have been carefully and, it seems, extensively investigated by the Court Surveyor. Mr. Walser, the solicitor acting for the Cargo interests, has been informed that whilst the Antwerp Court is not strictly obliged to follow the findings of the Court Surveyor it is extremely rare for his findings to be challenged or for his findings to be set aside. (This seems to have been the position in Antwerp for some time; see ***The Atlantic Star*** [1974] AC 436 at p.452 H, 459 E and 474 D.) What remains is for the Cargo Interests, the Owners and FAVV to submit written pleadings and for there to be an oral hearing in December 2008. It seems to me fair to conclude that, by reason of the completion of the surveyors' report, substantial progress has been made in the Antwerp proceedings with regard to an investigation both of the facts relevant to the Cargo Interests' claim against the Owners and of the facts relevant to the Owners' claim against FAVV.

45. It was submitted on behalf of the Owners that the court survey process was an investigative process which had no reference to where the cargo claim would or should be heard, that an anti-suit injunction could not have been obtained to restrain that process and that the evidence gathered by the court surveyor would be of use to the parties even if the cargo claim were heard in London arbitration. It was therefore submitted that there was no, or no material, delay.

46. To the extent that the jurisdiction of the Antwerp Court to appoint a court surveyor is independent of and separate from the Antwerp Court's jurisdiction to determine the merits of a claim it may be (though there is no clear evidence on this point) that the withdrawal of the Cargo Interests' claim in Antwerp pursuant to an injunction ordering them to withdraw the claim would not result in the cessation of the court survey. But I do not consider that that circumstance justifies the Owners in delaying their application for an anti-suit injunction until after the completion of the court survey process. The statement of principle by Millet LJ in ***The Angelic Grace*** that an anti-suit injunction should be sought *"promptly and before the foreign proceedings are too far advanced"* is clear and should be understood and applied in a common sense and straightforward manner.

47. In any event, if I am wrong in regarding this as a case where the Owners have not sought an injunction from the English Court promptly, the matters relied upon by the Owners to justify their apparent delay cannot eradicate the risk of injustice to the third party, FAVV.

48. Where the Owners have brought FAVV into the Antwerp proceedings and into the court survey process, that process has an obvious connection with the Antwerp proceedings because FAVV cannot be party to the London arbitration. Any liability of FAVV to the Owners can only be determined in Antwerp. Although the factual evidence gathered by the court surveyor could no doubt be deployed in the London arbitration there remains a risk of inconsistent decisions and consequent injustice to a third party FAVV.

Time Bar

49. The Cargo Interests submitted that there was a third reason why an anti-suit injunction should not be granted, namely, that an arbitration claim in London would now be subject to the time bar defence provided by Article III rule 6 of the Hague or Hague-Visby Rules. Much judicial thought has been given to the proper approach to a time bar defence in the contractual forum; see ***Citi-March v Neptune Orient Lines*** [1997] 1 Lloyds Rep. 72 per Colman J., ***The MC Pearl*** [1997] 1 Lloyds Rep. 566 per Rix J. and ***The Bergen*** [1997] 2 Lloyds Rep. 710 per Clarke J. In addition counsel for the Owners said that the availability of relief against the time bar pursuant to section 12 of the Arbitration Act meant that the time bar was a neutral factor.

50. I need not add to that debate. It is clear, as Clarke J. said in ***The Bergen*** at p.720, that a claimant who wished to avoid the effect of a time bar in the contractual forum must show that he did not act unreasonably in failing to preserve his right to sue in the contractual forum. Thus in the present case it was submitted that it was reasonable for the Cargo Interests not to commence arbitration proceedings in London within one year because the cargo had been discharged in Antwerp, a factual investigation was underway there, the Antwerp Court had jurisdiction and the Owners had said nothing to the Cargo Interests to suggest that that they were unhappy with the proceedings in Antwerp.

51. However, this does not appear to be a case where a decision was taken not to commence London arbitration within 12 months for those or any other reasons. Mr. Walser has said that the Cargo Interests were unaware of the London arbitration clause until it was mentioned by the Owners in November 2007. Counsel for the Cargo Interests accepted that this was because those acting for the Cargo Interests in Antwerp had not obtained a copy of the charterparty mentioned in the bills of lading. Thus, although the Cargo Interests were aware that the bills of lading purported to incorporate the Law and Jurisdiction clause of an identified charterparty, they did not take steps to obtain a copy of the charterparty from the Owners. Notwithstanding that Belgian law would not regard the London arbitration clause as binding upon the Cargo Interests (unlike English law) I do not consider that the

Cargo Interests can claim to have acted reasonably in not obtaining a copy of the charterparty. It is not clear why those acting for the Cargo Interests in Antwerp did not take steps to obtain a copy of the charterparty. Mr. De Cocker's fax dated 14 December 2007 does not say why such steps were not taken. He states that his clients had not agreed to the London arbitration clause and that as a result of the decision in ***Turner v Grovit*** [2004] 2 Lloyds Rep.169 anti-suit injunctions could not be obtained against a person who had issued proceedings in a state which was party to the Brussels Regulation. This letter suggests that he did not think it necessary to obtain a copy of the charterparty. However, he does not say that in terms and any shipping lawyer would know that where a bill of lading purports to incorporate the terms of a charterparty including the law and arbitration clause it is, at the very least, prudent to obtain a copy of the charterparty. That is because the arbitration clause might be regarded as binding upon the bill of lading holders by the applicable law. In the result I am left with Mr. Walser's evidence that the Cargo Interests were unaware of the London arbitration clause until November 2007 and counsel's acceptance that that was because they did not have a copy of the charterparty. In those circumstances the Cargo Interests are unable to show that they acted reasonably in not protecting their cargo claim in the contractual forum. It follows that the presence of a time bar defence in the London arbitration cannot amount to a reason, let alone a "strong cause or good reason", to refuse an anti-suit injunction.

Non-disclosure on the *ex parte* application

52. Two points are taken in this regard. Firstly, it is said that the Owners failed to inform the Court of the extent to which the Owners had participated in the Antwerp proceedings. Secondly, it is said that the Owners wrongly informed the Court that it had been made plain to the Cargo Interests "*at all material times*" or *"throughout"* that the Owners disputed the jurisdiction of the Antwerp Court.

53. Tomlinson J. was concerned about the extent to which the Owners might have *"participated*" in the Antwerp proceedings. He was told that the proceedings had been "*dormant"* until the order for service of a defence. He was further shown a letter dated 6 December 2007 from Mr. De Paep which said that the Owners had entered an appearance and had issued third party proceedings against FAVV. The letter also said that "in the scope of the survey of the court appointed surveyor, proceedings also have been initiated on behalf of [the Owners]."

54. The use of the word "dormant" cannot fairly be criticised. The proceedings had been adjourned *sine die* since February 2005, pending production of the surveyor's report. I accept that the Court was not informed of the detail of the steps taken by the Owners with regard to the court survey, namely, that they had made comments on the provisional survey report after requesting extra time in which to do so and that a final report was issued taking those comments into account. However, the letter from Mr. De Paep said, albeit in general terms, that the Owners had "initiated" proceedings with regard to the survey. Whilst more detail could have been given I do not consider that the Court was materially misled by this omission of detail.

55. The statement that it had been made plain to the Cargo Interests "*at all material times"* or "*throughout"* that the Owners disputed the jurisdiction of the Antwerp Court appears to have been incorrect. The explanation for this appears to be that it was thought that the Cargo Interests had seen a copy of the Owners' writ against FAVV which stated in terms that the jurisdiction of the Antwerp Court was challenged. There is no evidence that the Cargo Interests had seen that writ. It is not said that it was served on the Cargo Interests. All that is said is that Mr. de Cocker *ought* to have had a copy of it because he had been informed on 28 February 2005 that such a writ would be issued and that FAVV's counsel sent a letter dated 25 March 2005 to Mr. De Cocker saying that an adjournment *sine die* would be sought (although Mr. De Cocker has no recollection of such a letter).

56. Thus the statement that it had been made plain to the Cargo Interests "*at all material times"* or *"throughout"* that the Owners disputed the jurisdiction of the Antwerp Court does not appear to have been true. Had an attempt been made to give particulars of that statement it would have been appreciated that it was not true. When a party is applying for relief *ex parte*, albeit on notice, such an attempt ought to have been made. The Court relies upon those applying for relief to give accurate information. I have considered whether I should discharge the injunction on this ground alone. It is arguable that I should but I have decided that that would not be appropriate, for these reasons. Firstly, there is no reason to suppose the statement was deliberately untrue. Secondly, the truth of the statement was not a necessary part of the grounds underlying the claim for the injunction. Whilst the statement may well have been taken into account by Tomlinson J. the injunction would probably have been granted even if Tomlinson J. had been informed that the Cargo Interests had first been informed that jurisdiction was to be challenged in November 2007.

Conclusion

57. For the reasons I have endeavoured to explain (at some haste because of the need for a decision before 15 February 2008) I am satisfied that there is strong cause or good reason for not granting an anti-suit injunction in this case. Firstly, by reason of the Owners' decision to claim against FAVV in Antwerp, there is a risk of inconsistent decisions which might cause an injustice to FAVV. Secondly, by reason of the Owners' delay in seeking an anti-suit injunction from the English Court until December 2007, they did not seek the injunction promptly and before substantial progress had been made in the Antwerp proceedings. Even if my finding of delay is wrong, the risk of inconsistent decisions and therefore of injustice to a third party, FAVV, amounts by itself to a strong cause or good reason for not granting an anti-suit injunction.

58. It follows that the anti-suit injunction should not be continued.

Andrew Baker QC (instructed by Jackson Parton) for the Claimants
Robert Thomas (instructed by Holmes Hardingham) for the Defendants