

CASE IN BRIEF

Dainford Navigation Inc v PDVSA Petróleo SA 'Moscow Stars' [2017] EWHC 2150 (Comm)

-by Sarah Redding

The English High Court recently considered its jurisdictional power in support of arbitral proceedings under section 44 of the Arbitration Act 1996 to order the sale of cargo as goods 'the subject of the proceedings'.

Background

In early 2016, PDVSA Petr leo S.A ('PDVSA') entered into a time charter agreement with Dainford Navigation Inc. ('Dainford'). The charter was for the transport of crude oil by PDVSA on board Dainford's vessel the "Moscow Stars", and was one of 14 charters between PDVSA and other companies within a state-owned Russian shipping group.

Dainford alleged repeated failures by PDVSA to pay time charter hire since January 2016, culminating in an outstanding balance of approximately US \$4.5 million by October 2016. As a result of PDVSA's continual non-payment of charter hire, between October and November 2016 Dainford gave notice twice of its exercise of a lien over the cargo on board the Moscow Stars. In December 2016 and January 2017, PDVSA made payments towards the hire, but these were insufficient to clear the substantial arrears. With charter hire overdue and cargo still on the vessel, PDVSA continued to accrue the charter rate of US \$29,000 per day as further debt owing to Dainford. No further payments by PDVSA were made.

Dainford commenced arbitration in London pursuant to the parties' agreement in an attempt to recover the US\$7.7 million it claimed was owing. Incurring the usual costs of running the vessel while it remained moored subject the lien, Dainford sought and obtained permission from the arbitral tribunal under section 44 of the Arbitration Act 1996 to apply to the High Court for an order for sale of the cargo. Dainford sought payment from the proceeds given the cargo had been on board the Moscow Stars for over nine months and there were no reasonable prospects of resolution. Eleven other companies in the same state-owned Russian group also had similar claims against PDVSA under different charters.

In referring Dainford's application to the High Court, the arbitral tribunal determined that their power to "preserve goods" under section 38 of the United Kingdom's Arbitration Act 1996 did not extend so far as to order the sale of goods. PDVSA opposed the application.

At the time the High Court considered the application, the arbitral tribunal had not determined the award.



The Court ultimately determined that the cargo was 'goods the subject of the proceeding', and exercised its jurisdiction to order the sale of the cargo. In reaching its decision, the Court considered three defences advanced by PDVSA in support of dismissing Dainford's application:

- 1 The court did not have power under s 44(2)(d) of the Arbitration Act 1996 to order the sale of cargo, as the cargo was not the "subject" of the arbitral proceedings.
- 2 Even if there was such a power, the cargo was not perishable and there was no other good reason requiring a quick sale as required by the scope of CPR 25.1(c)(v).
- 3 In any event, the exercise of such a power was inappropriate in the circumstances.

English authorities had not previously discussed the interpretation of goods the "subject of proceedings". So in considering whether the cargo was the 'subject' of the arbitration proceedings, the Court considered a previous Singaporean decision under a reciprocal provision of the International Arbitration Act 2002. In *Five Ocean Corporation v Cingler Ship Pte Ltd* [2015] SGHC 311 the Singaporean High Court ordered the sale of cargo in similar circumstances, holding that the cargo in question was the "subject matter" of the proceedings as it formed the subject matter (i.e. the lien) of the claims for freight.

The Court acknowledged that section 44 did not confer power to make orders for sale as a form of independent relief, but that it also should not be read too narrowly. Males J considered there was sufficient nexus for goods to be "subject" of proceedings where a contractual lien is being exercised over a defendant's goods as a security for a claim which is being advanced in an arbitration. The Court concluded that it did have power to order a sale pursuant to section 44, but that it must first consider whether that power should be exercised as a matter of discretion.

The Court's discretion relates to making an order under CPR 25.1 for "the sale of relevant property which is of a perishable nature or which for any other good reason it is desirable to sell quickly." Given the goods (crude oil) were clearly not perishable, the Court's discussion focussed on its broader discretion to consider other good reasons for a quick sale. Dainford submitted that in the absence of an order, the cargo would remain on board the vessel for many more months and that it would be inevitably prejudiced by ongoing missed opportunities for hire and continuing to incur operation expenses for the vessel. PDVSA maintained its position that sale was unnecessary, claiming that Dainford's five month delay in making the current application (from when the tribunal gave permission) meant that any apparent urgency for sale could have been avoided.

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However, in a change of position attempting to maintain control of what seemed to be rapidly becoming an inevitable outcome, PDVSA also made a late offer during proceedings to sell the cargo itself and pay the proceeds into escrow.

Given any order for sale would be made before the issue of the arbitral therefore depriving PDVSA of its ownership of goods against its will, the Court carefully considered its discretion. Despite PDVSA's offer to undertake sale of the cargo itself, the Court considered that without a formal order for sale, previous history between the parties indicated there was a substantial risk that the p situation of impasse would drag on indefinitely. The Court also took PDVSA's last minute offer as an indication of its recognition that the only viable option was for the cargo to be sold.

In making an order for the sale of the cargo, the Court referred the security of damages back to the arbitral tribunal, pending their decision, and also noted that any dispute as to the terms of sale would need to be referred back to court for consideration.

Comment

This decision provides welcomed commentary on the interpretation of cargo as goods 'the subject of proceedings' pursuant to section 44(2) Arbitration Act 1996. The decision also demonstrates the application of frameworks included in legislation such as the Arbitration Act 1996 to support arbitral proceedings. However, the application of the decision to broader goods and in different factual scenarios remains to be seen. Males J made clear that this decision related only to goods owned by the defendant, deliberately excluding application to goods owned by a third party not a party to the arbitration.



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