

# Court continues anti-suit injunction in support of London arbitration agreement (Grace Ocean v Cofco Global Harvest, M/V 'Bulk Poland')

This analysis was first published on Lexis®PSL on 7 December 2020 and can be found [here](#) (subscription required).

**Arbitration analysis:** The English court continued an anti-suit injunction restraining the continuation of Chinese proceedings brought in breach of a London arbitration agreement incorporated into bills of lading governed by English law. The respondents did not appear. Mr Justice Bryan helpfully summarised the principles applicable to the grant of interim anti-suit injunctions in these circumstances (which are far from uncommon in the shipping trade). It will therefore provide a useful reference to applicants seeking similar relief, particularly under bills of lading incorporating the law and arbitration clauses in a charterparty. Written by Michael Collett QC, barrister at Twenty Essex.

*Grace Ocean Private Ltd v Cofco Global Harvest (Zhangjiagang) Trading Co Ltd, M/V 'Bulk Poland'* [2020] EWHC 3343 (Comm)

## What are the practical implications of this case?

This case illustrates the not-unusual situation in which Chinese cargo receivers allege cargo damage at the discharge port and insist on being provided with security which does not respond only to a London arbitration award, even though the bill of lading contracts are subject to English law and London arbitration. Chinese proceedings are then commenced, and attempts to rely upon the London arbitration agreement before the Chinese courts are unsuccessful. In those circumstances, the shipowners have little practical alternative but to seek an anti-suit injunction from the English court (albeit that is unlikely to be a deterrent unless the cargo receiver has connections with the English jurisdiction).

This judgment is useful because it addresses all the issues which commonly arise on interim applications of this sort. Of particular interest is the relevance of the Hague/Hague-Visby Rules time bar having expired without London arbitration being commenced. In this case, the shipowner undertook to waive the time bar if arbitration was commenced within a specified period. However, it is arguable that unless there has been inequitable conduct by the applicant, the expiry of a time bar in the contractual form should not be relevant in itself to whether an anti-suit injunction should be granted to restrain breach of an arbitration agreement.

## What was the background?

### The parties

The applicants, Grace Ocean, were the owners of the motor vessel 'Bulk Poland' and the contractual carriers under four bills of lading covering the carriage of a cargo of soybeans from Barcarena, Brazil to the People's Republic of China (PRC).

The respondents, Cofco, were the holders of the bills of lading, who presented the bills at Longkou, PRC, and took delivery of the cargo.

The bills of lading incorporated the terms of a voyage charterparty which was subject to English law and London ad hoc arbitration.

## Chinese proceedings

During discharge, Cofco alleged that the cargo had suffered heat damage and threatened to arrest the vessel. Security was provided on behalf of Grace Ocean which responded to a judgment of a competent court or an award of a competent tribunal. Subsequently, Cofco brought a claim before the Qingdao Maritime Court seeking damages of \$US 1,790,600.

Grace Ocean wrote to Cofco informing them that the Chinese proceedings were in breach of London arbitration agreements incorporated into the bills of lading, and threatening to seek an anti-suit injunction if the Chinese proceedings were not withdrawn. Cofco did not respond.

## English proceedings

Grace Ocean applied to the English court for an interim anti-suit injunction, which was granted on a without notice basis. The anti-suit injunction was served on Cofco and its Chinese lawyers, who did not engage with the English proceedings.

This judgment was given on the return date hearing, which Cofco did not attend.

## What did the court decide?

The judgment is a textbook explanation of the requirements for the grant of an anti-suit injunction in support of a London arbitration agreement incorporated into a bill of lading.

The applicant for an interim anti-suit injunction must show ‘to a high degree of probability that its case is right’—*Midgulf International Ltd v Groupe Chimiche Tunisien* [2009] EWHC 963 (Comm) at para [36].

The bills of lading included standard wording incorporating all terms and conditions of the relevant charterparty ‘including the Law and Arbitration Clause’. The governing law of the bills of lading was to be determined in accordance with [Regulation No 593/2008/EC](#) (Rome I). Under [Article 10\(a\)](#) of Regulation No 593/2008/EC (Rome I), the question whether the bills incorporated an express choice of English law was governed by English law. Under English law, the incorporation of a charterparty governed by English law amounts to an express choice of English law as the law applicable to the bills of lading: *Caresse Navigation Ltd v Office National de L'Electricite* [2013] EWHC 3081 (Comm) at paras [30]–[37].

If an express choice of English law is incorporated into a bill of lading, the question of whether an arbitration clause is incorporated into the bill is governed by English law under the putative proper law rule of the common law (because Rome I does not apply to arbitration agreements): *Seniority Shipping Corporation SA v City Seed Crushing Industries Ltd* [2019] EWHC 3541 (Comm) at para [12].

The express words of incorporation in the bills, referring specifically to the arbitration clause of the charterparty, were effective to incorporate a London arbitration agreement into the bills: *Delos, The, Owners of cargo lately laden on board the MV Delos v Delos Shipping Ltd* [2001] Lexis Citation 1153 at para [12].

Where a contract contains an English law and arbitration agreement, the court will ordinarily grant an anti-suit injunction unless there are good or strong reasons to the contrary: *Ecom Agroindustrial Corp Ltd v Mosharaf Composite Textile Mill Ltd* [2013] EWHC 1276 (Comm) at para [19].

Delay and submission to the jurisdiction of the English court may be strong reasons why an injunction should not be granted, but comity is not a material factor.

In the present case, there were no good or strong reasons why the injunction should not be continued. Grace Ocean's appearance before the Qingdao Maritime Court to challenge its jurisdiction did not amount to a submission to its jurisdiction. Further, the fact that Cofco's claim was time-barred under English law was not relevant in circumstances where Grace Ocean had undertaken not to rely upon the time bar if Cofco commenced London arbitration within 60 days of the anti-suit order.

The injunction was continued on terms that Grace Ocean undertook not to rely on the time bar if London arbitration was commenced within a specified period (extended from the original undertaking) and against a cross-undertaking in damages fortified by a P&I Club letter of undertaking in the sum of £50,000.

**Case details:**

- Court: Commercial Court (Queen's Bench Division), Business and Property Courts of England and Wales, High Court of Justice
- Judge: Bryan J
- Date of judgment: 4 December 2020

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