[2023] EWHC 3294 (Comm)

Ref. CL-2023-000216

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building
Fetter Lane
London EC4A 1NL

Before THE HONOURABLE MR JUSTICE ANDREW BAKER

IN THE MATTER OF

AFGHANISTAN INTERNATIONAL BANK (Claimant)

- v -

YES BANK LTD (Defendant)

MR S RAINEY KC AND MR J ENGLAND appeared on behalf of the Claimant
MR C LANGLEY appeared on behalf of the Defendant

JUDGMENT
8th DECEMBER 2023
(APPROVED TRANSCRIPT)

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MR JUSTICE ANDREW BAKER:

1. The claimant and defendant are banks. The claimant is incorporated and domiciled in Afghanistan. The defendant is incorporated and domiciled in India. Da Afghanistan Breshna Sherikat, "DABS", a company incorporated and domiciled in Afghanistan, operates the Afghan electricity generation and transmission infrastructure. It contracted with KEC International Limited, "KEC", a company incorporated and domiciled in India, for the installation of power transmission lines in Afghanistan.

2. As part of securing that business, KEC procured that the claimant issue guarantees to DABS backed by counter-guarantees issued by the defendant to the claimant. The counter-guarantees, both dated 24 October 2018, are:

(1) Guarantee number 001BG08182970001 for USD 6,515,773.08; and
(2) Guarantee number 001BG08182970003 for USD 7,673,523.80;

so that is a combined total counter-guarantee amount of a little over USD 14 million.

3. In August 2021, the Taliban took over the government of Afghanistan, leading KEC and DABS to serve force majeure notices on each other, respectively dated 13 August 2021 and 12 September 2021.

4. In September 2022, KEC commenced proceedings in India before the Commercial Division of the High Court of Judicature at Bombay, joining, inter alia, the claimant and the defendant as defendants, and obtaining ex party injunctions purporting to restrain DABS from making any demand for payment under the guarantees issued by the claimant, to restrain the claimant for making any demand for payment under the counter-guarantees issued by the defendant, and to restrain the defendant from making payment under those counter-guarantees or exercising any right, if it makes any such payment, to be reimbursed by KEC.

5. Self-evidently, there are at least four ways in which, stated in the abstract, it might be that the Indian court should not have granted or should not now maintain those injunctions or some parts of them.

a. firstly, it could be that the court has no jurisdiction in personam over one or more of the parties joined to the Indian proceedings as defendants;
b. secondly, it could be that there is no juridical basis in India for the court to grant an injunction at the instance of KEC that interferes with the operation of the guarantees or the counter-guarantees to which KEC is not privy;
c. thirdly, it could be that it was procedurally improper for the court to grant relief on an ex parte basis;
d. fourthly, it could be that there was no, or no sufficient, factual basis for any complaint that might justify the grant of injunctive relief if there is some juridical basis for such relief.

6. Equally self-evidently, none of those possibilities is a matter for this court. The claimant has filed an affidavit in the Indian court in response to the injunctions, demanding that they be immediately vacated, and has issued a form of strike out or dismissal application. It asserts in support of that response and application, in summary, that:

(1) the Indian court has no jurisdiction, because, so the claimant contends:

(a) the counter-guarantees and guarantees are subject to English law and the exclusive jurisdiction of the English courts, respectively Afghan law and the exclusive jurisdiction of the Afghan courts, and, for that matter, the contract between DABS and KEC provides for ICC arbitration under UNCITRAL rules;
(b) the guarantees and counter-guarantees are separate, distinct and independent instruments; and
(c) the claimant has no place of business within the jurisdiction of the Indian court.

(2) KEC deliberately failed to serve the claimant with or notify it of the ex parte hearings;

(3) the Indian proceedings are premature since no cause of action has yet arisen, in that inter alia:
(a) there has not been any demand by the claimant under the counter-guarantees, which remain valid, the claimant says, until 29 January 2024;
(b) no exception recognised in Indian law for interfering in the operation of bank guarantees arises on the facts; and
(c) in particular the invocation of force majeure by KEC and DABS would not affect the defendant's obligations to pay if the claimant were to make an otherwise valid demand under the counter-guarantees.

7. By this Part 8 Claim in the English court, the claimant sought against the defendant declarations that:

(1) If it makes a contractual demand under the counter-guarantees the defendant will be obliged to pay, irrespective of any contestation by KEC and irrespective of any claims or defences arising between the defendant and KEC arising out of the relationship between them. That compendiously paraphrases the first two of the declarations sought by the Claim Form.

(2) If the defendant failed to pay the claimant on demand in response to a contractual demand under the counter-guarantees then the defendant would be liable in debt and/or damages to the claimant. That paraphrases the third declaration sought by the Claim Form.

(3) The English courts have exclusive jurisdiction to determine and decide all questions of fact and law with respect to the counter-guarantees arising between the claimant and the defendant as to the claimant's entitlement to be paid under those guarantees.

8. The Claim Form was issued in April 2023 and amended in early May 2023 following pre-action correspondence starting in January 2023 and culminating with a formal letter before action and response to that in the second half of March 2023.

9. After service of proceedings and acknowledgement of service which came in at the very end of August 2023, and brief written evidence in reply from the claimant's solicitor dated 21 September 2023, the parties obtained a listing, in the event for today's date, of a one hour hearing to stand as a case management conference in these Part 8 proceedings.

10. With its acknowledgement of service dated 31 August 20023, the defendant filed and served a concise letter from its solicitors standing, in substance, as its response or defence on the merits of the claim, pursuant to Part 8, for declaratory relief.

11. In the light of the content, or it may be, to an extent, the lack of content, that is to say the lack of positive contestation in respect of the matters the claimant sought to have the

court declare, in that brief defence document, the claimant by its solicitors issued on 18 October 2023 an application for summary judgment. Through correspondence between the solicitors and then with the listing office, today's listing was expanded to a half hour hearing estimate for the purpose of taking that summary judgment application and conducting a case management conference, if at all, to the extent anything remained live after the summary judgment application had been determined.

12. Mr Rainey KC for the claimant acknowledged at the outset of his submissions, when I asked, that in substance all of the material the claimant was proposing to rely on at a Part 8 trial is now before the court and has been read by the court for the purposes of the summary judgment application. Through correspondence yesterday, counsel agreed a hearing timetable for today in which Mr Rainey would have an hour to open that application, and he fairly acknowledged that at the half day trial which the parties had proposed would be required for final trial, he would not be given more than about that time to open the matter. In those circumstances, he acknowledged and indeed submitted that the court was as well placed today as it was ever going to be at a trial as might be proposed, to determine finally whether there should or should not be declaratory relief as proposed, and the argument has, therefore, proceeded on the basis that this is, in effect, not merely a summary judgment application where the claimant might succeed, but if and to the extent that it did not, there would be a trial to follow, but in substance as the final hearing of the matter, for better or for worse as regards whatever relief the claimant might persuade the court to grant.

13. On a point of detail, in relation to all of that, Mr Rainey confirmed, as had been my understanding from the material provided from the summary judgment application, that the third declaration sought, which I paraphrased in the second of my two descriptions of the declarations sought, was not now pressed, either by way of the summary judgment application or by way of a possible subsequent trial if there was going to be any.

14. The matter, therefore, stands as the claimant's claim for declarations to the effect that if there is in the future contractual demand under the counter-guarantees it must, as a matter of contract, be met contractually, and a declaration that the English courts have exclusive jurisdiction as between the parties to the counter-guarantees in relation to questions of fact or law with respect to them as to the claimant's entitlement to be paid under them.

15. For the purposes of what may have been a case management hearing in traditional modern form, the parties agreed a list of common ground and issues. It is an unusual example of its type. It states at paragraph 1 that the issue of contractual construction that has arisen between the parties properly falls within the scope of CPR Part 8. It proceeds at paragraph 2 through a series of seven subparagraphs, under the overall heading of common ground, to state as a matter of common ground that the Part 8 claim proceeds on certain factual assumptions, and it then states, as the sole issue the court is asked to determine in these proceedings:

> "What declaratory relief, if any, should be granted to the claimant."

16. The supposed issue of contractual construction, said in the list of common grounds and issues to have arisen and to fall properly within the scope of Part 8, is not identified in that document. However, in the associated and also agreed case memorandum at paragraph 13, the parties state as follows:

> "The parties agree that their dispute raises one discrete issue of contractual construction that is properly the subject of part 8 proceedings, namely ... what declaratory relief, if any, should be granted to the claimant?"

17. That, of course, is not an issue of contractual construction and the parties' strange mutual choice to label it as such cannot alter that reality. Subject to one aspect that has emerged clearly through the argument this morning, the claim, as presented to the court, discloses no dispute between the claimant and defendant concerning the meaning, effect, or potential operation of the counter-guarantees. Were the court to make declarations such as are sought by the claimant in respect of that, as it were, primary content of the counter-guarantees, it would not, by doing so, or in order to do so, have made any judicial determination whatever as to the content of any of the declarations, because it is not in dispute between the parties before the court. It would merely have created a record in the form of an order of the court of that which is not and has never been disputed between the claimant and the defendant.

18. The question naturally arises, and exploring it for a moment will bring me to the one point that is or may be different in nature to what I have said so far, why the claimant proposes that the court should consider issuing some sort of declaration. For that, the claimant relies on the evidence of Kumar Abhishek Singh, a founding partner of Anoma Law Group LLP, an Indian legal practice with offices in Mumbai, New Delhi and Bengaluru. Anoma Law are the claimant's legal representatives before the Indian court in the proceedings brought by KEC, with carriage, therefore, of, inter alia, the claimant's grounds of objection to the interim injunctions and strike out or dismissal application before the court in Bombay which I have already summarised.

19. The essential point put forward by Mr Singh is his opinion that:

> "Timely Declaration/s from the English High Court would assist AIB [ie the claimant] in persuading the Bombay High Court to vacate the Injunction Orders restraining invocation/encashment of [the counter-guarantees]."

He gives that opinion at his paragraph 17, saying it is founded on his paragraphs 10, 11 and 16.

20. As Mr Rainey explained, and I agree, Mr Singh's paragraph 16 was focused mostly upon matters of urgency and timing and for my purposes does not add substance to what he says at paragraphs 10 and 11 as regards why, in his opinion, declaratory relief granted by this court might be of some utility. What Mr Singh says as to that is that in his view declarations as were sought, if granted by the English court, would assist the Indian court in determining, as he puts it,

> "That it did not/does not have any jurisdiction to pass any orders (including the injunction orders) with respect to [the counter-guarantees]."

21. It is an aspect of the responsive position and application made by the claimant before the Indian court that the jurisdiction provision in the counter-guarantees confers on the English court exclusive jurisdiction as between the claimant and defendant in line with the

language of the declaration that the claimant seeks. Mr Singh explains that in his opinion, having that definitively established, may be of value to the claimant and of interest to the Indian court in a manner that is in keeping with the principle of comity between courts.

22. He explains, as part of that, if it were necessary to make this good as a matter of Indian law rather than relying on a presumption that it is likely to take a similar approach to English law, that final declaratory judgments of an English court are, in principle, to be recognised and enforced by courts in India. That, he explains, is pursuant to section 13 of the Code of Civil Procedure 1908 and section 44A of that code in particular.

23. As he sets out, that concerns matters of recognising or enforcing foreign judgments as conclusive as to any matter,

> "thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim ..."

24. As I have already said, with the exception to which I am going to come in a moment, were the court to contemplate granting the sorts of declarations the claimant has proposed, it would not have adjudicated directly or indirectly upon anything, because they would be merely recitation of matters as to which there is no dispute and as to which no judicial determination by this court is required. I would on no view be willing to countenance the issuing under this court's authority of an order that did not spell out that no such determination had been made but rather the court was merely recording that which was agreed between the parties. I am sure this was not the intention on the claimant's side, but I would not be willing to grant an order that did not in fact amount to or reflect a judicial determination of a dispute, but which a party might inadvertently cause a foreign court to understand represented a judicial adjudication or determination that was required to be recognised or enforced.

25. As I have already made clear, however, the principal matter identified by Mr Singh in relation to which his view is that the Indian court would be assisted by its being definitively established, if the claimant is correct about it, is the exclusive nature of the jurisdiction of this court as agreed by contract between the claimant and the defendant under the terms of the counter-guarantees. That, the claimant says, is the effect of the relevant contractual language to which I shall turn very shortly.

26. That meaning and effect of the contractual language has not been, at any stage, common ground stated as such. Mr Langley, for whose submissions on behalf of the defendant I am equally grateful, has explained reasons why, there being no evidence to this effect, it might be that the defendant was reluctant to make explicit that it accepted that the language of the counter-guarantees in relevant respect rendered the contractual jurisdiction conferred on the English courts exclusive rather than non-exclusive. The fact remains, however, that that was not conceded, it was squarely one of the four propositions put to the defendant for agreement in the pre-action correspondence and one of the four matters upon which, therefore, the claimant was, in my judgment, entitled to seek declaratory relief by the Claim Form as it did as a matter in issue between the parties at the date when proceedings were commenced.

27. In that regard, I do take the view, as explored with Mr Langley in his submissions, that as regards whether a matter is in dispute, there is no relevant distinction between his client's absence of admission, or statement that it adopts a neutral stance, or an active contest or

dispute, had it raised any, to the proposition advanced by the claimant and, in the absence of it being acknowledged, proceedings for declaratory relief then being commenced.

28. Mr Langley, fairly, when pressed as to his client's ultimate position, was minded to acknowledge that he could not advance for his part any serious argument against the proposition that the language of the counter-guarantees, properly construed, provides for exclusive jurisdiction in the English court, and in that sense he would feel constrained if required to give a simple yes/no answer to whether it does so provide, that yes, it does.

29. I do not consider that my jurisdiction to grant declaratory relief so as to resolve the dispute that existed when the claim was brought, or as a matter of discretion the question whether declaratory relief should be granted, is much affected by Mr Langley's fair professional candour when the point was pressed in the course of the argument this morning.

30. If, therefore, I am persuaded by Mr Rainey's submissions -- he having, I should be clear, gone through with some care and responded to those points against the claimant's construction of the relevant contractual language as might conceivably be raised and have, to the extent any have been raised, been intimated by KEC rather than the defendant in correspondence -- if I am persuaded by those submissions that the claimant's construction is correct, there being no evidence challenging Mr Singh's explanation, which appears credible on its face, as to why declaratory relief may be of some utility, my view would be and is that it is not an exercise in the academic to grant the declaratory relief sought concerning the nature and effect of the jurisdiction clause and that to the contrary, declaratory relief ought as a matter of discretion to be granted.

31. In that respect, I agree with the opinion that is implicit in Mr Singh's explanation that just as the claimant's application before the Indian court in part invokes concepts of comity between courts, so it is not an infringement on that principle for this court, properly seized of a contest as to the meaning and effect of one or more provisions of a contract between the parties before the court and governed by English law, to grant declaratory relief as to that for the purpose of establishing that position, at least as between the parties before the court who are the parties to the contract in question, to whatever extent that will prove to be of assistance or value to the Indian court.

32. I turn, therefore, to the contractual language in question. In the counter-guarantees there is a general incorporation of the ICC's Uniform Rules for Demand Guarantees, the URDG, in the 2010 revision, ICC publication number 758. As regards governing law and jurisdiction, those rules for counter-guarantees provide as follows:

a. By article 34(b):
"Unless otherwise provided in the counter-guarantee, its governing law shall be that of the location of the counter-guarantor's branch or office that issued the counter-guarantee."

b. By article 35(b):
"Unless otherwise provided in the counter-guarantee, any dispute between the counter-guarantor and the guarantor relating to the counter-guarantee shall be settled exclusively by the competent court of the country of the location of the counter-guarantor's branch or office that issued the counter-guarantee."

33. The counter-guarantees in this case unarguably provided otherwise in both respects, that is to say both as to governing law and as to jurisdiction. If there be any question arising at all, it is as to the extent to which they provided otherwise as regards jurisdiction, or the effect properly construed of the provision different to the article 35(b) default rule as regards jurisdiction.

34. The contractual language in question is as follows.

> "This counter-guarantee shall be governed by and construed in accordance with the English laws and shall be subject to the jurisdiction of the courts of England."

35. The word "jurisdiction" in that contractual language is not explicitly qualified by the adjective "exclusive." That, however, is not a requirement for a provision as to jurisdiction to be, in effect, exclusive. That is because what matters is not which word or words parties have chosen to use to express the existence of an obligation to have disputes determined by a particular court jurisdiction, or it may be by arbitrators, but language that has that effect, as distinct from language that merely provides for the availability but non-exclusively of a particular jurisdiction.

36. The Court of Appeal's decision in *Compania Sud Americana de Vapores SA v Hin-Pro International Logistics Ltd* [2015] EWCA Civ 401 considered materially identical language to that of this counter-guarantee, albeit in a different commercial context, that of bills of lading. The conclusion of the Court of Appeal was that the language rendered the chosen jurisdiction exclusive as a matter of agreement between the parties.

37. That decision was relatively recently applied by Jacobs J in *AIG Europe SA, formally AIG Europe Ltd v John Wood Group Plc* [2021] EWHC 2567 (Comm) where, if anything, the language might have been argued to be one iota weaker, providing, as it did, that this court "shall have jurisdiction" rather than providing that the contract in question "shall be subject to" the jurisdiction of a particular court.

38. In my judgment there is no arguable reason to distinguish the language of these counter-guarantees from the language used in the bills of lading that were before the Court of Appeal in the *CSAV* case or the contract that was before Jacobs J in the *AIG Europe* case. It is the plain and ordinary meaning of a stipulation between contracting parties that their contract shall be subject to an identified jurisdiction, that that jurisdiction is *the* competent jurisdiction. I emphasise the definite article.

39. I also agree, for completeness, with a supplementary submission advanced by Mr Rainey if he needed it, that in the particular context of the default rule of article 35(b), providing for the exclusive jurisdiction, using that language, of a particular system, where parties have clearly provided otherwise as contemplated by that provision, it would require clear and explicit language that is not present in this case to create the effect which I understand KEC may have suggested in correspondence they would say was created in this case, namely that they are not providing otherwise in the sense of replacing the default exclusive jurisdiction with a chosen exclusive jurisdiction, but rather are retaining, but no longer as exclusive, the default exclusive jurisdiction and adding an additional permissive available jurisdiction, that being a different jurisdictional concept than that which is built into the URDG.

40. I also agree with a logically prior submission that Mr Rainey makes, namely that here, the parties provide in a single concise sentence and using the identical linguistic construct for English law replacing the default law as provided for by article 34(b) and English jurisdiction in place of the default jurisdiction provided for by article 35(b), and it would be an oddity unlikely to have been intended by the parties for the equivalent turns of phrase "shall be governed by and construed in accordance with" and "shall be subject to" to have materially different impact or result in relation to the two aspects of governing law and jurisdiction respectively.

41. For those reasons, I am persuaded by Mr Rainey's submissions, that his client is and always has been correct in its assertion that the language of these counter-guarantees provides for the English courts to have exclusive jurisdiction to determine and decide all questions of fact or law with respect to the counter-guarantees arising between the defendant and the claimant as to the claimant's entitlement to payment on demand under the counter-guarantees, that being the language of the proposed declaration.

42. Furthermore, in the proper traditions of English law in relation to claims for declaratory relief where the immediate litigating party is not raising an active contest, as summarised, for example, by Aikens LJ in *Rolls Royce PLC v Unite the Union* [2009] EWCA Civ 387 at [120], Mr Rainey has taken particular care to raise before the court for consideration and taken duly seriously anything that might conceivably have been said against the claimant's construction.

43. For those reasons and because, for reasons I explained earlier in this judgment, there will be, on the evidence before the court, utility in the grant of declaratory relief that will not, in my judgment, impinge upon the principle of comity between courts or the proper functioning of the Indian court in considering the applications properly before it, declaratory relief will be granted, but limited to the proposed declaration in relation to the exclusivity of this court's jurisdiction under the jurisdiction provision of the counter-guarantees. In its wider respects the claim fails and will be dismissed.

(Following further submissions)

44. It seems to me that the position in relation to this case is as follows. The claimant's claim has, to a substantial extent, failed, but it has succeeded in recovering from the court declaratory relief on one point which it is correct to observe the defendant could fairly and reasonably have conceded at the outset or at any event earlier than effectively it did, in a way, during the course of the dialogue this morning.

45. I consider the effective suggestion in Mr Rainey's submissions that if, in response to the requests for pre-action confirmations, the defendant had confirmed expressly its position on the point on which the claimant has succeeded, but otherwise been neutral, as it has in fact tried to be, the claimant would not have gone ahead and incurred all of the costs that it has incurred, as unrealistic. It seems to me that the claimant has, on the way the proceedings have presented themselves to the court, taken a view, at its risk as to costs, as to whether the court will be willing to grant something like the full range of declarations that it sought, and the court has not been so willing, and in that respect, so far as a consideration of costs is concerned, the claimant is very much more the losing party than the successful party.

46. Of course, if it were the case that I could say that the allowing to be in issue of the question of the meaning and effect of the jurisdiction clause was substantially on its own the driver of costs or will have materially aggravated the incidence and level of costs on the claimant's side, different considerations might arise, but as it seems to me, there is no basis for a serious suggestion that the costs incurred on the claimant's side would be materially different than they have proved to be if in that slight respect the defendant had expressed a position closer to the outcome.

47. On the other side, I do consider Mr Langley is correct to acknowledge that the defendant's approach in not simply acknowledging the exclusive nature of the English court's jurisdiction on the proper construction of the counter-guarantees when it had no basis for disputing it and it has been unable to suggest that anything that had happened in India and in particular the injunctions in India in reality prevented it, as at one point it suggested, from giving that confirmation, can be taken into account.

48. Moreover, the broad neutrality that it has intended or sought to maintain, one might have thought, ought to have enabled it to minimise the incurring of costs to something well below the costs that it has incurred in the claim as a whole.

49. Mr Rainey has been able to submit, with some force, that the declaration now obtained, according to the evidence of the likely attitude of the Indian court, may have some real prospect of being of value to the claimant; but that is because and only because, ironically, there was enough of a point there not conceded for me to have judged it appropriate to give a determination, with a judgment explaining it, and declaratory relief accordingly.

50. Stepping back from the matter and considering the justice overall of the way the litigation has turned out and the way it has generated costs, in my judgment, the appropriate order for costs is that there be no order as to costs; and that will be the order.

This transcript has been approved by the Judge