

Arbitrators Wrong to Award Equitable Compensation and Enjoin Sovereign States—*The Kingdom of Spain v The London Steam-Ship Owners' Mutual Insurance Association Ltd (The M/T Prestige)* [2024] EWCA Civ 1536

27 January 2025

On 12 December 2024, the Court of Appeal of England and Wales handed down its judgment in *The M/T Prestige*.

The judgment addressed a multitude of legal issues. This note focuses on the issues of sovereign immunity, injunctions, and equitable damages and compensation.

Background

The dispute relates to the sinking of the oil tanker *Prestige* in 2002, which caused an oil spill along the French and Spanish coastlines. The London Steam-Ship Owners' Mutual Insurance Association Ltd (the "Club"), an association of insurers, provided protection and indemnity ("P&I") coverage to the owners and managers of the vessel up to USD 1 billion. The insurance contract provided that all disputes were to be resolved through London-seated arbitration and included a "pay to be paid" clause, which provided that the Club would only pay after the vessel's owners and/or managers fully paid their liabilities.

Following the incident, an array of proceedings was commenced before local courts, arbitral tribunals, the Court of Justice of the European Union and the European Court of Human Rights.¹ France and Spain (the "States") sought to enforce the P&I cover before Spanish courts, claiming under a provision of the Spanish Penal Code which accorded third-party victims a right of direct action against the insurer of a wrongdoing insured.

In March 2019, Spain's Provincial Court issued a judgment against the Club for USD 1 billion (the "Spanish Judgment"). In May 2019, Spain sought to register the Spanish Judgment in the UK under the Brussels I Regulation. The issue ultimately came before the High Court, when Mr Justice Butcher refused registration on the public policy

¹ Judgment, paragraphs 29-65.

ground that previously registered arbitral awards obtained by the Club created binding issue estoppel.² Spain appealed the judgment.

In response, the Club lodged a second round of London-seated arbitrations against each of the two States, seeking to prevent the enforcement of the Spanish Judgment or be made whole. Both arbitrators—Sir Peter Gross in the Spain arbitration and Dame Elizabeth Gloster in the France arbitration—found that the Club was entitled to equitable compensation payable by the States, corresponding to indemnities for the amounts collected under the Spanish Judgment and associated costs. Dame Elizabeth Gloster also granted an anti-suit injunction enjoining France from pursuing the enforcement of the Spanish Judgment. The States sought to set aside the awards before the High Court in 2023.³ Spain appealed under Sections 67, 68 and 69 of the Arbitration Act 1996: substantive jurisdiction, serious irregularity, and appeal on a point of law. France appealed under Section 69 only.

In a set of judgments dated October 2023, Mr Justice Butcher, dismissing the Section 67 and Section 68 challenges but allowing the Section 69 challenge in part, concluded that arbitrators Gloster and Gross were entitled to grant equitable compensation in favour of the Club, but anti-suit injunctions were unavailable on sovereign immunity grounds.⁴

The States appealed the High Court's findings under Section 69 on the availability of equitable compensation to the arbitrators; the Club cross-appealed the finding under Section 69 on the unavailability of anti-suit injunctions.

The Court of Appeal's Judgment

The Court of Appeal dismissed the Club's cross-appeal relating to anti-suit injunctions and allowed the States' appeal on equitable compensation.

Arbitrators Were Not Empowered to Grant Injunctive Relief Against the States on Sovereign Immunity Grounds

Sir Geoffrey Vos M.R., giving the leading judgment, agreed with Butcher J that the arbitrators did not have the power to order anti-suit injunctions.

Section 13(2) of the State Immunity Act 1978 provides that English courts cannot grant injunctive relief against sovereign states, absent their written consent. The power of an

² Judgment, paragraphs 45-46.

³ Judgment, paragraphs 47-49, 60-65.

⁴ Judgment, paragraphs 82-108.

arbitral tribunal seated in England to grant injunctions derives from Section 48(5)(a) of the Arbitration Act, which provides: “*The tribunal has the same power as the court... to order a party to do or refrain from doing anything*”. Since the English courts cannot enjoin a sovereign, arbitrators in proceedings seated in England are similarly not empowered to order anti-suit injunctions against sovereign states.

Thus, the Court concluded that Dame Elizabeth Gloster was wrong to order an anti-suit injunction against France.

Given Lack of Power to Enjoin, Arbitrators Were Also Not Empowered to Order Equitable Damages in Lieu of an Injunction

The Court then turned to whether the arbitrators could order equitable damages in lieu of, or in addition to, an injunction under section 50 of the Senior Courts Act 1981 (“SCA”), which provides: “*Where the Court of Appeal or the High Court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to, or in substitution for, an injunction or specific performance*”.

Again upholding the judgment of Butcher J, the Court found that since there was no power or jurisdiction for the arbitrators to injunct the States from continuing the Spanish proceedings, there was no power for them to award equitable damages in place of such an injunction.

Arbitrators Were Wrong to Award Equitable Compensation

Equitable compensation may, in certain circumstances, be an available remedy for a breach of an equitable duty. However, the Court of Appeal, allowing the appeal against the judgment of Butcher J, held that equitable compensation was not available in the present case and would not be generally available as a remedy for breach of an equitable obligation to arbitrate.

Conditional Benefit

The States, as third-party claimants, sought to enforce the Club’s obligations to its insured by direct action in Spain, in violation of the arbitration clause in the P&I cover. Once the Spanish proceedings were initiated, an equitable obligation arose for the States “*not to take the benefit of the contract upon which they claim[ed] without accepting its burdens*”.⁵

⁵ Judgment, paragraph 211.

The States could therefore not enjoy the benefit stemming from the P&I cover without accepting the burdens of the policy, including the obligation to arbitrate and the “pay to be paid” provision.

Primary Remedy for Breach of Equitable Obligation to Arbitrate

However, the Court found that it was clear on the authorities that the primary remedy for a breach of the equitable obligation to arbitrate was an injunction and not compensation. Damages under section 50 SCA come in only to compensate a party for the refusal of an injunction or for the losses it has incurred before injunctive relief is sought. A claim for equitable compensation cannot be used to circumvent the unavailability of equitable damages due to sovereign immunity. Breach of the conditional benefit principle and the equitable duty to arbitrate does not give rise to a cause of action of a conventional kind. The Court concluded that it was wrong for the arbitrators to consider that equitable compensation could automatically be awarded in the same manner as common law damages.⁶

No Link Between Basis of Claim and Reasons for Compensation

Further, when awarding equitable compensation, the arbitrators were not compensating the Club for violations of the arbitration clause; in reality, they were compensating the Club for the fact that the Spanish courts ignored the “pay to be paid” clause and entered judgment against the Club anyway. For the Court, even if equitable compensation was available as a remedy beyond equitable damages under section 50 SCA, “*such compensation could not possibly extend to all the consequences of a breach of a pay to be paid clause*”, which was not the basis of the Club’s claim.⁷ Simply put, there was no nexus.

The Court concluded that Butcher J was wrong to uphold the arbitrators’ equitable compensation awards against the States, noting that, even if there was jurisdiction to order so, it should not have been exercised.⁸

Comment

The Court of Appeal’s judgment is a checkpoint in a dispute spanning two decades and several issues of law and equity.

Section 69 of the Arbitration Act 1996

The Court of Appeal’s decision highlights the use of the Section 69 procedure, a hotly debated topic among arbitration practitioners. The option of appealing an award on a

⁶ Judgment, paragraph 219.

⁷ Judgment, paragraph 221.

⁸ Judgment, paragraph 224.

point of law under Section 69 is a unique feature of the English Arbitration Act, which is a provision not reflected in the widely adopted UNCITRAL Model Law on International Commercial Arbitration. It is thus an avenue open to parties in arbitrations seated in England. No amendments to Section 69 are currently being envisaged in the draft arbitration bill before the UK Parliament.

State Immunity

The Court of Appeal's judgment highlights the determinative role state immunity can play in arbitration proceedings. For arbitrations seated in England and Wales involving sovereigns, arbitrators' powers to grant certain types of relief can be significantly curtailed, due to the protections afforded by state immunity.

Conditional Benefit

The judgment engaged in a lengthy discussion of authorities on conditional benefit, derived rights obligations and equitable compensation. It emphasised that a third party cannot benefit from a party's rights under a contract without submitting to its burdens. In the words of Lady Justices Andrews and Falk, this would constitute "*an unwarranted erosion of the principle of privity of contract*".⁹ The judgment reinforces the notion that third parties cannot selectively attempt to enforce contract terms to their advantage without honouring the corresponding obligations.

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⁹ Concurring Opinion, paragraph 251.