Neutral Citation Number: [2021] EWHC 333 (Comm)

Case No: CL-2021-000034

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 18/02/2021

Before :

THE HONOURABLE MR JUSTICE CALVER

- -

Between :

SPECIALISED VESSEL SERVICES LIMITED	**Claimant**
- and -	
MOP MARINE NIGERIA LIMITED	**Defendant**

- -
- -

Saira Paruk (instructed by **Winston & Strawn London LLP**) for the **Claimant**
No one in attendance for the Defendant

Hearing dates: 18 February 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 18 February 2021 at 12:30pm

Mr. Justice Calver:

Application

1. This is the Claimant (**SVS**)'s application pursuant to s.37 of the Senior Courts Act 1981 for an order that the Defendant (**MOP**) be subject to a final injunction (a) restraining it from pursuing the claims it has made against SVS in proceedings before the Federal High Court of Rivers State, Nigeria ("the Nigerian Proceedings") and (b) requiring MOP to take immediate steps to discontinue the Nigerian Proceedings.

2. SVS also seeks a declaration that

    i. MOP is obliged to arbitrate all disputes relating to the Bareboat charter between the parties dated 23 January 2019 ("the Bareboat Charter") in line with clause 30 thereof;

    ii. MOP is obliged to bring any challenge to the jurisdiction of the arbitral tribunal or the validity of the arbitration agreement before the Tribunal or before this Court; and

    iii. The Nigerian Proceedings against SVS constitute a breach of the Bareboat Charter and in particular the arbitration agreement therein.

3. MOP was on notice of this hearing but it indicated through its Nigerian lawyer that it does not intend to play any part in these proceedings or in the arbitration referred to below. In particular, by email dated 17 February 2021 MOP's Nigerian lawyer, Reiben E. Wanogho of RE Wanogho & Co, said this:

    "We write to acknowledge receipt of your mails and to reiterate our earlier position conveyed to you vide our letters of 1st and 11th February, 2020 as well as our mails to you. In our email of 13th February, 2020, we stated our position clearly that we do not intend to participate in any shape or form in the proceedings before the High Court, Commercial Court, Queen's Bench Division as the proceedings thereat are a ploy to completely undermine the two suits instituted before the Federal High Court, Port Harcourt, Nigeria by our client [MOP]. Our client's position has not changed. It is not our client's desire or intention to participate in the proceedings as same is in contempt of the Federal High Court.

    Our said client is desirous of continuing to pursue its claims before the Federal High Court here in Nigeria."

Background

(i) Commercial context

4. The background to this application is helpfully summarised in the first witness statement of Ben Bruton dated 26th January 2021 and it is as follows.

5. At all material times, SVS was the owner of the "SVS COCHRANE" ("the Vessel"). By a Bareboat Charter on an amended BARECON 2001 form dated 23 January 2019 ("the Bareboat Charter"), the Vessel was chartered to MOP.

6. On 9 October 2019, the Vessel was involved in a collision with a tugboat (the "Chidiebube") in waters close to Bonny Island in Nigeria. As a result of the collision, the Vessel was grounded and it has not been in operation since the collision.

7. SVS has claims under the Bareboat Charter against MOP arising from the collision, including:

   a) A claim for outstanding hire in the sum of US$1,209,137.50 plus late payment interest, under clause 11.

   b) Loss equivalent to the value of the Vessel

   c) Additional damages caused by the collision and grounding of the Vessel.

   d) Loss caused by MOP's failure to keep the Vessel insured, as MOP was contractually obliged to do.

8. By a letter dated 6 January 2020, SVS's solictors sent a letter of claim to MOP indicating that if required, arbitration would be commenced in accordance with clause 30 of the Bareboat Charter.

(ii) Agreement to arbitrate in London pursuant to English law

9. Clause 30 of the Bareboat Charter provides as follows:

> *"(a) This Contract shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with this Contract shall be referred to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause.*
> *The arbitration shall be conducted in accordance with the London Maritime Arbitrators Association (LMAA) Terms current at the time when the arbitration proceedings are commenced.*
> *The reference shall be to three arbitrators. A party wishing to refer a dispute to arbitration shall appoint its arbitrator and send notice of such appointment in writing to the other party requiring the other party to appoint its own arbitrator within 14 calendar days of that notice and stating that it will appoint its arbitrator as sole arbitrator unless the other party appoints its own arbitrator and gives notice that it has done so within the 14 days specified. If the other party does not appoint its own arbitrator and give notice that it has done so within the 14 days specified, the party referring a dispute to arbitration may, without the requirement of any further prior notice to the other party, appoint its arbitrator as sole arbitrator and shall advise the other party accordingly. The award of a sole arbitrator shall be binding on both parties as if he had been appointed by*

> *agreement. Nothing herein shall prevent the parties agreeing in writing to vary these provisions to provide for the appointment of a sole arbitrator. In cases where neither the claim nor any counterclaim exceeds the sum of USD 50,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the LMAA Small Claims Procedure current at the time when the arbitration proceedings are commenced…."*

(iii) ***The Nigerian proceedings***

10. Despite the terms of the arbitration clause, MOP has commenced two separate claims filed (claim numbers FHC/PH/CS/248/2019 and FHC/PH/CS/58/2020) which together are the "Nigerian Proceedings".

11. MOP issued proceedings in the Federal High Court of Rivers State of Nigeria, in the Port Harcourt Judicial Division on 22 November 2019 (with claim number FHC/PH/CS/248/2019), but SVS was only served with the proceedings in Mauritius on 21 January 2020. The claim brought by MOP was for negative declarations in relation to MOP's liability under the Bareboat Charter and an injunction preventing SVS from insisting on the payment of any hire thereunder. On 4 December 2019, MOP filed a further Motion on Notice of Suit in the same claim, seeking an injunction restraining SVS from contacting MOP in relation to the payment of hire.

12. By the time SVS was able to instruct Nigerian lawyers, the 14 day period to respond had lapsed. Accordingly, by an application dated 10 February 2020 SVS sought an extension of time to be heard as well as an application *for a stay of the Nigerian Proceedings on the basis that the matter should be referred to arbitration in London*. A Memorandum of Conditional Appearance was also issued on 10 February 2020 on behalf of SVS. I am told that this is a necessary procedural step by a defendant to indicate that they are appearing in protest and wish to challenge the jurisdiction of the Nigerian Court.

13. On 12 February 2020, there was a hearing of MOP's application for an injunction. However, the Judge determined that SVS's applications (for a time extension *and for a stay***)** should be given precedence and the matter was adjourned until 25 March 2020 to allow MOP to prepare a response. Although both sides filed further evidence (on 18 and 24 February 2020 respectively) the hearing scheduled for 25 March did not go ahead due to the Covid-19 pandemic. The matter was further adjourned until 25 May 2020.

14. The May hearing also did not go ahead due to Covid-19 and the re-listed hearing due to be on 22 September 2020 did not proceed as the Court had not resumed following the vacation. The matter was *heard on 20 October 2020*. At the hearing this court was told that lawyers on behalf of MOP did not deny the existence of the arbitration agreement between the parties, but argued that the court should be allowed to hear the matter in any event. *Judgment has been reserved*.

15. Following the commencement of an arbitration by SVS on 13 May 2020, MOP filed another claim (with claim no. FHC/PH/CS/58/2020). This claim was filed against

both SVS and the Arbitrator, Sir Jeremy Cooke. Following an ex parte application by MOP in this matter, by an order dated 4 June 2020, *the Nigerian Court granted an ex parte injunction against SVS and the Arbitrator restraining them from proceeding with the arbitration.*

16. MOP then filed a Motion on Notice in the same case seeking continuance of the injunction and on 1 July 2020 SVS issued an application seeking the setting aside of the injunction. A hearing took place on 8 July 2020, but no representative from MOP attended. I am informed that the judge heard counsel for SVS and adjourned to consider his decision. However, by a Motion on Notice filed on 13 July 2020, MOP sought a declaration that the hearing on 8 July was unconstitutional, this application was heard on 21 July 2020. At that hearing the judge agreed with MOP that the hearing of 8 July was unconstitutional but re-heard SVS's application to dismiss the ex-parte injunction granted to MOP. The judgment was reserved. Despite having been advised by its Nigerian lawyers that it was likely to succeed on the application, *by an order dated 24 July 2020, the Nigerian Court dismissed SVS's application to set aside the injunction and re-affirmed the order of 4 June 2020*. However this hearing apparently concerned only technical issues and whether the application for the injunction amounted to an abuse of court process. In particular, the arbitration agreement between the parties was not raised at this hearing. *A hearing on the substantive issues related to the underlying arbitration agreement was listed for 20 November 2020*.

17. Accordingly, by a motion dated 6 August 2020, SVS filed an appeal against the ruling dated 24 July 2020.

18. A hearing was listed for 20 November 2020 for both matters, but it did not go ahead as the Judge had commenced his annual vacation. *The matter has been adjourned until 2 March 2021,* although Mr. Bruton says that that hearing might also be adjourned**.**

19. SVS maintains that the Nigerian Proceedings commenced by MOP are a clear breach of the London arbitration and English law clause in the Bareboat Charter. In particular, the obtaining of the injunction restraining SVS and the Arbitrator from proceeding with the arbitration, is itself a breach of contract. The effect of that injunction is to prevent SVS from exercising its rights under the arbitration agreement.

20. Since SVS has been notified by MOP that MOP does not intend to appear and MOP has taken no part in the proceedings there is an obligation upon SVS to present the case fairly and identify points which might be to the benefit of MOP, including points which might have been taken had it appeared before the court: *Longulf Trading (UK) Ltd v Niyazi Onen Gida San A.S. & Another* [2019] EWHC 1573 (Comm).

21. Ms Saira Paruk who appears for SVS on this application has done just that in a helpful, articulate and thorough manner.

Injunctive Relief

Legal principles

22. I turn next to the applicable principles for the grant of an anti-suit injunction. The court, of course, has the power to make an anti-suit injunction *under s.37(1) of the Senior Courts Act 1981* where it is just and convenient to do so. That provision reads as follows:

> *"The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so."*

23. That, of course, includes anti-suit injunctions in arbitration cases. The authority for that is *AES Ust-Kamenogorsk Hydropower Plant v Ust-Kamenogorsk Hydropower Plant JSC* [2012] 1 WLR 920 (CA), paras 61-63; and *Raphael, The Anti-Suit Injunction 2nd Ed 2019*, paras.3.01 to 3.08.

24. In this case, the injunctive relief sought is an anti-anti-suit injunction – an injunction to counter the injunction obtained by MOP in Nigeria. In contractual cases, where the parties have agreed an exclusive English forum clause, a foreign anti-suit injunction to restrain substantive proceedings in England will be viewed as a breach of the clause and can be restrained by injunction on the basis that it is a breach of contract. As Hamblen J (as he then was) stated in Ecom v Mosharaf [2013] EWHC 1276 (Comm) at [21]:

> *"Where, as in the present case, the foreign defendant is itself seeking (or has obtained) an anti-suit injunction, and thus the Court is asked to grant an anti-anti-suit injunction, caution is called for (see Raphael, para 5.49; see also General Star International Indemnity v Stirling Brown [2003] Lloyd's Rep IR 719, para 16). However, where the foreign proceedings are brought in breach of an exclusive jurisdiction or arbitration clause, anti-anti-suit injunctions are frequently granted – see, for example, Sabah Shipyard v Government of Pakistan [2003] 2 Lloyd's Rep 571, paras 40-42; Goshawk v ROP [2006] EWHC 1730 (Comm))."*

25. It is important to emphasise, for the benefit of MOP and the Nigerian courts, that as Lord Hobhouse said in *Turner v Grovit* [2001] UKHL 65 at [23]:

> *"The present type of restraining order is commonly referred to as an "anti-suit" injunction. This terminology is misleading since it fosters the impression that the order is addressed to and intended to bind another court. It suggests that the jurisdiction of the foreign court is in question and that the injunction is an order that the foreign court desist from exercising the jurisdiction given to it by its own domestic law. None of this is correct. When an English court makes a restraining order, it is making an order which is addressed only to a party which is before it. The order is not directed against the foreign court: Lord Goff, SNI Aerospatiale v Lee [1987] AC 871 at 892. The order binds only that party, in*

> *personam, and is effective only insofar as that party is amenable to the jurisdiction of the English courts so that the order can be enforced against him. "An injunction will only be issued restraining a party who is amenable to the jurisdiction of the court, against whom an injunction will be an effective remedy": Lord Goff (ib)"*

And at para 26:

> *"The making of a restraining order does not depend upon denying, or preempting, the jurisdiction of the foreign court. One of the errors made by the deputy judge in the present case was to treat the case as if it were about the jurisdiction of the Madrid court. Jurisdiction is a different concept. For the foreign court, its jurisdiction and whether to exercise that jurisdiction falls to be decided by the foreign court itself in accordance with its own laws (including conventions to which the foreign country may be a party). The jurisdiction which the foreign court chooses to assume may thus include an extraterritorial (or exorbitant) jurisdiction which is not internationally recognised. International recognition of the jurisdiction assumed by the foreign court only becomes critical at the stage of the enforcement of the judgments and decisions of the foreign court by the courts of another country. Restraining orders come into the picture at an earlier stage and involve not a decision upon the jurisdiction of the foreign court but an assessment of the conduct of the relevant party in invoking that jurisdiction. English law makes these distinctions. Indeed, the typical situation in which a restraining order is made is one where the foreign court has or is willing to assume jurisdiction; if this were not so, no restraining order would be necessary and none should be granted."*

26. Where an anti-suit injunction is sought to enforce an exclusive London arbitration agreement as here, this court will, ordinarily, exercise its discretion to grant an anti-suit injunction to restrain a party from commencing or, indeed, continuing with foreign proceedings in breach of the arbitration agreement, *unless the injunction defendant can show strong or good reasons why the injunction should not be granted:* see *The Angelic Grace* [1995] 1 Lloyd's Rep 87 and *AES* in the Supreme Court [2013] UKSC 35 (per Lord Mance at [24] to [28]).

27. Thus, whilst the court should feel no diffidence in granting an anti-suit injunction to restrain a breach of a London arbitration clause, it has, nonetheless, been emphasised that this is provided it is sought promptly and before foreign proceedings are too far advanced: *The Angelic Grace* per Millett LJ at p.96, column 2.

28. Indeed, applications for anti-suit injunctions must be made promptly, both in the interests of fairness to the respondent and, indeed, in the interests of comity towards the overseas court. Millett LJ explained in *The Angelic Grace* that:

> *"If an injunction is granted, it is not granted for fear that the foreign court may wrongly assume jurisdiction to spite the plaintiffs, but on the sure ground that the Defendant promised not to put the plaintiff to the expense and trouble of applying to that court at all. Moreover, if there should be any reluctance to grant an injunction out of sensitivity to the feelings of a foreign court, far less offence is likely to be caused if an injunction is granted before that court has assumed jurisdiction than afterwards, while to refrain from granting it at any stage would deprive the plaintiff of its contractual rights altogether. In my judgment, where an injunction is sought to restrain a party from proceeding in a foreign court, in breach of an arbitration agreement governed by English law, the English court need feel no diffidence in granting the injunction provided it is sought promptly and before the foreign proceedings are too far advanced."*

29. A failure to seek relief promptly can of itself be viewed as a strong reason not to grant an anti-suit injunction and, in the *SKIER STAR* [2008] EWHC 213, Teare J refused to continue an anti-suit injunction to restrain proceedings brought by the cargo interest in Antwerp in breach of a London arbitration clause. The owners had participated in a court survey process in Antwerp in 2005, at the same time serving recourse proceedings and positively disputing the jurisdiction of the Antwerp court. Indeed, they were still disputing the Antwerp's court's jurisdiction when they applied for injunction relief in 2007. Teare J stated:

> *"… a party who wishes to enforce a jurisdiction clause should apply promptly once he is aware of a breach of the arbitration clause': …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."*

30. In *Essar Shipping v. Bank of China Ltd* [2015] EWHC 3266, Walker J refused to grant an injunction to restrain proceedings before the Qingdao Maritime Court on the ground that SVS had failed to act promptly. Noting at paragraph 51 that what is or is not "prompt" is especially fact sensitive, the Judge held as follows:

> *61. My conclusion is that the bank is right to say that the present claim has not been brought promptly. In a case where there was a potential time bar expiring in January 2015, if ESL were to seek an anti-suit injunction, it needed to issue and serve a claim form here, in the absence of some good reason to the contrary, no later than the end of November 2014. ESL's decision to defer issuing a claim form pending its Qingdao jurisdiction challenge is not a good reason to the contrary, for three reasons both individually and in conjunction with each other:*
>
> *(i) the decision was inconsistent with The Angelic Grace;*
>
> *(ii) there was no objective justification for thinking that the Qingdao jurisdiction challenge would be resolved speedily; and*

(iii) there was no objective justification for thinking that the Qingdao jurisdiction challenge would be successful."

31. In *Ecobank Transnational v. Tanoh* [2015] EWCA (Civ.) 1309, which was a claim for an anti-enforcement injunction, Christopher Clarke LJ addressed the issues of comity to which I have referred as follows, at para.133. He said:

> *"Injunctive relief may be sought (a) before any foreign proceedings have begun; (b) once they have begun; (c) within a relatively short time afterwards; (d) when the pleadings are complete; (e) thereafter but before the trial starts; (f) in the course of the trial; (g) after judgment. The fact that at some stage the foreign court has ruled in favour of its own jurisdiction is not per se a bar to an anti-suit injunction … But, as each stage is reached more will have been wasted by the abandonment of proceedings which compliance with an anti-suit injunction would bring about. That being so, the longer an action continues without any attempt to restrain it the less likely a court is to grant an injunction and considerations of comity have greater force.*
>
> *Whilst a desire to avoid offence to a foreign court, or to appear to interfere with it, is no longer as powerful a consideration as it may previously have been, it is not a consideration without relevance. A foreign court may justifiably take objection to an approach under which an injunction, which will (if obeyed) frustrate all that has gone before, may be granted however late an application is made (provided the person enjoined knew from an early stage that objection was taken to the proceedings). Such an objection is not based on the need to avoid offense to individual judges (who are made of sterner stuff) but on the sound basis that to allow such an approach is not a sensible method of conducting curial business."*
> (emphasis added)

32. On the question of comity, at first instance, in *Ecobank* [2015] EWHC 1874, Knowles J said this at paras.21 and 22:

> *"It is clear on authority that an applicant for an anti-suit or anti-enforcement injunction should apply 'promptly and before the foreign proceedings are too far advanced' However Mr Coleman, for Ecobank, submits that delay does not include any period during which the applicant sought to challenge the jurisdiction of a foreign court and the period pending the foreign court's decision on that challenge.*
>
> *I cannot accept that proposition. Leggatt LJ in The Angelic Grace … described graphically the 'reverse of comity' were the English court 'to adopt the attitude that if a foreign court declines jurisdiction, that would meet with the approval of the English court, whereas if the foreign court assumed*

> *jurisdiction, the English court would then consider whether at that stage to intervene by injunction'. As Christopher Clarke J said in [the Transfield case] '... comity, which involves respect for the operation of different legal systems, calls for challenges ... to be made promptly in whatever is the appropriate court'. Advent Capital PLC ... cited by Mr Coleman in support of his submission, was a decision on its facts and is not authority for a principle in the form of Mr Coleman's proposition. It is of note that Morison J [in that case] included a quotation of Leggatt LJ's reference to the 'reverse of comity'."*

33. Delay in seeking an anti-suit injunction, and related considerations of comity, were considered in *Team Y&R Holdings v Ghossoub* [2017] EWHC 2401 (Comm) by Laurence Rabinowitz QC sitting as a Deputy Judge of the Commercial Court. The application was in fact made promptly in that case, though it came on for hearing only after considerable delay, apparently arising from difficulties in serving the respondent abroad eventually leading to an order for service by alternative means. The respondent submitted that there had nonetheless been a total of six months' unexplained delay, including a two-month delay in applying for an alternative service order. After considering the evidence, the judge concluded that there had been no failure to act with sufficient urgency, even if there were periods where it was possible to imagine matters might have progressed more quickly, nor any 'two bites at the cherry' strategy of awaiting the outcome of the stay application abroad before pursuing the application for an anti-suit injunction. In addition, he stated:

> *"Furthermore, whilst the fact that resources of both the Hong Kong and the English court have been taken up dealing with this matter is regrettable, in the circumstances of this case - where the only matter with which the Hong Kong court has had to deal is the stay application itself and the proceedings have not progressed much further substantively - I do not accept that this should count as a factor against the grant of anti-suit relief if that would otherwise be appropriate."* (§ 110)

34. Finally, in *Qingdao v. Shanghai Ding* [218] EWHC 3009, Bryan J identified the following three relevant principles to the question of delay at [29]:

> *"(1) There is no rule as to what will constitute excessive delay in absolute terms. The court will need to assess all the facts of the particular case, see Essar Shipping v. Bank of China.*
>
> *(2) The question of delay and the question of comity are linked. The touchstone is likely to be the extent to which delay in applying for anti-suit relief has materially increased the perceived interference with the process of the foreign court or led to a waste of its time or resources - see Ecobank Transnational v Tanoh ..."*
>
> *(3) When considering whether there has been unacceptable delay a relevant consideration is the time at which the*

> *applicant's legal rights had become sufficiently clear to justify applying for anti-suit relief - see, for example, Sana Sabbagh v Khoury [2018 EWHC 1330 …"*

35. *Raphael* summarises the principles in this way:

> *"The significance of delay will depend on all the circumstances of a particular case. But some principles have been identified in the case law. First, even where there is a binding exclusive forum clause, the injunction should be sought promptly, and before the foreign proceedings are too far advanced. Second, the questions of delay and comity are linked. The more closely that the foreign court has become involved with the matter due to delay, the greater the interference with foreign court that an injunction is likely to produce, and so the stronger the factors against the grant of an injunction. Third, prejudice to the injunction defendant due to delay is significant, and if delay is not prejudicial it may be given significantly less weight. But delay is not necessarily immaterial in the absence of prejudice to the injunction defendant. The need to avoid delay arises from a variety of reasons including, in addition to prejudice to the injunction defendant, waste of judicial resources, the need for finality, and comity towards the foreign court. Fourth, and perhaps most importantly, the courts will take into account the extent to which the delay was justifiable or excusable in the circumstances; and will weigh delay against the importance of enforcing the forum clause. Even delay that can be criticized will often not be sufficient to justify refusing an injunction and thus permitting a breach of contract to continue. It seems that time taken in challenging the foreign court's jurisdiction does not in itself justify delay in applying for an anti-suit injunction."* (§ 8.21)

36. I would finally add that, for a helpful recent summary of the relevant legal principles, see Henshaw J's judgment in *Daiichi v. Chubb* [2020] EWHC 1223.

The facts

37. Against the background of the relevant authorities to which I have just referred, I come to the facts of this case. The real issue to be determined here is the question of delay.

38. Mr. Bruton on behalf of SVS gives the following evidence in his first and fourth witness statements, which I accept. SVS first learned of the Nigerian Court Proceedings on or around 21 January 2020 when they were served in Mauritius. Although this application could have been made earlier, there were good reasons for the delay and in the meantime the arbitration was commenced. In particular, it was believed by SVS upon taking Nigerian law advice that it would likely be able to deal with the Nigerian Proceedings more quickly and efficiently in the Nigerian Courts themselves, by successfully applying for a stay and then appealing the order for an

interim injunction. In the event that has not proven to be the case. I consider that that was a reasonable position for SVS to adopt.

39. In the Nigerian proceedings Mr. Bruton emphasises that:

    i. At no point does MOP suggest that the arbitration agreement is in any way invalid.

    ii. Instead, MOP allege that the commencing of arbitral proceedings is a "serious denigration and slight of Nigerian judicial system" and that given the facts of the substantive case, it would be "desirous" for the claim started by MOP in the Nigerian Courts to be heard.

    iii. Further, MOP also allege that given the pandemic and resulting lockdowns, it is impracticable for MOP or any of its representatives to attend or participate in any arbitration in London.

40. Mr. Bruton adds that no prejudice has been suffered by MOP by any delay in bringing this application. MOP has itself chosen to commence two claims in Nigeria including the obtaining of an injunction ex parte. In order to avoid default judgment being entered against it, SVS were necessarily required to take steps in that jurisdiction. Any costs and expenses incurred by MOP are as a direct result of MOP acting in breach of the arbitration agreement. In addition, there is no suggestion that the proceedings in Nigeria have reached an advanced stage and that MOP are prejudiced as a result. There has as yet been no consideration of the substantive merits of the dispute by the Nigerian Courts.

41. Mr. Bruton concludes by maintaining that SVS should not be criticised for pursuing the Nigerian proceedings in the manner that it did, as opposed to seeking injunctive relief in the English Courts immediately. The reasoning of SVS was that it was unnecessary and a potential waste of time and money to launch expensive and resource-heavy English proceedings when the Nigerian proceedings were not being progressed in relation to the substantive claim pending the outcome of the jurisdiction challenge and the setting aside of the injunction. This was especially so given the positive nature of the advice from SVS's Nigerian lawyers in relation to the merits of SVS's applications in Nigeria. The substantive issues would never have been considered in Nigeria if SVS had been successful in relation to its stay application and the setting aside of the injunction, as SVS had been advised it was likely to be. When it became apparent that the Nigerian procedure was taking significantly longer than expected (with the hearing on 2 March 2021 also at risk of adjournment) coupled with the fact that SVS's nominated arbitrator (Sir Jeremy Cooke) would not feel comfortable progressing the arbitration in the absence of an order from either the Nigerian court or the English court, relief was promptly sought in the English Court.

42. I consider that it is important to consider any allegation of delay in bringing this application in the context of the matters set out in paragraph 41 of this Judgment.

Analysis

43. The issue of delay in this particular case requires some careful analysis. The following are relevant factors:

(1) The Nigerian proceedings were served on SVS a year ago, on 21 January 2020.

(2) On 10 February 2020 SVS sought a stay in favour of London arbitration.

(3) Because of several Covid-related delays, this stay application was not heard until 20 October 2020. Judgment has still not been handed down.

(4) Separately, on 4 June 2020 the Nigerian court granted MOP's application for an ex parte injunction, made on 13 May 2020, to restrain SVS and Sir Jeremy Cooke from proceeding with the arbitration.

(5) On 1 July SVS filed an application to set aside this injunction. On 24 July 2020 the Nigerian Court dismissed SVS's application. However, this hearing was only concerned with whether the application for an injunction amounted to an abuse of process.

(6) A hearing on the substantive issues related to the underlying arbitration agreement was listed for 20 November 2020; that hearing was subsequently adjourned to 2 March 2021 and so has not yet taken place.

(7) It follows that no substantive hearing - on the issue of whether the arbitration agreement debars MOP from an entitlement to injunctive relief - has yet been heard in Nigeria.

44. I have described the reasons for the year's delay in bringing this application above. I consider that Mr. Bruton fairly summarises the position in his forth witness statement as follows:

> *"20. Accordingly, it is apparent from the above, that SVS engaged with the Nigerian Proceedings as much as necessary to preserve its position and challenge jurisdiction. Given the advice of ACAS, I and SVS believed that the jurisdiction issue could be dealt with quickly and efficiently in Nigeria. SVS's applications had good prospects of success and getting an order from the Nigerian Court on jurisdiction would be favourable when and if it came to enforcement of an arbitration award in Nigeria.*
>
> *21. However, due to the COVID-19 pandemic, other unforeseen delays and a particularly surprising judgment of the Nigerian Court, the resolution of the jurisdiction challenge in Nigeria has not been as simple and straightforward as envisaged."*

45. There has undoubtedly been delay in seeking the present relief. However, much of that delay has been caused by the Nigerian court process itself. This is not a case of

SVS seeking to have two bites of the cherry as its application for a stay has still not been determined. I accept Mr. Bruton's evidence that SVS was in fact seeking to minimise the incurring of costs by the parties in seeking to obtain an order from the Nigerian Courts restraining the Nigerian proceedings. Indeed, this was attempted by SVS in the first instance out of deference to the Nigerian Court.

46. Once it became apparent that that process was becoming substantially delayed, SVS sought relief from this court. Whilst it is obviously regrettable that a certain amount of resource of the Nigerian Court has already been taken up in dealing with this matter, that has so far only been so to a limited degree: the only matter with which the Nigerian Courts have had to deal at SVS's instigation is the application to set aside or stay the ex parte injunctive relief obtained by MOP and even that has not yet been determined at first instance.

47. When this fact is taken into account together with the fact that a) the proceedings have not progressed at all substantively on the merits in Nigeria; (b) the English court is not being asked to second guess any decision of the Nigerian Court; and c) MOP has at no stage suggested that the arbitration clause is for any reason invalid, nor has the Nigerian court made any finding to that effect, I do not consider that the delay in bringing this application should count as a decisive factor against the grant of anti-suit relief if that would otherwise be appropriate.

48. Moreover, as Ms Paruk submitted to the court, the fact that the Nigerian Court has already issued an ant-suit injunction does not require the English Court to refuse to grant the relief sought on the grounds of comity. Indeed, in the present case it is not a factor of any great weight against the granting of an injunction.

49. As Waller LJ stated in *Sabah v Islamic Republic of Pakistan & Anr* [2003] 2 Lloyd's Rep 571, para 40:

> *"If there was an injunction in place that would clearly be a relevant matter and the English Court would clearly prefer not to be thought to be aiding a contemnor. But where the obtaining of the injunction was itself a breach of contract, and was seeking to prevent a party exercising its contractual right to bring proceedings in the English Court, the English Court must at least allow the proceedings to be commenced in its Courts. It does not necessarily follow that the English Court should grant an injunction to prevent proceedings in the foreign Court, but again the existence of the foreign injunction should not prevent it doing so, if the very obtaining of that injunction can be seen to have abused the rights of the litigant with the contractual right to come to England…"*

50. Having cited that passage, Hamblen J (as he then was) in *Ecom v Mosharraf* went on to say (at paragraph 36):

> *"The present case is stronger than the Sabah case, since it contains an exclusive forum clause, whereas the English jurisdiction clause in the Sabah case was a non-exclusive one. In circumstances where the Defendant is bound by an*

> *arbitration clause, it is an egregious breach of contract for the Defendant not only to commence proceedings in a non-contractual jurisdiction but to obtain an injunction from that non-contractual forum to prevent the Claimant from itself vindicating the rights granted to it under the arbitration clause. Whilst the Bangladeshi court order is a relevant factor, where, as here, "the obtaining of the injunction can be seen to have abused the contractual rights of the litigant with the contractual right to come to England" to arbitrate, it is not a factor of any great weight."*

51. The facts of this case are very similar to those identified by Hamblen J in [31]-[35] of the *Ecom* case (where the delay was also in the order of a year). There is an exclusive arbitration clause which has been breached by the obtaining of the injunction in the foreign court, and the obtaining of that injunction is an egregious attempt to prevent SVS from exercising its contractual right to arbitrate in London. In such circumstances, questions of comity must be viewed against this background and the Nigerian Court order cannot be a reason for the English Court not to intervene; indeed, given the nature of the breach and in particular the injunction, it affords a reason for the English Court to intervene.

52. Unlike in *Essar* at [61], in the present case SVS had objective justification (in the form of its Nigerian legal advice) for thinking that its challenge in Nigeria would be resolved speedily and successfully. Once it became apparent that its swift and efficient resolution was unlikely, it brought these proceedings. No prejudice has been caused to MOP in the meantime. Moreover, Mr. Bruton explains that there has been no submission to the Nigerian Court's jurisdiction on the merits.

53. In all the circumstances, and in view of the very clear submission by MOP exclusively to London arbitration, I am firmly of the view that anti-suit relief should be granted to SVS by way of a final injunction on the facts of this case.

54. I should add that MOP's suggestion to the Nigerian Court that it is inconvenient to have the matter heard in London arbitration cuts no ice: MOP can make submissions and call evidence remotely, which is precisely what is happening on this application.

Mandatory relief?

55. I also consider that this is a case for mandatory relief.

56. In summary, if a prohibitory injunction may not be enough to ensure that the injunction is practically effective (e.g. where the foreign action has a life of its own), a mandatory injunction requiring the injunction defendant to discontinue the foreign proceedings may be granted in an appropriate case: see *Ecom v Mosharaf* [2013] EWHC 1276 (Comm). At [38] Hamblen J said this:

> *"The Claimant submits that this is an appropriate case [for a mandatory injunction] because (1) this case concerns a final order and therefore an established breach of contract; (2) it involves an exclusive forum clause; (3) the breach is*

> *particularly egregious in that it involves seeking to prevent the Claimant from exercising its contractual rights, and (4) it is necessary for such an order to made because of the interim injunction which is in place. I accept that these reasons justify the making of a mandatory order. In particular, given that the Defendant has already obtained an interim injunction from the Bangladeshi court, for the order to be practically effective it is important that the injunction granted by this Court be in mandatory form."*

57. In my judgment, precisely the same considerations apply in this case.

58. If MOP discontinues in Nigeria in accordance with the mandatory injunction granted by this court it may be ordered to pay costs, although that is not certain as (as Mr Bruton explains in his 4th statement) under Nigerian law the matter of costs is discretionary to be decided by the Judge. In any event, any resulting prejudice (a) is caused by MOP's own pursuit of the claim in a non-contractual forum and MOP's own actions in seeking to prevent SVS from exercising its contractual rights and (b) is far outweighed by the prejudice SVS will suffer if the proceedings continue in Nigeria.

Declaratory relief?

59. Finally, in addition to the anti-suit injunction, SVS seeks declarations in the terms which I have described. This is of course a matter for the court's discretion. In a case such as this, where foreign proceedings have been commenced in breach of an arbitration clause, it is not uncommon for the Courts to grant declaratory relief in the terms sought, whether or not injunctive relief is also granted.

60. As Hamblen J stated in *Ecom* at [40]:

> *"In cases such as the present where foreign proceedings have been commenced in breach of an arbitration clause the Courts have on numerous occasions granted declaratory relief in similar terms to those sought in this case, whether or not injunctive relief is also granted – see, for example, Through Transport Mutual Insurance Association v New India Assurance [2004] 2 CLC 1189; AES Ust-Kamenogorsk Hydropower Plant v Ust-Kamenogorsk Hydropower Plant JSC [2010] 1 CLC 519 (Burton J), para 20; and see Raphael, para 15.07. It is clear that the Court does have jurisdiction to grant such declarations, and the question whether they should do is a matter of the Court's discretion - see the decision of the Court of Appeal in AES Ust-Kamenogorsk Hydropower Plant v Ust-Kamenogorsk Hydropower Plant JSC [2012] 1 WLR 920 paras 36, 42, 64-5, 103-105."*

61. Such a declaration will in this case be of use to the Claimant, being of assistance to it if the injunction which this court grants is not obeyed by MOP, and also in enforcing an award should it obtain one from the arbitral tribunal (as to which I of course express no view whatsoever). In all the circumstances I consider that the Court should exercise its discretion to grant the declarations sought.