TOWCON and Exclusive Choice of Forum – No Stay of Proceedings

District Court of Rotterdam, 2nd July 2014 in Sovlot v. Bensam Maritime Oil & Gass

On 20 November 2012 a Towage Agreement was concluded between Sovlot B.V. (the Netherlands) as Tug Owner and Bensam (Nigeria) as Hirer on Bimco's TOWCON, 1985 version. Under the Towage Agreement Sovlot would use the tug "Sun Essex" to tow the m.t. "Frisius" from Rotterdam to a mooring at Lagos, Nigeria, together with another single-hull tanker ("Sapphire") being exported from the Netherlands to Nigeria. On 16 December 2012 the "Frisius" broke into two off the Spanish coast, with the rear section containing the machine room sinking whilst the bow section remained afloat. The "Sun Essex" entered the port of La Coruña, Spain, with the remaining bow section of "Frisius" and the other barge and after posting security for a sum of EUR 150,000 for the costs of salvaging the sunken rear section of "Frisius". "Sun Essex" continued the voyage to Lagos towing the other barge, "Sapphire". Immediately upon arrival at Lagos "Sun Essex" was arrested on behalf of Bensam, the Purchaser of both "Frisius" and "Sapphire" for a claim estimated by the Federal High Court in Lagos at EUR 1 million. On 22 January 2013 Bensam instituted proceedings on the merits at the Federal High Court in Lagos against (1) the tug boat "Sun Essex" (2) the captain of "Sun Essex" and (3) Owners of "Sun Essex" as defendants. On 29 May 2013 Sovlot commenced proceedings in the District Court of Rotterdam against Bensam, based on the choice of jurisdiction clause in the Towage Agreement i.e. seeking a provisionally enforceable judgment ruling that Sovlot is not liable to Bensam under the Towage Agreement for any damage that Bensam allegedly suffered as a result of the breaking up and sinking of "Frisius" during towage by the tug boat "Sun Essex".

Before all defences on the merits Bensam moves that the Rotterdam Court declines jurisdiction pursuant to article 12 of the Dutch Code of Civil Procedure (DCCP) in respect of the claim in the principal action, or that the court stay the proceedings in the principal action, ordering Sovlot to pay the costs of the proceedings in a provisionally enforceable ruling.

<u>Judgment of the court</u>

Sovlot asserts that the District Court in Rotterdam has international jurisdiction and is competent to assess the dispute between the parties because Article 25 of Part II of the Towage Agreement contains an exclusive choice of forum. Although Bensam contests the competence of this court, it does not contest in itself that the aforementioned Article 25 contains an exclusive choice of forum for the District Court of Rotterdam and that this provision is part of the applicable Agreement concluded between the parties. The binding nature of Article 25 of Part II of the Towage Agreement is therefore established between the parties. Bensam contests the competence of this court solely on the ground that pre-existing proceedings on the same subject are pending between the same parties before a foreign court as provided for in Article 12 of the DCCP. It therefore invokes *lis pendens*.

The Court has established that the aforementioned Article 25 contains an exclusive choice of forum for the District Court of Rotterdam that complies with the requirements of Article 23 of the EC Jurisdiction Regulation. The Parties do not dispute that the claims put by Sovlot arise from or in connection with the Towage Agreement. Therefore, on the ground of the choice of forum, the Court in Rotterdam has international jurisdiction and competence to hear this dispute. If the Bensam

defence must be interpreted to mean that it contests the international jurisdiction of the Dutch Court, as provided for in Article 11 of the DCCP (applied directly), then it fails on these grounds.

The fact that a stay on the basis of *lis pendens* of parallel proceedings in a foreign court can be based only on Article 12 of the DCCP in the case at hand is not in dispute. The situation provided for in Article 27 of the EC Jurisdiction Regulation, which relates to *lis pendens* of claims before courts in different EU Member States, does not arise in this case and no international treaty exists on this subject between the Netherlands and Nigeria.

Article 12 of the DCCP provides that where litigation is pending before a court in a foreign State and the court judgment in that case can be recognised and if appropriate enforced in the Netherlands, the Dutch court subsequently seised of a case between the same parties on the same matter may order a stay of proceedings until the former court has passed its ruling. After that court has rendered its decision, which can indeed be recognised and potentially enforced in the Netherlands, the Dutch court that ordered to stay of the proceedings must decline jurisdiction.

The parties do not dispute that there is a case pending before the Nigerian court, which was seized of the case before this court.

The Court observes that the proceedings in Nigeria relate to the same matter as these proceedings. Sovlot's claims in the principal action in Rotterdam seek a ruling that it is not liable under the Towage Agreement for the breaking and wrecking of the "Frisius" and seek compensation for costs incurred by Sovlot in this context. According to the Statement of Claim in the proceedings in Nigeria, Bensam's claims seek compensation for damage that Bensam suffered in connection with the same incident.

The parties also agree that the proceedings in Nigeria were brought by Bensam against, *inter alia*, the Owners of the "Sun Essex" (the third defendant) and to that extent the proceedings were therefore originally between the same parties. It is also established, however, that Bensam withdrew the Nigerian claim against Sovlot on 22 January 2013 so that Bensam's action in Nigeria after this withdrawal is only pending against the tug boat the "Sun Essex" and the captain of the "Sun Essex".

This does not necessarily mean, however, that the proceedings in Nigeria no longer involve Sovlot as the owner of the "Sun Essex". In order that the objective of the *lis pendens* rule should not be undermined, the concept of "the same parties" must be interpreted broadly. After all, the action there was brought as an *actio in rem* against the "Sun Essex", and therefore a ruling in the Nigerian proceedings against the vessel will affect the assets of Sovlot as owner of the "Sun Essex".

It follows from the judgment in the 'Tatry' case (EU Court of Justice, 6 December 1994, NJ 1995, 659) that – in any event for the application of Article 27 of the EC Jurisdiction Regulation – the distinction between *actiones in rem* and *in personam* is not essential for the application of the *lis pendens* rule and that an *actio in rem* brought originally in respect of an attached vessel that is subsequently continued both *in rem* and *in personam* or just *in personam* still relates to '*the same cause of action and the same object'* and the same parties. In the view of the Court, the same holds for the application of Article 12 of the DCCP. The conclusion therefore is that a case is pending before the Nigerian court between the same parties within the meaning of Article 12 of the DCCP.

As a consequence, the Court must now consider at its own discretion whether it will order a stay of the proceedings or not.

By and large, the interest of efficient administration of justice and avoiding the risk of contradictory judgments weigh in favour of a stay of the proceedings. These are compelling interests.

It is difficult to predict whether these interests are served by a stay in this specific case. Bensam, upon whom the onus lies, has not provided sufficient clarification on the status of the proceedings in Nigeria and the period within which a decision can be expected. The court understands from the documents that the proceedings in Nigeria are still at an initial stage after lapse of one year. It is therefore possible that, if the case were to be stayed in the Netherlands, consideration of the case could face unreasonable delays whilst awaiting the judgment of the Nigerian court. Bensam also hints in its documents that the Nigerian court might decline jurisdiction in favour of the Dutch court. This scenario does not give rise to the risk of contradictory judgments and the proceedings in this court would only be unnecessarily delayed by the stay requested by Bensam.

In this case, a stay is at variance with the fact that the parties have expressly agreed to put any disputes in connection with the Towage Agreement or its implementation exclusively before this Court, leaving aside the possibility of – essentially – conservatory measures. The parties themselves shaped their contractual relationship thus, and in principle are bound by their given word. It is not been asserted or demonstrated that this case should be considered differently. The principle of party autonomy and the principle that contracting parties are bound by their agreements carries significant weight. Sovlot stipulated that disputes must be settled before a court in its own country and Bensam consented to this. Bensam is bound by this agreement, even if it is now choosing a different court as a result of subsequent circumstances, in this case in Nigeria.

Even if the court in Nigeria were to retain the proceedings despite the choice of forum clause in the Towage Agreement, Sovlot has an interest that must be respected in continuing proceedings on its claim before the court designated by both parties without delay.

Consideration of the aforementioned interests leads the Court in this instance to decide that it will not stay consideration of this case.

In this context, the Court also took into account the thinking behind the new *lis pendens* rule in the 'recast' EC Jurisdiction Regulation (Council Regulation (EC) No 1215/2012 of the European Parliament and the Council of 12 December 2012 on jurisdiction, recognition and enforcement of judgments in civil and commercial matters). Although the 'recast' EC Jurisdiction Regulation has already entered into force its jurisdiction provisions will not apply until 10 January 2015. The *lis pendens* rule in this new Regulation includes the rule that – essentially – if the last seised court has jurisdiction on the grounds of a choice of forum, this jurisdiction will preclude reliance on *lis pendens*. As a result of the foregoing, the claim in the interim proceedings is dismissed.

Subsequently the case was placed on the Register for Statement of Defence by Bensam in the principal action.

Comments

This judgement of the District Court of Rotterdam in interim proceedings on the jurisdictional issue shows how careful Dutch courts investigate jurisdictional issues even if these seem only to be of a dilatory nature. Despite the parties' contractual choice of forum in favour of the District Court in Rotterdam, Bensam decided to bring a claim on the merits in a court in Nigeria. Although the

Nigerian court was first seised of the matter, the Rotterdam Court correctly decided against a stay of the later Dutch proceeding because of the choice of forum in the Towage Agreement. The TOWCON Towage Agreement has a knock-for-knock character (clause 18) which makes clear that loss or damage of whatsoever nature, howsoever caused to or sustained by the tow, as well as loss or damages suffered by third parties by reason of obstruction created by the tow, shall be for the sole account of the Hirer, regardless whether the damage or loss is due to breach of contract, negligence or any fault on the part of the Tug Owner, its servants or agents. Any liability in respect of wreck removal or in respect of the expense of moving or lighting a tow shall be for the account of the Hirer as well. It would therefore seem that the claim on the merits of the case will succeed in the proceedings in the Netherlands.

Van Steenderen MainportLawyers represented the Owners of “Sun Essex” in this action.

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