

Neutral Citation Number: [2023] EWHC 3263 (Comm)

Case No: CL-2019-000518

CL-2023-000050

CL-2023-000181

CL-2023-000293

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

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

Date: 19/12/2023

Before :

THE HON MR JUSTICE BUTCHER

Between :

THE FRENCH STATE

Appellant

- and -

**THE LONDON STEAM-SHIP MUTUAL
INSURANCE ASSOCIATION LIMITED**

Respondent

And Between

THE KINGDOM OF SPAIN

Appellant

-and-

**THE LONDON STEAM-SHIP MUTUAL
INSURANCE ASSOCIATION LIMITED**

Respondent

Tim Young KC and Jamie Hamblen (instructed by **Squire Patton Boggs (UK) LLP**) for the
Kingdom of Spain

Anna Dilnot KC and Naomi Hart (instructed by **K&L Gates LLP**) for the **French State**
Christopher Hancock KC, Thomas De La Mare KC and Alexander Thompson (instructed
by **Wikborg Rein LLP**) for the **Respondent Club**

Hearing date: 15 December 2023

APPROVED JUDGMENT

This judgment was handed down by the court remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 19 December 2023 at 10.00am

Mr Justice Butcher :

1. This is my ruling in relation to the applications made: for leave to appeal by the French State ('France') and the Kingdom of Spain ('Spain') (together 'the States'); for permission to appeal by Spain; and for a 'leapfrog certificate' by Spain, in respect of the orders arising from my judgments of 6 October 2023.
2. It is somewhat unusual for a judge, having heard oral argument on the point, to reserve for a written ruling the question of leave/permission. The present applications were, however, themselves somewhat out of the ordinary. I received about 100 pages of skeleton arguments (including proposed grounds of appeal) in relation to these applications, and the oral hearing took a full day.
3. There are, broadly, two groups of applications.
 - (1) There are applications for leave to appeal under s. 69(8) Arbitration Act 1996 ('AA 1996'), in respect of my dismissal of appeals under s. 69 AA 1996 from awards of Sir Peter Gross (in the case of Spain) and Dame Elizabeth Gloster (in the case of France). These may be called the Arbitration Applications.
 - (2) There is an application for permission to appeal by Spain in respect of my determination that the appeal by the Club against the Registration Order in Claim No. CL-2019-000518 succeeds; and an application by Spain for a 'leapfrog' certificate under s. 12 Administration of Justice Act 1969 ('AJA') in respect of that determination.
4. I will take the two groups separately, and in the order set out in the previous paragraph.

The Arbitration Applications

5. Spain seeks leave to appeal under s. 69(8) AA 1996 in respect of two matters:
 - (1) My dismissal of Spain's appeal under s. 69 AA 1996 on what were described in my judgment as Spain's grounds (1) and (2) (see para. 368(4) of the Spain judgment of 6 October 2023).
 - (2) My dismissal of Spain's appeal under s. 69 AA 1996 on what was called issue (4) (equitable compensation) (see para. 368(4) of the Spain judgment).
6. France seeks leave to appeal under s. 69(8) AA 1996 in respect of my dismissal of what was called Ground 2 in the France judgment of 6 October 2023, namely that relating to equitable compensation.
7. As I indicated at the hearing, I will give leave to both States under s. 69(8) AA 1996 in relation to the equitable compensation ground (ie that referred to in paragraphs 5(2) and 6 above). I consider that point to be one of general importance on which an appeal stands a real prospect of success.
8. As to Spain's application in relation to what were called its grounds (1) and (2) (i.e. those referred to in para. 5(1) above, and which are summarised in paragraph 2(1) of the Grounds of Appeal appended to its Skeleton Argument of 6 December 2023), I refuse leave under s. 69(8). I appreciate that if this court refuses such leave the Court of Appeal cannot grant it. Nevertheless, I consider that leave should be refused for the reasons which follow.
9. The ground sought to be advanced here (as summarised in para. 2(1) of the Grounds document I have referred to in the preceding paragraph) seeks to

contend that the CJEU judgment and the principles of EU law stated therein are such as to lead to the conclusion that Spain had not acted in actionable breach of its equitable obligation to arbitrate and/or had not acted unconscionably. However, as Sir Peter Gross found, and I have also held, the CJEU judgment says nothing about whether Spain was obliged to arbitrate. It does not consider whether Spain can be said to have acted in breach of an equitable obligation or ‘unconscionably’ in maintaining proceedings in Spain. I consider it to be an unwarrantable stretch to argue that the CJEU judgment has any significant bearing on those matters.

10. As Spain pointed out, I was persuaded, for the purposes of leave under s. 69(2)(b) AA 1996, that what were called in the Spain judgment of 6 October 2023 grounds (1) and (2) raised questions of ‘general public importance’ within s. 69(3)(c)(ii) AA 1996 (see para. 312 of Spain judgment of 6 October 2023). It is clear from authority, however, that the fact that leave to appeal to this court may have been given on the basis that the question of law arising out of an award is one of ‘general public importance’ does not determine that the question must be regarded as of ‘general importance’ for the purposes of leave under s. 69(8) AA 1996 (see Kyla Shipping Co Ltd v Bunge SA [2013] EWCA Civ 734). I consider that to be the case even if the decision to grant leave under s.69(2)(b) was made after oral argument. The issue of whether the question has general importance for the purposes of s. 69(8) has to be addressed in the light of the fact that the court has now heard the appeal and there is a decision of the Commercial Court on the question. In those circumstances, especially if the court - as here - has dismissed the appeal, it may be that the question is not of general importance for the purposes of s. 69(8) AA 1996.

11. Here I am not persuaded that there is a question of general importance for the purposes of s. 69(8) AA 1996. Specifically:
- (1) These grounds, in reality, relate only to whether Spain is, in this particular case, answerable for having maintained its civil action in Spain and for having sought to enforce the resulting judgment, notwithstanding an equitable obligation to arbitrate.
 - (2) Whether the CJEU judgment has any relevance to or bearing on such a situation will not arise in the future, given the UK's withdrawal from the EU.
 - (3) There is now a decision of the Commercial Court, in line with the decision of Sir Peter Gross, which finds that the CJEU judgment does not bear on the issue of whether there was an actionable breach of the equitable obligation or unconscionability on Spain's part.
12. In any event, and even if the points in what were called grounds (1) and (2) in the Spain judgment of 6 October 2023, and which are summarised in paragraph 2(1) of Spain's Grounds of Appeal document, can be said to be of 'general importance', I do not consider that there should be leave under s. 69(8) AA 1996 because I do not consider that an appeal stands a real prospect of success. The CJEU did not make any decision at all in respect of the Club's arbitration, and that was a matter which was not even arguably before it. Furthermore, the interests of justice favour finality as to points where Spain's argument has as limited prospects of success as I consider it to have here.

13. I do not consider that there is ‘some other special reason’ why these questions should be considered by the Court of Appeal, especially in circumstances where there has already been a determination by the arbitrator, which has been upheld by this court.

Spain’s Applications in relation to the decision as to the Registration Order

14. Spain sought permission to appeal in respect of my determination that the Club’s Appeal against the Registration Order in Claim No. CL-2019-000518 succeeds on the grounds (1) that the Spanish judgment is irreconcilable with the English s. 66 judgments and (2) that, if that is wrong, recognition of the Spanish judgment would be contrary to principles of English public policy relating to *res judicata* by reason of the prior Schaff Award.
15. The relevant Grounds of Appeal for which Spain sought permission are set out in paragraph 1 of the Grounds document appended to its Skeleton Argument of 6 December 2023 to which I have already referred.
16. While Spain puts at the forefront of its arguments the issue of whether this court was bound by paragraphs [54]-[73] of the CJEU judgment, an appeal will, in my view, only stand a realistic prospect of success if Spain has a realistic prospect of overcoming two other points arising from the findings in my judgment, namely:
 - (1) the argument that the CJEU judgment had no relevant bearing on the present case, given my findings as to submission in paragraphs 159 and 160 of the Spain judgment of 6 October 2023, and in particular the finding that ‘even if the insurance provisions of the Regulation were applicable, and even if

the arbitration agreement did not mean that the English courts could exercise jurisdiction because of Article 1(2)(d), Spain's submission would mean that the English courts had had jurisdiction under the Regulation'; and

(2) the point that there was already an issue estoppel by reason of the decision of Hamblen J in 2013 which meant that Spain could not rely on a judgment of the CJEU based on the premise that the s. 66 judgments were not properly given.

17. I have had doubts about whether Spain does have a realistic prospect of success in relation to these points. Ultimately, however, and bearing in mind the relatively low threshold involved, I have concluded that Spain should be given permission to appeal to the Court of Appeal on all the grounds contained in paragraph 1 of the Grounds document I have referred to.

18. I decline to grant a certificate under s. 12 AJA. I am not satisfied that all the grounds on which Spain must succeed in order to reverse my decision are points of law of general public importance. I am clearly of the view that neither the point in relation to my findings as to submission nor the issue estoppel point (ie the points referred to in sub-paragraphs 16(1) and 16(2) above) is of general public importance. I also doubt that the points in relation to the jurisdiction of the CJEU are either, given that the UK has now withdrawn from the EU. Nor am I satisfied that any of Spain's grounds are ones: (i) which relate wholly or mainly to 'the construction of an enactment or of a statutory instrument'; (ii) in respect of which I was bound by a decision of the Court of Appeal or of the Supreme Court; or (iii) to which any of the alternative conditions in s. 12(3A) AJA is applicable.

19. Even had I been satisfied that any of the conditions in s. 12(3) or (3A) AJA was met, I would not have considered that a sufficient case for an appeal to the Supreme Court had been made out. This issue involves a range of considerations ‘some merits-based, some discretionary’ (see per Jay J in Henderson v Dorset Healthcare University NHS Trust [2017] 1 WLR 2673 at [103]). In the present case, a number of inter-related and to some extent overlapping points fall to be addressed which can, in my view, only appropriately be determined together by the Court of Appeal. Specifically, in addition to the points for which I have given permission in paragraph 17 above, there will, I am told, be a Respondents’ Notice dealing with what has been called the Procedural Fairness Ground (see Spain judgment of 6 October 2023 paras. 240-241). There is also the Human Rights Ground, on which I have already given permission to appeal to the Court of Appeal, and which cannot be the subject of a ‘leapfrog’ certificate. There will also be the States’ appeal on the ‘equitable compensation’ ground for which I have given leave under s. 69(8) AA 1996, and in respect of which there is no application for a ‘leapfrog’ certificate. In my view all these need to be considered by one court, and that can only be the Court of Appeal. This means that no sufficient case is made for an appeal to the Supreme Court on only some of those issues; alternatively provides good reason for declining to grant a ‘leapfrog’ certificate in my discretion.
20. I will be obliged if the parties could draw up a formal order embodying the above decisions.