IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 309 OF 2022 (DDJ)

IN THE MATTER OF SECTION 72 OF THE ARBITRATION ACT, 2012

AND IN THE MATTER OF SECTION 5 OF THE FOREIGN ARBITRAL AWARDS ENFORCEMENT LAW (1997 REVISION)

AND IN THE MATTER OF THE ARBITRATION PROCEEDINGS BETWEEN SHARQ INSURANCE LLC (FORMERLY DOHA BANK ASSURANCE COMPANY LLC) AND BARENTS RE REINSURANCE COMPANY, INC. SEATED IN DOHA, IN THE STATE OF QATAR CONDUCTED IN ACCORDANCE WITH THE ICC RULES OF ARBITRATION WITH ICC INTERNATIONAL COURT OF ARBITRATION CASE NO.: 25600/ PTA/XZG (c.25601/PTA)

BETWEEN

SHARQ INSURANCE LLC (FORMERLY DOHA BANK ASSURANCE COMPANY LLC)
Plaintiff

and

BARENTS RE REINSURANCE COMPANY, INC.
Defendant

Appearances:	Chris Keefe of Walkers (Cayman) LLP for the Plaintiff Jonathon Milne of Conyers Dill & Pearman LLP for the Defendant
Before:	The Hon. Justice David Doyle
Heard:	16 June 2023
Date of decision:	16 June 2023
Draft reasons circulated:	7 July 2023
Reasons approved:	13 July 2023

HEADNOTE

Determination of Summons to set aside Ex parte order granting leave to enforce a final arbitral award and issues as to costs

JUDGMENT

Introduction

1. On 16 June 2023 I dismissed an ill-founded and misconceived summons dated 28 February 2023 (the "Opposition Summons") of Barents Re Reinsurance Company, Inc (the "Defendant") following a hearing on that date. I also made an order for costs against the Defendant in favour of Sharq Insurance LLC (the "Plaintiff") in respect of the Plaintiff's *ex parte* originating summons dated 15 December 2022 (the "*Ex parte* Summons") on the standard basis up to 28 February 2023 the date of the Defendant's Opposition Summons and thereafter on the indemnity basis. The reasons for such orders would have been readily apparent from my exchanges with counsel and statements during the hearing.

2. Walkers (Cayman) LLP, the attorneys for the victorious Plaintiff, nevertheless by email dated 20 June 2023 communicated with my Personal Assistant as follows:

> "… we have now been instructed to request written reasons if at all possible."

3. I now provide short written reasons for the orders made on 16 June 2023.

The *Ex Parte* Summons

4. The *Ex Parte* Summons sought an order that (1) the Plaintiff have leave to enforce a final arbitral award dated 5 May 2022 issued by Alistair Schaff KC (President), Colin Edelman KC and John Lockey KC of the ICC International Court of Arbitration in Case No 25600/PTA/XZG (c. 25601/PTA) (the "Award") against the Defendant in the Cayman Islands and (2) the Defendant pay the costs of the proceedings on the indemnity basis to be taxed if not agreed.

5. On 14 February 2023 I made an order (the "*Ex parte* Order") granting leave to enforce the Award in the Cayman Islands and adjourned the application for indemnity costs to give the Defendant an

FSD2022-0309 Page 2 of 11 2023-07-17

opportunity of making submissions if it thought fit to do so. I was uncomfortable in granting an indemnity costs order on an *ex parte* basis.

The Opposition Summons

6. The Opposition Summons, at paragraph 1, sought an order setting aside the *Ex parte* Order but was unclear as to its grounds. The Opposition Summons was supported by various evidence including 3 affidavits from Gerardo Garcia Gomez who gave an address in the Cayman Islands and stated that he was "a Director and Chairman" of the Defendant. At paragraph 2 of the Opposition Summons a declaration that the Award is unenforceable in the Cayman Islands was sought but again did not specify the grounds of that application. At paragraph 3 it sought a "stay of execution of [the *Ex parte* Order] pending production of an exequatur issued in the State of Qatar which confirms that the Award is enforceable in its country of origin and/or stayed until this Summons is finally disposed of". Jonathon Milne who appeared on behalf of the Defendant abandoned paragraph 3 at the hearing. At paragraph 4 a request was made that the application for indemnity costs be dismissed.

7. In his 34 page skeleton argument dated 7 June 2023 Mr Milne for the Defendant raised, amongst others, the following points:

   (1) *Ex parte* court orders have been obtained in Panama dated 31 March and 5 April 2023 which purport to suspend the effects of two reinsurance bonds/slips or cover notes and also purport to suspend the effects of the reinsurance contract entered into between the Defendant and the Plaintiff. Mr Milne said that the effect is that "the APB, the PB and the Reinsurance Contracts" which "underpin the Award" are suspended until "a competent tribunal issues a judgment (or award, as the case may be), on the merits, with regard to whether such contracts are a legal nullity". Mr Milne does not go so far as to suggest that the *ex parte* orders made in Panama purport to suspend the enforcement of the Award. Mr Milne invites the court to stay or set aside the *Ex parte* Order in light of the *ex parte* orders made in Panama pending final judgment in Panama;

   (2) the Plaintiff's nominated arbitrator Mr Colin Edelman KC failed to properly disclose a pre-existing potential conflict of interest and/or apparent bias against the Defendant. It is alleged that Mr Edelman KC previously acted on behalf of a German reinsurance company

in proceedings in the English High Court and "during those proceedings, he engaged in hostile cross-examination of a key individual associated with the Barents Re group which included allegations of dishonesty and bribery". What Mr Milne did not make plain in his skeleton argument was that such cross-examination took place as long ago as 5 July 2004;

(3) the Plaintiff bears the burden of demonstrating that the Award would be enforceable in Qatar and invites the Court to grant a stay of execution of the *Ex parte* Order pending the production of an exequatur issued in the State of Qatar which confirms that the Award is enforceable in its country of origin despite what Mr Milne describes as "the unresolved Conflicts Issue";

(4) Mr Milne refers to section 7 (2) (e) of the Foreign Arbitral Awards Enforcement Act ("FAAEA") and suggests that the Court should refuse to enforce the Award because of the "Conflicts Issue". Mr Milne says that the Qatari Court of Appeal cannot have decided an issue which it did not even mention in its judgment;

(5) Mr Milne says that taking into account "comity considerations" that it would be appropriate for this Court to set aside or grant a stay of the *Ex parte* Order pending the determination of the claim in Panama which affects the reinsurance contracts/notes which underpin the Award obtained by the Plaintiff. Mr Milne adds that the Panama Court "has now issued a request dated 25 May 2023 to this Honourable Court seeking assistance and recognition of the Panama Protection Measures";

(6) the Plaintiff failed to discharge the duty of full and frank disclosure at the *ex parte* stage by failing to disclose the facts that both parties had made submissions to the Qatari Court of Appeal on the Conflicts Issue and that the Qatari Court of Appeal had failed to decide the Conflicts Issue as part of its ruling. Mr Milne says that these were "not minor slips or mistakes, as they were material documents which Sharq should have provided to the Court given the Conflicts Issue squarely falls within section 7 (2) (e) of the FAAEA and this Court would have had the opportunity to test Sharq's case on the Conflicts Issue from the outset …";

(7) the Court should grant a stay of execution of the *Ex parte* Order pending the Plaintiff demonstrating that the Award would be enforceable by obtaining the production of an

FSD2022-0309 Page 4 of 11 2023-07-17

exequatur issued in the State of Qatar which confirms that the Award is enforceable in its country of origin; and

(8) on costs Mr Milne says that the Defendant is entitled to an order for costs on the basis that (a) on an objective analysis of the Opposition Summons it should succeed as the Conflicts Issue and the Panama proceedings represent "insurmountable hurdles to the recognition and enforcement of the Award at this stage" and (b) some consideration must be given to the Plaintiff's failure to draw the court's attention to the unresolved Conflicts Issue at the time of seeking to obtain the *Ex parte* Order. Moreover there are no proper grounds to make an indemnity costs order against the Defendant. Mr Milne at paragraph 64 of his skeleton argument has the temerity and rhino-thick skin to suggest that the Defendant "has made legitimate points at all times during these proceedings".

8. During his oral submissions Mr Milne:

(1) abandoned the allegation of non-disclosure and did not rely upon it as a ground for setting aside the *Ex parte* Order;

(2) abandoned the argument that the Plaintiff was required to obtain an exequatur in Qatar as an argument justifying the setting aside of the Award and the *Ex parte* Order and no longer sought to rely on paragraph 3 of the Opposition Summons; and

(3) could not confirm by reference to evidence or instructions whether the Award and the *Ex parte* Order were brought to the attention of the Panama Court before the *ex parte* Orders and letter of request were made in Panama.

Determination

9. There was absolutely nothing in the evidence or arguments presented on behalf of the Defendant that would have justified this Court in setting aside the *Ex parte* Order. It was apparent that the Defendant was desperately trying to invent any argument that would put off judgment day. Its position was quite hopeless. I am concerned that an entity which the court was informed is regulated by the Cayman Islands Monetary Authority should see fit to conduct itself in the way in

FSD2022-0309 Page 5 of 11 2023-07-17

which the Defendant has conducted itself in these proceedings. It should stop messing around and wasting court time. It should pay the Award forthwith.

10. Section 7 (1) of the FAAEA provides that the enforcement of a Convention award (which the Award is) shall not be refused except in the cases mentioned in subsections (2) and (3). Mr Milne relied on section 7 (2) (e) whereby the enforcement of a Convention award may be refused if the person against whom it is invoked proves that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country where the arbitration took place. Section 7 (3) provides that the enforcement of a Convention award may also be refused if it would be contrary to public policy to enforce the award.

11. After oral submissions only two grounds remained:

    (1) comity and the Orders and letter of request from the Panama Court (the "Section 7 (3) Panama point") and

    (2) what Mr Milne described as the Conflicts Issue but is more properly described as the "Section 7 (2) (e) recusal point".

12. In respect of the Section 7 (3) Panama point I was not persuaded that it would have been proper for this Court to have set aside the *Ex parte* Order on the basis that the enforcement of the Award would be contrary to public policy. I confess that I had serious reservations as to how the Defendant presented its *ex parte* applications to the Panama Court. Mr Milne could not help me in that respect. There was no evidence or submissions or instructions before the Court that the Defendant had placed before the Panama Court all relevant material including the Award and the *Ex parte* Order. Frankly it appeared to the Court that the Defendant's reactive and belated action to try and engage the assistance of the Panama Court was a tactical ploy in the hope of persuading this Court that it should not enforce the Award and that it should set aside the *Ex parte* Order.

13. The letter of request from the Panama Court has not been officially communicated to me. If and when it is I will require full disclosure from the Defendant as to all the material that it placed before the Panama Court. If the Defendant is unwise enough to continue with its proceedings in Panama regarding the Plaintiff and the Award it should bring to the attention of the Panama Court the

contents of this judgment. The letter of request exhibited to Mr Gomez's third affidavit refers to "the factual basis of the conservatory measure or protection" but nowhere is there reference to the Award or the *Ex parte* Order: maybe Mr Gomez did not bring those important documents to the attention of the Panama Court. I hope the Defendant did not mislead the Panama Court into granting the *ex parte* orders and issuing the letter of request. On the limited evidence provided to me and on the basis of Mr Milne's inability to assist me on the questions I asked in respect of the proceedings in Panama I could not rule that possibility out.

14. Moreover the Court Order no 528 from the Panama Court dated 31 March 2023 expressly included the following closing words:

> "The foregoing is without prejudice of the decision(s) adopted by the competent arbitral tribunal for the main cause."

15. The Defendant failed to prove to me that the enforcement of the award would be contrary to public policy.

16. The Defendant's Section 7 (2) (e) recusal point was even more hopeless. What Mr Milne did not highlight in his skeleton argument when he raised this point at paragraph 10.8 was that the cross-examination upon which reliance was placed took place on 5 July 2004 and there was no clear evidence that the individual subjected to the cross-examination was a key individual associated with the Defendant. I do not want to waste much time on this desperately hopeless point which should never have found its way into the skeleton argument but let me give some brief reasons for rejecting it.

17. It is common ground that what Mr Milne refers to as the Conflicts Issue was before the Court of Appeal in the State of Qatar and the parties had put in detailed written submissions in that respect. It is also common ground that the Qatar Court of Appeal did not include a separate section in the judgment dealing with the Conflicts Issue. I do not descend too far into the expert evidence as to how the Qatar Court of Appeal writes its judgments. I refer to the concluding words of the Judgment of the Court of Appeal of the State of Qatar dated 26 December 2022 which dealt with an appeal by the Defendant in the Cayman proceedings (described as the Plaintiff in the Qatar proceedings) requesting an "invalidation" of the Award on various grounds. It is expressly recorded in bold that the Court "perused the papers, heard the pleading and duly deliberated." It

FSD2022-0309 Page 7 of 11 2023-07-17

was held that the Defendant's "lawsuit lacks valid legal grounds and hence it should be dismissed in terms of merits thereof" and "The Court adjudicates to: Accept the appeal in form and dismiss its terms of merits thereof and oblige the Plaintiff to pay the legal expenses."

18. If the Qatar Court of Appeal felt that there was anything in the Conflicts Issue it is inconceivable that it would have delivered a judgment dismissing an appeal against the Award.

19. I should add, as it is relevant to the indemnity costs issue, that I was totally unimpressed with the evidence put forward by the Defendant for reasons which should be apparent from the contents of this judgment.

20. By legal opinion dated 7 March 2023 Georges Sioufi (described as attorney at law Paris and Beirut Bar) and Chafic Nehme (described as attorney at law Beirut Bar) purport, on behalf of the Defendant, to give opinions on Qatari law. They also betray the misconceived tactical thinking of the Defendant. The legal opinion is addressed to the Defendant and the authors at lines 3 to 5 of the opening paragraph "suggest to you a procedural approach which will *in minima*, gain Barents Re some time or even return the matter in front of the judge in charge of the enforcement in Qatar". If any evidence was required that the Defendant's main motivation in filing the Opposition Summons was to buy some more time to improperly delay the enforcement of the Award then those words from its own instructed foreign attorneys may be a good start. These foreign attorneys set out various Articles of what they describe as Qatari Arbitration Law and attempt at paragraph 4 to raise an argument on public policy and exequaturs. At paragraph 5 reference is made to the "non-legality of the composition of the Arbitral Tribunal."

21. The authors of the document at paragraph 6 say that it would be advisable for the Defendant in Panama and Cayman to assert that the Award cannot be enforced unless an exequatur is issued in Qatar.

22. Mr Gomez at paragraph 20 of his second affidavit says that Chefic Nehme worked with two local firms in Qatar for more than three years "although [the authors of the opinion] are not practising lawyers in Qatar". Mr Gomez tries unconvincingly to explain away the reference to "gain Barents Re some time".

23. Recognising the deep flaws in this evidence the Defendant produced a note from 3 individuals at Sultan Al-Abdulla & Partners dated 11 April 2023 which other than saying at paragraph 4.2 their

FSD2022-0309 Page 8 of 11 2023-07-17

view that "Mr Edelman KC's lack of disclosure of conflict should indeed constitute a violation of Qatari law" is of little assistance to the Defendant.

24. I much preferred the clear evidence of Sami Abdullah Abushaikha, who has over 18 years' experience practicing law in Qatar and is qualified as an advocate and has so appeared over many years before the Qatari courts, in a report dated 20 March 2023 and put before the Court on behalf of the Plaintiff. That evidence was plainly from a person duly qualified to give expert evidence on the law of the State of Qatar. At paragraph 4.5 he gives the opinion that "as a matter of Qatari law, an enforcement order or exequatur from the Qatari courts is *not* required for the purposes of enforcement in the Cayman Islands". On the Conflicts Issue his opinion is that the text of the Judgment clearly confirms that the Qatar Court of Appeal (a) did consider the parties' pleadings and written submissions on the Conflicts Issue and (b) determined that the Defendant's entire case including its case on the Conflicts Issue lacked valid legal grounds and dismissed the Defendant's entire case on its merits. Sami Abdullah Abushaikha adds that there is no requirement as a matter of Qatari law for the Qatar Court of Appeal expressly to address each and every argument raised by the parties in their submissions. Instead, it is sufficient for the Court of Appeal to confirm that it has considered the arguments and given its ruling on whether the arguments (either individually or together) are successful or have failed. In his opinion the judgment satisfies the relevant requirements and "has fully and clearly disposed of Barents' arguments on the "Conflicts Issue" by way of dismissing Barents' case in its entirety."

25. Even through Cayman common law eyes it is perhaps unsurprising that the Qatar Court of Appeal did not wish to waste any words on the Conflicts Issue.

26. I have to say that if a recusal issue was before me based upon the flimsy evidence relied upon by the Defendant I would have no hesitation in rejecting it. It is quite simply a non-runner.

27. Suffice to say the Defendant in raising the Section 7 (2) (e) recusal point has not proved to my satisfaction that I should refuse to enforce the Award and that I should set aside the *Ex parte* Order because the composition of the arbitral authority was not in accordance with the law of the country where the arbitration took place.

28. I can provide my reasons in respect of the costs orders relatively briefly. Mr Keefe agreed that for the Award to be enforceable in the Cayman Islands the Plaintiff had to apply to the Court for an order. In my judgment there was nothing improper or unreasonable to a high degree for the

FSD2022-0309 Page 9 of 11 2023-07-17

Defendant in effect to require that application to be made and there is nothing outside the norm in that respect. I do not think therefore that the Court would have been justified in imposing an indemnity costs order from day one. The situation changed however as soon as the Defendant filed its ill-founded and misconceived Opposition Summons on quite hopeless grounds which were doomed to fail as soon as it was filed. The Defendant's conduct in the way in which it pursued the Opposition Summons was improper and unreasonable to a high degree and what should be outside the legitimate norm. The Defendant failed to provide the court with the full picture in respect of its belated applications to the Panama Court and did not provide evidence as to whether the Panama Court had been provided with copies of the Award and the *Ex parte* Order. The evidence it provided in respect of the law of Qatar was also totally unsatisfactory. The way in which it tried to introduce the Conflicts Issue was improper and unreasonable to a high degree. Its failure to include proper grounds in its Opposition Summons was also unimpressive. Although Mr Milne was wise to do so the Defendant's late abandonment of (1) its serious allegations of non-disclosure and (2) its misplaced reliance on the exequatur arguments simply reflected the impropriety in the Defendant raising these totally inadequate grounds in the first place.

29. It also did the Defendant no credit whatsoever when Mr Gomez, its director and chairman, made desperate and belated allegations of deceit and fraud in his third affidavit without providing a shred of evidence in respect of them. This was improper conduct to a high degree which also supported the imposition of indemnity costs.

30. All in all the Defendant's conduct in the filing of the Opposition Summons and the way in which it pursued it was well worthy of condemnation by way of indemnity costs. It was for these reasons that I made the costs orders which I made on 16 June 2023.

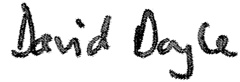
31. If parties continue to pursue meritless applications and arguments they should not be surprised if they are subjected to indemnity costs orders. I have spent part of a weekend working on these reasons when I could have been preparing for the cases in next week's docket. I hope next weekend is spent more productively on considering legal arguments which contain at least some merit.

<u>Postscript</u>

32. I should add that in response to notification of the advance draft of this judgment Mr Milne responded on 10 July 2023 11:11am as follows:

"Our client has also requested that we inform the Court that payment of the principal sum has been made by Barents Re Reinsurance Company Inc. to Sharq Insurance LLC."

33. By email dated 12 July 2023 9:46am Mr Keefe stated "… our client acknowledges that payment has now been received …"



THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT