

**ENGLISH HIGH COURT GRANTS INJUNCTION IN RESPECT OF FIDIC
CONTRACT UNDER ARBITRATION ACT 1996**

Doosan Babcock Ltd v Comercializadora De Equipos Y Materiales Mabe Limitada [2013]
EWHC 3010 (TCC)

Introduction

In a decision released on 11 October 2013 in *Doosan Babcock Ltd v Comercializadora De Equipos Y Materiales Mabe Limitada* [2013] EWHC 3010 (TCC), Mr Justice Edwards-Stuart gave his reasons for granting an interim injunction under the Arbitration Act 1996, preventing a party to an amended FIDIC contract from calling two performance bonds.

Background

Doosan Babcock Ltd (the “**Claimant**”) and Comercializadora De Equipos Y Materiales Mabe Limitada (the “**Respondent**”) entered into a contract (which was based on the FIDIC form of contract with some modifications) under which the Claimant agreed to supply two boilers for a power plant in Brazil. The performance guarantees in respect of each of those boilers expired on the earlier of the grant of Taking-Over Certificates or 31 December 2013.

The dispute resolution provisions in the contract provided that any dispute should be resolved by arbitration.

The Claimant made a without notice application for an interim injunction restraining the Respondent from making demands for payment under the performance guarantees.

The Claimant alleged that the Respondent had wrongfully failed to issue Taking Over Certificates for the boilers that had been taken into use, and that there was a strong case that any demand under the performance guarantees would be in breach of the contract in respect of which the guarantees were provided. The Respondent relied on a provision in the contract which permitted it to withhold a Taking-Over Certificate where the unit has been used only as a temporary measure, despite the fact that the unit had been used to export more than 7,500 hours of power at various loads to the local grid.

Decision

At the conclusion of the hearing on 4 October 2013, Mr Justice Edwards-Stuart granted the Claimant interim relief, such injunction to last for 14 days. In a decision released on 11 October 2013, he provided his reasons for granting such relief.

Mr Justice Edwards-Stuart found that the Claimant's concern that the Respondent was likely to make demands on the guarantees was justified.

The judge considered whether the application had been correctly made under section 44(3) of the Arbitration Act 1996, which provided that *"If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets."* There was no reason why an order should not be made for the purpose of the preservation of a right if its effect was to preserve the value of that right - a contractual right was not preserved if a failure to give effect to it would destroy much or all of its value. On that basis, if the requirements of urgency and necessity were met, this was a case where the court had the power to grant an injunction under Section 44(3).

In considering the threshold test for the grant of interim relief in relation to bonds/guarantees, Mr Justice Edwards-Stuart agreed with the principles set out by Akenhead J in *Simon Carves v Ensus UK* [2011] BLR 340:

(a) Unless material fraud is established at a final trial or there is clear evidence of fraud at the without notice or interim injunction stage, the Court will not act to prevent a bank from paying out on an on demand bond provided that the conditions of the bond itself have been complied with (such as formal notice in writing). However, fraud is not the only ground upon which a call on the bond can be restrained by injunction.

(b) The same applies in relation to a beneficiary seeking payment under the bond.

(c) There is no legal authority which permits the beneficiary to make a call on the bond when it is expressly disentitled from doing so.

(d) In principle, if the underlying contract, in relation to which the bond has been provided by way of security, clearly and expressly prevents the beneficiary party to the contract from making a demand under the bond, it can be restrained by the court from making a demand under the bond.

(e) The court when considering the case at a final trial will be able to determine finally what the underlying contract provides by way of restriction on the beneficiary party in calling on the bond. The position is necessarily different at the without notice or interim injunction stage because the Court can only very rarely form a final view as to what the contract means. However, given the importance of bonds and letters of credit in the commercial world, it would be necessary at this early stage for the Court to be satisfied on the arguments and evidence put before it that the party seeking an injunction against the beneficiary had a strong case. It cannot be expected that the court at that stage will make in effect what is a final ruling.

Mr Justice Edwards-Stuart agreed with Akenhead J that a claimant who wished to restrain a beneficiary from making a demand under a bond must show that it had a strong case that under the terms of the underlying contract for the performance of which the bond has been provided the beneficiary is not entitled to make a demand on the bond.

In the circumstances of the present case, a call on the bond could not be justified where the guarantee only remained in force by virtue of a continuing breach of contract on the part of

the beneficiary, and the Claimant comfortably passed the threshold test for an interim injunction in a without notice application.

However, this decision was not and could not be binding on any tribunal that had to determine the issues at a final hearing or at a further interim hearing at which the Respondent had an opportunity to put its own evidence before that tribunal.

Postscript

In a further hearing on 18 October 2013, the Respondent applied to discharge the injunction on the grounds that the Claimant's case was misconceived as a matter of construction of the contract and that, in any event, it was necessary for the Claimant to show that it had an arguable case that the Respondent's refusal to issue Taking-Over Certificates was not done in good faith and that it had not done so.

Mr Justice Edwards-Stuart dismissed the Respondent's application.

He noted that that injunctions concerning demands under performance bonds and guarantees have historically been treated differently to applications for other forms of interim injunction, on the basis that a performance guarantee stands on a similar footing to a letter of credit, and so a bank which gives a performance guarantee must honour that guarantee according to its terms. The bank is not concerned with the relations between the supplier and customer and whether or not the supplier has performed his contractual obligations.

Mr Justice Edwards-Stuart noted that his decision that the grant of interim relief could be justified if the Claimant could show a strong case had extended the law in this area, but in his view had done so adopting a principled and incremental approach that did not undermine the general principles applicable to interim injunctions to restrain a party making a call on a bond.

The 11 October 2013 decision can be found [here](#).

The 24 October 2013 decision can be found [here](#).

19th November 2013