



Neutral Citation Number: [2022] EWHC 3165 (Comm)

Case No: CL-2022-000557

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: 07/11/2022

Before:

MR JUSTICE JACOBS

Between:

**E-STAR SHIPPING AND TRADING COMPANY
LTD**

Claimant

- and -

DELTA CORP SHIPPING LTD

Defendant

Mr K Sharma (instructed by **Kennedys Law LLP**) for the **Claimant**
Mr Smith KC (instructed by **Campbell Johnston Clark LLP**) for the **Defendant**

Hearing dates: Monday 7th November 2022

Approved Judgment

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MR JUSTICE JACOBS

1. This is an application by the Claimant (“E-Star”) for an anti-suit injunction, and separately, for relief under section 44 of the Arbitration Act 1996. E-Star’s application has come on quickly. Informal notice was given to the Defendant on Friday 4 November 2022, the court having accepted that this was an urgent matter for which time would be made available today. Mr Smith KC has appeared for the Defendant. He has not been able, in the time available, to put in any evidence on behalf of the Defendant. He has therefore argued the case on the basis of the evidence adduced by E-Star, in particular, through the witness statement of Mr Kevin Okere, who is an advocate in Kenya acting for E-Star.
2. The anti-suit relief concerns proceedings which have been underway for some months in Benin, in relation to a cargo of rice. I will explain in more detail in a moment the factual background, but it is clear that the relief now sought goes well beyond the anti-suit relief typically sought in Commercial Court proceedings. The reason is that the proceedings in Benin, which E-Star seeks to injunct, have in fact run their course very substantially over the past three months. They have resulted in an order for the sale of the cargo, which is the subject matter of the Benin proceedings. The substance of the relief now sought is, in effect, a reversal of the order which has been made by the Benin court, after a contested hearing involving a large number of parties. That court is the Court of Commerce of Cotonou in the Republic of Benin, and I shall refer to it as “the Benin court”.
3. The order made by the Benin court is, in summary, follows. In a lengthy judgment originally given on 5 October 2022, and then, it appears, formally certified on 11 October 2022, the Benin court decided that various shippers and receivers (“the Benin plaintiffs”) would have to make payment for the cargo which was the subject of the proceedings, if they were to have delivery of that cargo. As the court says in the translation of the judgment (whose original language was French):

“Whereas, consequently, and subject to the above reservations, it is appropriate to rule that the various shippers of goods on board the vessel, MV ESHIPS PROGRESS, will have to fulfil their obligations to DELTA CORP SHIPPING PTE in order to claim any delivery.

That in the event that any person claiming goods embarked on the said vessel fails to fulfil the obligations relating thereto either by the person itself or its shipper, within a period of fifteen (15) days as from the present decision, Maître Monique KOTCHOFA FAIHUN, the aforementioned Court Bailiff, shall organize the sale by auction of the said goods, and shall hand over the proceeds to the DELTA CORPORATION SHIPPING PTE company in payment of its claim.”
4. Those orders were then reflected in the dispositive orders which the court made on page 27 of the translation of the judgment.
5. The application made by E-Star seeks to, in effect, reverse those orders. The present application is therefore not really for an anti-suit injunction, but rather for an anti-enforcement order. Indeed, the order sought goes somewhat beyond even that, because

it seeks positively to require the Defendant to take steps to reverse the orders made by the Benin court after contested proceedings.

6. I should say, in passing, that a number of other claims were made by the Benin plaintiffs in the Benin proceedings, and indeed, by the defendants to those proceedings. It is apparent from the dispositive part of the judgment that, broadly speaking, all of those other claims were dismissed.
7. E-Star seeks, in addition to anti-suit relief, an order under section 44 (3) of the Arbitration Act. The substance of that application is to preserve any monies which may be paid by the shippers or receivers in Benin to the Defendant, in order to ensure that those monies are available, potentially, to the shippers or receivers who made the payment.
8. I have explained the nature of the relief sought, but it is now necessary to go back in time in order to understand the context in which the claim arises.
9. The present proceedings arise out of a chain of charterparties. At the top of the chain is a charter made between the head owners and the Defendant. The relevant vessel is called the ESHIPS PROGRESS, and it was owned by Eships Progress Limited (“Eships”). They had chartered it to the Defendant, whom I will hereafter simply call “Delta”, although I will need to explain in due course that there are two Delta entities which feature in the evidence and argument.
10. There was a chain of sub-charters, which can be summarised as follows. Delta sub-chartered to a company called Sea King Shipping Limited. The vessel was, in turn, time chartered to Eastern Multitrans Logistics PVT Limited. There was then a voyage charter dated 29 September 2021, to the present Claimant, E-Star. There were then various fixture notes or sub-charters under which E-Star agreed carriage contracts with a number of other entities. Accordingly, E-Star itself is somewhat removed, contractually at least, from Delta, and indeed, from the head owners, Eships.
11. The vessel loaded cargo in India, now some time ago, and in due course it proceeded with its cargo of bagged rice to Africa. It appears that hire was not paid all the way up the charter chain, and this led to a problem which arose at the first discharge port material to the present proceedings, which was Durban. Whilst the vessel was at Durban, there were various legal proceedings. The position is summarised in a settlement agreement dated 10 May 2022, which was entered into by, or at least proposed to be entered into by, a number of parties. I will come to the parties in a moment, but clause F of the recital summarises the position at Durban, as follows.

“Upon the vessel’s arrival at Durban on 4 January 2022 bills of lading were not available and the vessel was not in a position to discharge. Hire was also unpaid to Eships, and Eships exercised rights of lien. Discharge at Durban was subsequently completed pursuant to an order of the Durban High Court once a berth became available. Thereafter, Eships suspended the vessel’s service. In due course, Eships bunkered the vessel at its own cost and the vessel sailed for Abidjan.”
12. This settlement agreement was an agreement between various parties: Eships; Delta (the company subscribing the settlement agreement was Delta Corporation Shipping

PTE Limited, which is the same name as the Defendant in these proceedings); E-Star; and various shippers identified in schedule A to the settlement agreement. There is an important issue as to whether the settlement agreement ever became effective. However, those were the named parties who would have been party to the agreement, at least if it had become effective.

13. The substantive terms of the settlement agreement are material to the present application in a number of ways.
14. Under clause 1 of the agreement, the shippers (i.e. the various companies and individuals identified in schedule A) agreed jointly and separately to remit various sums to the bank account of Eships. The bank account was specified in clause 1, as were the sums to be paid. Those sums amounted in total to just over USD 1 million.
15. Clause 2, on which some argument has focused in the course of today's hearing, provided as follows.

“Subject to and conditional upon payment and receipt of the sums referred to above, Eships and Delta hereby agree with all other parties to this agreement to continue the voyage from Durban to Abidjan and Cotonou, and thereupon to discharge and deliver the cargos referred to in the bills of lading listed in Schedule A hereto on Free Out terms but otherwise clear of all liens or other incumbrances, including port disbursements, which port disbursements shall be paid and borne by Delta/Eships. The terms of the time charter to Delta and the obligations thereunder shall remain unchanged by this agreement.”

16. The evidence indicates, at least judging from what later happened in Cotonou, that not all of the sums were in fact paid pursuant to the settlement agreement. The fact that the payments in full had not been made was a cause of the problems which later arose.
17. Although Mr Smith KC, in the course of argument, has placed some reliance on that clause, and the fact (as he submitted) that full payments had not been made pursuant to the settlement agreement, if binding. However, I do not consider that the question of whether full payment was or was not made is an issue which needs to be resolved or grappled with at the present stage. If there were to be an arbitration between any of the parties to this agreement, it is an issue which would fall within the remit of the arbitrators.
18. Clauses 3 to 6 of the settlement agreement contained various provisions relating to releases, undertakings, and matters of that kind, which is not necessary to describe in detail. Clause 7 provided that the agreement was subject to English law. Clause 8 was an arbitration agreement relating to any disputes. In relation to disputes between Eships and Delta, there was a nominated sole arbitrator. But if there were other disputes arising under the agreement between any of the parties hereto, those disputes were to be arbitrated under LMAA terms before a tribunal of 3 arbitrators. It is not necessary to set out the full terms of the arbitration clause, because nothing in the arguments has turned on the detail of the arbitration clause.

19. However, clause 9 is an important provision upon which Mr Smith has placed considerable reliance. This provides as follows.

“This agreement becomes effective only upon signature by all parties. All parties signing this agreement warrant that they are duly authorized by the company on behalf of whom they are signing.”
20. The evidence presently before me is not sufficient to show that all of the parties, who were proposed as parties to this agreement, did in fact sign it. Schedule A contains a lengthy list of proposed parties. As I understand the submission by Mr Sharma, on behalf of E-Star, it is accepted that there is no evidence that at least two of the parties did in fact sign this agreement. E-Star has been able to obtain signed copies from many of the other parties, but there is a gap in the evidence that is available to them, which they have not so far been able to fill. The current position, therefore, is that there is no evidence that at least two of the parties signed this agreement.
21. Following the settlement agreement, the vessel proceeded on its way. Recital F indicated that it had already in fact sailed for Abidjan at the time that the settlement agreement was being drawn up. There was a dispute which arose at Abidjan, which it is not necessary to describe. What does matter, however, are the various events at Cotonou in Benin, where the vessel arrived on 15 June 2022. There have, since that time, been a sequence of court hearings and decisions, and it is necessary to explain those in a little more detail.
22. The evidence indicates that Eships wanted to exercise a lien for unpaid freights. In many ways, that was a continuation of what had happened in Durban, as recorded in the settlement agreement itself. It appears that in relation to the exercise of a lien at Cotonou, they had the support of the charterers, Delta. The reason for their support was that freight had not been paid fully up the line. Accordingly, if the owners were successful in obtaining payment as a result of the exercise of a lien, then no doubt Delta would consider that to be helpful and satisfactory to them; because it might well be sufficient to discharge any liability on their part to Eships under the head charter.
23. That may well explain why the first application made in Benin was an application both by the master of the vessel and also by Delta. I say it was an application by Delta, but it was actually an application in the name of a company called, Delta Corp Shipping PTE. That is, or at least is alleged to be, an Indian company, which is said to be different from the present Defendant, whose name is Delta Corp Shipping PTE Limited, which is said to be a Singapore company. In the course of his argument today (and I bear in mind that he has not had a great deal of time to prepare) Mr Smith has not drawn any material distinction between the two Delta companies. He has pointed out, from time to time, that the evidence indicates that there were two separate companies, albeit with very similar names, which participated in different ways in the Benin proceedings. Delta (i.e. the Singapore company with the word Limited) was not originally a party, but only became party through an intervention. For present purposes, I will proceed on the basis that no distinction is to be drawn between the two Delta entities, if indeed there are two entities, which is a matter which Mr Sharma, on behalf of E-Star, disputes.
24. At all events, Eships, with the support of Delta, wished to exercise a lien. There are difficulties in doing that in Benin whilst the cargo is still on board. Mr Smith has

- submitted, and this is reflected to some extent in the Benin court's later judgment, that Benin law does not allow a shipowner to keep goods on its ship on account of a failure to pay freight. Accordingly, the master of the vessel and Delta applied to the Court of Commerce of Cotonou for an order that the cargo be discharged from the vessel and held to the order of the court.
25. That order was granted on 27 July 2022. It has been described by Mr Sharma as an attachment order, but I am not sure that that is an appropriate description. It seems to me to be an order which permitted discharge out of the vessel and into the custody of the court. Mr Sharma, on behalf of E-Star, has not alleged that there was, at that stage, any breach by Delta of the arbitration agreement in the settlement agreement, perhaps because applications relating to security are generally permissible, notwithstanding arbitration and jurisdiction agreements.
 26. The subsequent developments are more important. Proceedings were then commenced by a group of Benin plaintiffs. The exact date on which those proceedings were commenced is not clear. It is clear, however, that a main object of those proceedings, although not the exclusive claim made, was to set aside the order which had been granted by the court on 27 July 2022. There were 15 plaintiffs in the Benin proceedings, and I understand that the majority of them, some 12, were receivers of the cargo who had not been party to the settlement agreement. However, there were three shippers who were amongst the Benin plaintiffs, and two of those were parties who had in fact signed the settlement agreement. The third is a company where E-Star has been unable to find a signed agreement.
 27. The settlement agreement was not, however, the basis of the claims advanced by the Benin plaintiffs. The object of those proceedings was, essentially, to enable those plaintiffs to obtain their goods without payment of any further sums. There were, in addition to the application to set aside the 27 July order, various substantive claims for damages. This can be seen from the detailed judgment of the Benin court, although the claim document itself is not in the hearing bundle.
 28. Mr Sharma describes the additional claims (i.e. those beyond the claim to set aside the 27 July 2022 order) as being in the nature of add-ons, which lawyers are inclined to put into pleadings. I was not persuaded by that argument. They were substantive claims which were advanced, and in due course, the Benin court considered them, or at least considered them to the extent that it decided to dismiss them in the light of its decision on the main point.
 29. I have described so far the nature of the claims and the Benin plaintiffs. There were a number of defendants to the Benin proceedings ("the Benin defendants"). They were as follows. There was Delta, in the form, at least initially, of the Indian company, but as I have said, I am not drawing any distinction between that company, if indeed it is a company, and the Singapore company which is now the Defendant to the present proceedings. The other defendants were the Master; the vessel; Eships, the owners of the Vessel; Sharaf Shipping Agency, a Cotonou ship's agent; and E-Star itself. Thus, E-Star was itself a defendant to the Benin proceedings. However, E-Star says that it was not in fact served with the proceedings, and did not participate in a hearing which took place later on, on 30 August 2022.
 30. The Benin defendants, or at least the group comprising the owners and Delta, challenged the Benin plaintiffs' proceedings in various ways. The challenge included

a challenge to the jurisdiction of the Benin court. This challenge ultimately failed. Leaving aside that jurisdictional challenge, the main relief sought by this group of defendants was an order requiring the Benin plaintiffs to pay certain sums on account of freight, if they were to have delivery of their goods. I accept, for present purposes, that E-Star itself did not participate in seeking that relief.

31. Subsequent to the hearing in August 2022, the Benin court handed down a detailed judgment on 5 October 2022. E-Star accepts that, at that point, it was represented by a lawyer who was himself present at the giving of judgment. The Benin court's judgment is lengthy, and I need not go through it in detail. I have identified certain points already. The essence of the decision was that if the receivers wanted to receive their cargo, then they had to pay the freight to Delta. The court ordered that if they did not do so within a period of 15 days, the cargo was to be sold.
32. There is some evidence submitted by E-Star as to the nature of the court's decision. Mr Okere has said:

“I understand from Maitre Dako [the lawyer acting for the Claimant in Benin] and believe that this does not mean that the ruling is substantively provisional. In other words, it is not in some way interim or interlocutory. The ordering of the “*PROVISIONAL EXECUTION*” of the Judgment, indicates that it may proceed to be executed, despite the possibility of appeal, or even, despite the fact that an appeal may have been initiated.”

Accordingly, the present evidence is that the rulings made by the Benin court are not provisional or interim or interlocutory.

33. The decision was given on 5 October 2022, and some 15 days later, when the order for sale of the cargo would be coming into effect, 13 of the Benin plaintiffs applied for an order which resulted in a holding measure being put in place. The order sought was that these plaintiffs should be allowed to pay the sums due into court. The substance of the application was to achieve a result whereby, pending an appeal which by that time a number of Benin plaintiffs had intimated that they intended to pursue, the money would not be paid over to Delta, or indeed to Eships.
34. On 21 October 2022, the court in Benin accepted that application. It made an order, whose effect was that the money paid by any Benin plaintiff, who took delivery, would be held by the court. The order did not, however, protect any Benin plaintiff who had chosen not to pay, or indeed, was unable to pay. The cargo belonging to such plaintiffs was potentially at risk of being sold, with the monies potentially being paid to Delta, pursuant to the previous order which the court had made in its judgment on 5 October.
35. E-Star gave an indication to the Commercial Court in London on 18 October 2022 that it might be making an application for anti-suit injunction, or similar relief. However, the papers for that application were not in fact filed until last Thursday, 3 November 2022. It was not practical, if papers were only filed on a Thursday, for the matter to come on on a Friday, when the Commercial Court is normally extremely busy with previously listed applications. But the case has come on today, Monday 7 November 2022, and has been very ably argued by Mr Sharma for E-Star, and Mr Smith on behalf of Delta at short notice.

36. With that background, I turn to the various applications and my views as to their outcome. There are two separate claims which I have to consider. There is the claim for what is described as anti-suit relief, or which I have described as anti-enforcement relief, and there is the separate claim, and I accept that it is a separate claim, for section 44 relief.
37. I turn, first, to the claim for anti-suit or anti-enforcement relief. A large number of points have been advanced by Mr Smith KC, in opposing the injunction. It seems to me that there are three reasons, amongst the various points which he has put forward, which are very powerful and indeed dispositive.
38. The first is that there must, in the context of any application for anti-suit injunction, be a high degree of probability that there is a binding arbitration clause which governs the dispute in question. That is clear from a number of authorities, and the relevant principles were recently applied by Foxton J in *QBE Europe SA/NV and another v Generali España de Seguros Y Reaseguros* [2022] EWHC 2062 (Comm). Foxton J said that the applicant must establish “with a high degree of probability that there is an arbitration or jurisdiction agreement which governs the dispute in question.”
39. That does not usually involve looking at the merits of the claim which a party has sought to advance in proceedings, but it does involve looking both at the question of whether there is an arbitration agreement in existence, and also whether it governs the dispute in question. The latter issue involves looking at the nature of the dispute which is to be resolved in the proceedings which a party seeks to enjoin.
40. The important question here, to my mind, is whether or not E-Star can establish, with a high degree of probability, that there is indeed a binding arbitration agreement. I do not accept Mr Sharma’s submission that this is, in some way, a matter for the arbitrators to resolve. The settlement agreement, which is relied upon as providing the arbitration clause, contains a very clear provision that it is only to become effective on signature by all the parties. If the court is to be satisfied to the standard necessary to grant an anti-suit injunction, it is for E-Star to show, with a high degree of probability, that there is indeed a binding settlement agreement and therefore a binding arbitration agreement between the parties.
41. Mr Sharma referred to a decision of HHJ Waksman QC (as he then was) in *HC Trading Malta Ltd v Tradeland Commodities SL* [2016] EWHC 1279 (Comm). That decision is concerned with the question of whether a party, who asserts an arbitration agreement, can start what one might call pre-emptive court proceedings in order to establish the existence of that agreement by way of declaratory relief. HHJ Waksman said that if a party asserts that there is a valid arbitration agreement, then the right thing to do was to go to the arbitrators first, and for the mechanism in section 30 to 32 of the Arbitration Act 1996, to be played out. That may well be the case in that particular context. In my view, however, that approach is not applicable when a party seeks to persuade the court to grant anti-suit injunctive relief. It is at that stage that the court must consider whether or not there is indeed a binding arbitration agreement to the requisite standard, namely, a high degree of probability.
42. I was referred to an old decision of Hoffmann J, some 30 years ago, in support of the proposition that that standard was inapplicable, where all that was sought was without notice relief. I consider, however, that a consistent line of authority has since made it clear that high degree of probability is the requisite standard for the obtaining of anti-

suit injunctions. I see no reason why there should be any lower a standard when the court considers the question on a without notice application (whether or not with a degree of notice, as in the present case) or an inter partes application.

43. Mr Sharma has submitted, however, that the doctrine of separability is a matter which means that, in the present case, the question of whether there was an effective agreement is a matter for the arbitrators. In my judgment, that is not correct. The clause in question says that the agreement becomes effective only upon signature by all parties. In my judgment, that provision, which comes at the foot of the contract, clearly applies to all of the provisions which are set out in the previous eight clauses. There is, in my view, nothing which suggests that the parties agreed that there should be a binding arbitration agreement, even though nothing else was to be binding between the parties.
44. A similar issue arose, and I acknowledge that it is subject to an appeal which has recently been heard, where judgment is yet to be delivered, in *DHL Project and Chartering Ltd v Gemini Ocean Shipping Company Ltd* [2022] EWHC 181. That was a case in which I held that where a contract was subject to various conditions which had not been fulfilled, those conditions were applicable to the arbitration agreement itself, as well as to the substantive provisions of the contract.¹ I consider that that provision, clause 9, is not one which enables E-Star to say that there is a valid and binding arbitration agreement, even if nothing else in the agreement is itself binding.
45. Mr Sharma also relied, in support of his argument, on an argument of waiver, and he said that Delta must have waived any requirement for signature. In my view, there is no evidence at all that any part of clause 9 was in fact waived by any party.
46. The upshot is as follows. Clause 9 makes it necessary for the agreement to be signed by all parties. E-Star has not been able to produce evidence of signature by all of the proposed parties. There is no basis on which I can infer that other parties, whose signed documents are not before the court, did in fact sign the agreement. There is, for example, no evidence from them, stating that they signed the agreement, but can no longer find a copy of the relevant contract.
47. It follows, in my judgment, that on this simple point, E-Star's application for an anti-suit or anti-enforcement injunction cannot succeed. However, that is not the only ground on which I consider that the application for an anti-suit injunction should fail.
48. The second reason is that this is not really an application for an anti-suit injunction at all. Normally such injunctions are sought where there are proceedings underway in a foreign court. An injunction is sought in order to stop a defendant from continuing those proceedings. In the present case, however, the proceedings have, in substance, concluded. A court order was made following the contested hearing, and the evidence of E-Star is that it is not a provisional order. It is true that steps need to be taken to fully implement the court's order, because it contemplates that there will be sales of cargo by the court bailiff, and the receipt of monies and payment over to Delta. But

¹ The present judgment has been revised subsequent to the dismissal of the appeal against the decision in DHL: see [2022] EWCA Civ 1555.

that is simply a working out of the court's order made after the hearing. It does not mean that the proceedings are still underway in any meaningful sense.

49. The present application is, therefore, an anti-enforcement injunction designed to stop that order from being implemented, although the drafting of the order which is sought goes somewhat further, and requires Delta to take steps positively to reverse orders which have been made. In my judgment, this is not appropriate for an anti-suit injunction, or indeed, any injunction at all. The question of anti-enforcement injunctions is dealt with in some detail in the book by Thomas Raphael QC, *The Anti-Suit Injunction* 2nd Edition, paragraphs 5.65 to 5.72. In my view, he quite rightly points to two matters which are contrary to the idea that such an injunction should be granted.
50. The first is that, in practice, such injunctions are not granted. Secondly, the reason why such injunctions is that they would give rise to very serious comity considerations. In the present case, the Benin court has applied its mind in contested proceedings – to which there were many parties, including E-Star itself (albeit apparently not served) – to the question of what is to happen to cargo within its jurisdiction. It has reached conclusions on that question, and issued a detailed reasoned judgment. I do not consider that it is for this court, now, in effect, to tell the Benin court that it has come to the wrong decision, or to do so by the grant of anti-suit relief. It follows that the present application has come far too late. If a party does genuinely seek anti-suit relief, it must generally do so well before the foreign court has continued with its proceedings, and indeed, come to a decision.
51. That brings me to the third related point as to why no anti-suit or anti-enforcement injunction should be granted, and that is the question of delay. It is well established, in the context of anti-suit injunctions, that parties must act reasonably promptly and before the foreign proceedings are too far advanced. In the present case, as will be apparent from what I have already said, the foreign proceedings have advanced to the stage where judgment has actually been given. That is in the context of a case where, in my view, there is no satisfactory evidence which explains why, or excuses the fact that, E-Star did not act whilst those proceedings were underway.
52. E-Star's evidence indicates that its lawyer did not know of the proceedings until relatively recently, when he attended the hearing of judgment on 5 October 2022. But there is no evidence which indicates what E-Star itself knew about what was happening in Benin; and in particular, whether or not it knew that proceedings were indeed underway because of a substantial dispute which had arisen there. In my judgment, where a party seeks, in the context of proceedings which have been going on for some time, to injunct them, and where it appears that there has been some delay in the application, it is necessary for that party to explain why steps were not taken at an earlier stage, and in particular, at a stage well before the overseas court has itself reached a conclusion.
53. I also consider that Mr Smith's point, that there was a need to act promptly after 5 October 2022, and that there has been a delay of a further month since that time, is also of significance; particularly bearing in mind that matters have not been standing still in Benin. The Benin court order was made on 5 October 2022. There was then a period of 15 days, as E-Star knew, before sales might take place. There was then a further application which was made by some of the Benin plaintiffs on 20 October 2022. No application was made in England until 3 November 2022. I do not accept that the fact that E-Star gave some notification to the Commercial Court on 18 October 2022, that

it might be making an application, provides any real answer in relation to this period of further delay. However, the more significant delay in my view is the overall period of delay whilst the Benin proceedings were underway.

54. Accordingly, for all of these reasons, I decline to grant the anti-suit or anti-enforcement injunction which is sought.
55. That does not, however, dispose of the separate application under section 44 of the Arbitration Act 1996. Paragraph 2 of E-Star's proposed order is as follows:

“Pursuant to s.44(3) Arbitration Act 1996, the Defendants do preserve any of the proceeds from any sale of the Scheduled Cargoes or any of them that they may in way whatsoever directly or indirectly receive or have or gain control over by paying them into the Court Funds Office of this Court and notifying the Court, the Claimant and the Tribunal in the arbitration to be commenced pursuant to the Arbitration Agreement”.
56. The order therefore seeks to preserve a potential asset, namely, the proceeds of any sale of the cargo, pursuant to the order which the Benin court has made.
57. E-Star does not seek to preserve the proceeds of sale for their own benefit, or at least directly for their own benefit; because they recognise that they, themselves, would not be entitled to the proceeds of sale. However, they contend that it would be permissible for them, within the context of the arbitration proceedings, to seek relief which was designed to preserve that asset. For example, they could seek relief which would be in the nature of a declaration that the asset (i.e. the proceeds of sale) was held on trust for one or more of the shippers or receivers in Benin.
58. The application is, as Mr Smith submitted, somewhat strange. E-Star does not claim any interest in the proceeds of sale. Furthermore, the parties potentially interested in those proceeds are those Benin plaintiffs whose cargo may be sold if they do not themselves make payment. The evidence indicates that many Benin plaintiffs have made payment into court, pursuant to the Benin court order made on 21 October 2022. However, there may be some Benin plaintiffs who are at risk because they cannot or will not pay. However, those plaintiffs have not sought any relief from this court. They have not threatened any arbitration proceedings against either E-Star or Delta for any alleged breach of the settlement agreement. Indeed, it is not clear whether any of these plaintiffs are party to the settlement agreement. The principal plaintiffs in Benin were not, in fact, party to the settlement agreement, and therefore, they would appear to be in no position to enforce it or to complain about any breaches of it. Even if the settlement agreement were binding, a claim for a breach of the settlement agreement would not be entirely straightforward – in view of the evidence that full payment was not made to the ship owners, pursuant to clause 1, and because clause 2 provides that the various consequences, as set out in the settlement agreement, are dependent upon payment.
59. Not only have the shippers not threatened any arbitration proceedings, or alleged any breach of the settlement agreement, but they have positively sought to assert their own rights in Benin. Indeed, they continue to assert those rights because they intend to appeal the judgment of the Cotonou court. As far as they are concerned, their dispute has nothing to do with this jurisdiction, and they are seeking remedies in Benin.

60. Against that background, it seems to me that I should tread with some caution in the exercise of my discretion as to whether section 44 relief is appropriate. It would, in my judgment, be strange to order section 44 relief designed to benefit parties who do not allege any connection with the jurisdiction, do not rely upon any arbitration clause, and have shown no intention of pursuing proceedings in this country, as opposed to Benin. I can, however, see the theoretical basis on which E-Star can say that its rights have been potentially infringed if there were a breach of a settlement agreement, even if they were not the ultimate beneficiaries of the section 44 order which they are seeking.
61. However, it seems to me that two matters are decisive as to why I should not grant the relief sought.
62. First, I have not been satisfied that there is, in fact, an effective arbitration agreement in this case. I have already dealt with that in the context of the anti-suit injunction. It is true that when I was dealing with that, I was looking at a test of a high degree of probability, but it does seem to me that if a Claimant is to invoke section 44, there should be satisfactory evidence that there is indeed a valid arbitration agreement, and it seems to me that, for the reasons which I have given, the evidence at present is not satisfactory.
63. Secondly, I consider that comity considerations should result in the court not granting the relief sought, as a matter of discretion. The position, here, is that the Benin court has been considering, for over three months, the question of how to deal with cargo which is, within its physical territory. It has made orders as to how matters are to proceed, including orders which relate to the payment of monies. The most recent order is an order which makes provision as to how the ring is to be held, pending a possible appeal by the Benin plaintiffs. The Benin court has decided that the appropriate way of holding the ring is for the shippers and receivers to be in a position to take delivery, with payment not going to Delta, but instead being secured because it goes to the Benin court. There is, at present, no evidence that any of the other shippers or receivers cannot, or will not, take advantage of that route, and a number of shippers have in fact already done so.
64. Even if it were to be assumed that there are some other shippers or receivers who, for some reason, are unwilling or unable to follow the route which the Benin court has laid down, then it is really a matter for the Benin court to consider whether or not those shippers and receivers should have any further protection. I do not consider that it is for this court, applying section 44 of the Arbitration Act 1996, to say that some greater protection should be granted to those shippers and receivers, and thereby E-Star, in the context of proceedings in Benin, which have been commenced by the shippers and receivers themselves.
65. So for those reasons, I decline to grant the anti-suit or section 44 relief which has been sought by E-Star in these proceedings.
66. It follows that, there is no need to provide for a return date. If the matter is to be pursued, it will have to, I think, be pursued by an appeal against my decision, rather than coming back before the Commercial Court on another occasion.