

# Injunctions against calls on bank guarantees and the relevance of emergency arbitration (Shapoorji Pallonji (India) v Yumn Limited (Rwanda))

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**Arbitration analysis:** This case is about the court's approach to the determination of whether an injunction should be granted requiring the beneficiary of the proceeds of a bank guarantee (bond) to reverse its call on the bond. There is little authority in this area and the court clarified that the principles it will apply are the same as those that relate to the grant of an injunction against the beneficiary from making the call on the bond or from continuing with the call once made but before having received the proceeds. A further issue before the court was whether the court should apply a different (and more lax) test in determining the grant of an injunction when dealing with an underlying dispute between parties that had would have to finally be resolved in arbitration. It was argued that the arbitral tribunal (or, more specifically, an emergency arbitrator appointed before the constitution of the arbitral tribunal proper) operating under the International Chamber of Commerce Arbitration Rules in a Singapore-seated arbitration would not be constrained to apply the strict English law principles that the English court would apply, and, for this reason, the English court should not apply the principles of English law that would otherwise be applicable to such applications. This argument was rejected by the court. Written by Shourav Lahiri, barrister at Atkin Chambers.

*Shapoorji Pallonji & Company Private Ltd (a company incorporated under the laws of India) v Yumn Ltd (a company incorporated under the laws of Rwanda)* [\[2021\] EWHC 862 \(Comm\)](#)

## What are the practical implications of this case?

The decision in this case puts beyond doubt that the principles that are applicable to an application for an mandatory injunction against the beneficiary of a bond are the same as those that would be applicable to a prohibitory injunction against the beneficiary from making a call on the bond or continuing such call, and, broadly, also the same as those that would be applicable to an injunction restraining the bank issuing the bond from making payment. The applicant must show the existence of fraud in the making of the call and that the bank was informed of the fraud. The applicant must satisfy this burden of proof at an enhanced evidential standard.

What this means in the context of construction disputes relating to delay to completion, application of delay liquidated damages and applications for extension of time to excuse such delay, is that if a contractor is concerned about the employer seeking to liquidate its performance bond or other security to enforce a claim for delay liquidated damages, it should initiate arbitration before an attempt is made to enforce the bond and seek to obtain an order (either from the emergency arbitrator if the tribunal proper has not yet been constituted, or from the tribunal proper) either injunctioning the call on the bond or freezing the proceeds of the bond in the hands of the beneficiary pending the arbitral tribunal's final resolution of the dispute. These measures are fairly universally available under the arbitration legislation of most seats, and are certainly available in Singapore-seated arbitrations. A contractor that attempts to prevent or undo a call on a bond before the English courts will have to show fraud—and the mere refusal by the employer of applications for extensions of time leading up to the employer's call on the bank guarantee will not amount to sufficient evidence of fraud. While no other principles restraining a call on a bond were argued by Shapoorji Pallonji to be applicable in this case, an application for an injunction before the Singapore courts, for example, could also be based on the principle of unconscionability in the making of a call—a ground for restraining a call on a bond that Singapore law recognises but one which is unavailable under English law.

In the absence of such prior arbitration action, the only avenue for a contractor to injunct the beneficiary from calling on, or enjoying the proceeds of, a bank guarantee would be if there was either a condition precedent to the beneficiary making a call on the bank guarantee with which the beneficiary did not comply, or some other formal defect in the call itself. These are not matters that

the contractor can control and therefore the contractor cannot base its strategy on such matters occurring.

As regards arguments that an employer that is special purpose vehicle ought to be restrained from receiving the proceeds of a call until the final resolution of the dispute because the employer would have no assets against which the contractor could enforce an award of wrongful call, the court cautioned against such arguments where the contractor had known of the status of the employer at the time of contracting, the employer's financial position had not changed since the contract had been entered into and the contractor ought to have known what legal test it would have to meet under the law governing the bond were it to wish to make a successful application restraining the call.

### **What was the background?**

The facts in the case are fairly straightforward. Shapoorji Pallonji, one of India's leading construction companies, entered into three contracts for the design, engineering, construction, commissioning and testing of a power plant in Rwanda which Yumn would own and operate following completion. The governing law of all the contracts was English law and the resolution of disputes were subject to arbitration under the ICC Rules in Singapore.

Pursuant to an obligation under one of the three agreements, Shapoorji Pallonji had to supply a performance bond for 15% of the contract price to Yumn as a pre-condition to receiving payment. The bond was issued by Standard Chartered Bank (who was joined to the court proceedings as a third party) and was governed by English law and subject to the exclusive jurisdiction of the English courts. This latter aspect did not come into play in this case as the primary action was between Shapoorji Pallonji and Yumn under their contracts and the bank had agreed to comply with whatever orders were made by the court in that action.

As a result of delay to completion, Yumn made a call under the performance bond. Shapoorji Pallonji applied to the English courts for an injunction against Yumn requiring Yumn to reverse its call. The basis of its application was that Yumn had refused to engage with Shapoorji Pallonji's requests for extensions of time over the course of the project.

The court had to deal with the test applicable to such applications and whether Shapoorji Pallonji had met the required threshold to merit being granted the injunction. The court also had to deal with (the rather novel) suggestion that where the underlying dispute between the parties is subject to arbitration, the court should not apply the same (strict) test for the grant of an injunction since the arbitral tribunal would have greater flexibility in the test it adopted in determining the same issue.

### **What did the court decide?**

In dismissing the application for an injunction, the court made six main points.

First, that under English law, bonds are tantamount to cash that the party providing the bond has agreed can be collected by the beneficiary regardless of a dispute between the parties as regards the beneficiary's right to payment. An injunction would interfere with that principle and, if granted, the court would be coercing a bank to dishonour its promise to pay and risk damage to its reputation.

Secondly, given this, in the absence of any failure by the beneficiary to comply with a condition precedent to the making of the call, or some other formal defect in the call itself (neither of which were applicable here), the court will only injunct a call on a bond if it could be shown that the beneficiary's call was fraudulent (being the lack of a honest belief in his right to make the call) and the bank was aware that the call was fraudulently made.

Thirdly, at the interlocutory stage (i.e. before the merits of the underlying dispute have been adjudicated), the party applying for an injunction has to show a strong case that it is entitled to the injunction. It must satisfy its burden of proof at an 'enhanced evidential standard', as stipulated in *Ouais Group Engineering and Contracting v Saipem SpA* [\[2013\] EWHC 990 \(Comm\)](#).

Fourthly, there is no lesser threshold to restrain beneficiaries from proceeding with a call than that applicable to an injunction against the party that has issued the bond: in all cases, the applicant must demonstrate fraud unless it can demonstrate non-compliance with a condition precedent to the call or other formal defect in the call. However, even these matters must be proved to an 'enhanced evidential standard' (relying on *Salam Air SAOC v Latam Airlines Group SA* [\[2020\] EWHC 2414 \(Comm\)](#)).

Fifthly, the principles applicable to requiring a beneficiary to withdraw a call are the same as those which would apply to restraining it from making a call in the first place.

Sixthly, even if it was correct that an arbitral tribunal (or emergency arbitrator) would have the freedom to apply different principles to those adopted by the English courts in determining the grant of an injunction, it did not necessarily follow that the arbitral tribunal would grant an injunction where the English courts would have refused one. The court considered it relevant that it had been open for Shapoorji Pallonji to refer the disputes that led to the bond call to arbitration well in advance of the bond being called but it did not do so.

In an application for an injunction made under [section 44](#) of the Arbitration Act 1996, the court would apply the same principles as those it would apply to an application for an injunction made under [section 37](#) of the Senior Courts Act 1981. Even adopting the balance of convenience test usually adopted in determining interim injunctions, the court found that Shapoorji Pallonji's argument that Yumn was a special purpose company with no assets and hence there was a risk of it not being able to recover if the call was ultimately determined to be wrongful was of no merit given that Shapoorji Pallonji would have known of all these matters at the time of entering into the contract and, in fact, Yumn would be operating the power plant and would therefore have assets against which Shapoorji Pallonji could claim.

**Case details:**

- Court: Commercial Court, Queen's Bench Division, Business and Property Courts of England and Wales, High Court of Justice
- Judge: Mr Pelling QC (sitting as a judge of the High Court)
- Date of judgment: 6 April 2021

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