

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/08/2007

Before :

THE HONOURABLE MR JUSTICE COOKE

Between :

**(1) STARLIGHT SHIPPING CO (a company
incorporated in the Marshall Islands)**
**(2) OVERSEAS MARINE ENTERPRISES INC (a
company incorporated in Liberia)**

Claimants

- and -

**(1) TAI PING INSURANCE CO LTD, HUBEI
BRANCH (a company incorporated in China)**
**(2) INTERNATIONAL ECONOMIC AND
TRADING CORPORATION, WUGANG GROUP
(a company incorporated in China)**

Defendants

Mr Stephen Males QC (instructed by **Holman Fenwick & Willan**) for the **Claimant**
Mr Michael Collett (instructed by **MFB Solicitors**) for the **Defendant**

Hearing date: 26 July 2007

Judgment

Mr Justice Cooke :

Introduction

1. By this application the Claimants seek an interim anti-suit injunction restraining the Defendants from taking any steps in respect of proceedings commenced by the First Defendant against the Claimants in the Wuhan Maritime Court in China. Although the Defendants have not yet been served with the Claim Form and have not submitted to the jurisdiction, the application was made on notice to them and they appeared by counsel at the hearing, reserving the right to challenge the jurisdiction of the court.
2. The Claimants submit that the Chinese proceedings have been commenced in breach of an arbitration clause contained in a Bill of Lading dated 13 April 2006 and that there is no good or strong reason, within the meaning of the decided authorities, why an anti-suit injunction should not be granted.

The Background

3. The First Claimant was the Owner, and the Second Claimant the Manager, of the vessel Alexandros T (hereafter “the Owners”, “the Managers” and “the vessel”). The vessel was chartered by the Owners to Transfield ER Cape Ltd (“Transfield”) for a voyage from Brazil to China with a cargo of iron ore. The terms of that charter included an English law and arbitration clause. Transfield then sub-chartered the vessel to the Second Defendant (“the Cargo Owners”) on essentially back to back terms, including identical terms as to law and arbitration. A Bill of Lading was issued on 13 April 2006 in which the Cargo Owners were named as the notify party. In due course the Cargo Owners became the holder of the Bill of Lading under an endorsement in blank, and a party thereto. That Bill of Lading, on its reverse included the following wording:-

"Bill of Lading to be used for shipments under charter party dated as overleaf.

All terms conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the war risks clause and the law and Arbitration clause are hereby expressly incorporated. In case any of the herein mentioned conditions will cause any ambiguity with the Charter Party dated as overleaf, then Charter Party's terms and conditions, liberties and exceptions to apply for this Bill of Lading."

4. On the face of the Bill of Lading the statement was made that it was issued pursuant to a Charter Party dated 24 March 2006, which was the head charter. Clause 25 of that charter provided:-

"Arbitration

Any disputes arising under the contract shall be settled amicably. In case no such settlement can be reached, the matter in dispute shall be referred to three (3) peoples at London and according to English law. One chosen by each of the parties hereto and the third by the two so chosen; their decision or that of the two of them shall be final, and for the purpose of enforcing any awards, this agreement may be made a rule of the Court, the arbitrators shall be commercial men and members of the LMAA."

5. In the course of the voyage from Brazil the vessel was lost with her cargo.

Proceedings in China

6. On 15 March 2007 the First Defendant, the alleged insurers ("the Insurers") of the Cargo Owners obtained a "Civil Award" from the Wuhan Maritime Court against both the Owners and Transfield, naming the Cargo Owners, as a Third Party. The Civil Award froze the "credits" that had become due from the Cargo Owners to Transfield under the voyage sub-charter and from Transfield to the Owners under the head charter. Furthermore, the Owners and Transfield were ordered to provide security in the sum of \$5.25 million to the court. It was also a provision of the Civil Award (in translation) that "the applicant shall commence litigation within 15 days

from the date of service of this award, failing which this court shall cancel the property preservation". There was an issue between the parties as to whether this meant that litigation had to be commenced in the Wuhan Maritime Court or whether this provision allowed for commencement of arbitration within the specified time.

7. At all events, by a Bill of Complaint dated 27 March 2007, the Insurers commenced proceedings against the Owners and the Managers in the Wuhan Maritime Court claiming \$5.25 million by way of damages. The claim was also made against Transfield as Head Charterers and the basis of claim, as expressed in translation, appears to be the sub-charter between Cargo Owners and Transfield with a delegation of the duty to carry the cargo by Transfield to the Owners, whilst the Managers actually controlled the ship. The Bill of Complaint states that, under the trade contract between it and the foreign seller, the Cargo Owners obtained a full set of three original Bills of Lading, with an endorsement in blank by the seller, on acceptance of documents under a letter of credit, and thus became the legal holder of the Bills. The claim was made that the Owners, the Managers and Transfield, were all "jointly liable to carry the cargo...safely" and were "jointly and severally liable for any loss to the cargo during their liabilities period" (sic, in translation). In the Bill of Complaint, the Insurers alleged that they insured the Cargo Owners in respect of the cargo and indemnified them in the sum of \$5.25 million, obtaining a receipt, thus acquiring subrogation rights against the Owners, the Managers and Transfield to the extent of the paid indemnity.
8. On 2 April the Civil Award was served upon the Owners and the Managers and on 25 April the Wuhan Maritime Court gave notice to the Insurers that it had accepted the suit filed. It was on 22 May 2007 that the Bills of Complaint were served upon the Owners and the Managers.
9. Also on 22 May, Charles Taylor wrote to the Owners, stating that they represented both the Cargo Owners and the Insurers in connection with the claim for the total loss of the iron ore cargo. Once again, the Insurers were said to be subrogated to the rights of the Cargo Owners against third parties and the claim put forward was for the value of the lost cargo, quantified at \$9,329,375.63. By this letter Charles Taylor commenced arbitration on behalf of both the Cargo Owners and the Insurers, notifying the Owners of the appointment of Mr Mark Hamsher as arbitrator "to hear and to determine all and any disputes falling within the above arbitration clause", which, as set out earlier in the letter, referred to the arbitration clause in the Bill of Lading. The Owners were called upon to appoint their own arbitrator, whilst Charles Taylor asked the Owners to note "that the appointment of Mr Hamsher as arbitrator and the sending of this notice to you are without prejudice to our clients' rights, including the right to contest the jurisdiction of the tribunal".
10. I should at this point say that an issue was raised as to the identity of the Insurers. It was suggested by the Owners that the Claimant in the Wuhan Bill of Complaint, Tai Ping Insurance Co Ltd Hubei Branch and the company in whose name the arbitration had been commenced, Tai Ping Insurance Company of Shenzhen were different entities. Evidence has been produced which suggests that they are one and the same company, with a branch in Hubei, and I proceed on that basis.
11. On 18 June 2007, both the Owners and the Managers made separate objections to the jurisdiction of the Wuhan Maritime Court on grounds which included the existence of

the arbitration clause incorporated in the Bill of Lading. The evidence as to the date when such an application will be determined is unsatisfactory. In his statement, the solicitor acting for the Owners and Managers said that a decision on the Claimants' jurisdictional challenge was likely within about two months, on the basis of advice given to him by Chinese lawyers. The normal practice is for the Wuhan Court to ask the other party for its comments upon the objection and to give a reasonable time for such a response. There is no requirement for a hearing and although the courts could request it, it is considered unlikely that such a hearing would take place. When the statement referred to a decision on the Claimants' jurisdictional challenge as likely to take place within about two months, it was unclear whether it referred to two months from the date of the challenge - i.e. about 18 August 2007 or two months from the date of the statement - i.e. 10 September 2007. According to the evidence, there is room for appeal from that decision, which would take further time but the evidence before this court is to the effect that the Owners face a struggle in making good their objections because the current tendency of the Chinese Maritime Courts is often to declare arbitration clauses invalid for a variety of reasons.

Applicable Principles of Law

12. As a matter of English law which governs the Bill of Lading and charter party contracts, the Cargo Owners are clearly bound by the arbitration clause incorporated in the Bill of Lading issued by the Owners, to which the Cargo Owners became party. In accordance with principles laid down in a number of authorities, including The Angelic Grace [1995] 1 LLR 87, where contracting parties agree to refer disputes to arbitration and a claim falling within the scope of the arbitration agreement is made in proceedings elsewhere, the English court will ordinarily exercise its discretion to restrain the prosecution of those proceedings in the non-contractual forum, unless the party suing in that forum (the burden being on him) can show strong reasons for proceeding there. No strong reason is available to the Cargo Owners here to militate against the grant of such an injunction where, as a matter of English law, the arbitration clause plainly binds. Damages would for all the reasons given in the authorities, be an inadequate remedy for breach of such a clause since its very nature requires the parties to have their disputes determined in arbitration. A party to such an agreement should not be put to the trouble of having disputes determined elsewhere in a manner contrary to the express contract between the parties.
13. It is also clear as a matter of English law that the insurers are similarly bound by the arbitration clause in the Bill of Lading. In The Jay Bola [1997] 2 LLR 279 (CA) Hobhouse LJ said at page 286, after examining earlier authorities:-

"These authorities confirm that the rights which the insurance company has acquired are rights which are subject to the arbitration clause. The insurance company has the right to refer the claim to arbitration, obtain if it can an award in its favour from the arbitrators, and enforce the obligation of the [other party] to pay that award. Likewise an insurance company is not entitled to assert its claim inconsistently with the terms of the contract. One of the terms of the contract is that, in the event of a dispute, the claim must be referred to arbitration. The insurance company is not entitled to enforce its right without also recognizing the obligation to arbitrate."

14. The insurers here say that they are not bound by the arbitration clause as a matter of the law of the People's Republic of China. This, however, is irrelevant so far as these courts are concerned because the cargo claim is one which gives rise to a dispute "arising under the contract" and is therefore arbitrable. This is straight forward as a matter of analysis of English private international law and is established by the decision of Colman J in The Front Comor [2005] 2 LLR 257 at paragraphs 32-33 and Aikens J in The Ivan Zagubanski [2002] 1 LLR 106 at paragraph 52(1) and paragraph 54. The only rights under the Bill of Lading contract which are capable of being transferred to the insurers by way of subrogation are those which must be enforced by arbitration. As Colman J put it, the duty to arbitrate is an inseparable component of the claim transferred to the insurers as part of the subrogated rights.
15. It therefore follows, subject to a complex question about the inter-relationship of section 37 of the Supreme Court Act 1981 and the provisions of the Arbitration Act 1996, that I should grant an injunction in favour of the Owners against both Cargo Owners and Insurers unless there is some strong reason not to do so.

The Inter-relationship between section 37 of the Supreme Court Act and Section 44 of the Arbitration Act 1996

16. Historically, anti-suit injunctions to protect the jurisdiction of the English Courts were granted under the terms of section 37 of the Supreme Court Act. That section gives the court general power to grant an injunction "in all cases in which it appears to the court to be just and convenient to do so". Similarly, anti-suit injunctions to protect arbitration clauses were historically granted under that section, whether interim or final relief was being given. As mentioned by Lord Hoffmann in paragraph 10 in The Front Comor [2007] 1 LLR 391 at 393 (HL) "the English courts have regularly exercised this power to grant injunctions to restrain parties to an arbitration agreement from instituting or continuing proceedings in the courts of other countries: see The Angelic Grace." He then went on to say that, additionally, by section 44(1) and 44(2)(e) of the Arbitration Act 1996, the court has power to grant an interim injunction "for the purposes of and in relation to arbitral proceedings". That decision involved a reference to the European Court of Justice because the proceedings which were the subject of the attempted restraint order, were commenced in a Member State. No such European complication arises here. The Owners submitted that section 37(1) of the Supreme Court Act 1981 gave rise to a power to grant injunctions whether or not arbitration had been commenced and pointed to Through Transport Mutual Insurance v New India Assurance Co Ltd [2005] 1 LLR 67 where the Court of Appeal, in discharging the injunction, treated it as having been made under section 37, in accordance with the decisions referred to in paragraphs 67-75 and 87-92 - see also paragraph 97.
17. By way of contrast, the courts' powers under section 44 were, so the Owners, by Mr Stephen Males QC submitted, limited to the grant of an interim injunction in support of a specific arbitration. In those circumstances he submitted that the Owners did not have to meet the test set out in section 44(3-5).
18. In Elektrim SA v Vivendi Universal SA (No 2) [2007] 2 LLR 8 Aikens J stated, at paragraph 52, that there could be no dispute that the court has jurisdiction to invoke section 37 of the Supreme Court Act to grant an injunction to restrain a party from engaging in court proceedings in another jurisdiction, in breach of an English

arbitration clause in a contract by which the parties are bound. He referred elsewhere to the courts' jurisdiction in the light of the comments of the Court of Appeal in the case of Cetelem SA v Roust Holdings Limited [2005] 2 LLR 494 at paragraph 74, per Clarke LJ. In that case the Court of Appeal had made its decision to grant interim relief under section 44 of the Arbitration Act and did not consider it necessary to consider section 37 of the 1981 Act. The court specifically said that the relationship between the powers available to the court under these different sections would at some stage require detailed consideration, because of the tension between the apparently wide powers conferred on the court by section 37 of the 1981 Act and the much narrower powers conferred on the court by section 44 of the 1996 Act.

19. I too must work on the same basis as Aikens J that section 37 remains available to the court in a situation such as the present, whether or not section 44 of the later Act could also be brought into play. In exercising any discretion under section 37 of the earlier Act, I would have regard to matters which arise under section 44 of the 1996 Act.

Section 44 of the Arbitration Act 1996

20. Following the appointment of Mr Hamsher by Charles Taylor on behalf of the Cargo Owners and the Insurers (under reservation), the Owners appointed their own arbitrator, Mr Baker-Harber. Both were appointed under LMAA terms which provide, under clause 8(d) that, before the third arbitrator has been appointed, the two original arbitrators, if agreed on any matter, shall have the power to make decisions, orders and awards. By virtue of section 39(4) of the Arbitration Act, any tribunal has no power to make provisional awards or to give interim injunctions unless the parties have agreed to confer such power upon it. The LMAA terms do not give any power to grant interim injunctions.
21. By virtue of the decision in Cetelem (Ibid) paragraph 57-64, the court, on a proper construction of section 44 of the Arbitration Act, can grant an interim injunction, "if the case is one of urgency", "for the purpose of preserving assets". The Court of Appeal held this to include the preservation of a contractual right, as a chose in action. That must include the contractual right to have disputes referred to arbitration.
22. The question then arises as to whether this is a case of urgency or not. Mr Stephen Males QC told me that the intended meaning of the statement to which I have already referred was that a decision from the Chinese Court could be expected within 2 months of the date of the challenge to the jurisdiction - i.e. 18 August 2007. I accept that this is the effect of the evidence. Urgency, in this context must have reference to the question whether or not arbitrators could reach any decision on the point in any relevant timescale. The terms of the relevant sub-sections are as follows:-

"Section 44(1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.

...

(3) 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.

(4) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.

(5) In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively."

23. Whilst maintaining that the case was one of urgency, the Owners also wrote to the arbitrators to ask for permission to apply to this court for the injunction which they seek, in case the matter should not be considered one of urgency and the arbitrators' permission be required. The arbitrators declined to give permission saying that they were not "at the moment, at least persuaded that it would be appropriate for us to consent to your application". There is thus no possibility of the court exercising any jurisdiction under section 44(4) if the case is not one of urgency.
24. The court can only act under section 44(3) if the case is one of urgency but also, by reason of the terms of section 44(5), if, or to the extent that, the arbitral tribunal has no power or is unable for the time being to act effectively. The question thus arises as to whether or not the arbitral tribunal could, in the time before any decision of the Wuhan Court was issued, make a final (as opposed to an interim) award against the Cargo Owners and the Insurers, who are party to the arbitration, restraining them from pursuing the Chinese proceedings. That is the urgency suggested by the Owners.
25. When the arbitrators declined to give permission for what was, hypothetically, a non-urgent application, they were sent a copy of the Owners' application to this court but not, it appears, any of the supporting evidence. They were not aware therefore of the date when the Chinese Court might issue its decision. The parties failed to make any enquiry as to the availability of a two man or three man tribunal for a hearing to determine the very point which I am asked to decide. The hearing before me lasted 3 hours and I had read for 2 or more hours before that. Arbitrators would have to do the same and time would then be required to write the Award. I asked the parties to make enquiries after the termination of the hearing so that I could include reference to the position in the judgment which I reserved.
26. Should the two arbitrators agree, by virtue of the LMAA terms, there is sufficient power vested in the two arbitrators already appointed to make a final award restraining the pursuit of Chinese proceedings, but none to make an interim award. An interim award is not enforceable under the New York Convention in any event and the Cargo Owners and Insurers maintain that both a final award and an order of this court will not be recognised in China either, because, as a matter of public policy, Chinese courts will decide their own jurisdiction. Whilst therefore the arbitrators may have power within the meaning of section 44(5) the question arises as to whether or

not they are "unable for the time being to act effectively". The arbitrators would have to appoint a third arbitrator, in order to obviate any potential stalemate which might arise should they disagree. It appears to me that, provided a third arbitrator could be appointed and a decision made, they would be able to act effectively within the meaning of the section, even if their award was "ineffective" in a particular jurisdiction, because the courts of that jurisdiction refuse to recognise its validity or applicability.

27. The question therefore is simply whether or not the arbitrators could within the relevant time scale produce a final award on the subject. The information now obtained shows that at least one of the 2 chosen arbitrators would be unable to hear any application of the duration required to reach a decision on a final award by 18 August although both could be available between 4 and 10 September 2007. In these circumstances, the requirement of urgency is plainly made out for the purpose of section 44(3). The injunction is plainly necessary to preserve the Owners' right to arbitrate the dispute with the Cargo Owners and the Insurers. Furthermore, the arbitral tribunal are unable for the time being to act effectively so that the requirements of section 44(5) are also met. In these circumstances, where other discretionary requirements are satisfied and there is no strong reason not to make an interim order, the court will do so, to cover the position up to such time when the arbitration tribunal can itself determine this matter and make a final award in relation to the restraining orders sought.
28. The discretionary factors which apply are the same as under section 37 and for the reason given later in this judgment, do not carry much weight.

Section 37 of the Supreme Court Act 1981

29. Whilst the ability or otherwise of the arbitrators to deal with the dispute and to make a final order is a relevant consideration in the context of the exercise of discretion under section 37, it does not appear to me to govern the position under section 37 in the way that it operates under section 44. In circumstances where the Cargo Owners and the Insurers both maintain that the arbitration clause is ineffective in the Bill of Lading, so far as they are concerned, and the Insurers have commenced proceedings in China on the substantive claim under the Bill, it does not lie in their mouths to contend that this court should refuse to exercise its section 37 jurisdiction in favour of allowing the arbitrators to do so. The likelihood must be that, if the arbitrators did make an award against the Cargo Owners and the Insurers, an objection would then be taken to the arbitrators' jurisdiction and an application would then be made to this court under section 67 of the Arbitration Act.
30. Given that the situation is straight-forward with regard to the ambit of the arbitration clause, there is therefore every reason for this court to exercise its jurisdiction now and thus avoid unnecessary further proceedings before the arbitrator and later here again.
31. Mr Michael Collett, who appeared for the Cargo Owners and the Insurers sought to rely upon the fact that two arbitrators had been appointed and that they had refused permission for the application. I do not consider that these matters advance the Cargo Owners' and Insurers' position to any significant extent. The arbitrators were not presented with the evidence or information that is before this court. They were told by

the Cargo Owners/Insurers that their decision would be effective in the light of the fact that China is a party to the New York Convention. They were not told that the Chinese Courts would or might disregard any award they made. The difference between an order of this court and that of the arbitrators is that remedies for contempt are available if an order of this court should be breached. The Insurers, in particular, are likely to have assets which may well be capable of seizure. Whilst it is true that an award of the arbitrators can be enforced, with the leave of the court, as if it was a judgment, the jurisdictional question would doubtless be raised by the Cargo Owners/Insurers if that course was to be adopted, in exactly the same way as they might raise a section 67 jurisdiction challenge to the award itself. When the Cargo Owners/Insurers are maintaining that the arbitrators have no jurisdiction, and have unintentionally misled the arbitrators about the effectiveness of any award they might make, neither the existence of the arbitration nor the arbitrators' refusal to consent to a non-urgent application provide good reason for not granting the injunction sought by the Owners.

32. Mr Collett also relied on the fact that security had been obtained in the Chinese proceedings in the sum of \$4,137,625 in respect of the frozen freight payments under the head charter and sub-charter. It was maintained by the Insurers that this security would be lost if they were ordered to and refrained from pursuing the Chinese proceedings. There was an issue as to whether this was the case and what the Civil Award meant when requiring the commencement of litigation within 15 days. The Bill of Complaint was issued within that time but the notice of arbitration was not sent till 22 May 2007. Whether or not the security would therefore be available for the arbitration is a matter upon which I cannot decide and there is the additional complication that the security actually obtained is the larger sum owing by the Cargo Owners to Transfield, only \$3,977,397.70 being due from Transfield to the Owners. It appears to me however that there is no reason not to grant an injunction because of this factor. The court can, as a condition of granting the injunction, require the furnishing of security by the Owners. Furthermore, the evidence shows that there was a considerable amount of discussion about jurisdiction and security in May of this year and it can be said that the Cargo Owners/Insurers have brought matters on their own heads, by failing to issue arbitration proceedings within the time allowed, and instead pursuing Chinese substantive proceedings, in breach of the arbitration agreement.
33. In my judgment there is no strong reason against granting the injunction but it is right that I should make its continuance conditional upon the Owners making available to the Insurers/Cargo Owners the same security as is available in China as and when that security is released.
34. The Cargo Owners/Insurers also contend that, if there are two Tai Ping entities involved, then the claim of one may be time barred. As already indicated, it appears to me that there is nothing in the argument that there is more than one entity involved and this point does not therefore arise. The Claimant in the arbitration is the entity which has produced subrogation receipts, now totalling \$9,329,375.63 and business certificates which show, to my satisfaction, that it is one and the same company which is involved in the Chinese proceedings and the arbitration. This, ultimately, the Owners virtually accepted.

35. Given the view that I hold that section 37 of the Supreme Court Act entitles me to make the order sought by the Owners, I find every reason for making it and no strong reason against it. That order issues against both the Cargo Owners who maintain that they are not bound by the arbitration and against the Insurers who have not only made the same contention but actually commenced proceedings in China. Both are equally bound by the arbitration clause and should be restrained from pursuing proceedings elsewhere.

The Managers

36. Whilst the position is perfectly straight-forward with regard to the Owners and their claim against the Cargo Owners and Insurers for an injunction, the position is not so simple with regard to the Managers. Mr Collett argues that there is no basis for service out of the jurisdiction for any claim for an injunction whether under CPR 6.20(5)(c) or CPR 62.5(1)(b) or (c). Whilst the Managers were not a party to the proceedings in China for the obtaining of security, they are named as a Defendant in the Chinese substantive proceedings. As already mentioned, the suit there proceeds on the basis that the Managers are "jointly liable" with the Owner and the head charterer, on the basis that Cargo Owners had a contract of carriage with Transfield which was "remanded" to the Owners, for whom the Managers managed the vessel. There is obvious danger in relying upon an English translation of a Chinese Bill of Complaint and the evidence both direct and indirect from Chinese lawyers does not clearly establish the basis upon which the Managers might be held liable, in such circumstances, under Chinese law. The Owners and Managers refer to advice from their Chinese lawyers that, if the Managers were to be regarded as the carrier, any claim against them as carrier would be subject to the terms of the contract of carriage, including the arbitration clause. This appears to be suggesting that the claim against the Managers would lie in contract or some equivalent to a form of bailment on terms. The Cargo Owners/Insurers' Chinese lawyers maintain that the claim against the Managers runs by virtue of Article 63 of the Maritime Code of the Peoples Republic of China which refers to "the carrier and the actual carrier" who are to be "jointly liable". Reference is also made to Article 42 of the Code which defines the "actual carrier" as "the person to whom the performance of the carriage, or part of the carriage, has been entrusted by the carrier and includes any other person to whom such performance has been entrusted under a sub-contract". A Manager can be an actual carrier because it, rather than the registered owner, controls the vessel's day to day operations and the liability is a statutory one. Because it is not a party to an arbitration agreement contained in the carriage of goods contract, a Manager is not entitled to rely upon it. That dispute of Chinese law I cannot, on the limited evidence before me, resolve.
37. It is however plain that neither the Owners, the Managers, the Cargo Owners nor the Insurers maintain that the Managers are party to the arbitration agreement. As a matter of English law, that is obviously the case, but, as a matter of English law, Managers are obviously also not liable in contract and no possible basis has been put forward for any liability devolving on them in tort.
38. CPR 6.20(5)(c) allows for service out of the jurisdiction where "a claim is made in respect of a contract" which is governed by English law. The question arises therefore as to whether or not the claim made by the Managers for an injunction is a claim "in respect of" such a contract.

39. CPR 62.5 allows for service out of the jurisdiction where the claim is for an order under section 44 of the 1996 Act (s 62.5(b)) or where the Claimant seeks some other remedy or requires a question to be decided by the court affecting an arbitration, an arbitration agreement or an arbitration award, where the seat of the arbitration is within the jurisdiction.
40. As set out in CPR 6.21.34, "in order to bring a claim within the scope of CPR 6.20(5) the claimant must show that there is a good arguable case that there exists a contract between him and the defendant and that there is a good arguable case that the claim is made in respect of that contract". Since the Managers cannot show that there is an arguable contract between them and the Cargo Owners or Insurers, whether for the carriage or goods or for arbitration, this rule cannot apply. A non party to a contract cannot make a claim "in respect of a contract" since there is no basis for reliance upon the contract at all. Where there can be no reliance on a contract governed by English law, the rule is of no application.
41. Equally, the decision of Thomas J (as he then was) in Vale do Rio Doce Navagacao SA v Shanghai BAO Steel [2000] 2 LLR 1 establishes that CPR 62.5 can only apply to applications by and against parties to an arbitration or arbitration agreement. Someone who is not a party to an arbitration agreement cannot take advantage of the rule. The terms of section 44(3) and (4) of the Arbitration Act make it plain that the court can make orders under those sub-sections "on the application of a party or a proposed party to arbitral proceedings." It cannot act under those sub-sections on the application of someone who could not be and does not claim to be a party to a relevant arbitration agreement. The decision of Thomas J is authority for the proposition that the width of the wording in section 62.5(c) does not enable a remedy to be given against someone who is not a party to the arbitration, even if the question raised relates to an arbitration or arbitration agreement. The remedy or question must "affect" an arbitration or an arbitration agreement and this can only be the case if the Claimant and Defendant are both parties to the arbitration.
42. Whilst therefore the claim against the Managers appears to be hopeless, and therefore vexatious and oppressive, as a matter of English law, there is no jurisdiction in this court to restrain the Cargo Owners and Insurers from proceeding against them in China.

Conclusion

43. The arbitrators have no power to grant an interim injunction but this court has. It does so, not to intervene in the arbitration but in order to support it, in circumstances where the Cargo Owners and Insurers are deliberately flouting its provisions and submitting that an order from arbitrators to restrain Chinese proceedings would not be recognised there. Whilst the same is being said of English proceedings, this court will not lightly assume that a respectable foreign insurer will not comply with the terms of this injunction and the presence of lawyers instructed by it supports that view. The order that this court is about to make will, if disobeyed, give rise to potential consequences for contempt.
44. Whilst this court proceeds with the utmost respect for any foreign court and the exercise of its jurisdiction in accordance with its law, questions of comity play a small role where a party has agreed to the jurisdiction of a particular court or to arbitration.

As expressed by Longmore LJ in OT Africa Lyon Ltd v Magic Sportswear [2005] 2 LLR 170 at paragraph 32 - "it goes without saying that any court should pay respect to another foreign court but, if the parties have actually agreed that a [forum] is to have sole jurisdiction over any dispute, the true role of comity is to ensure that the parties' agreement is respected". He went on to say at paragraph 35 that a foreign court does not become involved unless a claimant chooses to involve it and it is the exercise of that choice, contrary to the claimant's contractual obligations, which the English courts restrain by granting an injunction. Once this is appreciated, it can be seen that the injunction granted is not in any way an attack on the legislature or the courts of another country or a breach of international comity; it is merely restraining a party to a contract from doing something which he has promised not to do.

45. It follows therefore that the Owners are entitled to an interim injunction against the Cargo Owners and the Insurers on the condition that the injunction will continue only if comparable security is put up by the Owners to that which exists in respect of the Chinese proceedings, once that security has been released. There will be liberty to apply in respect of that matter. I do not require any fortification by the Owners for the undertaking in damages, since there is a clear breach of the arbitration agreement and otherwise it appears to me that, leaving aside the question of the Managers, who are not entitled to any order, the form of relief will essentially follow that of the draft attached to the application. I trust that the form of the order can be agreed between the parties prior to the formal hand down of this judgment.
46. As to questions of costs, it appears to me that costs should follow the event. The amount of time taken in relation to the position of the Managers was very limited and the appropriate order, subject to any special considerations, of which I am unaware, would appear to be that the Defendants pay the Owners' costs on the standard basis (to be the subject of detailed assessment if not agreed) but that this be subject to a small discount in respect of the very limited success which the Defendants have achieved against the Managers. The parties can address me further on any issues which arise in relation to this or to the form of the order which will restrain the Defendants, until further order of this court or final determination by the arbitrators, whichever is the earlier.